

OMB APPROVAL

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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. SR - 2008 - 019
Amendment No. 1

Proposed Rule Change by Financial Industry Regulatory Authority
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial ☐	Amendment ☒	Withdrawal ☐	Section 19(b)(2) ☒	Section 19(b)(3)(A) ☐	Section 19(b)(3)(B) ☐
			Rule		
Pilot ☐	Extension of Time Period for Commission Action ☐	Date Expires 	☐ 19b-4(f)(1) ☐ 19b-4(f)(2) ☐ 19b-4(f)(3)	☐ 19b-4(f)(4) ☐ 19b-4(f)(5) ☐ 19b-4(f)(6)	

Exhibit 2 Sent As Paper Document
☐

Exhibit 3 Sent As Paper Document
☐

Description

Provide a brief description of the proposed rule change (limit 250 characters).

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name James Last Name Wrona
Title Associate Vice President and Associate General Counsel
E-mail jim.wrona@finra.org
Telephone (202) 728-8270 Fax (202) 728-8264

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date 11/12/2008

By Patrice Gliniecki
(Name)

Senior Vice President and Deputy General Counsel

(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Patrice Gliniecki,

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

Form 19b-4 Information

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

Add Remove View

Exhibit Sent As Paper Document

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

Add Remove View

Exhibit Sent As Paper Document

☐

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“SEA” or “Act”),¹ Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) Amendment No. 1 to SR-FINRA-2008-019, which covers transactions in deferred variable annuities.² The amendment proposes minor, clarifying modifications to the text of NASD Rule 2821, as described herein. Amendment No. 1 to SR-FINRA-2008-019 replaces and supersedes the original rule filing.

Below is the text of the proposed rule change. Proposed new language is underlined and proposed deletions are in brackets.

¹ 15 U.S.C. 78s(b)(1).

² On April 17, 2008, FINRA filed a proposed rule change, which became effective upon filing, to delay the effective date of paragraphs (c) and (d) of NASD Rule 2821 until 180 days following the Commission’s approval or rejection of a substantive proposed rule change. See Securities Exchange Act Release No. 57769 (May 2, 2008), 73 FR 26176 (May 8, 2008) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Delay the Effective Date of Certain FINRA Rule Changes Approved in SR-NASD-2004-183; File No. SR-FINRA-2008-015). Paragraphs (a), (b), and (e) of Rule 2821, as approved in SR-NASD-2004-183, became effective as originally scheduled on May 5, 2008. See id. at 26177. On May 21, 2008, FINRA filed the substantive proposed rule change to Rule 2821. See Securities Exchange Act Release No. 57920 (June 4, 2008), 73 FR 32771 (June 10, 2008) (Notice of Filing of Proposed Rule Change Relating to Sales Practice Standards and Supervisory Requirements for Transactions in Deferred Variable Annuities (“Substantive Amendment”); File No. SR-FINRA-2008-019). On June 10, 2008, the SEC published FINRA’s proposed changes in the Federal Register and sought public comment. The public comment period closed on July 1, 2008. FINRA is proposing the current amendment in response to one of the comments submitted during that period. FINRA also notes that it filed today with the SEC its response to comments by separate letter.

* * * * *

2821. Members' Responsibilities Regarding Deferred Variable Annuities

(a) General Considerations

(1) Application

This Rule applies to recommended [the] purchases [or] and exchanges of [a] deferred variable annuit[y]ies and recommended initial [the] subaccount allocations. This Rule does not apply to reallocations [of] among subaccounts made or to funds paid after the initial purchase or exchange of a deferred variable annuity. This Rule also does not apply to deferred variable annuity transactions made in connection with any tax-qualified, employer-sponsored retirement or benefit plan that either is defined as a “qualified plan” under Section 3(a)(12)(C) of the [Securities] Exchange Act [of 1934] or meets the requirements of Internal Revenue Code Sections 403(b), 457(b), or 457(f), unless, in the case of any such plan, a member or person associated with a member makes recommendations to an individual plan participant regarding a deferred variable annuity, in which case the Rule would apply as to the individual plan participant to whom the member or person associated with the member makes such recommendations.

