



DIVISION OF  
TRADING AND MARKETS

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC 20549

December 23, 2013

Holly H. Smith  
Sutherland Asbill & Brennan LLP  
700 Sixth Street, NW, Suite 700  
Washington, DC 20001

RE: Request for No-Action Relief Relating to Lost Securityholders

Dear Ms. Smith:

In your letter dated December 11, 2013 ("Letter"), on behalf of your client, the Committee of Annuity Insurers, you request assurance that the staff of the Division of Trading and Markets (the "Staff") of the Securities and Exchange Commission ("Commission") will not recommend enforcement action to the Commission if a broker-dealer relies on an insurance company issuer of variable annuities, acting on behalf of the broker-dealer, to conduct the database searches for lost securityholders required by Securities Exchange Act Rule 17Ad-17(a)(1) ("Rule 17Ad-17").

Rule 17Ad-17(a)(1) requires certain registered entities to exercise reasonable care to ascertain the correct addresses of lost securityholders and to conduct certain database searches for them. The Commission recently amended Rule 17Ad-17 to make the requirements to search for lost securityholders applicable to broker-dealers.<sup>1</sup> Securities Exchange Act Rule 17Ad-17(b)(2) defines lost securityholder as a securityholder "(i) To whom an item of correspondence that was sent to the securityholder at the address contained ... in the customer security account records of the broker or dealer has been returned as undeliverable; ... and (ii) For whom the ... broker, or dealer has not received information regarding the securityholder's new address."

Based on your Letter, we understand that, pursuant to written contract, insurance company issuers of variable annuities routinely send certain items of correspondence to broker-dealers' customers on behalf of broker-dealers. You note that this practice is derived from previous Commission guidance that, subject to certain conditions, permits a life insurance company that issues variable annuities and has an established relationship with a broker-dealer to: 1) maintain the records of a broker-dealer that distributes the annuities; and (2) send confirmations to variable annuity purchasers.<sup>2</sup> Given that the insurance company sends correspondence, you foresee implementation problems regarding SEC Rule 17Ad-17(a)(1) for broker-dealers that enter into such arrangements with insurance company issuers.

<sup>1</sup> SEC Release No. 34-68668, File No. S7-11-11 (Jan. 16, 2013).

<sup>2</sup> See *Distributions of Variable Annuities by Insurance Companies Broker-Dealer Registration and Regulation Problems Under the Securities Exchange Act of 1934*, Exchange Act Release No. 8389 (Aug. 29, 1968) ("Release No. 34- 8389").

Ms. Holly Smith  
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Based on the facts and representations set forth in your Letter, and due to the unique relationship between insurance company issuers of variable annuities and broker-dealers, the Staff will not recommend enforcement action under Rule 17Ad-17 against a broker-dealer if an insurance company issuer of variable annuities, acting on behalf of the broker-dealer, conducts the database searches for lost securityholders required by Rule 17Ad-17. Accordingly, in the event that the insurance company, in conducting the database search, obtains the securityholder's new address, the securityholder would no longer be deemed a lost securityholder. Additionally, the insurance company need not conduct searches in those situations specified in Rule 17Ad-17(a)(3).

This position is conditioned upon the existence of a pre-existing relationship between the insurance company and the broker-dealer and a binding written agreement between the insurance company and the broker-dealer requiring that all books and records related to searches for lost securityholders that are maintained and held by the insurance company on behalf of and as agent for the registered broker-dealer shall be the books and records of the broker-dealer and at all times subject to inspection by representatives of the Commission, the Financial Industry Regulatory Authority, any other self-regulatory organization, or other relevant federal or state governmental authorities. We also note that full and complete responsibility for compliance with Rule 17Ad-17(a)(1) remains with the broker-dealer.

This Staff position concerns enforcement action only and does not represent a legal conclusion regarding the applicability of statutory or regulatory provisions of the federal securities laws. In addition, this response is based strictly on the facts presented and the representations made in your letter, and any different facts or conditions might require a different response. Moreover, we express no view with respect to other questions the proposed activities may raise, including the application of any other federal or state laws or the applicability of any self-regulatory organization rules.

