September 30, 2008

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1500

RE: Regulatory Notice 08-39

Dear Ms. Asquith:

NAVA, Inc., the Association for Insured Retirement Solutions, respectfully submits this letter of comment in response to Regulatory Notice 08-39 concerning proposed changes to guidelines on communications with the public about variable life insurance and variable annuities.

NAVA is a not-for-profit organization dedicated to the growth and understanding of annuity and variable life insurance products. NAVA represents all segments of the annuity and variable life industry with over 300 member organizations, including insurance companies, banks, investment management firms, distribution firms, and industry service providers.

Background

In Regulatory Notice 08-39, FINRA proposes to update and consolidate the rules governing member firm communications with the public about variable insurance products by adopting a number of changes to NASD Interpretative Material 2210-2 ("IM-2210-2). FINRA also proposes to codify previous guidance concerning the use of comparative illustrations of the mathematical principles of tax-deferred versus taxable compounding in communications by adding new language to NASD Interpretive Material 2210-1 ("IM-2210-1").

Comments

Proposed IM-2210-2, Paragraph (d) Guarantee Claims and Riders

Paragraph (d) would add new provisions to IM-2210-2 dealing specifically with communications regarding guarantee claims and riders on variable insurance products.

Among other things, paragraph (d) (3) would require that such communications be "fair and balanced considering the circumstances under which the guarantee or rider will not benefit the customer."

NAVA and its members believe that this new requirement is very vague and potentially burdensome. IM-2210-2(d)(3) itself provides no guidance as to what type of communications would be expected of the circumstances under which a guarantee or rider will not benefit a customer. The discussion in the Notice only adds to the uncertainty, stating that while an "exhaustive disclosure of every circumstance in which a rider would not benefit a customer" is not required, any communication regarding a rider "would have to present a fair and balanced description of the circumstances under which the rider would not benefit customers." We are concerned that such a vague and uncertain requirement might subject member firms to inconsistent enforcement by FINRA examiners, or result in members attempting to make an exhaustive disclosure, notwithstanding the caveat in the discussion, in order to prevent a potential problem.

We also believe that the requirement is unworkable as drafted because the extent to which a rider will not provide a benefit can depend on the specific and varying circumstances of each customer, such as how long the customer intends to hold on to the contract and the particular subaccounts invested in.

NASD Rule 2210 (d)(1)(A) already requires that communications with the public shall be based on principles of fair dealing and good faith, and must be fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security. We believe a similar standard is appropriate for insurance product guarantees.

Accordingly, we recommend that paragraph (d)(3) of proposed IM-2210-2 be revised as follows:

"Communications that discuss the circumstances under which a guarantee or rider will benefit the customer must be fair and balanced and advise customers that whether a particular rider will provide a benefit will depend on their individual circumstances. Customers should also be advised to review the description of the rider in the contract prospectus and discuss the rider with their financial representative."

Paragraph (f) Historical Performance

Paragraph (f) of proposed new IM-2210-2 sets out new requirements governing communications on variable insurance product historical performance and, according to the Notice, generally reflect positions FINRA staff has taken through the filings review program.

Paragraph (f)(1) provides that historical performance information regarding variable annuities may only be presented in accordance with SEC Rule 482 under the Securities Act of 1933 or Rule 34b-1 under the Investment Company Act of 1940, as applicable. It

is unclear what the "as applicable" refers. As FINRA is aware, SEC Rules 482 and 34b-1do not apply to unregistered variable annuities. Accordingly, we seek clarification that paragraph (f)(1) is meant to apply only to variable annuities that are required to be registered with the SEC.

Paragraph (f)(3) pertains to communications on investment option performance predating its availability through the separate account of a variable insurance product. Paragraph (3)(B) would require that such pre-dated performance be "net of maximum guaranteed charges." The requirement for maximum guaranteed charges seems inapposite in this context since the performance that will be illustrated is the actual historical performance of the investment option. Actual performance history should obviously also include the actual charges during the period illustrated, not the maximum charges that could have been assessed.

