

July 30, 2010

Marcia E. Asquith  
Senior Vice President and Corporate Secretary  
Office of the Corporate Secretary  
FINRA  
1735 K. Street, NW  
Washington, DC 20006-1506

**Re: Regulatory Notice 10-25: Registration and Qualification Requirements  
for Certain Operations Personnel**

Dear Ms. Asquith:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),<sup>1</sup> in response to Regulatory Notice 10-25, "Registration and Qualification Requirements for Certain Operations Personnel" (the "Notice"). In the Notice, FINRA requests comments on a proposed new registration category for representatives deemed as "Operations Professionals." The Notice identifies a proposed new section of FINRA Rule 1230 (Registration Categories) and Rule 1250 (Continuing Education Requirements) (the "Proposed Rules").

**THE PROPOSED RULES**

The Notice indicates that the Proposed Rules respond to FINRA's concerns about regulatory gaps in the licensing and education of individuals performing certain operations functions for the broker-dealer, and the role played by such individuals with respect to client funds, accounts and transactions. FINRA indicates that registration of Operations Professionals is required "to help ensure that investor protection mechanisms are in place in all areas of a member firm's business that could harm a customer, a firm, the integrity of the marketplace or the public."

The Notice indicates generally that the trigger for requiring registration is being engaged in activities "relating to sales and trading support and the handling of customer assets." The

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<sup>1</sup> The Committee of Annuity Insurers is a coalition of 31 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 80 % of the annuity business in the United States. A list of the Committee's member companies is attached as Appendix A. 9284849.4

Notice goes on to provide that registration would be required only for personnel with “decision-making and/or oversight authority” such as that listed below over certain “covered functions” (described below):

- (1) Senior management with responsibility over the covered functions;
- (2) Supervisors, managers or other persons responsible for approving or authorizing work in direct furtherance of the covered functions, including work of other persons in the covered functions;
- (3) Persons with the authority or discretion to commit the firm’s capital in direct furtherance of the covered functions or to commit the firm to any contract or agreement (written or oral) in direct furtherance of the covered functions (including, *e.g.*, a person who has the discretion to commit the firm to any contract or agreement involving securities lending or borrowing activities).

The registration requirement *would not* apply to an individual who engages in a covered function, but does not meet the standards set forth above indicating the required level of oversight.

The so-called “covered functions” that could lead to an individual registration requirement under Proposed Rule 1230(b)(6) include the following:

- Development and approval of pricing models used for valuations;
- Trade confirmation, account statements, settlement, margin;
- Stock loan/securities lending;
- Prime brokerage (services to other broker-dealers and financial institutions);
- Client on-boarding (customer account data and document maintenance);
- Capturing of business requirements for sales and trading systems and any other systems related to the covered functions, and validation that these systems meet such business requirements;
- With respect to the covered functions, defining and approving business security requirements and policies for information technology (including, but not limited to, systems and data);
- Defining information entitlement policy in connection with the covered functions;
- Financial Controller (including general ledger);
- Collection, maintenance, re-investment (*i.e.*, sweeps) and disbursement of funds;
- Bank, custody, depository and firm account management and reconciliation;
- Segregation, possession and control, fail control, buy-ins;
- Receipt and delivery of securities and funds, account transfers;



- Financial regulatory reporting; and
- Posting entries to the books and records of a firm in connection with the covered functions.

## **COMMITTEE COMMENTS ON THE PROPOSED RULES**

The Committee commends FINRA for undertaking the proposed rulemaking in an effort to protect investors, and appreciates the opportunity to provide comments on the Proposed Rules. In general, the Committee believes many aspects of the Proposed Rules need to be clarified and that the reach of the registration requirements for an Operations Professional should be circumscribed. In addition, the Proposed Rules should clarify and address their limited impact when the Operations Professional is providing shared services to a number of legal entities, including but not limited to a broker-dealer, in a financial services holding company. Set forth below are the Committee's detailed comments on the Proposed Rules.

