

Honorable Christopher Cox, Chairman
U. S. Securities and Exchange Commission
100 F. Street N.E.
Washington, D.C. 20549-1090

Submitted via email on SEC website
September 10, 2008

Re.: Abbreviated Comments for Proposed Proposal 151A on Indexed Annuities and Certain
Other Insurance Contracts: File No. S7-14-0(8); Release Nos. 33-(8)933 and 34-5(8)022

Dear Chairman Cox:

The Lafayette Life Insurance Company ("Lafayette Life") joined the many stakeholders requesting additional time to comment on Proposed Proposal 151A and its accompanying Release (referred to jointly as "the Proposal"). Disappointingly, it appears no extension has been granted. Given that today is the final day of the original comment period, and the SEC has not advised whether or not it would allow an extension, I respectfully submit the following abbreviated comments as General Counsel for Lafayette Life, highlighting only a few key points of importance. Absence of comment on other aspects of the Proposed Proposal does not indicate agreement; the limited time frame allowed for submitting only a limited response. With additional time, we, as many, would provide expanded commentary which would be helpful to the SEC in further revising Proposed Proposal 151A. We will provide additional comment should an extension or second comment period, be granted.

1. These comments are presented with the utmost respect for the SEC, support for its important work, and a desire to assist the SEC in achieving its purposes.
2. The Proposal is flawed from many perspectives, including legal, actuarial, marketplace, regulatory, insurance industry, and more. Thousands of comments received, almost all negative, reflect this.
3. We urge the SEC to withdraw the Proposal or reconsider a significantly revised new version to propose, utilizing the benefit of the input of the wide and diverse group of stakeholders and experts who have already commented and will continue to do so.
4. The test proposed for when an annuity would qualify for Section 3(a) (8) exemption is essentially illusory. As a practical matter, no annuity meeting the test would be marketable.
5. The test is flawed in that it ignores the guaranteed aspect of fixed indexed annuities in allocating investment risk between the annuity holder and the insurer. The value of fixed indexed annuities to the consumer is that the insurer bears any downside risk by guaranteeing principal and a certain return, but the consumer has the upside potential for additional return depending upon the change in the index. This is unlike securities such as mutual funds or variable annuities where there are no downside guarantees for consumers.
6. The threshold for classifying an indexed annuity as a security "when the amounts payable by an insurer under an indexed annuity are more likely than not to exceed the amounts guaranteed under the contract" is

unsupported and is a poor threshold, because it does not recognize how much of the policyholder's benefit is guaranteed and how much is affected by securities markets.

