

December 27, 2010

SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2415
202.383.0100 Fax 202.637.3593
www.sutherland.com

VIA Electronic Mail

Ms. Marcia Asquith
FINRA
Office of the Corporate Secretary
1735 K Street, N.W.
Washington, D.C. 20006-1506

Dear Ms. Asquith:

**Re: Regulatory Notice 10-54: Disclosure of Services,
Conflicts and Duties**

Dear Ms. Asquith:

This letter is submitted on behalf of our client, the Committee of Annuity Insurers (the "Committee"), in response to the publication of Regulatory Notice 10-54, "Disclosure of Services, Conflicts and Duties" (the "Notice").¹ The Notice requests comments on a "concept proposal" that would require member firms to provide retail customers, at or prior to commencing a business relationship, with a written statement ("Disclosure Statement") describing the types of accounts and services provided, the conflicts of interest associated with such services, and limitations on the duties the firms owe to retail customers.

While the Committee lauds FINRA's proactive steps in this area, the Committee has serious concerns about the timing of this proposal, as well as the ability to integrate the Disclosure Statement with disclosure initiatives that are likely to be developed under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") or otherwise. In addition, the Committee believes that the quantity of information proposed for the Disclosure Statement in the Notice is excessive and will dramatically reduce the potential effectiveness of the Disclosure Statement for retail customers.

As set forth in more detail below, the Committee believes:

- The Disclosure Statement must carefully fit together with other existing and proposed disclosure regimes to provide customers with useful, consistent and well-integrated information about their broker-dealer services and products.

¹The Committee of Annuity Insurers is a coalition of 31 life insurance companies that issue fixed and variable annuities. The Committee was formed in 1982 to participate in the development of federal securities law regulation and federal tax policy affecting annuities. The member companies of the Committee 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.

- Given the strong likelihood of rulemakings by the Securities and Exchange Commission (“SEC”) under the Dodd-Frank Act and the near-term completion of the mandated study on the standards of care and regulatory gaps and overlaps of broker-dealer and investment adviser regulation (the “Study”), the Disclosure Statement should not be implemented unless, at a minimum, it fully reflects the findings and recommendations in the Study.
- A layered approach to disclosure is appropriate and FINRA’s proposal for the Disclosure Statement should aim to provide high-level information on broker-dealer services and conflicts and refrain from product- or representative-specific disclosure.
- The Disclosure Statement raises particular concerns for variable annuity² products, including the applicability of the Disclosure Statement to the retirement products marketplace.

RETAIL CUSTOMERS NEED A CONSISTENT, INTEGRATED APPROACH TO DISCLOSURE

In order to be valuable to a retail customer, any Disclosure Statement must be integrated and consistent with, and logically connected to, all the documentation that such customer receives from a broker-dealer. Given all the possible documentation received by a retail customer at the beginning of a relationship with a broker-dealer (e.g., account forms, customer agreements, privacy statements, specific product applications, prospectuses), it is critical for the Disclosure Statement to work in conjunction with such documentation. The Committee believes that as a result of all of this competition for the attention of a retail customer, a Disclosure Statement that is brief, focused and provides high-level information should be the target. Otherwise, the Disclosure Statement is unlikely to provide any real value.

In creating the requirements for the Disclosure Statement, FINRA should consider the way that it will be integrated with all of the following:

- Any proposed summary prospectus for variable annuity products;
- Any rulemakings under the Dodd-Frank Act to create new disclosure documents or regimes including:
 - Rulemaking under Section 913(g) of the Dodd-Frank Act directing the SEC to “facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationship with [broker-dealers] . . . including any conflicts of interest;” and

² We use the term “variable annuity” to identify typical variable annuity contracts as well as other annuity contracts that may be registered or deemed to be securities, as well.
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- Potential rulemaking under Section 919 of the Dodd-Frank Act that grants the SEC the authority to determine “documents or information” that must be provided to a retail investor prior to purchase. The Dodd-Frank Act directs that such documents or information must provide “clear and concise” information about investment objectives, strategies, costs, and risks, as well as compensation or financial incentives to the broker-dealer.
- The proposed amendments to Rule 10b-10 under the Securities Exchange Act of 1934 that would provide additional requirements on the confirmation information provided with respect to mutual fund shares, including mutual funds underlying variable annuity contracts.

