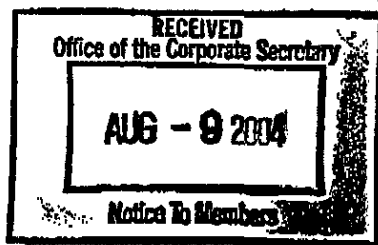


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August 9, 2004

VIA HAND DELIVERY

Ms. Barbara Z. Sweeney
NASD
Office of the Corporate Secretary
1735 K Street, NW
Washington, DC 20006-1500

**Re: NASD Notice to Members 04-45
Proposed Rule Governing the Purchase, Sale, or Exchange of
Deferred Variable Annuities**

Dear Ms. Sweeney:

Our firm represents the Committee of Annuity Insurers (the "Committee").¹ This letter of comment is respectfully submitted on behalf of the Committee regarding the above-referenced rule (the "Proposed Rule") proposed by NASD in Notice to Members 04-45 (June 2004) ("NtM 04-45").

The Proposed Rule would impose on NASD member firms suitability, disclosure, principal review, supervisory and training requirements tailored specifically to transactions in deferred variable annuities ("variable annuities"). NASD stated in NtM 04-45 that the Proposed Rule is necessary because some of its members have continued to engage in problematic variable annuity sales practices and some investors have continued to be confused by certain features of these products, despite the issuance by NASD of "best practices" guidelines for variable annuity transactions.²

NASD proposes imposing a regulatory framework on the offer and sale of variable annuities that is significant, and perhaps unprecedented, in two respects. First, the Proposed Rule would codify and make mandatory "best practices" guidelines issued by NASD in Notice to Members 99-35 ("NtM 99-35"). The Proposed Rule would therefore turn industry "best practices" into minimum levels of acceptable sales practices for all variable annuity transactions. The Committee supports regulatory efforts to ensure suitable variable annuity sales and adequate supervision of NASD member firms'

¹ The Committee of Annuity Insurers is a coalition of 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 half of the annuity business in the United States. A list of the Committee's member companies is attached as Appendix A. This comment letter addresses variable annuities only, since fixed annuities are not subject to the Proposed Rule.

² The "best practices" guidelines were issued by NASD in Notice to Members 99-35 (May 1999).

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transactions in variable annuities. However, the Committee believes that the nature of "best practices" dictates that firms should have flexibility to determine which "best practices" are necessary for particular products in particular sales situations.³

The Committee's comments in this letter are intended to assist NASD and the Securities and Exchange Commission (the "SEC") in assessing whether each of the multiple new requirements of the Proposed Rule is essential in every sales situation.⁴ The Committee supports many of the provisions of the Proposed Rule. However, the Committee's comments herein also reflect significant concerns that if NASD member firms are required to comply with a new series of complex rules that do not provide measurable, additional investor protection, firms may sell other products that do not offer the unique combination of securities features and insurance protections variable annuities offer to investors to provide for critical retirement and other long-term financial needs.

A second largely unprecedented aspect of the Proposed Rule is the new disclosure document requirements that would be imposed. The Proposed Rule's suitability, supervisory, and training requirements were generally addressed in the best practices guidelines issued by NASD in NtM 99-35. However, the Proposed Rule's specific disclosure document requirements were not addressed in NtM 99-35 and depart in several important respects from requirements applicable to the sale of mutual funds and most other securities.⁵ The Committee has serious concerns that there may be instances where suitable sales of variable annuities are deterred and investors' financial goals not met solely because of protracted and unnecessary procedural hurdles in the variable annuity sales process. Specifically, the Committee believes that the Proposed Rule's requirement that customers receive variable annuity prospectuses and the proposed risk disclosure document before any variable annuity transaction could be effected departs unnecessarily from fundamental federal securities law requirements regarding disclosure document delivery established by Congress over seventy years ago.

³ We note that NASD indicated in NtM 04-45 that "many members offer deferred variable annuities in a manner consistent with NASD's existing rules (and a large segment adhere to the guidance provided in NtM 99-35)...."

