



April 1, 2008

Nancy M. Morris VIA ELECTRONIC MAIL
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

FOCUSonFiduciary™

Subject: Solicitation of Public Views Regarding Practices Being Developed
to Deal with the Increasing Number of Senior Investors
File No. S7-03-08

Dear Ms. Morris:

The National Association of Personal Financial Advisors (“NAPFA”)¹ appreciates the opportunity to submit these comments relative to the Commission’s efforts to enhance protections for senior investors. As fee-only fiduciary personal financial advisors, many NAPFA members deal extensively with senior investors. NAPFA members are often in a position to witness, after-the-fact, the result of ongoing abuse of our senior citizens through the unscrupulous sales practices of product sellers. Sadly, these abuses often lack available measures for private remediation. Once the damage has been done, it is often permanent, and the treasured nest egg of the senior investor has been substantially eroded.

In this correspondence we set forth several observations regarding some of the attributes of senior investors which make them particularly susceptible to fraud and poor sales practices (Section A). We then identify specific measures which some of our members employ to address the unique needs of their senior citizen clients (Section B). Tackling the abuse of senior investors will take a concerted, coordinated long-term effort by both securities industry participants and regulators. Hence, in this correspondence we also recommend steps the Office of Compliance Inspections and Examinations (OCIE) of the SEC, other divisions of the SEC, NASAA, state securities regulators, and FINRA can undertake to attack fraudulent sales practices, improve disclosures, prohibit certain abusive sales practices, and more broadly application of the fiduciary protections of the Investment Advisers Act of 1940 (Sections C, D, and E).

- A. Attributes of Senior Investors. It must first be asked as to why senior investors possess special needs. NAPFA members observe these characteristics of senior investors:
1. *Accumulations of Wealth.* Senior investors are more likely to possess accumulated wealth. This may result from qualified retirement plan rollovers into IRA accounts, sales of homes when “downsizing” or moving to lower-expense retirement communities, inherited wealth, or other means. As such, senior investors are specifically targeted by those who prey upon the unsuspecting.
 2. *Responsibility for Management of Retirement Nest Egg.* Senior investors are more likely to be “fearful” with regard to their investments. This is understandable, as senior investors possess the daunting challenge of managing their “retirement nest egg.” They are particularly susceptible to sales pitches which offer “guarantees” – even when such guarantees only apply at time of death (such as the case with many variable annuities) and even when such guarantees may only come at extremely high cost (as is the case with some variable annuities, and most equity indexed annuities). Moreover, salespersons are often trained to take advantage of the emotion of fear which is so often present in senior investors, in their marketing pitches.
 3. *Diminished Capacity.* Senior investors may, at some point, suffer from diminished capacity, making them even more susceptible to undue influence and/or other forms of abuse.
 4. *Ineffectiveness of Disclosure.* It has often been said that the federal securities laws’ entire focus is on disclosure. NAPFA notes that while enhancing disclosures is always a worthwhile endeavor, there exist inherent limits for disclosure documents – of any size and whatever the content. This is due to behavioral biases which individuals often exhibit in connection with their investment decisions. Such behavioral biases include “bounded rationality,” “rational ignorance,” insensitivity to the source of information, and the tendency of oral communications to trump written communications. This is especially true for many senior investors, as many do not avail themselves of additional informational resources available on the internet. Many senior investors, especially widows or widowers following the end of lifetime of a spouse who may have handled “financial matters” for the couple, are not attuned to read disclosure documents at all, and base their decisions entirely upon trust with the advisor into whom they place their confidence. NAPFA members have observed that senior investors are more likely to place their complete trust in their financial advisors, whether or not such trust is merited, and whether or not the “financial consultant” or “financial advisor” is legally bound to act in the best interests of the senior investor.

- B. Compliance Measures by Investment Advisors Designed To Address Senior Investors. You inquire as to methods adopted by investment advisory firms to discern and meet the changing needs of customers as they age. The following actions are undertaken by many members of NAPFA to address the unique needs of senior investors:
1. *Waiver of Confidentiality If Incapacity or Undue Influence Suspected.* Some NAPFA members request that their clients authorize a waiver of confidentiality with regard to their financial affairs. Under such a waiver of confidentiality and authorization, the personal financial advisor may, upon suspicion of diminished capacity and/or undue influence and/or the possibility of untreated physical or mental illness, contact appropriate family members, successor trustees, attorneys-in-fact (acting under durable powers of attorney), and the client's own private attorney. This form often stresses that the NAPFA member shall always act in good faith with regard to such communications, if they should occur. Some forms relieve the NAPFA member from liability by reason of such communication, if it is undertaken in good faith, but not in any manner which would waive rights granted under federal or state securities laws. These forms often stress that the personal financial advisor is not the client's guardian, and that the personal financial advisor does not possess a duty to contact the aforementioned persons, but that the personal financial advisor initiate contact with a senior's family members or others in order to protect the client's best interests.
 2. *Encourage Involvement of Family Members.* Many NAPFA members encourage meetings with client's family members and/or successor trustees. Moreover, as clients attain advanced ages, many NAPFA members encourage their clients, when appropriate, to share details regarding their financial affairs with key, trusted family members. Should intervention by a family member or trusted advisor be necessary later, such conferences and sharing of financial information can go a long way in speeding assistance to the client.
 3. *Increase Frequency of Personal Contact with Clients.* Many NAPFA members encourage semi-annual or even quarterly in-person contact with their clients of advanced ages. This is because more frequent contact is often necessary as a person's physical and/or mental health can change rapidly. Even greater personal contact with the client may occur if the personal financial advisor becomes aware of a situation that often leads to undue influence, such as the presence of a personal aide or housekeeper in the client's home.

