



AMERICAN ACADEMY *of* ACTUARIES

June 15, 2011

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: File Number S7-45-10; Release No. 34-63576 - Registration of Municipal Advisors

Dear Ms. Murphy:

The American Academy of Actuaries¹ Pension Practice Council and Public Plans Subcommittee appreciate the opportunity to submit comments on Release No. 34-63576—Registration of Municipal Advisors. We request that public pension plans be excluded from the definition of “investment strategies” and that enrolled actuaries and members of the five U.S.-based actuarial organizations that have adopted the actuarial Code of Professional Conduct (including the Academy) be excluded from the definition of “municipal advisors” to the extent they are providing actuarial services that are governed by the Actuarial Standards of Practice and the Code of Professional Conduct.

Definition of Investment Strategies

Securities Exchange Act Section 15B(e)(3) defines investment strategies to include “plans or programs **for** [emphasis added] the investment of the proceeds of municipal securities....” The Securities and Exchange Commission (SEC) is proposing an overly broad interpretation of this definition, that essentially includes any potential entity to which the municipal entity might direct the proceeds of a municipal security. This apparently would include the pension plan in which the municipal entity participates and any advice related to that potential use of proceeds, whether the advice is related to issuing a municipal security or investing the proceeds of a municipal security.

We do not believe this broad interpretation was the intent of Congress, rather it was to regulate advice provided to municipal entities to issue municipal securities and advice as

¹ The American Academy of Actuaries is a 17,000-member professional association whose mission is to serve the public and the U.S. actuarial profession. The Academy assists public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

to where or how to invest the proceeds of a municipal security. The phrase “plans or programs **for** [emphasis added] the investment of the proceeds of municipal securities...” implies that the purpose of the plan or program is to invest the proceeds of municipal securities. The purpose of public pension plans is to provide retirement benefits to public employees. While proceeds of municipal securities eventually may be invested in public pension plans, the plans themselves are not “plans... **for** [emphasis added] the investment of the proceeds of municipal securities.” A municipal entity, with the help of a municipal advisor, may devise a plan or program for the investment of the proceeds of a municipal security that may include some portion of the proceeds being contributed to the public pension plan. But it is the development of the plan to invest the proceeds that Congress intended to regulate—not the entity that is targeted to receive the proceeds of the municipal security according to a program in which it had no part.

The public pension plan managers and its advisors generally do not advise the municipal entity issuing the municipal security as to where to invest the proceeds nor do they consider any municipal securities proceeds in the development of their investment or funding strategy.

As noted in the introduction to the proposed regulations, the intent of the Dodd-Frank Act was, among other things, to improve the accountability and transparency of the financial system. With respect to municipal securities and municipal advisors, the Dodd-Frank Act was intended to extend regulation to a previously unregulated environment. Public pension plans are not an unregulated environment.

Public pension plans are governed by state and municipal laws and generally are administered by trustees with specific fiduciary duties. Accounting and financial reporting for the plans and employers sponsoring the plans are guided by the Governmental Accounting Standards Board (GASB). The funding and investment policies for the plans are designed to meet these fiduciary responsibilities and generally do not consider whether the contributions come from the proceeds of municipal securities or other sources. Many public pension plans serve multiple employers, and the public pension plan is not likely to have interest in or knowledge of the financing sources used by the various employers who participate in the plan. Even if a plan’s trustees, administrator, or advisors had knowledge, they typically have no control over decisions to issue municipal securities or where to invest the proceeds.

Some municipal entities have issued pension obligation bonds to fund the pension plans in which they participate. Pension plans often provide municipal sponsors with information about how a lump sum deposit would affect expected contributions under various economic scenarios. This information may be used by a municipal advisor to recommend the structure, timing, terms, and other matters concerning a municipal security—but is not provided by the plan as advice. In some cases, the municipal advisor may use projections already produced by the plan for its own purposes to advise a participating municipal entity with respect to the issuance of a municipal security or the investment of its proceeds. The act of producing the projections to meet the fiduciary

obligations of a pension plan should not be considered advice related to a municipal security.