⁴ Section 19(b) of the Securities Exchange Act of 1934 (the "1934 Act") requires NASD to file the Proposed Rule with the SEC after approval of such filing by the NASD Board. The Proposed Rule must then be approved by the SEC following publication for public comment in the *Federal Register*, unless the Proposed Rule qualifies for the exception provided by Section 19(b)(3)(B), which permits certain limited types of proposed rule changes to take effect upon filing with the SEC. The Committee believes that because of the extreme importance of the Proposed Rule and the Committee's comments herein that certain provisions of the Proposed Rule are not necessary for the protection of investors or the maintenance of fair and orderly markets, and in some cases do not appear to be consistent with certain provisions of the federal securities laws, the Proposed Rule should not take effect immediately upon filing with the SEC.

⁵ See NtM 04-45 at page 566 (explaining that in addition to codifying and making mandatory the guidelines issued by NASD in NtM 99-35, the Proposed Rule also would create certain written disclosure requirements).

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The Committee appreciates the opportunity to submit its comments on the Proposed Rule.⁶ The following is a summary of the Committee's comments:

- **Appropriateness/Suitability.** The Proposed Rule should be revised so that it does not specify particular items of information to be obtained from customers (other than those currently required by Rule 2310) but instead provides guidance for use by NASD member firms to develop appropriate information collection processes specifically tailored to the variable annuities they offer.
- **Prospectus Delivery.** The Proposed Rule should be revised to require the delivery of a prospectus before a variable annuity transaction is effected by an NASD member or as soon as practical thereafter.
- **Risk Disclosure Document.** NASD should coordinate with the SEC to develop specific variable annuity prospectus requirements that would govern the content of any "risk disclosure document," or revise the Proposed Rule to permit the use of a brief, generic summary disclosure document.
- **Exchange Form.** NASD should repropose requirements for a standard disclosure document for use with variable annuity exchanges.
- **Principal Review.** The Proposed Rule should be revised to impose a requirement for principal review as soon as practical after receipt of completed application materials rather than "within one day."

I. Appropriateness/Suitability

The Committee broadly supports Sections (a)(1) and (a)(2) of the Proposed Rule, which would require that before recommending the purchase, sale or exchange of a variable annuity to a customer, a member and its associated persons first make and document certain enumerated determinations after obtaining specified information from the customer. However, while the Committee believes that much of the information that would be required by Section (a)(2) may be appropriate in many instances to a member firm's variable annuity suitability determination, certain of such information may not be appropriate depending on the member and the products offered by the member. Furthermore, such information is not currently required by NASD's suitability rule, Rule 2310. For example, it is not clear why in all cases it is necessary to obtain information about a customer's marital status to determine the suitability of a variable annuity for that

⁶ We are aware that other commentators will address issues and concerns as to how the Proposed Rule may adversely impact the sale of deferred variable annuities in connection with qualified retirement plans. The Committee, respectfully, would appreciate the opportunity to comment further on this aspect of the Proposed Rule after those other comments have been published. Alternatively, the Committee invites the NASD to discuss this matter at any time with representatives of some of our member companies.

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customer.⁷ Moreover, it is not clear why some of the information should be required to be obtained in connection with the sale of variable annuities but not mutual funds or other securities.

Accordingly, the Committee requests that the Proposed Rule be modified to eliminate the requirement that particular information be obtained from customers. The Proposed Rule should instead provide guidance for use by member firms to develop appropriate information collection processes specifically tailored to the products they offer. In the alternative, should NASD decide to retain the requirement that specified items of information be collected from customers, the Committee requests that when submitting the Proposed Rule to the SEC, NASD explain why this information is relevant to a suitability determination for variable annuities but not for mutual funds or other securities. The Committee believes that understanding NASD's rationale will help ensure that Committee members are able to comment on and implement the final rule as effectively as possible.

II. Prospectus Delivery and Risk Disclosure Document

A. Prospectus Delivery

The Proposed Rule would require NASD member firms to deliver a current prospectus before "effecting" a variable annuity transaction.⁸ This delivery requirement is significantly more restrictive than the best practices guidelines set forth in NtM 99-35, which specified only that "to the extent practical," registered representatives should give a prospectus to customers when recommending a variable annuity.