(2) through (3) No Change.

(b) Recommendation Requirements

(1) No member or person associated with a member shall recommend to any customer the purchase or exchange of a deferred variable annuity unless such member or person associated with a member has a reasonable basis to believe

(A) that the transaction is suitable in accordance with Rule 2310 and, in particular, that there is a reasonable basis to believe that

(i) through (ii) No Change.

(iii) the particular deferred variable annuity as a whole, the underlying subaccounts to which funds are allocated at the time of the purchase or exchange of the deferred variable annuity, and riders and similar product enhancements, if any, are suitable (and, in the case of an exchange, the transaction as a whole also is suitable) for the particular customer based on the information required by [sub]paragraph (b)(2) of this Rule; and

(B) in the case of an exchange of a deferred variable annuity, the exchange also is consistent with the suitability determination required by [sub]paragraph (b)(1)(A) of this Rule, taking into consideration whether

(i) through (ii) No change.

(iii) the customer[‘s account] has had another deferred variable annuity exchange within the preceding 36 months.

The determinations required by this paragraph shall be documented and signed by the associated person recommending the transaction.

(2) No change.

(3) Promptly after receiving information necessary to prepare a complete and correct application package for a deferred variable annuity, a person associated with a member who recommends the deferred variable annuity shall

transmit the complete and correct application package to an office of supervisory jurisdiction of the member.

(c) Principal Review and Approval

Prior to transmitting a customer's application for a deferred variable annuity to the issuing insurance company for processing, but no later than seven business days after [the customer signs the application] an office of supervisory jurisdiction of the member receives a complete and correct application package, a registered principal shall review and determine whether he or she approves of the recommended purchase or exchange of the deferred variable annuity.

[Subject to the exception in this paragraph, and treating all transactions as if they have been recommended for purposes of this principal review, a] A registered principal shall approve the recommended transaction only if he or she [the registered principal] has determined that there is a reasonable basis to believe that the transaction would be suitable based on the factors delineated in paragraph (b) of this Rule. [Notwithstanding the foregoing, a registered principal may authorize the processing of the transaction if the registered principal determines that the transaction was not recommended and that the customer, after being informed of the reason why the registered principal has not approved the transaction, affirms that he or she wants to proceed with the purchase or exchange of the deferred variable annuity.]

The determinations required by this paragraph shall be documented and signed by the registered principal who reviewed and then approved[, or rejected[, or authorized] the transaction.

(d) No change.

(e) Training

Members shall develop and document specific training policies or programs reasonably designed to ensure that associated persons who effect and registered principals who review transactions in deferred variable annuities comply with the requirements of this Rule and that they understand the material features of deferred variable annuities, including those described in [sub]paragraph (b)(1)(A)(i) of this Rule.

• • • **Supplementary Material:** -----

.01 Under Rule 2821, a member that is permitted to maintain customer funds under SEA Rules 15c3-1 and 15c3-3 may, prior to the member's principal approval of the deferred variable annuity, deposit and maintain customer funds for a deferred variable annuity in an account that meets the requirements of SEA Rule 15c3-3.

.02 If a customer provides a member that is permitted to hold customer funds with a lump sum or single check made payable to the member (as opposed to being made payable to the insurance company) and requests that a portion of the funds be applied to the purchase of a deferred variable annuity and the rest of the funds be applied to other types of products, Rule 2821 would not prohibit the member from promptly applying those portions designated for purchasing products other than a deferred variable annuity to such use. A member that is not permitted to hold customer funds can comply with such requests only through its clearing firm that will maintain customer funds for the intended deferred variable annuity purchase in an account that meets the requirements of SEA Rule 15c3-3. In such circumstances, the checks would need to be made payable to the clearing firm.

