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September 10, 2008

VIA E-MAIL

Florence E. Harmon
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: **File Number S7-14-08**
Indexed Annuities and Certain Other Insurance Contracts
Proposed Rule, File No. 33-8933

Dear Ms. Harmon:

This letter is being submitted on behalf of the Association for Advanced Life Underwriting (“AALU”). AALU is a nationwide organization of life insurance agents, many of whom are engaged in complex areas of life insurance such as business continuation planning, estate planning, charitable planning, retirement planning, deferred compensation and employee benefit planning. AALU represents approximately 2,000 life insurance agents and financial advisors nationwide.

AALU is pleased to have the opportunity to offer its comments in response to the request by the Securities and Exchange Commission (the “Commission” or “SEC”) in Release No. 33-8933ⁱ (the “Proposing Release”) for comments on proposed rule 151A that would deem certain annuity contracts for state law purposes as not an “annuity contract” or “optional annuity contract” under Section 3(a)(8) of the Securities Act of 1933 (the “1933 Act”). As noted in the Proposing Release, this proposed rule is “intended to clarify the status under the federal securities laws of indexed annuities, under which payments to the purchaser are dependent on the performance of a securities index.”ⁱⁱ

Introduction and Overview

AALU and its member agents are dedicated to sales practices that put clients’ interests first. Accordingly, it commends the Commission for its ongoing efforts to enhance consumer protection and to provide greater certainty to issuers and sellers of annuity products, including indexed annuities, with respect to their obligations under the federal securities laws.

AALU agrees that there is no place for inappropriate sales practices involving indexed or other fixed annuities, just as with other investment or insurance products and services.

AALU understands the Commission's motivation for issuing proposed rule 151A. However, AALU does not express a view as to whether all or some portion of what are commonly thought to be indexed annuities should be considered to be securities and therefore subject to federal securities regulation or whether such products are primarily protection-oriented and more appropriately regulated by state insurance departments.

In addition, the shortness of the comment period provided on the proposed rule 151A has not allowed for detailed evaluation of the rule and specific recommendations for changes to the methodology in the proposed rule.

The focus of AALU's comments is to point out strong concerns about the potential breadth of the proposed rule and specifically request clarification that general account life insurance products and traditional fixed annuities are not covered by the proposed rule.

Comments on Proposed Rule 151A

Background

Proposed rule 151A would define a class of annuity that would *not* be able to rely on the Section 3(a)(8) exemption for annuity or optional annuity contracts in the 1933 Act. Issuers and others involved in the offer and sale of certain fixed annuities would be required to determine whether an annuity fits within the broad scope of the rule. If proposed rule 151A applies, then a determination must be made whether a contract that is an annuity for state law purposes falls within or outside the definition of when a contract is "not" an annuity for federal securities law purposes. Absent another exemption, annuities that meet this definition would be required to be registered as securities. The status under the 1933 Act of annuities that fall outside the definition "would continue to be determined by reference to the investment risk and marketing tests articulated in existing case law under Section 3(a)(8) and, to the extent applicable, the Commission's safe harbor rule 151."ⁱⁱⁱ

The proposed definition of an annuity that is not an "annuity contract" under Section 3(a)(8) would have two principal elements. Under proposed rule 151A, an annuity would be subject to registration if:

- (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.^{iv}

The proposed rule expressly excludes a contract whose value varies according to the investment experience of a separate account.^v No other contracts are specifically excluded, and

the proposed rule's determination of securities' status does not include any consideration of other factors deemed relevant by the courts in evaluating whether a contract falls within the Section 3(a)(8) exclusion.

Concerns with the Broad Scope of the Rule

The Commission is proposing that a contract which is an annuity for state insurance law purposes would not be an annuity under Section 3(a)(8) if the amounts payable by the insurance company under an annuity are "calculated in whole or in part by reference to the performance of a security, including a group or index of securities."^{vi} The Commission states in the Proposing Release that it intends to "define the class of contracts that is subject to scrutiny broadly,"^{vii} so that the proposed rule would, by its terms, "apply to indexed annuities but also to other annuities where amounts payable are calculated by reference to a single security or any group of securities."^{viii} If payments under an annuity are "calculated by reference to the performance of a security or securities, rather than being paid in a fixed amount," the Commission notes that "some investment risk relating to the performance of the securities is assumed by the purchaser" and so the annuity is subject to scrutiny.