Prospectus Delivery Requirements Under the Federal Securities Laws. The Committee agrees that prospectuses should be delivered as early in the sales process as practical. The federal securities laws, however, specifically permit a security to be sold in circumstances, such as when the security is sold pursuant to a selling firm's oral communications, where the prospectus is delivered with the confirmation. A federal district court examining this question explained Congressional intent in this regard as follows:

"Section 5(b)(2) of the 1933 Act makes it unlawful for anyone to send a registered security through the mail 'for the purpose of sale or delivery after sale, unless accompanied or preceded by a prospectus.' It was clearly within the

⁷ Information about spouses and other potential beneficiaries who could be designated under a variable annuity contract may be useful in structuring the contract but would not appear to be necessary in all cases for a suitability analysis.

⁸ NtM 04-45 does not specify, but we presume for purposes of this comment letter, that the "current prospectus" that would be required is the prospectus for the variable annuity contract and not the underlying funds. If subsequent versions of the Proposed Rule or the final rule include a prospectus delivery requirement, the Committee asks for clarification on this point.

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contemplation of the drafters of the statute that a purchaser might not see the prospectus covering the security he purchased until after the sale had been completed. Yet no provision of the statute . . . prevents the parties from binding themselves to the terms of a contract prior to that receipt."⁹

It is not necessary for prospectuses to be provided to investors in every situation prior to delivery of the confirmation because the federal securities laws include alternative protections to cover such situations. For example, if a registered representative sells a variable annuity contract to a customer over the telephone or otherwise solely through oral communications, Section 12 of the Securities Act of 1933 (the "1933 Act") explicitly provides for rescission if the representative offered or sold the contract through the use of a material misrepresentation. If the customer is provided with written sales literature in addition to or instead of oral communications, the sales literature would be required to be accompanied or preceded by a prospectus or conform to the requirements of Rule 482 under the 1933 Act.

Prospectus Delivery for Variable Annuity Transactions. This situation regularly presents itself in connection with variable annuity transactions. For example, when application information for a variable annuity purchase is taken from the customer over the telephone, the prospectus may be delivered with the contract and confirmation after issue. If the prospectus instead is required to be delivered before the application is accepted, the customer's request would be delayed.¹⁰ The Committee believes strongly that it is not necessary to prohibit all sales unless a prospectus has been provided prior to an application being taken, since there are situations where customers wish to rely on a registered representative to determine that a variable annuity is suitable for the customer. The Committee believes it would be overly paternalistic in these types of situations to assume that a registered representative and a customer should not be able to agree to proceed so that a proposed variable annuity transaction may go forward without requiring the customer first to have a prospectus in his or her hand.

⁹ *Byrnes v. Faulkner, Dawkins & Sullivan*, 413 F. Supp. 453 (S.D.N.Y. 1976), *aff'd* 550 F.2d 1303 (2d Cir. 1977). See also *Protecting Investors: A Half Century of Regulation*, Report by the Staff of the Division of Investment Management, United States Securities and Exchange Commission (1992) at page 354 (noting that under the 1933 Act it is possible to sell a security orally and to send the statutory prospectus later, either with the security or the confirmation of the sale (whichever occurs first), and thus investors in mutual funds and other securities do not necessarily receive full, written disclosures before they decide to purchase the security).

¹⁰ We note that other provisions of the federal securities laws permit the delivery of a required disclosure document at a time later than is typically required when to do otherwise would substantially delay a transaction the customer has requested. For example, under Regulation S-P, a broker/dealer may provide a required privacy notice within a reasonable time after the customer relationship has been established if the customer agrees to receive the notice at a later time, and to do otherwise would substantially delay the transaction; the rule cites as an example a transaction entered into over the telephone. See Regulation S-P, Privacy of Consumer Financial Information, Rule 4(e).

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Moreover, registered representatives are permitted to sell mutual funds over the telephone, with the prospectus being delivered with the confirmation, and NtM 04-45 does not explain why NASD believes variable annuity transactions present such a greater risk to investors that representatives should not be permitted to also sell variable annuities in this manner. Finally, it is important to note that, unlike for other securities products, the free-look rights imposed by every state's insurance laws and available to variable annuity purchasers, enable investors who receive a prospectus concurrent with contract delivery to rescind the contract within a specified period should they determine after contract delivery and review of the prospectus that the product is unappealing to them.¹¹

For these reasons, the Committee requests that the Proposed Rule be modified to require that prospectus delivery be made either prior to effecting the transaction, or as soon thereafter as practical without unduly delaying the transaction. In addition, we request further guidance on what the phrase "prior to effecting any purchase, sale or exchange" means under the Proposed Rule.

