



2019 Advertising Regulation Conference

October 24—25 | Washington, DC

Variable Insurance Products – Regulatory Overview and New Developments

Thursday, October 24, 2019

3:00 p.m. – 4:00 p.m.

Panelists from FINRA and the industry conduct this interactive session—first with a brief overview of the essentials for creating compliant communications, followed by a discussion of specific areas that frequently raise questions and regulatory challenges. The panelists also explore new regulatory developments and innovations in the structure of contracts and investment options, along with how firms address the compliance challenges raised by the marketing of variable insurance products.

Moderator: Pramit Das
Associate Director, Technology
FINRA Advertising Regulation

Speakers: Richard Choi
Shareholder
Carlton Fields

Joseph George
Associate Director, Advertising Regulation
FINRA Advertising Regulation

James Nemecek
Director, Advertising Compliance
AXA Equitable

Variable Insurance Products – Regulatory Overview and New Developments Panelist Bios:

Moderator:

Pramit Das is Associate Director-Technology of FINRA's Advertising Regulation Department. In this role, his responsibilities include managing a filings review group; assisting with administration of the filings review program; developing and maintaining the department's technology needs; providing education to members, FINRA staff and other regulatory staff; and participating in certain rule amendment and rulemaking projects as necessary. He served in the same role at NASD before its 2007 consolidation with NYSE Member Regulation. Prior to joining NASD in 1994, Mr. Das worked for Metropolitan Life Insurance Company and Arthur Andersen & Co. He holds an MBA in Finance from the University of Maryland, College Park, and an MA in Financial Economics from Clemson University, Clemson, South Carolina. He was also Series 7 and 63 registered.

Speakers:

Richard Choi has extensive experience advising investment companies, investment advisers, broker-dealers, and life insurance companies on federal and state securities and insurance compliance and regulatory matters. Mr. Choi's experience includes advising investment company boards, independent directors and trustees, and special committees of directors and trustees. He counsels clients on the development and distribution of sophisticated financial products, such as variable annuities, variable life insurance, and face-amount certificates. His experience also includes representation of investment advisers and investment companies in regulatory compliance inspections and examinations, opinions on the availability of 1940 Act exemptions in connection with various types of transactions, and in-house training and education seminars on a variety of regulatory and compliance matters. He has published numerous articles and regularly speaks on federal securities issues relating to variable insurance products and mutual funds. He has appeared on Bloomberg TV and has been quoted in *Bloomberg*, the *Chicago Tribune*, the *Los Angeles Times*, *National Underwriter*, *U.S. Banker*, the *Wall Street Journal Online*, and other financial and trade publications. Mr. Choi is the securities and investment companies industry group co-leader. Mr. Choi earned a B.A. from the University of Chicago and a J.D. from the University of Virginia School of Law.

Joseph George is Associate Director in FINRA's Advertising Regulation Department, where he supervises analysts who review communications with the public for compliance with applicable rules. He has been with the Department for more than 22 years and has spoken on panels at Advertising Regulation Department Conferences over the past 17 years. Prior to joining FINRA, he worked for New York Life as a registered representative and was a project manager with Computer Sciences Corporation. Mr. George holds a B.A. in Economics from the University of Maryland.

James Nemecek is Director of Advertising Compliance at AXA Equitable Life Insurance Company (AXA Equitable). Based in Charlotte, Mr. Nemecek manages a team of six full-time reviewers who work closely with field and corporate submitters in reviewing, revising, negotiating and ultimately providing registered principal approval of all retail communications and internal training content generated by, and in support of, AXA Equitable's affiliated retail and wholesale broker-dealers, AXA Advisors, LLC and AXA Distributors, LLC. Prior to joining AXA Equitable in 2004, Mr. Nemecek spent a combined total of 11 years in advertising compliance roles with Metropolitan Life Insurance Company, The MONY Group and The Guardian Life Insurance Company of America, respectively.



