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September 26, 2011

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Secretary
Commodity Futures Trading Commission
Three Lafayette Center
155 21st Street, NW
Washington, DC 20581

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

**Re: Release No. 34-65153; File No. S7-32-11: Acceptance of Public Submissions Regarding the Study of Stable Value Contracts**

Dear Commissioners:

We are submitting this letter on behalf of the Committee of Annuity Insurers (the "Committee") in connection with the Securities and Exchange Commission's (the "SEC") and the Commodity Futures Trading Commission's (the "CFTC," and together with the SEC, the "Commissions") joint request for comments (the "SVC Joint Request")[1] on stable value contracts ("SVCs") under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The Dodd-Frank Act requires the Commissions to conduct a study to determine whether SVCs fall within the definition of swap under Title VII of the Dodd-Frank Act and, if so, whether SVCs should be exempted from such definition (the "SVC Study");[2] the SVC Joint Request is intended to further such study.

For the reasons summarized below, stable value contracts that are issued by state-regulated insurance companies should not be viewed as falling within the definition of swap in the Dodd-Frank Act. Alternatively, such contracts should be exempted from that definition because they are insurance contracts subject to the full panoply of state insurance regulation.

**The Committee**

The Committee was formed in 1982 to address Federal legislative and regulatory issues relevant to the annuity industry and to participate in the development of Federal securities, banking,

[1] Acceptance of Public Submissions Regarding the Study of Stable Value Contracts, at 76 Fed. Reg. 53162 (August 25, 2011).

[2] Dodd-Frank Act Section 719(d)(1).

and tax policies regarding annuities. For nearly three decades, the Committee has played a prominent role in shaping the Federal government's policies with respect to annuities. Today the Committee is a coalition of 32 of the largest and most prominent issuers of annuity contracts. The Committee's member companies represent over 80% of the annuity business in the United States. A list of the Committee's member companies is attached as Appendix A.

**Background**

The definition of "stable value contract" in the Dodd-Frank Act is very broad and expansive, and could potentially be interpreted to encompass many non-variable product options commonly available in qualified plans, deferred compensation plans, or tuition savings plans. As acknowledged by a number of the questions in the SVC Joint Request, the SVC Study is intimately related to the definition of swap under Title VII of the Dodd-Frank Act. On behalf of the Committee, the undersigned previously commented on (1) the definition of swap under Title VII of the Dodd-Frank Act in a letter dated December 3, 2010[3] and (2) the Commissions' joint proposed rules and proposed interpretive guidance further defining the term swap under Title VII of the Dodd-Frank Act[4] in a letter dated July 22, 2011[5] (together, the "Committee Comment Letters"). The Committee Comment Letters intentionally did not cover SVCs because the Committee recognized that SVCs were to be addressed subsequently in connection with the SVC Study. As discussed and emphasized in the Committee Comment Letters, the Committee's member companies have critical and abiding interests in ensuring that the term swap is interpreted, applied and further defined in a manner that effectuates Congress' intent of not improperly and unintentionally encompassing the annuities and other guaranteed retirement income products that Committee members issue to broad classes of American workers, savers, investors, retirement plan participants and other policyholders. A number of these products could be SVCs within the statutory definition thereof and/or swaps within the statutory or proposed regulatory definition of swap. Accordingly, Committee members appreciate the opportunity to inform such study through these comments.

**Swaps and SVCs under the Dodd-Frank Act**

As noted above, the definition of stable value contract is very broad and could encompass many varieties of agreements or guaranties issued by insurance companies (a number of which, we submit, were not intended by Congress to be included). We understand that other commenters have or will describe various types of stable value contracts and their use in retirement plan arrangements. Rather than repeating information regarding SVCs issued by insurance companies herein, we refer to

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[3] Letter of Sutherland Asbill & Brennan LLP, on behalf of the Committee, dated December 3, 2010, attached as Appendix B to the letter of Sutherland Asbill & Brennan LLP, on behalf of the Committee, dated July 22, 2011, available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=47899&SearchText=committee%20of%20annuity.

[4] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Release No. 33-9204, 34-64372, 76 Fed. Reg. 29818 (May 23, 2011) (the "Product Definitions Proposing Release").

[5] Letter of Sutherland Asbill & Brennan LLP, on behalf of the Committee, dated July 22, 2011, available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=47899&SearchText=committee%20of%20annuity.

and endorse the information provided in the letter being submitted today by the American Council of Life Insurers.

