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October 22, 2019

VIA ELECTRONIC SUBMISSION

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Modernization of Regulation S-K Items 101, 103, and 105
File No. S7-11-19
Release Nos. 33-10668; 34-86614

Dear Ms. Countryman:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"), in response to the request for public comment by the Securities and Exchange Commission (the "SEC") on the proposing release titled "Modernization of Regulation S-K Items 101, 103, and 105" (the "Release").[1] The Committee appreciates the opportunity to submit these comments and strongly supports the SEC's and SEC staff's continued efforts to improve the Regulation S-K disclosure framework as part of the Disclosure Effectiveness Initiative.

This letter, after providing background information on the Committee and registered insurance contracts, includes the following comments by the Committee on the Release:

- First, as the Committee has commented in response to other SEC releases,[2] the SEC should exempt insurance companies that issue registered non-variable insurance contracts from the various business-related disclosures under Regulation S-K. The disclosures are immaterial (as well as confusing and unhelpful) to potential and existing owners of non-variable insurance contracts and significantly burdensome for insurance companies to prepare, resulting in an ill-fitted disclosure framework for both investors and registrants.

  The Committee acknowledges that this comment is not directly related to the proposals set forth in the Release. However, the Committee strongly believes that the disclosure framework for registered non-variable insurance contracts should be addressed by the SEC as part of the Disclosure Effectiveness Initiative or otherwise, and the Committee appreciates the opportunity to raise this important topic once again.

- Second, to the extent insurance companies that issue non-variable insurance contracts remain subject to Item 101 under Regulation S-K (Description of Business), the SEC should clarify whether proposed Item 101(a)(2), related to the incorporation by reference of disclosure regarding the general development of a registrant's business, can apply to insurance companies that rely on Rule 12h-7 under the Securities Exchange Act of 1934 (the "1934 Act"), which provides an exemption from the 1934 Act's periodic and

[1] 84 Fed. Reg. 44358 (Aug. 23, 2019).

[2] *See, e.g.*, Comment Letter from the Committee of Annuity Insurers to Brent J. Fields, Secretary of the SEC, re Concept Release on Business and Financial Disclosure Required by Regulation S-K (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-219.pdf.

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current reporting requirements. If proposed Item 101(a)(2) cannot apply to insurance companies relying on Rule 12h-7, the SEC should reconsider and revise the proposed item so that it can apply to such insurance companies.

Background Regarding the Committee and Registered Insurance Contracts

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 member companies represent over 80% of the annuity business in the United States. Appendix A includes a list of the Committee's member companies. 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 registered with the SEC under the Securities Act of 1933 (the "1933 Act") and, with respect to variable annuity contracts, the Investment Company Act of 1940 (the "1940 Act").

Committee members register variable annuity contracts with the SEC on either Form N-3 or Form N-4, registration statement forms developed by the SEC specifically for variable annuities. Committee members that offer variable life insurance policies register those policies on Form N-6.[3]

Committee members also issue several types of non-variable insurance contracts registered with the SEC under the 1933 Act on Form S-1 or S-3. These contracts include (but are not necessarily limited to):

- Certain index-linked annuity contracts that credit interest based on the performance of one or more referenced indices (or potentially funds) and provide some level of downside protection;
- Market value-adjusted fixed annuity contracts (MVAs), which guarantee an interest rate for assets that remain invested for one or more specified periods and adjust proceeds payable to contract owners who make a withdrawal or surrender prior to the end of a specified period based on changes in prevailing interest rates;
- Contingent deferred annuity contracts that insure the contract owner against outliving specified assets held by the owner in an associated mutual fund, brokerage, or investment advisory account.

Unlike variable contracts, these non-variable insurance contracts do not pass through the investment performance of a unitized separate account. Instead, the contract values, benefits, and guarantees provided by these contracts are paid out of assets held in the insurance company's general account or a non-unitized separate account. As a result, these contracts are not investment company securities required to be registered under the 1940 Act, and they are not eligible to be registered on Form N-3, Form N-4, or Form N-6. Due to the current absence of a dedicated registration form for these contracts, insurance company issuers must register these contracts under the 1933 Act on Form S-1 or S-3. Furthermore, because these contracts are registered under the 1933 Act, absent an exemption, their registration triggers the obligation to file periodic and current reports pursuant to Section 15(d) of the 1934 Act.[4]

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[3] Some older variable life insurance policies, which the sponsoring company no longer offers for sale to new policy owners, continue to be registered with the SEC on Form S-6. Form N-6 replaced Form S-6 as the 1933 Act registration form for variable life insurance policies funded by separate accounts registered with the SEC as unit investment trusts in 2002.