4. *Encourage Utilization of Geriatric Care Managers.* Once a client's physical and/or mental condition has deteriorated, many NAPFA members suggest the employment of a geriatric care manager to monitor the client's health care and other needs.
5. *Monitor Account Withdrawals.* NAPFA members who practice with a great many senior citizens are often very proactive in monitoring withdrawals made by the clients from their investment accounts, including custodian-associated money market accounts. Some NAPFA members will seek to confirm with a client the purpose of any unusual withdrawal or of a smaller series of withdrawals.
6. *Paying Closer Attention to Proper Management of Conflicts of Interest.* NAPFA members, who are fee-only, avoid third-party fee payments which may trigger conflicts of interest. Even then, some conflicts of interest may arise from time to time. It should be noted that mere disclosure of a conflict of interest – while important – is not sufficient for an investment adviser to adhere to his or her fiduciary duties of loyalty, due care, and utmost good faith. All conflicts of interest, even when they are disclosed, must be properly managed. This means that an analysis of the situation must be undertaken from the perspective of what is in the best interests of the client, and advice must be given accordingly. Moreover, when dealing with those who may suffer from even a slight decrease in mental capacity, any "close call" in the analysis must be resolved in favor of the client, and against any interest of the investment adviser. This is because clients with diminished capacity may not possess the ability to provide *informed consent* to the conflict of interest, nor may the client be able to exercise sound judgment if presented with two or more alternatives in the decision-making process.

While there are a large number of situations which exist in which conflicts of interest must be appropriately managed and resolved, in particular NAPFA suggests that a compliance officer review be conducted when the following financial planning or investment analyses occur, for any client age 65 or older:

- a. Whether to purchase a lifetime annuity, versus investing funds with the investment adviser or registered representative;
- b. Whether to pay off a mortgage (versus investing the funds), or take out a mortgage (or reverse mortgage) to meet financial needs, or to invest funds with an investment adviser or registered representative;
- c. The exchange of one annuity contract for another; and

- d. The sale of any mutual fund which was bought with a sales load, in order to purchase a mutual fund which possesses another sales load (or higher 12b-1 fees, or 12b-1 fees which may extend in time beyond the length of time of 12b-1 fees in the original fund).
7. *Obtain Copy of Client's Estate Planning Documents.* To facilitate aid to the client, many NAPFA members obtain and review the client's estate planning documents, including wills, trust agreements, powers of attorney, and advance health care directives. Many NAPFA members encourage their clients to obtain estate planning documents the client may lack, and many NAPFA members encourage clients to review and update their estate planning documents periodically.
 8. *Provide Clients With Wallet Cards With Emergency Contact Information.* Some NAPFA members provide their clients with wallet-size, laminated cards, containing emergency contact information for the personal financial advisor. In this manner, should the client need assistance at times other than normal office hours, the client's personal financial advisor can be reached at home or by cell phone. They may also provide access to a service such as DocuBank which provides an ID with emergency telephone numbers for family members and access to a health care power of attorney, etc.
- C. Regulatory Response: Apply the Investment Advisers Act of 1940 Broadly, As Congress Intended. The Commission seeks in its request for comments those industry practices in dealing with senior investors that appear to be effective in ensuring that the firms deal fairly with senior investors. In this regard, NAPFA notes that fiduciary status is imposed as a means to protect consumers, including our senior investors, where there exists a wide knowledge gap. Fiduciary status is historically imposed in order to prevent abuse of the client by the person with the superior knowledge, and this is certainly the case in the context of clients and their personal financial advisors. Accordingly, it is evident that **the application of fiduciary duties upon those providing investment advisory services is by far the greatest measure which can be undertaken to ensure senior investors are protected.**

The fiduciary protections of the Investment Advisers Act of 1940 are intended to be applied broadly, and forcefully, and it is through their increased application by both federal and state securities regulators that senior citizens will be better protected. NAPFA urges the Commission to conform the securities industry to the Advisors Act and its requirements, rather than seek to further exceptions from the Advisors Act by seeking to "conform the law to current industry practices" (a dangerous concept, as revealed by the scandals plaguing the securities industry in

the past decade). Based upon the plain language of the Advisers Act and the Congressional history, the Commission can readily reverse its current course of action, in which it continues to refuse to apply the Advisers Act and the fiduciary duties upon all those who provide personal financial planning and investment advisory services. The Commission can choose to apply the Advisers Act much more broadly and forcefully, in order to protect our senior citizens. Hence NAPFA urges, again, that the Commission establish clear distinctions between salespersons in arms-length relationships with their customers and investment advisers in positions of trust and confidence with respect to their clients.

The Rand Report, issued recently, merely confirmed the huge amount of consumer confusion which exists in understanding the key distinctions between fiduciary advisers and non-fiduciary product salespersons. NAPFA has the following specific recommendations which will serve to ease this consumer confusion and more fully protect all investors, especially our senior citizens:

1. *Define "Solely Incidental" According To Its Plain Meaning.* NAPFA suggests the Commission adopt a definition of "solely incidental" in connection with the broker-dealer exclusion to the Investment Advisers Act. NAPFA's proposed definition is set forth in Exhibit A hereto.
2. *Mandate Disclosure of Type of Relationship.* NAPFA recommends that at the inception of each and every relationship between an investment adviser and/or registered representative and his or her client or customer, respectively, that a disclosure be mandated of the distinctions between registered representative and investment adviser. NAPFA suggests a form of disclosure in Exhibit B attached hereto.
3. *Prohibit Use of Misleading Titles.* NAPFA suggests that titles which denote relationships based upon trust and confidence be confined to those who are registered as investment advisers. Such titles include, but are not limited to, the following: "financial advisor," "financial consultant," "financial planner," "Certified Financial Planner™," "Chartered Financial Consultant™," "wealth manager," "wealth advisor," and "estate planner." NAPFA further suggests that all financial planning activities, whether undertaken comprehensively or in discrete (some would say "modular") fashion, be subject to the fiduciary duties of the Investment Advisers Act of 1940.
4. *Eliminate Inappropriate Use of 12b-1 Fees To Finance Advisory Services.* NAPFA further recommends that the Commission enforce the "special compensation" limitation on the broker-dealer exclusion to the Investment Advisers Act of 1940, by prohibiting the use of any 12b-1 fees to finance the provision of ongoing investment advisory services by registered representatives. Over and over again registered representatives, and even

