

December 29, 2008

VIA E-MAIL

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

**Re: Regulatory Notice 08-71:  
FINRA Requests Comment on Proposed Consolidated FINRA Rule  
Governing Reporting Requirements**

Dear Ms. Asquith:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),<sup>1</sup> in response to Regulatory Notice 08-71, "FINRA Requests Comment on Proposed Consolidated FINRA Rule Governing Reporting Requirements" (the "Notice").

The proposed rule would have two main parts. First, the proposed rule would combine aspects of current NASD Rule 3070 ("Rule 3070") and Incorporated NYSE Rule 351 ("Rule 351") and replace them with a single rule, to be numbered Rule 4530 ("Proposed Rule 4530"). As explained in the Notice, FINRA patterned Proposed Rule 4530 primarily on Rule 3070. Second, the proposed rule would include a "Proposed Supplementary Material" section ("Proposed Supplementary Material") that would be adopted in conjunction with Proposed Rule 4530 and would provide rule clarifications and definitions, and codify certain existing staff guidance on reporting requirements. The Committee's comments follow.

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<sup>1</sup> The Committee of Annuity Insurers is a coalition of 33 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.

### **Timing of Reports**

**Proposal.** Paragraph (a) of Proposed Rule 4530 would extend the time period for reporting certain identified significant events from the current Rule 3070 requirement of 10 days to no later than 30 calendar days after the member firm knows or should have known of the event.

**Comments.** The Committee supports the proposed extension of the reporting period. Compliance with the current 10-day reporting requirement in Rule 3070 creates significant challenges, especially in a large and diversified financial services organization that receives a substantial amount of correspondence each day, some of which may be related to a member's business, and most of which is not related. Further, the change to a 30-day reporting requirement would align reporting obligations under Proposed Rule 4530 with those that apply to Form U4 and Form U5. The Committee notes that, in many cases, an event requiring reporting under the current Rule 3070 also is likely to require a Form U4 or U5 amendment.

### **Reporting Internal Conclusions**

**Proposal.** Paragraph (a)(3) of Proposed Rule 4530 would require that a member report "internal conclusions" (more specifically, instances in which a member has concluded that it or an associated person(s) has violated securities, insurance, commodities, financial or investment-related laws, rules, regulations or standards of conduct of any domestic or foreign regulatory body or SRO). As explained in Proposed Supplementary Material .01, a member would not be required to report an isolated violation that can reasonably be viewed as a ministerial violation that did not result in customer harm and were remedied promptly upon discovery.

**Comment.** The Committee believes that this proposed category of reportable events is too broad in scope, vague, and poorly justified. More importantly, the Committee believes that the proposed reporting requirement would serve to chill members' internal review and self-policing efforts, which we submit should be encouraged, not discouraged.

In terms of chilling effect, the Committee wishes to remind FINRA that, at the time NASD Rules 3012 and 3013 were advanced, member firms expressed concern that the NASD would use the reports and review processes contemplated by those rules as a roadmap for disciplinary action against a firm or a representative(s). NASD officials assured member firms that the NASD would not do so, and that members would be given latitude to resolve deficiencies uncovered during the annual review. The requirement in Proposed Rule 4530 that members report internal conclusions thus represents a dramatic shift in FINRA's approach to self-policing. The Committee is concerned that an obligation to report an internal conclusion may very well lead to members refraining from reaching such conclusions in the course of their internal review processes. The Committee believes that such a result is not in the best interests

of the public. We urge that this proposed category of reportable events be eliminated from Proposed Rule 4530.

Alternatively, if this requirement is not eliminated, we would request that FINRA provide clearer guidance regarding the types of “internal conclusions” that need not be reported (or conversely that should be reported). The Proposed Supplementary Material refers to “ministerial violations” that have been “remedied promptly” without further elaboration, leaving open to speculation what types of findings or discrepancies should be reported or not reported. For example, the Committee questions whether FINRA intends member firms to report incidents of the following type: a representative failing to submit marketing material for review and approval; or a representative failing to report a non-securities-related outside business activity. Also, the Committee suggests that, in light of its concerns about the potential chilling effect of this proposal, the Proposed Supplementary Material clarify that findings arising out of a firm’s review processes carried out under current NASD Rules 3010, 3011, 3012 and 3013 not be considered an “internal conclusion” of the type to be reported under paragraph (a)(3) of Proposed Rule 4530.

Further, the Committee suggests that FINRA should clarify that the internal conclusion is limited to one that is reached at a senior level in the member. For example, a determination by a direct supervisor that a recommendation made by a representative was unsuitable should not be a “reportable” conclusion. Also, a determination made by an affiliate of a member firm should not trigger a reporting obligation for the firm itself.

Finally, the Committee believes that the reporting obligation should be limited to matters relating to violations of the securities laws or rules of a self-regulatory organization operating under the securities laws and should not encompass a determination regarding a violation of insurance laws.

