EVERSHEDS SUTHERLAND

THE Committee OF Annuity Insurers
www.annuity-insurers.org

Eversheds Sutherland (US) LLP
1114 Avenue of the Americas
40th Floor
New York, NY 10036-7703

D: +1 212.389.5000
F: +1 212.389.5099

August 7, 2018

Via E-Mail

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Via email to: rule-comments@sec.gov

Re: File No. S7-08-18
Release No. 34-83063
Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles

Dear Mr. Fields:

The Committee of Annuity Insurers (the "Committee") is pleased to submit this letter in response to the request for comments in Release No. 34-83063 (the "Proposing Release") issued by the U.S. Securities and Exchange Commission (the "SEC" or the "Commission"), proposing the adoption of new rules and forms (including the Form CRS Relationship Summary or "Form CRS") and amendments of existing rules and forms relating to Form CRS, including proposed new rule 17a-4 (together, the "Form CRS Proposal"), as well as a new rule, proposed Rule 15l-2 restricting the use of certain names or titles (the "Advisor Title Proposal") and two new rules, proposed Rule 15l-3 and Rule 211h-1 requiring broker-dealers and investment advisers and certain associated or supervised persons to disclose their registration status in retail investor communications (the "Registration Status Proposal," together with the Form CRS Proposal and the Advisor Title Proposal, the "Proposals").[1]

OVERVIEW OF THE COMMITTEE

The Committee is a coalition of life insurance companies formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of federal policy with respect to securities, regulatory, and tax issues affecting annuities. The Committee's current 31 member companies represent over 80% of the annuity business in the United States. Most of the Committee's members also have affiliated broker-dealers and/or investment advisers that distribute and/or sell registered insurance products (including proprietary and/or non-proprietary products), or provide investment advice in connection with such products as well as other securities. A list of the Committee's member companies is available at https://www.annuity-insurers.org.

For over 35 years, the Committee has been actively involved in shaping and commenting upon many elements of the SEC regulatory framework as it applies to annuity products

[1] *Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles*, 83 Fed. Reg. 21416 (May 9, 2018). All citations in this letter to the Proposing Release are to the version published in the federal register.

registered with the SEC under the Securities Act of 1933 and, with respect to variable annuities, also regulated under the Investment Company Act of 1940. The Committee also routinely comments on issues that affect broker-dealers registered with the SEC under the Securities Exchange Act of 1934, as amended (the "1934 Act"), particularly those sales practices issues that have a specific impact on the marketing and sale of annuities.

EXECUTIVE SUMMARY OF COMMITTEE'S VIEWS

The Proposals seek to provide enhanced disclosure to guide investors in understanding the differences between broker-dealers and investment advisers, and their respective services. The Committee supports efforts to provide enhanced disclosure along these lines to investors. However, the Committee believes that the Commission should not move forward with the Proposals, because they are unworkable in many key respects. More specifically, the Form CRS Proposal contemplates investors having an ***account*** relationship with either a broker-dealer or investment adviser. As acknowledged in the Proposing Release, this type of relationship is generally not applicable to annuities, which are typically "held" directly with an insurance company, and not in a brokerage or advisory account. In light of this, the Form CRS' required content, which does not contemplate direct held investments, would be inaccurate in many respects. As an alternative to the Proposal, the Committee requests that the SEC consider allowing broker-dealers to use a more flexible-type of disclosure document at the outset of the customer relationship, such as a Form ADV-like document. In addition, the Committee requests confirmation that the Advisor Title Proposal would not apply to persons acting as appointed agents or brokers of an insurance company in selling annuities to retail investors. Finally, the Registration Status Proposal is duplicative of, and arguably in conflict with, existing disclosure requirements and practices.

OVERVIEW OF THE PROPOSALS

Form CRS Proposal. The Form CRS Proposal would require broker-dealers, investment advisers, and dual registrants (together, "registrants") to provide certain prescribed, narrative disclosures in a new form, Form CRS. As proposed, Form CRS would be provided to "retail investors" (as defined in the Form CRS Proposal)[2] before or at the time a retail investor engages the services of a broker-dealer, or before or at the time a retail investor enters into an advisory agreement with an investment adviser. For dual registrants, the Form CRS would be provided at the earlier of engaging the services of the broker-dealer or entering into an investment advisory agreement with the investment adviser.

Form CRS would be limited to a maximum of four pages, or the equivalent limit if provided in electronic format. It must contain eight separate sections: (1) introduction; (2) a description of the broker-dealer's, adviser's, or dual registrant's relationship with the retail customer and the services provided; (3) the standard of conduct applicable to the relationship; (4) a summary of fees and costs; (5) a comparison of advisory and brokerage services; (6) a disclosure of certain conflicts of interest; (7) additional information, such as disciplinary history and other resources; and (8) key questions that the retail customer should ask the broker-dealer or investment adviser.

