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November 22, 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-2010-052
Notice of Filing of Proposed Rule Change to Adopt FINRA Rules Regarding Books and Records 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"),[1] in response to *Notice of Filing of Proposed Rule Change to Adopt FINRA Rules Regarding Books and Records in the Consolidated FINRA Rulebook* (the "Notice"), issued by the U.S. Securities and Exchange Commission (the "SEC").[2] The Notice proposes to adopt certain paragraphs of NASD Rule 3110 (Books and Records), subject to certain amendments, as FINRA Rules in the consolidated FINRA rulebook and to adopt Incorporated NYSE Rule Interpretations 410/01 (Pre-Time Stamping) and 410/02 (Allocations of Block Orders), subject to certain amendments, as FINRA Rules in the consolidated FINRA rulebook.[3]

The Committee appreciates this opportunity to comment on the proposed rules. Our comments are limited to five particular provisions: (i) proposed FINRA Rule 2268, which imposes new disclosure requirements for predispute arbitration agreements; (ii) proposed FINRA Rule 4511 with respect to the commencement of the recordkeeping period for those books and records with no specified retention period; (iii) proposed FINRA Rule 4512 as it applies to

[1] The Committee of Annuity Insurers is a coalition of 31 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 80% of the annuity business in the United States. A list of the Committee's member companies is attached as Appendix A.

[2] The Notice was published in SEC Release No. 34-63181, 75 Fed. Reg. 67155 (Nov. 1, 2010).

[3] The Notice is substantially similar to a proposal published by FINRA in Regulatory Notice 08-25 "Books and Records, Proposed Consolidated FINRA Rules Governing Books and Records Requirements" (May 2008), available at *http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p038507.pdf*.

commission sharing arrangements and the collection of customer employment and tax or Social Security information; (iv) proposed Rule 4513 with respect to the imposition of a new record retention period for customer complaints; and (v) Supplementary Material to Rule 4515, which imposes new duties on broker-dealers that accept orders from investment advisers.

I. FINRA Rule 2268: Requirements When Using Predispute Arbitration Agreements for Customer Accounts

As proposed, new Rule 2268 would require that predispute arbitration agreements include specified disclosures requiring arbitrators to provide an "explained" decision to the parties in eligible cases[4] if there is a joint request by all parties at least 20 days before the first scheduled hearing date.

Comment. The Committee believes that FINRA should confirm that the new disclosure requirement under Rule 2268 would not apply to those predispute arbitration agreements entered into prior to the effective date of Rule 2268. Otherwise, member firms could be required under Rule 2268 to amend existing predispute arbitration agreements to comply with the newly required disclosure requirement. We would expect that the additional disclosure required under Rule 2268 would apply only to those predispute arbitration agreements entered into after the effective date of new Rule 2268.

II. FINRA Rule 4511: General Requirements

As proposed, new Rule 4511 would require member firms to preserve for a period of at least six (6) years those books and records required by a FINRA rule for which there is no specified retention period under the FINRA Rules or applicable Securities and Exchange Act (the "Exchange Act") rules.

Comment. The Committee believes that FINRA should specify the starting "trigger" for the six (6) year retention period under Rule 4511. Exchange Act and other FINRA recordkeeping rules specify a starting date for the retention period, *e.g.*, six years beginning with the creation of a record or six years after the closing of an account. Member firms need to program their systems to commence recordkeeping on a certain date; thus, FINRA recordkeeping rules need to be specific with regard to the start date.

III. FINRA Rule 4512(a)(1)(C): Customer Account Information – Responsible Associated Person

As proposed, paragraph (a)(1)(C) of proposed Rule 4512 would require member firms to maintain a record of the name(s) of the associated person (if any) responsible for the account as

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[4] Pursuant to FINRA Rule 12904(g)(6), the requirement does not apply to simplified cases decided without a hearing under FINRA Rule 12800 or to default cases conducted under FINRA Rule 12801.

well as records indicating the "scope" of the responsibilities of each individual assigned responsibility for an account, where there is more than one responsible individual.

