

January 13, 2006

Ms. Nancy Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.W.
Washington, D.C. 20549-9303

Re: Rule 202(a)(11)-1 Under the Investment Advisers Act of 1940 (File No. S7-25-99)

Dear Ms. Morris:

The American Council of Life Insurers (ACLI) respectfully requests a three month extension of the date for compliance with new Rule 202(a)(11)-1 under the Investment Advisers Act of 1940. The rule involves the application of the Investment Advisers Act to broker-dealers under certain circumstances. Many of our members¹ manufacture variable life insurance and variable annuities distributed through registered broker-dealers. Some insurers' agents and broker-dealer affiliates conduct investment advisory activities covered by the rule. Our industry's experience in adjusting to the rule and a number of recent developments warrant an extension of the compliance date. This letter raises some of the same concerns in our initial request, as well as other supplemental issues.

The Rule's Chronology

New Rule 202(a)(11)-1 under the Investment Advisers Act of 1940 clarifies the scope of the broker-dealer exclusion from the definition of investment adviser. The new rule has an important impact on broker-dealers affiliated with life insurers requiring significant systems and structural changes. In September, the SEC extended the rule's October 24, 2005, compliance date until January 31, 2006, in response to requests from ACLI, the Securities Industry Association, and the Financial Services Institute.² On December 16, 2006, the SEC granted a no-action letter responding to questions concerning the application of the rule to financial planning activities of broker-dealers.³ The no-action letter provides several useful clarifications that life insurers are currently implementing as supplements to new programs developed for Rule 202(a)(11)-1. We

¹ ACLI's 356 life insurers represent 80 percent of total industry assets, 78 percent of total life insurance premiums, and 84 percent of total annuity considerations in the United States.

² See ACLI rulemaking petition dated July 27, 2005, which is available at <http://www.sec.gov/rules/petitions/4-507a.pdf> , SIA rulemaking petition dated July 28, 2005, which is available at <http://www.sec.gov/rules/petitions/petn4-507.pdf> , and FSI rulemaking petition dated August 25, 2005, which is available at <http://www.sec.gov/rules/petitions/4-507c.pdf> .

³ SEC letter issued to Securities Industry Association dated Dec. 16, 2005, which is available at <http://www.sec.gov/divisions/investment/noaction/sia121605.htm> .

note that the Securities Industry Association filed a letter dated January 10, 2006, requesting a three month additional extension of the rule's compliance date until March 31, 2006.

Regulatory Background and Issues Presented

The principal impact of the new rule on life insurers involves the broker-dealer exclusion from the definition of investment adviser. Section 202(a)(11) defines investment advisers as persons who receive compensation for providing advice about securities as part of a regular business. Section 202(a)(11)(C) provides an exclusion from the definition of investment adviser for brokers or dealers “ whose performance of investment [advisory] services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefore.” The SEC has issued several releases over the years interpreting this definitional exclusion in light of evolving securities, advisory and financial planning practices.⁴ In the same way, new Rule 202(a)(11)–1 provides updated guidance on the scope of the broker-dealer exclusion from the definition of investment adviser, among other things.

Under Rule 202(a)(11)–1(b)(2), a broker-dealer would not be providing advice *solely incidental* to brokerage if it provides advice as part of a financial plan or in connection with providing planning services and: (i) holds itself out generally to the public as a financial planner or as providing financial planning services; or (ii) delivers to its customer a financial plan; or (iii) represents to the customer that the advice is provided as part of a financial plan or financial planning services.

According to the adopting release, a broker-dealer that provides investment advice and delivers a financial plan to a customer or represents to a customer that its advice is provided as part of a financial plan or in connection with financial planning services must register under the Advisers Act and treat that customer as an advisory client. The extended deadline for compliance with Rule 202(a)(11)–1(b)(2) is January 31, 2006.⁵

The release explains that financial planning services typically involve assisting clients in identifying long-term economic goals, analyzing their current financial situation, and preparing a comprehensive financial program to achieve those goals. The release also notes that a financial plan generally seeks to address a wide spectrum of a client's long-term financial needs, including insurance, savings, tax and estate planning, and investments, taking into consideration the client's goals and situation, including anticipated retirement or other employee benefits. Many of these functions have historically been performed in traditional life insurance distribution as ingredients of fact finding and needs-based recommendations.