Definition of Municipal Advisor—Exclusion for Actuarial Services

The definition of municipal advisor in Securities and Exchange Act Section 15B(e)(4) as interpreted by the SEC excludes certain professionals for certain services. As noted by the SEC:

“These proposed interpretations and exclusions would mean that certain persons who are currently regulated (such as broker-dealers serving as underwriters or investment advisers providing advice which would subject them to the Investment Advisers Act) or that are governed by other professional codes of conduct (such as attorneys providing traditional legal services) would not be required to register as municipal advisors.”

Based on this interpretation, we request that the SEC also exclude actuaries providing services that are governed by the Code of Professional Conduct that has been adopted by the Academy, the American Society of Pension Professionals and Actuaries, the Casualty Actuarial Society, the Conference of Consulting Actuaries, and the Society of Actuaries. Such exclusion is consistent with the intent to extend regulation only to a previously unregulated environment.

Role of an Actuary in Public Pension Plans

With public pension plans, actuaries typically prepare for the pension plan and for the sponsoring employers a periodic actuarial valuation to determine employer and employee contribution rates and disclosures required for accounting purposes under GASB Statements Nos. 25 and 27. Actuaries also perform a number of other services, including estimates of the effects of changes in plan provisions, changes in actuarial assumptions, and changes in actuarial methods. Actuaries also project contribution rates and funded status under various assumptions, and describe actuarial methods (including amortization methods and periods) so that the governing board can make informed policy decisions to manage the pension plan. In the context of asset-liability studies, these projections also may be used by the investment advisor to recommend an investment policy for the pension plan.

The actuarial assumptions used include rates of retirement, termination from employment, mortality, disability, salary increases, inflation, and the expected return on assets. Actuarial methods are used to develop rates of contribution or determine the adequacy of statutory rates of contribution. These methods include the selection of an actuarial cost method, an asset-smoothing method to limit the volatility of contribution rates, and a method to amortize the payment of unexpected changes in liability due to plan amendments, changes in assumptions, or experience gains and losses.

For instance, assume the following illustrative example: a public pension plan may expect an investment return of 8 percent, but each year a different investment return is realized. To pay for these differences without causing the contribution rate to change significantly from one year to the next, the plan might recognize only the difference between the actual return and the expected return over a five-year period and then might amortize the recognized difference over a period of 20 years as a level percentage of expected payroll. Except when prescribed by law, the actuary, in this example, would have been expected to provide information on alternatives with respect to the length of the asset-smoothing period, the length of the amortization period, the choice between structuring payments as a level percentage of payroll or a level dollar amount, the assumed rate of increase in payroll over the amortization period, the expected return on assets, and the choice between establishing separate amortizations each year (or separately for plan amendments, assumption changes, and gains or losses) or re-amortizing each year.

Most actuaries provide services directly to the pension plan, but actuaries are also employed by sponsoring employers or labor organizations whose members participate in plans. When an actuary works for a sponsoring employer or employee organization, services generally are related to evaluation of benefit design or other policies used and relied upon to manage the pension plan. When a municipal entity considers issuing a pension obligation bond, an actuary might be asked to provide projections under various economic scenarios for contribution streams needed by the pension plan. This information can be used by other registered municipal advisors to recommend whether or not to issue a pension obligation bond and how to structure it.

All of the actuarial services described above are covered by the Code of Professional Conduct. It should be noted, however, that some actuaries also provide investment advice to plan sponsors. These actuaries should be registered as investment advisors for those actuarial services rendered, and our request for an exclusion for actuaries is not intended to provide an exclusion for actuaries who also provide investment advice, which is properly regulated by the SEC.

Code of Professional Conduct

As noted above, the five major U.S.-based actuarial organizations jointly adopted a Code of Professional Conduct requiring actuaries to adhere to the high standards of conduct, practice, and qualifications of the actuarial profession. The full code can be found at http://www.actuary.org/pdf/prof/code_of_conduct.pdf. It also is attached to this comment letter for your immediate reference. The code consists of precepts covering the issues of professional integrity, qualification standards, standards of practice, communications and disclosure, conflict of interest, control of work product, confidentiality, courtesy and cooperation, advertising, titles and designations, and violations of the code.

Qualification Standards

The Academy's qualification standards include basic education requirements, continuing education requirements, and experience requirements. In the pension practice area, enrolled actuaries are deemed to meet the basic education and experience requirement.