.03 Rule 2821 does not prohibit a member from forwarding a check made payable to the insurance company or, if the member is fully subject to SEA Rule 15c3-3, transferring funds for the purchase of a deferred variable annuity to the insurance company prior to the member's principal approval of the deferred variable annuity, as long as the member fulfills the following requirements: (a) the member must disclose to the customer the proposed transfer or series of transfers of the funds and (b) the member must enter into a written agreement with the insurance company under which the insurance company agrees that, until such time as it is notified of the member's principal approval or rejection, it will (1) segregate the member's customers' funds in a bank in an account equivalent to the deposit of those funds by a member into a "Special Account for the Exclusive Benefit of Customers" (set up as described in SEA Rules 15c3-3(k)(2)(i) and 15c3-3(f)) to ensure that the customers' funds will not be subject to any right, charge, security interest, lien, or claim of any kind in favor of the member, insurance company, or bank where the insurance company deposits such funds or any creditor thereof or person claiming through them and hold those funds either as cash or any instrument that a broker or dealer may deposit in its Special Reserve Account for the Exclusive Benefit of Customers, (2) not issue the variable annuity contract prior to the member's principal approval, and (3) promptly return the funds to each customer at the customer's request prior to the member's principal approval or upon the member's rejection of the application.

.04 A member is not prohibited from forwarding a check provided by the customer for the purpose of purchasing a deferred variable annuity and made payable to an IRA custodian for the benefit of the customer (or, if the member is fully subject to SEA Rule

15c3-3, funds) to the IRA custodian prior to the member's principal approval of the deferred variable annuity transaction, as long as the member enters into a written agreement with the IRA custodian under which the IRA custodian agrees (a) to forward the funds to the insurance company to complete the purchase of the deferred variable annuity contract only after it has been informed that the member's principal has approved the transaction and (b), if the principal rejects the transaction, to inform the customer, seek immediate instructions from the customer regarding alternative disposition of the funds (e.g., asking whether the customer wants to transfer the funds to another IRA custodian, purchase a different investment, or provide other instructions), and promptly implement the customer's instructions.

.05 Rule 2821 requires that the member or person associated with a member consider whether the customer has had another deferred variable annuity exchange within the preceding 36 months. Under this provision, a member or person associated with a member must determine whether the customer has had such an exchange at the member and must make reasonable efforts to ascertain whether the customer has had an exchange at any other broker-dealer within the preceding 36 months. An inquiry to the customer as to whether the customer has had an exchange at another broker-dealer within 36 months would constitute a "reasonable effort" in this context. Members shall document in writing both the nature of the inquiry and the response from the customer.

.06 Rule 2821 requires principal review and approval "[p]rior to transmitting a customer's application for a deferred variable annuity to the issuing insurance company for processing...." In circumstances where an insurance company and its affiliated broker-dealer share office space and/or employees who carry out both the principal

review and the issuance process, FINRA will consider the application “transmitted” to the insurance company only when the broker-dealer’s principal, acting as such, has approved the transaction, provided that the affiliated broker-dealer and the insurance company have agreed that the insurance company will not issue the contract prior to principal approval by the broker-dealer.

.07 Rule 2821 does not prohibit using the information required for principal review and approval in the issuance process, provided that the broker-dealer and the insurance company have agreed that the insurance company will not issue the contract prior to principal approval by the broker-dealer. For instance, the rule does not prohibit a broker-dealer from inputting information used as part of its suitability review into a shared database (irrespective of the media used for that database, i.e., paper or electronic) that the insurance company uses for the issuance process, provided that the broker-dealer and the insurance company have agreed that the insurance company will not issue the contract prior to principal approval by the broker-dealer.

* * * * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The current rule was approved by the Board of Directors of NASD Regulation, Inc. at its meeting on April 21, 2004, which authorized the filing of the current rule with the SEC. The Board of Governors of FINRA (then known as NASD) had an opportunity

to review the current rule at its meeting on April 22, 2004. No other action by FINRA is necessary for the filing of the proposed rule change.

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be six months following publication of the Regulatory Notice announcing Commission approval.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

On May 21, 2008, FINRA proposed a number of changes to Rule 2821, including adding a Supplementary Material ("SM") section following the Rule's text to examine issues that potentially could have a significant impact on how members sell or process deferred variable annuities.³ On June 10, 2008, the SEC published FINRA's proposed changes in the Federal Register and sought public comment.⁴ The public comment period closed on July 1, 2008.⁵ The current amendment proposes that certain clarifying language be added to SM.03 in response to one of the comments submitted during that period.⁶

³ See Substantive Amendment, supra note 2.