The Commission has requested comments on the broad scope of the proposal. AALU believes that a rule which would conclusively determine the securities' status of products that on their face would have a bona fide claim to the Section 3(a)(8) exemption should be crafted narrowly, not broadly. The Commission has studied indexed annuities for over 10 years. However, as drafted and acknowledged by the Commission, the proposed would, or at least might, apply to many annuity products other than those commonly understood as indexed annuities. For example:

- As drafted, the rule would appear to apply to any fixed annuity products with market value adjustment features where the market value adjustment is determined by reference to a security (e.g. a specified U.S. Treasury security).
- It might apply to any fixed annuity products crediting discretionary excess interest where the interest rate set by the carrier from time to time is determined "by reference to" the performance or yield of the carrier's general account, or a segment of the carrier's general account, which of course are comprised of a portfolio (i.e., group) of securities.
- It might even conceivably apply to traditional participating policies where the dividend formula has an investment component so that the proceeds payable would arguably be determined in part by the investment experience of the carrier or of a class of the carrier's business -- and again, that experience would relate to a portfolio (i.e., group) of securities.

Although the Commission clearly states its intent to define the scope of the proposed rule broadly, AALU questions whether it really intended to encompass such a broad array of traditional annuity products within the rule. Many of these products may in fact be able to meet the conditions of the Rule 151 safe harbor (e.g., annuity products whose interest rate is determined in advance, tied to the rate on specified U.S. Treasury securities, and changes no more frequently than annually). It seems highly unlikely that the Commission intended the terms

of proposed rule 151A to subject products that might qualify for the Rule 151 safe harbor to another test, particularly where that test is different from, and in many circumstances may lead to results in conflict with, the standards set forth in Rule 151.

Moreover, while proposed rule 151A by its terms is limited to annuity products, AALU is concerned that the securities' status of any life insurance products with cash value interest crediting mechanisms similar to the accumulation value interest crediting mechanisms in deferred annuity products falling within the broad scope of the rule could come into question. In Rule 151, the Commission stated that, while life insurance products could not technically rely upon the safe harbor, the securities' status of life insurance products should be analyzed "based upon the principles" of the Rule 151 safe harbor.^{ix} A similar logic here would lead to unwarranted questions being raised about participating whole life insurance, universal and other life insurance products whose interest rates may be set in advance either by reference in the policy or marketing materials to specific securities (e.g., U.S. Treasury securities), and life insurance products with limited market value adjustment features.

For these reasons, AALU urges the Commission to reconsider and narrow the scope of any rule it may determine to adopt which would conclusively determine that certain fixed annuity contracts are securities not entitled to the Section 3(a)(8) exemption. Alternatively, AALU urges the Commission to clarify that traditional fixed annuities and whole life insurance policies are not covered by the rule.


Conclusion

AALU appreciates the opportunity to offer the comments above. It respectfully requests that the Commission consider these comments and reflect them in an amended, re-proposed rule. If you have any questions or if additional information would be helpful, please contact Tom Korb, AALU Vice President of Policy & Public Affairs, at 703-641-8120.

Respectfully Submitted,



Michael P. Corry, CLU
AALU President



David J. Stertz, FLMI
AALU CEO

ⁱ See Indexed Annuities and Certain Other Insurance Contracts, Rel. No. 33-8933 (June 25, 2008).

ⁱⁱ Id. at 1.

ⁱⁱⁱ Proposing Release at 46.

^{iv} Proposing Release at 93-94.

^v Proposed rule 151A(c), Proposing Release at 94.

^{vi} Proposing Release at 46.

^{vii} Proposing Release at 31.

^{viii} Proposing Release at 32.

^{ix} Release 6645 at footnote 4.