B. Proposed "Risk Disclosure Document"

The Proposed Rule would require NASD member firms or their registered representatives to provide customers with a "risk disclosure document" prior to effecting any variable annuity transaction. This requirement was not included in the best practices guidelines issued by NASD in NtM 99-35, although the variable life counterpart to NtM 99-35, Notice to Members 00-44 (July 2000), did note that firms may wish to provide customers with firm-approved product information brochures that explain the features and principal risks associated with variable life insurance.

Need for Summary Document. The Committee agrees that customers may benefit from a summary document that describes the basic features of variable annuity contracts and discusses liquidity and other issues germane to variable annuity transactions generally. However, the Committee does not believe that the Proposed Rule's requirement that member firms deliver a separate "risk disclosure" document "highlighting the main features" of the particular variable annuity transaction is necessary and could in fact be counterproductive. In this regard, the Committee would support a one- or two-page summary disclosure document alerting customers to the product features that most clearly distinguish a variable annuity from other investments, such as mutual funds. The summary disclosure document could describe, for example, how the insurance protections and fees and expenses of variable annuity contracts differ from mutual funds, and caution investors that surrender charges and tax penalties, among other things, may mean that variable annuity transactions present unique issues that should be considered.

¹¹ We note that such free-look rights result in the return of the customer's contract value, the value of premium payments, or the greater of the two, depending on state law.

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With respect to the means of delivery of a summary disclosure document, the Committee believes that, given the diversity of NASD member firms' structures and operations, each firm would need the flexibility to determine the most effective way to deliver the document to its customers. For example, the document could be provided upon account opening or shortly thereafter or by making it available on the firm's website.

The Committee agrees that such a summary could be a valuable source of information for investors. On the other hand, the Proposed Rule enumerates categories of information that would be required to be included in the proposed "risk disclosure document" that simply could not be appropriately and thoroughly addressed in a brief summary document. To take one example, the Proposed Rule would require a discussion of "federal and state tax treatment," a topic that many variable annuity prospectuses cover in three or four pages of text. The Committee believes that diluting this material to the few sentences necessary for inclusion in a "brief" disclosure document runs the risk of rendering the disclosure largely meaningless at best, and misleading at worst. In short, the unfortunate result of this provision of the Proposed Rule would be a document that either sacrifices thoroughness and clarity for brevity, or a lengthy document that resembles a "mini prospectus," which would do little to accomplish NASD's goals or to improve investor understanding of variable annuities.

Risk of Investor Confusion. The Committee also suggests that any potential benefits from a summary disclosure document be weighed against potential investor confusion resulting from both existing and proposed point-of-sale disclosure requirements, such as:

- the SEC's proposed point-of-sale disclosure regarding potential conflicts of interest and costs associated with the purchase of investment company securities,¹²
- the privacy notice required under Regulation S-P,¹³
- disclosures regarding a member's business continuity plan,¹⁴ and
- disclosures regarding information collected for anti-money laundering purposes.¹⁵

As an example of potential investor confusion that could be created if multiple point-of-sale documents were required, the SEC's proposed point-of-sale disclosure rule would require "distribution-related" fees and expenses only to be disclosed, while the Proposed Rule would require all variable annuity fees and expenses to be disclosed. Some investors might conclude that the fees and expenses disclosed on the SEC point-of-sale document were in addition to, rather than overlapping with, the fees and expenses

¹² See proposed Rule 15c2-3, Release No. 34-49148 (Jan. 29, 2004).

¹³ See Regulation S-P, Rule 4.

¹⁴ See generally NASD Rule 3520(e), Notice to Members 04-37 (May 2004).

¹⁵ See 31 CFR § 103.122(b)(5).

