

April 17, 2009

VIA ELECTRONIC MAIL

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

**Re: File No. SR-FINRA-2009-008
Notice of Filing of Proposed Rule Change Relating to
Proposed Changes to Forms U4 and U5**

Dear Ms. Murphy:

This letter is submitted on behalf of the Committee of Annuity Insurers (the "Committee")¹ in response to the Securities and Exchange Commission's (the "SEC") publication of, and request for comments on, File No. SR-FINRA-2009-008 *Notice of Filing of Proposed Rule Change Relating to Proposed Changes to Forms U4 and U5* (the "Rule Change Proposal").² The Committee appreciates this opportunity to comment on the Rule Change Proposal.

The Committee first wishes to commend FINRA for its efforts to update and modernize Forms U4 and U5. The Committee supports a number of FINRA's proposed rule changes, either in whole or in part, and is particularly supportive of FINRA's proposal to allow members to amend the "date of termination" and "reason for termination" in Form U5. However, the Committee has several comments with respect to other parts of the Rule Change Proposal.

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 Committee members is attached at Appendix A.

² File Number SR-FINRA-2009-008 was published in SEC Release No. 34-59616, 74 Fed. Reg. 13491 (Mar. 27, 2009).
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Our specific comments pertain to: (1) the scope of proposed Form U4 questions on “willful violations;” (2) Form U4 amendment requirements; (3) the proposed requirement to report allegations of sales practice violations against registered persons not named in litigation complaints and arbitration claims; (4) the proposed requirement to report oral customer complaints; and (5) the proposal to raise the monetary threshold for reporting customer complaints, arbitrations or litigation to \$15,000. Each comment is discussed in more detail below.

Scope of Proposed Form U4 Questions on “Willful Violations”

Proposal. The Rule Change Proposal would add a series of new questions to Form U4 inquiring about “willful violations.”³ FINRA asserts that this information will help identify members and individuals subject to statutory disqualification pursuant to Section 15(b)(4)(D) and (E) of the Securities Exchange Act of 1934 (the “Exchange Act”), as recently amended. In combination, the proposed questions limit the scope of the inquiry in Form U4 to whether the SEC, CFTC, or an SRO ever found the member or registered person to have willfully violated the:

- Securities Act of 1933 and any rules thereunder;
- Exchange Act and any rules thereunder;
- Investment Advisers Act of 1940 and any rules thereunder;
- Investment Company Act of 1940 and any rules thereunder;
- Commodities Exchange Act and any rules thereunder; and/or
- Rules of the Municipal Securities Rulemaking Board.⁴

Comment. The Committee understands that the proposed questions paraphrase relevant statutory provisions. Nonetheless, the Committee is concerned about the extensive use of “legalese” in the proposed new questions. The use of legal terms like “willful” and various other terms may make the proposed new questions inscrutable to the average registered person. The Committee encourages FINRA to restate these questions in “Plain English.” This will facilitate greater understanding of, and accurate answers to, the questions.

³ Specifically, the Rule Change Proposal suggests adding new questions 14C(6)-(8) and 14(E)(5)-(7).

⁴ See Rule Change Proposal at discussion preceding note 7.

Also, while the Committee agrees with FINRA that identifying statutorily disqualified persons is important, the Committee believes greater clarity is needed with respect to the types of violations that must be reported. In informal conversations with FINRA staff concerning the scope of the proposed new questions, the staff appears to have suggested that the scope of the willful violation questions may in fact be broader than a plain reading of the questions would purport. Specifically, one Committee member was informed that *any finding of fraudulent conduct* would be considered a “willful violation.” The Committee requests clarification on the scope of the proposed questions about “willful violations” so that members and registered persons better understand the specific violations that will be required to be reported.

Form U4 Amendment Requirements

Proposal. The Rule Change Proposal indicates the proposed questions about “willful violations” will apply retroactively. Further, the Rule Change Proposal would afford member firms 120 days after the Rule Change Proposal takes effect to have their registered persons update their Forms U4. While the provision for a 120-day updating period suggests that a member firm could implement a process for contacting its registered persons and updating their respective Form U4 in an orderly fashion, the Rule Change Proposal indicates that the proposed new questions on “willful violations” would have to be answered any time a registered person’s Form U4 is amended during the 120-day period for whatever reason, thus causing that person’s Form U4 to be updated on an “one-off” basis.

Comment. The Rule Change Proposal acknowledges that updating Forms U4 will place administrative burdens on members. The Committee believes that these burdens will likely be time consuming and costly for all member firms, but especially so for those with hundreds or thousands of registered persons. The Committee commends FINRA for seeking to alleviate this administrative burden with a 120-day implementation period. However, Committee members remain concerned about administrative burdens and inefficiencies still present in the Rule Change Proposal.