Enrolled actuaries are actuaries who have met the qualification standards of the Joint Board for the Enrollment of Actuaries and thereby are approved specifically by the joint board to provide services under the Employee Retirement Income Security Act of 1974 (ERISA). The joint board consists of three members appointed by the Secretary of the Treasury and two members appointed by the Secretary of Labor. The Pension Benefit Guaranty Corporation also provides one nonvoting member. The regulations governing enrolled actuaries can be found at <http://www.irs.gov/pub/irs-utl/20cfr901.pdf>. For an actuary to be enrolled initially, the qualification standards require the successful completion of a series of examinations and the documentation of responsible actuarial experience. Once enrolled, an actuary must meet ongoing continuing education requirements.

The Academy's qualification standards also require an actuary to complete 30 hours of relevant continuing education each calendar year with at least three hours on professionalism topics and six hours of activities involving actuaries or professionals who work for other employers. The full qualification standards can be found at <http://actuary.org/qualstandards/qual.pdf>.

Standards of Practice

The Code of Professional Conduct requires actuaries to ensure that services they provide satisfy applicable standards of practice. The Actuarial Standards Board (ASB) develops and adopts Actuarial Standards of Practice (ASOPs) following a process that includes:

- Publishing a proposal for a new or amended standard,
- Developing and releasing an exposure draft for comment and discussion,
- Posting all comments received and responses to those comments,
- Developing and adopting a final standard.

The complete standards can be found on the ASB's website at <http://www.actuarialstandardsboard.org/asops.asp>. Some of the relevant standards for actuaries who serve public pension plans include:

- ASOP No. 4, *Measuring Pension Obligations*
- ASOP No. 6, *Measuring Retiree Group Benefit Obligations*
- ASOP No. 21, *Responding to or Assisting Auditors or Examiners in Connection with Financial Statements for All Practice Areas*
- ASOP No. 23, *Data Quality*
- ASOP No. 27, *Selection of Economic Assumptions for Measuring Pension Obligations*

- ASOP No. 35, *Selection of Demographic and Other Noneconomic Assumptions for Measuring Pension Obligations*
- ASOP No. 41, *Actuarial Communications*
- ASOP No. 44, *Selection and Use of Asset Valuation Methods for Pension Valuations.*

Violations of the Code

The five U.S.-based actuarial organizations have jointly delegated to the Actuarial Board for Counseling and Discipline (ABCD), the authority to investigate potential violations of the Code of Professional Conduct, counsel actuaries regarding potential violations of the code, and make disciplinary recommendations where appropriate to the organizations to which the subject actuary belongs. Discipline can include a private reprimand, a public reprimand, suspension, or expulsion of the actuary. The ABCD also provides guidance to actuaries about the proper interpretation of the Code of Professional Conduct and the Actuarial Standards of Practice. The rules for the ABCD can be found at <http://www.abcdboard.org/publications/procedure/rules.pdf>.

Suggested Regulatory Language

To carve out actuaries from the definition of municipal advisor to the extent they are providing traditional actuarial services, we respectfully suggest the addition of clarifying language to Section 240.15Ba1-1(d)(2)(vii) as follows:

Any enrolled actuary or any member of an actuarial organization subject to the actuarial Code of Professional Conduct who meets the specific qualification standards of that code, unless the actuary engages in municipal advisory activities other than actuarial advice of the type governed by the Joint Board for the Enrollment of Actuaries or the Code of Professional Conduct.

We note that some actuaries do provide investment advice and the Society of Actuaries maintains an investment track as part of its education program. We did not identify these actuaries in the suggested language for this exception, however, because actuaries who provide investment advice are already required to register under the Investment Advisers Act of 1940 and thus qualify for the exception in proposed rule 15Ba1-1(d)(2)(ii).

In summary, we respectfully request that the SEC reconsider its proposed broad interpretation of investment strategies to only include advice directly related to the investment of proceeds of municipal securities—as opposed to also including ongoing actuarial services provided to manage a public pension plan in which the proceeds of municipal securities may (or may not) have been invested in the past or may (or may not) be invested in the future. We further respectfully request that the SEC provide an exclusion from the municipal advisor registration requirements for actuaries providing services of the type governed by the Joint Board for the Enrollment of Actuaries or covered by the Code of Professional Conduct.