⁴ Id.

⁵ Id.

⁶ As noted above, on April 17, 2008, FINRA filed a separate proposed rule change, which became effective upon filing, to delay the effective date of paragraphs (c) and (d) of Rule 2821 until 180 days following the Commission's approval or rejection of this substantive proposed rule change. See supra note 2. FINRA now seeks to delay the effective date of paragraphs (c) and (d) until after the proposed effective date of the current amendment.

The rule change filed on May 21, 2008 stated in SM.03 that a member could forward a customer's check or funds to the insurance company prior to principal approval of the deferred variable annuity under certain conditions.⁷ One of those conditions is that the insurance company agrees to "(1) segregate the member's customers' funds in a bank ... account ... (set up as described in SEA Rules 15c3-3(k)(2)(i) and 15c3-3(f)) to ensure that the customers' funds will not be subject to any right, charge, security interest, lien, or claim of any kind in favor of the member, insurance company, or bank where the insurance company deposits such funds or any creditor thereof or person claiming through them and hold those funds either as cash or any instrument that a broker or dealer may deposit in its Special Reserve Account for the Exclusive Benefit of Customers" One commenter found such a requirement to be confusing because "the insurance company would necessarily have a claim for payment if an application is approved and a contract issued, while the member would necessarily have a claim for a return of the funds if the application is not approved and the contract is not issued."⁸

FINRA did not intend to suggest that the funds had to remain in a segregated bank account of the type referenced in SM.03 in perpetuity. To clarify the point, however, FINRA proposes to modify that section in the following manner (brackets signify deleted text and underlining signifies added text): the member must "enter into a written agreement with the insurance company under which the insurance company agrees [to]

⁷ FINRA notes that it initially prohibited member firms from ever forwarding checks/funds prior to principal approval of the transaction. Most commenters favored allowing member firms to forward checks/funds, but they differed regarding their views of FINRA's proposed requirements for allowing it.

⁸ Letter from Michael P. DeGeorge, General Counsel, NAVA, Inc., to Florence E. Harmon, Acting Secretary, SEC, dated July 1, 2008.

that, until such time as it is notified of the member's principal approval or rejection, it will ([a]1) segregate the member's customers' funds"

As stated in Section 2 of this rule filing, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be six months following publication of the Regulatory Notice announcing Commission approval.

(b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁹ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The rule change will promote investor protection because it will allow firms to better understand the requirements of Rule 2821 and will provide additional protection for customer funds prior to principal approval of deferred variable annuity transactions.

4. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.¹⁰

⁹ 15 U.S.C. 78o-3(b)(6).

¹⁰ FINRA notes that ACLI, in its letter dated August 20, 2008, raised an issue regarding the burden on competition to which FINRA previously responded at length. FINRA incorporates that response by reference. See Letter from NASD, Inc., to Nancy M. Morris, Secretary, SEC, dated August 31, 2006. (NASD's Response to Comment in SR-NASD-2004-183).

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

FINRA, by separate letter, filed with the Commission today its response to comments regarding the original rule filing for SR-FINRA-2008-019. No comments were sought or received regarding Amendment No. 1 to SR-FINRA-2008-019. However, as noted herein, the amendment proposes minor, clarifying changes that responded to a previous comment.

6. Extension of Time Period for Commission Action

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.¹¹

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

FINRA requests that the Commission find good cause pursuant to Section 19(b)(2) of the Act¹² for approving the proposed rule prior to the 30th day after its publication in the Federal Register. The current rule filing merely clarifies an issue in response to a comment. As such, FINRA requests that the Commission accelerate the effectiveness of the proposed rule prior to the 30th day after its publication in the Federal Register.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

¹¹ 15 U.S.C. 78s(b)(2).

¹² 15 U.S.C. 78s(b)(2).

