

November 20, 2009

VIA ELECTRONIC MAIL

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

**Re: Regulatory Notice 09-55: Communications With the Public: FINRA
Requests Comments on Proposed New Rules Governing Communications
with the Public**

Dear Ms. Asquith:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),¹ in response to Regulatory Notice 09-55, "FINRA Requests Comments on Proposed New Rules Governing Communications with the Public" (the "Proposal Notice"). The Proposal Notice proposes new FINRA rules and supplementary material to replace current NASD Conduct Rules 2210 ("Current Rule 2210") and 2211 ("Current Rule 2211"), most NASD Interpretive Materials under Conduct Rule 2210, and portions of Incorporated NYSE Rule 472 (the "Proposal").

The Committee commends FINRA for undertaking, as part of the FINRA Rulebook Consolidation, to consolidate FINRA's current advertising rules and past guidance and interpretations regarding advertising issues into new FINRA rules. The Committee appreciates the opportunity to provide comments on the Proposal.

This letter provides comments with respect to certain provisions of one of the rules covered by the Proposal: Proposed Rule 2210 (the "Proposed Rule"). In particular, this letter

¹ The Committee of Annuity Insurers is a coalition of 30 life insurance companies that issue fixed and variable annuities. The Committee was formed in 1981 to participate in the development of federal securities law regulation and federal tax policy affecting annuities. The member companies of the Committee represent over two-thirds of the annuity business in the United States. A list of the Committee's member companies is attached as Appendix A. 8736655.1

provides comments on the Proposed Rule's definitions of "retail communication" and "correspondence," its exception for "solely administrative" communications, and its requirements concerning template updates. The Committee then provides comments on certain issues not addressed by the Proposal (i.e., applicability of the "text box rule" to variable annuity contracts and social networking).

PROPOSED DEFINITION OF "RETAIL COMMUNICATION"

Definition of "Retail Communication." Under the Proposal, clause (a)(5) of the Proposed Rule would define a new category of communication, named "retail communication." This new category effectively combines two of the communication categories in Current Rule 2210, for "advertisement" and "sales literature," into a single category.

Comment. The Committee understands FINRA's reasoning for combining the two current categories of communications into a single category. However, the Committee notes that, under Current Rule 2210, FINRA Advertising Department staff has applied more stringent content standards to those communications categorized as "advertisements" as opposed to "sales literature," in recognition of the difference in the anticipated audiences for the two categories. If FINRA proceeds with the proposal to combine the two categories into a single category, the Committee believes that it would be helpful for FINRA to provide guidance that it will continue to take into account the anticipated audience for a proposed retail communication. More particularly, the Committee requests FINRA confirm that FINRA Advertising Department staff will not assume that all "retail communications" are intended for publication or use in the public media, and rather, that it will be guided by the intended audience, use, and circulation of a proposed communication.

PROPOSED DEFINITION OF "CORRESPONDENCE"

Definition of "Correspondence." Under the Proposal, clause (a)(2) of the Proposed Rule would define "correspondence" as a written (including electronic) communication distributed or made available to no more than 25 retail investors. This proposed definition would differ from Current Rule 2211's definition of "correspondence," which applies to a letter or email message sent to an unlimited number of existing retail customers and fewer than 25 prospective retail customers in any 30 calendar-day period.

Comment. The Committee believes that it would be helpful for FINRA to provide background information regarding its decision to select a numerical limit of "25 or fewer retail investors" as the ceiling limit for correspondence. The Committee observes that this numerical limit seems arbitrary. The Committee is concerned that, as a practical matter, given the challenges in monitoring that a written communication is limited to 25 or fewer recipients, members would likely be forced to treat all letters or email messages, as retail communications.

Given the dramatic departure from the current standard, it would be helpful to provide members background into the policy reasons driving this change.

CONTENT OF "SOLELY ADMINISTRATIVE" COMMUNICATIONS

Proposal. Under the Proposal, Clause (b)(1)(D) of the Proposed Rule would except from the principal approval requirement any "retail communication" that is "solely administrative in nature."

Comment. The Committee is concerned that the Proposal Notice appears to contemplate a very limited range of administrative communications that would fit within the exception.² In contrast to the Proposal, FINRA guidance and practice generally has recognized a broader range of administrative communications that are excepted from the principal approval and filing requirements.

In this regard, the Committee notes that Current Rule 2211 generally does not require registered principals to pre-approve correspondence that does not make any financial or investment recommendation or otherwise promote a product or service of the member.³ The Committee requests that FINRA explicitly recognize that any such communications remain exempt from principal pre-approval as well as filing requirements otherwise applicable to retail communications.

