

June 11, 2009

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-2009-028  
Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 2231  
(Customer Account Statements) in the Consolidated FINRA Rulebook**

Dear Ms. Murphy:

This letter is submitted on behalf of the Committee of Annuity Insurers (the “Committee”)<sup>1</sup> in response to the publication of *Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 2231 (Customer Account Statements) 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 requests comment on the proposed adoption of FINRA Rule 2231, including supplementary material (together, the “Proposed Rule”), in the Consolidated FINRA Rulebook, which would replace current NASD Conduct Rule 2340 (“Rule 2340”).

The Committee appreciates the opportunity to comment on the Proposed Rule. While we are generally in agreement with many aspects of the Proposed Rule, we are concerned about the proposal to change from a quarterly to monthly frequency for customer account statements for accounts with “account activity” because of the greatly increased administrative costs and burdens associated with doing so. We discuss this comment below.

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<sup>1</sup> The Committee of Annuity Insurers is a coalition of 30 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> The Proposal Notice was published in SEC Release No. 34-59921, 74 Fed. Reg. 23912 (May 14, 2009).  
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We also discuss below a technical point, seeking confirmation that FINRA members relying on an SEC exemptive order permitting them to temporarily hold customer funds for the purchase or exchange of a variable annuity contract would continue to qualify for the Proposed Rule's exemption for a member that does not carry customer accounts and does not hold customer funds or securities.

Finally, we note below our support of the proposed supplementary material that would preserve the current treatment of externally held assets, *i.e.*, that externally held assets (for example, assets held at a mutual fund transfer agent or insurance company issuer) need not be reflected on account statements, although members may voluntarily elect to do so as a courtesy to customers.

### **Monthly Account Statements Present Greatly Increased Administrative Costs and Burdens**

**Proposal.** Rule 2340(a) currently requires a "general securities member" to send a quarterly customer account statement to each customer whose account had a (i) security position, (ii) money balance, or (iii) "account activity" during the period since the last statement. Paragraph (a) of the Proposed Rule would change this delivery requirement for customer accounts that had "account activity," increasing the frequency of customer account statements for any such account from quarterly to monthly. "Account activity" would be defined by paragraph (d)(1) of the Proposed Rule, consistent with Rule 2340, as "purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities or funds in the possession or control of the member." The Proposal Notice reports that, in FINRA's view, a monthly statement requirement "better reflects current industry practice." The Proposal Notice also reports that FINRA believes that monthly account statements would help customers detect "errors, possible identity theft or other potential problems," which is the only potential benefit noted.

**Comment.** The Committee includes a number of member firms that are currently subject to Rule 2340 and provide customer account statements. The Committee is concerned that FINRA has underestimated the administrative costs and burdens the Proposed Rule would impose and overestimated its potential benefits. FINRA offers little support for the statement that requiring monthly account statements for customer accounts with account activity "better reflects current industry practice." To the contrary, the Committee believes that many member firms that provide customer account statements currently provide them on a quarterly basis, not a monthly basis. Thus, the Proposed Rule would require these member firms to change their practices to deliver monthly statements instead. Scaling up the member's compliance systems, training programs, personnel, policies and procedures, and acquiring the resources necessary for such an undertaking, would impose immense administrative costs and burdens on these firms, and ultimately result in the imposition of increased costs on customers.

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These costs and burdens seem inordinate in light of the benefits described in the Proposal Notice. The Committee acknowledges that monthly rather than quarterly account statements may, to some degree, help customers detect discrepancies in their accounts. However, SEC and FINRA rules require that most items of “account activity” as defined in the Proposed Rule be reflected on transaction confirmations, which must be sent to customers at or before completion of a transaction.<sup>3</sup> The immediate nature of transaction confirmations makes them a very effective tool for customers for identifying discrepancies in a customer’s account related to erroneous transactions, identity theft, or other potential problems. In addition, member firms are currently required by other rules to maintain monitoring and surveillance programs to identify errors, discrepancies and other problematic items. Periodic statements (whether monthly or quarterly) are at best a supplemental measure to assist with the detection of account discrepancies. However, the Proposal Notice fails to demonstrate why increasing the frequency of customer account statements would provide benefits at least commensurate with the significant costs and burdens that would be imposed on many member firms, and ultimately on customers.

The Committee acknowledges that Supplementary Material .02 to the Proposed Rule would permit a member firm to comply with the customer account statement delivery requirement through electronic methods. However, the Committee does not believe that permitting electronic delivery will significantly minimize the costs of upgrading to monthly statements because electronic delivery can be utilized only if a customer affirmatively opts for such a delivery method. Further, the use of electronic delivery methods raises larger issues that the Committee urges FINRA to consider on a more global basis, rather than solely in the context of periodic customer account statements.