The SVC Joint Request generally describes and discusses a type of SVC that generally is a component of stable value funds ("SVFs"), a type of investment commonly offered in 401(k) and other defined contribution plans (with the objective of providing preservation of principal, liquidity, and current income at levels higher than those provided by money market funds). In this context, the SVF sponsor or manager purchases SVCs that provide a guarantee, or "wrap," by the SVC provider to pay plan participants at book value should the market value of the SVF be less than the amount needed to pay that book value. This guarantee is, of course, subject to certain limitations and conditions and only applies to certain transactions (*e.g.,* it generally would not apply in the context of employer-driven events). With respect to insurance company providers, the SVC can take various forms, such as a general account guaranteed investment contract ("GIC"), a separate account GIC with a general account guarantee, or a synthetic GIC. The comments made herein apply to these types of SVCs as well as other types of insurance company agreements and arrangements that may be encompassed by the broad definition of stable value contract.

As noted in the SVC Joint Request, SVC providers include state-regulated insurance companies and federally- or state-regulated banks. However, *this comment letter only addresses SVCs issued by state-regulated insurance companies* ("insurance company SVCs").

SVFs and related SVCs are a key element of defined contribution retirement plans and provide an important (and generally the safest) investment option. Neither the structure and administration of SVFs nor the SVCs that "wrap" the SVFs lend themselves to speculative abuses or systemic risks of the type that Title VII of the Dodd-Frank Act is aimed at regulating.

### 1. *Insurance Company SVCs Should Not Be Included in the Definition of Swap*

As discussed more fully in the prior Committee Comment Letters with respect to annuity and life insurance products in general, the Dodd-Frank Act includes within clause (A)(ii) of the new swap definition, any contract that "provides for any purchase, sale, payment, or delivery ... that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence."[6] Notwithstanding the broad scope of this definition of "swap" in the Dodd-Frank Act, both during and following the Dodd-Frank Act legislative process, the insurance industry has taken considerable comfort in the fact that, while the Act gave the CFTC and the SEC rulemaking authority to interpret terms used in the Act, there was absolutely no indication that Congress intended the definition of swap to broadly include state-regulated insurance, annuity, and other guaranteed retirement income products. Simply put, the definition of swap set forth in Title VII of Dodd-Frank was never intended to encompass state-regulated insurance and annuity products. Similarly, while Congress clearly

[6] Dodd-Frank Act Section 721(a)(21), amending the Commodity Exchange Act (the "CEA") by adding paragraph 47 to Section 1a of the CEA. This definition of swap in new section 1a(47) of the CEA is cross-referenced in new §3(a)(69) of the Securities Exchange Act of 1934 (the "Exchange Act"), as added by Dodd-Frank section 761(a)(5). The definition of swap also determines the scope of agreements, contracts and transactions that could be "security-based swaps."

mandated the SVC Study and defined "stable value contract" very broadly, we respectfully submit that the SVC Study should conclude that Congress did not intend for insurance company SVCs to be defined as swaps. The practical result of including insurance company SVCs in the definition of swap, if they are not exempted, would be to bar state regulated insurance companies from providing this important retirement plan product.[7] Congress, in adopting Dodd-Frank, gave absolutely no indication that any such consequence was even contemplated, much less intended.

Insurance company SVCs are a type of annuity or guaranteed investment contract and are regulated as insurance products by the state insurance departments. The Product Definitions Proposing Release recognizes that swaps and insurance products are subject to fundamentally different and inconsistent regulatory regimes, and that nothing in Title VII suggests that state-regulated insurance products should instead be regulated as swaps. This includes SVCs as well as other types of annuity (and life insurance) products. Title VII was aimed at the largely unregulated swap or derivatives market; it was not intended to replace state regulation of insurance products, including insurance company SVCs.

SVCs should not be swept into the same regulatory category as swaps. SVCs are based on the excess, if any, of book value over market value. Plan participants in SVFs seek to transact at book value (principal plus accumulated interest) so their upside potential from a SVC is limited to the excess of book over market value. (Importantly, the book value guarantee is limited to participant transactions, generally plan benefit transactions, which in turn are limited by the terms of the plan). The SVC is, and should be viewed as, insurance – as a guarantee of book value; it is not a speculative investment or used for leverage. Conversely, the insurer's risk is also limited to the excess of book over market value. As discussed more fully in other comment letters,[8] insurance company SVCs are subject to reserve and capital requirements, underwriting standards, and all other applicable aspects of state insurance regulation. They should not be treated as swaps and therefore removed from state insurance regulation.

### 2. *Insurance Company SVCs Should Not Be Regulated As Swaps*

If the Commissions nevertheless determine that insurance company SVCs fall within the definition of swap, then an exemption from that definition for such products is appropriate and in the public interest for several reasons. First, insurance company SVCs are already subject to a thorough and comprehensive (state insurance) regulatory scheme; they are not the largely unregulated derivatives that Title VII of Dodd-Frank is intended to regulate. Second, insurance company SVCs do not present the risks, systemic or otherwise, posed by swaps because as noted above, their risk (and benefit) is limited to the difference between book and market value (which is itself controlled by various mechanisms, generally identified in the SVC Joint Request), and also because of the state

[7] See text below at footnote 10.

