I oppose the adoption of proposed rule 151a by the SEC for several reasons which will be outlined below and generally find that the SEC is exceeding its authority in creating this rule.

The Executive Summary produced by the SEC contains latently inaccurate information that may lead many readers to come to an erroneous conclusion. It lacks factual integrity. The SEC document states for example:

1. *"Individuals who purchase indexed annuities are exposed to a significant investment risk – i.e., the volatility of the underlying securities index. Insurance companies have successfully utilized this investment feature, which appeals to purchasers not on the usual insurance basis of stability and security, but on the prospect of investment growth. Indexed annuities are attractive to purchasers because they promise to offer market-related gains. Thus, these purchasers obtain indexed annuity contracts for many of the same reasons that individuals purchase mutual funds and variable annuities, and open brokerage accounts"* (page 5 - Executive Summary).

The fact is that individuals who purchase indexed annuities are NOT exposed to a investment risk. "Investment Risk" has been adjudicated in specific reference to an index annuity. (See Malone v. Addison Ins. Marketing, (W.D. Ky 2002). "Investment risk" does not mean that a consumer could have received a better return in a different product. The underlying guarantees in an index annuity are similar to those in a traditional declared rate fixed annuity. Excess interest is credited to an index annuity based on a guaranteed formula which is linked to an outside index. The consumer does not own shares in any security, nor does their account value fluctuate due to market volatility. The consumer's funds are not held in a separate account. Instead premium are place into the general account of the insurance carrier. It is grossly inaccurate and borderline reckless to state that a purchaser of an index annuity may suffer investment risk. Insurance companies have successfully developed and designed innovative solutions promoting this benefit, which appeals to purchasers on the familiar insurance mainstay of stability and security. Indexed annuities are attractive to purchasers because they promise the potential to exceed traditional fixed interest rates without exposing principal or past interest credits to market risk. Thus, these purchasers obtain Fixed Indexed Annuity contracts for many of the same reasons that individuals purchase non-securities products such as certificate of deposits (CDs) and traditional fixed annuities.

1. The Executive Summary continues, "*When the amounts payable by an insurer under an indexed annuity are more likely than not to exceed the amounts guaranteed under the contract, the majority of the investment risk for the fluctuating, equity-linked portion of the return is borne by the individual purchaser, not the insurer. The individual underwrites the effect of the underlying index's performance on his or her contract investment and assumes the majority of the investment risk for the equity-linked returns under the contract"* (page 6).

The fact is that within a Fixed Indexed Annuity the majority of the investment risk for the equity-linked fluctuation is NOT borne by the purchaser. And unlike true security products, the purchaser is NOT directly impacted by market fluctuations. Negative investment risk fluctuation to the purchaser is eliminated entirely. Further, positive investment risk fluctuations are muted because of internal insurance company accounting processes and systems rather than being processed directly through security fund managers. Often these positive fluctuations are restricted by the interest crediting methods through caps and participation rates by the insurance company, not directly through a securities fund manager. This clearly demonstrates that any investment risk fluctuation is NOT borne by the purchaser. The insurer underwrites the effect of any underlying index's performance. The purchaser has no incident of ownership in any security when they purchase a Fixed Indexed Annuity.

1. The SEC document incorrectly states, *"Individuals who purchase such indexed annuities*

assume many of the same risks and rewards that investors assume when investing their money in mutual funds, variable annuities, and other securities" (page 6).

The fact is that individuals who purchase Fixed Indexed Annuities do NOT assume any of the same risks and rewards that investors assume when investing in mutual funds, variable annuities and other securities. For example, the purchaser of an index annuity does not have a separate account which fluctuates based on the market's movement. The purchasers experience is much more consistent with the benefits of a savings vehicle; for that is what a Fixed Indexed Annuity is. Indexed Annuity purchasers do not experience a loss in value due to negative market fluctuations. Indexed Annuity owners do not experience a gain equal to the positive fluctuation in a market index. As an example, index annuities do not benefit from dividends paid. Rather, they receive an interest credit that is derived from a set portion of a positive market fluctuation. Once interest is credited to an index annuity, it can not be reduced due to market volatility.

1. It is true that the SEC document accurately states, *"…most purchasers of indexed annuities have not received the benefits of federally mandated disclosure and sales practice protections"* (page 6). The document neglects to identify however, the significant protection afforded all Indexed Annuity purchasers through state mandated disclosure and sales practices.

It is common knowledge that each state department of insurance provides a great deal of regulatory protection for any Indexed Annuity purchaser.

Sales materials produced by each insurer are filed with the state along with a complete review of any product before the state permits the sale of the product within their borders.

Consumers will lose a far superior complaint resolution process should this rule be adopted.

Consumers receive rapid responses from local state insurance departments when they file a complaint. In most cases, companies and agents must provide a written response within 10 business days of an insurance department inquiry. Purchaser complaints are routinely resolved in 30 days. This is largely due to the extensive and aggressive follow up provided by the insurance department in each state. If necessary, a purchaser can meet personally with a department of insurance representative to help them resolve any complaint.

