EVERSHEDS SUTHERLAND

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

Eversheds Sutherland (US) LLP
700 Sixth Street, NW, Suite 700
Washington, DC 20001-3980

D: +1 202.383.0158
F: +1 202.637.3593

steveroth@
eversheds-sutherland.com

May 5, 2020

VIA ELECTRONIC SUBMISSION

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

Re: Request for Comments on Fund Names
File No. S7-04-20
Release No. IC-33809

Dear Ms. Countryman:

We are submitting this comment letter on behalf of the Committee of Annuity Insurers (the "Committee") in response to the release by the Securities and Exchange Commission (the "SEC") requesting public comment on the regulation of fund names (the "Release").[1] The Committee appreciates the opportunity to submit this comment letter and continues to strongly support the SEC's ongoing efforts to improve the investor experience and modernize current regulatory approaches.

The Committee acknowledges that the Release primarily relates to the application of Rule 35d-1 under the Investment Company Act of 1940 (the "1940 Act") to management investment companies, especially mutual funds and ETFs, and that the Release does not specifically address registered variable insurance contracts. However, registered variable insurance contracts also come under the purview of Rule 35d-1, hence subjecting the names of such contracts, and their associated features, to Rule 35d-1. For this reason, the Committee believes it is an opportune time to communicate its belief that the fundamental differences between funds and registered insurance contracts may not always have been taken into account in the application of the current "naming" regulatory framework. To this end, the Committee is hopeful that any rulemaking, interpretive guidance, or other action that the SEC may take related to the regulation of "fund" names will be tailored to the investment companies to which it is intended to apply, and that any potential consequences for variable insurance contracts be considered.

The Committee of Annuity Insurers

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 1940 Act.

[1] 85 FR 13221 (Mar. 6, 2020).

Eversheds Sutherland (US) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.

Registered Variable Insurance Contracts and their Robust State Regulation

Committee members register variable annuity contracts with the SEC on Form N-4, which is a registration statement form developed by the SEC specifically for variable annuities.[2] Those Committee members that offer variable life insurance policies register those policies on Form N-6, a registration form designed specifically for variable life insurance policies.[3] Variable annuities registered on Form N-4 and variable life insurance policies registered on Form N-6 are supported by insurance company separate accounts that are registered as unit investment trusts under the 1940 Act ("UIT separate accounts").

Unlike other investments regulated by the federal securities laws, registered variable insurance contracts provide investors with an array of significant standard and elective guaranteed insurance benefits. These guaranteed insurance benefits primarily come in two forms: retirement income protection and death benefit protection, which depending on the features of the particular insurance contract, provide some minimum level of income stream or minimum death benefit, respectively.

Because such guarantees are subject to an insurance company's financial strength and claims-paying ability, insurance companies must comply with robust state insurance solvency regulations in the form of required capital and reserving levels, restrictions on investments, and valuation requirements, all with the objective of ensuring that a company will be able to make good on its financial promises under its insurance contracts.[4] These robust state solvency regulations are fundamental to the nature of registered insurance contracts because they significantly reduce the credit risk associated with the financial protections under a contract.

The Current "Naming" Regulation Framework's Unintended Effects on Registered Variable Insurance Contracts

As discussed in the Release, registered investment company names are subject to the antifraud provisions of the federal securities laws,[5] Section 35(d) of the 1940 Act, and Rule 35d-1 thereunder.[6] Because registered variable insurance contracts are supported by insurance

---

[2] Some members continue to support variable annuity contracts that are registered on Form N-3. Variable annuities registered on Form N-3 are funded by insurance company separate accounts that are registered as management companies under the 1940 Act. However, the vast majority of variable annuity contracts today are supported by UIT separate accounts (as defined herein) and therefore are registered on Form N-4, not Form N-3.

[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 UIT separate accounts (as defined herein) in 2002.

[4] The Committee notes that the SEC has previously cited the extensive state regulations to which insurance companies are subject, including state solvency regulations, as the basis for distinguishing between registered insurance contracts and other registered securities under the federal securities laws. *See, e.g.,* Index Annuities and Certain Other Insurance Contracts, Release Nos. 33-8996, 34-59,221, 74 Fed. Reg. 3138 (adopted Jan. 8, 2009) (adopting Rule 12h-7 under the Securities Exchange Act of 1934 (the "1934 Act"), which conditionally exempts insurance companies issuing registered non-variable insurance contracts from periodic and current reporting requirements).

