

March 27, 2017

VIA ELECTRONIC MAIL

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1506

**Re: FINRA Regulatory Notice 17-06
Communications with the Public: FINRA Requests Comment on Proposed
Amendments to Rules Governing Communications with the Public**

Dear Ms. Asquith:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),¹ in response to Regulatory Notice 17-06, *Communications with the Public* (the "Notice"), issued by the Financial Industry Regulatory Authority, Inc. ("FINRA") on February 27, 2017.²

The Notice solicits comments on proposed amendments (the "Proposed Amendments") to FINRA Rule 2210 that were developed as part of FINRA's retrospective review of its rules governing communications with the public. The retrospective review was launched by Regulatory Notice 14-14, *Retrospective Rule Review: FINRA Requests Comment on the Effectiveness of its Communications with the Public Rules*, which was issued by FINRA on April 8, 2014. The findings were subsequently published in a December 2014 report on the assessment phase of the retrospective review.

The Notice requests comment on the Proposed Amendments, which would create an exception to the prohibition on projecting performance. Currently, FINRA Rule 2210 prohibits member use of communications that predict or project performance. The Proposed Amendments would provide an exception to this prohibition on projections to permit the use of customized hypothetical investment planning illustrations. Members would be permitted to use illustrations to project performance of an asset allocation or other investment strategy, but not an individual security. The use of a customized hypothetical investment planning illustration would require that the member meet certain conditions. In particular, the proposal would require that there be a "reasonable basis" for all assumptions, conclusions and recommendations. In addition, these illustrations would be required to clearly and prominently disclose: (1) that the illustration is hypothetical; (2) that there is no assurance that any

¹ The Committee was formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of securities, banking, and tax policies regarding annuities. For over three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities, working with and advocating before the SEC, FINRA, CFTC, IRS, Treasury, Department of Labor, as well as the National Association of Insurance Commissioners (NAIC) and relevant Congressional committees. Today, the Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's member companies represent more than 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 is available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf.

described investment performance or event will occur; and (3) all material assumptions and limitations applicable to the illustration. The proposal would also prescribe supervisory requirements for the illustrations.

COMMITTEE COMMENTS

The Committee appreciates the opportunity to submit comments in response to the Notice. The Committee is generally supportive of the Proposed Amendments and more broadly of FINRA's efforts to create an exception to the prohibition on projections that would allow members to better inform investors about recommended investment strategies. To that end, the Committee offers the following comments on the Proposed Amendments.

Interplay with Rules Governing Variable Product Illustrations. The Notice does not explicitly mention hypothetical illustrations for variable products or refer to FINRA Rule 2211, which applies to communications with the public about variable life insurance and variable annuities (together, "variable products"). The Committee notes that FINRA Rule 2211 currently permits the use of various types of hypothetical and personalized illustrations for variable products. FINRA staff guidance under this rule has permitted various types of hypothetical illustrations for variable products including "random rate" illustrations. It does not appear that the Proposed Amendments would affect FINRA Rule 2211 or the ability of member firms to continue to provide hypothetical illustrations for variable products in reliance on FINRA Rule 2211 and staff guidance. Nonetheless, the Committee requests that FINRA confirm the Committee's understanding that the Proposed Amendments would not adversely impact FINRA Rule 2211 or directly or indirectly impose any additional requirements on variable product hypothetical illustrations used by member firms in reliance on FINRA Rule 2211.

Use of Projections in Connection with a Single Security. The Proposed Amendments would not permit the use of performance projections for a single security. The Notice requests comment on several questions, the sixth of which asks whether there are "single investment products that operate like an asset allocation or other investment strategy for which performance projections might be appropriate?" The Committee submits that a variable annuity, which permits the contract owner to allocate contract value in accordance with an asset allocation strategy, may be an example of a "single security" for which the hypothetical illustrations contemplated by the Proposed Amendments would be appropriate. Accordingly, the Committee suggests that FINRA consider modifying the Proposed Amendments to permit hypothetical investment planning illustrations for a single security, such as a variable annuity product.

Relatedly, the Committee would like to remind FINRA that in 2009 FINRA proposed amendments to NASD IM-2210-2, the predecessor rule for FINRA Rule 2212, that would have permitted, among other things, hypothetical illustrations of variable products utilizing historical index performance history.³ The Committee was strongly supportive of the proposed amendments to FINRA Rule 2212, including the amendments to permit illustrations utilizing historical index performance history. While for various reasons FINRA ultimately withdrew the proposed amendments to FINRA Rule 2212, the Committee continues to be supportive of initiatives to permit the use of historical index performance in variable annuity illustrations.

Reasonable Basis Requirement. As a condition for the use of a customized hypothetical investment planning illustration, the Proposed Amendments would require that members be able to demonstrate that "there is a reasonable basis for all assumptions, conclusions and recommendations."⁴ The Notice provides examples of factors relevant to a "reasonable basis" determination, and requests comment on appropriate factors. In the Notice's list of requests for comment, the fifth request asks for comment on the "reasonable basis" requirement. The Committee believes that the Proposed Amendments should not require a

³ See SEC Release No. 34-61108, 74 Fed. Reg. 65180 (Dec. 9, 2009), File No. SR-FINRA-2009-070.