FILING REQUIREMENTS FOR TEMPLATE UPDATES

Proposal. Under the Proposal, Clause (c)(7)(A) of the Proposed Rule would except from the filing requirement retail communications that are based on templates previously filed with FINRA, the changes to which are limited to updates of more recent statistical or other non-narrative information.

Comment. Current Rule 2210 effectively permits a member firm to update a communication subject to the filing requirement without resubmitting the communication if the update does not reflect a "material change." The Proposal appears to narrow this exception by limiting it to those changes "which are limited to updates of more recent statistical or other non-narrative information." The Committee urges FINRA to reconsider any revisions that would have the effect of narrowing the circumstances in which member firms can update previously-filed retail communications. Marketing materials for variable annuity contracts are often

² See Proposal Notice at FN 6 (indicating that communications related to recruitment or changes in a firm's name, personnel, electronic or postal address, ownership, offices, business structure, partners, telephone and teletype numbers, or concerning a merger with, or acquisition by another firm, would satisfy the "solely administrative in nature" requirement of the Proposal).

³ See NASD Conduct Rule 2211(b)(1)(A). See also Notice to Members 06-45 (August 2006). 8736655.1

updated to reflect various changes in narrative information such as a change in the name of a sub-adviser or in a firm's address. The Committee believes that changes of this type should not trigger a refiling requirement. Accordingly, the Committee asks FINRA to confirm that such changes would not trigger a refiling requirement.

OTHER ISSUES

Social Networking. The Proposal does not address social networking issues that many member firms are struggling to address. FINRA has provided guidance on social networking activity through FINRA podcasts that are predicated on an analysis of such activity under the Current Rule 2210, but not with regard to the Proposal. The Committee questions the continued viability of these podcasts if FINRA does not address social networking in the context of the Proposal. The Committee recommends that FINRA address social networking platforms (e.g., Facebook, LinkedIn, Twitter, etc.) in the context of the Proposal.

In this regard, we note that FINRA has announced that it has organized a working committee ("Social Networking Committee"), which will analyze how FINRA should regulate member communications sent through or posted on social networking platforms. The Committee recommends that FINRA not advance the Proposal until any recommendations resulting from the Social Networking Committee's review are integrated into the current rulemaking initiative and members are given an additional opportunity to comment.

Text Box Rule and Interpretive Guidance. The Proposed Rule retains the substance of the current "text box rule" (currently codified in NASD Rule 2210(d)(3), proposed to be renumbered as FINRA Rule 2210(d)(5)). FINRA has not applied the current text box rule to communications discussing underlying funds for variable annuity contracts. The Committee believes that it would be worthwhile for FINRA to clarify that the text box rule, as it would be carried over to the Proposed Rule, would not apply to communications related to variable annuity contracts or their underlying funds, consistent with its current position.

IMPLEMENTATION ISSUES

The Committee notes that member firms would need to undertake a significant review and modification of current business practices, policies and procedures, and training programs to comply with the Proposal, if all the proposed rule changes are adopted substantially as proposed. This undertaking would likely require an extended period of time. In light of these considerations, the Committee recommends that FINRA provide a lengthy implementation period for the Proposal, if it is eventually adopted.

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CONCLUSION

The Committee appreciates the opportunity to comment on the Proposal. We would look forward to a meeting with FINRA staff in order to provide more specific input on the issues raised in this letter and answer any questions the staff may have regarding our comments.

Please do not hesitate to contact Clifford Kirsch (212.389.5055) or Susan Krawczyk (202.383.0197) if you have any questions on the issues addressed in this letter.

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: Clifford Kirsch (JKH)

BY: Susan Krawczyk (JKH)

FOR THE COMMITTEE OF ANNUITY INSURERS

Appendix A

THE COMMITTEE OF ANNUITY INSURERS

AEGON Group of Companies
Allstate Financial
AVIVA USA Corporation
AXA Equitable Life Insurance Company
Commonwealth Annuity and Life Insurance Company
Conseco, Inc.
Fidelity Investments Life Insurance Company
Genworth Financial
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Hartford Life Insurance Company
ING North America Insurance Corporation
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Life Insurance Company of the Southwest
Lincoln Financial Group
Massachusetts Mutual Life Insurance Company
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
RiverSource Life Insurance Company
(an Ameriprise Financial company)
Sun Life Financial
Symetra Financial
USAA Life Insurance Company