9. Exhibits

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 4. Text of proposed rule change marking changes from the originally filed proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- ; File No. SR-FINRA-2008-019)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Sales Practice Standards and Supervisory Requirements for Transactions in Deferred Variable Annuities

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 21, 2008, Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) filed with the Securities and Exchange Commission (“SEC” or “Commission”) and amended on -----³ the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. For the reasons discussed below, the Commission is granting accelerated approval of the proposed rule change.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing Amendment No. 1 to SR-FINRA-2008-019, which covers transactions in deferred variable annuities.⁴ The amendment proposes minor, clarifying

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 to SR-FINRA-2008-019 replaced and superseded the original rule filing.

⁴ On April 17, 2008, FINRA filed a proposed rule change, which became effective upon filing, to delay the effective date of paragraphs (c) and (d) of Rule 2821 until 180 days following the Commission’s approval or rejection of a substantive

modifications to the text of NASD Rule 2821, as described herein. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

2821. Members' Responsibilities Regarding Deferred Variable Annuities

(a) General Considerations

(1) Application

This Rule applies to recommended [the] purchases [or] and exchanges of [a] deferred variable annuit[y]ies and recommended initial [the] subaccount allocations. This Rule does not apply to reallocations [of] among subaccounts made or to funds paid after the initial purchase or exchange of a deferred variable annuity. This Rule also does not apply to deferred variable annuity transactions made in connection with any tax-qualified, employer-sponsored retirement or benefit plan that either is defined as a “qualified plan” under Section 3(a)(12)(C)

proposed rule change. See Securities Exchange Act Release No. 57769 (May 2, 2008), 73 FR 26176 (May 8, 2008) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Delay the Effective Date of Certain FINRA Rule Changes Approved in SR-NASD-2004-183; File No. SR-FINRA-2008-015). Paragraphs (a), (b), and (e) of Rule 2821, as approved in SR-NASD-2004-183, became effective as originally scheduled on May 5, 2008. See id. at 26177. On May 21, 2008, FINRA filed the substantive proposed rule change to Rule 2821. See Securities Exchange Act Release No. 57920 (June 4, 2008), 73 FR 32771 (June 10, 2008) (Notice of Filing of Proposed Rule Change Relating to Sales Practice Standards and Supervisory Requirements for Transactions in Deferred Variable Annuities (“Substantive Amendment”); File No. SR-FINRA-2008-019). On June 10, 2008, the SEC published FINRA’s proposed changes in the Federal Register and sought public comment. The public comment period closed on July 1, 2008. FINRA is proposing the current amendment in response to one of the comments submitted during that period. FINRA also notes that it filed today with the SEC its response to comments by separate letter.

of the [Securities] Exchange Act [of 1934] or meets the requirements of Internal Revenue Code Sections 403(b), 457(b), or 457(f), unless, in the case of any such plan, a member or person associated with a member makes recommendations to an individual plan participant regarding a deferred variable annuity, in which case the Rule would apply as to the individual plan participant to whom the member or person associated with the member makes such recommendations.

(2) through (3) No Change.

(b) Recommendation Requirements

(1) No member or person associated with a member shall recommend to any customer the purchase or exchange of a deferred variable annuity unless such member or person associated with a member has a reasonable basis to believe

(A) that the transaction is suitable in accordance with Rule 2310 and, in particular, that there is a reasonable basis to believe that

(i) through (ii) No Change.

(iii) the particular deferred variable annuity as a whole, the underlying subaccounts to which funds are allocated at the time of the purchase or exchange of the deferred variable annuity, and riders and similar product enhancements, if any, are suitable (and, in the case of an exchange, the transaction as a whole also is suitable) for the particular customer based on the information required by [sub]paragraph (b)(2) of this Rule; and

(B) in the case of an exchange of a deferred variable annuity, the exchange also is consistent with the suitability determination required by [sub]paragraph (b)(1)(A) of this Rule, taking into consideration whether

(i) through (ii) No change.

(iii) the customer[‘s account] has had another deferred variable annuity exchange within the preceding 36 months.

The determinations required by this paragraph shall be documented and signed by the associated person recommending the transaction.

(2) No change.

