

July 2, 2015

**VIA ELECTRONIC MAIL**

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

**Re: FINRA Regulatory Notice 15-16  
Communications With the Public: FINRA Requests Comment on  
Proposed Amendments to Rules Governing Communications With the  
Public**

Dear Ms. Asquith:

We are submitting this letter on behalf of the Committee of Annuity Insurers (the “Committee”),<sup>1</sup> in response to Regulatory Notice 15-16, *Communications With the Public: FINRA Requests Comment on Proposed Amendments to Rules Governing Communications With the Public* (the “Notice”), issued by the Financial Industry Regulatory Authority, Inc. (“FINRA”) on May 18, 2015.<sup>2</sup>

The Notice proposes amendments to FINRA’s communications rules as a follow-up to certain findings developed during FINRA’s retrospective review of the FINRA rule set for communications with the public. The retrospective review was launched by Regulatory Notice 14-14, *Retrospective Rule Review: FINRA Requests Comment on the Effectiveness of its Communications with the Public Rules*, which was issued by FINRA on April 8, 2014.<sup>3</sup> The

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<sup>1</sup> The Committee was formed in 1982 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of securities, banking, and tax policies regarding annuities. For three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities, working with and advocating before the SEC, CFTC, FINRA, IRS, Treasury, Department of Labor, as well as the NAIC and relevant Congressional committees. Today the Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee’s member companies represent more than 80% of the annuity business in the United States. A list of the Committee’s member companies is attached as Appendix A.

<sup>2</sup> FINRA Regulatory Notice 15-16, available at [https://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory\\_Notice\\_15-16.pdf](https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory_Notice_15-16.pdf).

<sup>3</sup> FINRA Regulatory Notice 14-14, available at <https://www.finra.org/sites/default/files/NoticeDocument/p479810.pdf>.

findings were ultimately published in a December 2014 report (the “Report”) on the assessment phase of the retrospective review.<sup>4</sup>

The Notice proposes amendments to communications with the public rule set – FINRA Rules 2210, 2213, and 2214 – to revise filing requirements for investment company communications among other things. The Committee is generally supportive of the proposed amendments, but seeks clarification regarding the proposed amendments as they would affect generic investment company communications and the template filing exclusion. The Committee continues to strongly support FINRA’s initiative to modernize its communications with the public rule set and hopes to engage in further dialogue with FINRA as this modernization process continues.

## COMMITTEE COMMENTS

The Committee appreciates the opportunity to submit its comments in response to the Notice. The paragraphs below offer the Committee’s comments generally on the filing requirements embedded in the communications with the public rule set, as well as comments on specific provisions of the proposed amendments.

### General Comments

Improved Effectiveness of Advertising Filing and Review Process. The Committee believes that FINRA should consider additional rule changes to the current general requirement that all variable product and mutual fund retail communications be filed with FINRA’s Advertising Regulation Department (the “Department”) with a view to differentiating between those warranting the Department’s review and those that do not. A more risk-based approach to the filing requirements would allow FINRA to deploy its advertising review resources more strategically, which could include spot-checking material related to various types of securities products that the Department believes may present risks to investors, with more attention paid to those products that present a higher degree of risk. This approach would be consistent with FINRA’s examination program and guidance concerning member supervisory systems and compliance programs. In this regard, the Committee believes that FINRA should conduct further assessments of the costs imposed by the requirement to file all such pieces as compared to the investor protections afforded by the requirement. In offering this comment, the Committee acknowledges that the general requirement to file all variable product and mutual fund retail communications stems from certain provisions of the federal securities laws, which exempt such communications from SEC filing requirements if they are filed with FINRA. Nevertheless, the Committee believes that it is critical for FINRA to consider this issue in order to meaningfully achieve the objectives of the retrospective rule review.

Continuation of the Retrospective Review. It is the Committee’s understanding that the topics addressed in the Notice constitute a sub-set of the issues that emerged during the course of the retrospective review of the communications with the public rule set and were deemed relatively easy to address through rulemaking. The Committee appreciates FINRA’s efforts to

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<sup>4</sup> FINRA Retrospective Rule Review Report, available at <https://www.finra.org/sites/default/files/p602011.pdf>.

quickly address the issues selected for consideration in the proposals presented in the Notice. The Committee urges FINRA to continue to consider further rule changes to address other issues identified in the course of the retrospective review. For example, the increasing reliance on digital (including mobile) communications and the evolution of websites into more dynamic and interactive tools for informing customers about products and services, which were noted in many of the comments submitted when FINRA launched its retrospective review, deserve continued attention, analysis, and dialogue between FINRA and the broker-dealer community.

The Committee would also like to encourage FINRA to continue modifying its rules and updating its electronic filing system in connection with recent technological innovations, particularly with respect to allowing members to file materials in other than PDF format and adopting more consistent standards for review.

### **Specific Comments**

Generic Investment Company Communications. FINRA Rule 2210(c)(3)(A) currently requires members to file with FINRA within 10 business days of first use or publication any retail communication concerning registered investment companies. The Notice proposes to limit this filing requirement to investment company retail communications that “promote or recommend a specific registered investment company or family of registered investment companies,” with the effect that generic investment company retail communications would no longer need to be filed with FINRA.