associations which represent broker-dealer organizations, have admitted that these fees are utilized to provide ongoing investment advisory services to customers which are not undertaken in connection with the sale of the product.ⁱⁱ The Commission should not permit to be done indirectly (through 12b-1 fees) what cannot be done directly (i.e., fee-based brokerage accounts, which are no longer permitted). NAPFA urges OCIE, NASAA members, and FINRA to monitor whether the receipt of 12b-1 fees is, in fact, leading to the establishment of an investment advisory relationship to which fiduciary duties should be appropriately applied and enforced.

5. *Monitor Principal Trading for Abuses.* NAPFA recommends that OCIE, state securities regulators, and FINRA monitor whether principal trading in investment advisory relationships is being undertaken properly and in accordance with the investment adviser's fiduciary duties.
 - a. First and foremost, there should be adequate disclosure of *all of the material facts* relating to the principal trade, in order to secure from the investment advisory client *informed* consent.
 - b. Second, while a dual registrant – with informed consent of the client – is permitted to profit from the trade, the dual registrant is not permitted to profit *at the expense of the client*, as this would violate the dual registrant's fiduciary duties. In other words, principal trades should not be undertaken when a better price could have been obtained for the client in an agency trade (or else informed consent would not have been given, by any client, acting reasonably). This is in accord with an investment adviser's fiduciary duty, since even when disclosure of a conflict of interest has occurred the investment adviser possesses the continuing duty to act in the best interests of the client.
 - c. Third, NAPFA urges regulators to investigate whether dumping of securities has occurred in connection with a principal trade. Are there facts known to the dual registrant, relating to the specific security (or its issuer), or interest rate dynamics, or macro-economic events, which have prompted the dual registrant to seek to unload the security – for its own benefit but to the detriment of the client. Fiduciary duties would require full disclosure of such material facts to the client, and *informed* consent to any conflict of interest arising by virtue of such material facts.

NAPFA notes that while principal trading has occurred for a number of years, large amounts of fiduciary trading *under the fiduciary standard of conduct* have likely not occurred until adoption of the Commission's "Temporary Rule" in September 2007. NAPFA urges both federal and state securities regulators to play close attention, utilizing their anti-fraud authority, to the monitoring of investment advisers' fiduciary duties in connection with principal trades. No expansion of the "Temporary Rule" adopted by the Commission in September 2007 should occur, and certainly not before adequate time has passed to monitor and detect possible abuses. Moreover, NAPFA believes that the statutory exception for principal trades – with informed consent – contained in the Advisers Act, was intended to permit principal trades to occur when the client would be positively affected by permitting such rare event to occur, such as when price improvement was present, and was not intended to permit wholesale principal trading by a broker-dealer with its investment advisory clients in abrogation of its fiduciary responsibilities.

6. *Prohibit "Two Hats" and "Switching of Hats" and "Removal of the Fiduciary Hat."* NAPFA urges the Commission to not enact the "Special Rule" contained in its September 24, 2007 release [Release No. IA-2652; File No. S7-22-07; "Interpretive Rule Under the Advisers Act Affecting Broker-Dealers."] For the reasons expressed in our extensive prior comments dated November 2, 2007, dual registrants should not be permitted to wear both a fiduciary and non-fiduciary hat at the same time with respect to the same client, nor to "switch hats" back and forth between fiduciary and non-fiduciary status, nor to "remove the fiduciary hat" once it is assumed. It is clear under ample precedent that fiduciary status extends under the law to the entirety of the relationship. Furthermore, as we previously noted in our extensive comments we submitted on this Proposed Rule, fiduciary duties cannot be waived by the client, as they are imposed by law in order to effect sound public purposes.

Moreover, any attempt to embrace a client in a fiduciary relationship based upon trust and confidence, only to later seek to cast off fiduciary duties and enter into an arms-length relationship with the customer, amounts to "bait-and-switch" and is likely to run afoul of general consumer protection statutes which may apply under state law. For example, under Section 6-1-105 of the Colorado Consumer Protection Act (2006) deceptive trade practices include both: (1) the advertisement of "goods, services, or property with intent not to sell them as advertised," and (2) the employment of "'bait and switch' advertising, which is advertising accompanied by an effort to sell goods, services, or property other than those advertised or on terms other than those advertised and which is also accompanied by one or more of the following practices" (several practices set forth, including refusal to offer services advertised, or disparagement of the services advertised). NAPFA urges the states to carefully monitor advertisements by financial services firms in their states, and to apply the

state consumer protection statutes to prohibit advertisements of financial services relationships based upon trust and confidence when in fact they are utilized mainly to promote arms-length product sales activities.

7. *Sponsor An Annual "Fiduciary Forum."* NAPFA observes that many participants in the securities industry are unaware of the extensive reach of federal and state securities laws which impose fiduciary status through the broad definition of the term "investment adviser" [and, as noted in *Financial Planning Association vs. SEC* 482 F.3d 481 (D.C. Cir., 2007)]. Moreover as the D.C. Circuit Court of Appeals stated, the plain language of the Advisers Act contains only a "precise exemption for broker-dealers." Also, the Court noted that the "SEC's suggestion that 'new' broker-dealer marketing developments fall within the scope of its authority ... ignores its own contemporaneous understanding of Congressional intent to capture such developments and the *very narrow* broker-dealer exclusion." [*Emphasis added.*]

Moreover, many actors in the securities industry appear unaware of the imposition of fiduciary duties upon relationships based upon trust and confidence through state common law. Additionally, many securities industry participants lack an understanding of fiduciary duties, or the required conduct in order to adhere to same, and also fail to understand that fiduciary duties cannot be waived by a client.