The Form CRS Proposal also encompasses proposed new and amended rules imposing delivery, updating, filing, and recordkeeping requirements on broker-dealers and investment advisers that would be subject to the requirement to provide a Form CRS to retail investors.

Advisor Title Proposal. The Advisor Title Proposal, which would add Rule 15l-2 under the 1934 Act, would prohibit firms solely registered as broker-dealers, along with their associated persons, from using the term "adviser" or "advisor" as part of their name or title when

[2] Proposed Rule 17a-14 would define a "retail investor" as a prospective or existing client or customer who is a natural person (an individual)).

communicating with retail investors. The prohibition on the use of "adviser" or "advisor" does not apply to dual registrants, unless the financial professional only offers brokerage services and does not provide any investment advice to retail investors on behalf of the dually registered firm.

Registration Status Proposal. The Registration Status Proposal, which would add Rule 15l-3 under the 1934 Act and Rule 211h-1 under the Investment Advisers Act of 1940, as amended, would require disclosure of broker-dealer or investment adviser registration status in all written and electronic retail investor communications. This disclosure requirement would also apply to the communications of associated persons of a broker-dealer and supervised persons of an investment adviser.

THE COMMITTEE'S COMMENTS

The Committee offers the following comments on the Proposals.

A. Form CRS Proposal

1. The Form CRS Proposal Would Create an Inefficient Disclosure Regime

As noted above, proposed new Rule 17a-14 of the Form CRS Proposal would require the delivery of a Form CRS to retail investors "before or at the time the retail investor first engages" a broker-dealer's services. Similarly, proposed new Rule 204-5 would require the delivery of a Form CRS (also referred to as Part 3 of Form ADV) to a retail investor "before or at the time" the investment adviser enters into an investment advisory contract with the retail investor. When viewed in a vacuum, this disclosure delivery requirement may not seem problematic. However, the disclosure delivery requirement needs to be viewed in the context of existing disclosure delivery requirements and practices.

Retail investors today receive multiple disclosures at the time of account opening that are required by various regulations. As noted above, the Proposals contemplate separate required disclosures of registration status. In addition, and in conjunction with the Proposals, the SEC also issued a separate regulation, Regulation Best Interest ("Regulation BI"), which also would require delivery of a written disclosure. Adding another disclosure to the pile (literally), such as the Form CRS, whose content overlaps with these other disclosures would inevitably lead to retail investor confusion or disclosure fatigue. In addition, there is a risk that a retail investor might review the Form CRS disclosure only, and then ignore the other required and important regulatory disclosures.

Committee member experience with existing disclosures suggests that retail investors struggle with understanding which of the many disclosure documents currently required to be delivered are "important" and a "must-read." Adding another layer of disclosure could complicate – rather than enhance – retail investors' understanding of the services offered by their financial professional.

The Committee urges the SEC to consider how the goals of the Form CRS can be met by enhancing existing disclosures and by providing broker-dealers with the flexibility to use an ADV-like document at the outset of the relationship.

2. Form CRS Content Would Be Inaccurate in Various Respects

a. Inaccuracies and Misrepresentations Created by Narrow Construction of "Brokerage" vs. "Advisory" Accounts

The Form CRS Proposal would require, among other things, mandated disclosures regarding a registrant's standard of conduct, services, fees and costs, and conflicts of interest. Certain of

the mandated statements and disclosures in Form CRS would create misimpressions, and may even constitute outright misstatements, inaccuracies, or misrepresentations, in the context of retail investor investment in annuities, exposing registrants delivering the Form CRS to potential liability. Beyond any potential expansion of liability, the inaccuracies would undoubtedly sow confusion in the minds of retail investors, who may misunderstand custody or fee information due to the required disclosures in Form CRS.

For example, Item 4 of Form CRS would mandate certain summary information regarding the principal fees and costs that retail investors will incur. More specifically, for brokerage accounts, dual registrants must affirmatively state that the retail investor will "pay us a fee *every time you buy or sell an investment*. This fee, commonly referred to as a commission, is based on the specific transaction and not the value of your account" (emphasis added).[3] In the context of annuity sales, this statement is inaccurate. The retail investor does not directly pay any up-front commission; rather this commission is paid to the registrant by the issuing insurance company. Moreover, a commission is not typically deducted from the purchase payment for the annuity. Furthermore, investors are not typically charged fees for each purchase or sale of investment options underlying a variable annuity contract. For instance, a retail investor would generally not incur any fees associated with reallocating his or her investments across different subaccounts, even though that would technically entail a securities transaction.