The Committee supports this proposed change, which would effectively exclude generic investment company retail communications from the filing requirement, but believes that additional guidance should be provided with respect to the type of retail communications that would be considered to promote or recommend an investment company. Specifically, the Committee requests that FINRA confirm that the mere mention of the name of an investment company in and of itself does not necessarily constitute the promotion or recommendation of such investment company and that the determination of whether a communication constitutes the promotion or recommendation of an investment company needs to be made with consideration of the full context of the piece. In addition, it is not entirely clear that generic investment company communications would encompass generic retail communications for variable annuity contracts that do not promote a particular variable annuity contract. The Committee therefore requests that FINRA confirm that generic communications for variable annuity contracts also would not be subject to the filing requirement.

Principal Approval of Third-Party Communications. The Committee also requests that, in connection with moving forward with an effective filing exception for generic investment company communications, FINRA consider the collateral consequences for member firms currently relying on FINRA Rule 2210(b)(1)(C) for an exemption from the principal approval requirement for a retail communication furnished by another member firm (i.e., “third-party communications”). This exemption provides that the principal approval requirement does not apply with regard to a retail communication proposed to be used by a member firm if another member has (1) filed the retail communication with FINRA and has received a letter from the Department stating that it appears to be consistent with applicable standards, and (2) the member

using it in reliance upon the previous filing and approval has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter. In this regard, the exemption from the principal approval requirement is premised on the third-party communication having been filed with FINRA. The Committee anticipates that many of the communications that could qualify as generic investment company communications would be third-party communications (i.e., retail communications provided by one member firm to another member firm for the latter's use with its retail customers). The Committee is concerned that, if FINRA moves forward with a revised filing requirement that excepts generic investment company communications as proposed, the exception could have the unintended effect of increasing compliance costs for member firms in the case of generic communications that would be third party-communications. In particular, each of those member firms proposing to use a third-party communication would need to comply with the principal approval requirement (with the effect that multiple firms would conduct a review of the same communication). Accordingly, the Committee requests that FINRA address this consequence in connection with moving forward with the proposal to except generic investment company communications from the filing requirement. As one potential solution, FINRA could revise paragraph (b)(1)(C) of FINRA Rule 2210 to exempt from the principal approval requirement any generic investment company communication for a member using the communication if that communication has been approved by a principal with another member firm that has furnished the communication. Also, more broadly, FINRA should consider the principal approval requirement on a comprehensive basis, and should consider removing the principal approval requirement for any communications that have been previously reviewed and approved by a principal with another member firm.

Filing Exclusion for Templates. FINRA Rule 2210(c)(7)(B) currently excludes from the requirement to file with FINRA any retail communication that is based on templates previously filed with the Department and has changes limited to updates of more recent statistical or other non-narrative information. FINRA proposes to expand this filing exclusion for templates to allow the inclusion of updated non-predictive narrative descriptions of market events during the period covered by the communication and factual descriptions of portfolio changes without the revised template becoming subject to the filing requirement.

The Committee supports this proposed expansion of the filing exclusion for templates, but believes that FINRA should provide additional flexibility with respect to the type of changes to narrative information that could be made in reliance on the filing exception. More specifically, the Committee urges FINRA to expand the template filing exclusion to allow firms to make non-material changes more broadly to narrative disclosures, as well as updates to non-predictive narrative descriptions of market events. This would ease member compliance costs and release FINRA resources for other matters, while not compromising investor protection.



**CONCLUSION**

The Committee appreciates the opportunity to offer these comments on the Notice and FINRA's initiative in conducting the retrospective review. Please do not hesitate to contact Susan Krawczyk (202.383.0917, [susan.krawczyk@sutherland.com](mailto:susan.krawczyk@sutherland.com)) or Clifford Kirsch (212.389.5052, [clifford.kirsch@sutherland.com](mailto:clifford.kirsch@sutherland.com)) if you have any questions regarding this letter.

Respectfully submitted,

**SUTHERLAND ASBILL & BRENNAN LLP**

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BY:  BTM  BTM

**FOR THE COMMITTEE OF ANNUITY INSURERS**

**Appendix A**

**THE COMMITTEE OF ANNUITY INSURERS**

AIG Life & Retirement  
Allianz Life  
Allstate Financial  
Ameriprise Financial  
Athene USA  
AXA Equitable Life Insurance Company  
Fidelity Investments Life Insurance Company  
Genworth Financial  
Global Atlantic Life and Annuity Companies  
Great American Life Insurance Co.  
Guardian Insurance & Annuity Co., Inc.  
Jackson National Life Insurance Company  
John Hancock Life Insurance Company  
Life Insurance Company of the Southwest  
Lincoln Financial Group  
MassMutual Financial Group  
Metropolitan Life Insurance Company  
Nationwide Life Insurance Companies  
New York Life Insurance Company  
Northwestern Mutual Life Insurance Company  
Ohio National Financial Services  
Pacific Life Insurance Company  
Protective Life Insurance Company  
Prudential Insurance Company of America  
Symetra Financial Corporation  
The Transamerica companies  
TIAA-CREF  
USAA Life Insurance Company  
Voya Financial, Inc.