[4] If the insurance company issuer registers the contract on Form S-1 and relies on the exemption from 1934 Act reporting set forth in Rule 12h-7 under the 1934 Act, all Regulation S-K disclosures will appear in the prospectus. If the insurance company issuer registers the contract on Form S-3, or on Form S-1 and does not otherwise rely on an exemption from 1934 Act reporting, the Regulation S-K disclosures will appear in

Perhaps most importantly with respect to the immateriality of the business-related disclosures under Regulation S-K, an owner of a non-variable insurance contract (and generally any other insurance contract) is not an investor in the insurance company issuer. The contract owner does not participate in the insurance company's revenues. The contract owner's sole financial interest is in the financial guarantees and insurance benefits that the insurance company provides pursuant to the terms of the contract. Moreover, as further discussed below, even though the insurance company's obligations are subject to the insurance company's claims-paying ability, insurance companies are subject to significant solvency regulations by their domiciliary states, essentially eliminating the need for contract owners to consider financial information about the issuers of their contracts beyond the information contained in the financial statements. Indeed, it is the combination of these factors—the contractual nature of insurance products and the robust state solvency regulation—that makes offerings of insurance contracts fundamentally different than offerings of equity, debt, and other securities.

The Committee's Comments on the Release

I. The SEC should exempt insurance companies issuing non-variable insurance contracts from the various business-related disclosures under Regulation S-K

The registration statements for non-variable insurance contracts and any related 1934 Act reports must contain disclosures responsive to the applicable items under Regulation S-K. However, because the business-related disclosures required by Regulation S-K are immaterial to a potential or existing owner of an insurance contract and are significantly burdensome for insurance companies to prepare, the SEC should exempt insurance companies issuing non-variable insurance contracts from those disclosure items.

The disclosures for a registered non-variable insurance contract provide information on two overarching topics: (1) the product itself and (2) the life insurance company issuer. On one hand, the disclosure related to the product is critical, as it describes the material terms and risks of the investment. On the other hand, the disclosure related to the life insurance company is currently of de minimis value to potential and existing contract owners, as it goes well beyond the insurance company's ability to meet its financial obligations, and fails to acknowledge the robust state solvency regulations to which insurance companies are subject and that afford contract owners substantial protection. Further, the content, volume, and detail of the required business-related disclosures are confusing and harmful to potential and existing contract owners, as they deemphasize the product disclosure and task contract owners with evaluating information that is, at best, marginally relevant to their investment decisions.

The specific business-related disclosures required by Regulation S-K that are immaterial to owners of non-variable insurance contracts, and from which life insurance companies should be exempt, include:[5]

- Item 101 (Description of Business)
- Item 102 (Description of Property)
- Item 301 (Selected Financial Data)
- Item 302 (Supplementary Financial Information)
- Item 403 (Security Ownership of Certain Beneficial Owners and Management)
- Item 404 (Transactions with Related Persons, Promoters, and Certain Control Persons)

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the prospectus, annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K, as provided by the applicable form instructions.

[5] The Committee believes that the business-related disclosures provided in connection with a registered non-variable insurance contract should be similar, in nature and extent, to the disclosures required by Form N-4 and Form N-6 (*e.g.*, basic information about the company; the general nature of the business; limited organizational and ownership information; and financial statements). Form N-4 and Form N-6 registration statements contain substantially less business-related disclosure, which ensures that investors focus their attention on important product-related information.

- Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A"))
- Item 305 (Quantitative and Qualitative Disclosures About Market Risk)
- Item 401 (Directors, Executive Officers, and Control Persons)
- Item 402 (Executive Compensation)
- Item 407 (Corporate Governance)
- Item 504 (Use of Proceeds)
- Item 511 (Other Expenses of Issuance and Distribution)
- Item 701 (Recent Sales of Unregistered Securities; Use of Proceeds From Registered Securities)
- Item 703 (Purchases of Equity Securities By the Issuer and Affiliated Purchasers)

These disclosures are valuable to investors in other public offerings because they provide detailed information about a company's business operations, ownership, financial results, and future prospects. Yet, an owner of an insurance contract will not share in the profits or losses of the insurance company issuer, so he or she should not be asked to consider extensive information about the insurance company's business. Nor should the insurance company be required to expend the substantial resources and time necessary to prepare disclosures (*e.g.*, MD&A, executive compensation) that are immaterial and confusing to potential and existing contract owners, and that distract potential and existing contract owners from important product-related information.

