

December 10, 2008

Ms. Florence Harmon  
Acting Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**RE: File Number SR-FINRA-2008-056**

Dear Ms. Harmon:

This letter is submitted on behalf of the Committee of Annuity Insurers (“CAI”)<sup>1</sup> in response to the Securities and Exchange Commission’s (“SEC”) publication of amendments to FINRA Rule 8210 in the Federal Register on November 19, 2008.<sup>2</sup> The SEC invited interested persons to submit written data, views and arguments concerning the rule by December 10, 2008.

The CAI is submitting this letter because it is concerned that the amendments were adopted before FINRA members or others had an opportunity to study the intent and objectives of the amended rule and evaluate whether the intent and objectives make sense. In the short time that the CAI has had to study the amendments, we have preliminarily concluded that the amendments raise significant consumer protection as well as broker-dealer recordkeeping, disclosure and cost-benefit issues. Accordingly, we are requesting that the issues discussed in this letter and any other issues raised by commenters be addressed by the SEC or FINRA before the amendments are applied to FINRA member firms and their associated persons. Our concerns are set forth below, following a brief discussion of Rule 8210 as it existed prior to the November, 2008 amendments and as amended in November.

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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 Committee members is attached at Appendix A.

<sup>2</sup> SEC Release No. 34-58937 (Nov. 13, 2008), 73 FR 69700 (Nov. 19, 2008). In its filing with the SEC, FINRA included (at Exhibit 5), the text of proposed changes to FINRA Rule 8210 as well as the text of proposed changes to NASD Rule 8210. Proposed changes to the NASD rule are identical to proposed changes to the FINRA rule with the exception of replacing “NASD” with “FINRA” in the NASD Rule. Throughout this letter, we refer to “FINRA Rule 8210.”

## **FINRA Rule 8210**

### **1. Pre-Amendment**

Prior to the November, 2008 amendments, FINRA Rule 8210 gave FINRA staff and adjudicators the authority to require that FINRA members, persons associated with those members or persons subject to FINRA's jurisdiction provide information, and testimony under oath, to FINRA, "for the purpose of an investigation, complaint, examination or proceeding" authorized by FINRA.<sup>3</sup> The rule also permitted FINRA staff and adjudicators to inspect and copy the books, records and accounts of persons subject to the rule "with respect to any matter involved in the investigation, complaint, examination, or proceeding."<sup>4</sup> The rule applied to associated persons of a member firm as well as to member firms, thus giving FINRA authority to request books and records and take testimony from, among others, each direct owner of a member firm as reported on Schedule A of Form BD.<sup>5</sup>

Rule 8210 also stipulated that FINRA staff could exercise the above-described authority "for the purpose of an investigation, complaint, examination or proceeding" conducted by another domestic or foreign self-regulatory organization ("SRO"), association, securities or contract market, or regulator of such markets, provided that FINRA had entered into an information sharing agreement with the other entity.<sup>6</sup> The rule also provided that if a member, associated person of a member, or other person over whom FINRA has jurisdiction, failed to comply with a request made under Rule 8210, that entity or person could be sanctioned by FINRA.<sup>7</sup>

### **2. Post-Amendment**

The November, 2008 amendments to Rule 8210 added new text to the paragraph of the rule that had given FINRA authority to assist other domestic and foreign securities regulators with their investigations, complaints, examinations and proceedings. In the new text, FINRA gave itself authority to enter into agreements with any "domestic federal agency, or subdivision thereof, or foreign regulator to share any information in FINRA's possession for any regulatory purpose set forth in such agreement, ...."<sup>8</sup> The amended rule requires the other regulator, in

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<sup>3</sup> Rule 8210(a)(1).

<sup>4</sup> Rule 8210(a)(2).

<sup>5</sup> Art. 1 of FINRA's By-Laws defines a "person associated with a member" as: (1) a natural person registered with FINRA or an individual who has applied for registration; (2) a sole proprietor, partner, officer, director, branch manager or natural person having a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by the FINRA member, regardless of whether such person is registered with FINRA or exempt from such registration; and (3) for purposes of FINRA Rule 8210, any other person listed in Schedule A of Form BD.