### **Staff of an Insurance Company Issuing a Variable Annuity Performing Insurance Company Functions Should Be Outside the Scope of the Registration Requirement**

While the Committee recognizes that the Proposed Rules were not drafted with specific securities products in mind, the Committee is concerned generally about the possibility that the Proposed Rules will be difficult to apply and could be interpreted too broadly in the context of persons performing functions of the issuer of a variable annuity contract.<sup>2</sup> Unlike other types of securities, a variable annuity contract represents a contractual obligation between a state licensed insurance carrier, and the variable annuity contract owner. As a result of that contractual obligation and state insurance law requirements, the issuing insurance company must perform a number of ongoing functions related to the variable annuity contract (e.g., providing annual contract information, updating beneficiaries); these functions are independent of those that are conducted by the broker-dealer firm that sold the variable annuity contract or the principal underwriter of the variable annuity contract. The Committee believes that the Proposed Rules are drafted so broadly as to possibly be read to apply to certain insurance operational functions performed by staff of the issuing insurance company, including, for example, the following: development and approval of variable annuity pricing; disbursements from variable annuity contracts such as policy loans, withdrawals or surrenders; receiving payments; collecting and inputting information required for contract issuance; and preparing separate account valuations. Therefore, the Committee requests that clarification be provided that the Proposed Rules are not intended to reach functions performed by or on behalf of an insurance company issuing a variable annuity or to its staff when they are performing such functions on behalf of the insurance company.



### **Applicability of the Registration Requirements When an Operations Professional Provides Services to a Number of Financial Services Holding Company Affiliates Should Be Limited**

The Proposed Rules and the Notice appear to be drafted presuming that broker-dealers operate in a “stand-alone” manner. However, financial services holding companies routinely rely on shared services (e.g., accounting, legal, data processing) being provided to different legal entities. As a result, many individuals required to register as Operations Professionals are likely also to engage in functions on behalf of a broker-dealer’s affiliated insurance company, bank or other operating company. The Committee believes that FINRA should provide explicit guidance on the limitations of the applicability of the Proposed Rules in these situations.

It may be helpful to illustrate such a limitation through an example. Assume that an individual is designated as an Operations Professional because he or she is a “senior manager” who has responsibility for the covered function of business security requirements and policies for information technology with respect to a broker-dealer. In an insurance company complex (or any other financial services complex), that individual is likely to be employed by the insurance company and be providing services not just to the broker-dealer, but also to other legal entities (insurance companies, investment advisers, non-regulated institutions). In addition, that individual is very likely to have several persons to whom they report (for purposes of example, the Senior Vice President of IT Security and the Executive Vice President of Operations of the affiliated insurance company), and possibly a number of people that report to such individual (e.g., data analysts, programmers, etc.). The Committee believes that clarification should be provided that only the Operations Professional, and not his or her supervisors or subordinates, will be deemed to be associated persons of the broker-dealer. In addition, the Committee believes that FINRA’s jurisdiction should be limited to the Operations Professional, and should not reach into any of the affiliated entities for which the Operations Professional also works.<sup>3</sup>

The Committee believes strongly that, if the Proposed Rules are adopted, the Operations Professional should be the end of the chain in terms of FINRA oversight. It makes no sense to continue up the chain to senior level managers that have already been determined by the firm not to meet the definition of the Operations Professional and have limited interaction with the broker-dealer. In addition, the personnel who report up to the Operations Professional and do not meet the requirements to be deemed an Operations Professional should not be deemed to be associated persons of the broker-dealer firm. To hold otherwise would ensnare a large pool of individuals that have only a tenuous relationship with the broker-dealer while providing no concomitant investor protection. The Committee believes that such an interpretation would still

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<sup>2</sup> These same issues would apply to any insurance product that is deemed to be a security, including variable life insurance policies.