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AXA Equitable

Joseph S. George
Associate Director
FINRA Advertising Regulation

Introduction

- I. How to create compliant advertising
- II. Complex on-going issues
- III. Recent areas of regulatory interest
- IV. Structure of the advertising review process
- V. Common compliance challenges faced
- VI. How the firm addresses revision requests
- VII. Development and marketing of new products and features
- VIII. Social media: branding versus promotion
- IX. How does Regulation BI impact what is said and how it's said?
- X. Guidance on novel issues raised by firms
- XI. Successful review process

Wrap-up

- I. Q and A: from the audience as well as prepared questions



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Variable Insurance Products – Regulatory Overview and New Developments

Panelists

■ Moderator

- **Pramit Das, Associate Director, Technology, FINRA Advertising Regulation**

■ Panelists

- **Richard Choi, Shareholder, Carlton Fields**
- **Joseph George, Associate Director, Advertising Regulation, FINRA Advertising Regulation**
- **James Nemecek, Director, Advertising Compliance, AXA Equitable**

How To Create A Variable Product Communication

■ Content

- Identify the product.
- Provide a sound basis to evaluate the product.
- Address risks, fees, tax issues, and potential penalties, as needed.
- Clearly explain how riders work, if applicable.
- Disclose limitations of any guarantees mentioned.
- Balance any discussion of investment features of VLI with a discussion of the insurance component.
- Disclose the long-term nature of a VA.

How To Create A Variable Product Communication

■ Performance

- **Variable Annuities:**

- SEC performance standards apply.
- Must be net of all recurring and non-recurring fees and expenses.
- Returns must be keyed off inception date of separate account.

How To Create A Variable Product Communication

■ Performance

- **Variable Life:**

- SEC performance standards do not apply.
- Apply FINRA Rule 2210(d)(1)(A).
- At a minimum, deduct investment option management fees.
- Prominently disclose fees/charges deducted and not deducted
- Disclose that the performance would have been lower if all fees and charges had been deducted.

Rubric for Predated Variable Annuity Performance

■ Can we show...

- **(A) Separate account onward?**

- YES, BUT – Deduct fees and charges

Disclose CDSC

- **(B) Predating separate account?**

- YES, BUT – Deduct Fees and charges

Disclose CDSC

Must also show (A)

- **(C) Predating separate account without fees and charges?**

- YES, BUT – Must also show (A) and (B)

Complex On-Going Issues

■ Supplemental Hypothetical Illustrations:

- Weighted Average Expenses
- Random Rate
- Split Annuity
- Rider
- Historical Performance

Complex On-Going Issues

■ Structured Investment Options

- Crediting Methods
- Caps & Buffers

■ Registered Index Linked Annuity (RILA)

■ Alternative Investments

- Leveraged ETFs

■ Taxable vs Tax-Deferred Comparisons

Areas of Regulatory Interest

- **Interpretive Guidance – Related Performance**
- **Variable Annuity Summary Prospectus**
- **Senior Concerns**
- **1035 Exchanges**
- **Example that led to Formal Action**

Our Advertising Compliance Team

Six full-time reviewers and three part-time reviewers

- Registered principals with our retail and wholesale broker-dealers
- Specifically-focused: proprietary product, retail field-generated, corporate marketing content
- Flexible, experienced, versatile
- Effective communicators
- Seek the achievable balance between effective marketing and good compliance
- *Always!*



What We Do ...

Roughly 11,000 submissions per year:

- Proprietary variable product content – *sales kits, brochures, illustration templates, seminar decks, web content ...*
- Seminars
- Letters
- Invitations
- Videos
- Infomercials
- Radio & television advertising
- Press releases
- E-mail marketing
- All web content
- ***Social Media!!***





How we do it

Interactive electronic platform

- Accommodates even large files created in a wide variety of software programs
- Central advertising compliance queue for reviewer assignment, review, revisions, final approval, and 17a-4 WORM-compliant recordkeeping
- Retains the original submission, all mark-ups and iterations, final approved version, all related communications, sign-offs and other reference material

Why?

We do it to ensure content that complies with ...

- ✓ *State, federal and regulatory requirements*
- ✓ *Our own the policies, procedures and high standards*

We do it because we want our customers to know what they're buying ... and why.



Challenges ...

We're not selling Hula Hoops!