Hence, NAPFA repeats its call for a "Fiduciary Forum" to be hosted annually by federal and/or state securities regulators. The goals of this forum would include: (1) educate forum participants on the broad application of fiduciary duties under federal law and state common law to personal financial advisory and investment advisory activities, and the very narrow scope of the broker-dealer exemption; (2) promote an understanding of fiduciary standards of conduct; and (3) suggest best practices which can be observed in adhering to fiduciary principles.

- D. Regulatory Response: Equity Indexed Annuities: Define Them As A “Security,” Mandate Clear Disclosure of Fees and Compensation, Require Back-Tested Returns Comparisons, and Require Additional Disclosures. NAPFA members have seen unscrupulous insurance agents, time and again, market equity indexed annuities as investment vehicles, not as insurance products. Such marketing efforts target senior citizens. NAPFA members have also seen senior citizens sold equity index annuity products with surrender periods as long as 25 years, and with surrender fees of as much as 25%, declining only slowly over time, and with surrender fees extending even after the end of lifetime of the annuitant. Indeed, lunch seminars and marketing materials abound in which high-cost equity indexed annuities are marketed as investment products. It is long past time that the Commission define equity indexed annuities, which clearly have investment characteristics and are marketed as such, as a “security” and to accordingly regulate them.

NAPFA supports the efforts by many state securities regulators to apply investment advisor registration and fiduciary duty requirements to those insurance agents who sell equity indexed annuities, especially following the provision of advice to sell another security which was owned by the client.

In addition, clearer disclosures for equity indexed annuities should be provided. These should include clear point-of-sale disclosures, in dollar amounts according to the amount invested in the contract, of all of the fees and costs of these products and the compensation paid to the salesperson in association with its sale. Other disclosures should set forth hypothetical returns in a standardized format. For example, each equity index annuity investment option should contain a disclosure of the hypothetical back-tested performance of the annuity product over the past 20 years, for each option within the annuity contract, with comparisons provided year-by-year (and cumulatively) to bond index returns, to S&P 500 index annual returns, and to another index (such as the Russell 2000, if appropriate to the option chosen).

In addition, NAPFA members have often seen equity indexed annuities touted for their suggested great benefits, with little or no discussion of their adverse characteristics. Hence, NAPFA suggests a special form of disclosure for equity indexed annuity products accompany each sale of same, as set forth in Exhibit C hereto. NAPFA further suggests that each sale of these products be accompanied with a 30-day right of rescission, in order to ensure that senior citizens sold these products possess adequate time to take the annuity contract and disclosure documents to trusted advisors for review.

- E. Regulatory Response: Variable Annuities: Enhanced Point-Of-Sale Disclosures. Senior citizens are often targeted for sales of variable annuities. While variable annuities possess their uses, these are highly complex investment vehicles. Moreover, in marketing to senior citizens through luncheon seminars and otherwise, the “guarantees” of variable annuities are often hyped – and misunderstood by senior citizens who often believe that they cannot lose money on these products during their lifetimes. As with equity-indexed annuities, NAPFA suggests point-of-sale disclosures be adopted for the sale of these products, mandating disclosure in writing of the amount of all forms of compensation associated with their sale, and specifying that amount in a dollar figure according to the amount invested in the contract. In addition, NAPFA suggests the form of disclosure be required for each variable annuity sale as set forth in Exhibit D hereto.

While NAPFA desires uniformity nationwide as to point-of-sales disclosures for the sale of pooled investment vehicles and equity-indexed annuities, efforts to adopt such disclosures at the national level have been delayed. Hence, NAPFA suggests that the state securities regulators consider adopting disclosures at point-of-sale under the anti-fraud authority they retain,ⁱⁱⁱ using several of the states as a laboratory to measure the effectiveness of various disclosures. This may enhance the form and content of national point-of-sale disclosures once they are eventually adopted by the Commission.

In conclusion, senior investors desire, and need, trusted personal financial advisors. NAPFA has suggested several “best practices” for use by investment advisers in dealing with senior investors. NAPFA has also suggested additional disclosures regarding the nature of the relationship between the securities industry participant and the customer or client. NAPFA has also suggested specific disclosures in connection with the sale of certain annuity products. However, NAPFA stresses that, due to the inherent limitations of disclosure, the Commission and state securities regulators should fully apply the provisions of the Investment Advisers Act of 1940, and its fiduciary protections, to all those who hold themselves out as trusted advisors and to all those who provide advisory services of an ongoing nature. NAPFA believes that senior investors (and most other investors) both desire, and need, trusted personal financial advisors in order to navigate this increasingly complex financial world.

It must be recognized that the world is far more complex for individual investors today than it was just a generation ago. There exist a broader variety of investment products, including many types pooled and/or hybrid products, employing a broad range of strategies. This explosion of products has hampered the ability of individual investors to sort through the many thousands of investment products to find those very few which best fit within the investor’s portfolios. Furthermore, as such investment vehicles have proliferated, individual investors – especially seniors - are challenged to discern an investment product’s true “total” fees, costs, investment characteristics, tax consequences, and risks.

Additionally, U.S. tax laws have increasingly become more complex, presenting both opportunities for the wise through proper planning, but also traps for the unwary.

