September 3, 2008

Mr. Christopher Cox, Chairman
US Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

File Number S7-14-08

Good Morning Chairman Cox,

1st American Pension Services, Inc. is a multi-state licensed corporate insurance agency. As president and CEO, I am also a registered representative. As a dually licensed individual, together with the response of agency leadership, it is my responsibility to offer comments on the subject of the consideration of your fixed index annuity SEC Rule 151a.

The more I have studied SEC 17 GFR Parts 230 and 240 RIN 3235-AK 16 and the proposed SEC Rule 151a, the more concerned I become.

As I understand, the concern exhibited by authorities of the SEC and FINRA member firms, as well as some FINRA members, is that certain insurance companies (approximately 58 out of more than 2500) have designed and constructed fixed index annuity policies (approximately 250) which have the potential to credit from 1 to 2 percent more growth than a traditional fixed annuity. More of a concern is the growing popularity of these policies over the last decade.

I also understand that the SEC / FINRA firms and members believe that certain appointed agents of the 58 or so companies offering fixed index annuities are specializing in marketing to seniors. Many of the SEC's complaints appear to object to the "free lunch" seminars allegedly designed in part to transfer seniors' assets from where they are currently, over to fixed index annuities.

It is also my understanding that SEC allegations are that many of these transactions are unsuitable.

Claims also include the use of "easy to get" credentials. Deceptive actors use the "easy to get" financial designations and credentials for the dual purpose of puffing their resume while lowering the sales resistance of senior citizens and others.

Other allegations are that seniors are sold unsuitable products by omitting pertinent information, such as full disclosure of any fees, charges and expenses, which if included or revealed in the presentation, might cause a rational person to avoid the purchase.

Additional allegations include unreasonably long surrender penalties for seniors; from 15-20 years.

Still more SEC allegations complain about obscene commissions on the alleged unsuitable fixed index annuities sold to seniors while at or in connection with an appointment gained at a "free lunch", "free dinner" or "free breakfast" educational seminar.

Under full disclosure, you should know that my practice is that of assisting citizens to prepare for retirement through savings and investment vehicles, both qualified and non-qualified. I have **not** practiced in the senior market and have never held a "free lunch" seminar or any seminar for seniors.

To the best of my knowledge, I am not appointed with any of the companies that have been the target of senior selling complaints at Departments of Insurance or the Attorney Generals of Minnesota and California.

For more clarity in projecting my comments concerning proposed SEC Rule 151a, my experience with the industry began in 1972. I have witnessed the development of securities (pre and post ERISA), mutual funds (pre and post Oct. 19, 1987), variable annuities (pre and post ERISA), fixed annuities (pre and post fixed indexed annuities), and life insurance (pre and post variable life, universal life and the A.L. Williams debacle).

Decades prior to the over pricing (bubble) of certain investment opportunities with stocks, mutual funds, and other traded products in the 90's, a vast segment of our population was risk-averse.

The SEC and NASD made attempts to oversee the safety of the equity purchasing public with rules and by using the "bully pulpit" and courts when "easy to do". They were not effective in most cases in my experience and were slow to move in catching a large number of bad actors. One reason may be the structure of the SEC authority itself.

October 19, 1987 made even more citizens risk-averse. When the stock markets rebounded, the inflated returns experienced in the 80's on fixed annuities were in slow decline.

The securities environment after ERISA (1974) was driven by competing pressures. The competitors created an environment which appeared beneficial by advertising lower and lower fees. The trick was to make potential customers believe they were actually paying lower fees. Without authoritative leadership from the SEC/NASD or Congress requiring full disclosure of any and all fees and/or expenses, the motivation within certain NASD member firms to non-disclose fees, hide fees or rename activities such as "revenue sharing", soon became the norm. Certain firms would intentionally hide fees in order to

win bids. The more aggressive firms adopted the practice to beef up the bottom line. Ironically today, the deceptively hidden fees are the very lifeline too many firms need just to stay afloat.

Creative thinkers within the insurance industry however, applied their wits in an effort to positively affect the declining bond trend. Certain captains of creativity became proactive. These far looking fixed annuity providers possessed 2 compelling pieces of information. This information had been available, but with returns for fixed annuities between 8% and 12% during the 80's, there was no need for the strategy.