(3) Promptly after receiving information necessary to prepare a complete and correct application package for a deferred variable annuity, a person associated with a member who recommends the deferred variable annuity shall transmit the complete and correct application package to an office of supervisory jurisdiction of the member.

(c) Principal Review and Approval

Prior to transmitting a customer’s application for a deferred variable annuity to the issuing insurance company for processing, but no later than seven business days after [the customer signs the application] an office of supervisory jurisdiction of the member receives a complete and correct application package, a registered principal shall review and determine whether he or she approves of the recommended purchase or exchange of the deferred variable annuity.

[Subject to the exception in this paragraph, and treating all transactions as if they have been recommended for purposes of this principal review, a] A registered principal

shall approve the recommended transaction only if he or she [the registered principal] has determined that there is a reasonable basis to believe that the transaction would be suitable based on the factors delineated in paragraph (b) of this Rule. [Notwithstanding the foregoing, a registered principal may authorize the processing of the transaction if the registered principal determines that the transaction was not recommended and that the customer, after being informed of the reason why the registered principal has not approved the transaction, affirms that he or she wants to proceed with the purchase or exchange of the deferred variable annuity.]

The determinations required by this paragraph shall be documented and signed by the registered principal who reviewed and then approved[, or rejected[, or authorized] the transaction.

(d) No change.

(e) Training

Members shall develop and document specific training policies or programs reasonably designed to ensure that associated persons who effect and registered principals who review transactions in deferred variable annuities comply with the requirements of this Rule and that they understand the material features of deferred variable annuities, including those described in [sub]paragraph (b)(1)(A)(i) of this Rule.

• • • Supplementary Material: -----

.01 Under Rule 2821, a member that is permitted to maintain customer funds under SEA Rules 15c3-1 and 15c3-3 may, prior to the member's principal approval of the deferred variable annuity, deposit and maintain customer funds for a deferred variable annuity in an account that meets the requirements of SEA Rule 15c3-3.

.02 If a customer provides a member that is permitted to hold customer funds with a lump sum or single check made payable to the member (as opposed to being made payable to the insurance company) and requests that a portion of the funds be applied to the purchase of a deferred variable annuity and the rest of the funds be applied to other types of products, Rule 2821 would not prohibit the member from promptly applying those portions designated for purchasing products other than a deferred variable annuity to such use. A member that is not permitted to hold customer funds can comply with such requests only through its clearing firm that will maintain customer funds for the intended deferred variable annuity purchase in an account that meets the requirements of SEA Rule 15c3-3. In such circumstances, the checks would need to be made payable to the clearing firm.

.03 Rule 2821 does not prohibit a member from forwarding a check made payable to the insurance company or, if the member is fully subject to SEA Rule 15c3-3, transferring funds for the purchase of a deferred variable annuity to the insurance company prior to the member's principal approval of the deferred variable annuity, as long as the member fulfills the following requirements: (a) the member must disclose to the customer the proposed transfer or series of transfers of the funds and (b) the member must enter into a written agreement with the insurance company under which the insurance company agrees that, until such time as it is notified of the member's principal approval or rejection, it will (1) segregate the member's customers' funds in a bank in an account equivalent to the deposit of those funds by a member into a "Special Account for the Exclusive Benefit of Customers" (set up as described in SEA Rules 15c3-3(k)(2)(i) and 15c3-3(f)) to ensure that the customers' funds will not be subject to any right, charge,

security interest, lien, or claim of any kind in favor of the member, insurance company, or bank where the insurance company deposits such funds or any creditor thereof or person claiming through them and hold those funds either as cash or any instrument that a broker or dealer may deposit in its Special Reserve Account for the Exclusive Benefit of Customers, (2) not issue the variable annuity contract prior to the member's principal approval, and (3) promptly return the funds to each customer at the customer's request prior to the member's principal approval or upon the member's rejection of the application.