Comment. The Committee believes that FINRA should clarify what FINRA intends by the phrase "assigned responsibility for an account." The Committee points out that many member firms may permit commissions attributable to a transaction effected for a customer account to be shared or split between two or more associated persons. Depending on a member firm's business model, such arrangements may – or may not – align with a sharing of responsibility for the particular transaction or for the customer account overall. The Committee is concerned that FINRA could treat a sharing or split of commissions as a presumption that the associated person receiving a portion of the commission has been assigned responsibility, when such may not be the case. The Committee requests in particular that FINRA confirm that an arrangement in which commissions are split or shared between two or more associated persons does not create a presumption that each of them has "responsibility" for the customer account to which the commissions are attributable.

Moreover, again, depending on a firm's business model, two or more associated persons may share responsibility for a specific transaction for a customer, but not for all transactions effected for the customer's account. The Committee recommends that FINRA clarify that the assignment of responsibility among two or more associated persons can be limited to a specific transaction, without it being applied to all transactions for a customer account.

Finally, the Committee notes that there are situations in which member firms may share commissions with respect to a transaction or a customer. The Committee is concerned that the proposed rule could be read to require each of the broker-dealers to maintain records regarding the assignment of responsibility to associated persons of the other broker-dealer. The Committee expects that, pursuant to the new rule, each member firm would be responsible for determining which of its registered persons is "responsible" for the account and in making that determination, could determine that a person sharing in commissions is not responsible for the account. We would also expect that in cases where commissions are shared between member firms, neither firm would be required to create a record under Rule 4512 that names persons *associated with another member firm.*

IV. FINRA Rule 4512(b): Customer Account Information – Employer Information

As proposed, paragraph (b) of proposed Rule 4512 would require member firms to meet the requirements of the rule for accounts opened prior to January 1, 1991 when the member updates the information for the account either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.

Comment. The Committee would like to confirm that member firms would not be required to obtain the name and address of a customer's employer for accounts that were opened prior to January 1, 1991, or update a customer's tax identification number or Social Security number, when a member updates information for an account. We believe that such a requirement would be more burdensome than is the case under SEC Rule 17a-3(a)(17), and more

importantly, would require the collection of information that is "not applicable to the account" under proposed Rule 4512(a)(2) because these accounts were opened almost twenty (20) or more years ago. FINRA previously has recognized that a primary purpose of obtaining retail customer account information "is to help a member evaluate the suitability of a recommendation."[5] In the case of an account opened prior to January 1, 1991, this information is not pertinent to a suitability analysis and imposing an obligation to collect the name and address of a customer's employer or update a customer's tax identification or Social Security number for such accounts would significantly burden member firms and does not add to the customer protections goals of the rule. Accordingly, we request confirmation that, under new Rule 4512, members would not be required to obtain a customer's employer's name and address or the customer's tax identification or Social Security number if such information had not previously been obtained.

V. FINRA Rule 4513: Records of Written Customer Complaints

If adopted, proposed Rule 4513 would require members to preserve customer complaint records for at least four (4) years, instead of following the three (3) year preservation period required by SEC rules. FINRA has stated that it is requesting a longer retention period for customer complaints because it examines some member firms on a four – as opposed to three – year cycle.

Comment. The Committee believes that member firms should not be required to deviate from long observed SEC record retention requirements and that the current three (3) year retention period for customer complaints should be retained. The majority of securities laws require retention periods of three or six years. The current three (3) year retention period observed by member firms for customer complaints corresponds with the existing retention period for complaints under Exchange Act Rules 17a-3(a)(18), 17a-4(b)(1) and 17a-4(b)(4). Extending the retention period to four (4) years for customer complaint records increases compliance costs for all member firms without regard to the inspection cycles for the majority of firms, and overlooks the fact that all firms, regardless of inspection cycle, report customer complaints directly to FINRA. Thus, with regard to those firms that are examined every four years, FINRA already has information on customer complaints within its own databases. All member firms are under tremendous pressure to deploy their financial assets to the best use; in the compliance area, new rules that impose industry-wide costs, without due consideration of those costs as well as viable alternatives, would not seem to be in the best interests of member firms or regulators. Rather than require member firms to extend the record retention period beyond established securities laws in order to fit within the FINRA examination cycle, we believe that FINRA should take advantage of the customer complaint reporting system already utilized by member firms to access information about customer complaints beyond the three (3) year retention period.

