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August 30, 2010

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-2010-034  
Notice of Filing of Proposed Rule Change to Adopt  
FINRA Rule 4530 in the Consolidated FINRA Rulebook**

Dear Ms. Murphy:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),<sup>1</sup> in response to *Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 4530 (Reporting Requirements) in the Consolidated FINRA Rulebook* (the "Proposal Notice"), issued by the U.S. Securities and Exchange Commission (the "SEC").<sup>2</sup> The Proposal Notice proposes to adopt NASD Rule 3070 ("Rule 3070") as FINRA Rule 4530 (the "Proposed Rule") in the consolidated FINRA rulebook, subject to certain amendments, and to delete paragraphs (a) through (d) of Incorporated NYSE Rule 351 and Incorporated NYSE Rules 351.10 and 351.13. The Proposal Notice also would add a supplementary material section to the Proposed Rule (together with the Proposed Rule and the Proposal Notice, the "Proposal"). The Committee appreciates this opportunity to comment on the Proposal.

The Proposal is substantially similar to a proposal (the "2008 Proposal") published by FINRA in Regulatory Notice 08-71 ("RN 08-71"),<sup>3</sup> in response to which the Committee

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<sup>1</sup> The Committee of Annuity Insurers is a coalition of 33 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 the Committee's member companies is attached as Appendix A.

<sup>2</sup> The Proposal Notice was published in SEC Release No. 34-62621, 75 Fed. Reg. 47863 (Aug. 9, 2010).

<sup>3</sup> FINRA, Inc., Regulatory Notice 08-71: FINRA Requests Comment on Proposed Consolidated FINRA Rule Governing Reporting Requirements (Nov. 28, 2008), *available at* <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117454.pdf>.  
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submitted comment.<sup>4</sup> The Committee continues to have significant concerns with certain aspects of the Proposal, which have been heightened by an expansion in the scope of one provision. More specifically, the Committee finds the Proposal's reporting requirements concerning internal conclusions of violations, financial-related civil litigation or arbitration, and events related to former associated persons to be particularly troubling. This letter provides comments with respect to these particular aspects of the Proposal.

### **Reporting Internal Conclusions**

**Proposal.** Proposed Rule 4530(b) would require that a member report "internal conclusions" (more specifically, instances in which a member has concluded that it or an associated person(s) has violated securities, insurance, commodities, financial or investment-related laws, rules, regulations or standards of conduct of any domestic or foreign regulatory body or self-regulatory organization). Proposed Supplementary Material .01 provides that a member would not be required to report an isolated violation that can reasonably be viewed as a ministerial violation that did not result in customer harm and was remedied promptly upon discovery. These provisions of the Proposal are unchanged from the 2008 Proposal.

**Comments.** The Committee's comment letter on the 2008 Proposal expressed a number of concerns with respect to these provisions.

First, the Committee's comment letter expressed its belief that the requirement to report internal conclusions of violations is too broad in scope, vague and poorly justified, and would serve to chill members' internal review and self-policing efforts. The Committee also recommended that the reporting obligation be limited to matters relating to violations of the securities laws or rules of a self-regulatory organization operating under the securities laws, and should not encompass a determination regarding a violation of insurance laws. Proposed 4530(b) reflects no revisions to the 2008 Proposal in response to the Committee's comments.

The Committee continues to believe that the proposed requirement to report internal conclusions of violations should be eliminated from the Proposed Rule. Requiring the reporting of internal conclusions of violations is contrary to the philosophy that the SEC and other regulators have attempted to advance regarding voluntary self-reporting and credit for cooperation. It also runs counter to the goal of encouraging the implementation of robust compliance programs with a view to uncovering problems and identifying – and fixing – areas that need to be remedied. The Committee is concerned that this proposed reporting requirement could have the unintended effect of weakening, rather than strengthening, firms' internal compliance programs, and thus would not be in the best interests of the investing public.