7. The Proposal is excessively expansive in terms of the annuities it impacts, which is virtually all, including more traditional annuities. The Proposal could be read so broadly that it leaves no annuities qualified for the 3(a)(8) exemption. This could not be the intended result.
8. The Proposal is overly broad and arguably exceeds the extent of the authority of the SEC in light of the current state of the law.
9. Much of the discussion of the Proposal focuses on some media stories about inappropriate marketplace practices involving seniors and the suitability of products sold to them. The SEC has reviewed and adopted sound bites from these media accounts. Too much of the Proposal seems to be driven by an acceptance of these media accounts at face value, without a balanced and careful scrutiny of whether the evidence supports the sweeping statements made.
10. Of course, life insurance companies, including Lafayette Life, want to see that the bad actors in the marketplace are stopped and punished. Some of the recent media attention on bad actors involved indexed annuity sales. The Proposal follows the media's approach and focuses on the need to improve disclosures and suitability standards. It also focuses on some more "extreme," atypical examples of indexed products which contain non-consumer-friendly features, and which arguably push the envelope even under the current state of the law as to whether such products qualify for the 3(a)(8) exemption. Current law could be used by the SEC to take action against these bad actors and extreme products.
11. We agree with the importance of an ever-improving regulatory scheme and enforcement in the sales of life insurance and annuities. We believe that state regulation and regulators effectively address and continue to improve addressing these issues.
12. Most of the Proposal's discussion focuses on marketplace abuses and has no direct bearing on the legal merits of whether an indexed annuity qualifies for the 3(a)(8) exemption under the 1933 Act, which is really the question at hand. We urge the SEC to refocus its approach to a careful legal review and analysis of the current state of the law on Section 3(a)(8) and the current Rule 151, and to use that as the starting point for developing a Proposal that updates Rule 151 to clarify the ability to use indexes in the way most responsible indexed annuity carriers do today.
13. The law and legal guidance for over 10 years have established guidelines that reflect that most indexed annuities, with proper design and sales disclosures and practices, qualify for the Section 3(A)(8) exemption. The Proposal proposes to change drastically the non-security status under the 1933 Act of virtually all fixed indexed annuity contracts, given that the Proposal's safe harbor would not fit any reasonable product. The Proposal fundamentally and incorrectly alters the basic legal test used effectively for many years to determine whether these annuities qualify for the statutory exclusion set forth by Congress in Section 3(a)(8).
14. The Proposal defines indexed annuities to be outside the 3(a)(8) exclusion if the amounts payable by the insurer under the contract are more likely than not to exceed the amounts guaranteed under the contract. According to the SEC, this proposed definition is tied to the "allocation of risk," a significant factor in earlier Supreme Court cases determining whether a state regulated product is subject to the federal securities law. In those Supreme Court cases, a primary issue was whether the insurance company guaranteed a sufficient rate of interest so as to have retained a significant investment risk. Those Supreme Court cases analyzed the "investment risk" factor by viewing the contract as a whole, thus analyzing the allocation of investment risk from a benchmark of 0%. By doing so, in its assessment of whether the insurance company retained a

significant investment risk under the contract, the Supreme Court fairly reflected the guaranteed interest rate that the insurance companies promised to pay under the contracts. Under proposed Proposal 151A, the SEC completely disregards the guaranteed rate of interest in its investment risk analysis. Under the proposed Proposal, the investment risk analysis only looks at the investment risk as it pertains to amounts greater than the minimum guaranteed interest rate under the contract, completely disregarding any investment risk assumed by the insurance company as to the guaranteed minimum interest rate that it promises to pay under the contract. Such an analysis stacks the deck against any insurance product that provides an investment component with non-guaranteed elements. Even the SEC's current Rule 151, which established a "safe harbor" for certain annuity contracts, reflected benchmarks/factors that the Supreme Court had used to determine whether an annuity contract was entitled to 3(a)(8) exemption. The SEC's proposed analysis of investment risk under Proposal 151A is significantly different than its Rule 151 analysis and Supreme Court precedent.

15. The SEC states that the rationale behind the Proposal is that customers assume the majority of investment risk for the "equity-linked" returns under the indexed contract (e.g., that amount greater than the minimum guaranteed interest rate and value). This rationale is faulty for the following reasons:
 - a. The allocation of investment risk analysis by the SEC is contrary to established Supreme Court precedent. In its analysis, the SEC divides or splits the returns under an indexed annuity for investment risk analysis purposes between those guaranteed by a state's annuity non forfeiture statute and those actually credited by the insurer based upon a formula guaranteed in advance. It then applies its investment risk analysis to the latter return amount, the excess interest. This is contrary to established Supreme Court precedent and previous SEC guidance. (See section below)
 - b. The SEC overreaches beyond the Congressional intent of the 3(a)(8) exemption. Setting aside the "linked to a security index" test, under the SEC's analysis, a traditional deferred annuity (which provides both a minimum guaranteed interest rate and policy value as a floor based upon the annuity non-forfeiture statute and annual interest at a rate guaranteed in advance for only 1 year), would probably not pass the more likely than not test set forth in the proposed Proposal. It is highly unlikely that any court or regulator would consider such a product a security because amounts payable by the insurer are more likely than not to exceed the minimum guaranteed amounts under the contract.
16. The SEC disregards indexed annuity product guarantees. Because of underlying guarantees, an indexed annuity does not reflect securities market risk of a loss of principal caused by security performance. In general, under an indexed annuity, if the indexed used for measuring purposes is rising, then the consumer will experience the crediting of excess interest above the guaranteed interest rate. But if the index is not increasing, but is decreasing or stagnant, then the consumer will not be credited with a negative interest rate. Stated differently, an indexed annuity will not experience negative returns or loss of principal because of market volatility and market risk like true securities do.
17. An index is not a security. Under an indexed annuity, the interest rate is linked in part to an index of securities for purposes of calculating any excess interest above the guaranteed minimum interest rate. An index, by itself, is not a security, and linking to an index does not expose the consumer to market volatility that can result in the loss of principal. The marketing materials for the contracts and the disclosure statements for the contracts, explain this distinction.
18. The SEC supports its proposal with references to indexed annuities sold with high withdrawal fees over an extended period of time: e.g., "withdrawal charges, which may be as high as 15-20%" that are over "a specified surrender charge period, which may be in excess of 15 years." As is typical in the Proposal, the SEC highlights the extremes with little or no reference to more common product designs.