The Committee believes that a well crafted and targeted Disclosure Statement can be beneficial to retail customers. The Committee is deeply concerned, however, that if the Disclosure Statement addresses too many topics in too much detail, its value will be critically diminished. The Committee urges FINRA to avoid the creation of a Disclosure Statement that will simply result in the delivery of another disclosure document at a different time (e.g., at the point of forming a business relationship rather than at the point of sale or confirming a securities transaction) that includes similar information in a different format to that delivered to a retail customer under other regulatory requirements or practices. Such a Disclosure Statement would serve only to confuse retail customers, rather than inform and provide guidance on their relationship with a broker-dealer.

THE DISCLOSURE STATEMENT SHOULD NOT BE ADOPTED PREMATURELY

While the Committee recognizes that FINRA believes that it should move forward with the Disclosure Statement proposal irrespective of Dodd-Frank Act related SEC initiatives, the Committee believes that schedule is illogical and has the potential to create unnecessary burdens for broker-dealers. Since the Study will likely define the standards of care required of broker-dealers with some relatively high level of precision, we believe FINRA should propose the Disclosure Statement only after the findings and recommendations of the Study are clear. Any other approach creates too much opportunity for inconsistent and confusing guidance being provided to retail customers.

FINRA’s Rulebook Consolidation Project has already imposed significant burdens on member firms. Each new and modified rule requires careful study and analysis, training and education of registered persons, the creation and adoption of new procedures, and in many cases new and/or revised forms and systems. While the Committee believes that an appropriately crafted Disclosure Statement can be a helpful tool for investors, the Committee fears that multiple changes to regulatory disclosure requirements are a distinct possibility. The regulations flowing from the Dodd-Frank Act have a substantial likelihood of altering the form, content and even the timing of the delivery of the Disclosure Statement. If the Disclosure Statement is advanced prematurely, firms could be subject to the costs not only of implementation of the Disclosure Statement, but also of implementing a series of modifications to the Disclosure Statement resulting from SEC rulemaking under the Dodd-Frank Act.

GENERAL COMMENTS ON THE DISCLOSURE STATEMENT AND THE CONCEPT RELEASE

Set forth below are the Committee's general comments on some of the issues upon which FINRA requested comment.

The Committee Supports a "Layered" Approach to Disclosure. As described above, the Committee believes that providing high-level information in the Disclosure Statement is most helpful to a retail customer. Requiring significant information on compensation practices for different products and detailed account fees and charges in a preliminary disclosure statement that is required at or prior to establishing a "business relationship"³ does not provide much value. If FINRA determines that most or all of the content identified in the Notice should be included in the Disclosure Statement, it is possible that the retail customer could receive an overwhelming level of disclosure, much of which may not even be relevant since the relationship with the broker-dealer firm is just beginning and the broker-dealer has no idea what types of securities products or services might be appropriate for the customer. As a result, the Committee strongly recommends that FINRA's Disclosure Statement include only general information with clear instructions to the retail customer on how to access other sources of additional information of interest to a particular customer.

In this regard, the Committee believes that much of the proposed information related to financial incentives is much too detailed. The Committee believes providing all the currently contemplated information in the Disclosure Statement would create a complex, voluminous and ultimately unhelpful reference for the retail customer. In particular, the Committee highlights the following examples of excessively detailed disclosures proposed for the Disclosure Statement:

- *Any* arrangement in which the firm receives *any* economic benefit from *any* person in connection with a particular product, service or investment strategy;
- *Any* arrangement in which the firm compensates or receives *an* economic incentive for customer referrals to or from *any* individual firm; and
- *All* fees associated with a brokerage account and a specific description of the services provided for such fees.

