EVERSHEDS SUTHERLAND

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

December 21, 2018

Mr. Brent Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: List of Rules Scheduled to be Reviewed Pursuant to the Regulatory Flexibility Act, File No. S7-25-18

Dear Mr. Fields:

We are submitting these comments on behalf of the Committee of Annuity Insurers (the "Committee").[1] The Committee appreciates the opportunity to comment on the above-referenced release, dated November 21, 2018, which identifies rules that are scheduled for review. The Committee has a particular interest in the following rules and requirements listed in the release: Rule 12h-7 under the Securities Exchange Act of 1934 (the "1934 Act"), which relieves certain insurance companies from 1934 Act reporting requirements with respect to registered insurance contracts; executive compensation and related person disclosure currently required by Regulation S-K; and the custody rule set forth in Rule 206(4)-2 under the Investment Advisers Act of 1940 (the "Advisers Act") applicable to certain registered investment advisers.

Rule 12h-7

Rule 12h-7 under the 1934 Act relieves from 1934 Act reporting requirements insurance companies whose reporting obligations arise solely from the registration of non-variable insurance contracts under the Securities Act of 1933 (the "1933 Act"). The rule is based on the premise that insurance companies are subject to extensive supervision and regulation by state insurance regulators, which obviates the need for the financial information provided in periodic reports under the 1934 Act. Relief is available only to issuers that meet the following requirements: (1) the issuer is a corporation subject to the supervision of a state insurance regulator; (2) the securities do not constitute an equity interest in the issuer and either are subject to regulation under state insurance laws or are guarantees of such securities; (3) the issuer files annual statements with, and supervised and periodically examined by, a state insurance regulator; (4) the securities are not listed, traded or quoted on any organized market; (5) the issuer takes reasonable steps to prevent the development of such trading as specified in the Rule; and

[1] The Committee is a coalition of 31 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. Over the past 37 years, the Committee has been an active commenter and interested party with respect to SEC rule proposals or other forms of guidance affecting that issuance and distribution of annuity products. The member companies of the Committee represent over 80% of the annuity business in the United States.

(6) the issuer discloses its reliance on the rule in the relevant prospectuses offering the contracts. These eligibility requirements, and the relief provided by Rule 12h-7, recognize the unique nature of SEC-registered insurance contracts: the issuer and its registered securities are subject to comprehensive state insurance regulation designed to assure the solvency of the issuing insurance company and these securities are not traded on any form of organized market.

The Committee strongly advocated for the adoption of Rule 12h-7, which became effective on May 1, 2009. The Rule is a very important SEC exemptive rule for the life insurance industry and ultimately for Main Street investors. The life insurance industry continues to develop innovative insurance product solutions for retirement investors that provide guaranteed lifetime income. Over the past several years, much of that innovation has focused on developing non-variable annuity contracts that are securities required to be registered under the 1933 Act. Rule 12h-7 has facilitated, and continues to facilitate, the offering of a wide variety of these non-variable annuity contracts registered on Form S-1 under the 1933 Act, including market value adjusted annuities, index-linked annuities and contingent deferred annuities. Due to the significant costs and burdens associated with 1934 Act reporting, including the burdens imposed by the Sarbanes-Oxley Act of 2002 on 1934 Act public reporting companies, but for the Rule 12h-7 exemption many life insurance companies (particularly those who not are publicly traded companies or subsidiaries of public companies, such as mutual life insurance companies, life insurance companies owned by foreign parents, and life insurance companies that are privately owned) almost certainly would not offer these types of SEC-registered insurance contracts to Main Street investors.

A number of life insurance companies currently rely on Rule 12h-7. In particular, over the past several years, a number of insurers have registered continuous offerings of new non-variable annuity contracts on Form S-1 and have elected to rely on Rule 12h-7. As noted above, these companies almost certainly would not have proceeded to register and offer these annuity contracts if such registration would have triggered 1934 Act reporting pursuant to Section 15(d) of the 1934 Act. The Rule has relieved this group of insurance companies from the substantial costs and administrative burdens of preparing and distributing periodic reports that are designed principally to provide information relevant to investors who trade securities on the secondary market. The Committee believes that Rule 12h-7 is an excellent example of a provision that relieves a targeted class of issuers from costly and burdensome disclosure requirements that do not provide material information to investors in the issuers' securities and that fosters making important investment opportunities available to Main Street investors.

Executive Compensation Disclosure Requirements

Executive compensation and related person disclosure requirements impose significant costs and administrative burdens on insurance companies that register non-variable insurance contracts on Form S-1. Insurance product offerings that are not investment company securities subject to the Investment Company Act of 1940 cannot be registered under the 1933 Act on one of the specialized registration forms for variable insurance products. Due to the absence of a registration form specifically designed to accommodate such insurance products, these contracts must be registered on Forms S-1 or S-3 and insurance company issuers must develop and provide all of the disclosures required by those forms as set forth in Regulation S-K. In particular, these forms require insurance companies registering non-variable insurance contracts to provide the full panoply of company-related disclosure that has been developed for investors in equity securities, including extensive information about its executive compensation policies and practices.

Developing executive compensation disclosure required by Item 402 of Regulation S-K is extremely burdensome and, in the context of registered insurance contracts, does not provide any information that is material to investors in those insurance contracts. Item 402 requires extensive information about all compensation paid by the issuer to its executive officers and directors and an in-depth analysis of all material elements of the issuer's compensation program. Executive compensation disclosure, which typically can run 12 pages or more, is not relevant to an investor who purchases a state-regulated insurance product. It does not enhance the investor's understanding of the insurance product or of the risks associated with the insurance company's ability to fulfill its contractual obligation. Nor do investors in registered insurance contracts have any voting rights with respect to the issuer to which such information would relate. Therefore, consistent with its prior comment letters and communications,[2] the Committee again requests that the SEC recognize the unwarranted administrative costs and burdens that executive compensation disclosure requirements impose on insurance companies that register insurance contracts on Form S-1 or S-3 and urges the SEC to provide relief from the executive compensation disclosure requirements to this class of issuer.

Advisers Act Custody Rule

The Committee encourages a review of Rule 206(4)-2 under the Advisers Act (the "Custody Rule"). The Custody Rule has become the most complicated of the Advisers Act rules. One of the main reasons is that the definition of what constitutes custody goes beyond mere possession and includes access to customer funds. Over the years, the SEC and its staff have released formal and informal guidance on a number of occasions as to what constitutes access. One has to parse through various SEC releases, no action letters and staff FAQs to determine whether or not a particular scenario constitutes custody. As a result, the rule is fraught with confusion and resulting compliance challenges. The Committee urges the SEC to consider and evaluate the staff's formal and informal guidance, including associated costs and benefits.

****

Members of the Committee very much appreciate consideration of their views. The Committee stands ready to provide any addition information that would be helpful to assist the Commission and its staff in any way as it conducts its review of the rules and disclosure requirements discussed above. Please do not hesitate to contact the undersigned at [redacted] or at [redacted].

Respectfully submitted,

Stephen E. Roth

Stephen E. Roth
For the Committee of Annuity Insurers

---

[2]See letter from Eversheds Sutherland (US) LLP on behalf of Committee of Annuity Insurers to SEC Chairman Walter J. Clayton, dated July 11, 2017; letter from Sutherland, Asbill & Brennan to the SEC, dated July 21, 2016, available at: https//www.sec.gov/comments/s7-06-16/s70616-219.pdf.