<sup>6</sup> Rule 8210(b).

<sup>7</sup> Rule 8210(c).

<sup>8</sup> Text of amended Rule 8210(b).

accordance with the terms of its agreement with FINRA, to treat the shared information confidentially and to assert such confidentiality and other applicable privileges in response to requests for the information received from third parties. In addition, if the other regulator is not a U.S. regulator, it must have “jurisdiction over common regulatory matters” and agree to share with FINRA “information of regulatory interest or concern to FINRA.”<sup>9</sup>

FINRA explained in its filing with the SEC that it wants to share information with domestic federal agencies, subdivisions thereof and foreign regulators “irrespective of whether the information was obtained in furtherance of an existing investigation or other regulatory action by another regulator. Instead, the proposal would expressly allow FINRA to share any information in its possession for any regulatory purpose set forth in the agreement.”<sup>10</sup> The rule filing does not define “possession.”

FINRA requested that the rule amendments be effective immediately upon filing with the SEC and the SEC granted that request.

### **Concerns Regarding the Rule’s Lack of Clarity**

The CAI is concerned that in a number of areas the rule amendments lack the specificity that is necessary to ensure consistent application of the rule and important customer protections. Each of these areas is discussed below.

#### **1. Confidentiality, Data Security and Data Retention**

The CAI’s first concern is that no assurance has been provided to FINRA members regarding the scope, effectiveness or enforcement of the confidentiality laws applicable to the foreign regulators with whom FINRA intends to share confidential information. In comparable initiatives, the SEC, FINRA and other domestic securities regulators have debated the positive and negative attributes of “mutual recognition” and to our knowledge have concluded that before a domestic securities regulator gives formal recognition to a foreign regulator’s laws and rules, it must study the laws and rules applicable to the other regulator and reach a determination regarding whether the other regulator has a regulatory regime comparable to that of the U.S. on important investor protection issues. SEC Chairman Cox has stated that a comparability assessment is one of the lynchpins of mutual recognition.<sup>11</sup>

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<sup>9</sup> Text of amended Rule 8210(b)(A) and (B). In its rule filing with the SEC, FINRA defined “jurisdiction over common regulatory matters” as “those involving investor protection or market integrity.” See SR-FINRA-2008-056 (Nov. 6. 2008) (“FINRA Rule Filing”) at p. 5.

<sup>10</sup> FINRA Rule Filing at p. 5.

<sup>11</sup> See, e.g., “SEC Announces Next Steps for Implementation of Mutual Recognition Concept,” March 24, 2008, available at: <http://www.sec.gov/news/press/2008/2008-49.htm> and “Schedule Announced for Completion of U.S.-Canadian Mutual Recognition Process Agreement,” May 29, 2008, available at: <http://www.sec.gov/news/press/2008/2008-98.htm>.

There is no indication in the rule filing that any information sharing agreements will be implemented only after a thorough study of each foreign country's confidentiality laws has been undertaken and a decision made with respect to comparability with U.S. law. The CAI believes that the study process should be transparent to FINRA members so that members can relate their own experiences with foreign country laws to FINRA. To confirm these points, the CAI would like to see FINRA make its intentions in this regard explicit either by amending the text of the rule or publishing supplementary material that augments the rule.

The CAI is also concerned about the potential implications of Rule 8210 for member firms' Regulation S-P obligations related to the privacy and use of customer information. For example, will FINRA member firms be required to amend the disclosures required under Regulation S-P that are provided to customers and potential customers whenever FINRA enters into a new information sharing agreement? As FINRA is aware, all FINRA members are subject to Regulation S-P as well as state consumer protection laws, and because of these laws and for other reasons, each member firm must adopt, implement, and bear the expense of substantial information-protection protocols and systems. FINRA member firms are subject to serious and costly sanctions in the event of a Regulation S-P violation. Accordingly, the CAI would like to see some discussion regarding how the information sharing agreements impact member firm compliance with Regulation S-P. If there is no impact, then we would like to see a clear statement to that effect.