If you have any questions regarding this letter, please call Joseph Furey, Assistant Chief Counsel, Joanne Rutkowski, Branch Chief, or me at (202) 551-5550.

Sincerely,



Carla J. Carriveau  
Attorney-Adviser

HOLLY H. SMITH  
DIRECT LINE: 202.383.0245  
E-mail: holly.smith@sutherland.com

December 11, 2013

**VIA E-MAIL**

Mr. Joseph Furey  
Assistant Chief Counsel  
Division of Trading and Markets  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-7010

Re: **Request for No-Action: Final Rules With Respect To  
Lost Securityholders**

Dear Mr. Furey:

This letter is submitted on behalf of the Committee of Annuity Insurers (the "Committee")<sup>1</sup> in connection with the Securities and Exchange Commission's (the "SEC" or "the Commission") adoption of final rules amending Rule 17Ad-17 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and adopting new Exchange Act Rule 15b1-6 (together, all such rules are referred to herein as the "Lost Securityholders and Unresponsive Payees Rules" or "the Rules").<sup>2</sup> Among other things, the Rules broaden the type of entity that must search for "lost securityholders" to include, for the first time, brokers and dealers.

As you may know, the Committee was an active participant in the SEC's request for comments when the Commission first proposed new rules in this area.<sup>3</sup> The Committee has now studied the Rules in their final form, as well as the Commission's Adopting Release, and has an issue regarding the application of the lost securityholders rules to distributors of variable

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<sup>1</sup> The Committee of Annuity Insurers is a coalition of 28 life insurance companies that issue fixed and variable annuities. The Committee was formed in 1982 to participate in the development of federal securities law regulation and federal tax policy affecting annuities. The member companies of the Committee represent approximately 80% of the annuity business in the United States. A list of Committee members is attached at Appendix A.

<sup>2</sup> The new rule and rule amendments were published in final form in SEC Release No. 34-68668; File No. S7-11-11 (Jan. 16, 2013) (hereafter, the "Adopting Release").

<sup>3</sup> See Letter from Sutherland Asbill & Brennan LLP, on behalf of the Committee of Annuity Insurers, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (May 9, 2011), *available at* <http://www.sec.gov/comments/s7-11-11/s71111-9.pdf>.

annuities. Specifically, we believe that Rule 17Ad-17 should be read to permit an insurance company, acting on behalf of a broker or dealer that has customer security accounts that include accounts of lost securityholders, to conduct database searches for lost securityholders in cases where the insurance company sends items of correspondence to the broker-dealer's customers, on behalf of the broker-dealer. As we discuss below, such treatment would be consistent with past SEC guidance that permits an insurance company to perform certain activity on behalf of a broker or dealer, as a ministerial function.

### **Issues Under Rules 17Ad-17(a) and 17Ad-17(b) - "Lost Securityholders"**

#### **1A. Federal Regulation of Variable Annuities – Ministerial Activities**

The Committee's request for "no-action" is based on a long history of SEC precedent regarding the regulation of insurance-based securities. The federal securities laws, and rules adopted by the Commission thereunder, were not originally designed with the distribution of variable annuity contracts in mind. Section 3(a)(8) of the Securities Act of 1933, as amended (the "Securities Act"), defines exempted securities to include any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of any state or territory of the United States or the District of Columbia.

For many years after the enactment of the Securities Act, the Exchange Act, and the Investment Company Act of 1940, as amended, annuity contracts were subject to state insurance law and federal tax law, but not SEC registration or distribution laws and rules. In 1959, however, in response to the development of the "variable" annuity, the Supreme Court held, in *SEC v. Variable Annuity Life Ins. Co. of Am.*, that variable annuity contracts do not qualify for the section 3(a)(8) exemption, and accordingly, are securities under the Securities Act (the "VALIC decision").<sup>4</sup>

