

October 6, 2011

**VIA Electronic Mail**

Ms. Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

**Re: Release Nos. 33-9257; 34-65262; 39-2479; IA-3271;  
IC-29781; File Number S7-36-11  
Retrospective Review of Existing Regulations**

Dear Ms. Murphy:

This letter is submitted on behalf of our client, the Committee of Annuity Insurers<sup>1</sup> (the “Committee”), in response to *Retrospective Review of Existing Regulations* (the “Request”).<sup>2</sup> The Request asks interested members of the public to submit comments to assist the U.S. Securities and Exchange Commission (the “Commission”) in considering the development of a plan for the retrospective review of its regulations. The Request was triggered by a Presidential executive order issued on July 11, 2011 (the “Presidential Order”),<sup>3</sup> directing federal independent regulatory agencies, consistent with a directive to federal executive agencies, to conduct a periodic review of existing significant regulations “that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” The Committee appreciates the opportunity to comment on this important initiative.

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<sup>1</sup> The Committee of Annuity Insurers is a coalition of 32 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 more than 80% of the annuity business in the United States. A list of the Committee’s member companies is attached as Appendix A.

<sup>2</sup> The Request was published in Securities Act Release No. 33-9257, *Retrospective Review of Existing Regulations* (Sep. 6, 2011), *available at* <http://sec.gov/rules/other/2011/33-9257.pdf>.

<sup>3</sup> Memorandum for the Heads of Independent Regulatory Agencies, M-11-28, “Executive Order 13579, “Regulation and Independent Regulatory Agencies” (July 22, 2011), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf>.

## COMMITTEE COMMENTS

The Request solicits comments on the “scope and elements” the Commission should consider in developing a retrospective regulation review plan, and poses seven questions for commenters to address. These questions pertain to such matters as the factors for selecting and prioritizing rules for review, frequency and intervals of review, relevant data to consider, and ways in which the Commission could change its regulatory review processes, improve public outreach or increase public participation in the process. In response to these questions, the Committee provides the following recommendations for the Commission’s consideration. These recommendations pertain to factors for selecting regulations for review and factors for consideration when reviewing a regulation, as well as ways to increase public participation in the process.

### **FACTORS FOR CONSIDERATION WHEN SELECTING REGULATIONS FOR REVIEW**

The Committee recommends that the Commission consider the following factors for the selection of regulations for review under a retrospective regulation review plan (the “Plan”).

**1. THE PLAN SHOULD PROVIDE FOR PERIODIC REVIEW OF COMPREHENSIVE REGULATORY FRAMEWORKS GOVERNING REGULATED INDUSTRIES FOR PURPOSES OF ASSESSING EFFECTIVENESS OF EXISTING FRAMEWORKS**

The Committee recommends that the Commission periodically review the totality of rules that apply to an industry regulated under the federal securities laws, such as the securities and retirement businesses of the insurance industry, as well as the broker-dealer, investment adviser, transfer agent or investment company industries, for purposes of assessing the effectiveness of the existing regulatory framework and the relative costs and benefits of that overall framework. The Committee recognizes that the Commission considers these matters when developing and adopting each rule. However, the Committee believes that the current process, in which regulations are considered on a case-by-case basis, does not sufficiently provide for an examination of the costs and potential inefficiencies resulting from the totality of the regulatory framework as it evolves over time. Further, the Committee recommends that this review take into account the totality of costs and burdens imposed on the selected regulated industry under the existing framework, for purposes of assessing the continued reasonableness of those costs and burdens, in light of the Commission’s mission “to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”

**2. THE PLAN SHOULD PROVIDE FOR ASSESSMENT OF THE IMPACT OF A REGULATORY FRAMEWORK ON DIFFERENT BUSINESS MODELS OR INVESTMENT PRODUCTS AND SHOULD PRIORITIZE FOR REVIEW THOSE REGULATIONS APPLICABLE TO ONE INDUSTRY THAT ARE OUTMODED RELATIVE TO REGULATIONS APPLICABLE TO OTHER INDUSTRIES**

The Committee recommends that the Commission, in considering the impact of a regulatory framework on a regulated industry, seek input from the regulated industry to

determine which rules unfairly benefit or harm particular business models, and should then prioritize those rules for review and revision. Similarly, the Committee recommends that the Commission also prioritize for review those regulations which, as currently administered, result in competitive disadvantages for certain investment products relative to other investment products. As an example, the Committee specifically points to the currently uneven regulation of mutual fund disclosure and variable insurance product disclosure as well as the processes available to amend and update that disclosure. To eliminate competitive disadvantages, the Commission should use the review process to ensure that regulatory findings, policies and regulatory developments for one segment of the overall financial services industry are applied expeditiously across all segments.

