

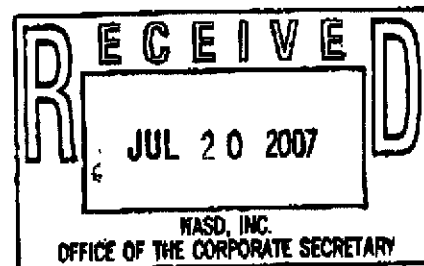
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July 20, 2007

VIA MESSENGER

Ms. Barbara Z. Sweeney
Office of the Corporate Secretary
NASD
1735 K Street, N.W.
Washington, D.C. 20006-1506



Re: NASD Notice to Members 07-27; Proposed Conduct Rule 2721

Dear Ms. Sweeney:

Our firm represents the Committee of Annuity Insurers (the "Committee").¹ We respectfully submit this letter of comment on behalf of the Committee regarding new Conduct Rule 2721 proposed by NASD in Notice to Members 07-27 (June 2007) ("NtM 07-27").

Proposed new Conduct Rule 2721 (the "Proposed Rule") would establish disclosure and filing requirements as well as limits on offering expenses for private placements (*i.e.*, non-public offerings) of securities issued by NASD members or their affiliates that come within the definition of a "control entity" in the Proposed Rule (hereinafter, "Member Private Offerings" or "MPOs"). The Committee does not believe that the Proposed Rule is intended to apply, and believes that it should not apply, to the offer and sale by an NASD member of variable annuity contracts, variable life insurance policies, modified guaranteed annuity contracts, or modified guaranteed life insurance policies issued by an insurance company that is a control entity of the NASD member.² Therefore, the Committee recommends the changes to the Proposed Rule discussed below that would specifically exempt offers of Subject Contracts from the Rule's requirements.

The Proposed Rule

The Proposed Rule would impose the following requirements on Member Private Offerings:

¹ The Committee of Annuity Insurers is a coalition of life insurance companies that issue fixed and variable annuities. The Committee was formed in 1981 to participate in the development of federal securities law regulation and federal tax policy affecting annuities. The member companies of the Committee represent over half of the annuity business in the United States. A list of the Committee's member companies is attached as an Appendix.

² Variable annuity contracts and variable life insurance policies are together defined as "Variable Contracts" by NASD Conduct Rule 2820(b)(1). Modified guaranteed annuity contracts and modified guaranteed life insurance policies are identified in NASD Conduct Rule 2710(b)(8)(E). For purposes of this letter, we refer collectively to Variable Contracts, modified guaranteed annuity contracts, and modified guaranteed life insurance policies as "Subject Contracts".

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- Delivery of a private placement memorandum ("PPM") to each investor with information regarding risk factors, intended use of proceeds, offering expenses and any other information necessary to ensure that required information is not misleading;
- Filing of the PPM with NASD's Corporate Financing Department at or prior to the time it is provided to any investor; and
- At least 85% of the offering proceeds be used for the business purposes identified under "use of proceeds" disclosure in the PPM.

According to NtM 07-27, the Proposed Rule is a result of widespread abuses NASD has observed in recent years with certain MPOs, a number of which have been the basis of enforcement actions against offending members.³ Among the abuses observed by NASD was the failure to provide a PPM to non-accredited investors in MPOs relying on Regulation D under the Securities Act of 1933 (the "1933 Act") and misleading, incorrect, or selective disclosures in PPMs that were provided to investors, including omissions and misrepresentations regarding selling compensation and the use of offering proceeds.⁴

As explained in NtM 07-27, MPOs are non-public offerings of securities not registered under the 1933 Act.⁵ Typically, MPOs rely on the exemption from the registration and prospectus delivery requirements of the 1933 Act available under Section 4(2) of that Act and Regulation D thereunder.⁶ According to NtM 07-27, NASD members and their control entities use MPOs to raise capital to finance their operations or to pool customer funds to create investment vehicles that provide revenue to the members.⁷

The Proposed Rule is intended to provide investor protections with respect to MPOs that are parallel, though not identical, to the protections provided by NASD Conduct Rule 2720 in connection with member public offerings.⁸ Rule 2720 was designed to protect investors in member public offerings from potential abuses arising as a result of the conflicts between the interests of a member's customers and those of the member or its control entities inherent in the offering of its own securities or those of its control entities to its customers.⁹ Thus, the Proposed

³ NtM 07-27, note 3 and accompanying text.

