

December 21, 2017

Via E-Mail

Mr. Brent J. Fields
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

**Re: Release on FAST Act Modernization and Simplification of Regulation S-K,
File No. S7-08-17**

Dear Mr. Fields:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"), in response to the Securities and Exchange Commission's ("SEC" or "Commission") request for public comment in its Release on FAST Act Modernization and Simplification of Regulation S-K (the "FAST Act Release").¹ For the reasons set forth below, the Committee supports the Commission's proposal to provide relief from the requirement to submit requests for confidential treatment of information omitted from material contracts filed as exhibits in response to Item 601(b)(10) of Regulation S-K.² The Committee also supports providing comparable relief to insurance companies that register variable annuity and/or variable life insurance contracts with the SEC by amending the registration forms for those contracts.

I. Background Regarding the Committee and Registered Annuity Contracts

The Committee is a coalition of life insurance companies formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of federal policy with respect to securities, regulatory and tax issues affecting annuities. The Committee's current 32 member companies represent over 80% of the annuity business in the United States. Set forth in Appendix A is a list of the Committee member companies. For over 35 years, the Committee has been actively involved in shaping and commenting upon many elements of the SEC regulatory framework as it applies to annuity products registered with the SEC under the Securities Act of 1933 (the "1933 Act") and, with respect to variable annuity contracts, which are also regulated under the Investment Company Act of 1940 (the "1940 Act").

Committee members register variable annuity contracts with the SEC as securities on either Form N-3 or Form N-4, registration statement forms developed by the SEC specifically for variable annuities. Form N-4, which is used when the separate accounts funding variable annuities are registered under the 1940 Act as unit investment trusts, is by far the registration form most frequently used by insurance companies to register variable annuity contracts. Although Form N-3 is no longer widely used, Committee members have used and may continue

¹ FAST Act Modernization and Simplification of Regulation S-K, Securities Act Release No. 33-10425 (Oct. 11, 2017), 82 Fed. Reg. 50988 (Nov. 2, 2017).

² Item 601(b)(10) of Regulation S-K generally requires a registrant to file as an exhibit "Every contract not made in the ordinary course of business which is material to the registrant and is to be performed in whole or in part at or after the filing of the registration statement or report or was entered into not more than two years before such filing."

to use Form N-3 to register variable annuity contracts funded by separate accounts registered with the SEC as management investment companies.³

Committee member companies also issue several types of non-variable annuity contracts registered with the SEC as securities on Form S-1 or S-3. These contracts include:

- market value-adjusted fixed annuity contracts (MVAs), which guarantee an interest rate for assets that remain invested for a specified period(s) and adjust proceeds payable to contract owners who make a withdrawal or surrender prior to the end of the specified period, in order to reflect changes in prevailing interest rates;
- certain index-linked annuity contracts that credit interest based on the performance of one or more referenced securities or indices and provide some level of downside protection; and
- contingent deferred annuity contracts that insure the contract owner against outliving specified assets held by the owner in an associated mutual fund, brokerage or investment advisory account.

Unlike variable contracts, these non-variable insurance contracts do not pass through the investment performance of the insulated insurance company separate accounts funding the contracts to contract owners. Instead, the contract values, benefits and guarantees provided by these contracts are paid out of assets held in the insurance company's general account or a non-unitized separate account. As a result, these insurance contracts are not investment company securities required to be registered under the 1940 Act and are not eligible to register under the 1933 Act on Form N-3 or Form N-4 for variable annuity contracts. Due to the absence of a registration form designed to specifically accommodate these non-variable annuity contracts, insurance company issuers must register them under the 1933 Act on Form S-1 or S-3.