Paragraph (f)(5) addresses illustrations based on historical performance of individual investment options or combinations of investment options available through a separate account. Paragraph (5)(A) again would mandate the use of maximum guaranteed charges. As discussed above in regard to paragraph (3)(B), actual charges should be permitted.

Paragraph (g) Illustrations Based on Assumed Rates of Return

Paragraph (g) sets forth a number of requirements relating to illustrations based on assumed rates of return. Paragraphs (g)(1) would require an illustration based on an assumed gross annual rate of return of 0%, and paragraph (2) would permit the use of an assumed positive gross rate of return not more than 10%. Paragraph (3) would permit the use of an assumed negative gross rate of return, so long as investment results based on an assumed rate of return between 5% and 10% are also illustrated. All three sections would require that the results reflect the deduction of the maximum guaranteed charges (defined in paragraph (a)(4) as the maximum recurring and nonrecurring charges as disclosed in the prospectus that all investors incur at the variable insurance contract level, but does not include charges for optional riders).

We believe that illustrations reflecting the deduction of current actual charges would be most helpful to investors. The currently applied charges are more germane to the investor and more likely to impact a purchase decision than the maximum charge allowable under the contract. The maximum allowable charges can be much higher than the charges actually being imposed by the insurer and, historically, insurers have not imposed charges at the maximum level allowed.

We recommend that paragraph (g)(1) be revised to permit illustrations based on assumed annual rates of return that reflect the deduction of current actual charges, so long as the illustration is accompanied by a prominent disclosure that the annuity contract authorizes the insurer to increase the charges as provided in the contract prospectus.

Alternatively, proposed IM-2210-2 should permit illustrations showing current actual charges in addition to the maximum guaranteed charges. This is what is presently permitted by IM-2210-2(b)(5) pertaining to hypothetical illustrations of rates of return in variable life insurance sales literature, and it is not clear from the Regulatory Notice as to whether this would be precluded under the proposed rule.

Paragraph (g)(2) would change the maximum assumed positive rate of return that could be illustrated from the current limit of 12% to 10%. Again, the Notice gives no reason as to why FINRA now believes that a reduction in the maximum allowed assumed rate of return is necessary. Given that variable insurance products are generally considered long-term investments, we believe that there may be times when a rate of up to 12% would be justified and helpful to customers. We note that proposed paragraph (g)(2) would state that, in any case, assumed rates of return must be reasonable considering market conditions and the available investment options. Accordingly, we believe that the maximum assumed rate of return that would be permitted should remain at the current level of 12%, absent a compelling explanation as to why this limit is no longer appropriate.

Paragraph (g)(4) would permit illustrations based on the actual performance of an appropriate broad-based securities market index. NAVA supports this proposal but requests clarification that the use of rates of return based on a blend or combination of two or more indexes is permitted.

Proposed Changes to IM-2210-1

FINRA is also proposing modifications to existing IM-2210-1 regarding comparative illustrations of the mathematical principles of tax-deferred versus taxable compounding.

We are concerned that the amendments to Rule 2210-1 are incomplete because they do not address an important aspect of FINRA staff comments on these types of communications. FINRA staff has long advised members that comparisons of the mathematical principle of tax-deferred versus taxable compounding cannot contain specific references to products or asset classes, unless they also contain an exhaustive list of all other differences between the products or asset classes. We believe that it is in fact possible to create a fair and balanced communication that illustrates the difference between taxable and tax-exempt compounding that mentions actual asset classes. A communication comparing variable insurance products and mutual funds, for example, could meet the “fair and balanced” standard if it contained the most important differences between the products, while referring investors to the prospectus for more information. We ask that FINRA allow product -specific comparisons in this context, and that it facilitate this by listing the key product provisions that such a communication should disclose in order to meet the fair and balanced standard.

Again, we appreciate the opportunity to comment. If we can answer any questions or be of further assistance, please contact me at (703) 707-8830, extension 20, Richard Choi of Jorden Burt LLP at (202) 965-8127, or Karen Alvarado of AEGON Insurance Group at (319) 355-8327. Mr. Choi and Ms. Alvarado are co-chairs of NAVA's Regulatory Affairs Committee.

Sincerely,

Michael P. DeGeorge

Michael P. DeGeorge
General Counsel