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disclosed on the NASD point-of-sale summary disclosure document.¹⁶ Moreover, the Committee believes that there is a very real possibility that many investors, overwhelmed by voluminous disclosure information, will simply choose to ignore all of it.¹⁷

Disclosure Document Should Be Reconsidered. In light of the risk that this aspect of the Proposed Rule may exacerbate the very problem it is seeking to solve, the Committee respectfully recommends that NASD repropose or reconsider the requirement governing the risk disclosure document.¹⁸ The Committee believes that the type of disclosure document contemplated by NASD would be most appropriately generated by each product's issuer and included in the product prospectus. If NASD determines that the contract highlights or summary section appearing in the front of many variable annuity prospectuses is an insufficiently clear or brief source of information, we suggest that it coordinate its efforts with those of the SEC, as well as seek industry input, to modify this element of the prospectus to better serve variable annuity investors. This approach also has the benefit of maintaining issuer control over product-specific disclosure and marketing materials, a requirement almost universally called for in variable annuity selling agreements.

Finally, whatever form the disclosure document ultimately takes, the Committee respectfully takes issue with NASD's characterization of such a product summary as a "risk disclosure" document. Many of the elements NASD proposes for inclusion, such as sales charges, fees, and tax treatment, pose no "risk" to variable annuity purchasers, even though they are certainly factors all investors should consider in determining whether a variable annuity is appropriate for them. To suggest that these considerations, which are common to almost all investment decisions, constitute "risks" particular to a variable annuity transaction is misleading, and may distract investors from the factors most relevant to their decision.¹⁹

¹⁶ This risk would be magnified if the NASD were to also proceed with a rule requiring the point-of-sale disclosure document it proposed in Notice to Members 03-54 (Sept. 2003). While that proposed rule applied solely to mutual funds, there was a request for comment on extending its application to variable annuities. At the very least, the Committee urges the NASD to ensure these various disclosure documents are not duplicative, overlapping or unduly confusing.

¹⁷ Cf. "Registration Form for Separate Accounts Registered as Unit Investment Trusts that Offer Variable Life Policies," Investment Company Act Release No. 25522 (Apr. 12, 2002) (stating that the SEC is concerned that investors could be overwhelmed by information if fees and charges for every underlying fund in a variable life insurance policy were required to be separately stated in the policy prospectus).

¹⁸ As noted above, the Committee would support a brief generic summary document.

¹⁹ We note in this regard that the only other requirement under the federal securities laws and rules thereunder for a broker/dealer to deliver a point-of-sale document prior to effecting a transaction are the penny stock rules. See, e.g., "Penny Stock Disclosure Rules," Exchange Act Release No. 30608 (Apr. 20, 1992). In enacting the section of the 1934 Act that constitutes the basis for the penny stock rules, Congress was addressing concerns that basic information about the nature of the penny stock market, such as its depth, liquidity, and risks of investment, was largely unavailable to many investors. In contrast, extensive information about each particular variable annuity is provided in the product's prospectus. Furthermore, as noted below, the Committee supports a requirement to deliver a prospectus as early in the sales process as practical without unduly delaying the transaction.

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III. Exchange Form

The Committee is aware of NASD's concerns regarding inappropriate exchanges of variable annuity products and supports its efforts to ensure that such exchanges are suitable. The Committee believes those provisions of the Proposed Rule that would require a registered representative to determine that the exchange is suitable, and require a principal to review and sign-off on that determination, with particular attention paid to registered representatives and customers with a history of exchange activity, are a practical and appropriate means of facilitating suitable exchanges. In addition, the Committee generally supports the use of a disclosure document designed to highlight material information regarding the exchange transaction.

However, the Committee objects to the Proposed Rule's requirement that customers be provided with a summary of "all significant differences" between the existing and proposed contract, without the NASD's providing explicit guidance regarding what information it considers "significant." The Committee believes that this requirement imposes on broker/dealers an unworkably ambiguous standard, complicating the sales process and exposing member firms unnecessarily to broad regulatory liability. In addition, the Committee believes that an analysis of any "tax treatment" differences between the contracts would be inordinately complex and out of place in what is essentially a summary comparison highlighting key factors the customer and registered representative should consider during their consideration of the exchange transaction. Such a comparison is more appropriately made by the customer and his or her tax advisor.

As an alternative, the Committee proposes the use of an NASD-mandated exchange disclosure document appropriate for all exchange transactions.²⁰ The information collected on this document should be limited to those items of objectively determinable information most relevant to an exchange transaction, such as the surrender charge on the existing contract, costs associated with the purchase of the new contract, such as sales loads, and a comparison of death benefits. This document could be based on a replacement form mandated by state insurance law, or the Committee would be pleased to work with NASD to develop a template. The Committee believes that use of a standard disclosure document would ensure that all customers exchanging a variable annuity are provided with the same categories of information and would help simplify and regularize the information gathering process for registered representatives.

