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Via Electronic Filing

Ms. Martha E. Esquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1500

**RE: FINRA Regulatory Notice 08-39
Proposed changes to guidelines on illustrations of tax-deferred versus taxable
compounding in advertising and sales literature (NASD Interpretative
Material 2210-1) and communications with the public about variable life
insurance and variable annuities (NASD Interpretative Material 2210-2)**

Dear Ms. Esquith:

Thank you for the opportunity to comment on the proposal of the Financial Industry Regulatory Authority ("FINRA") to amend guidelines included in NASD Interpretative Material 2210-1 and 2210-2 on illustrations of tax-deferred versus taxable compounding in advertising and sales literature and on communications with the public about variable life insurance and variable annuities (the "Variable Products"). The Cornell Securities Law Clinic (the "Clinic") is a Cornell Law School curricular offering in which law students provide representation to public investors and public education as to investment fraud in the largely rural "Southern Tier" region of upstate New York. See <http://securities.lawschool.cornell.edu>.

We generally agree with the modifications put forward by IM-2210-1 and thus will only address issues in IM-2210-2.

IM-2210-2 would further clarify the duties of registered representatives and their broker dealers regarding communications with public investors. The need for such clarification clearly arises from past cases of abusive sales practices regarding Variable Products. The complexity of Variable Products make them difficult for the public to understand, and easier for registered representatives to misrepresent.

The Clinic generally supports IM-2210-2, although for the reasons described hereunder, we believe that the proposal could be improved.

A. There is a Definite Need for Further Clarification

The Clinic agrees that the updated guidelines provided in IM-2210-2 are needed. As set forth elsewhere by FINRA, Variable Products are complex investments with long required holding periods, which are not easily understood by most public investors:

“While variable annuities can be appropriate as an investment under the right circumstances, as an investor, you should be aware of their restrictive features, understand that substantial taxes and charges may apply if you withdraw your money early, and guard against fear-inducing statistics.”¹

It also is beyond reasonable dispute that sales practice violations have led to the purchase of Variable Products by public investors who would have done better investing in a different category of financial products more adapted to their needs.² The Securities and Exchange Commission (the “SEC”) also has addressed this issue.³

B. Analysis of IM-2210-2

The Clinic will only comment on certain sections of IM-2210-2. To the extent we do not comment on a particular section, please consider that the Clinic supports such section.

i. Heading

“This Interpretive Material applies to all communications with the public about variable insurance products other than institutional sales material.”

¹Variable Annuities: *Beyond the Hard Sell*, FINRA Investor Alert, (<http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/AnnuitiesAndInsurance/p005976>)

²“The marketing efforts used by some variable annuity sellers deserve scrutiny – especially when seniors are the targeted investors. Sales pitches for these products might attempt to scare or confuse investors.” Variable Annuities: *Beyond the Hard Sell*, FINRA Investor Alert, (<http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/AnnuitiesAndInsurance/p005976>)

³ Variable Annuities: *What You Should Know*, www.sec.gov/investor/pubs/varaanty.htm

We believe this proposed language makes clear that these guidelines apply to all communications with the public. This is an improvement on the current version of IM-2210-2, which only refers to certain means of communication to which the guidelines apply. Widening the scope of such guidelines to “all communications” will further protect investors.

ii. Definitions – Section (a) of IM-2210-2

Section (a) of IM-2210-2 defines certain terms commonly referred to throughout IM-2210-2. Such definitions are not mentioned in the current version of IM-2210-2. The Clinic believes that defining the terms in Section (a) with precision will assist in assuring that the public better understands the true implications of IM-2210-2 in light of the complexity of Variable Products.

iii. Product Identification – Section (b) of IM-2210-2

“All communications must clearly identify the type of product discussed. The communication may not represent or imply that variable insurance products are mutual funds.”

In Section (b), IM-2210-2 suggests that the type of product must be clearly identified and not imply that it is a mutual fund. Public investors may often confuse the subaccounts of their Variable Products with regular stand-alone mutual funds. The Clinic believes that IM-2210-2 should further require that registered representatives be required to identify to the public investor in what ways the Variable Products differ from mutual funds. Furthermore, the exception provided for in the current version of IM-2210-2⁴ does not appear in IM-2210-2. We believe that this further clarifies matters for the public investor and is a positive change.

iv. Liquidity – Section (c) of IM-2210-2

“The communication may not falsely imply that variable insurance products are short-term, liquid investments. Presentations regarding access to account values must be balanced by a description of the potential effect of all charges, penalties, or tax consequences resulting from redemption or surrender. Discussions of loans and withdrawals must explain their impact on account values and death benefits.”

⁴ Current version of IM-2210-2 under Section (a) (1) Product Identification: “In cases where the proprietary name includes a description of the type of security being offered, there is no requirement to include a generalized description”.

In Section (c), IM-2210-2 specifies that Variable Products are long-term and non-liquid. IM-2210-2 also refers to the numerous charges, penalties and tax consequences inherent in such products. We believe that the wording of the current version of IM-2210-2 is clearer with regard to the potential costs of Variable Products. Indeed, specifying that the Variable Products “[...] frequently involve substantial charges and/or tax penalties [...]”⁵, as set forth in the current version of IM-2210-2, might warn the public against such charges, which are far from obvious. The new language of IM-2210-2 provides that “[...] the presentations regarding account values must be balanced by a description of the potential effects of all charges, penalties, or tax consequences resulting from redemption or surrender.” This new language does not adequately alert investors that such charges can be very high in comparison with other investment products. We believe that the language used in the current version of IM-2210-2, as quoted above, reflects this more clearly and should be maintained in IM-2210-2.