As ways to address these problems, the Committee proposes that a member firm be permitted to defer providing responses to the proposed new questions when filing a Form U4 amendment during the implementation period if the purpose for the filing of the Form U4 amendment is to update information unrelated to the proposed new questions, thus allowing a member firm to follow an orderly or batch process for all updates. The Committee also proposes that FINRA consider additional adjustments to streamline the amendment process and/or waiving the fees that would be required to be paid for the filing of each amendment. We discuss each of these below.

First, the Committee suggests permitting a member firm to defer providing responses to the new questions when filing a Form U4 amendment during the implementation period if (a) the

purpose for the amendment is unrelated to the new questions and (b) the member firm is in the midst of a process for collecting information from registered persons to respond to the proposed new questions. The Rule Change Proposal would require that registrants answer the proposed questions on “willful violations” any time a member amends a Form U4 (*e.g.*, makes an address change) during the implementation period. Unfortunately, requiring responses to the new questions at that time: (1) reinstates administrative burdens relieved by the implementation period; (2) nullifies the usefulness of any “batch” amendment process FINRA may develop; and (3) forces members to amend Forms U4 in a piecemeal fashion, rather than efficiently processing all amendments at once. In contrast, permitting a deferral would allow members to focus on creating an efficient means of surveying their registered persons during the implementation period, eliminate the burdens associated with creating a second manual process for updates, and promote increased reporting accuracy.

Second, the Committee proposes that FINRA consider whether the implementation period could be aligned with the annual CRD FINRA Renewal Program.⁵ While the Committee appreciates the benefits of a 120-day implementation period, there may be unforeseen complications, depending on when the 120-day period would occur, and whether it would overlap or interfere with other routine updating processes. Allowing members to update Forms U4 as part of the annual CRD FINRA Renewal Program will help them prepare for the updates, and rolling the updates into the FINRA Renewal Program will allow members to build on existing update processes, while allowing FINRA to process the updates more efficiently.

Third, the Committee requests that FINRA streamline the amendment process as much as possible. For example, the Committee suggests that only registered persons who must answer “Yes” to one of the new questions be required to update their Forms U4. Another approach might be to allow member firms to document registered persons responses by permitting them to respond to questions as a block in lieu of requiring each registered person to document his or her response to each new question. Registered persons who must respond “Yes” would still do so and provide the requested information.

At a minimum, the Committee requests that FINRA consider ways to make the updating process as seamless as possible. For example, FINRA could allow “batch” filing for representatives who answer “No” to all of the new questions. FINRA could also provide guidance, consistent with a pending FINRA Rule Proposal, that any Form U4 amendments required by the Rule Change Proposal need not contain an original signature from each

⁵ This solution assumes that the Rule Change Proposal is adopted within the next few months. If its adoption is delayed until July or later of this year, updating the Forms U4 during the 2010 CRD FINRA Renewal Program would be more appropriate.

registered person if certain conditions are met.⁶ Both of these requests would significantly reduce the administrative burdens placed on members.

Finally, the Committee requests that FINRA waive any fees that may be incurred in connection with filing Form U4 amendments to respond to the new questions. Such fees would include “Disclosure Processing” and other fees for amending Forms U4 and U5,⁷ any fees that must be paid in connection with statutory disqualification eligibility proceedings,⁸ and any other fees arising in connection with the proposed form changes.

Proposed Requirement to Report Allegations of Sales Practice Violations Against Registered Persons Not Named in Litigation Complaints and Arbitration Claims

Proposal. Current Forms U4 and U5 require that allegations of sales practice violations made against registered persons in a lawsuit or arbitration be reported if the registered person is a named party. The Rule Change Proposal suggests adding new questions to Forms U4⁹ and U5¹⁰ requiring that members and registered persons report such allegations if they are named in, or could be reasonably identified from, the body of a lawsuit complaint or arbitration claim, even if they are not named as a party. The new reporting requirements would apply prospectively.¹¹

Comment. The Committee commends FINRA’s decision to apply this requirement prospectively. However, the Committee is concerned that requiring members to report any registered persons “reasonably identified” in a complaint or claim as involved in an alleged sales practice violation after “reasonable investigation” is too open-ended.¹² Such broad language

⁶ See FINRA Rule Proposal SR-FINRA-2009-019. The conditions proposed are that the member uses reasonable efforts to (1) provide the registered person with a copy of the amended disclosure information prior to filing and (2) obtain the registered person’s written acknowledgment (which may be electronic) prior to filing that the information has been received and reviewed. The proposed rule change would also require a member to retain the written acknowledgment and make it available promptly upon regulatory request. *Id.* at 7.

⁷ See FINRA Registration/Exam Fee Schedule, *available at* <http://www.finra.org/Industry/Compliance/Registration/CRD/FilingGuidance/p005237>. This would also include filing fees required in connection with a statutory disqualification eligibility proceeding.

⁸ See Schedule A, Section 12 of FINRA’s By-Laws.

⁹ Proposed Questions 14I(4)-(5).