In the years following the VALIC decision, issuers of variable contracts have needed to seek guidance from the SEC from time to time with respect to how to comply with a federal securities regulatory framework that was not originally designed to include the issuance, distribution and administration of variable contracts. SEC staff guidance has been extremely helpful and important in terms of assisting the variable annuity industry in complying with the federal securities laws. This guidance has taken the form of staff responses to no-action requests and the publication of other authority. The most seminal of this authority is a Commission release, issued in 1968 pursuant to the Exchange Act, in which the staff addresses a number of problems unique to issuers and distributors of variable annuity contracts. The 1968 release is commonly cited in the industry as "Release 8389."<sup>5</sup>

In Release 8389, the staff addressed broker-dealer registration issues for variable annuity issuers, as well as recordkeeping and accounting issues for issuers and their distributors. Among

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<sup>4</sup> See 359 U.S. 65 (1959); and *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967).

<sup>5</sup> See SEC Release No. 34-8389 (Aug. 29, 1968).

the questions Release 8389 addresses, the staff was asked: (i) whether the records required of a broker-dealer that acts as the distributor of variable annuities could be maintained by the life insurance company that issued the variable annuities; and (ii) whether the life insurance company could send confirms to the purchasers of variable annuities. These questions arose in the context of a life insurance company, which had created a separate account under state law for the offer and sale of variable annuities, forming a subsidiary to be registered as a broker-dealer for the purpose of distributing the insurance company's variable annuities.

With respect to both issues, Release 8389 states that "no question will be raised by the staff," (i) if a life insurance company that issues variable annuities maintains the records required of a broker-dealer that distributes the annuities; and (ii) if the life insurance company sends confirms to variable annuity purchasers, provided a number of conditions are adhered to, specifically:

1. That a binding agreement exists between the insurance company and the broker-dealer registrant that all the books and records maintained by the insurance company in connection with the offer and sale of variable annuity interests funded by a separate account are to be maintained and preserved in conformity with the requirements of Rule 17a-3 and 17a-4 under the Act, to the extent that such requirements are applicable to the variable annuity operations; that all such books and records are maintained and held by the insurance company on behalf of and as agent for the broker-dealer registrant whose property they are and shall remain; and that such books and records are at all times subject to inspection by the SEC in accordance with Section 17(a) of the Act.
2. That the making of payments by the insurance company to the sales personnel of the broker-dealer registrant be performed as a purely ministerial service and that the records in respect thereof are properly reflected on the books and records maintained by or for the broker-dealer registrant.
3. That, since the crediting of a payment by a participant on the books and records maintained by or for the broker-dealer registrant constitutes the sale of a security and, therefore, a "transaction" as the term is used in Rule 15c1-4 under the Act, a confirmation for each such transaction will be sent to the participant at or before the completion thereof; and that the confirmation will reflect the facts of the transaction, and the form thereof will show that it is being sent on behalf of the broker-dealer registrant acting in the capacity of agent for the insurance company.
4. That the broker-dealer registrant has and assumes full responsibility for the securities activities of all persons engaged directly or indirectly in the variable annuity operation, each such person being a "person associated" of the registrant as defined in Section 3(a)(18) of the Act, and, therefore, a person for whom the broker-dealer registrant has full responsibility in connection with training, supervision, and control as contemplated by Section 15(b)(5)(E) of the Act.

Today, in reliance on Release 8389 and other related interpretations,<sup>6</sup> insurance company issuers of variable annuities, acting on behalf of both affiliated and unaffiliated broker-dealers<sup>7</sup> that have established securities accounts for customers, send certain items of correspondence to broker-dealers' customers. The most common type of such correspondence is a trade confirmation: generally, variable annuity issuers, not broker-dealers, mail statements to customers confirming purchases, redemptions and asset allocation transfers among the sub-accounts of the annuity. Other examples include the mailing of annual prospectuses and updates.