We appreciate the SEC's consideration of these requests. Please contact Jessica M. Thomas, the Academy's senior pension policy analyst (202-785-7868, thomas@actuary.org) if you have any questions or would like to discuss these items further.

Respectfully submitted,

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Chair, Public Plans Subcommittee

Code of Professional Conduct

EFFECTIVE JANUARY 1, 2001, the five U.S.-based actuarial organizations adopted this Code of Professional Conduct. It was adopted by the Board of Directors of the American Academy of Actuaries on September 28, 2000, and applies to all members.

The Code of Professional Conduct sets forth what it means for an actuary to act as a professional. It identifies the responsibilities that actuaries have to the public, to their clients and employers, and to the actuarial profession.

The Board of the American Academy of Actuaries thanks the Joint Committee on the Code of Professional Conduct for their hard work and perseverance in drafting the Code and obtaining the approval of all five organizations' boards.

Code of Professional Conduct

The purpose of this Code of Professional Conduct ("Code") is to require Actuaries to adhere to the high standards of conduct, practice, and qualifications of the actuarial profession, thereby supporting the actuarial profession in fulfilling its responsibility to the public. An Actuary shall comply with the Code. An Actuary who commits a material violation of the provisions of the Code shall be subject to the profession's counseling and discipline procedures.

The Precepts of the Code identify the professional and ethical standards with which an Actuary must comply in order to fulfill the Actuary's responsibility to the public and to the actuarial profession. The Annotations provide additional explanatory, educational, and advisory material on how the Precepts are to be interpreted and applied.

In addition to this Code, an Actuary is subject to applicable rules of professional conduct or ethical standards that have been promulgated by a Recognized Actuarial Organization for the jurisdictions in which the Actuary renders Actuarial Services. Actuarial Services are considered to be rendered in the jurisdictions in which the Actuary intends them to be used unless speci-

fied otherwise by an agreement between a Recognized Actuarial Organization for any such jurisdiction and the organizations that have adopted the Code.

Laws may also impose obligations upon an Actuary. Where requirements of Law conflict with the Code, the requirements of Law shall take precedence.

An Actuary must be familiar with, and keep current with, not only the Code, but also applicable Law and rules of professional conduct for the jurisdictions in which the Actuary renders Actuarial Services. An Actuary is responsible for securing translations of such Laws or rules of conduct as may be necessary.

DEFINITIONS

As used throughout the Code, the following terms are capitalized and have the meanings indicated:

- ▶ **Actuarial Communication:** A written, electronic, or oral communication issued by an Actuary with respect to Actuarial Services.
- ▶ **Actuarial Services:** Professional Services provided to a Principal by an individual acting in the capacity of an actuary. Such services include the rendering of advice, recommendations, findings, or opinions based upon actuarial considerations.
- ▶ **Actuary:** An individual who has been admitted to a class of membership to which the Code applies by action of any organization having adopted the Code. When the term "actuary" is used without being capitalized, it refers to any individual practicing as an actuary, regardless of organizational membership or classification.
- ▶ **Confidential Information:** Information not in the public domain of which an Actuary becomes aware as a result of providing Actuarial Services to a Principal. It includes information of a proprietary nature and information that is legally restricted from circulation.
- ▶ **Law:** Statutes, regulations, judicial decisions, and other statements having legally binding authority.
- ▶ **Principal:** A client or employer of the Actuary.
- ▶ **Recognized Actuarial Organization:** An organization that has been accepted for full membership in the International Actuarial Association or a standards-set-

ting, counseling, or discipline body to which authority has been delegated by such an organization.

Professional Integrity

PRECEPT 1. An Actuary shall act honestly, with integrity and competence, and in a manner to fulfill the profession's responsibility to the public and to uphold the reputation of the actuarial profession.

ANNOTATION 1-1. An Actuary shall perform Actuarial Services with skill and care.

ANNOTATION 1-2. An Actuary shall not provide Actuarial Services for any Principal if the Actuary has reason to believe that such services may be used to violate or evade the Law or in a manner that would be detrimental to the reputation of the actuarial profession.

ANNOTATION 1-3. An Actuary shall not use a relationship with a third party or with a present or prospective Principal to attempt to obtain illegal or materially improper treatment from one such party on behalf of the other party.