**3. THE PLAN SHOULD PROVIDE FOR PERIODIC REVIEW OF SELF-REGULATORY ORGANIZATION RULEMAKING WITH A VIEW TO ASSESSING WHETHER THE RULEMAKING REMAINED CONSISTENT WITH THE ORGANIZATION'S LEGISLATIVE MANDATE**

The Committee recommends that the Commission periodically review the rule changes adopted by a self-regulatory organization ("SRO") during a review period with a view to assessing whether the rule changes, taken as a whole, continue to be consistent with the legislative mandate for the SRO set forth in the federal securities laws. The Committee further recommends that the review of an SRO's rulemaking be conducted no less frequently than once every three years, and that the Commission solicit public comment in connection with conducting its retrospective review of the SRO's rule changes. While the Committee appreciates that the Commission considers an SRO's legislative mandate in connection with the review of each rule change, the Committee believes that a periodic, comprehensive review of the rule changes adopted by an SRO would provide a context for verifying actual compliance costs and identifying opportunities for streamlining rules.

**FACTORS FOR CONSIDERATION WHEN REVIEWING A REGULATION**

The Committee recommends that the Plan provide for consideration of the following factors when a regulation is under review.

**1. THE COMMISSION SHOULD CONSIDER WHETHER ORIGINAL COST ESTIMATES FOR COMPLIANCE WITH THE REGULATION WERE ACCURATE AND, IF NOT, WHETHER THE REGULATION SHOULD BE REVISED TO REDUCE COMPLIANCE COSTS**

The Committee recommends that the Commission assess whether the initial estimates of industry costs for compliance with the regulation under review turned out to be accurate. Further, the Committee recommends that, if such review determines that actual costs were significantly higher than estimated costs, the review also consider whether the regulation could be revised to reduce compliance costs without appreciable diminution in the benefits provided by the regulation under review. Such an undertaking would be consistent with the Presidential Order to modify or repeal a regulation that has been determined to be excessively burdensome.

**2. THE COMMISSION SHOULD CONSIDER WHETHER THE REGULATION OVERLAPS WITH REGULATIONS ADMINISTERED BY OTHER REGULATORS**

The Committee recommends that the Commission take into consideration any regulations administered by other regulators that also apply to the same activity and/or registrant covered by the regulation under Commission review. In this regard, the Committee recommends that the Commission consider regulations administered by state agencies, as well as federal agencies and SROs. The Committee urges the Commission to consider whether regulations administered by other agencies may be sufficient to achieve the purpose of a Commission regulation and, if so, whether to provide exemptions from compliance with the Commission regulation to those regulated entities subject to the other regulations. Doing so would be consistent with the Presidential Order to streamline regulations for affected industries.

As a corollary, the Committee recommends that, in the course of developing a new regulation, the Commission identify relevant regulations administered by other regulators (both federal and state regulators) governing the same activity and/or registrants to assist with a retrospective review of the regulation at a later date. In this regard, the Committee believes that the Commission should more formally communicate with other interested regulators such as SROs, state agencies, and federal agencies in any regulatory rulemaking or review with a view to addressing overlapping or contradictory regulations.

Specifically with respect to regulations affecting the insurance industry, the Committee respectfully notes that a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit held that, in order to comply with the mandate in Section 2(b) of the Securities Act of 1933 to consider a rule's promotion of efficiency, competition, and capital formation, the Commission must consider existing state insurance regulations to determine whether Commission regulations would offer greater efficiencies and promote competition or whether sufficient protections already exist at the state level.<sup>4</sup> Insofar as this Section 2(b) standard has been clearly stated by the U.S. Court of Appeals, the Committee believes that the Commission should be carefully considering this standard in any review of regulations subject to Section 2(b) which affect any aspect of the insurance industry.

**3. THE COMMISSION SHOULD CONSIDER THE EFFECTIVENESS OF SEC ADMINISTRATION OF THE REGULATION**

The Committee recommends that the Commission assess the effectiveness of SEC administration of the regulation under review. In particular, the Committee recommends that the Commission consider whether and how Commission staff have administered the regulation, through examinations, interpretive guidance, no-action letters and enforcement actions, and whether that staff activity has identified aspects of the regulation under review that may warrant modification or clarification or possibly repeal, in response to what has been learned.