1. These farsighted people had the capability and financial tools to create a fixed index product using an index as a *marker only* which was not invested in, sponsored by or endorsed by the index, insurance company or the policyowner. It was used only as a benchmark.
2. These farsighted executives and actuaries, who were few in number, wanted to continue to attract risk-averse savers who wanted the 100% protection of premium and gains, together with the opportunity for a higher return, say 1-2 %, more than traditional fixed annuities.

These fixed index annuities have taken on many interesting features, some attractive and some unattractive to me personally. These features however, have nothing to do with the fundamentals of the fixed index annuity.

For example:

Chart 1:

FIXED INDEX ANNUITIES	**VARIABLE ANNUITIES**
• Declare a current interest rate, participation rate, and/or index margin (depending on the type) • Guarantee a minimum rate of return • No loss of premium or earnings due to market downturn or volatility.	• Separate accounts are based on unit share (not mutual fund shares) performance[1] • Investor bears the market risk • Prior earnings and principal are both subject to loss.

These charts, above and below, are in **direct conflict** with your author(s) Proposed Rules allegations of seniors losing principal and interest due to market volatility. The necessity of accurate information provided to decision makers cannot be overstated. In this instance, however, the results from so many conflicting assertions could damage the

[1] "Dirty Little Secrets of 401(k) Plan Fees" by Ken Webber

decision maker's objectivity, the credibility of the SEC, the public's perception at large and the integrity of one of our most necessary industries.

Chart 2:

FIXED INDEX ANNUITIES VS. INDEXED MUTUAL FUNDS

	INDEX MUTUAL FUND	**INDEX ANNUITY**
• MANAGEMENT FEES	YES	NO
• DOWNSIDE MARKET RISK	YES	NO
• PAST INTEREST EARNINGS PROTECTED	NO	YES
• PREMIUM PROTECTED FROM MARKET RISK	NO	YES
• INCLUDE REINVESTED DIVIDENDS	YES	N/A

The author(s) of the Proposed Rule, in my view misrepresent fixed index annuity fundamental characteristics. For example, on page one, second sentence of the SUMMARY, "*The 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.*" This language appears to suggest that a policyholder's monies are at risk in some investment in which principal is increased or diminished based on the performance or volatility of the policyholder's investment.

In Charts 1 and 2 above, the fundamentals of a fixed index annuity do not permit the risk of the policyholder's contributions. All risk is born by the insurance company in the purchase of options for the opportunity to credit higher interest to a policyholder. Fixed index annuities do not permit the risk of a policyholder's principal or gains at any time.

Products that have an element of risk are securities. Therefore, the author(s) constant reference to a fixed index annuity as an investment is misleading to the reader and decision makers. It is my earnest hope that this misleading is not a result of nefarious influence of certain FINRA firms who may be desirous of the fixed index annuity production. Certain firms seem to prefer variable annuities and their excessive fees with no reserves.

Securities licensed representatives' use of certain terms with the buying public when comparing or discussing products that are securities with those that are not securities, are good rules and I concur with their purpose.

A securities licensed salesman should not refer to products which do not have an element of investment risk (the potential of losing principal and gain) as “an investment”. This would include bank CD’s, savings accounts, fixed annuities and the like.

Departments of Insurance also prohibit insurance agents from touting CD’s, savings accounts, and guaranteed fixed products containing no investment risk of principal “as investments”, as they do not have a component of investment risk for principal or gain. Investments have investment risk.

The SEC and especially the author(s) of the 96 page Proposed Rule could have served all of us better if accuracy and evidence had any bearing on the potential description of a legitimate, legal, and prospering segment of the insurance industry.

To be specific, the author(s) and signature, Florence Harmon, Acting Secretary of the SEC, failed to document a single sentence from any fixed index annuity policy to validate any of the statements regarding policyholder investment risk due to market volatility throughout the entire document.

To the discredit of the author(s), all statements indicating a fixed index annuity policyholder could or might lose principal or gain bears no resemblance to the workings of a fixed index annuity. In plain language, the cornerstone argument in the rule is non-existent.