ANNOTATION 1-4. An Actuary shall not engage in any professional conduct involving dishonesty, fraud, deceit, or misrepresentation or commit any act that reflects adversely on the actuarial profession.

Qualification Standards

PRECEPT 2. An Actuary shall perform Actuarial Services only when the Actuary is qualified to do so on the basis of basic and continuing education and experience, and only when the Actuary satisfies applicable qualification standards.

ANNOTATION 2-1. It is the professional responsibility of an Actuary to observe applicable qualification standards that have been promulgated by a Recognized Actuarial Organization for the jurisdictions in which the Actuary renders Actuarial Services and to keep current regarding changes in these standards.

ANNOTATION 2-2. The absence of applicable qualification standards for a particular type of assignment or for the jurisdictions in which an Actuary renders Actuarial Services does not relieve the Actuary of the responsibility to perform such Actuarial Services only when qualified to do so in accordance with this Precept.

Standards of Practice

PRECEPT 3. An Actuary shall ensure that Actuarial Services performed by or under the direction of the Actuary satisfy applicable standards of practice.

ANNOTATION 3-1. It is the professional responsibility of an Actuary to observe applicable standards of practice that have been promulgated by a Recognized Actuarial Organization for the jurisdictions in which the Actuary renders Actuarial Services, and to keep current regarding changes in these standards.

ANNOTATION 3-2. Where a question arises with regard to the applicability of a standard of practice, or where no applicable standard exists, an Actuary shall utilize professional judgment, taking into account generally accepted actuarial principles and practices.

ANNOTATION 3-3. When an Actuary uses procedures that depart materially from those set forth in an applicable standard of practice, the Actuary must be prepared to justify the use of such procedures.

Communications and Disclosure

PRECEPT 4. An Actuary who issues an Actuarial Communication shall take appropriate steps to ensure that the Actuarial Communication is clear and appropriate to the circumstances and its intended audience, and satisfies applicable standards of practice.

ANNOTATION 4-1. An Actuary who issues an Actuarial Communication shall ensure that the Actuarial Communication clearly identifies the Actuary as being responsible for it.

ANNOTATION 4-2. An Actuary who issues an Actuarial Communication should indicate the extent to which the Actuary or other sources are available to provide supplementary information and explanation.

PRECEPT 5. An Actuary who issues an Actuarial Communication shall, as appropriate, identify the Principal(s) for whom the Actuarial Communication is issued and describe the capacity in which the Actuary serves.

PRECEPT 6. An Actuary shall make appropriate and timely disclosure to a present or prospective Principal of the sources of all direct and indirect material compensation that the Actuary or the Actuary's firm has re-

ceived, or may receive, from another party in relation to an assignment for which the Actuary has provided, or will provide, Actuarial Services for that Principal. The disclosure of sources of material compensation that the Actuary's firm has received, or may receive, is limited to those sources known to, or reasonably ascertainable by, the Actuary.

ANNOTATION 6-1. An Actuary who is not financially and organizationally independent concerning any matter related to the performance of Actuarial Services should disclose to the Principal any pertinent relationship that is not apparent.

ANNOTATION 6-2. An Actuary employed by a firm that operates in multiple locations is subject to the requirement of disclosure of sources of compensation that the Actuary's firm may receive in relation to Actuarial Services with respect to a specific assignment for that Principal, regardless of the location in which such compensation is received.

Conflict of Interest

PRECEPT 7. An Actuary shall not knowingly perform Actuarial Services involving an actual or potential conflict of interest unless:

- A** the Actuary's ability to act fairly is unimpaired;
- B** there has been disclosure of the conflict to all present and known prospective Principals whose interests would be affected by the conflict; and
- C** all such Principals have expressly agreed to the performance of the Actuarial Services by the Actuary.

Control of Work Product

PRECEPT 8. An Actuary who performs Actuarial Services shall take reasonable steps to ensure that such services are not used to mislead other parties.

ANNOTATION 8-1. An Actuarial Communication prepared by an Actuary may be used by another party in a way that may influence the actions of a third party. The Actuary should recognize the risks of misquotation, misinterpretation, or other misuse of the Actuarial Communication and should therefore take reasonable steps to present the Actuarial Communication clearly and fairly and to include, as appropriate, limitations on the distribution and utilization of the Actuarial Communication.