Furthermore, the Committee is concerned that the requirement to report internal conclusions of violations could add unnecessary complexity and expense to firms' internal

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<sup>4</sup> Letter from Committee of Annuity Insurers, dated December 29, 2008, *available at* <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/noticecomments/p117653.pdf>. 9461990.1

compliance programs. More particularly, ordinarily under these programs, a firm's internal compliance and operational personnel base their determinations regarding compliance on whether the issue at hand entailed a failure to comply with their firm's policies and procedures, which in turn may not necessarily align with specific legal or regulatory requirements. However, the Proposal would necessitate a legal analysis of every compliance issue to ascertain whether it entails not only a violation of a firm's policies and procedures but also a violation of law or regulation.

In addition, the Committee continues to believe that FINRA is not warranted in seeking reports with respect to internal conclusions of violations regarding matters with which FINRA does not have jurisdiction, such as insurance laws. For instance, what actions will FINRA take with respect to firms' determinations regarding a violation of insurance laws? What if the determination is made by a member firm's affiliate, such as an insurer, rather than the firm and only indirectly involves the firm?

Second, the Committee's comment letter on the 2008 Proposal suggested that Proposed Supplementary Material .01 clarify that findings arising out of a firm's review processes carried out under current NASD Rules 3010, 3011, 3012 and 3013 (now FINRA Rule 3130) (collectively, the "Supervision Rules") not be considered an "internal conclusion" of the type to be reported under paragraph (a)(3) of Rule 4530. In this connection, the Committee wishes to remind the SEC that, at the time NASD Rules 3012 and 3013 were advanced, member firms expressed concern that FINRA would use the reports and review processes contemplated by those rules as a roadmap for disciplinary action against a firm or a representative(s). At the time, FINRA officials assured member firms that FINRA would not do so, and that members would be given latitude to resolve deficiencies uncovered during the annual review. The requirement in Proposed Rule 4530 that members report internal conclusions thus represents a dramatic shift in FINRA's approach to self-policing.

In the Proposal Notice, FINRA responds to the Committee's comment by stating that firms have an obligation to meet each of their regulatory requirements, and that an obligation to meet one regulatory requirement is not superseded based on compliance with other regulatory requirements. Despite FINRA's explanation of its position with respect to the Committee's suggestion, the Committee reiterates its request that Proposed Supplementary Material .01 contain the Committee's requested clarification. To this end, the Committee notes that the purpose of the Supervision Rules is to require firms to identify potential compliance deficiencies and possible enhancements, to remedy these deficiencies, and to maintain records of such actions for consideration during examinations by FINRA staff.

Finally, the Committee's comment letter on the 2008 Proposal requested that FINRA provide guidance on the types of "internal conclusions" that would be considered isolated or ministerial violations under Proposed Supplementary Material .01. In response to the Committee's request, the Proposal Notice provides as an example of a violation that would need not be reported, the discovery of "a few corporate accounts that, due to a ministerial lapse, do not

have a record identifying the person(s) authorized to transact business on behalf of the accounts and upon discovering the problem promptly updates the accounts with the required information.”

The Committee is concerned that this example is insufficient, or, worse, would lead to the inference that anything other than an isolated, inconsequential oversight would need to be reported. The Committee had anticipated that FINRA guidance would be along the lines of the guidance provided by the NYSE in Information Memo 06-11, in connection with NYSE Rule 351, on which the “internal conclusion” reporting requirement is based. In that Information Memo, the NYSE explained that the types of incidents requiring reporting would be those that are serious in nature, and would include “systemic firm failures involving numerous customers, multiple errors or significant dollar amounts” and “discovery of violative conduct by the firm or its employees that is not systemic but has widespread impact to the firm, its customers, or the industry.”<sup>5</sup> This guidance clearly indicated that only serious violations would be subject to the reporting requirement. The Committee urges FINRA to provide guidance on par with the guidance provided by the NYSE.

#### **Reporting Internal Conclusions – “Reasonably Should Have Concluded”**

**Proposal.** As noted above, Proposed Rule 4530(b) would require that a member report instances in which it has concluded that it or an associated person(s) has violated securities, insurance, commodities, financial or investment-related laws, rules, regulations or standards of conduct of any domestic or foreign regulatory body or self-regulatory organization. Additionally, Proposed Rule 4530(b) would require that a member report instances in which it *reasonably should have concluded* that it or an associated person(s) violated securities, insurance, commodities, financial or investment-related laws, rules, regulations or standards of conduct of any domestic or foreign regulatory body or self-regulatory organization. The “reasonably should have concluded” clause was not included in the 2008 Proposal and hence represents a significant expansion in the scope of Proposed Rule 4530(b).