The process for complaint resolution within the SEC will be dramatically slower, more complex and more costly for the consumer. They may be subject to the cost of legal representation and the delays of litigation. All of this can be avoided completely through the state regulatory model within the department of insurance.

The SEC's own website provides investors warnings about their lack of ability to help consumers resolve complaints. *"Sometimes a complaint is successfully resolved when we ask a firm to report to you and us. But in many cases, the firm or company denies wrongdoing, and it remains unclear as to who is wrong or whether any wrongdoing occurred at all. If this happens, we cannot act as a judge or an arbitrator and force a broker, brokerage firm, or company to resolve your complaint. But the law allows you to take legal action on your own."* (http://www.sec.gov/investor/pubs/howoiea.htm)

So, if a consumer complains and their broker denies wrongdoing, the consumer has no options other than costly litigation. Conveniently, the SEC site even provides advice on how to find a lawyer specializing in securities litigation. (http://www.sec.gov/answers/arbatty.htm)

This is the most important element in protecting the consumer; complaint resolution leading to a full restoration of value for the consumer. The inherent safety of a Fixed Indexed Annuity combined with the authority of the state department of insurance provides a far superior platform for consumer protection. The state department of insurance does have authority to address allegations of violations in insurance code. The SEC does not have such authority.

1. The SEC document continues, *"This growth has, unfortunately, been accompanied by growth in complaints of abusive sales practices. These include claims that the often-complex features of these annuities have not been adequately disclosed to purchasers, as well as claims that rapid sales growth has been fueled by the payment of outsize 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"* (page 8).

The fact is that in response to the growth in complaints, the National Association of Insurance Commissioners (NAIC) created a model suitability regulation that has now been adopted in 35 states. All Indexed Annuity carriers have applied this regulation on all their sales, irrespective of states pending adoption or even if the state elected representatives have not enacted this legislation. This means that all Indexed Annuity purchasers not only receive full disclosure, each transaction is reviewed for its suitability to the individual purchaser. This is why the Indexed Annuity industry rate of complaint is relatively so low. According to Advantage Compendium, an annuity analyst firm, the Indexed Annuity industry experiences one complaint for every $109 million of premium received.

A professional insurance agent is well equipped to determine if a specific Indexed Annuity is suitable for a particular purchaser. This comes through regular training provided by the insurer and through many state mandated continuing education requirements. Both of which give an agent a better understanding of liquidity and income features available within this savings product. By properly planning and evaluating the purchaser's needs, it is possible to provide a great deal of financial certainty through these products. Further, through the proper disclosure of surrender charges combined with the liquidity features, it is very likely that the purchaser will never unknowingly experience a surrender charge.

Commissions earned by insurance agents are quite similar to those of an investment advisor or fund manager. For example, a typical annuity with a 10-year surrender period would pay approximately 8% commission to the agent. Under a managed account, an investment advisor or fund manager might charge as much as 2% per year. Over 10 years, that would be a 20% cost to the consumer. The fact is insurance agent commissions are not exorbitant in comparison to other financial service professionals. Unlike fees charged within the securities arena, insurance agent commissions are not paid by the consumer. Rather, they are paid by the insurance company from their surplus. This allows 100% of the purchaser's money to go to work for them within their Fixed Indexed Annuity.

It should be noted that many insurance companies report that a substantial amount of Fixed Indexed Annuity sales are derived from Broker Dealer organizations. These same commission percentages are paid through the Broker Dealer channel of distribution. Are readers to believe that the SEC has not been supervising this activity over the last 10 years?

1. The SEC document references, *"The only judicial decision that we are aware of regarding the status of indexed annuities under the federal securities laws..."* (Page 21 – 22) but fails to share with the public the findings of the judge in this highly prescient case. One can only conclude that the SEC withholds this important information because the findings of the judge are contradicting the SEC's proposed regulation. The judge found that the Indexed Annuity was exempt from registration under the Securities Act.

The fact is that in Malone v. Addison Insurance Marketing (2002), the plaintiff attorney attempted to argue that the sale of index annuities was improper in that these products were securities and should have only been sold by a registered representative.

First, the judge noted that, per Sec 3(a) 8, Insurance Company (a defendant in the case) was subject to the supervision of an insurance regulator and that its index annuity was subject to the approval of an insurance commissioner per 3(a) 10.

Second, the district court also found that the plaintiff's effort to have her Fixed Indexed Annuity contracts declared as variable annuities failed for two reasons: (1) By guaranteeing the plaintiff a minimum return irrespective of the performance of the S&P 500 index, the district court found that the Insurance Company took the investment risk and not the plaintiff who stood to be credited annually no matter how the market performed; and (2) Annuitization payments were fixed in advance. Thus, both questions in the *VALIC* referenced by the SEC were answered properly.

Third, the district court found that the Insurance Company did promise the plaintiff a fixed amount of her savings plus interest (the return of premium plus annually credited interest less any surrender charges) and that her assets were not kept in a separate account - "the keystone characteristic of all variable annuity contracts" according to the judge. Thus, both key questions asked in the *United Benefit Life* case referenced by the SEC were answered in the affirmative.