II. The FAST Act Release

In the FAST Act Release, the Commission identifies the modernization and simplification of the disclosure requirements of Regulation S-K as a primary goal of the proposed amendments. The proposed addition of paragraph (b)(10)(iv) to Item 601 of Regulation S-K supports that goal by permitting registrants, including insurance companies that register non-variable insurance contracts on Form S-1 and S-3, to omit confidential information from material contracts filed as exhibits without requiring them to file a request for confidential treatment with the SEC. The proposed relief would be subject to the conditions that the confidential information omitted from the exhibits (1) is not material⁴ and (2) would be competitively harmful if publicly disclosed. Although registrants relying on proposed paragraph (b)(10)(iv) of Item 601 would no longer need to file requests for confidential treatment of information redacted from material

³ Committee members that offer variable life insurance policies register those policies on Form N-6. Some older variable life insurance policies, which the sponsoring company no longer offers for sale to new policy owners, continue to be registered with the SEC on Form S-6. Form N-6 replaced Form S-6 as the 1933 Act registration form for variable life insurance policies funded by separate accounts registered with the SEC as unit investment trusts in 2002.

⁴ FAST Act Release, 82 Fed. Reg. at 51021. For purposes of construing the "not material" condition of proposed paragraph b 10 iv to Item 601 of Regulation S-K, the Committee notes that the Commission interprets the term "material" to mean material to an investment decision. See *id.* at 51002 n. 188. That interpretation is consistent with the definition of the term "material" in Rule 405 under the 1933 Act, which when used in qualifying a requirement to provide information means information "... to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered."

contract exhibits the registrant would continue to be responsible for ensuring that all material information in the exhibits has been disclosed.⁵

Further a registrant relying on proposed paragraph (b)(10)(iv) would be required to provide an analysis justifying its omission of the redacted information from an exhibit(s) upon request by the SEC staff. The Commission noted in the FAST Act Release that such an analysis if requested by the SEC staff, would be substantially the same as the analysis that registrants are currently required to provide for confidential treatment requests submitted pursuant to Rule 406 under the 1933 Act or Rule 4b- under the Securities Exchange Act of 1934.⁶

The Committee generally applauds the Commission's efforts to modernize and simplify the disclosure requirements in Regulation S-K and reduce the costs and burdens placed on registrants through its proposed amendments in the FAST Act Release and its other rulemaking initiatives. The Committee also welcomes the opportunity to respond more specifically to the Commission's request for public comment in the FAST Act Release regarding (1) whether registrants should be permitted to omit confidential information from exhibits filed pursuant to Item 601(b)(10) of Regulation S-K that is both (i) not material and (ii) competitively harmful if publicly disclosed, without submitting a request for confidential treatment and (2) whether the Commission should amend "investment company forms" to permit investment companies to omit confidential information from exhibits.

- **The committee supports the commission's proposal to provide relief from the requirement to submit requests for confidential treatment of information omitted from material contracts filed as exhibits in response to Item 601 of Regulation S-K.**

As the Commission acknowledges in the FAST Act Release registrants must often incur substantial legal expenses when they need the assistance of outside counsel to prepare confidential treatment requests.⁷ However legal expenses are just a part of the total cost insurance companies and other registrants incur in connection with submitting requests for confidential treatment to the SEC. Those expenses do not take into account the substantial time and effort a registrant's employees must dedicate to preparing requests for confidential treatment. This includes preparing and assembling documents submitted with such requests and filing requests with the SEC as well as preliminary and follow-up discussions with the SEC staff to ensure filing requirements are met.

Currently requests for confidential treatment of information in a material contract exhibit are filed with the SEC under Rule 406 of the 1933 Act ("Rule 406 Request(s)").⁸ However Rule 406 Requests cover only information omitted from the material contract exhibit because the exhibit itself is the only item required to be filed under the 1933 Act.⁹ Rule 406 Requests do not afford confidential treatment to supplementary materials associated with making a Rule 406 Request such as the letter requesting confidential treatment itself and any emails or other written correspondence between the SEC staff and the registrant pertaining to the Rule 406 Request. Those supplementary materials often include discussion of commercial,

⁵ Consistent with the procedures registrants currently follow when submitting requests for confidential treatment to the SEC staff, registrants relying on proposed paragraph (b)(10)(iv) of Item 601 would be required to: (1) mark the exhibit index in the registration statement to indicate that portions of an exhibit(s) have been omitted; (2) include a prominent statement on the first page of each redacted exhibit that information in marked sections of the exhibit has been omitted; and (3) indicate where information has been omitted from the exhibit with brackets.