Several aspects of Rule 202(a)(11)–1(b)(2) may have an impact on life insurance agents who are registered representatives of a broker-dealer. Because broker-dealers affiliated with life insurers are significantly different from full-service broker-dealers, compliance with Rule 202(a)(11)–1(b)(2) will present different compliance and timing challenges, which are highlighted below. The life insurance industry has carefully studied the rule and developed appropriate systems, and

⁴ See Investment Advisers Act Rel. No. 1092 (Oct. 8, 1987)[52 FR 38400 (Oct. 16, 1987)]

⁵ See Investment Advisers Act Rel. No. 2426 (Sep. 12, 2005) [179 FR 54629 (Sept. 16, 2005) initial extension of compliance date] and Investment Advisers Act Rel. No. 2376 (Apr.12, 2005)[74 FR 20424 (Apr. 19, 2005) original rule].

operational or training adjustments to fulfill the rule. Moreover, the additional interpretive guidance the SEC staff provided on December 16, 2005 will require supplemental adjustments to programs that life insurers have developed to fulfill the new rule. The guidance affects the compliance programs and operational changes our industry had prepared for final implementation of the rule's requirements.

The Unique Nature of Broker-Dealers Affiliated with Life Insurers

Many broker-dealers affiliated with life insurance companies are significantly different from full service or "wire-house" broker-dealers in their structure, operations, products and services. The securities activities of broker-dealers affiliated with life insurers are a component of a larger insurance business. Many registered representatives operate principally as life insurance and annuity salespersons. In some business models, securities sales and investment advisory activity are small relative to traditional insurance product sales by an office or registered representative.

Broker-dealers affiliated with life insurers often conduct supervision and compliance through an insurance distribution system. Consequently, registered representatives of broker-dealers affiliated with life insurers often conduct business in small, geographically dispersed offices. In contrast, full-service firms generally tend to have many more sales people report to a number of large branch offices. Full service firms' existing compliance infrastructures may be adapted to include the delivery of advisory services. The rule's compliance date, therefore, is more logistically complex for insurance affiliated broker-dealers than for full-service firms.

An example may help demonstrate the challenges of the rule's January 31, 2006 compliance deadline on the life insurance industry. One of our member life insurers has approximately 7,000 life insurance agents who are registered representatives of an affiliated broker-dealer. These life insurance agents typically have a Series 6 NASD license authorizing the sale of variable life insurance, variable annuities, and mutual funds, and derive the bulk of their income from insurance sales. As a technological extension of the life insurer's emphasis on fact-finding and needs-based recommendations, the company provides qualified agents access to proprietary planning software that generates custom tailored reports based on information customers provide about their financial background and objectives.

The company's planning software can address a variety of topics, including: survivor income; disability protection; long term care planning; retirement planning; education planning; estate planning; major purchase funding; and, asset allocation. Several of these topics focus on traditional insurance planning issues supported by fact-finding and customer needs. This insurance company has historically made the reports available to customers without charge or obligation. The life insurer spent millions of dollars developing the software and training its agents to use the program for appropriate recommendations and sales. The NASD has reviewed and approved the program for use by registered representatives.

Following the adoption of Rule 202(a)(11)-1(b)(2), the use of a planning program in this fashion may preclude continued reliance on the broker-dealer exclusion from the definition of investment adviser because the planning program is no longer construed to be "solely incidental" to the broker-dealer business. As a consequence, many of the life insurer's 7,000 NASD registered agents may need to become investment advisory representatives. The magnitude of this regulatory status transformation and the unique characteristics of broker-dealers affiliated with

life insurers make the rule's January 31, 2006 compliance deadline very challenging. Additionally, the helpful new staff interpretive guidance will necessitate adjustments to some of the initiatives already developed in advance of the no-action letter. The scope and factors highlighted above will be faced by a number of our member life insurers. This is not an isolated example.

The logistics of such a large scale transformation are quite challenging. Although the life insurer has a small investment advisory affiliate, the infrastructure to support such a large scale increase will consume time and resources in planning and execution. The short-term transformation would also strain the life insurer's broker-dealer supervisory services, which were not designed to quickly integrate Advisers Act compliance procedures. Such a large scale transformation also requires coordination of many small offices that are geographically dispersed. In contrast, full-service broker dealers typically have most registered representatives operating out of larger branch offices that may be easier to integrate into the new rule's requirements.