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<sup>4</sup> American Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010).

#### **4. THE COMMISSION SHOULD CONSIDER TECHNOLOGICAL DEVELOPMENTS IMPACTING ACTIVITIES COVERED BY THE REGULATION**

The Committee recommends that the Commission take into consideration technological developments since the initial adoption or last amendment to the regulation under review for purposes of assessing whether those developments obviate the regulation or certain aspects of the regulation, or provide an alternative, more effective means of complying with the regulation. By way of example, the Committee notes that current Commission guidance governing the electronic delivery of documents is outdated as it was developed during the mid 1990s when use of the Internet for information delivery was still in its infancy.<sup>5</sup> That guidance reflects the time in which it was written and requires firms to meet certain conditions designed to protect investors when using the Internet to deliver investor materials. In most relevant part, the guidance requires firms either to obtain an investor's consent to electronic delivery or otherwise to be able to evidence receipt of an electronic transmission.<sup>6</sup> These restrictions have become obsolete and unnecessarily burdensome given the current widespread use of the Internet.

Since the Commission last issued general guidance focused on electronic delivery in 2000, the Internet has become the dominant provider of information and investors have embraced its "24/7" availability. The Investment Company Institute ("ICI") found that nearly 90% of U.S. households owning mutual funds had Internet access, and that of this group, 91% used the Internet to obtain access to e-mail and 82% used the Internet for financial purposes.<sup>7</sup> Overall, eight in ten mutual fund owning households with Internet access used the Internet daily.<sup>8</sup> This near ubiquity provides an opportunity for firms and investors to realize significant savings should the Commission modernize its electronic delivery guidance.

#### **PUBLIC PARTICIPATION**

The Committee believes that the plan simply cannot achieve the objectives outlined in the Presidential Order without the opportunity for public participation. Providing the opportunity for public participation in the review process is therefore critical to the success of the retrospective regulation review process. To that end, the Committee offers the following recommendations.

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<sup>5</sup> See Securities Act Release No. 7856 (Apr. 28, 2000) (the "2000 Release"); Securities Act Release No. 7288 (May 9, 1996) (the "1996 Release"); Securities Act Release No. 7233 (Oct. 6, 1995) (the "1995 Release").

<sup>6</sup> See 1995 Release, *supra* note 4; 1996 Release, *supra* note 4; 2000 Release, *supra* note 4.

<sup>7</sup> INVESTMENT COMPANY INSTITUTE, 2011 INVESTMENT COMPANY FACT BOOK: A REVIEW OF TRENDS AND ACTIVITY IN THE INVESTMENT COMPANY INDUSTRY 92 (51st ed. 2011), *available at* [http://www.ici.org/pdf/2011\\_factbook.pdf](http://www.ici.org/pdf/2011_factbook.pdf). at 92 and 93.

<sup>8</sup> *Id.*

**1. THE COMMISSION SHOULD SEEK PUBLIC INPUT AT THE OUTSET OF EACH REVIEW UNDER ITS PLAN**

The Committee believes that the Plan should provide for the publication of a notice at the outset of a retrospective regulation review that would identify the regulations selected for review and solicit public comment on those rules. Along similar lines, the Committee believes that the Commission should seek input from the public and affected industries in connection with the annual reviews that the Commission conducts under the Regulatory Flexibility Act. In both cases, the notice should provide a generous period of time for public comment -- 60 days at a minimum.

**2. THE COMMISSION SHOULD ISSUE A REPORT AT THE CONCLUSION OF EACH REVIEW UNDER ITS PLAN**

The Committee believes that the Plan should provide for the publication of a report at the conclusion of a review, to inform the public of the results of the Commission's review and its consideration of any industry comments and suggestions.

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The Committee appreciates the opportunity to provide comments in response to the Request. We are happy to provide more specific input on the comments offered in this letter and answer any questions that the staff may have regarding our comments. Please contact Stephen E. Roth (202.383.0158), Clifford Kirsch (212.389.5052) or Susan Krawczyk (202.383.0197) if you have any questions regarding the comments provided in this letter.

Sincerely,

**SUTHERLAND ASBILL & BRENNAN LLP**

BY:   
Stephen E. Roth

BY:   
Clifford E. Kirsch *HSK*

BY:   
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  
The Phoenix Life Insurance Company  
TIAA-CREF  
USAA Life Insurance Company