<sup>3</sup> This limitation on FINRA jurisdiction would also be applicable where an unaffiliated third party vendor employed an individual who served as an Operations Professional.



clearly allow FINRA to satisfy the articulated purpose of the rule to “enhance the regulatory structure surrounding a firm’s back-office operations.”<sup>4</sup>

### **Additional Guidance Should Be Provided for a Number of the Covered Functions**

Many of the covered functions identified in Proposed Rule 1230(b)(6)(B) are described only in short, jargon-like terms and should be clarified.<sup>5</sup> For example, while “client on-boarding” is a covered function, the Committee is not aware that “client on-boarding” has ever been defined or described by FINRA. The Proposed Rules would benefit from some additional guidance indicating precisely what the term “client on-boarding” means. The phrase “client on-boarding” is simply one example. While the bullet-point list of covered functions uses terminology that may be more understandable in the context of a stand-alone broker-dealer engaged in general securities business, it does not readily translate to the business of a broker-dealer engaged in variable annuity (or other special product type) sales. Broker-dealers engaged in variable annuity business should not be exposed to the risk of non-compliance attributable to a lack of clarity of the covered activities. Accordingly, we encourage FINRA to clarify the covered functions and provide guidance with respect to the applicability of these functions in the context of variable annuity business. As an example, it may be helpful to link the list of covered functions, where applicable, to FINRA or SEC rules related to the functions. The on-boarding requirements could be linked to the FINRA and SEC customer account and recordkeeping rules.

The Committee believes strongly that certain of the covered functions may also be functions that have historically been performed by the insurance company issuing a variable annuity (or another securities issuer), in addition to the broker-dealer. For example, “account statements” are indicated to be a covered function. As described above, insurance companies are subject to state insurance law requirements to provide periodic statements to their contract owners regarding their variable annuities. In addition, many of the other functions identified on the list of covered functions are engaged in by a variable annuity issuer. Therefore, the Committee reiterates its request that FINRA clarifies that the Proposed Rules only lead to a registration requirement for an Operations Professional if such functions are being performed by

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<sup>4</sup> See Notice at p. 3.

<sup>5</sup> The Committee also notes that Proposed Rule 1230(b)(6)(A)(iii) appears overly broad. Under that provision, any person with authority or discretion to commit the member’s capital in direct furtherance of any of the covered functions would be required to be registered as an Operations Professional. Particularly in the context of a financial services holding company relying on the delivery of shared services to multiple legal entities within the holding company, the mere ability to direct funds to cover an operational expense would not often equate to the type of management or supervision required under the other provisions of the Proposed Rule. The Committee believes this category needs to be significantly narrowed.



or on behalf of the broker-dealer, and not when they are being performed on behalf of the issuing insurance company carrying out its insurance operations.<sup>6</sup>

### **Multiple Registration Changes Proposed by FINRA Should Provide a Consistent and Understandable Framework**

The Committee believes that some of the covered functions create confusion with other registration categories. For example, the interplay of the covered functions of the “financial controller” and “financial regulatory reporting” may overlap with those functions supervised by the financial and operations principal. In addition, the Committee is concerned about the interplay of the Operations Professional with the proposed registration/designation of the Principal Operations Officer under Regulatory Notice 09-70. In that regard, the Committee urges FINRA to ensure that the proposed registration changes under both the Notice and Regulatory Notice 09-70 are consistent, and result in a coherent, non-duplicative, understandable framework for registration. Going further, the Committee recommends that FINRA review the comments received under this Notice, and re-publish an integrated registration notice that addresses the comments received under this Notice and RN 09-70 jointly to allow for additional, and consolidated, review and interpretation of the proposed registration requirements.

### **Registration Waiver Period Should Be Extended for Operations Professionals**

Given the FINRA restrictions on parking securities registrations, including certain enforcement actions that included stiff fines, member firms have been reluctant to register personnel unless they clearly met either the required or permissive registration categories under NASD Rule 1031(a). As a result, many individuals have withdrawn their registrations in the last several years to ensure compliance with FINRA guidance and enforcement actions related to parking registrations, particularly where such registrations were under the permissive portions of FINRA rules.<sup>7</sup> As described in the Notice, the qualification exam for an Operations Professional is designed to “heighten their awareness of operating in a regulated environment and to demonstrate a basic understanding of the securities industry.”<sup>8</sup> In light of both the widespread withdrawal of permissive registrations held for back office operations, and the relatively modest nature of the securities knowledge requirements subject to examination for an Operations Professionals, the Committee believes it is appropriate to extend the time period during which a formerly registered individual could rely on a past registration to qualify as an Operations

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<sup>6</sup> The Committee observes that the Operations Professional registration requirements do not appear to impact in any way FINRA guidance with respect to the offering and sale of exempt securities, such as certain group variable annuity contracts.