²⁰ As noted above, the Committee believes that "tax treatment" is an inappropriate topic for such a document.

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IV. Principal Review

The Proposed Rule would require that a registered principal review and approve any variable annuity transaction, including any suitability determination made by the selling registered representative. As noted above, the Committee supports the requirement for such a review. However, the Committee believes that the additional requirement that the principal review be conducted "no later than one business day following the date of execution of the deferred variable annuity application" is not practicable in light of existing variations in selling channels and would provide no apparent additional protection for investors.

The Proposed Rule seems to contemplate only a "wirehouse" sales channel where registered representatives are generally collocated with their supervising principals (although even this arrangement, as discussed below, may not allow for next-day review in all cases). A large proportion of variable annuity sales are made by registered representatives not collocated with the person or compliance unit responsible for reviewing their transactions. Instead, these representatives forward applications and supporting materials to a central point (such as an office of supervisory jurisdiction, or the broker/dealer's home office) for suitability review and processing. Often, sales by these representatives occur in a customer's home, frequently in the evening. An application "executed" at this time of day cannot, in most areas of the country, be sent by overnight mail carriers, which will not accept packages for next-day delivery after mid- or late afternoon. Thus, the only way to transmit these materials in a manner that would make next-day review possible, is for the representative to send a lengthy fax to the reviewing principal, and then to forward the originals by U.S. mail, or other delivery service. Presumably, it would be necessary to review the fax against the original received, at least on a sampling basis, to ensure that the fax was not used as a means to change information that appears on the original application materials.

In addition to objecting to the unnecessary administrative burden the one-day review requirement would impose, the Committee believes that the requirement will be impossible to meet in many instances. For example, the Proposed Rule makes no exception for applications that are "executed," but that are either missing information necessary for the suitability review or that require an answer to some clarifying question. It is simply unreasonable to expect that the appropriate persons can be contacted and the necessary information received within the same business day, particularly if, as NASD has urged, firms contact customers directly with questions or to confirm information regarding a variable annuity transaction.²¹ Rather than the impractical and onerous one-day review requirement, the Committee instead recommends that NASD urge member

²¹ See Joint SEC/NASD Report, "On Examination Findings Regarding Broker/Dealer Sales of Variable Insurance Products" (June 2004) at 15 (citing as a sound supervisory practice establishing guidelines indicating when the supervisor or the firm would "contact a customer to verify that [a] recommendation was suitable").

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firms to complete suitability reviews as soon as practicable after receipt of completed variable annuity application materials.

V. Conclusion

The Committee appreciates the time and resources that NASD and its staff have devoted to the Proposed Rule. We are pleased to have this opportunity to provide comments to NASD, and we appreciate NASD staff's careful consideration of the Committee's specific recommendations.

Respectfully Submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: W. Thomas Conner
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Eric A. Arnold
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FOR THE COMMITTEE OF ANNUITY
INSURERS

Cc: John J. Fahey

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APPENDIX A

THE COMMITTEE OF ANNUITY INSURERS

Allmerica Financial
Allstate Financial
American International Group, Inc.
AmerUs Annuity Group Co.
Equitable Life Assurance Society of the United States
F & G Life Insurance
Fidelity Investments Life Insurance Company
The Guardian Life Insurance Company
GE Financial Assurance
Great American Life Insurance Co.
Hartford Life Insurance Company
ING North America Insurance Corporation
Jackson National Life Insurance Company
Life Insurance Company of the Southwest
Lincoln Financial Group
ManuLife Financial
Merrill Lynch Life Insurance Company
Metropolitan Life Insurance Company
Mutual of Omaha Companies
Nationwide Life Insurance Companies
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Ohio National Financial Services
Pacific Life Insurance Company
The Phoenix Life Insurance Company
Protective Life Insurance Company
Prudential Insurance Company of America
Sun Life of Canada
Travelers Insurance Companies
USAA Life Insurance Company
Zurich Kemper Life Insurance Companies