**Comments.** The Committee urges that the “reasonably should have concluded” clause be eliminated from Proposed Rule 4530. The Committee is deeply concerned that inclusion of this phrase would create a great deal of uncertainty and would lead to second-guessing by FINRA staff when reviewing a member firm’s records, particularly when considering a firm’s action with the benefit of hindsight. We note that in the Proposal Notice, FINRA did not offer any explanation as to why it determined to add this phrase. It would appear that this provision will merely serve as an additional means for FINRA enforcement personnel to penalize member firms when they may have acted in good faith based on the information at hand in evaluating a compliance issue, but failed to anticipate how an issue might ultimately develop.

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<sup>5</sup> NYSE Information Memo 06-11, NYSE Rule 351(a)(1) Guidance on Reporting Requirements (Mar. 16, 2006), available at [http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom/85256FCB005E19E88525712D00543576/\\$FILE/Microsoft%20Word%20-%20Document%20in%20in%2006-11.pdf](http://apps.nyse.com/commdata/PubInfoMemos.nsf/AllPublishedInfoMemosNyseCom/85256FCB005E19E88525712D00543576/$FILE/Microsoft%20Word%20-%20Document%20in%20in%2006-11.pdf).  
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### **Reporting Financial-Related Insurance Civil Litigation/Arbitration**

**Proposal.** Proposed Rule 4530(a)(1)(G) would specifically require reporting of the disposition of any “financial-related” insurance civil litigation or arbitration, or any customer claim that is financial or transactional in nature, that exceeds certain monetary thresholds. Further, paragraph (e) of Proposed Rule 4530 would require the filing of copies of criminal and civil complaints and arbitration claims with respect to certain securities and financial-related insurance claims. These provisions of the Proposal differ from the 2008 Proposal, which would have required the reporting of “insurance-related” civil litigation or arbitration. The Proposal Notice also clarifies that the reporting obligation would apply only to the firm and its associated persons, and would not apply to affiliates.

**Comments.** The Committee’s comment letter on the 2008 Proposal suggested that FINRA eliminate the requirement to report insurance-related civil litigation or arbitration, except in the case of insurance products treated as securities, because such information would be of limited relevance to FINRA’s regulatory purposes and, in the case of affiliates, may have nothing to do with the member firm. It would seem that the substitution of the qualifier “financial-related” for “insurance-related” is FINRA’s response to the Committee’s comment on the 2008 Proposal.

While the Committee appreciates FINRA’s consideration of its comment on the 2008 Proposal, the Committee urges further refinement of the requirement to report insurance-related civil litigation or arbitration or that such requirement be eliminated. The Committee continues to believe that the reporting of matters and claims relating to insurance should be limited to insurance products that are securities, and does not think that the qualifier “financial-related” clearly conveys that limitation.

### **Reporting Related to Former Associated Persons**

**Proposal.** Proposed Supplementary Material .07 would require member firms to report events related to *former* associated persons if a reportable event under paragraphs (a), (b) or (d) of Proposed Rule 4530 occurred while the individual was associated with the member. This aspect of the Proposal is unchanged from the 2008 Proposal. The Proposal Notice also explains that firms should report the information in their custody, possession or control or to which they have knowledge, and provide an explanation of information firms are unable to obtain due to circumstances beyond their control.

**Comments.** The Committee’s comment letter on the 2008 Proposal expressed a number of concerns with respect to this Proposed Supplementary Material. More specifically, the Committee pointed out that this proposed reporting obligation is not subject to any time limit and would be burdensome for members with a large number of registered representatives. The Committee urged that the requirement be recast as a specific requirement to maintain information related to such events to the extent such information becomes known to the member, and to make such information available to FINRA examiners upon request. Alternatively, the

Committee requested that FINRA set a time limit with respect to how long after a representative's termination such reporting would be required. In response to the Committee's concerns, the Proposal Notice explains that firms need only report the information in their custody, possession or control or to which they have knowledge, and provide an explanation of information firms are unable to obtain due to circumstances beyond their control.