- We're using written content to market complex investment products to customers with presumably little or no related background
- We're making sure that our customers fully understand the options, features, costs, risks, objectives and the ultimate benefits of what they're buying – *before they buy*



A silhouette of a person pushing a large sphere up a hill, symbolizing the challenges of a project.

Challenges

- Submitter turnover
- Competing submitter priorities
- Product design developments (moving targets)
- *Consistency, consistency, consistency*
- Overlapping initiatives
- Industry competition
- Subjectivity and interpretation
- Friction between “compliance” and “business”
- Outside vendors
- Social media, digital communication

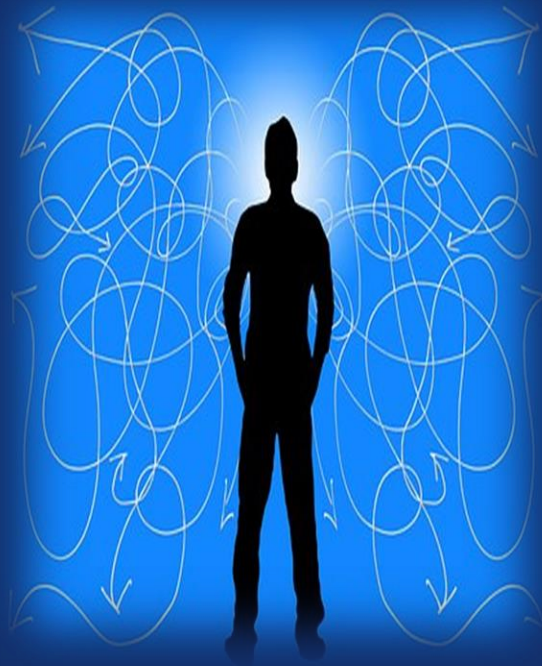
Our Advertising Regulation Filings

Wide variety of variable annuity and variable life insurance contracts ...

- Offered directly to investors through our affiliated retail broker-dealer
- Offered by our peer companies through our affiliated wholesale broker-dealer

We file lots of stuff!

- ❖ FINRA's subjective assessment of whether our content appears consistent with applicable standards
- ❖ Our mission for each filing: *The “clean” Review Letter*
- ❖ Comments? We re-group, re-write, re-approach, and often re-file
- ❖ FINRA's agreement that we appear to be meeting applicable standards is valuable because ...
 - 1) We're a member firm
 - 2) Third-party firms through which we offer our variable products generally expect to see a “clean” letter



When we get comments

Our goal for every filing is a “clean” Review Letter, but ...

If revisions are necessary (assuming a file-and-use)

- Suspend our approval
- Interpret the comments and amend the material accordingly
- Re-file for a “clean” Review Letter *if*...
 - ✓ The piece will be distributed through our wholesale B/D or,
 - ✓ We want to be sure that we’ve correctly interpreted and fully addressed the Letter’s concerns
- If neither applies, we will re-approve the amended content for resumed use

Do Not Use (rare)

- Rescind any approval as a file-and-use filing
- Entirely revisit the material to determine whether appropriate amendments are even possible.
- Re-file toward a “clean” letter on a requested *expedited* basis or as a *regular* filing.

Securities Act §12 Civil Liabilities

Applies to prospectuses and oral communications that:

- contain untrue statements of a **material** fact
- omit a **material** fact necessary to make the statements, in light of the circumstances under which they were made, not misleading

Materiality

SEC Rule 405 definition:

“The term *material*, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a **substantial likelihood** that a **reasonable investor** would attach **importance** in determining whether to purchase the security registered.”

Materiality

What might be material?

- Accuracy of performance
- Contributors to performance
- Fees and charges
- Risks
- Product guarantees and features
- Assumptions used in illustrations

Social Media **Considerations:**

1. Advertising/Branding vs.
Solicitation/Recommendation
2. Influencers and Promoters
3. Static vs. Interactive Content

SEC Regulation Best Interest Considerations

1. Differentiation of BD vs IA Services
2. Consistency with Reg BI Disclosures
3. De Facto Recommendations

Successful Review Process

- P**repare early
- R**eview iteratively
- A**pprove appropriately
- M**ake filings completely
- I**nclude partners broadly
- T**rain and educate continually



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Question and Answers