Fourth, the plaintiff's argument that her return over and above the minimum guarantee was variable, and thus did involve an element of risk and uncertainty, was found to be inconclusive. The Insurance Company was found to bear substantially more risk as it can actually take a loss on the product if it was unable to surpass the minimum guaranteed crediting rate in its own investments. On the other hand, plaintiff's risk was not that she would lose the value of her initial investment, but rather the risk that had she chosen a different contract her money might have been worth more. Again, according to the judge, "That type of risk - that she could have gotten a better deal but for the pressure she encountered to enter into this particular contract - is not the type of risk central to determining whether a security exists."

Interestingly, the district court said it could end its deliberation there and find that the "plaintiff's Fixed Indexed Annuity contracts are more like 'fixed annuities' and therefore are excluded from the definition of 'security' under the Supreme Court's opinions in *VALIC* and *United Benefit*" without considering how the product was sold.

However, the district court did decide to continue and examine SEC Safe Harbor Rule 151 and found that the Fixed Indexed Annuity product had satisfied all three criteria necessary under Rule 151 and was also exempt from registration under this basis.

1. The SEC document includes important contradictions. On page 69 and 72, the SEC document attempts to state that one of the benefits of this proposed regulation is “enhanced competition.” On page 75 and 79, the document reverses itself stating the cost as, “diminished competition.” Competition will surely be restricted if this rule is adopted. The distribution of the product will transfer from existing traditional insurance firms to Broker Dealers. In essence the regulation will be eliminating the competition to the benefit of the Broker Dealers. This will reduce access to Fixed Indexed Annuities so that they will only be available to individuals who open a brokerage account and only if the Broker Dealer they are with offers the product.

1. Increased costs to the insurance companies as a result of this rule change will be passed onto the consumer further diminishing their value.

1. Tens of thousands of Small Entities will be dramatically impacted by this regulatory change. According to Indexed Annuity analyst, Advantage Compendium, “…there may well be 100,000 annuity agents that would be affected by the proposal…” Advantage Compendium estimates a total cost in economic impact to be in excess of $852 million to the insurance industry distribution channels.

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, this constitutes:

1. A major effect on the economy of $100 million or more.
2. A major increase in costs or prices for consumers or individual industries and
3. A significant adverse effect on competition, investment or innovation.

1. The SEC document states, "*We have observed the development of indexed annuities for some time, and we have become persuaded that guidance is needed with respect to their status under the federal securities laws*" (page 8).

The fact is that the SEC has already provided guidance with respect to the status of the federal securities laws and Fixed Indexed Annuities. The SEC's own website states, "*The typical equity-indexed annuity is not registered with the SEC.*" The SEC website also goes on to state that the regulatory authority on these products is, "*…your state insurance commissioner*" (http://sec.gov/investor/pubs/equityidxannuity.htm).

The SEC's new position appears to be motivated by one thing; sales volume. Because the Fixed Indexed Annuity complaint rate is so low, as expressed earlier, this desire to change the definition of what is a security cannot be proposed to protect consumers. Because the Fixed Indexed Annuity sales practices all include a suitability process today, it cannot be for better sales practices. The fact is that the SEC only desires this product to be a security because of sales volume. By reaching into this market, the SEC can expand its control to include a product that is clearly a safe, secure, non-investment, insurance product. In addition, this move would transfer product distribution from traditional insurance product distribution firms to Broker Dealers.

It appears that the SEC desires to overreach its authority while being heavily "persuaded" by a group of securities marketing firms now known as the Financial Industry Regulatory Authority (FINRA). FINRA was formerly known under a much more accurate and truthful title, the National Association of Securities Dealers (NASD). The fact is that FINRA is a trade association exerting inappropriate influence over the SEC, an entity that is supposed to be in place to protect consumers, not promote a particular segment of the financial services industry.

It is interesting to note that the SEC has completely failed to mention or include other financial products in this proposed regulation that use the same crediting methods as a Fixed Indexed Annuity, namely Indexed Universal Life and Indexed Certificates of Deposit. It is shamefully obvious that these were overlooked because of their lack of sales volume and therefore, lack of appeal to the securities dealers who work in concert to restrict product access to both financial professionals and consumers alike.

Sadly, the SEC has shown its true intent by drafting a document full of errors designed to give readers a false concern and an inaccurate picture of what a Fixed Indexed Annuity actually is. Further, the SEC is demonstrating it is only interested in defining financial products as securities if they are achieving a certain level of sales success.

As the demographic of American savers increases, the value proposition of registered securities diminishes. As millions of Americans approach retirement, it is perfectly reasonable for those same people be become more conservative with their resources and choose safe money options like a Fixed Indexed Annuity. The SEC and FINRA (NASD) are proposing this regulation not to protect American Consumers but rather, their own self interests.

Please reject this proposed rule 151a for the benefit of millions of Americans desiring a safe and guaranteed option for their money, for the tens of thousands of small entity insurance professionals who will be impaired if it is adopted, and for the purchasers of Fixed Indexed Annuities who deserve a robust local regulatory authority to rapidly resolve their complaints.