The CAI is also concerned about data security and data retention, particularly as they relate to identity theft and information that is leaving the U.S. What are FINRA's plans with respect to ensuring data security when FINRA transmits member firm information (which can include customer information and sensitive personnel information regarding associated persons, including tax information) outside the U.S.? Will FINRA require foreign regulators, as part of the information sharing agreement, to have written procedures and systems in place to ensure that confidential information cannot be stolen or misused, and is safely archived by the foreign regulator, destroyed, or safely returned to FINRA upon the conclusion of the other regulator's need for the information or within a specified time period? We are concerned about the risks to member firm and consumer information and believe that other regulators' commitments to protect the information during the time that they have control over the information should be a part of the information sharing agreements. We also believe that third-party regulators, especially those that have no jurisdiction over FINRA members, should not be able to retain shared information indefinitely. We also recommend that the rule be amended to provide for notice to members prior to FINRA sharing information with another regulator.

## **2. What does "Possession" Mean?**

As noted previously, the rule amendments give FINRA authority to share any information in FINRA's "possession." The CAI would like to know how "possession" is defined. Does it connote only information that FINRA possesses at the time it receives a request for confidential information from another regulator, such as information on Form BD or a person's tax returns? Or does it mean that after receiving a request from another regulator, FINRA is authorized to require a FINRA member to search its records and produce relevant information? Are there any limits on what a FINRA member firm or associated person could be

asked to produce or do, or the cost a firm could be asked to incur, in order to enable FINRA to respond to another regulator's request?

A related issue is whether a FINRA member firm or associated person could be sanctioned by FINRA for failing to comply with certain requests made pursuant to amended Rule 8210. In other words, if "possession" is not defined to mean only that information that FINRA possesses at the time it receives a request for confidential information from another regulator, could a member be sanctioned under Rule 8210, paragraph (c), if it does not comply with a request from FINRA (made for a purpose other than an investigation, complaint, examination or proceeding), pursuant to an information sharing agreement?

We believe that a proper comment period to analyze and systematically address each of these questions is of critical importance.

### **3. Other Regulators' Jurisdiction and Use of Confidential Information**

Another area we believe FINRA should address concerns the jurisdiction another regulator may obtain over a FINRA member firm or associated person as a result of FINRA entering into an information sharing agreement and sharing confidential information with the other regulator. We assume that FINRA has no authority to confer jurisdiction on another regulator but are concerned that no research has been done on the issue of whether another regulator, particularly a foreign regulator, could claim jurisdiction over a FINRA member or associated person solely by virtue of having an information sharing agreement with FINRA or obtaining information from FINRA pursuant to that agreement.

With respect to foreign regulators, we note that many FINRA member firms have purposefully designed their businesses so that the firm has no operations or customers outside the territory of the U.S. These firms recognize how difficult and costly it is to build the systems that would ensure compliance with all of the rules and laws of another country. Indeed, on numerous occasions FINRA has cautioned its members against doing business outside the U.S. unless the member firm complies with all applicable foreign country laws and rules.<sup>12</sup> The CAI strongly believes that FINRA member firms, and each firm's associated persons and direct owners, should not suddenly find themselves subject to another country's jurisdiction by virtue of a FINRA information sharing agreement. Accordingly, we would like assurance that no regulator would have jurisdiction over a FINRA member firm or any of its associated persons as a result of these rule amendments.

We also believe that the rule should be clear on its face that no regulator other than FINRA can directly request information from a FINRA member firm if that regulator does not have jurisdiction over the member firm. Information sharing should be regulator-to-regulator, not member firm-to-third-party regulator.

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<sup>12</sup> See, e.g., NASD Notices to Members 98-91 (Nov. 1998), 00-02 (Jan. 2000) and 01-81 (Dec. 2001).