Given the numerous relationships that member firms have with issuers of variable contracts (and mutual funds), the requirement to identify any arrangement from which the firm receives any economic benefit seems grossly over-inclusive. At most, the Disclosure Statement should provide a concise but meaningful general description of the ways in which a firm may be paid by issuers of securities products. The Committee believes that any detailed disclosures related to such compensation practices could be handled through website or other product-specific disclosures. While FINRA indicates that the policy behind the Disclosure Statement is

³ While the Notice does not define the term "business relationship," it appears the Disclosure Statement might be required to be delivered before any specific securities products have been recommended or purchased.

to provide retail customers with information on the “services, conflicts and duties” of their broker-dealer firm, FINRA further indicates that firms would “continue to provide the more particularized sales practice disclosures.” FINRA appears to lose sight of these objectives when it identifies information that should be provided in the Disclosure Statement that is much more appropriate with respect to a product-specific disclosure document at the point of a recommendation or sale, rather than a general description of the broker-dealer’s “services, conflicts and duties” at the outset of a customer relationship.

The Disclosure Statement Should Primarily Include Firm-Level Disclosure. The Committee believes strongly that the vast majority of the information imparted on the Disclosure Statement should focus on the services and conflicts of interests in the relationship between the customer and the *broker-dealer*. The Committee agrees that information about differential compensation paid to registered representatives (e.g., compensation paid to the registered representative that may be higher for securities products issued by certain product manufacturers than by others) is relevant and could be included in the Disclosure Statement. For example, the Committee believes that the Disclosure Statement could indicate that different compensation may be paid by the broker-dealer based on the product purchased by the retail customer and direct the customer to a website for more detailed information. However, detailed information about different payout rates for each representative would serve no valuable purpose for a retail customer. In addition, it would be extremely difficult to monitor and describe the compensation received on a representative-by-representative basis as the payout grids for registered representatives can be very complex. The Committee believes that the articulated goals in the Notice are best met through a focus on firm-level information.

FINRA Should Consider Developing Template Forms of the Disclosure Statement. Given the Committee’s proposed ideas with respect to the Disclosure Statement, it would appear that member firms as well as retail customers would benefit from similar forms of Disclosure Statements used by similar firms. This could assist retail customers with differentiating one firm from another, and also identifying firms that have similar business models and practices. The Committee believes that a FINRA-designed template Disclosure Statement that permits firms to delete inapplicable content could be very helpful to firms and retail customers.⁴

FINRA Should Survey Retail Customers on Disclosure Needs. The Committee believes that FINRA should consider conducting surveys or assembling “focus groups” to determine what general information retail customers want about their broker-dealer firm at the time of forming a business relationship. The Committee believes that input from retail customers could provide significant value to developing a user-friendly Disclosure Statement.

Timing of the Delivery of the Disclosure Statement. The Notice requests comment on how often the firm should update and provide the disclosure statement to retail customers. The Committee believes that the Disclosure Statement should be provided only at the outset of the business relationship. Requiring periodic updates to existing retail customers would be

⁴ We assume that even if FINRA prepared a template Disclosure Statement, firms would be free to draft their own versions of the Disclosure Statement subject to FINRA guidance.
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extremely burdensome without any significant value to such customers. Any changes in the terms of the relationship with the broker-dealer are likely to be communicated through means other than the Disclosure Statement, such as amended customer agreements, confirmation statements and certain other periodic information delivered to retail customers.

COMMENTS SPECIFIC TO VARIABLE ANNUITIES

In addition to the general comments described above, the Committee also has several comments that are directed at the impact that the Disclosure Statement could have on broker-dealers engaged in distribution efforts with respect to variable annuities.

