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VIA ELECTRONIC MAIL

September 10, 2008

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

RE: File Number S7-14-08 - Indexed Annuities and Certain Other Insurance Contracts

Dear Ms. Harmon:

On July 1, 2008, the Securities and Exchange Commission (SEC) filed a proposed new rule (Proposed Rule) that would define the terms "annuity contract" and "optional annuity contract" under the Securities Act of 1933 (Act).[1] If the Proposed Rule is adopted it is expected to require insurance companies that issue equity index annuities (EIAs) to register the products as securities under the Act. Among other things, the Proposed Rule will result in EIAs being sold pursuant to prospectus by registered representatives associated with broker-dealers and subject to the antifraud provisions of the securities laws. The Financial Services Institute[2] (FSI) seeks clarification of certain aspects of the Proposed Rule prior to adoption and implementation.

Background on FSI Members

The Proposed Amendment is of particular interest to FSI members. The independent broker-dealer (IBD) community has been an important and active part of the lives of American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD members also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their unique business model, IBDs and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

In the U.S., approximately 98,000 independent financial advisors – or approximately 42.3% percent of all practicing registered representatives – operate in the IBD channel.[3] These financial advisors are self-employed independent contractors, rather than employees of the IBD firms.

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[1] 15 U.S.C. 77a *et seq*.

[2] The Financial Services Institute, Voice of Independent Broker-Dealers and Independent Financial Advisors, was formed on January 1, 2004. Our members are broker-dealers, often dually registered as federal investment advisers, and their independent contractor registered representatives. FSI has 119 Broker-Dealer member firms that have more than 138,000 affiliated registered representatives serving more than 15 million American households. FSI also has more than 12,500 Financial Advisor members.

[3] Cerulli Associates Quantitative Update: Advisor Metrics 2007, Exhibit 2.04. Please note that this figure represents a subset of independent contractor financial advisors. In fact, more than 138,000 financial advisors are affiliated with FSI member firms. Cerulli Associates categorizes the majority of these additional advisors as part of the bank or insurance channel.

These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisors are typically "main street America" – it is, in fact, almost part of the "charter" of the independent channel. The core market of advisors affiliated with IBDs is clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisors are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.[4] Independent financial advisors get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisors have a strong incentive to make the achievement of their clients' investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisors. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisors play in helping Americans plan for and achieve their financial goals. FSI's primary goal is to ensure our members operate in a regulatory environment that is fair and balanced. FSI's advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

The Proposed Rule is of particular interest to FSI member firms. EIAs have long existed in the regulatory grey area between insurance and securities. In Notice to Members 05-50[5], the NASD described the EIA dilemma faced by broker-dealer firms as follows:

> The question of whether a particular EIA is an insurance product or a security is complicated and depends upon the particular facts and circumstances concerning the instrument offered or sold…
>
> Many firms assume that EIAs that are not registered under the Securities Act are insurance products and not securities. These firms treat the sale of unregistered EIAs by associated persons in their capacity as insurance agents as an outside business activity under Rule 3030, beyond the mandated purview of the firm's supervision. Rule 3030 does not require that the firm supervise or even approve an outside business activity, although a firm may choose to deny or limit the ability of associated persons to engage in the activity. Rule 3030 simply requires that an associated person promptly notify the firm in writing that he is engaging in a business activity outside the scope of his relationship with the firm.
>
> However, if a particular EIA were a security, and an associated person sold the EIA outside the regular scope of his employment with the firm, Rule 3040 requires that the firm treat the sale as a private securities transaction and supervise the sale in accordance with the provisions of that rule. The associated person must notify the firm in writing before participating in a private securities transaction. If the associated person will receive compensation for the transaction, the firm must provide written approval of his participation in the transaction. If the firm does approve the participation, it must record

[4] These "centers of influence" may include lawyers, accountants, human resources managers, or other trusted advisors.
[5] See NtM 05-50 at http://www.finra.org/web/groups/rules_regs/documents/notice_to_members/p014821.pdf.

> the transaction on its books and records and supervise the associated person's participation in the transaction as if the transaction were executed on behalf of the firm.
>
> A broker-dealer runs certain risks in applying Rule 3030 to the sale of an unregistered EIA on the assumption that the product is not a security. It is often unclear whether a particular EIA qualifies for the exemption under Section 3(a)(8), since the analysis is made on a case-by-case basis and may turn on the particular features and marketing materials associated with the product. As a result, if a particular EIA did not qualify for the exemption, a firm might incorrectly treat the EIA transaction as an outside business activity under Rule 3030 rather than a private securities transaction under Rule 3040 and thereby fail to supervise sales of the product as required by NASD rules.[6]

The Proposed Rule appears to offer some clarity to the supervision requirements for these products. However, we believe that certain aspects of the Proposed Rule should be clarified. We describe these concerns below.

Comments

FSI seeks clarification of the following issues prior the adoption of the Proposed Rule:

- Application of Proposed Rule to Other Fixed Annuity Products – Some commentators have indicated that the Proposed Rule could be reasonably interpreted to cover traditional fixed annuity products. These commentators argue that traditional fixed-rate annuities commonly expose the consumer to fluctuating levels of annual "excess" interest (i.e., the interest addition above guaranteed minimums). They claim, therefore, that such fixed annuity contracts exposure consumers to the same type of risk associated with EIAs. Our understanding of the proposing release is that traditional fixed annuity contracts are not intended to be impacted by the Proposed Rule. We request that the SEC clearly indicate in the adopting release and the text of the final rule that traditional fixed annuity products are not subject to the Act or supervision by broker-dealers.
- Prospective Nature of the Proposed Rule - The SEC's proposing release indicates that the new definitions of "annuity contract" and "optional annuity contract" will apply "only to indexed annuities issued on or after the effective date of a final rule."[7] We believe this approach makes sense in light of the absence of a definitive interpretation or definition prior to the adoption of a final rule. However, we would request that the SEC clarify in the adopting release and the text of the final rule that an investor's additional contribution to an EIA contract established prior to the effective date of the final rule would not be subject to the terms of the Act or supervision by broker-dealers.
- Application to Broker-Dealer Firms and Financial Advisors – The SEC's proposing release indicates that the SEC is aware that many insurance companies, out of necessity, acted in reliance on their own analysis of the legal status of indexed annuities based on the state of the law prior the time of the Proposed Rule. Under these circumstances, the SEC has indicated that it does "not believe that insurance companies should be subject to any additional legal risk relating to their past offers and sales of indexed annuities as a result of our proposal today or its eventual adoption."[8] We note that IBD firms and their affiliated independent financial advisors were subject to the same uncertainty and, therefore, out of necessity were forced to make their own determination as to the application of the law to the sale of EIAs. As a result, we believe IBD firms and independent financial advisors should be shielded from additional legal risk relating to

[6] See pages 3-4 of NtM 05-50.
[7] Indexed Annuities and Certain Other Insurance Contracts, 73 Fed. Reg. 37752, 37762 (July 1, 2008).
[8] Id.

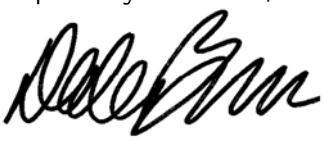
their past offers and sales of EIAs. Therefore, we ask that the adopting release state clearly that it is the SEC's intention to establish a rule that provides broker-dealers and financial advisors with the same protections as those offered to insurance companies.

Conclusion

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with you on this important issue.

Thank you for your consideration of our comments. Should you have any questions, please contact me at 770 980-8487.

Respectfully submitted,



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