[5] *See, e.g.*, Section 17(a) of the 1933 Act, Section 10(b) of the 1934 Act and Rule 10b-5 thereunder, and Section 34(b) of the 1940 Act. While not subject to naming regulation under the 1940 Act, the names of registered non-variable insurance contracts, such as registered index-linked annuities, and their associated features are subject to antifraud provisions of the other federal securities laws above. Because registered non-variable insurance contracts generally include the same types of guaranteed insurance benefits as registered variable insurance contracts, and likewise implicate the same robust state solvency regulations, the manner in which names associated with registered non-variable insurance contracts are regulated should also account for the issues raised in this letter.

[6] Section 35(d) of the 1940 Act prohibits any registered investment company from adopting as part of its name "any word or words" that the SEC finds are materially deceptive or misleading. Rule 35d-1 under the

company separate accounts registered as investment companies, this regulatory framework applies to registered variable insurance contracts. However, this regulatory framework, particularly Rule 35d-1, fails to acknowledge the inherent differences between funds (*e.g.*, mutual funds and ETFs) and insurance contracts. Indeed, while Rule 35d-1 is "technically" applicable to registered variable insurance contracts as a result of the term "Fund" being broadly defined thereunder to include any registered investment company, its provisions (*e.g.*, the asset-based tests under Rule 35d-1(a)) are specific to management investment companies and have practically no relevance to variable insurance contracts.

The fact that the regulatory framework does not acknowledge the fundamental differences between funds and insurance contracts has had an unintended consequence insofar as insurance companies have been impeded or prevented from using names for insurance contracts and features that should be acceptable. Perhaps most prominently, there have been a number of instances where the SEC staff has not permitted registered variable insurance contracts and their guaranteed features to include terms like "protection" or "guaranteed" in their names, despite the fact that, unlike funds, insurance contracts by definition are protection vehicles. Indeed, insurance companies are in the business of providing financial protection and guarantees, which is the very reason why they are subject to a robust state regulatory framework.

The SEC staff's actions in this regard likely have been based on the SEC's Division of Investment Management November 2013 published guidance regarding names that suggest protection from loss.[7] That guidance expressed the SEC staff's concerns about fund names that include terms such as "protected" or "guaranteed" when used without some additional qualification. Yet, this guidance, which like Rule 35d-1 appears to have been prepared with management investment companies primarily in mind, does not acknowledge guaranteed insurance benefits and the significant state solvency regulations supporting such guarantees, both of which are unique to registered insurance contracts.[8] Indeed, given these differences and the long-standing role that insurance contracts have played and continue to play in our society as financial vehicles that offer contractual income and death protection and guarantees, the Committee believes that insurance companies should presumptively have more latitude—even wide latitude—to responsibly use terms such as "guaranteed."

In light of the foregoing, the Committee encourages the SEC to carefully consider any unintended consequences and potential negative impacts on registered variable insurance contracts of any forthcoming rulemaking, guidance, or other action related to the regulation of "fund" names. Going forward, given the fundamental differences between funds and registered insurance contracts, the Committee hopes that such considerations will result in a more

---

1940 Act generally requires, among other restrictions, that if the name of a "Fund" (defined to include any registered investment company and any series thereof) suggests a particular type of investment, industry, or geographic focus, the Fund must invest at least 80% of its assets in the type of investment, industry, country, or geographic region suggested by its name.

[7] See Fund Names Suggesting Protection from Loss, IM Guidance Update 2013-12 (Nov. 2013) (https://www.sec.gov/divisions/investment/guidance/im-guidance-2013-12.pdf).

[8] Increasingly, perhaps as a result of the 2013 guidance, SEC staff has questioned the historical names of many variable insurance contracts' benefit riders or features that have included the term "guaranteed," such as guaranteed lifetime withdrawal benefit riders and guaranteed minimum income or guaranteed accumulation benefit riders. The Committee strongly encourages the SEC not to take any action with respect to the regulation of fund names that would necessarily prevent insurance companies from continuing to refer to features as providing "guaranteed" benefits, as the term "guaranteed" is an important tool in communicating the nature of these benefits to investors. The Committee believes that the names of such riders and features are not misleading in light of their design and operation and the state solvency regulations to which insurance companies are subject, as well as the fact that the prospectuses and policy forms associated with such riders and features clearly disclose that all such benefits are subject to the insurance company's financial strength and claims-paying ability.

EVERSHEDS SUTHERLAND

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

consistent and appropriately tailored application of the regulatory framework to registered variable insurance contracts.

* * *

The Committee appreciates the opportunity to present this letter to the SEC. The Committee would be pleased to assist the SEC and the SEC staff in any manner that would be helpful in the SEC's consideration of the Committee's comments.