As the sophistication of our capital markets, as well as portfolio construction and management methodology, have increased, so has the knowledge gap between individual consumers and knowledgeable financial advisors. Investment theory continues to evolve, with new insights gained from academic research each year. In constructing an investment portfolio today a financial advisor must take into account not only the individual investor's risk tolerance and investment time horizon, but also the investor's tax situation (present and future) and risks to which the investor is exposed in other aspects of his or her life.

Personal financial advisors must embrace fiduciary standards of conduct, at all times, and government policies should foster this development. In the end, senior investors, and our other fellow citizens – need and desire financial advisors into whom they can place their trust. They need assurance that the financial advisor will – at all times – keep the best interests of the client paramount.

Continuing to address the unique needs of senior investors will involve actions both by regulators as well as those in the financial services industry. NAPFA and its members will continue to seek out best practices which can better protect their clients. NAPFA urges the Commission and state securities regulators to embrace and enforce the application of fiduciary standards of conduct – the highest standards under the law – for all those providing investment and financial advisory services. The application of fiduciary principles is the most significant means which can be readily adopted to better afford our senior citizens with the protections they deserve.

Our senior citizens are subject to a huge amount of abusive sales practices. While outright fraud exists and must be countered, other sales practices exist which end up costing senior investors far more - billions and billions each year in excessive fees and costs. Hence, we urge regulators to act quickly to adopt new rules and/or enforcement mechanisms to protect senior investors.

Again, the National Association of Personal Financial Advisors thanks the Commission for the opportunity to submit these comments. As the nation's leading organization of fiduciary and fee-only financial advisors, we are available to respond to questions or submit further comments as you may desire.

Respectfully,

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EXHIBIT A: PROPOSED DEFINITION OF “SOLELY INCIDENTAL”**PROPOSAL: A DEFINITION OF “SOLELY INCIDENTAL”**

1. Under the limited exclusion from the application of the Investment Advisers Act of 1940, broker-dealers and their registered representatives may provide investment advice only when it is *solely incidental* to a securities transaction and only when *no special compensation* is received for such investment advice. “Solely incidental” or “merely incidental” investment advice means only that advice in connection with the sale of a security, such as explaining the fees, costs and characteristics of a security and the risks of the security, so that the investment advice is discrete, minor, casual, and at all times subordinate to the sale process.
2. The following activities are illustrative of forms of advice which is not “solely incidental” to a securities transaction (this is not intended to be an exclusive listing):
 - a. Strategic asset allocation - The division of assets within an investment portfolio with regards to the long term view of the risk and return profile of those asset classes
 - b. Tactical asset allocation - modify their asset allocation according to the valuation of the markets in which they are invested or other valuation or economic factors
 - c. Monitoring an investment portfolio for purposes of advising to switch investments between various securities, or even between sub-accounts of a variable annuity
 - d. Any discretionary authority to effect a trade in a security (even if the discretion only relates to the timing of the trade, and not to the identity of the security)
 - e. Preparing a financial plan addressing the extent, amount, or timing of withdrawals during retirement
 - f. Preparing a financial plan advising as to the amount necessary to accumulate to reach any particular financial goal, such as retirement or educational expenses, or advising as to what type of account (i.e., traditional or Roth IRA or taxable account) to be utilized to effect retirement savings, which is followed by a recommendation or the sale of a security
 - g. Preparing a financial plan which includes any one of more of the following: risk management issues (asset protection planning, whether through insurance or other means), estate planning, and/or tax planning , which is followed by a recommendation or the sale of a security
 - h. Regular or periodic reviews of a client’s investment portfolio, with the goal of determining whether to rebalance the investment portfolio or otherwise address risk levels of the portfolio.
3. Once investment advice has been provided to a client which is subject to the Advisers Act and its imposition of fiduciary duties, further investment advice always remains subject to the Advisers Act and cannot be considered “solely incidental.” Section 215 of the Advisers Act does not permit a client to waive the protections of the broad fiduciary duties of due care, loyalty, and utmost good faith imposed by the Advisers Act.

**EXHIBIT B: DISCLOSURE OF TYPE OF RELATIONSHIP:
INVESTMENT ADVISOR OR REGISTERED REPRESENTATIVE**

UNDERSTANDING WHO WE ARE. Investment services providers fall into two categories: (1) investment advisers; and (2) brokers. Key differences exist as to the types of services offered, the fees and costs associated with such services, and the different federal and state regulatory requirements and the resulting different legal obligations to their clients or customers. Important distinctions – including whether the provider has a clear obligation to act in your best interests or disclose conflicts of interest – depend on which legal category the provider falls into under our securities laws. *Following is some basic information you can use to find an investment services provider who is right for you – one who offers the services you want on terms you understand and accept.*

Investment Advisers. The term investment adviser is a legal term that describes a broad range of people who are in the business of giving advice about securities (the term “securities” includes stocks, bonds, mutual funds, annuities, and other types of investments). They may use a variety of titles in addition to investment adviser, such as financial planner, financial advisor, financial consultant, investment manager, investment counsel, asset manager, wealth manager, or portfolio manager.

Services Provided. Investment advisers provide ongoing management of investments based on the client’s objectives. The client of an investment adviser may, or may not, give the adviser authority to make investment decisions without having to get prior approval from the client for each transaction (called “discretionary authority”).

Compensation. Most investment advisers charge fees for their services which clients pay directly to the provider. They may be hourly fees or a flat fee or retainer fee for a particular service or range of services. In some instances they may also include a performance fee based on how well the client’s account performs.