Providing the Disclosure Statement Should Not Be Required For Variable Annuity Wholesalers or Principal Underwriters. While there is no description of what constitutes a “business relationship” that triggers the delivery of the Disclosure Statement, the Committee believes that the obligation should be imposed only on those broker-dealers that have meaningful and direct relationships with the retail customer. Therefore, the Committee proposes that any delivery obligations should include exceptions for broker-dealers that do not have such a relationship and should be reserved for what is often referred to in connection with variable annuity sales as selling firms. In the context of a variable annuity transaction, the Committee recommends that only the selling firm, and not any broker-dealer that is serving solely as a wholesaler, and/or any broker-dealer serving solely as a principal underwriter of the variable annuity contract, should be under an obligation to deliver a Disclosure Statement to a retail customer. The Committee believes that the lack of any meaningful relationship between the customer and those firms counsels against requiring the delivery of the Disclosure Statement. Requiring such firms to provide Disclosure Statements would very likely confuse the retail customer, rather than provide any valuable information.

The Disclosure Statement Should Only Be Required for Participants in a Retirement Plan in Certain Circumstances. Variable annuity contracts are often used as funding vehicles for certain retirement plans and are offered in connection with other retirement plans. As with the description above for wholesalers and principal underwriters of variable annuities, the contours of the “business relationship” with a “retail customer” are quite different in the context of the retirement plan market than they are in the individual retail market. There are plan sponsors and other financial intermediaries often interposed between the participant in a retirement plan and the broker-dealer firm that sells the variable annuity contract.

The Committee notes by analogy that FINRA responded to the differences in the retirement plans market for variable annuities by providing relief for broker-dealers from the requirements of FINRA Rule 2330 related to certain deferred variable annuity transactions. Under FINRA Rule 2330(a), the suitability requirements are not applicable to the following variable annuity transactions:

[D]eferred variable annuity transactions made in connection with any tax-qualified, employer-sponsored retirement or benefit plan that either is defined as a

“qualified plan” under Section 3(a)(12)(C) of the Exchange Act or meets the requirements of Internal Revenue Code Sections 403(b), 457(b), or 457(f).

FINRA Rule 2330 does provide that broker-dealers may not rely on the exception for variable annuity transactions where a member firm makes recommendations to participants.

In its original form, FINRA Rule 2330 (f/k/a NASD Rule 2821) did not provide such an exemption for plan-related annuity transactions. In response to comment letters, FINRA provided the exception and described its rationale as follows:

In part, NASD created this exception in recognition that, in general, the nature of sales to a plan sponsor, trustee or custodian regarding the plan-level selection of investment vehicles and options involves a level of sophistication, negotiation and bargaining power not usually present in individual retail sales. Thus, the protection provided by the rule change is not necessarily required for such sales. However, if, in the case of any such plan, a member makes recommendations to individual plan participants regarding a deferred variable annuity, the rule change would apply as to the individual plan participants to whom the member makes such recommendations (but would not apply as to the plan sponsor, trustee or custodian regarding the plan-level selection of investment vehicles and options for such plans).⁵

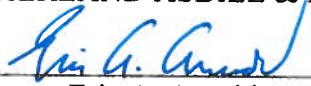
The Committee believes that the Disclosure Statement requirements imposed on broker-dealer firms should not be applicable to the extent that such broker-dealers are involved in variable annuity transactions that meet the terms of the exception provided for under FINRA Rule 2330.

CONCLUSION

The Committee appreciates the opportunity to comment on the Notice. Please contact Eric Arnold (202.383.0741), Michael Koffler (212.389.5014) or Susan Krawczyk (202.383.0197) if you have any questions.

Sincerely,

SUTHERLAND ASBILL & BRENNAN LLP

BY: 

Eric A. Arnold

⁵ FINRA Rule Filing with the SEC, Proposed New Rule 2821 Regarding Transactions in Deferred Variable Annuities, File No. SR-2004-183 (December 14, 2004) (p. 11-12).
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BY: Michael B. Koffler EAA
Michael B. Koffler

BY: Susan S. Krawczyk EAA
Susan S. Krawczyk

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
CNO Financial Group, 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 (USA)
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)
SunAmerica Financial Group
Sun Life Financial
Symetra Financial
TIAA-CREF
USAA Life Insurance Company