One of my crucial tasks is that of a contract evaluator. In these comparisons, I’ve seen many features in fixed index annuities which I view as unsuitable. Long surrender charges, two tier interest crediting, and worst of all, three tiered annuities. None of these features, however, no matter how distasteful and uncompetitive to me personally, make the fixed index annuity a security.

In the second paragraph on page 5, the author(s) states accurately that *“Insurance provides protection against risk, and the courts have held that the allocation of investment risk is a significant factor in distinguishing a security from a contract on insurance.”*

Then, the author(s) moves to misinformation by falsely asserting... *“Individuals who purchase indexed annuities are exposed to a significant investment risk – i.e, the volatility of the underlying securities index...”*

There are dozens of similar incorrect statements in the arguments set forth.

Sadly, none of these statements offer any examples of supporting policy language to demonstrate the credibility of the statement.

No evidence using any language from the more than 250 fixed index annuity policies referred to in the Proposed Rule are sited. Yet, all of the policies have been dissected, vetted and approved by NAIC member Departments of Insurance which would have made sure no principal or gains were at risk by the policyholder. To believe the author(s)

of the Proposed Rule, one would have to accuse every Department of Insurance as being wholly incompetent while endangering the public.

How can we practitioners or the public have any confidence in Rule Makers if this kind of recklessness in the Proposed Rule is permitted to stand?

The author(s), in my view, have poisoned the well of information that the Rule Makers must have in order to make accurate, reasonable decisions literally affecting the billions of dollars in savings the public has at stake.

If I, like the Rule Makers, had read this 96-page document, without the savvy that my experiences in the securities and insurance industry have provided, I would unnecessarily agree with an action against certain insurance companies, their products and their regulators.

The allegations in the Proposed Rules made toward bad actors did not fail to move me. However, overlooking their bad acts or being years too slow in warning the public is no less atrocious.

In my view, the author(s) made good arguments for seven (7) categories of bad acting.

1. Bad actors dispensing misleading information in the senior financial market;

2. Bad actors holding "free lunch" educational seminars;

3. Bad actors creating the environment for unsuitable transactions, churning, twisting, etc.;

4. Deceptive professional titles and/or credentials;

5. Selling unsuitable (fees, expenses, charges) products to seniors;

6. Unsuitable surrender charges to seniors, i.e., 15-20 years; and

7. Obscene, large commissions

I am personally aware of ongoing Department of Insurance activities aggressively pursuing enforcement and expanding their rules specifically targeting these seven sins. Many Departments will no doubt give you their voice on their activities and/or accomplishments in their comments on the Proposed Rule.

For decades, the SEC, NASD and now FINRA have been largely unsuccessful reigning in their own bad "free lunch" actors. While I have witnessed the damage some have done, I caution you not to forget that there are many good actors in the senior industry.

Chairman Cox, last September you faulted many registered representative seminar hosts, accusing free lunch meetings being disguised to fool seniors to promote financial products, some of which were inappropriate to their needs.

In a briefing on September 10th, you faulted many seminar hosts for inducing individuals to attend by offering free luncheons, golf, vacations or other inducements.

You opined on unsuitable variable annuities, real estate investment trusts or speculative securities.

I certainly concur with these efforts. As I have now reached the age to be a prime target for these "free lunch" invitations, some of these meetings I have been "invited to" have also even encouraged IRA Real Estate Investment Trusts… in Mexico.

You estimated 50% of the "free lunch" seminars to have been misleading, exaggerated or downright wrong.

50% of the advertising for the meetings were promoted by ads featuring exaggerated or deceptive advertising claims.

23% involved possibly unsuitable recommendations.

How in good conscience can the SEC / FINRA member firms point any fingers at non-security sales people when our own house is so entangled with the same marketing behavior? Unfortunately, unlike fixed index annuities, many of the products offered from FINRA member firms are laden with fees and expenses, both disclosed and undisclosed.

My own clients' experiences reveal that most senior financial product marketing problems are due to unscrupulous securities representatives coercing the investment of accumulated assets in products with hidden, undisclosed fees in house accounts within variable annuities.

Chairman Cox, with regard to unsuitable transactions and unsuitable products, the unsuitable transaction is often the act of placing an unsuitable product with a prospect that is unable to operate the product the way it was designed to function.