In addition, while the insurance company's ability to meet its financial obligations is material to a contract owner, the business-related disclosures listed above do not help people make informed investment decisions about whether to invest in an insurance product. The financial condition of an insurance company is heavily regulated by its domiciliary state in the form of required capital levels, restrictions on investments, and valuation requirements, all with the goal that the company will be able to satisfy its financial obligations under its insurance contracts. In light of these robust regulations, potential and existing contract owners should not be expected to review and evaluate an insurance company's solvency. Rather, they should be given the opportunity to focus on the disclosures about the product, which are key to their investments decisions.

The Committee also emphasizes that the SEC has already concluded in other contexts that substantial information about an insurance company issuer is not material to an investor in an insurance product. In 2009, the SEC adopted Rule 12h-7,[6] which exempts insurance companies from the 1934 Act's periodic and current reporting requirements with respect to their registered non-variable insurance contracts, provided certain conditions are satisfied. As the SEC stated in the adopting release:

> We base [the adoption of Rule 12h-7] on two factors: first, the nature and extent of the activities of insurance company issuers, and their income and assets, and, in particular, the regulation of those activities and assets under state insurance law; and, second, the absence of trading interest in the securities. . . . State insurance regulation, like [1934 Act] reporting, relates to an entity's financial condition. We are of the view that, in appropriate circumstances, it may be unnecessary for both to apply in the same situation, which may result in duplicative regulation that is burdensome. Through [1934 Act] reporting, issuers periodically disclose their financial condition, which enables investors and the markets to independently evaluate an issuer's income, assets, and balance sheet. State insurance regulation takes a different

[6] Index Annuities and Certain Other Insurance Contracts, Release Nos. 33-8996, 34-59,221, 74 Fed. Reg. 3138 (adopted Jan. 8, 2009). The exemption requires that both the insurance company and the security it issues be subject to state insurance regulation; that the insurance company file an annual statement of its financial condition with its state insurance regulator; that the security not be listed on any exchange, other trading, or quotation system or other electronic communication network; that the insurance company take steps to ensure that a trading market in the security does not develop; and that the contract prospectus disclose that the insurance company is relying on the exemption.

> approach to the issue of financial condition, instead relying on state insurance regulators to supervise insurers' financial condition, with the goal that insurance companies be financially able to meet their contractual obligations. We believe that it is consistent with our federal system of regulation, which has allocated the responsibility for oversight of insurers' solvency to state insurance regulators, to exempt insurers from [1934 Act] reporting with respect to state-regulated insurance contracts.

The reasons for exempting insurance companies from 1934 Act reporting under Rule 12h-7 are the same reasons why insurance companies should be exempt from the business-related disclosures under Regulation S-K. Exempting life insurance companies from the business-related disclosures under Regulation S-K would not only be a logical extension of the principles that underlie Rule 12h-7, but would also be an important step towards the SEC's overall objective to improve the disclosure regime for both investors and registrants as part of the Disclosure Effectiveness Initiative.

In light of the foregoing, the Committee urges the SEC and SEC staff to consider how the disclosure framework applicable to non-variable insurance contracts could be expeditiously reformed, whether it be through a rulemaking providing exemptions from Regulation S-K, interpretive guidance, a new registration form, or otherwise. Certainly, the requested exemptions from Regulation S-K would represent an initial and important step towards such reform.

II. The SEC should clarify whether insurance companies relying on Rule 12h-7 under the 1934 Act may rely on proposed Item 101(a)(2) under Regulation S-K and, if necessary, revise proposed Item 101(a)(2) so that they may do so

Item 101(a) under Regulation S-K currently requires registrants to provide disclosure regarding the general development of their businesses. In the Release, the SEC proposes to retain the requirement for registrants to fully describe the general development of their businesses in initial registration statements under the 1933 Act or reports under the 1934 Act, as applicable (the "initial disclosure").[7] However, the SEC has also proposed a new Item 101(a)(2), and proposed Item 101(a)(2) would require only an update of the above-referenced disclosure in subsequent filings, with a focus on material developments, if any, during the reporting period (the "update disclosure").[8] In order to rely on proposed Item 101(a)(2), a registrant would be required to incorporate by reference, and include an active hyperlink to, "the most recently filed disclosure that, together with the update [disclosure], would present a full discussion of the general development of its business."[9] The Release appears to assume that a registrant relying on proposed Item 101(a)(2) would be subject to 1934 Act reporting, in which case the registrant would include the initial disclosure in either a registration statement under the 1933 Act or a report under the 1934 Act, and then provide the update disclosure in subsequent 1934 Act filings.[10]

Insurance companies that rely on Rule 12h-7 do not file 1934 Act reports, but those insurance companies may wish to take advantage of the flexibility afforded by proposed Item 101(a)(2) (to the extent insurance companies that issue non-variable insurance contracts continue to remain subject to Item 101 along with the other business-related disclosures under Regulation S-K). When seeking to rely on proposed Item 101(a)(2), an insurance company relying on Rule 12h-7 would (i) provide the initial disclosure in a prospectus for a registered non-variable

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[7] *See* 84 Fed. Reg. 44362.