Legal Duties To You, The Client. Investment advisers are subject to a broad fiduciary duties of due care, loyalty, and utmost good faith to their clients. That means they have to put your best interests ahead of theirs at all times by providing advice and recommending investments that they view as being the best for you. Investment advisers also are required to provide up-front disclosures about their qualifications, what services they provide, how they are compensated, possible conflicts of interest, and whether they have any record of disciplinary actions against them. You should ask for, and receive, a copy of the investment adviser’s disclosure brochure (SEC Form ADV, Part 2, or its equivalent), which contains detailed information about the investment adviser, investment philosophies, fees, conflicts of interest, and how such conflicts of interest are managed to keep your best interests paramount at all time. Investment advisers are regulated directly by either the U.S. Securities and Exchange Commission (SEC) or by state securities regulators, depending on the amount of assets they have under management. You can find out whether a person or firm is registered or licensed as an investment adviser by calling your state securities regulator using the contact information on the NASAA website: www.nasaa.org or by visiting: www.adviserinfo.sec.gov.

- **cont. UNDERSTANDING WHO WE ARE.**

Brokers. The terms broker and broker-dealer are legal terms that refer to people who are in the business of buying and selling securities (called trading) for customers. Individual salespeople employed by brokerage firms are often called stockbrokers and are officially referred to as *registered representatives* of the brokerage firm.

Products Provided. Brokers engage in the buying and selling of securities, including stocks, bonds, CDs, mutual funds, annuities, and other types of securities. Brokers sell products, and any investment advice they provide must only be solely incidental to the sale of the product or security.

Compensation. Brokers typically receive their compensation based on commissions clients pay each time they buy or sell a security, and through principal trading (mark-ups and mark-downs on bond prices, selling or purchasing stocks or other securities from or to the broker-dealer firm’s own inventory). Other compensation may be paid to a brokerage firm (or, indirectly, to the broker) resulting from the sale of a product, such as 12b-1 fees, soft dollar compensation, bid-ask spreads (including payment for order flow to market makers), and other indirect payments. Commission-based compensation can be an affordable option for customers who expect to trade only rarely, but the payment of commissions and other indirect compensation to brokers by product manufacturers and others may expose customers to potential conflicts of interest, such as creating an incentive to recommend frequent trades or particular investment products.

Legal Duty To Their Customers. Brokers are generally not considered to have a broad fiduciary duty to their customers, although this standard may apply in certain limited circumstances. Instead, brokers are required: (1) to know your financial situation well enough to understand your financial needs, and (2) to recommend investments that are suitable for you (mainly as to risk, as applied to your situation) based on that knowledge. They are not required to provide up-front disclosure of the type provided by investment advisers. In addition to being regulated directly by the SEC and by state securities regulators, brokers are subject to regulation by an industry self-regulatory organization, the Financial Industry Regulatory Authority (FINRA). You can find out whether a person or firm is registered or licensed as a broker and check out their disciplinary record by calling your state securities regulator using the contact information on the NASAA website: www.nasaa.org, or by using FINRA’s “BrokerCheck” at www.finra.org.

Date: _____, 20____ **Client or Customer Name:** _____

I confirm to you that in my relationship with you I am acting as (check one):

____ **an investment adviser**

____ **a broker**

_____ **(signature)**

- cont. EXHIBIT B

The foregoing proposed form is based in large measure upon the “Coalition on Investor Education” brochure, *Cutting Through the Confusion*, available at www.nasaa.org. Consistent with NAPFA’s view that the use of titles implying fiduciary status should trigger investment adviser registration and application of the Advisers Act and its fiduciary duties, NAPFA has confined the use of the titles “financial planner,” “financial consultant,” and “financial advisor” to investment advisers. Additionally, consistent with the view that fee-based compensation is not permitted unless governed by the Advisers Act, the description of brokerage compensation is limited to commissions, profits from principal trading, and certain other third-party compensation (soft dollars, etc.). While 12b-1 fees are also noted to exist as a means of broker-dealer compensation, NAPFA has recommended that the SEC revised its rules on 12b-1 fees to exclude those which would serve to compensate brokers for providing ongoing investment advisory services, as this would constitute “special compensation” and not be excluded from the Advisers Act’s applicability.

EXHIBIT C: SUGGESTED POINT-OF-SALE DISCLOSURE, EQUITY-INDEXED ANNUITIES

MANDATORY DISCLOSURE FOR EQUITY INDEX ANNUITY SALES

This is an insurance product. If this product is being sold to you as an “investment” and not as “insurance,” this equity index annuity must be accompanied by a prospectus and the salesperson must be licensed as a registered representative or investment adviser representative.

The Costs of Equity Index Annuities: Something To Watch Closely. The costs found in equity index annuity contracts can have a significant effect on the investment performance of the annuity contract. Equity index annuities that are sold by agents are likely to involve sales charges (which the issuer pays the agent) and/or lengthy surrender fees (which the insurance company charges the annuity owner if he or she cancels the contract prematurely, and which are often utilized to compensate the insurance company for fees already paid to the agent). If you purchase an equity index annuity, be certain to understand the withdrawal rules associated with any removal of funds from the annuity product.

Warning From The North American Securities Administrators Association. This warning has been issued regarding variable annuity sales: “What might be a suitable investment for one investor might not be right for another. Securities professionals must know their customers’ financial situation and refrain from recommending investments that they have reason to believe are unsuitable. For example, variable and equity indexed annuities are often unsuitable for senior citizens because those products are generally long-term investments that limit access to invested funds. But sales agents stand to earn high commissions on these investment products so they don’t always adhere to the suitability standards – with dire consequences for seniors. Remember: Make sure your investments match up with your age, your need for access to money, and your risk tolerance.” (From “State Securities Regulators Identify Top 10 Traps Facing Investors,” May 15, 2007.) For more information, visit www.nasaa.org.

