Tucker Advisory Group - Official Comment Letter - SEC's Proposed Rule 151A

On June 25, 2008, the United States Securities and Exchange Commission proposed a new Rule 151A that would, in effect, define most indexed annuities as securities. **Please accept this submission for public comment in strong opposition to Proposed Rule 151A on behalf of Tucker Advisory Group, Inc ("TAG").** TAG is a distributor in the insurance industry in the solicitation and sales of fixed index annuities.

TAG contracts with top insurance carriers to provide insurance product support and compliant marketing and sales aids to a national network of insurance producers. TAG offers full service comprehensive sales training and support for our agents in the field. TAG offers a full product line of annuities, product training and support, turnkey direct mail programs for clients and prospects, and field-tested marketing systems. The TAG position with respect to the proposed Rule is simple and straightforward. The proposed rule, 151A, would subject these insurance products, which are already regulated by the individual states, to dual regulation. **The proposed new Rule 151A is wrong as a matter of law, fact and policy, and TAG actively opposes its enactment.**

Pursuant to statute (Section 3(a)(8) of the Securities Act), "[a]ny…annuity contract or optional annuity contract" is exempt from registration under the Act. Accordingly, as Congress has made clear, "insurance policies are not to be regarded as securities subject to [the Act]. The law on indexed annuities has been addressed in a number of court cases, most notably in a case before the United States District Court for the Western District of Kentucky. In that case, *Malone v. Addison Insurance Marketing, Inc.,* 225 F. Supp. 2d 743 (W.D.Ky. 2002*)* (http://www.eiabook.com/securitiesissues.htm), the court held that the indexed annuities in question were not securities. The court noted several reasons for its decision but particularly focused upon the assumption of investment risk by the insurer, stating that "the insurer is acting in a role similar to that of a savings institution." It rejected the argument that because the return could be determined by an index the insured was at risk since the insurer provided a return of principal and a minimum rate of return guarantee. The guarantees provided by an indexed annuity offer consumers significant protection against investment risk. The DJIA has suffered a decline this year in excess of 20% from its October 2007 record, yet a fixed indexed annuity purchaser will not lose any principal due to such market performance, unlike a consumer of an equity security or a stock mutual fund, or a variable annuity.

The Commission argues that "individuals who purchase indexed annuities are exposed to a significant investment risk." This statement assumes an entirely novel definition of investment risk based on the anticipated return being linked to an index alone. *Cf., SEC v. Variable Annuity Life*, 359 U.S. 65 (1959)("*VALIC*")(without a "true underwriting of risks" and without a "floor" of value guaranteed by the insurer, annuities cannot be insurance). As the *VALIC* Court noted, "the concept of 'insurance' involves *some* investment risk-taking on the part of the company…and a guarantee that at least *some* fraction of the benefits will be payable in fixed amounts." *Id*. at 71 (emphasis in original). By providing a minimum guarantee and principal protection, indexed annuities clearly qualify as insurance products exempt from registration. Despite the protection of the savings at issue from principal loss, the SEC deems the uncertain amount of the consumer's gain pursuant to the contract sufficient "risk" to trigger securities law regulation. This position is contrary to a plain understanding of the supporting legislation, as reflected by the decisions in *Malone* and *VALIC*. Moreover, the overall structure of indexed annuities comply with the administrative safe harbor provisions of Rule 151, mandating that these products fall within the scope of Section 3(a)(8). Thus this conclusion and redefinition by the Commission is erroneous as a matter of law.

The alleged facts suggested by the Commission also do not support the conclusions proposed. The SEC cites examples of complaints involving annuities comprising large percentages of the case load in at least two states but fails to separate complaints concerning variable annuities from those concerning indexed annuities, even though variable annuity contracts are already deemed securities and regulated as such. American Equity Insurance Company has a complaint ratio of less than 0.2% of its contracts. Allianz Insurance Company has a complaint ratio of less than 0.5% of its contracts. While we have not as of this date seen a full statistical breakdown, in our experience, when not lumped in with variable annuity complaints, complaints involving indexed products comprise only a very small percentage of overall annuity complaints. We typically see a much higher complaint rate with registered products than with the indexed products, negating the claim that requiring registration would provide consumers with better protection.

The Chairman's statement also cites surrender charges as "another way investors find they get back less money than they put in" if, for example they needed it "for medical expenses or rent." This charge relates to suitability and not to whether a product ought to be regulated as a security. Rent money is simply not a suitable source of funds for any insurance *or* securities product. Based upon a clip from NBC's *Dateline* on abusive sales practices, the Chairman asserts that such practices "are often used to sell equity indexed annuities to seniors." The Chairman goes on to say that "one big reason these abusive sales practices have gone unchecked is that the question of whether they are securities at all has been left unanswered." That statement is simply false on its face. There are no facts to support either contention. While we know that there are abuses in the sales approaches of some indexed annuity sales people, we have seen no evidence that they are "often" used and note that there are also at least as many abusive sales practices used in the sale of registered products in general and variable annuities in particular.