⁶ FAST Act Release, 82 Fed. Reg. at 51004 n. 199.

⁷ *Id.* at 51021.

⁸ See Confidential treatment of information filed with the Commission, 16 C.F.R. § 230.406 (setting forth the procedure for requesting confidential treatment of information required to be filed with the Commission under the 1933 Act).

⁹ See 16 C.F.R. § 230.406(1)(a).

financial or other sensitive information that registrants making Rule 406 Requests want kept confidential.

To obtain confidential treatment of supplementary materials associated with making a Rule 406 Request, registrants also must also file a separate request for confidential treatment under Rule 83 of the 1933 Act.¹⁰ As such, a request for confidential treatment of information omitted from a material contract filed as an exhibit to a registration statement often involves submitting two separate requests for confidential treatment to the SEC. One request for confidential treatment would be filed under Rule 406 to address information omitted from the material contract filed as exhibit, while another request would be filed under Rule 83 to address the Rule 406 request itself and any associated written communications with the SEC staff. Preparation and submission to the SEC of such requests for confidential treatment under Rule 83 can result in significant additional costs for registrants.

The Committee believes the Commission's proposed addition of paragraph (b)(10)(iv) to Item 601 of Regulation S-K strikes an appropriate balance between the interests of reducing the costs and burdens placed on registrants in submitting confidential treatment requests to the SEC while ensuring all material information continues to be provided in material contract exhibits. As discussed above, the addition of proposed paragraph (b)(10)(iv) should result in significant cost savings to registrants because it will obviate the need to prepare and file, in many cases two different requests for confidential treatment. However, proposed paragraph (b)(10)(iv) maintains the same level of substantive protection for investors because it continues to require registrants to include all material information in their material contract exhibits, and only allows registrants to omit information that is both (1) not material and (2) competitively harmful if publicly disclosed. In addition, the SEC staff may, at its discretion, review redacted material contract exhibits and request that registrants provide unredacted copies of the exhibits. As noted above the SEC staff may also request that registrants provide an analysis of why the redacted information meets the conditions of proposed paragraph (b)(10)(iv). The prospect of SEC staff review and request for analysis of compliance with the conditions of proposed paragraph (b)(10)(iv) should act as a strong deterrent against registrants failing to carefully examine whether information redacted from a material contract exhibit(s) meets the paragraph (b)(10)(iv) conditions.

IV. The Commission should provide similar relief for insurance companies issuing variable insurance contracts as well as for issuers of other investment company securities.

Insurance companies that register variable annuity contracts with the SEC are also required to file material contracts as exhibits to their Form N-3 or Form N-4 registration statements. Form N-3 requires insurance companies to file as an exhibit(s) "Copies of all other material contracts not made in the ordinary course of business which are to be performed in whole or in part at or after the date of filing of the registration statement . . ." ¹¹ Form N-4 includes substantially the same requirement.¹² In this respect, the Form N-3 and Form N-4 requirements are both substantially the same as the requirements Form S-1 or Form S-3 registrants must meet pursuant to Item 601(b)(10) of Regulation S-K. In addition, insurance companies that file Form N-3 or Form N-4 registration statements and request confidential treatment of information in material contracts filed as exhibits (and of supplementary material related to those requests) are subject to the same requirements governing those requests and

¹⁰ See Confidential treatment procedures under the Freedom of Information Act, 17 C.F.R. § 200.83 (setting forth the procedure for requesting confidential treatment for supplemental information not required to be submitted to the Commission).

¹¹ See Item 29(b)(11) to Form N-3.

¹² See Item 24(b)(8) to Form N-4.

the same costs and burdens in preparing the requests as registrants that file on Form S-1 and S-3.¹³

As such, the compelling reasons discussed above for providing the proposed relief to Form S-1 and S-3 registrants apply equally to insurance companies that file Form N-3 and N-4 registration statements. Because there does not appear to be any basis to treat insurance companies that register variable annuity contracts on Form N-3 or N-4 differently than Form S-1 and S-3 registrants, and because of the significant cost savings that would be achieved in extending comparable relief to Form N-3 and N-4, the Committee respectfully recommends that the Commission extend comparable relief to insurance companies that register variable annuity contracts with the SEC.