Respectfully submitted,

The Committee of Annuity Insurers

By: Stephen E. Roth

Stephen E. Roth
Eversheds Sutherland (US) LLP
Counsel to the Committee of Annuity Insurers

cc: The Honorable Jay Clayton, Chairman
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

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
Security Benefit Life Insurance Company
Symetra Financial Corporation
Talcott Resolution
The Transamerica companies
TIAA
USAA Life Insurance Company

EVERSHEDS SUTHERLAND

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

Eversheds Sutherland (US) LLP
700 Sixth Street, NW, Suite 700
Washington, DC 20001-3980

D: +1 202.383.0158
F: +1 202.637.3593

steveroth@
eversheds-sutherland.com

May 6, 2020

VIA ELECTRONIC SUBMISSION

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

Re: File Number S7-05-20; Release Nos. 33-10763; 34-88321.
Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets

Dear Ms. Countryman:

We are submitting this comment letter on behalf of the Committee of Annuity Insurers (the "***Committee***")[1] in response to one of the Securities and Exchange Commission's (the "Commission") proposals in ***Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*** (Release Nos. 33-10763; 34-88321, March 4, 2020) (the "***Proposing Release***"). Among other things, the Commission proposed amendments to provisions in numerous rules and forms that permit registrants to redact terms and provisions from certain exhibits required to be filed, provided that the redacted material is "confidential" (subject to certain other requirements). The proposals would revise the standard for treating information as "confidential" for redaction purposes. This includes proposed amendments to Forms N-3, N-4, and N-6, the registration statement forms for variable annuity contracts and variable life insurance policies.[2]

The Committee strongly supports the proposed amendments to the 'confidential' standard in the Form N-3, N-4, and N-6 variable product registration statement forms.[3] In addition, the Committee recommends minor revisions to Form N-6 (for variable life insurance policies) to properly apply the standard to all of the appropriate categories of exhibits.

---

[1] The Committee was formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of securities, banking, and tax policies regarding annuities. For over three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities, working with and advocating before the Commission, CFTC, FINRA, IRS, Treasury, Department of Labor, as well as the NAIC and relevant Congressional committees. Today the Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's member companies 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.

[2] See pages 103-105 of the Proposing Release.

[3] The Commission's proposals regarding the confidentiality standard for redaction are much broader than just the variable product registration statement forms referred to herein. However, the Committee's interests here focus on insurance products, so these comments are addressed primarily to applicability of the redaction standard to insurance products (both variable and non-variable; see footnote 6 below). Nevertheless, the Committee believes that the broad and consistent application of the new standard proposed by the Commission is appropriate.

Eversheds Sutherland (US) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.

The 'Confidential' Standard

Currently, the registration statement forms for variable annuity contracts (Forms N-3 and N-4) and variable life insurance policies (Form N-6) permit redaction of information from certain types of documents required to be filed as exhibits.[4] The standard in those forms (and in other rules and forms) is that provisions or terms can be redacted if they are both (1) not material and (2) would likely cause competitive harm to the registrant if publicly disclosed. The 'competitive harm' requirement is viewed as a test for determining whether the information is 'confidential.'

In June 2019, in a Freedom of Information Act (FOIA) case, the Supreme Court rejected this test for 'confidential' and adopted a new definition that does not include a competitive harm requirement.[5] The Supreme Court stated that information is 'confidential' if it is "both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy." In accordance with that decision, the Commission proposes adjusting the exhibit redaction filing requirements by removing the competitive harm requirement and replacing it with a "customarily and actually treats as private or confidential" standard.

The Committee supports the proposed amendments to Forms N-3, N-4, and N-6 adopting the new confidentiality standard, in accordance with the Supreme Court's interpretation of 'confidential."[6] In addition to applying the appropriate redaction standard (in accordance with the Supreme Court's decision), this would result in all material information being disclosed (since the 'not material' prong for redaction would be retained), and the proposals would retain the Commission staff's ability (pursuant to the instructions cited in footnote 4 herein) to obtain and review the redacted information and request its disclosure if the standard is not met.

Conforming Amendments to Form N-6

There is currently a technical difference in how certain documents are filed as exhibits to variable annuity registration statements (Forms N-3 and N-4) and variable life insurance policies (Form N-6). This results in a significant, but apparently unintended, technical difference in the applicability of the redaction requirements. For variable annuity contracts, the Form N-4 list of exhibits (Item 24(b)) includes two relevant categories: reinsurance contracts (Item 24(b)(7)) and "other material contracts" (Item 24(b)(8)).[7] Form N-4 does not include separate exhibit requirements for participation agreements between the insurer and underlying mutual funds (portfolio companies), or for administrative service contracts. Participation agreements and administrative service contracts (if material) would be filed as "other" material contracts. The Form N-4 exhibit redaction instruction (instruction 5 to Item 24(b)) applies to both paragraphs (7) (reinsurance) and (8) (other material contracts) and therefore would apply to any participation agreements and administrative contracts filed under paragraph (8) of Item 24(b). The new confidentiality redaction standard, then, would apply to reinsurance contracts, participation agreements, administrative service contracts, and other material contracts filed as exhibits to variable annuity registration statements on Forms N-3 and N-4.