Most fundamentally, the rationale behind the SEC proposal is to "enhance investor protection." This claim is necessarily predicated upon the assumption that the current regulatory scheme offered by the states' insurance commissions is somehow inadequate. However, the facts do not support such an assumption. Variable annuities are registered products, subject to the very oversight the SEC proposes be extended to indexed annuities. However, from 2004-2006, of the total of all variable and indexed annuity complaints, variable annuities accounted for nearly 63% of those complaints according to the National Association of Insurance Commissioners (http://www.naic.org). Moreover, since the NAIC's model act mirrors FINRA's rules and recent enhancements to state insurance laws provide additional suitability guidelines and protection, there is no basis upon which to conclude that the current regulatory scheme is failing to protect consumers. Accordingly, adding an additional (and redundant) layer of enforcement by requiring registration is unlikely to reduce abuse.

The proposed securities regulation will add little benefit to consumer protection. Many states have already adopted the NAIC Annuity Disclosure Model Regulation and most, if not all, of the major indexed annuity carriers have mandated the use of a disclosure statement or certificate describing all important terms and conditions of the annuity contract, including prominent disclosure of surrender charges. Many, if not all, major indexed annuity carriers conduct suitability reviews of all sales in all states. Suitability reviews required of brokers under FINRA rules would not add any meaningful protections over and above what is already being done.

We also believe that this proposed rule is wrong as a matter of public policy. The indexed annuity is an insurance product created by insurance companies and distributed through licensed agents supervised by their respective state insurance regulatory bodies and the insurance carriers themselves (by the recent enactment of stringent suitability requirements and protections). While we have always been in favor of full and honest disclosure and opposed to abusive sales practices, and remain committed to those objectives, the proposed rule does not advance them. Rather, it appears to us that it is an overreaching power grab that is not in the best interests of consumers. Accordingly, we are opposed to the adoption of this proposed rule. The implementation of this rule would likely impair the availability of fixed indexed annuities. Making these products less available to the consumer would deprive many from access to these products and their valuable principal guarantees.

There is a further policy reason to question the proposed Rule. There are thousands of insurance-licensed agents and dozens of insurance carriers that are currently providing life insurance, fixed annuities and fixed index annuities to the public. Proposed rule 151A would also have a dramatic negative effect on their ability to support themselves and their employees and to provide valuable products to consumers.

The Small Business Regulatory Enforcement Fairness Act of 1996 provides for congressional review of federal agencies' regulations. Before any proposed rule goes into effect, agencies are required to forward the rule to Congress for review. Major rules—those with a $100 million impact on the economy or a major impact on an industry, government, or consumers, or those affecting competition, productivity, or international trade—cannot go into effect until congressional review is complete. It should be quite obvious that proposed Rule 151A is such a major rule. The timing of this comment period has been insufficient to allow for adequate analysis of the proposed rule and appropriate comment from members of Congress.

According to the Bureau of Labor Statistics (http://www.bls.gov/oco/ocos118.htm), insurance sales agents held about 436,000 jobs in 2006. Almost 50 percent of insurance sales agents work for insurance agencies and brokerages. About 23 percent work directly for insurance carriers. Although most insurance agents specialize in life and health insurance or property and casualty insurance, a growing number of multiline agents sell all lines of insurance. A small number of agents work for banks and securities brokerages. Approximately 26 percent of insurance sales agents are self employed. Of these insurance agents, the best estimate of the number of annuity producers is roughly 100,000 nationwide (http://www.insurancenewsnet.com/article.asp?a=top_news&id=95784). Industry analysts (for example, http://www.zibb.com/article/3584405/Expert+Predicts+SEC+Indexed+Annuities+Rule+Could+Cause+Sales+to+Drop) agree that sales of indexed annuities would "drop dramatically" if they become registered products, in part because nearly half of all annuity producers do not have a securities registration. Indeed, industry analyst Advantage Compendium, "…there may well be 100,000 annuity agents that would be affected by the proposal…" Advantage Compendium (http://www.indexannuity.org) very conservatively estimates a total cost in economic impact to be in excess of $852 million to the insurance industry distribution channels as well as a major increase in costs for consumers and the insurance industry and a significant adverse effect on competition and innovation. Accordingly, proposed Rule 151A is indeed a major rule requiring Congressional review before implementation.

For the foregoing reasons, TAG urges the SEC to decline to enact proposed Rule 151A and to allow the insurance commissions of the various states to continue to perform their regulatory function in this area. Indexed annuities are not securities. They are fixed annuities and should be treated as such.

Respectfully submitted,

Karlan Tucker
President & CEO
Tucker Advisory Group, Inc.