While the Committee appreciates FINRA's clarification, the Committee still has serious concerns with an open-ended reporting obligation with respect to former associated persons. The Committee points out that to ensure compliance with this requirement, a member firm – and its affiliates – would need to investigate every communication received not only against its records of existing associated persons, but also against historical records, which over time will amount to many years' worth, to ascertain whether a referenced person ever was associated with the member.

As explained in the Committee's comment letter on the 2008 Proposal, the obligation to keep track of former associated persons is likely to become staggering as time goes on. FINRA's response that firms need only report information in their custody, possession or control does not acknowledge the huge infrastructure burden this proposed obligation would impose on firms. In effect, a member firm will need to maintain an active, accessible database capturing information on every person who ever was associated with the firm. The record retention requirements inherent in this expectation are far beyond those imposed under SEC broker-dealer recordkeeping rules. The Committee notes that SEC recordkeeping rules for broker-dealers require registered broker-dealers to maintain records for former associated persons only for three years after the termination of their association with the firm.<sup>6</sup> Given the existing retention requirements, the Committee believes that if the rule advances with a requirement to report with respect to former associated persons, such requirement should be consistent with SEC broker-dealer recordkeeping rules and accordingly be limited to no more than three years after termination of an associated person.

### **Overlap with Other Reporting Obligations**

**Proposal.** Proposed Rule 4530(e) would provide that a firm is not required to report an event otherwise required to be reported under FINRA Rules 4530(a) or (b) if the firm has disclosed the event on Form U5 for the affected associated person, consistent with the requirements of that form. This provision reflects a change from the 2008 Proposal.

**Comment.** The Committee supports this provision of the Proposal. The Committee recognizes that this provision reflects FINRA's undertaking in RN 08-71 to "work toward the goal of eliminating duplicative reporting of information disclosed on the Uniform Forms." The Committee notes, however, that FINRA has not yet addressed the overlap of reporting obligations with respect to information required to be disclosed on the Forms BD and U4 as well

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<sup>6</sup> See Rule 17a-4(e)(1), establishing a three-year retention requirement for records required to be made and kept by Rule 17a-3(a)(12) with respect to associated persons of a broker-dealer.  
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as pursuant to the Proposed Rule. The Committee urges FINRA to consider revising the Proposed Rule to exclude the reporting of events otherwise reported on Forms BD or U4.

The Committee appreciates this opportunity to comment on the Proposal. Please do not hesitate to contact Clifford Kirsch (212.389.5055) or Susan Krawczyk (202.383.0197) if you have any questions on the issues addressed in this letter.

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: Clifford E. Kirsch *(IJK)*

BY: Susan S. Krawczyk *(IJK)*

FOR THE COMMITTEE OF ANNUITY INSURERS

## Appendix A

### THE COMMITTEE OF ANNUITY INSURERS

AEGON Group of Companies  
Allstate Financial  
American General Life Insurance Companies  
AVIVA USA Corporation  
AXA Equitable Life Insurance Company  
Commonwealth Annuity and Life Insurance Company  
CNO Financial Group, Inc.  
Fidelity Investments Life Insurance Company  
Genworth Financial  
Great American Life Insurance Co.  
Guardian Insurance & Annuity Co., Inc.  
Hartford Life Insurance Company  
ING North America Insurance Corporation  
Jackson National Life Insurance Company  
John Hancock Life Insurance Company (USA)  
Life Insurance Company of the Southwest  
Lincoln Financial Group  
Massachusetts Mutual Life Insurance Company  
Metropolitan Life Insurance Company  
Nationwide Life Insurance Companies  
New York Life Insurance Company  
Northwestern Mutual Life Insurance Company  
Ohio National Financial Services  
Pacific Life Insurance Company  
Protective Life Insurance Company  
Prudential Insurance Company of America  
RiverSource Life Insurance Company  
*(an Ameriprise Financial company)*  
SunAmerica Annuity and Life Insurance Company  
Sun Life Financial  
Symetra Financial  
TIAA-CREF  
USAA Life Insurance Company