¹⁰ Proposed Questions 7E(4)-(5).

¹¹ See Rule Change Proposal at discussion following note 18.

¹² See Rule Change Proposal at discussion accompanying note 19.

would establish an unreasonable burden on members to analyze a complaint or claim and ascertain whether an unnamed person is “reasonably identified” after a “reasonable investigation” within the 30-day period for reporting. The Committee is also concerned that these standards, when combined with a limited time to investigate, will lead to the misidentification of registered persons and result in defamation or other legal actions against members.

To remedy this, the Committee suggests that FINRA provide guidance about when members should consider a registered person “reasonably identified,” and what constitutes a “reasonable investigation,” keeping in mind that any such investigation and analysis will need to be conducted within 30 days. To that end, the Committee also suggests that FINRA alternatively consider extending the 30-day period for reporting if a member determines an investigation must be conducted.

Proposed Requirement to Report Oral Customer Complaints

Proposal. The Rule Change Proposal would add the words “written or oral” to Question 14I(2) in Form U4 and Question 7E(2) in Form U5. Reporting in response to Question 14I(3) in Form U4 and 7E(3) in Form U5, however, would continue to be triggered only in the case of a written complaint.

Comment. The Committee is concerned that Rule Change Proposal will result in confusion about the types of oral complaints which must be reported. Footnote 26 of the Rule Change Proposal explains that the proposed changes “reflect FINRA’s longstanding interpretation that, for purposes of this question, a customer-initiated complaint can be in either written or oral format.” The Committee notes that Interpretive Questions and Answers on Forms U4 and U5 posted on FINRA’s website suggest that an oral complaint must be reported in response to Question 14I(2) only if the complaint is reflected in a “written settlement agreement.”¹³ The Committee also believes that there is uncertainty regarding whether and when oral complaints are to be reported.

The Committee believes the proposed changes go beyond codifying “longstanding” FINRA interpretations. If FINRA intends to modify its previous guidance, such a proposal should be accompanied by greater explanation and should be the subject of a separate notice and comment process.

¹³ See Form U4 and U5 Interpretive Questions (2009) available at <http://www.finra.org/Industry/Compliance/Registration/CRD/FilingGuidance/p005243>.

Proposal to Raise the Monetary Threshold for Reporting Customer Complaints, Arbitrations or Litigations to \$15,000

Proposal. The Rule Change Proposal suggests increasing the threshold for reporting customer complaints, arbitrations or litigation from \$10,000 to \$15,000 on Forms U4 and U5, and making conforming changes to FINRA Rule 8312.

Comment. The Committee commends FINRA for proposing to establish monetary thresholds reflecting market realities. However, to best realize this goal, the Committee suggests increasing this threshold to \$30,000 and employing the same threshold in Forms U4 and U5, NASD Conduct Rule 3070 and FINRA Rule 8312. As noted in the Committee's comments on FINRA Regulatory Notice 08-71, the \$15,000 reporting threshold in NASD Conduct Rule 3070 was established more than 10 years ago, making this threshold outdated.¹⁴ Raising the reporting threshold to \$15,000 on Forms U4 and U5 would simply continue use of an outdated figure thereby failing to accomplish FINRA's stated goal of "reflecting more accurately the business criteria (including the cost of litigation) members consider when deciding to settle claims."¹⁵ Committee members consider \$30,000 a more accurate reflection of the business criteria they consider when deciding to settle claims, and thus more appropriate.¹⁶ Raising the threshold to \$30,000 would also allow parties greater flexibility in crafting reasonable and equitable settlements. Whichever threshold is chosen, the Committee suggests using the same threshold requirement in Forms U4 and U5, NASD Conduct Rule 3070, and FINRA Rule 8312.

¹⁴ See Sutherland Comment Letter Submitted on Behalf of the Committee of Annuity Insurers to FINRA Regulatory Notice 08-71 (Dec. 29, 2008), indexed under FINRA Regulatory Notice 08-71. The changes suggested in FINRA Regulatory Notice 08-71 are still pending.

¹⁵ See Rule Change Proposal at discussion following note 27.

¹⁶ This amount is in line with amounts suggested by other commenters in light of statistical evidence that litigation and arbitration costs have risen much more sharply than acknowledged by a \$15,000 threshold. See SIFMA Comment Letter to FINRA Regulatory Notice 08-20 (May 27, 2008) (proposing a \$25,000 threshold in response to FINRA Regulatory Notice 08-20), indexed under FINRA Regulatory Notice 08-20; Wachovia Securities, LLC Comment Letter to Regulatory Notice 08-20 (May 27, 2008) (proposing a \$50,000 threshold in response to FINRA Regulatory Notice 08-20), indexed under FINRA Regulatory Notice 08-20.

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

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: Clifford Kirsch (DGA)

BY: Susan Krawczyk (DGA)

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
MassMutual Financial Group
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