[8] *See id.*

[9] *See id.*

[10] *See id.* ("The Concept Release sought comment on whether to allow registrants to omit this disclosure from filings other than the initial Securities or Exchange Act registration statement filed by the registrant and instead disclose only material changes in subsequent reports.").

insurance contract; (ii) provide the update disclosure in a subsequently-filed prospectus; and (iii) in the subsequently-filed prospectus, incorporate by reference the initial disclosure and include an active hyperlink thereto.

The SEC should clarify whether an insurance company relying on Rule 12h-7 may rely on proposed Item 101(a)(2) in the manner described above. In the Release, the SEC stated that proposed Item 101(a)(2) is "a clarification of our existing [incorporation by reference rules] rather than a substantive update,"[11] and proposed Item 101(a)(2) itself cross-references certain incorporation by reference rules, including Rule 411 under the 1933 Act. Rule 411(a) provides that "unless provided in the appropriate form, information must not be incorporated by reference in a prospectus." Form S-1 is the appropriate registration form for insurance companies relying on Rule 12h-7. Form S-1 permits incorporation by reference, but only with respect to previously-filed 1934 Act reports.[12] Because insurance companies relying on Rule 12h-7 are not subject to 1934 Act reporting, they have no 1934 Act reports and, in turn, no previously-filed disclosures that can be incorporated by reference into their Form S-1 prospectuses, including Item 101(a) disclosures that appear in prior prospectuses.

If it was intended that insurance companies relying on Rule 12h-7 could rely on proposed Item 101(a)(2), it would be helpful to clarify that those insurance companies may indeed rely on that proposed item in the manner described above. If that was not intended, and those insurance companies cannot rely on proposed Item 101(a)(2), the SEC should reconsider and revise that proposed item to permit such reliance. A primary justification for proposed Item 101(a)(2) is that a registrant should not be required to repeat disclosure that is contained in another, easily accessible document filed with the SEC.[13] The manner in which an insurance company relying on Rule 12h-7 would rely on proposed Item 101(a)(2)—*i.e.*, by including the initial disclosure in a prospectus for a continuously-offered non-variable insurance contract, and incorporating that disclosure by reference into subsequently-filed prospectuses for the same offering—would be consistent with that justification.

* * *

The Committee appreciates the opportunity to present this letter to the SEC. The Committee would be pleased to assist the SEC and its staff in any manner that would be helpful in the SEC's consideration of the Committee's comments or in further understanding the Committee's goal of improving the disclosure framework for non-variable insurance contracts. Please do not hesitate to contact the undersigned at 202.383.0158 or by email at SteveRoth@eversheds-sutherland.us.

Respectfully submitted,

The Committee of Annuity Insurers

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[11] *See id.* fn. 47.

[12] *See* General Instruction VII and Item 12.

[13] *See* 84 Fed. Reg. 44362. ("Several commenters recommended revising the requirement to distinguish between new and established registrants, stating that much of the disclosure required under this Item is redundant for registrants already subject to the reporting requirements. . . . Under [our] approach, a reader would have access to a full discussion by reviewing the updated disclosure and one hyperlinked disclosure.").

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cc: The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson Jr., Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Allison Herren Lee, Commissioner
Ms. Dalia Blass, Director of the Division of Investment Management
Mr. William Hinman, Director of the Division of Corporate Finance

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Appendix A

THE COMMITTEE OF ANNUITY INSURERS

AIG
Allianz Life
Allstate Financial
Ameriprise Financial
Athene USA
AXA Equitable Life Insurance Company
Brighthouse Financial, Inc.
Fidelity Investments Life Insurance Company
Genworth Financial
Global Atlantic Financial Group
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Lincoln Financial Group
Massachusetts Mutual Life Insurance Company
Metropolitan Life Insurance Company
National Life Group
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
Sammons Financial Group
Symetra Financial Corporation
Talcott Resolution
The Transamerica companies
TIAA
USAA Life Insurance Company

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