In addition, Form CRS repeatedly refers to the distinction between "brokerage accounts" and "advisory accounts." The use of the term "brokerage account" may be confusing to retail investors purchasing and owning annuities, as annuities are typically "held" directly by an insurance company. Indeed, the Proposing Release acknowledges that not all investments are held in brokerage accounts, and that some are directly held.[4] Despite this acknowledgment, the use of the term "brokerage accounts" throughout the Form CRS will likely lead to significant retail investor confusion in the case of retail investors investing in annuities.

Moreover, by requiring broker-dealers to refer to the services they provide as being in connection with "brokerage accounts," Form CRS would cause broker-dealers to make misleading and inaccurate representations regarding the services that they may provide in connection with annuity investments. In short, the mandated statements referencing a "brokerage account" create risk of broker-dealer liability for misstatements, particularly when the insurance or annuity products are held directly with the issuing insurance company.

Finally, certain of the "Key Questions" required to be included in Item 8 of Form CRS would not apply in the context of annuity sales. For instance, Question 2 requests information on how much a typical "brokerage account" would cost the investor per year. As noted above, where annuities are direct held with the issuing insurer, they do not involve "brokerage account" maintenance fees and costs. Questions 3 and 4 also contemplate disclosures related to fees and payments in connection with the investor's "account." These questions do not have clear application in the context of annuity contracts, particularly when the contract is held directly with the issuing insurance company.

Beyond these issues, we also note that Form CRS contemplates that advisory services will be provided through a registered adviser entity. However, some of our Committee members offer advisory services through a non-depository trust company regulated by the Office of the Comptroller of the Currency, or under state law. Because of the restrictive nature of the Form CRS required disclosures and format, a firm would not have the flexibility to discuss these advisory services fully and accurately in Form CRS.

---

[3] *Id.* at 21432.
[4] *Id.* at 21454.

b. Inefficiencies with Regulation BI Conflicts Disclosures

The "conflicts of interest" information required to be disclosed in Form CRS differs in several key respects from the information required to be provided in the conflicts disclosure statement under Regulation BI. Since both Form CRS and Regulation BI would in many cases apply to the same customer interactions, the multiple disclosures would create inefficiencies. Investors receiving both disclosures would likely be confused about the relationship of the two disclosures and the differences between them. The Form CRS disclosure at the outset of the relationship would present one limited view of conflicts of interest. Then, as the SEC acknowledged, Regulation BI would call for a separate description of the conflicts of interest associated with a recommended securities transaction.[5] This may cause retail investors to question why the disclosure of material conflicts of interest in Regulation BI was somehow not important enough to merit inclusion in the 4-page relationship summary in Form CRS.

c. Inconsistencies with Insurance Law

The disclosures required by Item 4 of Form CRS would require broker-dealers to summarize the principal fees and costs that retail investors will incur. In connection with this required summary of fees and costs, Form CRS would require broker-dealers to state whether their fees vary and are "negotiable." This required statement would create the impression that fees should be negotiable. The implication that fees should be negotiable overlooks the state insurance law prohibition against rebating of fees or expenses in connection with annuity sales.

By creating the impression that commissions on annuity sales are, or should be, "negotiable," Form CRS's required disclosures would lead to investor confusion. Beyond investor confusion, retail investors may pressure broker-dealers to negotiate their fees, without regard to violations of state insurance anti-rebating laws. Even if broker-dealers responded to Item 4 by disclosing that fees are "not negotiable," investors may still view this disclosure as an unfair firm-specific decision, rather than mandated by state insurance anti-rebating laws.

3. Form CRS Recordkeeping Requirements are Operationally Unfeasible

The Form CRS Proposal also imposes conforming amendments to existing broker-dealer and investment adviser recordkeeping rules, to require firms to retain copies of each relationship summary, as well as any update or amendment to the relationship summary. Firms must also maintain records noting the date that a relationship summary was delivered to each and every retail investor.

This is a cumbersome requirement that cannot be easily integrated into existing operational practices. For example, many required disclosures are included in account opening documentation, and by virtue of maintaining copies of the account opening documentation, the firm can document evidence of delivery of the required disclosures and the date the delivery was made. However, the proposed recordkeeping requirement for Form CRS would require firms to separately record the "date" of delivery. Since Form CRS may be delivered before account opening, this means that a firm would need to track the delivery of the relationship summary separate from its tracking of account opening documentation.

In addition, under the Form CRS Proposal, a firm apparently must record the date whenever a Form CRS is provided to a prospective customer even if the prospective customer never becomes a customer. Keeping this record may be impracticable from an operational perspective, particularly given that the delivery requirement may be triggered before sufficient identifying information is obtained for a customer's record, and may not be able to

---

[5] *Id.* at 21443.

be obtained after the fact if the recipient decides not to move forward with opening an account or purchasing an investment through the broker-dealer.