Our members understand the importance of the new rule and the need to fulfill its standards. Many companies have made significant headway in identifying agents whose activities now trigger registration as investment advisory representatives. Our members are endeavoring to make good faith compliance with the new rule as promptly as possible.

Unlike full-service broker-dealers, few registered representatives in the insurance industry traditionally have investment advisory status. Some of our members have reported that the required operational changes were significantly greater than anticipated. For example, large insurers have built infrastructures that identify salespersons needing advisory representative (IAR) status, review and process the many new IAR registrations, train new IARs, draft new and existing ADVs or contracts, and establish compliance and supervisory procedures that recognize financial plans distributed without charge as advisory services. We believe that even with best efforts and good faith, some companies will be unable to fulfill the enterprise-wide transformation for all investment advisory representatives by the January 31, 2006 deadline due to the unique features of broker-dealers affiliated with life insurers, and the scope of the transformations required.⁶

Relief Requested

The deadline for compliance with Rule 202(a)(11)–1(b)(2) will have an important impact on broker-dealers affiliated with life insurers due to the challenges of integrating large numbers of registered representatives into the Investment Advisers Act, and because of the recently issued interpretive clarifications. These factors warrant a three month extension of the January 31, 2006 compliance deadline. This would correspond to our initial request for a six month extension beyond the original October 2005 compliance date.

Former SEC Chairman Levitt emphasized the importance of reviewing the impact of rulemaking on efficiency and competition when he stated:

⁶ The release adopting the rule notes that transformation of registered representatives to investment advisory representatives will require broker-dealers to create new disclosures, redraft contractual language, and create processes for developing, delivering, and managing these new materials.

In response to the National Securities Markets Improvement Act of 1996 (NSMIA), the Commission has rededicated itself to considering how rules affect competition, efficiency, and capital formation as part of its public interest determination. Accordingly, the Commission intends to focus increased attention on these issues when it considers rulemaking initiatives. In addition, the Commission measures the benefits of proposed rules against possible anti-competitive effects, as required by the Exchange Act.⁷

There are several policy considerations supporting our request for a reasonable extension to the rule's January 31, 2006 compliance deadline. With an extension, registered representatives of broker-dealers affiliated with life insurers can be integrated into the new rule's requirements in an orderly fashion responsive to their unique characteristics. In contrast to many other registered representatives, life insurance agents must also fulfill state insurance laws and regulations, which provide additional meaningful consumer protection, such as free-look provisions, replacement regulation standards, buyers' guides, disclosure regulations, and proscriptions under Unfair Trade Practices Acts, among many others. A reasonable compliance extension, therefore, is warranted under these circumstances.

The traditional fact-finding and need-based approaches to insurance sales fulfill consumer interests by matching consumer needs with product recommendations. This approach helps consumers make informed purchase decisions, and has been a constant component of insurance distribution well before the advent of financial planning. Adherence to the January deadline may interrupt the delivery of needs-based planning tools, which may conflict with the best interests of consumers who can benefit from comprehensive approaches to decision making.

For the reasons discussed above, we respectfully request that the compliance deadline be extended for six months until March 31, 2006. This extension should allow broker-dealers affiliated with life insurers to fulfill the requirements of the new rule for salespersons or offices that will trigger the definition of investment adviser under Rule 202(a)(11)-1. A brief extension relieves unnecessary burdens, and reflects the purposes of the Advisers Act.

An implementation delay would sensibly integrate different segments of the financial services industry. An extended compliance deadline also allows the Staff's December 16, 2005 interpretive clarifications to be reasonably integrated in a thorough and orderly fashion. An adjusted compliance deadline will allow insurers to build new infrastructures in a coordinated manner

⁷ See testimony of Arthur Levitt, SEC Chairman, concerning appropriations for fiscal year 1998 before the Subcommittee on Commerce, Justice, and State, the Judiciary, and Related Agencies of the House Committee on Appropriations (Mar 14, 1997), which appears at <http://www.sec.gov/news/testimony/testarchive/1997/tsty0497.txt>

I greatly appreciate your attention to our views. Please let me know if any questions develop or if we can provide any additional information that would be helpful.

Sincerely,

Carl B. Wilkerson

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Cc: The Honorable Christopher Cox, Chairman
The Honorable Cynthia A. Glassman, Commissioner
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner
The Honorable Annette L. Nazareth, Commissioner
Robert E. Plaze, Associate Director, Division of Investment Management