<sup>7</sup> The Committee notes that “back office operations” are identified as one of the permissive categories of registration under NASD Rule 1031.

<sup>8</sup> Notice at p. 5.  
9284849.4



Professional. Therefore, the Committee believes that a waiver from the examination requirement should be provided for individuals to become Operations Professionals who have, within the last five years, held a registration with a FINRA firm that would otherwise qualify the individual to register as an Operations Professional.

The Committee also believes that a 90-day grace period should be provided for an individual who transfers into, or is hired to, serve a role with the broker-dealer that requires them to be Operations Professionals. Providing such a grace period is important to allow for firms to hire and integrate new employees and mitigate the impact of turnover. This type of grace period is provided for registered principals under NASD Rule 1021(d), and the Committee believes that similar transition periods should be granted newly minted Operations Professionals.

### **The Operations Professional Registration Category Should Not Limit the Issuer Exemption Under Rule 3a4-1 of the Securities Exchange Act of 1934**

The Committee also has concerns about the possible impact of Operations Professional registration on the “issuer exemption” under Rule 3a4-1 of the Securities Exchange Act of 1934. While the Notice references certain conduct that would not rise to the level requiring registration as an Operations Professional,<sup>9</sup> the Committee believes that is important for FINRA to indicate the proposed registration category is in no way designed to eliminate or limit the ability of a securities issuer and its associated persons to rely on the exemption provided for under Rule 3a4-1 to avoid broker-dealer (and thus FINRA) registration requirements.

### **Alternative Proposal**

The Committee believes that similar enhancements in investor protection related to operational functions could be achieved without the creation of a separate registration category for Operations Professionals through a much simpler mechanism: specifying that each of the functions identified as a covered function must be delegated to a registered principal of the firm and must be covered by written supervisory procedures of the firm. By doing so, a firm would ensure that a registered managerial level securities professional would be tasked with, and held responsible for, the covered functions. As described above, the creation of the new registration category, in light of other FINRA regulatory proposals, and existing registration requirements (e.g., financial and operations principals), creates an even more complex web of registration categories and exams than already exists. We would urge FINRA to consider whether similar protections to investors can be achieved simply by requiring firms to assign the covered functions to designated registered principals and enhancing supervisory procedures related to those functions. In addition, to the extent FINRA has expressed concerns in the Notice about

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<sup>9</sup> See Notice at p. 3 (“the requirements would not apply to persons who are engaged solely in clerical or ministerial activities in any of the covered functions.”)  
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education and training for individuals with decision making and/or oversight responsibility for the covered functions, the Committee recommends that those concerns could be addressed under this alternative proposal simply by requiring such persons to complete training. The Committee believes that such training could be easily constructed and delivered to meet the securities knowledge requirements contemplated under the Proposed Rules.

### CONCLUSION

The Committee appreciates the opportunity to comment on the Proposed Rules. Please do not hesitate to contact Cliff Kirsch (212.389.5052) or Eric Arnold (202.383.0741) if you have any questions on the issues addressed in this letter.

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: Clifford L. Kirsch EAA

BY: Eric G. Arnold

FOR THE COMMITTEE OF ANNUITY INSURERS



## Appendix A

### THE COMMITTEE OF ANNUITY INSURERS

AEGON Group of Companies  
Allstate Financial  
American General Life Insurance Company  
AVIVA USA Corporation  
AXA Equitable Life Insurance Company  
Commonwealth Annuity and Life Insurance Company  
CNO Financial Group, 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  
Massachusetts Mutual 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  
Pacific Life Insurance Company  
Protective Life Insurance Company  
Prudential Insurance Company of America  
RiverSource Life Insurance Company  
*(an Ameriprise Financial company)*  
SunAmerica Annuity and Life Insurance Company  
Sun Life Financial  
Symetra Financial  
TIAA-CREF  
USAA Life Insurance Company