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Executive Vice President
Corporate Financing/
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August 11, 2008

Florence E. Harmon
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: *Indexed Annuities and Certain other Insurance Contracts, File
Number S7-14-08 (the "Proposal")*

Dear Ms. Harmon:

The Financial Industry Regulatory Authority (FINRA) staff appreciates the opportunity to provide its views on the Commission's proposal to define the terms "annuity contract" and "optional annuity contract" under the Securities Act of 1933 (the "Act").¹ The Proposal would clarify the status under the federal securities laws of indexed annuities, under which payments to contract holders depend on the performance of a securities index. Section 3(a)(8) of the Act exempts certain annuity contracts and optional annuity contracts. The Proposal would provide that this exemption is not available to an indexed annuity contract if the amounts payable under the contract are more likely than not to exceed amounts guaranteed under the contract.²

¹ See Securities Act Rel. No. 33-89-33 (June 25, 2008) (the "Proposal"). As the largest non-governmental regulator for all securities firms doing business with the public in the United States, FINRA oversees nearly 5,100 brokerage firms, about 174,000 branch offices and more than 672,000 registered securities representatives.

Created in July 2007 through the consolidation of NASD and the member regulation, enforcement and arbitration functions of the New York Stock Exchange, FINRA is dedicated to investor protection and market integrity through effective and efficient regulation and complementary compliance and technology-based services. FINRA has approximately 3,000 employees and operates from Washington, DC, and New York, NY, with 15 District Offices around the country.

The comments provided in this letter are solely those of the staff of FINRA; they have not been reviewed or endorsed by the Board of Governors of FINRA. For ease of reference, this letter may refer to "we," "FINRA" or "FINRA staff" interchangeably, but these terms refer only to FINRA staff.

² The Proposal also would create new Rule 12h-1 under the Securities Exchange Act of 1934 (the "Exchange Act"), which would exempt an insurance company from Exchange Act reporting with respect to indexed annuities and certain other securities issued by the company that are registered under the Act and regulated as insurance under state law.

Customers who purchase similar products, such as variable annuities and indexed annuities, should receive similar protections. For that reason, FINRA strongly supports the Commission's decision to clarify the status of indexed annuities under the federal securities laws. Since 2002, FINRA has endeavored to educate investors about indexed annuities and promote sound practices by broker-dealers concerning the sale of these products by their registered representatives. However, uncertainty about the status of these products has impeded the ability of FINRA and other regulators to ensure that indexed annuity investors receive comparable protections under the securities laws to products so similar that investors cannot reasonably distinguish them from indexed annuities. The SEC's proposal would better ensure that these investors receive the same protections as investors in variable annuities and other securities.

FINRA does offer some technical suggestions concerning the proposal, which we describe below.

FINRA's Efforts To Educate and Protect Investors

The status of indexed annuities has been uncertain since their introduction in the mid-1990s. The Commission has stated that an indexed annuity may or may not be a security, depending on the particular mix of features.³ Because most indexed annuities are not registered with the Commission, investors may not receive adequate disclosure about these complex products. Salespersons who market unregistered indexed annuities are not required to register as associated persons of broker-dealers and are not subject to FINRA's suitability and other sales practice requirements with respect to these sales. Consequently, indexed annuity investors do not receive the same protections under FINRA rules as investors in variable annuities or other securities.

Despite these limitations, FINRA has endeavored to educate investors about indexed annuities and promote sound practices by broker-dealers concerning the sale of these products by their registered representatives. In January 2002, FINRA issued an Investor Alert, "Equity-Indexed Annuities – A Complex Choice" to help investors appreciate the complexities of these products and questions that should be considered before purchase.⁴ The Alert highlights the features of an indexed annuity that can make it difficult for a customer to compare different indexed annuities or to understand the indexed annuity that he owns.

³ See *Equity Index Annuities*, SEC Investor Information.
<http://www.sec.gov/investor/pubs/equityidxannuity.htm>

⁴ We most recently updated the Alert in April 2008. Our Alerts educate the public about a range of issues relating to savings and investments, including mutual funds, retirement scams, and a host of securities trading issues. A number of Investor Alerts have addressed annuities and insurance, including "Seniors Beware: What You Should Know About Life Settlements" (Feb. 2007), "Free Lunch Seminars: Avoiding the Heartburn of a Hard Sell" (Sept. 2007), "Should You Exchange Your Variable Annuity?" (March 2006) and "Variable Annuities: Beyond the Hard Sell" (May 2003).