19. On page 13, the SEC notes that “many indexed annuities permit purchasers to withdraw a portion of contract value each year, typically 10%, without payment of surrender charges.” This is an understatement of common annuity withdrawal features
20. As a general proposition, annuities provide for limited liquidity without the imposition of withdrawal charges. More specifically, annuities often provide for a 10% free withdrawal amount per policy year, which may be increased to 25% for certain nursing facility care. Additionally, annuities often waive the surrender charges if the annuitant is suffering from a terminal illness.
21. The SEC uses other negative broad brush characterizations when discussing indexed annuities, often discussing and even highlighting extreme product features that are not representative of the majority of indexed products on the market. Examples follow:
 - a. On page 8 the Proposal reads, “This growth has, unfortunately, been accompanied by growth in complaints of abusive sales practices. These include claims that...rapid sales growth has been fueled by the payment of outside commissions that are funded by high surrender charges imposed over long periods, which can make these annuities particularly unsuitable for seniors and others who may need ready access to their assets.”
 - b. On page 12 the Proposal reads: “The maximum surrender charges, which may be as high as 15-20%, are imposed on surrenders made during the early years of the contract and decline gradually to 0% at the end of a specified surrender charge period, which may be in excess of 15 years.”
22. Instead of using statistical data to support its claim of abusive sales practices in the industry, especially regarding sales to seniors, the SEC relies on unsubstantiated statements like those above, and from entities that are not responsible (and likely not fully knowledgeable) for regulating such products. Additionally, such entities clearly have a self interest in regulating indexed annuities. For example, on pages 15 and 16, the Proposal reads: “At the same time that sales of indexed annuities have increased concerns about potentially abusive sales practices and inadequate disclosure have grown. {No statistics or empirical evidence set forth supporting}. Patricia Struck, then President of the North American Securities Administrators Association (“NASAA”), identified indexed annuities as among the most pervasive products involved in senior investment fraud. {Again no statistics or empirical evidence set forth supporting}.
23. As in any industry or with any product, there are going to be incidents of abusive sales practices, but with regard to indexed annuities, these incidents are not the norm but in fact are uncommon and limited to certain actors. To a great extent, when it comes to alleged market abuses, indexed annuities are fighting a battle between perception and reality.
24. We know that indexed annuities have been and can continue to be designed and sold well within the 3(a)(8) exemption and successfully and appropriately regulated under the current state scheme, without imposing on consumers the unnecessary and extensive additional cost of securities law regulation.
25. Lafayette Life’s experience in selling indexed annuities has been extremely positive for our customers and bears no relation to the negative accounts and quotes appearing in the Proposal. The same would be true for indexed annuity providers in general.
26. Lafayette Life is a 103 year old life insurance company with the highest industry ratings. We have for many years very successfully and responsibly developed and sold valuable and consumer-friendly fixed indexed annuities, using appropriate marketplace practices, operating under effective state insurance regulation. Our customers have benefited greatly these valuable products, and future customers would be harmed by the significant additional and unnecessary costs and burdens of declaring these products to be securities.