Finally, with respect to U.S. federal regulators, we understand that currently FINRA sometimes provides access to its investigative files to other domestic regulatory and law enforcement authorities. Since the amendments to Rule 8210 do not require domestic federal agencies or subdivisions thereof to have jurisdiction over “common regulatory matters,” we suggest that the agreements FINRA negotiates with domestic federal agencies and subdivisions thereof contain clear statements regarding the other regulator’s statutory authority to request the information from FINRA.

#### **4. Domestic Regulators**

The text of amended Rule 8210 states that FINRA may enter into information sharing agreements with “a domestic federal agency, or subdivision thereof, . . . [and foreign regulators.]” We request that FINRA confirm that the amended rule does not apply to any agency or regulator of a state, Commonwealth or U.S. Territory, including any securities or insurance regulator.

#### **5. Disclosure and Recordkeeping Issues**

The rule filing FINRA submitted to the SEC is silent with respect to a member firm’s disclosure and recordkeeping obligations. The questions we have in this regard include: (1) whether FINRA members would be required to alert their customers to the fact that their identities and account information may be leaving the U.S., and (2) whether member firms would be required to keep records that track when the customer’s information was provided to FINRA, the circumstances of FINRA’s request, and any request for follow-up information.

#### **The Need for Rule Amendments**

The CAI also has questions regarding FINRA’s need to amend Rule 8210 in the manner proposed. The CAI recognizes and appreciates the global nature of the securities business and the need in appropriate circumstances for cross-border regulatory cooperation. It had been our understanding, however, that FINRA’s Rule 8210 authority (as it existed prior to the November, 2008 amendments), the SEC’s existing authority under numerous memoranda of understandings executed with foreign regulators, and the SEC’s mutual recognition initiative, provided both FINRA and the SEC with the authority necessary to collect confidential information deemed to be critical for a regulatory purpose. We also note that federal anti-money laundering laws provide FINRA with another means by which to obtain information. Given the breadth of this existing authority, we would like to understand why FINRA needs additional authority.

#### **The Rule Amendment Process**

Finally, the CAI would like to comment on the fact that FINRA member firms did not have any notice, prior to the filing of the amendment, of FINRA’s concerns with regard to Rule 8210 and its desire to enter into information sharing agreements as described in the filing. The CAI believes that the issues raised by the proposal merit public discussion of the most appropriate means to achieve the intended goal and a cost-benefit analysis of various alternatives. We are confident that this type of analysis can take place now, and accordingly

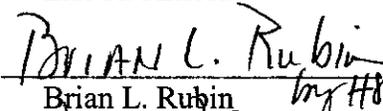
request that the rule amendments not be implemented until all of the issues have been resolved. Given the SEC and FINRA's existing authority to obtain confidential information from member firms and foreign regulators, we do not see a downside in working through the issues prior to implementing the rule.

We thank you in advance for your consideration of these comments. We would be happy to discuss our comments with you at your convenience. Please contact Holly Smith, Eric Arnold or Brian Rubin at (202) 383-0100 if you would like to discuss any matter raised herein.

Sincerely,

Sutherland Asbill & Brennan LLP

By:   
Eric A. Arnold

By:   
Brian L. Rubin *by HS*

By:   
Holly H. Smith

For The Committee of Annuity Insurers

APPENDIX A

THE COMMITTEE OF ANNUITY INSURERS

AEGON USA, Inc.  
Allstate Financial  
AIG Life Insurance Companies  
AmerUs Annuity Group Co.  
AXA Equitable Life Insurance Company  
Commonwealth Annuity and Life Insurance Company  
Conseco, 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  
Life Insurance Company of the Southwest  
Lincoln Financial Group  
MassMutual Financial Group  
Merrill Lynch 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  
Old Mutual Life Insurance Company  
Pacific Life Insurance Company  
Protective Life Insurance Company  
Prudential Insurance Company of America  
RiverSource Life Insurance Company  
*(an Ameriprise Financial company)*  
Sun Life Financial  
Symetra Financial  
The Phoenix Life Insurance Company  
USAA Life Insurance Company