In 2005, we issued Notice to Members 05-50, which addressed the sales practices of broker-dealers who offer indexed annuities. The Notice states that firms must adopt special procedures under Rule 3030 (governing outside business activities of an associated person) that require associated persons to specifically identify any intention to sell indexed annuities, as opposed to an intention to sell insurance products in general. The Notice also stated that, in the absence of a clear determination that such products were not securities, broker-dealers were “well advised to consider” treating the sale of unregistered indexed annuities by their registered representatives as private securities transactions under Rule 3040. In doing so, broker-dealers would supervise an associated person’s participation in these transactions as if they were executed on behalf of the firm. The Notice also encouraged firms to consider other supervisory procedures, such as requiring that all sales of unregistered indexed annuities occur through the firm.

FINRA has worked with state securities and insurance regulators to advance the harmonization of standards that apply to indexed annuities, variable annuities, and fixed annuities. In May 2005, NASD and the Minnesota Department of Commerce hosted an Annuity Roundtable in Washington, D.C. to begin a dialogue on the regulatory framework under which annuity products are marketed and sold. We have since encouraged approval by the various states of a rule to require that insurance companies and agencies recommend only suitable annuity products to their customers. We hope that these efforts will encourage the development of standards that will protect customers no matter what type of annuity they purchase.

Despite these efforts, the sale of indexed annuities continues to be a source of concern. For example, abusive sales practices involving indexed annuities were an important topic at the 2006 Senior Summit.⁵ Indexed annuity investors still need and deserve the protection of the securities laws. The Proposal would provide this protection.

Technical Comments on the Proposal

Proposed Rule 151A would provide that an insurance company’s determination of whether a contract is an “annuity contract” or “optional annuity contract” under Section 3(a)(8) is conclusive, as long as (1) the insurer’s methodology and its economic, actuarial and other assumptions are reasonable; (2) the insurer’s computations are materially accurate; and (3) the determination is made at or prior to the issuance of the contract.⁶ The Commission

⁵ The Commission, FINRA and the North American Securities Administrators Association conducted a joint examination of “free lunch” seminars, which identified a number of questionable practices relating to the products discussed at the seminars, which often included indexed annuities. See *Protecting Senior Investors: Report of Examinations of Securities Firms Providing “Free Lunch” Sales Seminars* <http://www.sec.gov/spotlight/seniors/freelunchreport.pdf>

⁶ Proposed Rule 151A(b)(2)(C) would provide that the determination must be made not more than six months prior to the date on which the form of contract is first offered and not more than three years prior to the date on which the particular contract is issued.

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requests comment on whether this approach facilitates its goal of providing certainty regarding the status of indexed annuities.

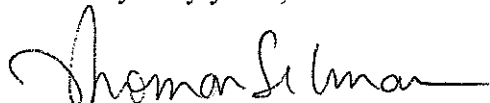
The Commission may wish to consider more detailed guidance on the implementation of Proposed Rule 151A to promote greater clarity and, consequently, a more uniform approach by issuers in making the required determinations. For example, the Commission might consider providing guidance as to the factors that may affect whether an issuer's methodology and assumptions under Proposed Rule 151A are reasonable for purposes of paragraph (b) of the rule.

The Proposal would not create a safe harbor for annuities that are not covered by Rule 151A. The status of annuities not covered by Rule 151A would continue to be determined by reference to the investment risks and marketing tests articulated in existing case law and, to the extent applicable, Rule 151 under the Act.⁷ As the SEC gains experience with the application of Rule 151A if adopted, the Commission should consider whether additional guidance may be needed with respect to the status of indexed annuities that do not fall within Rule 151A. FINRA would be pleased to assist the Commission in any way possible as this important rulemaking moves forward.

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Thank you for the opportunity to express our views on these important issues. Please contact me at (202) 728-6977 or Angela Goelzer at (202) 728-8120 if you have any questions.

Very truly yours,



Thomas M. Selman

⁷ See Proposal at 46.