



September 10, 2008

Florence E. Harmon
Acting Secretary
Securities & Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Number S7-14-08, Release Number 33-8933:
Indexed Annuities and Certain Other Insurance Contracts

Dear Ms. Harmon:

We write today on behalf of America's Health Insurance Plans ("AHIP"), the nation's foremost association representing nearly 1,300 member companies providing health, long-term care, dental, disability and supplemental coverage to more than 200 million Americans. AHIP appreciates this opportunity to comment on Release Number 33-8933 ("Release"), a proposed rule intended to clarify the status under the federal securities laws of annuities under which payments to the purchaser are dependent on the performance of a securities index.

Under Section 3(a)(8) of the Securities Act of 1933, insurance policies and annuities are normally exempted from securities registration requirements. The intent of this proposed rule, as we understand it, is to exclude from this exemption any annuity contract that satisfies the following two-part test:

- 1) Amounts payable by the issuer under the contract are calculated, in whole or in part, by reference to the performance of a security, including a group or index of securities; and
- 2) Amounts payable by the issuer under the contract are more likely than not to exceed the amounts guaranteed under the contract.

AHIP offers no comment on the proposed rule as it pertains to annuity contracts. Our reason for writing relates to a passage in Section III.A.2 of the Release, where the following question is posed on page 30: "Should the proposed definition apply to forms of insurance other than annuities, such as life insurance or health insurance?" We have interpreted this question as a solicitation for comment on whether the current exemption from securities regulation should be removed for any insurance contract (as opposed to any annuity contract) that satisfies the two-part test stated above.

AHIP believes subjecting insurance contracts that satisfy the proposed two-part test to securities regulation would be inappropriate. Our specific concern, which we will

describe below in greater detail, relates to retrospectively-rated health insurance contracts that insurers issue to companies, rather than to individuals. We believe that no useful regulatory or public policy purpose would be served if such contracts were to be scoped into securities regulation, but we are concerned that application of the proposed two-part test to all insurance contracts would lead to such a result.

A retrospectively-rated group health insurance contract is a contract issued by an insurance company to an employer (or other group sponsor) in which a premium rate is agreed upon for the contract period (typically a 12-month period), but where a settlement mechanism exists so that if the insurer's financial experience on the contract turns out to have been more favorable than expected, some portion of that favorable experience is shared with the group sponsor via a partial refund of premium. Such contracts have been common in the health insurance industry for decades. The employer's (or other sponsor's) motivation for entering into such a contract is to transfer risk to the insurer, while minimizing the need for extensive negotiations with the insurer over the precise level of premiums that the group should be charged given its risk profile.

With a retrospectively-rated group health insurance contract, the insurer and the group agree on a formula that will be used to determine what portion, if any, of the premiums will be refunded to the group based on actual experience. It is common for such refund formulas to include a component whereby the group is credited with investment income on funds that are held by the insurer but that would have been available to the group if the group had self-insured for this risk rather than enter into an insurance contract (e.g., the portion of premium payments that the insurer sets aside as a reserve for claims not yet paid). The purpose of these investment income credits is simply to reflect the time value of money; they are just one part of the refund determination, and may be offset by unfavorable experience unrelated to investments. The group does not enter into this contract for investment purposes; the investment income credits are merely incidental to the true purpose of the contract, which is to transfer morbidity risk from the group to the insurer.

It appears to us, however, that many retrospectively-rated group health insurance contracts could be construed to satisfy the two-part test described above:

- 1) In many cases, the contractual interest rate used in the computation of investment income credits in the refund formula is based on market interest rates, such as the current yield on a U.S. Treasury bill of a stated maturity. This would appear to make the investment income credits fall under the stated definition of amounts payable by the issuer that are determined in part by the performance of a security, which would imply that the contract passes the first prong of the test.
- 2) In many cases, the premium level for the retrospectively-rated contract is set at a level that is slightly higher than the insurer's median estimate of what the premiums for the accepted risks really need to be. This reflects the asymmetric nature of the situation: the insurer will bear losses if premiums are set too low,

but the insurer does not receive the full benefit of gains if premiums are set too high, due to the need to refund a portion of premiums to the group. As a consequence, it is more likely than not that the insurer will need to make premium refund payments to the group. However, no premium refund payments are guaranteed under the contract, for if experience is sufficiently poor, the insurer will not refund any portion of the premiums to the group. Therefore, it appears the contract passes the second prong of the test: amounts payable by the issuer are more likely than not to be positive, hence more likely than not to exceed the guaranteed amount, which is zero.

Subjecting these retrospectively-rated group health insurance contracts to securities regulation, however, would not appear to serve any useful purpose, for the following reasons.

First, the contracts in question do not remotely resemble investment vehicles. Retrospectively-rated contracts are not offered directly to individual consumers, but to large companies (or other large organizations) who should be viewed as sophisticated buyers. The contracts in question are not standardized in nature, but rather are negotiated separately with each customer. Each of these facets indicates that applying the mechanics of securities regulation to these contracts would bring considerable expense to insurers without bringing a remotely commensurate benefit to the public.

Second, group health insurance contracts are fully regulated by state insurance departments. To our knowledge, there has been no significant volume of consumer complaints, either from individuals or from institutional purchasers, regarding the investment income aspect of these products, which have been sold for many years. If, as stated in the proposed rule, one of the primary reasons for seeking to amend the existing regulation is an increase in complaints, then these products do not fall within that area of concern. The federal agency should not preempt existing, adequate state regulation.

We hope the above example has demonstrated that extending the scope of the proposed two-part test from annuity contracts to insurance contracts is a concept that would have inadvertent consequences and that therefore would be ill-advised. Thank you for this opportunity to present our perspective and please do not hesitate to contact us if we can be of further assistance.

Sincerely yours,

Randi Reichel