⁴ See proposed Section (d)(iv)(a) of Rule 2210 in Attachment A to Regulatory Notice 17-06.

member to demonstrate a "reasonable basis" for all assumptions, conclusions and recommendations underlying a hypothetical illustration. This standard could be understood to require that a member predict the likely outcome for all assumptions, conclusions and recommendations underlying a hypothetical illustration. Under the Proposed Amendments, members would already be required to provide customers with adequate disclosures as to the underlying assumptions and limitations applicable to the illustration. However, the addition of a "reasonable basis" requirement for assumptions, conclusions or recommendations creates the risk of subjectivity. Whether a combination of factors is sufficient, or whether a member places an unreasonable emphasis on any one factor, may lead to uncertainty as to whether there is a "reasonable basis" for an assumption, conclusion or recommendation. Moreover, there may be some assumptions for which it may not be practicable to form a "reasonable basis," such as a customer's likely life span. The Committee believes that requiring members to clearly and prominently disclose: (1) that the illustration is hypothetical; (2) that there is no assurance that any described investment performance or event will occur; and (3) all material assumptions and limitations applicable to the illustration, should be considered an adequate safeguard for the protection of investors. Accordingly, the Committee recommends that the "reasonable basis" requirement be removed from the Proposed Amendments.

Review and Approval Requirements. The Proposed Amendments would require a registered principal to review and approve each investment planning illustration before use or distribution, but allows alternative review and supervision requirements in the case of illustrations based on templates. In the case of illustrations based on templates, the Proposed Amendments would require that a registered principal review and approve each template, and supervise and review the illustrations in the same manner as required for supervising and reviewing correspondence under FINRA Rule 3110. The Committee is supportive of a supervisory approach that treats illustrations as "correspondence" under FINRA rules. However, the Proposed Amendments requirement of prior approval of every non-template illustration appears to suggest that any hypothetical illustration not based on a template is necessarily a Retail Communication. Understandably, if an illustration is not based on a template, then it would be unique to the customer for whom the illustration is prepared and would therefore meet the definition of "correspondence" in FINRA Rule 2210. Requiring prior review and approval for each non-template illustration would be inconsistent with the supervisory approach that FINRA adopted for correspondence and would create a heightened supervisory requirement for investment planning illustrations as compared to other correspondence. The Committee recommends that FINRA continue to impose a uniform supervisory framework for correspondence under FINRA Rule 3110, and treat illustrations permitted under the Proposed Amendments, whether or not based on templates, as correspondence within such framework.

Impact on Existing Interpretive Guidance. The Committee notes that the Proposed Amendments may impact existing interpretive guidance, and suggests that FINRA consider clarifying the continued applicability of this guidance in connection with moving forward with the Proposed Amendments. For example, FINRA's General Counsel office issued an interpretive letter in 1998 indicating that NASD Rule 2210, the predecessor to FINRA Rule 2210, prohibits the use of performance projections by persons dually-registered with a member firm and an investment adviser.⁵ This letter, which appears to apply the FINRA communication rules to materials relating to investment advisory services, has presented obstacles and challenges for member firms that are dual registrants or affiliated with an investment adviser. The Committee recommends that FINRA withdraw or modify the interpretive letter to clarify that material used by member firms and/or their registered persons intended primarily to promote investment advisory services conducted under the auspices of a registered investment adviser should not be viewed as subject to FINRA's communication rules.

Also, the Committee notes that member firms have relied on longstanding guidance permitting the use of blended fund family performance in certain asset allocation illustrations.

⁵ See FSC Sec. Corp., FINRA Interpretive Letter, <http://www.finra.org/industry/interpretive-letters/july-30-1998-1200am> (July 30, 1998).

This guidance was published in the November 1996 edition of the Regulatory and Compliance Alert. The Committee believes that member firms continue to rely on this guidance for variable annuity asset allocation illustrations. The Committee requests that FINRA confirm that this guidance continues to be in force in connection with FINRA's moving forward with the Proposed Amendments.

CONCLUSION

The Committee appreciates the opportunity to provide these comments to FINRA. Please do not hesitate to contact Clifford Kirsch (212.389.5052 or CliffordKirsch@eversheds-sutherland.com), or Susan Krawczyk (202.383.0197 or SusanKrawczyk@eversheds-sutherland.com), if you have any questions regarding these comments.

Respectfully submitted,

EVERSHEDS SUTHERLAND (US) LLP

BY: *Clifford Kirsch* *CK*
Clifford Kirsch

BY: *Susan Krawczyk* *SK*
Susan Krawczyk

FOR THE COMMITTEE OF ANNUITY INSURERS

Appendix A

THE COMMITTEE OF ANNUITY INSURERS

AIG
Allianz Life
Allstate Financial
Ameriprise Financial
Athene USA
AXA Equitable Life Insurance Company
Fidelity Investments Life Insurance Company
Genworth Financial
Global Atlantic Life and Annuity Companies
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
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
USAA Life Insurance Company
Voya Financial, Inc.