### **Reporting Insurance-Related Civil Litigation/Arbitration**

**Proposal.** In addition to requiring that members report any securities or commodities-related civil litigation or arbitration as well as any claim disposed of exceeding certain monetary thresholds established by the rule, paragraph (e) of Proposed Rule 4530 would specifically require that *insurance-related* civil litigation or arbitration be reported. Further, paragraph (e) of Proposed Rule 4530 would require that copies of criminal and civil complaints and arbitration claims be filed with respect to certain securities *and insurance-related* claims.

**Comment.** The Committee urges that the requirement to report insurance-related civil litigation or arbitration be eliminated. The Notice offers no rationale why FINRA would seek reporting of such matters. The Committee believes that reporting of insurance-related matters is of limited relevance to FINRA’s regulatory purposes. Further, insurance-related matters may

have nothing to do with the member firm. The Committee notes that Proposed Rule 4530 would require a member affiliated with an insurance company to report on insurance-related matters involving affiliates that have nothing to do with the member itself. Also, the proposal would appear to require a member to report on litigation involving property and casualty insurance carried out by an associated person through an agency unrelated to the member firm. This requirement would be akin to a state insurance regulator requiring the reporting of securities-related matters. For these reasons, the Committee believes that the requirement should be limited to reporting civil litigation or arbitration involving insurance products that are registered or treated as securities (e.g., variable annuities).

### **Reporting Judgments, Awards and Settlements**

**Proposal.** Paragraph (a)(1)(G) of Proposed Rule 4530 would continue to require that member firms report judgments, awards and settlements for amounts exceeding \$15,000 (\$25,000 if the member is the defendant or respondent).

**Comment.** The Committee notes that the \$15,000 and \$25,000 thresholds were established more than 10 years ago. The Committee urges that FINRA increase the dollar thresholds for this reporting requirement. The Committee believes that, given the passage of time, the reporting threshold where a representative is named should be raised from \$15,000 to \$30,000 and where the firm is named should be raised from \$25,000 to \$50,000.

### **Calculation of Monetary Thresholds for Reportable Judgments, Awards and Settlements**

**Proposal.** Proposed Supplementary Material .06 for Proposed Rule 4530 would require that a member include attorney fees and interest in the total amount when calculating whether the monetary thresholds for reportable civil litigation and arbitration events have been met.

**Comment.** The Committee urges FINRA to delete the proposed requirement to include attorney fees and interest in calculating the amounts. The inclusion of such items would in all likelihood cause over reporting. The Committee believes that the underlying policy of paragraph (a)(1)(G) of Proposed Rule 4530 would be satisfied without including attorney fees and interest in the calculation of monetary thresholds.

### **Reporting Internal Disciplinary Actions**

**Proposal.** Paragraph (a)(2) of Proposed Rule 4530 would continue to require that member firms report certain disciplinary actions taken by the member against its associated persons. The Proposal would specify that any disciplinary action that involves the withholding of any remuneration (not just commissions) valued in excess of \$2,500 must be reported.

**Comment.** The Committee notes that the \$2,500 threshold was established more than 10 years ago. Along the lines of our comment above regarding the threshold for reporting judgments, awards and settlements, the Committee urges that FINRA increase the dollar amount for disciplinary actions. The Committee believes that, given the passage of time, the reporting threshold should be increased to \$5,000.

### **Reporting Related to Former Associated Persons**

**Proposal.** Proposed Supplementary Material .07 would require member firms to report events related to *former* associated persons if a reportable event under paragraphs (a) or (c) of Proposed Rule 4530 occurred while the individual was associated with the member.

**Comment.** The Committee has serious concerns with the proposal to obligate member firms to be subject to a reporting requirement with respect to former associated persons. The Committee points out that this requirement is open-ended, without any time limit on the period during which a member may be required to report information about a former representative. The obligation to keep track of former associated persons is likely to become staggering as time goes on. However, even with a time limit, the Committee believes that this requirement would be very burdensome, particularly for members with high levels of employee turnover. The Committee urges that FINRA consider a less burdensome alternative for former associated persons (for example, a specific requirement to maintain information related to such events to the extent such information becomes known to the member, and to make such information available to FINRA examiners upon request). Alternatively, FINRA should consider providing a time limit with respect to how long after a representative's termination such reporting would be required.

### **Overlap with Other Reporting Obligations**

The Notice notes that FINRA "will work toward the goal of eliminating duplicative reporting of information disclosed on the Uniform Forms." The Committee urges FINRA to work diligently towards that goal, and also urges that FINRA make every effort to have this change in place when Rule 4530 takes effect.

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The Committee appreciates the opportunity to comment on Proposed Rule 4530. We would be happy to answer any questions you may have about our comment letter.

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY:

Clifford Kirsch (w.v.)

BY:

Susan Krawczyk (w.v.)

FOR THE COMMITTEE OF ANNUITY INSURERS

**APPENDIX A**

**THE COMMITTEE OF ANNUITY INSURERS**

AEGON group of companies  
Allstate Financial  
AIG Life Insurance Companies  
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  
MassMutual Financial Group  
Merrill Lynch 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  
OM Financial Life Insurance Company  
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  
The Phoenix Life Insurance Company  
USAA Life Insurance Company