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VIA E-MAIL

May 12, 2005

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

RE: Additional Comments to Final Rule Regarding
Mutual Fund Redemption Fees (File No. S7-11-04)

Dear Mr. Katz:

New York Life Insurance and Annuity Corporation ("NYLIAC"), a wholly owned subsidiary of New York Life Insurance Company, appreciates the opportunity to express our opinion in response to a request for comments on new Rule 22c-2 (the "Rule") under the Investment Company Act of 1940, as amended (the "1940 Act"), by the Securities and Exchange Commission (the "Commission") in Release No. IC-26782, dated March 11, 2005 (the "Adopting Release"). The Rule permits mutual funds to impose a redemption fee in order to discourage market timing.

NYLIAC supports the Commission's efforts to protect mutual fund investors from harmful market timing. We are concerned, however, that the Rule, as presently adopted, creates significant administrative burdens and contract issues for variable life insurance policies ("Variable Insurance Policies") and variable annuity contracts ("Variable Annuities" and, together with Variable Insurance Policies, "Variable Products"). Since retail mutual funds will not encounter these same issues under the Rule, we believe that Variable Products should be addressed separately in the Rule. As noted in the Adopting Release, insurance company separate accounts have "special circumstances" and we have addressed some of these below. For these reasons, we are requesting that the Commission limit redemption fees to owner-initiated transfers and that the Rule set forth specific standards for administering redemption fees in Variable Products.

I. The collection of redemption fees on transactions within Variable Products will result in significant cost and administrative burdens.

It would be difficult and expensive to collect redemption fees with respect to short-term transfers among subaccounts within Variable Products because Variable Products are structured differently than mutual funds. Most Variable Products are issued through a two-tier investment company structure. The first tier consists of a separate account of the life insurance company that, absent an exemption, is required to be registered as an investment company under the 1940 Act. The separate account is a segregated investment account established under state insurance law to hold Variable Product assets and liabilities separate and apart from the insurer's general account liabilities and assets. The separate account is typically divided into subaccounts, each of which invest solely in the shares of an affiliated or unaffiliated underlying fund organized as an open-end management investment company. This is the second tier of the two-tier structure. Variable Product owners can allocate their purchase payments and transfer contract value among the various subaccounts.

Purchases, sales and transfers between subaccounts are communicated by the customers to the insurance company, which in turn transmits the appropriate instructions to the underlying funds to accomplish the transaction. Variable Product owners do not have direct contact with the underlying funds and they are not in privity of contract with the funds. The purchases, sales and transfers are accounted for in "accumulation units." When a contract owner sells shares in an underlying fund, no actual redemption of shares occurs. Rather, the insurance company cancels the appropriate number of accumulation units at the separate account level. Purchases and sales, including those involved in transfers among subaccounts, are aggregated and netted at the separate account level on a daily basis and converted by the insurance company into a net order to purchase or redeem the underlying mutual fund shares.

Because of this more complicated structure, the imposition of redemption fees on individual policyowner transactions will place significantly greater expenses and administrative burdens on Variable Product issuers relative to that imposed on retail mutual funds, resulting in a competitive disadvantage.

II. The application of the Rule would present conflicts with the terms of outstanding Variable Product contracts and state insurance law.

NYLIAC is concerned that the new redemption fees may raise significant legal issues for existing Variable Product contracts. The purchase of a Variable Product creates a legally binding contract between the insurance company and the purchaser, which sets forth the rights and duties of the respective parties. Under state contract law and the terms of our Variable Product contracts, one party cannot unilaterally modify such contract's terms.

State insurance laws require that Variable Product contracts specify maximum and guaranteed charges and pricing formulae. Contract provisions also detail limitations or charges applicable to transfers among subaccounts. In some cases, contract provisions guarantee owners the right to make unlimited transfers without charge. In other cases, provisions specify a maximum transfer charge or a minimum number of transfers that can be made without charge. These contract terms may arguably be viewed as limiting the ability of insurers to unilaterally impose a new transaction-based redemption fee, even if the insurer would be doing so on behalf of an underlying fund. We do not believe that our Variable Product contracts will permit the imposition of the fee.

Furthermore, attempts to impose a redemption fee or otherwise modify or restrict transfer rights of in-force contracts could subject insurance companies to litigation by contract owners whose rights have been curtailed. In the past several years various lawsuits have been filed against insurance companies by contract owners seeking to enforce transfer rights in Variable Product contracts and it is likely that contract owners will continue to bring similar litigation and file regulatory complaints claiming that any new redemption fees amount to a breach of contract. The costs of defending these actions would be significant.

The Adopting Release cites *Miller v. Nationwide Ins. Co.,* 391 F.3d 698 (5th Cir. 2004) for the proposition that the imposition of a redemption fee on existing contracts would not conflict with state insurance laws because the fee would be imposed by the fund rather than pursuant to a contract issued by the insurance company.[1] While the trial court did cite this fact as one of three reasons to grant the defendant's motion to dismiss, this was not part of the holding of the Fifth Circuit Court of Appeals. Rather, the Court of Appeals affirmed the dismissal on the grounds that the plaintiffs' claim under the Securities Act of 1933 was barred by the statute of limitations and their contract claim required dismissal because of the restrictions placed on state law claims under the Securities Litigation Uniform Standards Act ("SLUSA"). The Court of Appeals specifically stated:

> "[W]e express no opinion as to whether Miller did or did not have a viable claim under the Securities Act or whether he had a valid claim for state law breach of contract. We hold only that the statute of limitations ran as to any Securities Act claim and that SLUSA required dismissal of the state contract claim because plaintiff included with his state contract claim allegations of an untrue statement." 391 F.3d 698 at fn3.

We are requesting that the Rule be applicable only to new contracts and not to existing contracts. We note, however, that even if a redemption fee were to be imposed only on new Variable Product contracts, it is likely that insurance companies would need to re-file contract forms with state insurance departments and be granted approval prior to use.

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[1] See Release No. IC-26782 (March 11, 2005) at page 23, fn 62.

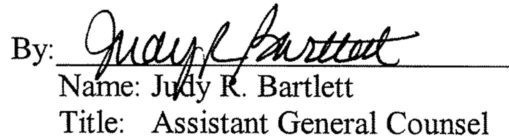
This lengthy process would be costly and it would significantly increase the workload of the state insurance departments.

For the reasons described above, the application of the Rule to Variable Products creates significant cost and administrative burdens and contract issues that retail mutual funds would not encounter. The unique features of Variable Products support our request that the Commission limit redemption fees to owner-initiated transfer requests and also that the Commission issue clear and uniform standards for administering the redemption fee.

NYLIAC lauds the Commission's efforts to stop market timing and excessive trading abuses in order to protect mutual fund investors. We appreciate the opportunity to express our views to the Commission.

Respectfully submitted,

NEW YORK LIFE INSURANCE AND
ANNUITY CORPORATION

By: 

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