.04 A member is not prohibited from forwarding a check provided by the customer for the purpose of purchasing a deferred variable annuity and made payable to an IRA custodian for the benefit of the customer (or, if the member is fully subject to SEA Rule 15c3-3, funds) to the IRA custodian prior to the member's principal approval of the deferred variable annuity transaction, as long as the member enters into a written agreement with the IRA custodian under which the IRA custodian agrees (a) to forward the funds to the insurance company to complete the purchase of the deferred variable annuity contract only after it has been informed that the member's principal has approved the transaction and (b), if the principal rejects the transaction, to inform the customer, seek immediate instructions from the customer regarding alternative disposition of the funds (e.g., asking whether the customer wants to transfer the funds to another IRA custodian, purchase a different investment, or provide other instructions), and promptly implement the customer's instructions.

.05 Rule 2821 requires that the member or person associated with a member consider whether the customer has had another deferred variable annuity exchange within the

preceding 36 months. Under this provision, a member or person associated with a member must determine whether the customer has had such an exchange at the member and must make reasonable efforts to ascertain whether the customer has had an exchange at any other broker-dealer within the preceding 36 months. An inquiry to the customer as to whether the customer has had an exchange at another broker-dealer within 36 months would constitute a “reasonable effort” in this context. Members shall document in writing both the nature of the inquiry and the response from the customer.

.06 Rule 2821 requires principal review and approval “[p]rior to transmitting a customer’s application for a deferred variable annuity to the issuing insurance company for processing....” In circumstances where an insurance company and its affiliated broker-dealer share office space and/or employees who carry out both the principal review and the issuance process, FINRA will consider the application “transmitted” to the insurance company only when the broker-dealer’s principal, acting as such, has approved the transaction, provided that the affiliated broker-dealer and the insurance company have agreed that the insurance company will not issue the contract prior to principal approval by the broker-dealer.

.07 Rule 2821 does not prohibit using the information required for principal review and approval in the issuance process, provided that the broker-dealer and the insurance company have agreed that the insurance company will not issue the contract prior to principal approval by the broker-dealer. For instance, the rule does not prohibit a broker-dealer from inputting information used as part of its suitability review into a shared database (irrespective of the media used for that database, i.e., paper or electronic) that the insurance company uses for the issuance process, provided that the broker-dealer and

the insurance company have agreed that the insurance company will not issue the contract prior to principal approval by the broker-dealer.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On May 21, 2008, FINRA proposed a number of changes to Rule 2821, including adding a Supplementary Material ("SM") section following the Rule's text to examine issues that potentially could have a significant impact on how members sell or process deferred variable annuities.⁵ On June 10, 2008, the SEC published FINRA's proposed changes in the Federal Register and sought public comment.⁶ The public comment period closed on July 1, 2008.⁷ The current amendment proposes that certain clarifying

⁵ See Substantive Amendment, supra note 4.

⁶ Id.

⁷ Id.

language be added to SM.03 in response to one of the comments submitted during that period.⁸

The rule change filed on May 21, 2008 stated in SM.03 that a member could forward a customer's check or funds to the insurance company prior to principal approval of the deferred variable annuity under certain conditions.⁹ One of those conditions is that the insurance company agrees to "(1) segregate the member's customers' funds in a bank ... account ... (set up as described in SEA Rules 15c3-3(k)(2)(i) and 15c3-3(f)) to ensure that the customers' funds will not be subject to any right, charge, security interest, lien, or claim of any kind in favor of the member, insurance company, or bank where the insurance company deposits such funds or any creditor thereof or person claiming through them and hold those funds either as cash or any instrument that a broker or dealer may deposit in its Special Reserve Account for the Exclusive Benefit of Customers" One commenter found such a requirement to be confusing because "the insurance company would necessarily have a claim for payment if an application is approved and a contract issued, while the member would necessarily have a claim for a return of the funds if the application is not approved and the contract is not issued."¹⁰

⁸ As noted above, on April 17, 2008, FINRA filed a separate proposed rule change, which became effective upon filing, to delay the effective date of paragraphs (c) and (d) of Rule 2821 until 180 days following the Commission's approval or rejection of this substantive proposed rule change. See supra note 4. FINRA now seeks to delay the effective date of paragraphs (c) and (d) until after the proposed effective date of the current amendment.