---

[4] See Instruction 5 to Item 29(b) of Form N-3, Instruction 5 to Item 24(b) of Form N-4, and Instruction 3 to Item 26 of Form N-6.

[5] See *Food Marketing Institute v. Argus Leader Media,* 139 S.Ct. 2356 (2019).

[6] In addition to supporting the proposed amendments to Forms N-3, N-4, and N-6, the Committee also supports the comparable revisions proposed for Regulation S-K (which would apply to, among other things, certain types of "non-variable" insurance products registered on Forms S-1 and S-3); and to Form N-1A (which apply to mutual funds, including funds available as investment options in variable insurance products).

[7] For Form N-3 variable annuity registration statements, the comparable provisions are paragraphs 9 (reinsurance) and 11 (other material contracts) of Item 29(b) and Instruction 5 to Item 29(b)).

However, for variable life insurance policies (Form N-6 registrants), the new confidentiality redaction standard would *not* apply to participation agreements or administrative service contracts. Form N-6 has four relevant exhibit categories: reinsurance contracts (paragraph (g) of Item 26), participation agreements (paragraph 26(h)), administrative contracts (paragraph 26(i)), and other material contracts (paragraph 26(j)). The applicable redaction instruction (Instruction 3 to Item 26) only applies to paragraphs (g) and (j), not paragraphs (h) and (i), so it does not apply to participation agreements or administrative contracts filed under paragraphs (h) or (i). However, there is no reason for this disparate treatment,[8] and the Supreme Court decision defining "confidential" applies broadly and does not distinguish between these categories of exhibits.

The Committee therefore recommends that, in addition to amending the 'confidentiality' standard, the first sentence in Instruction 3 to Item 26 of Form N-6[9] be revised to apply to exhibits filed under paragraphs (g), (h), (i), and (j), rather than just to exhibits filed under paragraphs (g) and (j). The instruction should include applicability to exhibits filed under paragraphs (h) (participation agreements) and (i) (administrative contracts).

Error in Proposed Amendment to Form N-6

There is an error in the proposed amendment to Form N-6 regarding the "confidential" standard. The proposed new standard is "customarily and actually treats that information as private ***or confidential***" in Forms N-1A, N-2, N-3, N-4, N-5, N-14, S-6, 20-F, and in Items 601(b)(2) and 601(b)(10) of Regulation S-K (emphasis added).[10] However, the proposed standard in Form N-6 is "customarily and actually treats that information as private," without the "or confidential." The omission of "or confidential" here was certainly inadvertent.[11] The words "or confidential" should be added to first sentence of the proposed amended Instruction 3 to Item 26 of Form N-6 to apply the same new standard as in all of the other forms.

****

[8] Indeed, in many cases a single participation agreement or administrative contract would apply to both variable annuity and life insurance products; it would obviously make no sense to require an unredacted version to be filed with the variable life insurance registration statement on Form N-6 while a redacted version of the same document could be filed with the variable annuity registration statement on Form N-4.

[9] See page 339 of the Proposing Release.

[10] See pages 297, 298, 316, 318, 321, 326, 332, 335, 336, and 337 of the Proposing Release.

[11] See page 339 of the Proposing Release. Note, the standard in the first sentence of proposed instruction 3 to Item 26 of Form N-6 is "private," while the second sentence refers to "private or confidential" and the fourth sentence refers to the "privacy or confidentiality analysis." This further demonstrates that the omission of "or confidential" from the first sentence was inadvertent.

EVERSHEDS SUTHERLAND

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

The Committee appreciates the opportunity to submit these comments in response to the Proposing Release. Please do not hesitate to contact Stephen E. Roth at 202-383-0158 (steveroth@eversheds-sutherland.us) or Frederick R. Bellamy (fredbellamy@eversheds-sutherland.us) if you have any questions regarding this letter.

Respectfully submitted,

The Committee of Annuity Insurers

By: Stephen E. Roth
Stephen E. Roth

By: Frederick R. Bellamy
Frederick R. Bellamy

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

cc: Ms. Dalia Blass, Director of the Division of Investment Management

EVERSHEDS SUTHERLAND

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

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
Security Benefit Life Insurance Company
Symetra Financial Corporation
Talcott Resolution
The Transamerica companies
TIAA
USAA Life Insurance Company

Eversheds Sutherland (US) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.