Finally, from an operational perspective, there are a number of questions that need clarity from the SEC: How must firms "record" the date of delivery, especially when Form CRS is delivered separate from account opening documentation? How must firms record the date of delivery when Form CRS is included in account opening documentation? Would it be when the completed account opening documentation is received by the firm, the date the customer signs the account opening documentation, or date Form CRS is actually handed to customer? What if the account opening documentation is never completed and the potential customer never becomes a customer? How will firms track the delivery for each of these interactions with potential customers that never engage the firm? If electronic delivery is used, would delivery be the date the customer clicks on Form CRS? If so, how would a firm be able to "track" these clicks on an electronic basis without incurring the expense of additional recordkeeping vendors or developing new (and costly) computer tracking software programs?

4. Form CRS's Definition of "Retail Investors" is Inconsistent with Regulation BI

The Proposals and Regulation BI are not consistent in their application notwithstanding that they are intended to address the same or similar concerns. As discussed above, the Form CRS Proposal applies to "retail investors," which is defined to mean a "client or prospective client who is a natural person (an individual)."[6] By contrast, Regulation BI applies to "retail customers," which is defined to mean a "person, or the legal representative of such person, who: (A) Receives a recommendation of any securities transaction or investment strategy involving securities from a broker, dealer, or a natural person who is an associated person of a broker or dealer; and (B) Uses the recommendation primarily for personal, family, or household purposes."[7]

While this distinction is likely to have an impact only at the margins, it would be an operational challenge – and a purposeless one – for firms to identify those investors who would be subject to one rule but not the other, and ensure that applicable requirements are met. A standardized definition used across both the Proposals and Regulation BI would be more efficient and would enable firms to more easily comply with both proposed rules.

In light of these concerns, we urge the SEC to reconsider the Form CRS Proposal in its entirety.

B. Advisor Title Proposal

The Advisor Title Proposal would prevent firms solely registered as broker-dealers from using the term "adviser" or "advisor" as part of their name or title when communicating with retail investors. The prohibition on the use of "adviser" or "advisor" would not apply to dual registrants, unless the financial professional only offers brokerage services and does not provide any investment advice to retail investors.

The SEC Should Confirm Use of Advisor Title by Bank or Insurance Agents. The Proposing Release notes that the Advisor Title Proposal would not apply to a broker-dealer's or its associated natural persons' use of the terms "adviser" or "advisor" when acting on behalf of a bank or insurance company.[8] The Committee requests confirmation that this statement would permit the use of the term "adviser" or "advisor" by a broker-dealer or its

---

[6] *Id.* at 21548.
[7] *Regulation Best Interest*, 83 Fed. Reg. 21574, at 21682 (May 9, 2018).
[8] Proposing Release, 83 Fed. Reg. 21416, at 21462.

associated natural persons when acting as appointed agents or brokers of an insurance company in selling annuities to retail investors.

C. Registration Status Proposal

The Registration Status Proposal would introduce new Rule 15l-3 and Rule 211h-1, which would require prominent disclosure of broker-dealer or investment adviser registration status, as applicable, in all written and electronic retail investor communications. These requirements raise a number of operational issues.

Registration Status Disclosure Requirement is Unclear and Duplicative. First, it is unclear whether the registration status requirement is intended to apply only to e-mails and correspondence type materials and thus could be addressed in a signature box, or also apply to every item of marketing material or customer account statement used or distributed by a broker-dealer. If the latter, it may not be feasible for a broker-dealer to include this information on marketing materials for investment products created and provided by a product sponsor. Second, it is unclear what is meant by "prominent" disclosure. Finally, the registration status requirement appears to duplicate existing disclosure requirements. For example, FINRA Rule 2210(d)(3) currently requires broker-dealers to disclose their name and certain other relationship information in all retail communications.

In light of these concerns, the Committee urges the SEC to abandon the Registration Status Proposal, as it presents operational challenges (particularly for marketing materials created by product sponsors or issuers), and offers little benefit to retail investors who already receive this information in other disclosures.

* * *

The Committee appreciates the opportunity to comment on the Proposing Release and the Proposals. Please do not hesitate to contact Cliff Kirsch (212.389.5052 or cliffordkirsch@eversheds-sutherland.com) or Susan Krawczyk (202.383.0197 or susankrawczyk@eversheds-sutherland.com) with any questions or to discuss this comment letter. The Committee would be happy to provide any additional information to the Commission or discuss any of the issues or concerns identified in this letter if that would be helpful.

Respectfully submitted,

THE COMMITTEE OF ANNUITY INSURERS

BY: _____ BTM
Clifford Kirsch

BY: _____ BTM
Susan Krawczyk

Eversheds Sutherland (US) LLP
Counsel to the Committee of Annuity Insurers

cc: The Honorable Jay Clayton, Chair
The Honorable Robert J. Jackson Jr., Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Kara M. Stein, Commissioner

Ms. Dalia Blass, Director, Division of Investment Management
Mr. Brett Redfearn, Director, Division of Trading and Markets