27. In short, our experience with indexed annuities has shown that a relatively conservative “fixed” indexed annuity, when designed and sold correctly, is a valuable product for consumers, results in relatively few consumer complaints or litigation, can effectively and appropriately be regulated by the state insurance regulators, does not need the added costs and burdens of federal securities law, and, in short, belongs squarely within the 3(a)(8) exemption in the federal securities law, as that law exists to date. We will urge the SEC to expand the Proposal 151 safe harbor to encompass such products
28. Lafayette Life has been issuing indexed annuities since 1997. Indexed annuities comprise a substantial portion of the annuities that we sell. Since that time, the company has not observed a complaint trend of any substance regarding these products. In fact, the ratio of complaints on annuities at Lafayette Life overall does not even reach 1 complaint annually per 1,000 annuities in force. The average over the last ten years is 0.25 complaints per annuity in force, or a rate of approximately 1 per 4000 annuities in force over the last ten years. This includes any type of complaint whatsoever.
29. Since starting in 1997, Lafayette Life has issued more than 19,500 annuities (the majority of which are indexed), and has received only 31 complaints. Stated differently, for every 629 annuities issued, Lafayette Life may anticipate one complaint on average.
30. Over the last few years the Company has begun receiving peer average data from the Market Conduct Annual Statement, including complaint ratios on Fixed Annuities, a category which includes Indexed Annuities. Lafayette Life's complaint ratio per 1000 in force policies through that time period was 0.48, a figure more favorable than the industry average ratio of 0.65 complaints per 1,000 Fixed Annuities In force. Stated differently, Lafayette Life received fewer complaints on its Fixed Annuity block of business, which is primarily indexed annuities, than the insurance industry average for Fixed Annuities, which likely is not predominated by indexed annuities. It would be surprising if these complaint ratios were less favorable than the complaint ratio on any product type that the SEC regulates.
31. Contrary to the SEC's representations, most states have an extensive statutory and regulatory framework in place to regulate annuity product sales practices. Those statutes and regulations directly address unfair trade practices, suitability and annuity disclosure.
32. The Section 3(a)(8) exemption for life insurance and annuities has been in the statute since its inception. Congress is aware that annuities have evolved since 1933. Congress is aware of the current state of the law with regard to indexed annuities qualifying under the 3 (a) (8) exemption. If Congress thought this was wrong, they could amend the statute. They haven't.
33. We agree completely with the SEC's approach that, should the SEC move forward with this proposal, clearly the “prospective application only” aspect and the “12 month lead time for an effective date” aspect of the Proposal should be retained, for the reasons set forth in the Proposal.
34. We also believe that the SEC appropriately excluded life insurance from the scope of the Proposal. It nearly goes without saying that the allocation of risk in a life insurance product falls heavily on the insurer, particularly given the mortality risk (death benefit) and other factors.
35. Indexed annuities like Lafayette Life's appeal to consumers based primarily on the stability and security provided by the guarantees and similar features, and only secondarily on upward potential for additional return based on an index performance.
36. Given the broad, sweeping, complex and controversial nature of the Proposal, and given the many convincing reasons for significant revision to it that have already been put forth in hundreds of comments received by the SEC from a wide and diverse group of stakeholders, it is clear that the Proposal should either be withdrawn or significantly revised to address the thousands of compelling points made.

37. Such a proposal, with its wide-ranging implications, will undoubtedly lead to extensive debate and challenge, including litigation already planned by some stakeholders, causing confusion and unnecessary delays and expenses. A more prudent approach would be to work cooperatively with major stakeholders and experts to reach the best resulting Proposal possible.
38. In conclusion, we strongly urge the SEC to carefully consider the thousands of comments received and either withdraw the Proposed Proposal 151A or significantly revise it in light of those comments.

Thank you for your consideration of these comments.

Sincerely,

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