⁴ NtM 07-27, note 4 and accompanying text.

⁵ NtM 07-27, note 5 and accompanying text.

⁶ NtM 07-27, note 5. MPOs also may rely on other exemptions from the registration and prospectus delivery requirements of the 1933 Act.

⁷ NtM 07-27, note 5.

⁸ NtM 07-27, text accompanying note 10.

⁹ See NASD Notice to Members, Proposed Amendments to By-Laws and Rules of Fair Practice (Interpretations) Governing the Distribution of Securities of Members (May 8, 1971).

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Rule is designed to protect a member's customers from conflicts of interest that may arise between the customer and the member or its control entities as a result of an MPO.

Under the Proposed Rule, MPOs would include offerings by an entity that is under common control with the member, or that the member firm or its associated persons control. "Control" under the Proposed Rule would be defined as beneficial ownership of (1) more than 50% of the outstanding voting securities if the entity is a corporation, or (2) in the case of a partnership, more than a 50% interest in the partnership's distributable profits or losses. As a result, the Proposed Rule would not apply to MPOs by an entity that does not meet this test, including investment partnerships, direct participation programs and other private funds that the member might organize but in which the member, its associated persons, or any parent of the member does not beneficially own the requisite positions.¹⁰

Applicability of the Proposed Rule to Subject Contracts

It is not clear from the Proposed Rule and NtM 07-27 whether or not NASD intends the Proposed Rule to apply to Subject Contracts. The purpose of the Proposed Rule suggests that it is not targeted at member offerings of Subject Contracts issued by control entity insurance companies. Nonetheless, the definition of MPO in paragraph (a)(1) of the Proposed Rule appears to include such offerings. Paragraph (a)(1) defines an MPO as "[A] private placement of unregistered securities issued by a member or a control entity in a transaction exempt from registration under the Securities Act and the filing requirements under Rules 2710, 2720, and 2810." Subject Contracts may be offered and sold in transactions exempt from the 1933 Act, such as a non-public offering pursuant to Section 4(2) of the 1933 Act or Regulation D thereunder, and are exempt from the filing requirements of NASD Conduct Rules 2710, 2720 and 2810.¹¹

The Committee believes that the public policy reasons for adopting the Proposed Rule are laudable, but that its purpose would not be served by applying the Proposed Rule to Subject Contracts. Therefore, regardless of NASD's intent, for the reasons expressed below, the Committee strongly urges NASD to exempt member offers of Subject Contracts from the Proposed Rule.

The purpose of the Proposed Rule is to address abuses observed by NASD in MPOs. NtM 07-27 cites a number of enforcement actions NASD has taken against members for such abuses. None of the cited enforcement actions relate in any way to the offer or sale of a Subject Contract. This is not surprising because the conflicts of interest inherent in many MPOs do not arise in connection with the offer and sale of Subject Contracts by a member that are issued by a

¹⁰ NtM 07-27, page 5.

¹¹ NASD Conduct Rule 2710(b)(D) exempts Variable Contracts, and Rule 2710(b)(E) exempts modified guaranteed annuity contracts and modified guaranteed life insurance policies, from the filing requirements of Rules 2710, 2720, and 2810.

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control entity insurance company. Unlike securities sold to obtain financing for the issuer, Subject Contracts are issued by insurance companies and sold by their affiliated underwriters in the ordinary course of their business. The "proceeds" from the sale of such contracts are used primarily for the benefit of the owner of the contract, and only a small portion of the proceeds directly benefits the issuer. As a result, the interests of the issuing insurance company and its affiliated member do not generally conflict with the interests of prospective owners of Subject Contracts. In this regard, the offer and sale of a Subject Contract in an MPO is not materially different than the sale of such a Contract by a member in a registered public offering.