In the past 6 years on Capitol Hill, there has been much light shed concerning the undisclosed fees[2] including the hiding of fees and legal kickbacks or "revenue sharing"[3] obscured in securities sold to the public. For years now, testimonies under oath at the U.S. House and Senate committee meetings have unearthed damning information of certain FINRA members financially skinning customers with the use of hidden/undisclosed fees.[4]

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[2] Testimony of Matthew D. Hutcheson, MS, CPC,AIFA, CRC Independent Pension Fiduciary, Uncovering and Understanding fees in Qualified Retirement Plans, 2007. www.dol.gov/ebsa/pdf/IF408b2.pdf,

[3] Industry's BIG Secret, http://www.mchenryconsulting.com/research/mchenry_sec_update.pdf

[4] Between $1 Billion and $1.5 Billion of investor assets may be redirected each year through this practice of Revenue Sharing. www.mchenrygroup.com

Since ERISA, billions of dollars[5] are stripped annually from IRA variable annuities, 401(k) plans, 403(b) plans, 457(b) plans, mutual funds, retirement products and other equity investment products sold to more mature workers at or near retirement including into retirement. The Department of Labor has identified 17 types of fees (mostly hidden) which are killing the investment growth[6] opportunities of millions of senior investors.

Countless credible articles are written every year extolling agencies in authority and the U.S. Congress to require full and complete disclosure of every single fee.

These fees (3% per annum) can "transfer" up to 50% of a worker's earnings over 35 years to the investment provider. Chairman Cox, if the Congressional Thrift Plan had those fees, the same fees that the SEC / FINRA members are permitted to hide from customers; couldn't we agree that would be most unsuitable?

The irony of this undisclosed environment is why a study quoted by *Pension and Investment Age Magazine* indicates that ***"There is an inverse relationship between investment returns and fund fees. What other industry do you know of where the more the product costs the poorer it is?"***

Exactly who is against full and complete fee disclosure? And why are they so successful in their efforts to keep fees, expenses and charges of any or every kind hidden?

Chairman Cox, many FINRA member firms play an "unsuitable" game. The game is to distribute the fees in such an extraordinarily confusing manner, that they are not understood by most representatives, much less the consumer. These FINRA member firms ensure no fee is too large so that it draws attention. They ensure that the fees that get the most attention (e.g. surrender charge) are the most presentable from a competitive view. Design the fee in a manner that you can get State and SEC regulating approval, and make sure the whole package meets the profit and time frame goals of the company (as well as paying adequate commissions). It's quite a juggling act, but those who are good at it are well rewarded.

This undisclosed fee environment has been testified about and reported to Congress for years, yet the SEC to my knowledge has not moved to unequivocally require all FINRA member firms to disclose all fees on all products including mutual funds, 401(k) plans, 403(b) plans, 457(b) plans, IRA variable annuities and variable life insurance; WITHOUT EXCEPTION.

For the fixed index annuity, there are unsuitable products for certain people as well. However, none of the unsuitable features involve investment risk of principal or credited earnings.

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[5] Barbara Bovbjerg, http://waysandmeans.house.gov/media/pdf/110/bovb.pdf, Director of Education, Workforce, and Income Security Issues at the Government Accountability Offices, (GAO)

[6] Stephen Butler, President of Pension Dynamics Corporation, http://edlabor.house.gov/testimony/030607StephenButlertestimony.pdf

Sadly, I have little hope that the SEC will address the hidden fee debacle. This may be because the SEC has demonstrated an abject failure in requiring FINRA member firms to stop inadequately advertising tax deferred growth charts in tax-qualified products. (See Exhibits 1-4. See fine print under each chart.)

There seems to be a chart in every tax-qualified product brochure (401(k), 403(b), 457(b), IRA and tax deferred variable annuities sold to seniors) demonstrating the benefits of tax deferred compounding.

The chart depicts the growth of a monthly amount or a single payment amount at a hypothetical percentage rate of return over a certain number of years. The chart adequately demonstrates the virtues of tax deferred savings over non-taxed deferred savings. (I've enclosed 4 charts, Exhibits 1-4, all demonstrating my view of an unacceptable failure to fully disclose practice from 4 separate FINRA member firms.)