⁹ FINRA noted that it initially prohibited member firms from ever forwarding checks/funds prior to principal approval of the transaction. Most commenters favored allowing member firms to forward checks/funds, but they differed regarding their views of FINRA's proposed requirements for allowing it.

¹⁰ Letter from Michael P. DeGeorge, General Counsel, NAVA, Inc., to Florence E. Harmon, Acting Secretary, SEC, dated July 1, 2008.

FINRA did not intend to suggest that the funds had to remain in a segregated bank account of the type referenced in SM.03 in perpetuity. To clarify the point, however, FINRA proposed to modify that section in the following manner (brackets signify deleted text and underlining signifies added text): the member must “enter into a written agreement with the insurance company under which the insurance company agrees [to] that, until such time as it is notified of the member’s principal approval or rejection, it will ([a]1) segregate the member’s customers’ funds”

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be six months following publication of the Regulatory Notice announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹¹ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The rule change will promote investor protection because it will allow firms to better understand the requirements of Rule 2821 and will provide additional protection for customer funds prior to principal approval of deferred variable annuity transactions.

¹¹ 15 U.S.C. 78o-3(b)(6).

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.¹²

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

On November 12, 2008, FINRA filed with the Commission its response to comments by separate letter.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

FINRA has requested that the Commission find good cause pursuant to Section 19(b)(2) of the Act¹³ for approving the proposed rule change prior to the 30th day after publication in the Federal Register. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to FINRA and, in particular, the requirements of Section 15A of the Act and the rules and regulations thereunder. The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of notice of filing thereof because the current rule filing merely clarifies an issue in response to a comment. The clarification, moreover, will allow firms to better understand the

¹² FINRA noted that ACLI, in its letter dated August 20, 2008, raised an issue regarding the burden on competition to which FINRA previously responded at length. FINRA incorporated that response by reference. See Letter from NASD, Inc., to Nancy M. Morris, Secretary, SEC, dated August 31, 2006. (NASD's Response to Comment in SR-NASD-2004-183).

¹³ 15 U.S.C. 78s(b)(2).

requirements of Rule 2821 and will provide additional protection for customer funds prior to principal approval of deferred variable annuity transactions.

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2008-019 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Florence Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2008-019. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2008-019 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Florence Harmon

Acting Secretary

¹⁴ 17 CFR 200.30-3(a)(12).

EXHIBIT 4

Exhibit 4 shows the text of the changes proposed in this Amendment No. 1 to SR-FINRA-2008-019, with the proposed changes in the original filing shown as if adopted. Proposed additions in this Amendment No. 1 are underlined; proposed deletions are in brackets.

* * * * *

2821. Members' Responsibilities Regarding Deferred Variable Annuities

(a) through (e) No Change.

• • • Supplementary Material: -----

.01 through .02 No Change.

.03 Rule 2821 does not prohibit a member from forwarding a check made payable to the insurance company or, if the member is fully subject to SEA Rule 15c3-3, transferring funds for the purchase of a deferred variable annuity to the insurance company prior to the member's principal approval of the deferred variable annuity, as long as the member fulfills the following requirements: [(1)](a) the member must disclose to the customer the proposed transfer or series of transfers of the funds and [(2)](b) the member must enter into a written agreement with the insurance company under which the insurance company agrees [to] that, until such time as it is notified of the member's principal approval or rejection, it will [(a)](1) segregate the member's customers' funds in a bank in an account equivalent to the deposit of those funds by a member into a "Special Account for the Exclusive Benefit of Customers" (set up as described in SEA Rules 15c3-3(k)(2)(i) and 15c3-3(f)) to ensure that the customers' funds will not be subject to any right, charge, security interest, lien, or claim of any kind in favor of the member, insurance company, or bank where the insurance company deposits such funds or any creditor thereof or person claiming through them and hold those funds either as cash or

any instrument that a broker or dealer may deposit in its Special Reserve Account for the Exclusive Benefit of Customers, [(b)](2) not issue the variable annuity contract prior to the member's principal approval, and [(c)](3) promptly [to] return the funds to each customer at the customer's request prior to the member's principal approval or upon the member's rejection of the application.

.04 through .07 No Change.

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