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[5] See NASD Notice 98-047, "SEC Approves Changes to Books and Records Requirements," available at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p004851.pdf.

VI. FINRA Rule 4515: Allocation of Orders Made by Investment Advisers

The Notice also sets forth a summary of proposed FINRA Rule 4515. If adopted, the proposed rule change would adopt NYSE Rule Interpretation 410/02 as FINRA Interpretation 4515.01. NYSE Rule Interpretation 410/02 outlines an exception to the order entry requirements of NYSE Rule 410 by permitting a member to accept block orders and allowing investment advisers to make allocations of such orders to customer accounts after trade execution (*i.e.*, allocations among sub-accounts), provided that the member obtains specific account designations or customer names for the order records by the end of the business day. Rule 4515 as proposed to be adopted would extend the time period for trade allocation until noon of the next following trading day.

As proposed, Rule 4515 imposes what we believe is a new duty on broker-dealers not to knowingly facilitate the allocation of orders from investment advisers in a manner other than in compliance with (i) the investment adviser's intent at the time of trade execution to allocate shares on a percentage basis to the participating accounts and (ii) the adviser's fiduciary duty with respect to allocations for such participating accounts, including but not limited to allocations based on the performance of a transaction between the time of trade execution and the time of allocation.

Comment. We are very concerned about the imposition of these apparently new responsibilities on broker-dealers that accept orders from investment advisers. The prohibition against "knowingly facilitating" an adviser's intent at the time of trade execution and the adviser's fiduciary duty goes well beyond current NASD requirements applicable to the acceptance of orders for institutional accounts. We also note that this new requirement was not vetted in FINRA Regulatory Notice 08-25. We respectfully request that FINRA provide member firms with a detailed discussion regarding how this proposed requirement comports with the trade allocation rules applicable to advisers, such as, for example, SEC rules and interpretations thereof that permit an adviser to change his initial allocation decision on the day following the trade date under certain circumstances.[6] We also request confirmation that FINRA does not expect broker-dealers to make a legal determination regarding whether an adviser's activities are in keeping with the adviser's fiduciary duty. Broker-dealers are not charged with the responsibility to make legal determinations regarding compliance with the Investment Advisers Act of 1940 or other laws applicable to an adviser and, moreover, these determinations are often highly complex and require substantial knowledge of the surrounding facts and circumstances.

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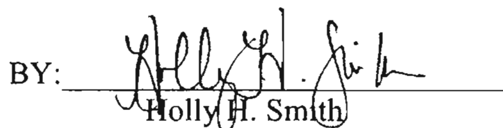
[6] See letter issued to SMC Capital, Inc. by the Division of Investment Management, SEC, dated September 5, 1995.

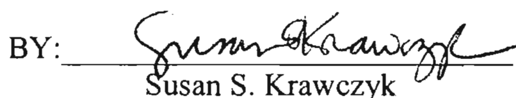
VII. Conclusion

The Committee appreciates the opportunity to comment on the Notice. If you have any questions about the Committee's comments, please do not hesitate to contact Holly H. Smith (202.383.0245) or Susan S. Krawczyk (202.383.0197).

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: 
Holly H. Smith

BY: 
Susan S. Krawczyk

FOR THE COMMITTEE OF ANNUITY INSURERS

Attachment: Appendix A

Appendix A

THE COMMITTEE OF ANNUITY INSURERS

AEGON Group of Companies
Allstate Financial
AVIVA USA Corporation
AXA Equitable Life Insurance Company
Commonwealth Annuity and Life Insurance Company
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 Financial Group
Sun Life Financial
Symetra Financial
TIAA-CREF
USAA Life Insurance Company