The relationship between an insurance company issuer of variable annuities and a broker-dealer selling those annuities to customers is evidenced in a written contract (commonly referred to as the "Selling Agreement") entered into by the insurance company, its principal underwriter, and the broker-dealer that has established the securities account for the customer (the "Selling Firm"). The Selling Agreement plays a key role in the distribution of variable annuities by establishing the respective obligations of each of the agreement's parties. In a typical Selling Agreement, the Selling Firm assumes responsibility for determining the suitability of any transaction under applicable laws and rules, while the insurance company agrees to appoint persons associated with the Selling Firm as agents of the insurance company for the purpose of meeting state insurance licensing requirements.<sup>8</sup> The principal underwriter typically agrees to use its best efforts to provide support to the Selling Firms for the issuer's products, and to assist the issuer in developing marketing materials for use by Selling Firms.

#### **1.B. Problems Arising Under Rule 17Ad-17 for Variable Annuity Issuers, and Broker-Dealers that Have Customer Accounts for Securityholders that Own A Variable Annuity**

Rule 17Ad-17 requires that every broker or dealer that has customer security accounts that include accounts of lost securityholders exercise reasonable care to ascertain the correct address of such securityholders.<sup>9</sup> For these purposes a "lost securityholder" is defined as a securityholder "(i) To whom an item of correspondence that was sent to the securityholder at the address contained ... in the customer security account records of the broker or dealer has been returned as undeliverable; .... And (ii) For whom the ... broker, or dealer has not received information regarding the securityholder's new address."<sup>10</sup> Database searches for a lost

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<sup>6</sup> In a series of no-action letters, SEC staff provided substantial guidance that builds upon the guidance provided in Release 8389. *See, e.g.*, Southwestern Life Insurance Company (pub. avail. Mar. 3, 1971); Century Life of America (pub. avail. Aug. 6, 1987); Allstate Life Insurance Company, Lincoln Benefit Life Company (pub. avail. Sept. 12, 1988); and Pacific Mutual Life Insurance Company (pub. avail. Apr. 13, 1989).

<sup>7</sup> For example, in Southwestern Life Insurance Company (pub. avail. Mar. 3, 1971), SEC staff found that, pursuant to Release 8389, an insurance company issuing variable annuity contracts was not required to register as a broker-dealer when it paid sales commissions to registered representatives of unaffiliated broker-dealers in connection with their sale of variable annuity contracts, and also maintained certain records on behalf of the unaffiliated broker-dealers.

<sup>8</sup> For a discussion of state insurance licensing issues, *see* Insurance Networking Arrangements (pub. avail. April 23, 2013).

<sup>9</sup> Rule 17Ad-17(a)(1).

<sup>10</sup> Rule 17Ad-17(b)(2)(i) and (ii).

securityholder must be performed between three and twelve months of the securityholder becoming a lost securityholder, and between six and twelve months after the broker or dealer's first search for the lost securityholder.<sup>11</sup> The database searches do not need to be conducted in the event the broker or dealer (i) has received documentation that the securityholder is deceased; (ii) the aggregate value of assets owned by the lost securityholder is less than \$25; or (iii) the securityholder is not a natural person.<sup>12</sup>

The lost securityholders rule outlined above creates certain implementation problems for broker-dealers who have entered into Selling Agreements with variable annuity issuers. As noted above, since 1968, it has been common industry practice for insurance companies to mail certain items of correspondence, including confirms, to the Selling Firm's customers, on behalf of the Selling Firm. This practice, which has its origins in Release 8389, is a ministerial activity undertaken by the insurance company for the Selling Firm.

We believe that the text of 17Ad-17 as quoted and described above, should be read to permit an insurance company, acting on behalf of a broker or dealer who has customer security accounts that include accounts of lost securityholders, to conduct applicable database searches for lost securityholders, in cases where the insurance company sends items of correspondence to the broker-dealer's customers, on behalf of the broker-dealer.

We believe the Committee's request makes sense for practical reasons, *i.e.*, if an insurance company mails certain items of correspondence, it is highly likely that an item of correspondence that is not successfully delivered to the Selling Firm's customers will be returned to the insurance company, not the broker-dealer on whose behalf it was mailed. If an insurance company then had to transfer that item to the broker-dealer so that the database searches required by Rule 17Ad-17 could be conducted, it is likely that the process of searching for the lost securityholder would become less efficient and more costly, and could result in items of correspondence themselves becoming lost.

