

February 1, 2010

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 09-69: FINRA Requests Comments on Proposed Consolidated FINRA Rule Governing Payments to Unregistered Persons

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 09-69, "FINRA Requests Comments on Proposed Consolidated FINRA Rule Governing Payments to Unregistered Persons" (the "Notice"). The Notice proposes new FINRA Rule 2040 (Payments to Unregistered Persons) ("Proposed Rule 2040") and new FINRA Rule 0180 (Effective Date of Revocation, Cancellation, Expulsion, Suspension or Resignation) ("Proposed Rule 0180"). The Notice also proposes revisions to current FINRA Rule 8311 (Effect of a Suspension, Revocation, Cancellation or Bar) ("Rule 8311") and proposes Supplementary Material to accompany current FINRA Rule 8311 (Remuneration Accrued Prior to Effective Date of Sanction or Disqualification) ("Proposed Supplementary Material") (the new rules and revised rules and supplementary material are collectively referred to herein as the "Proposal").

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

The Committee believes many aspects of the Proposal provide additional clarity to the registration issues that arise under FINRA rules. However, as described in more detail below, the Committee also has comments on certain aspects of Proposed Rule 2040 and on Rule 8311.

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. 8849681.3

CONTINUING COMMISSION PAYMENTS TO RETIRING REGISTERED REPRESENTATIVES

Proposal. Proposed Rule 2040 would prohibit members from paying or offering to pay, directly or indirectly, “any compensation, fees, concessions, discounts, commissions or other allowances” (collectively, “Payments”) to any person that is not registered with the Securities and Exchange Commission (“SEC”) as a broker-dealer under Section 15(a) of the Securities Exchange Act of 1934, but that would be required to be registered by reason of receiving the Payment. The Notice clarifies that in determining whether a Payment would trigger a registration requirement, the member should consider the SEC’s rules and regulations. Under Proposed Rule 2040(b)(2), FINRA members are permitted to pay continuing commissions to retiring registered representatives of the member, after they cease to be employed by the member, provided that:

- (1) the member and the retiring registered representative entered into a bona fide contract in good faith calling for such payments while the person was a registered representative of the employing member; and
- (2) the arrangement complies with applicable SEC rules, regulations and published guidance by the SEC or its staff.

Comments. The Committee notes that it is unclear whether the requirement set forth in Proposed Rule 2040(b)(2) compelling compliance with SEC rules, regulations and staff guidance is intended to add any substantive restrictions or requirements, as it appears to merely forbid members from making payments that are already otherwise prohibited. The Committee does not believe as a general matter that FINRA rules should include blanket references to compliance with SEC rules and published guidance from SEC staff. Member firms are already subject to SEC rules and regulations. Moreover, the Committee believes that incorporating the positions of SEC staff as FINRA rules is extremely problematic. SEC staff positions, particularly when articulated through no-action letters, are extremely fact specific. In addition, such positions do not allow for the notice and comment period that accompanies formal rulemaking, and would in effect give such positions the force and effect of a rule. Therefore, the Committee believes that the second prong of the test for the payment of compensation to a retiring registered representative should be deleted.

The Committee also requests guidance and clarification on an issue that is of special importance to Committee members. Under Proposed Rule 2040, commissions are permitted to be paid that are “derived from accounts held for continuing customers of the retiring registered representative regardless of whether customer funds or securities are added to the accounts during the period of retirement.” The Committee requests clarification from FINRA that a retiring registered representative who receives compensation payable under a group variable annuity contract may receive compensation based on individuals who become certificate holders

under such contract after the registered representative has retired. Under a group variable annuity contract, the contract itself is typically sold to an entity such as an employee benefit plan. Employees eligible for such plan can then purchase interests under the group variable annuity contract and become certificate holders under the group policy. Permitting retired registered representatives to receive compensation based on individuals who become certificate holders under a group variable annuity contract is the most logical interpretation of the express terms of Proposed Rule 2040(b). Since Proposed Rule 2040(b) provides that additional purchases in individual customer accounts are permitted to benefit the retiring registered representative, additional individuals becoming certificate holders under a group variable annuity contract after the retiring registered representative has left the member firm should also be permitted to benefit the registered representative. From a policy perspective, the account relationship that the retiring registered representative developed in a group variable annuity contract sale was with the employer and its plan, and therefore such representative should be permitted to continue to benefit from that relationship during retirement.

PAYMENTS TO SANCTIONED PERSONS

Proposal. Under the proposed amendments to FINRA Rule 8311, FINRA members may not allow a person subject to suspension, revocation, cancellation of registration, bar from association with a member or other disqualification (collectively, “Sanctions”) to be associated with the member in any capacity inconsistent with the Sanction. The amended rule would also prohibit any payments to a person during the period of the Sanction or anytime thereafter if the payments might have accrued during the period of the Sanction. A proposed Supplementary Material to the amended rule would allow payments to Sanctioned persons that the “member can evidence accrued ... prior to the effective date” of the Sanction and that does not relate to the activity that gave rise to the Sanction.

Comments. The Committee notes that while the amendments would clarify the scope of sanctions subject to the rule and codify certain exceptions, some questions remain unanswered. In the proposed amendments, it is unclear whether registered representatives subject to Sanctions would be permitted to continue to receive compensation earned as a result of automatic monthly payments to a variable annuity contract made during the period of the Sanction. The Committee requests that registered representatives subject to Sanctions be permitted to continue to receive compensation earned as a result of automatic monthly payments to a variable annuity contract during the term of the disqualification, where such payments were arranged for during a time period that preceded the Sanctions.²

² The Committee notes that other securities products (e.g., mutual funds, variable life insurance) may have similar issues with such automatic payments.
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The Committee also requests clarification that the “Sanctions” identified under FINRA Rule 8311 do not in any way impact the current FINRA rules and guidance with respect to registered representatives who are deemed to be “inactive” due to a failure to complete the regulatory element of the continuing education requirements in a timely manner under NASD Rule 1120. The Committee reads the current, proposed language of FINRA Rule 8311, which is triggered by a finding that a person is “subject to a suspension, revocation, cancellation of registration, bar from association with a member (each a ‘sanction’) or other disqualification,” as failing to cover the situation expressly addressed under NASD Rule 1120(a)(2). The Committee would appreciate clarification (which may not need to be provided through a change to the language of FINRA Rule 8311) that FINRA Rule 8311 does not impact the current treatment of registered representatives that are deemed to be inactive under NASD Rule 1120.

CONCLUSION

The Committee appreciates the opportunity to comment on the Proposal. Please do not hesitate to contact Cliff Kirsch (212.389.5052) or Eric Arnold (202.383.0741) if you have any questions on the issues addressed in this letter.

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: Cliff Kirsch, FAA

BY: Eric G. Arnold

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