The Committee notes that were the Commission to amend Forms N-3 and N-4 to provide relief comparable to the relief contemplated by proposed paragraph (b)(10)(iv) to Item 601 of Regulation S-K, the Commission would need to modify not only the item requirement in each registration form requiring the filing of material contracts as exhibits, but also a separate item requirement in each registration form requiring the filing of reinsurance agreements as exhibits.¹⁴ Form S-1 and S-3 registrants would in appropriate circumstances file reinsurance agreements as exhibits in response to the material contract exhibit requirement of Item 601(b)(10) of Regulation S-K. In the case of registered variable annuity contracts, insurers file reinsurance agreements as exhibits in response to a separate item requirement in both Form N-3 and Form N-4 that specifically requires the filing of those agreements.

For the same reasons, the Commission should provide similar relief to insurance companies that register variable life insurance policies on Form N-6 or Form S-6 because they also are required to file material contracts as exhibits to those registration statements.¹⁵ Unless relief comparable to that proposed in paragraph (b)(10)(iv) to Item 601 of Regulation S-K is similarly extended to insurance companies that register variable life insurance policies with the SEC, they would be continue to be required to request confidential treatment of information they seek to omit from material contracts filed as exhibits to Form N-6 or S-6 (and of supplementary material related to those requests) and incur the same costs and burdens.

Finally, the Committee also supports extending comparable relief in connection with other investment company forms, such as Form N-1A which is used to register shares of mutual funds with the SEC, including shares of mutual funds underlying variable insurance contracts.

The Committee appreciates the opportunity to comment on the Commission's proposal to provide relief from the requirement to submit confidential treatment requests. Please do not hesitate to contact Steve Roth ([REDACTED]) or [REDACTED]) or Thomas Bisset ([REDACTED]) or [REDACTED]) with any questions or to discuss this comment letter. We would also be happy to meet with the SEC staff to discuss any of the issues or concerns identified in this letter if doing so would be helpful.

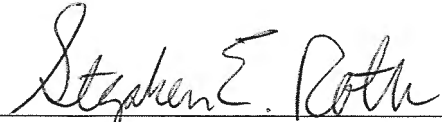
[SIGNATURE PAGE FOLLOWS]

¹³ See the discussion in Section I *pra*.

¹⁴ See Item 29(b)(9) to Form N-3 and Item 24(b)(7) to Form N-4. See also Item 26(g) to Form N-6 for comparable exhibit filing requirements for variable life insurance policies.

¹⁵ See Item 26(g) and 26(j) to Form N-6; Instructions as to Exhibits to Form S-6.

Respectfully submitted,
Eversheds Sutherland (US) LLP

BY: 
Stephen E. Roth

FOR THE COMMITTEE OF A UILITY I SURERS

cc: The Honorable Jay Clayton, Chairman
The Honorable Kara M. Stein, Commissioner
The Honorable Michael S. Piwowar, Commissioner
Valia Blass, Director, Division of Investment Management
William H. Hinman, Director, Division of Corporation Finance

Appendix A

**2017
THE COMMITTEE OF ANNUITY INSURERS
MEMBER LIST**

AIG
Allianz Life
Allstate Financial
Ameriprise Financial
Athene USA
AXA Equitable Life Insurance Company
Brighthouse Financial, Inc.
Fidelity Investments Life Insurance Company
Genworth Financial
Global Atlantic Life and Annuity Companies
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
The Hartford Life Insurance Companies
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Lincoln Financial Group
MassMutual Financial Group
Metropolitan Life Insurance Company
National Life Group
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
Sammons Financial Group
Symetra Financial Corporation
The Transamerica Companies
TIAA
USAA Life Insurance Company
Voya Financial, Inc.