The Committee maintains that the potential for overreaching, providing deficient disclosure documents (or failing to provide disclosure documents) or otherwise misleading prospective investors, and misusing proceeds, are no greater when Subject Contracts issued by a control entity of a member are offered and sold in an MPO than when such Contracts are offered and sold in a registered public offering. The Committee observes that, for largely the same reasons expressed above, Subject Contracts offered in a registered public offering are exempted from NASD Rule 2720, the public offering analog of the Proposed Rule.¹² Consequently, the Committee believes that no useful public policy would be served by applying the conditions of the Proposed Rule to the offer and sale of Subject Contracts in an MPO and that the Proposed Rule should exempt offerings of Subject Contracts from its coverage.

Recommended Changes to the Proposed Rule

To make clear that the Proposed Rule does not apply to Subject Contracts offered or sold by NASD members, the Committee respectfully recommends adding two exemptions to paragraph (e) of the Proposed Rule.¹³ The exemptions provisions would read as follows:

- (9) offerings of variable contracts (as defined in NASD Rule 2820(b)(1)); and
- (10) offerings of modified guaranteed annuity contracts and modified guaranteed life insurance policies (as referenced in NASD Rule 2710(b)(8)(E)).

Securities Exempted by Section 3(a)(12) of the Act

From time to time, members may offer and sell Subject Contracts issued as "exempted securities" within the meaning of Section 3(a)(12) of the Securities Exchange Act of 1934 ("Exempted Securities"). Exempted Securities, including those in the form of Subject Contracts,

¹² See, e.g., Securities Exchange Act Release Number 35435 (March 9, 1995).

¹³ The Committee notes that in identifying the range of insurance products over which a *Limited Principal - Investment Company and Variable Contracts Products* may function in a principal capacity, Conduct Rule 1022(d)(1)(A)(iii) references all contracts issued by an insurance company that are securities. Therefore, in lieu of the exemptions proposed above, the Proposed Rule could exempt "offerings of variable contracts, insurance premium funding programs, and other contracts issued by insurance companies (as referenced in NASD Rule 1022(d)(1)(A)(iii))."

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are offered and sold pursuant to the exemption from the registration and prospectus delivery requirements of the 1933 Act provided by Section 3(a)(2) of that Act. Because NtM 07-27 does not mention adding the Proposed Rule to the list of NASD Conduct Rules and Interpretive Materials that apply to Exempted Securities found in Rule 0116 (the "Rule 0116 List"), the Committee assumes that the Proposed Rule would not apply to Exempted Securities. However, in the event that such an assumption is not correct, the Committee wishes to express its strong belief that, for the same reasons that Conduct Rule 2720 is not included in the Rule 0116 List, the Proposed Rule should not be added to the List.

Conclusion

The Committee appreciates the time and resources that NASD and its staff have devoted to the Proposed Rule. We are pleased to have this opportunity to provide comments to NASD, and we appreciate NASD staff's careful consideration of the Committee's recommendations.

Respectfully Submitted,

SUTHERLAND ASBILL & BRENNAN LLP

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APPENDIX**Committee of Annuity Insurers**

AEGON USA, Inc.
Allstate Financial
AIG American General
AmerUs Annuity Group Co.
AXA Equitable Life Insurance Company
Commonwealth Annuity and Life Insurance Company
Conseco, Inc.
F & G Life Insurance
Fidelity Investments Life Insurance Company
Genworth Financial
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Hartford Life Insurance Company
ING North America Insurance Corporation
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Life Insurance Company of the Southwest
Lincoln Financial Group
Merrill Lynch Life Insurance Company
Metropolitan Life Insurance Company
Nationwide Life Insurance Companies
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Ohio National Financial Services
Pacific Life Insurance Company
Protective Life Insurance Company
Prudential Insurance Company of America
RiverSource Life Insurance Company
(an Ameriprise Financial company)
Sun Life of Canada (U.S.)
The Phoenix Life Insurance Company
USAA Life Insurance Company