Disclosure of Returns Offered By Investment Options: For this product, the following are required disclosures:

| Annualized Returns Over 1 Year (2006) | | | Annualized Returns Over 5 Years (Jan. 1, 2002-Dec. 31, 2006) | | | Annualized Returns Over 10 Years (Jan. 1, 1997 – Dec. 31, 2006) | | | Annualized Returns Over ___ Years (equal to max. period for surrender charges) | | |
|---------------------------------------|--|---------------|--|---|---------------|---|--|---------------|--|---|---------------|
| Annuity Option, No Surrender | Annuity Option, With Full Surrender After 1 Year | S&P 500 Index | Annuity Option, No Surrender | Annuity Option, With Full Surrender After 5 Years | S&P 500 Index | Annuity Option, No Surrender | Annuity Option, With Full Surrender After 50 Years | S&P 500 Index | Annuity Option, No Surrender | Annuity Option, With Full Surrender After ___ Years | S&P 500 Index |
| % | % | % | % | % | % | % | % | % | % | % | % |
| | | | | | | | | | | | |

Returns are shown for the Standard and Poors’ 500 Index, an unmanaged stock index. Index returns assume that dividends are reinvested. Returns for the annuity account tied to the index are shown assuming: (1) no withdrawals are undertaken; and (2) assuming that no funds are withdrawn until the end of the period shown, but

that at the end of such period all funds are withdrawn and any applicable surrender charge is paid. All returns are calculated based upon the formulas utilized in the annuity contract.

[Repeat disclosure for each other indexed option. Also show historical returns for any fixed account.]

If you desire to proceed to purchase an equity index annuity contract, you must read and initial each of the following:

I believe that the equity index annuity is appropriate for my insurance needs, given my financial objectives and needs. I am purchasing this annuity with funds that I do not need for current (or near-term) expenses.

I understand that the credit given to me during any period for index returns during that period does not include dividends which would have been received by an index fund tied to that index and which would otherwise have been reinvested in that index. I also understand that there are caps on index returns credited to my contract.

I understand that I will possess limited rights to withdraw funds from the annuity product, and that any withdrawals in excess of the amounts permitted under the annuity contract will incur a substantial surrender fee until such time as surrender fees disappear.

I have been provided with a specimen copy of the actual annuity contract, have reviewed it, and have compared the contract terms against any representations the salesperson may have made to me.

I am aware that the insurance salesperson does not possess a broad fiduciary duty to act in my best interests, and instead represents the insurance company.

I understand that the ability of the insurance company to make payments to me, upon surrender, is dependent upon the financial strength of the insurance company, and that this investment is not insured against loss of principal due to default by the insurance company by any federal or state government agency.

I understand that any withdrawals from the annuity of gains in the annuity will be taxed at my ordinary income tax rates, and will not receive more favorable long-term capital gain treatment which may have been available through a stock mutual fund.

I understand that withdrawals from the annuity before I reach age 59½, like early withdrawals from other tax-deferred products, may be subject to a 10% federal penalty tax.

I understand that, unlike mutual funds held in taxable accounts, annuities do not receive any stepped-up basis which eliminates capital gains at the death of the mutual fund owner, and that beneficiaries of the annuity will be taxed on the annuity's gains at their ordinary income tax rates, which (combined federal, state and local) tax rates may be higher or lower than my ordinary income tax rate, depending upon the situation.

I understand that if I replace an existing annuity or life insurance policy with a equity indexed annuity contract, the death benefit promised under the prior annuity or insurance policy (including any guarantee that my beneficiary will receive more than the annuity's current market value) will not transfer to my new annuity. Furthermore, I understand that I may incur new sales charges and a new surrender fee period without necessarily receiving any major benefit as a result of the replacement.

THIS FORM MUST BE INITIALED, SIGNED, AND RETAINED BY THE ANNUITY SALESPERSON AND/OR HIS OR HER FIRM. A COPY OF THIS DISCLOSURE MUST BE PROVIDED TO THE CONSUMER WITH THE ORIGINAL ANNUITY CONTRACT.

(SIGNATURES)

EXHIBIT D: SUGGESTED POINT-OF-SALE DISCLOSURE, VARIABLE ANNUITIES

This disclosure is required by the laws and/or regulations of this state and may not be altered by any entity of person. Please read this disclosure carefully.

MANDATORY DISCLOSURE FOR VARIABLE ANNUITY SALES

The Costs Of Variable Annuities: Something To Watch Closely. The combined costs found in variable annuity contracts can have a significant effect on the investment performance of the annuity contract. Even seemingly small differences in mutual fund and annuity contract expenses can, over time, have a dramatic effect on the performance of your investments. Variable annuities charge mortality and expense charges and certain administrative fees. These fees are in addition to the management and administrative fees of the funds (subaccounts) offered within the variable annuity product. In addition, annuities that are sold by agents are likely to involve sales charges (which the issuer pays the agent) and/or surrender fees (which the insurance company charges the annuity owner if he or she cancels the contract prematurely, and which are often utilized to compensate the insurance company for fees already paid to the agent). In addition, certain optional features of annuities (such as guaranteed income benefits) also result in additional annual expense charges. The fees charged by a variable annuity are described in its prospectus. When comparing variable annuities always obtain the prospectus prior to your purchase – and read the prospectus carefully.

A Variable Annuity Is A Long-Term Investment. It may take ten, twenty or more years for the benefits of tax deferral to offset the costs associated with a variable annuity under current income tax laws.

Warning From The North American Securities Administrators Association. This warning has been issued regarding variable annuity sales: “What might be a suitable investment for one investor might not be right for another. Securities professionals must know their customers’ financial situation and refrain from recommending investments that they have reason to believe are unsuitable. For example, variable and equity indexed annuities are often unsuitable for senior citizens because those products are generally long-term investments that limit access to invested funds. But sales agents stand to earn high commissions on these investment products so they don’t always adhere to the suitability standards – with dire consequences for seniors. Remember: Make sure your investments match up with your age, your need for access to money, and your risk tolerance.” (From “State Securities Regulators Identify Top 10 Traps Facing Investors,” May 15, 2007.) For more information, visit www.nasaa.org.