The Clinic believes that this section of IM-2210-2 also should require that investors be informed that the guaranteed minimum death benefit for variable annuities is unlikely to be of value to the investor. If the purchaser of a variable annuity dies before the investment is redeemed or payments upon retirement start, a designated beneficiary is guaranteed to receive at least the amount invested less any withdrawals. This feature pays off only if the aggregate value of the investments in the subaccounts has declined net of withdrawals since the initial investment – and this is very unlikely,⁶

This section of IM-2210-2 also should prohibit the use of unreasonably long periods for illustrating the growth of Variable Products. Registered representatives should not be authorized to refer to 20 or 30-year time spans in order to illustrate the return value of the Variable Products, since investors rarely hold such products for such time periods. The unauthorized use of “unreasonable periods” already is provided for in section (5) (B) (vi) Tax Considerations of IM-2210-1⁷. While the Clinic appreciates the inclusion of this limitation regarding tax issues, we believe that this should also be mentioned in this section of IM-2210-2.

The consequences of early withdrawals should be mentioned in this Section. The public investor should be aware that any withdrawal before the age of 59 and 6 months is generally subject to a 10% tax in addition to any gain being taxed as ordinary income.

⁵ Current version of IM-2210-2 Section (a) (2)

⁶ See *Annuities* by Craig J. McCann, PhD, CFA and Kaye A. Thomas, Securities Litigation and Consulting Group, Inc.

⁷ “The illustration may not assume an unreasonable amount of time.”

v. *Riders – Section (d) (4) of IM-2210-2*

“Any communication that discusses a rider must explain the rider, its costs and limitations, and the fact that the rider is an optional feature of the contract.”

Section (d) (4) of IM-2210-2 describes the duties of registered representatives regarding riders in the contracts structuring Variable Products. Such clarification is not provided for in the current version of IM-2210-2 and the Clinic approves of this addition. Regulating riders, and more specifically stating that such riders are “an optional feature of the contract,” will guarantee additional transparency.

vi. *Qualified Plans – Section (e) of IM-2210-2*

“Any member communication concerning a variable insurance product offered within a tax-qualified retirement plan:
(1) must not indicate that tax-deferred treatment of earnings is available only through investment in the contract; and
(2) must disclose that the contract does not provide any additional tax-deferred treatment of earnings beyond the treatment of earnings provided by the tax-qualified retirement plan.”

Section (e) of IM-2210-2 requires registered representatives to make explicit the tax implications of the Variable Products when included in a Qualified Plan. Such clarification is not mentioned in the current Guidelines and the Clinic approves of this addition.

However, IM-2210-2 does not impose the suitability analysis mentioned in FINRA notice 99-35 as well as in the State Regulators Joint Statement, dated May 8, 2007.⁸ The Joint Statement supports a new rule requiring that insurance companies and agencies recommend only suitable variable annuity products to their costumers. The Clinic agrees with the Joint Statement, as it is unlikely that a public investor would spontaneously decide to invest in Variable Products without prior recommendation by the registered representative. This is especially true in the context of qualified plans. In this sense, the Clinic suggests that IM-2210-2 consider that Variable Products are by definition *recommended* to public investors and mention the suitability requirements inherent in such recommendations.

⁸ <http://www.finra.org/newsroom/NewsReleases/2007/p019123>

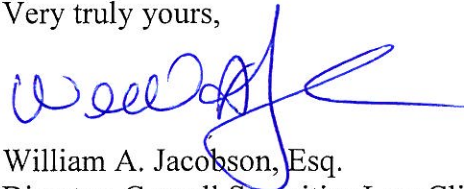
C. Additional Suggestions

The Clinic believes that IM-2210-2 would be improved if certain additional disclosures, not contained in either the current form of IM-2210-2 or the proposed form of IM-2210-2, were included. First, IM-2210-2 should require disclosures on the topic of the variable annuity exchanges as previously set forth by FINRA.⁹ Second, the issue of “Bonus Credits” should be addressed by IM-2210-2. In an attempt to attract investors, many variable annuities now offer “Bonus Credits” that can add a specific percentage to the amount invested. However, unlike their name suggests, such “Bonus Credits” are not free. In order to fund them, insurance companies typically impose higher charges. Therefore, since IM-2210-2 deals with all communications with the public, it seems like more transparency regarding this specific topic would ensure clarity.¹⁰ The Clinic believes that when offering “Bonus Credits”, IM-2210-2 should require the registered representatives to notify the public investor of the impact such credits will have on the charges inherent in the Variable Products.

Conclusion

As set forth above, the Clinic generally supports the proposed changes to both IM-2210-1 and IM-2210-2. There are specific areas we believe could be improved in IM-2210-2, however, and we hope you will consider our comments.

Very truly yours,



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Tamim T. Bazzi
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⁹ FINRA Investor Alert,
<http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/AnnuitiesAndInsurance/P006045>

¹⁰ SEC Staff addressed this issue in *Variable Insurance Products, The Challenges of a New Millennium*, October 19, 2000 (www.sec.gov/news/speech/spch409.htm); *Variable Annuities: Beyond the Hard Sell*, FINRA Investor Alert, (<http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/AnnuitiesAndInsurance/p005976>)