Confidentiality

PRECEPT 9. An Actuary shall not disclose to another party any Confidential Information unless authorized to do so by the Principal or required to do so by Law.

Courtesy and Cooperation

PRECEPT 10. An Actuary shall perform Actuarial Services with courtesy and professional respect and shall cooperate with others in the Principal's interest.

ANNOTATION 10-1. Differences of opinion among actuaries may arise, particularly in choices of assumptions and methods. Discussions of such differences between an Actuary and another actuary, or in observations made by an Actuary to a Principal on the work of another actuary, should be conducted objectively and with courtesy and respect.

ANNOTATION 10-2. A Principal has an indisputable right to choose a professional advisor. An Actuary may provide service to any Principal who requests it, even though such Principal is being or has been served by another actuary in the same matter.

ANNOTATION 10-3. An Actuary in the course of an engagement or employment may encounter a situation such that the best interest of the Principal would be served by the Actuary's setting out an alternative opinion to one expressed by another actuary, together with an explanation of the factors that lend support to the alternative opinion. Nothing in the Code should be construed as preventing the Actuary from expressing such an alternative opinion to the Principal.

ANNOTATION 10-4. An Actuary may be requested to advise a Principal for whom the Actuary knows or has reasonable grounds to believe that another actuary has provided, or is providing, Actuarial Services with respect to the same matter. In such event, the Actuary may choose to consult with such other actuary both to prepare adequately for the assignment and to make an informed judgment as to whether there are circumstances involving a potential violation of the Code that might affect acceptance of the assignment. The Actuary should request the Principal's consent prior to such consultation.

ANNOTATION 10-5. When a Principal has given consent for a new or additional actuary to consult

with an Actuary with respect to a matter for which the Actuary is providing or has provided Actuarial Services, the Actuary shall cooperate in furnishing relevant information, subject to receiving reasonable compensation for the work required to assemble and transmit pertinent data and documents. The Actuary shall not refuse to consult or cooperate with the prospective new or additional actuary based upon unresolved compensation issues with the Principal unless such refusal is in accordance with a pre-existing agreement with the Principal. The Actuary need not provide any items of a proprietary nature, such as internal communications or computer programs.

Advertising

PRECEPT 11. An Actuary shall not engage in any advertising or business solicitation activities with respect to Actuarial Services that the Actuary knows or should know are false or misleading.

ANNOTATION 11-1. Advertising and business solicitation activities encompass all communications by whatever medium, including oral communications, that may directly or indirectly influence any person or organization in deciding whether there is a need for Actuarial Services or in selecting a specific Actuary or firm to perform Actuarial Services.

Titles and Designations

PRECEPT 12. An Actuary shall make use of membership titles and designations of a Recognized Actuarial Organization only in a manner that conforms to the practices authorized by that organization.

ANNOTATION 12-1. “Title” refers to any title conferred by a Recognized Actuarial Organization re-

lated to a specific position within that organization. “Designation” refers to a specific reference to membership status within such organization.

Violations of the Code of Professional Conduct

PRECEPT 13. An Actuary with knowledge of an apparent, unresolved, material violation of the Code by another Actuary should consider discussing the situation with the other Actuary and attempt to resolve the apparent violation. If such discussion is not attempted or is not successful, the Actuary shall disclose such violation to the appropriate counseling and discipline body of the profession, except where the disclosure would be contrary to Law or would divulge Confidential Information.

ANNOTATION 13-1. A violation of the Code is deemed to be material if it is important or affects the outcome of a situation, as opposed to a violation that is trivial, does not affect an outcome, or is one merely of form.

ANNOTATION 13-2. An Actuary is not expected to discuss an apparent, unresolved material violation of the Code with the other Actuary if either Actuary is prohibited by Law from doing so or is acting in an adversarial environment involving the other Actuary.

PRECEPT 14. An Actuary shall respond promptly, truthfully, and fully to any request for information by, and cooperate fully with, an appropriate counseling and disciplinary body of the profession in connection with any disciplinary, counseling, or other proceeding of such body relating to the Code. The Actuary’s responsibility to respond shall be subject to applicable restrictions on Confidential Information and those imposed by Law.