[8] *See, e.g.,* letter from the American Council of Life Insurers, September 26, 2011.

insurance regulatory structure.[9] Third, removing insurance company SVCs from state insurance regulation, and instead regulating them as swaps, would seriously disrupt the SVFs that are a key aspect of 401(k)s and other defined contribution retirement plans. The preemption provisions of the Dodd-Frank Act,[10] combined with state insurance regulatory requirements and prohibitions, would have the practical affect of barring state-regulated insurance companies from offering these products if they are regulated as swaps.

For the reasons discussed in the Committee's comment letter of July 22, 2011 with respect to annuities in general,[11] the proposed rules and guidance set forth in the Product Definitions Proposing Release are not appropriate or sufficient with respect to insurance company SVCs. However, the two alternative solutions discussed in that comment letter generally are appropriate for exempting insurance company SVCs from treatment as swaps. These alternatives are not mutually exclusive; the Commissions certainly can and should adopt both of them (as optional alternatives) with respect to annuities and life insurance in general as well as specifically with respect to insurance company SVCs.

### *A. Exemption Based on State Insurance Regulation (Original Recommendation)*

The approach to excluding insurance products from treatment as swaps originally supported by the Committee in its comment letter of December 3, 2010[12] (endorsing a recommendation originally made by the American Council of Life Insurers in its letter of November 12, 2010)[13] would appropriately and effectively exempt insurance company SVCs from the definition of swap. To briefly summarize, that approach would exclude from the definition of swap (and security-based swap) a contract (1) issued by an insurance company and subject to state insurance regulation, (2) that is a recognized type of insurance contract, and (3) that is not a type of contract that the CFTC or the SEC determines to regulate as a swap or security-based swap. This should include insurance company SVCs.

### *B. Exemption Based on Federal Securities Laws*

The alternative approach for excluding insurance products recommended by the Committee in its comment letter of July 22, 2011[14] would also appropriately exempt insurance company SVCs.

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[9] There are other mechanisms for limiting the risk of SVCs to providers, as noted in the SVC Joint Request (*e.g.*, immunization provisions, "pull to par" termination provisions). The SVF generally must consist of high quality debt instruments, and the SVC generally gives the provider a significant degree of control over the composition of the SVF.

[10] Sections 722(b) and 767 of the Dodd-Frank Act.

[11] See footnote 5 above.

[12] See footnote 3 above.

[13] Letter of American Council of Life Insurers, dated November 12, 2010, available at http://www.sec.gov/comments/s7-16-10/s71610-122.pdf

[14] See footnote 5 above.

That approach is essentially two-pronged. First, it would exclude, through regulation, insurance products that are excluded from the Securities Act of 1933 pursuant to section 3(a)(8) thereof (which excludes certain annuity and life insurance products). Second, that approach would also rely on statutory provisions in Title VII of Dodd-Frank that generally exclude securities from the definitions of swap and security-based swap.[15]

**Conclusion**

The SVC Study should conclude that insurance company SVCs are not swaps, or that if they are, then they should be exempted from the definition of swap. In their final actions regarding the Product Definitions Proposing Release, the Commissions should make it clear that the definition of swap in the Dodd-Frank Act does not include insurance company SVCs; alternatively, the Commissions' final regulations further defining "swap" should include one (or both) of the exemptions referred to above and the Commissions should confirm that the exemption covers insurance company SVCs.

The members of the Committee very much appreciate your consideration of the views expressed above. If you have any questions, please feel free to contact the undersigned.

Respectfully submitted,

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FOR THE COMMITTEE OF ANNUITY INSURERS

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[15] The Product Definitions Proposing Release states that "[t]he Dodd-Frank Act excludes purchases and sales of securities from the definitions of swap and security-based swap in a number of different clauses," citing CEA sections 1a(47)(B)(ii), (v), and (vi). Product Definitions Proposing Release, *supra* note 4, at 29830. See also CEA section 1a(47)(B)(vii).

Attachments: Appendix A

cc: Stephen A. Krane
David E. Aron
Matthew A. Daigler
Donna Chambers
Leah Drennan

**Appendix A**

# THE COMMITTEE OF ANNUITY INSURERS
# MEMBER LIST
**July 2011**

AEGON Group of Companies
Allstate Financial
AVIVA USA Corporation
AXA Equitable Life Insurance Company
Commonwealth Annuity and Life Insurance Company
*(a Goldman Sachs 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
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)*
SunAmerica Financial Group
Sun Life Financial
Symetra Financial
The Phoenix Life Insurance Company
TIAA-CREF
USAA Life Insurance Company