Using the Enclosure, Exhibit 1 as an example:

Exhibit 1: $278 x 12 mo. @ 8% x 30yrs = $390,383

Impressive growth. Yet in small print (smaller than the print in the rest of the advertisement) under the chart, a disclaimer advises that the management expense, mortality and expense risk charges are not included in the chart. The small print mentions nothing of "revenue sharing" or any other potential undisclosed fees that will have an even greater negative impact on the value of the account.

In my view, this is deceptive. An advertisement should be required by every authority to reveal in the exact same manner and size, the same numbers with all fees including revenue sharing which will be applied to the investment.

Then, and only then, could the consumer be fully and fairly informed of the effect of the fees on their investment.

$200 x 12 mo. @ 8% - (2.75% aggregate annual fees) x 30 yrs. = $225,936.[7]

Who was the benefactor of the $164,447 difference? Who would argue that the potential customer needed that information in order to make a fully informed decision? I would have certainly wanted my own parents to have had that information prior to point of sale.

Did the consumer overpay for services purchased? Who stands in the gap for the citizen if not the SEC and Congress? Have FINRA member firms created a reimbursement clause in their products when the costs plus some profit become egregious? Who determines what egregious is?

Now, can we agree why certain FINRA member companies collectively spend vast amounts of money for lobbyists to derail Congress and the SEC from demanding that authorities force companies to disclose 100% of fees?

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[7] TRAK Software 2008.

If the SEC, since ERISA[8] , won't require FINRA member firms to fully and properly disclose all fees, expenses and charges including revenue sharing, resulting in billions of dollars in unnecessary wealth transfers from seniors and workers, how can we trust the SEC to properly decide on the products the author(s) has/have attempted to discredit with misinformation?

Regarding "obscene commissions"; taken in direct comparison to a security product with lifetime monthly commission and a lifetime asset trail commission, in most cases the security would in fact pay more commission over time.

When I hear posturing from one of my securities brethren about obscene commissions on certain fixed index annuities, without so much as a balanced comparison, other statements that person has to offer are discounted due to a consistent lack of credibility.

The extreme lateness (30+ years) of the SEC / NASD / FINRA on the unsuitable hidden fee issues is more than unfortunate. It's especially sad that after so many years, it took a television show to force the SEC's hand. But it's not too late to clean up our securities full disclosure practices. Chairman Cox, disclose those fees!

Over 50% of the American people are risk-averse. The fixed index annuity is safe, durable and doesn't eat up a senior's retirement monies with either disclosed or undisclosed fees.

Lastly, the SEC Rule 151a is proposing wording on crediting interest at or near the guarantee. The actual crediting history of fixed annuities that hundreds of insurance companies have safely provided to clients the past 20 years has been between 30% and 300% above the policy guarantee. (3.5% to 12%) Hundreds of thousands, if not millions, of risk-averse citizens and their beneficiaries have benefited from these policies. Your rule would appear to swoop these non-risk products over to the securities side of the ledger where hiding fees has been the standard operating procedure.

Chairman Cox, it's my view that the Proposed Rule is an "end run" using arguments with absolutely no credibility. Please be alert of the greed factor of certain FINRA firms and members desirous of the fixed index annuity contribution volume and that it is properly weighed on a balanced scale.

I urge you to extend your comment period in order for all invested parties to provide your decision makers with thorough documentation. After all, it took three years of SEC posturing to finally pass the new variable annuity rule. Even well intended rules rarely stop bad actors. It takes enforcement.

Your officials wrote, about variable annuity salespeople, *"We believe NASD's examinations and enforcement actions over the years clearly demonstrate an entrenched problem in the sales culture for these products…"* . In my experience, the NAIC

[8] Employee Retirement Income Security Act 1974, http://www.dol.gov/compliance/laws/comp-erisa.htm

members have demonstrated far more effectiveness than the SEC. Departments of Insurance regularly fulfill their responsibility with a willingness to take up the offense of a citizen within their state. The SEC seems to either not be designed or equipped for the massive enforcement needed in this unsuitable non-disclosure of fees environment.

I urge you to **not** enact Rule 151a. If you need any additional information, please contact me directly. You may reach me by phone at 817-226-4032, or e-mail plynch@1staps.com or fax, 817-274-4032.

Thank you for your consideration of these thoughts.

Sincerely,

Phil Lynch

Enclosures: 4 Exhibits