In light of the considerations discussed above, the Committee strongly urges that the Proposed Rule be revised to retain Rule 2340’s quarterly account statement requirement for accounts with “account activity.” The current quarterly requirement, which has been in place for more than 16 years, is well integrated into member firms’ compliance programs. Firms that prefer to provide account statements on a more frequent basis of course could continue to do so.

However, if the SEC approves this change, the Committee requests that FINRA allow no less than one year for the compliance effective date of the Proposed Rule after it has been approved. The Committee believes that affected member firms will need at least this much time to increase the scale of their compliance systems, training programs, personnel, policies and procedures, and to acquire the necessary resources to comply with the monthly frequency requirement.

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<sup>3</sup> See SEC 1934 Act Rule 10b-10; NASD Conduct Rule 2230.

### **Member Firms Relying on SEC Exemptive Order for Variable Annuity Purchases**

**Proposal.** Paragraph (d)(2) of the Proposed Rule would retain the definition of “general securities member” currently present in Rule 2340, which explains that the term “refers to any member that conducts a general securities business and is required to calculate its net capital pursuant to the provisions of SEC Rule 15c3-1(a).” Paragraph (d)(2) would also retain the exemption from the definition currently provided in Rule 2340 for a member who: (i) does not carry customer accounts; and (ii) does not hold customer funds or securities (the “Exemption”). As explained by the NASD in announcing the adoption of Rule 2340’s predecessor, Article II, Section 45 of the NASD Rules of Fair Practice, the Exemption is intended to exclude “members whose business is limited to variable contract insurance products, mutual funds, and unit trusts, among other products.”<sup>4</sup>

**Comment.** The Committee applauds FINRA for retaining the Exemption in the Proposed Rule’s definition of a “general securities member.” However, the Committee wishes to confirm that reliance by member firms on an exemptive order recently issued by the SEC (the “SEC Exemptive Order”) to permit broker-dealers to hold initial payments for the purchase or exchange of variable annuity contracts would not cause those members to be considered to be “holding customer funds” for purposes of the Proposed Rule’s definition of “general securities member.”<sup>5</sup>

As you know, NASD Conduct Rule 2821 permits a member firm to hold customer checks for the purchase or exchange of variable annuity contracts up to seven business days under certain circumstances.<sup>6</sup> The SEC Exemptive Order issued in conjunction with its approval of Rule 2821 provides that a broker-dealer will not be deemed to “hold” customer funds for purposes of SEC Rule 15c3-1 and Rule 15c3-3, if, among other things, the transaction to which the check relates is subject to the registered principal review requirement of Rule 2821 and the broker-dealer promptly transmits the check after the principal’s review has been completed. Committee members believe that FINRA has not considered a member holding a customer check in reliance on the SEC Exemptive Order to be a “general securities member” for purposes of Rule 2340. The Committee requests confirmation that a member firm relying on the SEC Exemptive Order to temporarily hold customer funds for the purchase or exchange of a variable annuity contract would continue to qualify for the Exemption in the Proposed Rule.

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<sup>4</sup> See NASD Notice to Members 92-60 (1992) (adopting Article III, Section 45 of the NASD Rules of Fair Practice).

<sup>5</sup> See SEC Release No. 34-56376 (Sept. 7, 2007).

<sup>6</sup> See FINRA Rulemaking SR-FINRA-2008-019.  
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**Externally Held Assets**

**Proposal.** Supplementary Material .04 to the Proposed Rule (“Proposed SM .04”) recognizes that, pursuant to certain conditions, a member firm may include externally held assets on an account statement issued to its customers solely as a courtesy to such customers.

**Comment.** Proposed SM .04 would preserve the current treatment of externally held assets, *i.e.*, that externally held assets (for example, assets held at a mutual fund transfer agent or insurance company issuer) need not be reflected on account statements, although members may voluntarily elect to do so as a courtesy to customers. The Committee believes that this approach appropriately recognizes the responsibilities and limits of member firms.

The Committee appreciates this opportunity to comment on the Proposed Rule, and would be happy to answer any questions you may have.

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: Clifford Kirsch (DGA)

BY: Susan Krawczyk (DGA)

FOR THE COMMITTEE OF ANNUITY INSURERS

## **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  
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  
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)*  
Sun Life Financial  
Symetra Financial  
USAA Life Insurance Company