If you desire to proceed to purchase a variable annuity contract, you must read and initial each of the following:

I believe that the variable annuity is appropriate for my insurance needs and financial objectives, considering my tax bracket, investments, and financial status.

I understand that a nonqualified variable annuity is a deferred annuity and that I may not see a benefit from tax-deferred compounding for 10-20 years or more.

I understand that there is no tax advantage for holding a variable annuity in a traditional IRA, Roth IRA, 401(k), or other qualified retirement plan.

I am purchasing this annuity with funds that I do not need for current (or near-term) expenses.

I understand that withdrawals from the annuity before I reach age 59½, like early withdrawals from other tax-deferred products, may be subject to a 10% federal penalty tax.

I understand that I should invest in a variable annuity only after contributing the maximum amount to qualified plans (such as IRAs and 401(k) plans) that are available to me. Qualified plans may feature tax-deductible contributions, often offer more investment options than annuity contracts, and do not charge the mortality and expense risk charges and administrative fees that annuities do.

I am in a higher income tax bracket. I understand that an annuity's expenses (including underlying portfolio expenses) can outweigh the benefits of tax-deferred compounding for investors in lower tax brackets. Those investors may be able to earn higher total returns by investing in mutual funds outside of an annuity.

I understand that any growth in the value of the variable annuity, when withdrawn from the annuity contract, will be taxed at ordinary income tax rates and will not receive long-term capital gains treatment as to gains (as mutual funds held in taxable accounts would receive as to long-term capital gains), nor qualified dividend treatment, which results in lower marginal rates of taxation in most instances. I also understand that foreign tax credits are not available to me for international investments held in variable annuities. I further understand that tax-managed or otherwise tax-efficient mutual funds nearly always result in less taxation to the owner than variable annuities, as cash funds are pulled from these types of investments and utilized to meet expense needs.

I understand that, unlike mutual funds held in taxable accounts, annuities do not receive any stepped-up basis which eliminates capital gains at the death of the mutual fund owner, and that beneficiaries of the annuity will be taxed on the annuity's gains at their ordinary income tax rates, which (combined federal, state and local) tax rates may be higher or lower than my ordinary income tax rate, depending upon the situation.

I understand that a variable annuity, like other securities, is subject to market risk and that the contract does not protect me from losing money. I understand that accumulation values fluctuate and that the contract I am applying for does not guarantee a fixed dollar value for my assets. I understand that any "guarantees" only result in a return of the principal amount invested (or some other amount) (less withdrawals) only upon the death of the annuitant and/or annuity contract owner, as set forth in the prospectus.

I understand that if I replace an existing annuity or life insurance policy with a variable annuity contract, the death benefit promised under the existing policy (including any guarantee that my beneficiary will receive more than the annuity's current market value) will not transfer to my new annuity. Furthermore, I understand that I may incur new sales charges and a new surrender fee period without necessarily receiving any major benefit as a result of the replacement.

Customer Signature

Customer Signature

Date: _____

Date: _____

THIS FORM MUST BE INITIALED, SIGNED, AND RETAINED BY THE ANNUITY SALESPERSON AND/OR HIS OR HER FIRM. A COPY OF THIS DISCLOSURE MUST BE PROVIDED TO THE CONSUMER WITH THE ORIGINAL ANNUITY CONTRACT.

ⁱ NAPFA has more than 1,700 members across the United States. All NAPFA-Registered Financial Advisors must submit a comprehensive financial plan and undergo a thorough review of their qualifications prior to admission.

NAPFA-Registered Financial Advisors all sign a *Fiduciary Oath* which states that the advisor will only work in good faith and with the best interests of the consumer at heart. NAPFA-Registered Financial Advisors are strictly Fee-Only®, which means they do not accept commissions or any additional fees from outside sources for the recommendations they make to their clients.

NAPFA's Code of Ethics provides:

Objectivity: NAPFA members strive to be as unbiased as possible in providing advice to clients and NAPFA members practice on a fee-only basis.

Confidentiality: NAPFA members shall keep all client data private unless authorization is received from the client to share it. NAPFA members shall treat all documents with care and take care when disposing of them. Relations with clients shall be kept private.

Competence: NAPFA members shall strive to maintain a high level of knowledge and ability. Members shall attain continuing education at least at the minimum level required by NAPFA. Members shall not provide advice in areas where they are not capable.

Fairness & Suitability: Dealings and recommendation with clients will always be in the client's best interests. NAPFA members put their clients first.

Integrity & Honesty: NAPFA members will endeavor to always take the high road and to be ever mindful of the potential for misunderstanding that can accrue in normal human interactions. NAPFA members will be diligent to keep actions and reactions so far above board that a thinking client, or other professional, would not doubt intentions. In all actions, NAPFA members should be mindful that in addition to serving our clients, we are about the business of building a profession and our actions should reflect this.

Regulatory Compliance: NAPFA members will strive to maintain conformity with legal regulations.

Complete Disclosure: NAPFA members shall fully describe method of compensation and potential conflicts of interest to clients and also specify the total cost of investments.

Professionalism: NAPFA members shall conduct themselves in a way that would be a credit to NAPFA at all times. NAPFA membership involves integrity, honest treatment of clients, and treating people with respect.

ⁱⁱ See Comment Letter of NAPFA member Ron A. Rhoades, June 18, 2007, re: SEC File Number 4538 (12b-1 Fees Forum).

ⁱⁱⁱ The states retain authority to regulate broker-dealer conduct. "Although the preemption provision expressly prohibits any state from imposing conditions on the use of a covered security's offering documents, the savings clause gives the Attorney General authority to 'bring enforcement actions with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions.'" *Capital Research and Management Company v. Brown*, B189249 (Cal. App. 1/26/2007) (Cal. App., 2007)