We note that nothing in the text of Rule 17Ad-17 appears to prohibit the use of a third party to conduct the required database searches. Broker-dealers in a wide range of contexts have been permitted to outsource required functions to a third party.<sup>13</sup>

If insurance companies are permitted, in the circumstances described above, to conduct the database searches required by Rule 17Ad-17(a)(1), we believe they should also be permitted to avail themselves of the exemptions provided for in Rule 17Ad-17(a)(3), *i.e.*, they should not be required to conduct the database searches if:

(i) the broker-dealer on whose behalf the search is being conducted has received documentation that the securityholder is deceased, or the insurance company performing the search has determined that the securityholder is deceased; or

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<sup>11</sup> Rule 17Ad-17(a)(1).

<sup>12</sup> Rule 17Ad-17(a)(3).

<sup>13</sup> *See, e.g.*, NASD Notice to Members 05-48 (July 2005).

(ii) the aggregate value of assets listed in the lost securityholder's account, including all dividends, interest and other payments due to the lost securityholder and all securities owned by the lost securityholder as recorded in the customer security account records of the broker or dealer, is less than \$25; or

(iii) the securityholder is not a natural person.

We understand that if this no-action request is granted, the broker-dealers on whose behalf the database searches are performed will remain responsible for compliance with Rule 17Ad-17.

**3.C. Request For No-Action With Respect To The Permissibility Of An Insurance Company Conducting Database Searches On Behalf Of A Broker or Dealer, Based on the Guidance in SEC Release No. 8389**

In view of the foregoing, the Committee respectfully requests assurance from the staff that it will not recommend enforcement action to the Commission under Section 17A or Rule 17Ad-17 thereunder, if:

1. An insurance company issuer of variable annuities, acting on behalf of an affiliated or unaffiliated broker-dealer, based on the guidance contained in SEC Release 8389, and assuming that the broker-dealer has customer security accounts that include accounts of lost securityholders, conducts the database searches for lost securityholders required by SEC Rule 17Ad-17(a)(1); in the event that the insurance company, in conducting the database searches, obtains the securityholder's new address, the securityholder will no longer be deemed a lost securityholder, and
2. An insurance company issuer of variable annuities, if it conducts the database searches required by SEC Rule 17Ad-17(a)(1) on behalf of an affiliated or unaffiliated broker-dealer, does not conduct the searches otherwise required by Rule 17Ad-17(a)(1) if:
  - i. the insurance company, or the broker-dealer of whose behalf it is acting, receives documentation that the securityholder is deceased; or
  - ii. the aggregate value of assets listed in the lost securityholder's account, including all dividend, interest, and other payments due to the lost securityholder and all securities owned by the lost securityholder as recorded in the customer security account records of the broker-dealer, is less than \$25; or
  - iii. the securityholder is not a natural person.

Mr. Joseph Furey  
December 11, 2013  
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We would be pleased to answer any questions the staff may have with regard to any of the issues discussed in this letter. Please feel free to contact the undersigned at 202-383-0245.

Sincerely,

SUTHERLAND ASBILL & BRENNAN LLP

BY:  \_\_\_\_\_  
Holly H. Smith

FOR THE COMMITTEE OF ANNUITY INSURERS

cc: Carla Carriveau, SEC Division of Trading and Markets

HHS/rbb

**THE COMMITTEE OF ANNUITY INSURERS  
MEMBER LIST**

AIG Life & Retirement  
Allianz Life  
Allstate Financial  
AVIVA USA Corporation  
AXA Equitable Life Insurance Company  
Commonwealth Annuity and Life Insurance Company  
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Genworth Financial  
Great American Life Insurance Co.  
Guardian Insurance & Annuity Co., Inc.  
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  
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  
Symetra Financial Corporation  
The Transamerica companies  
TIAA-CREF  
USAA Life Insurance Company