



1275 Pennsylvania Avenue, NW
Washington, DC 20004-2415
202.383.0100 Fax 202.637.3593
www.sutherland.com

ATLANTA
AUSTIN
HOUSTON
NEW YORK
TALLAHASSEE
WASHINGTON DC

STAMP & RETURN

November 17, 2008

VIA ELECTRONIC DELIVERY

Florence E. Harmon
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

SEC Mail
Mail Processing
Section
NOV 17 2008
Washington, DC
109

Re: **Supplemental Comments on Proposed Rule 151A**
File Number S7-14-08; Release No. 33-8933

Dear Ms. Harmon:

We are submitting this supplemental letter on behalf of the Committee of Annuity Insurers (the "Committee")¹ in response to the request by the Securities and Exchange Commission (the "Commission" or "SEC") in Release No. 33-8933² (the "Proposing Release") for comments on proposed rule 151A. The Committee previously submitted a comment letter in response to the Proposing Release on September 10, 2008.³ With the reopening of the comment period in Release 33-8976 (Oct. 10, 2008), the Committee appreciates the opportunity to submit additional comments on certain matters not addressed in the Committee's previous letter.

Section 3(a)(8) of the Securities Act of 1933 (the "1933 Act") excludes from the provisions of that act "[a]ny insurance or endowment contract or annuity contract or optional annuity contract" issued by an insurance company subject to state insurance

¹ The Committee of Annuity Insurers is a coalition of 33 life insurance companies that issue fixed and variable annuities. The Committee was formed in 1981 to participate in the development of federal securities law regulation and federal tax policy affecting annuities. The member companies of the Committee represent over two-thirds of the annuity business in the United States.

The Committee is submitting a separate supplemental comment letter on proposed rule 12h-7.

² See Indexed Annuities and Certain Other Insurance Contracts, Rel. No. 33-8933, 34-58022 (June 25, 2008).

³ See Letter from Stephen E. Roth, Mary Jane Wilson-Bilik, and Fred R. Bellamy, Sutherland Asbill & Brennan LLP, on behalf of the Committee of Annuity Insurers, to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission (Sept. 10, 2008) at 5, available at <http://www.sec.gov/comments/s7-14-08/s71408-1861.pdf>.

regulation.⁴ The Proposing Release poses several important questions that could have significant implications for interpreting and applying the Section 3(a)(8) exemption that, given the press of time, the Committee was not able to comment upon previously. Specifically, the Proposing Release asks for comment on (1) the treatment of annuity contracts that offer more than one allocation option, and (2) the treatment of various benefits available under an annuity.

Analysis of Contracts with Multiple Allocation Options

The Proposing Release asks whether, for contracts with more than one allocation option, a separate determination under Section 3(a)(8) should be made for each allocation option, and if so whether the Commission should provide that the entire annuity contract is not an annuity under Section 3(a)(8) if one or more of the allocation options would not be an annuity under the proposed rule.

Many annuity contracts offer multiple allocation options. Variable annuities, for instance, typically offer a large number of variable subaccounts (where the investment risk is primarily on the contract owner) and one or more 'fixed' account options (where the investment risk generally is born primarily by the insurance company). In most instances, interests in the variable subaccounts are registered as securities under the 1933 Act, but the fixed options are not registered in reliance on the exemption in Section 3(a)(8) (or on the Rule 151 safe harbor). The status of the variable options as securities has not affected the status of the unregistered fixed options; the allocation options are analyzed separately and treated separately under Section 3(a)(8). In other cases, one or more fixed account options might also be registered as securities (for example, they may have a market value adjustment that has no floor). In that context, the variable subaccounts and any registered fixed allocation options are registered separately, on separate registration statements.⁵ This separate treatment of different allocation options in variable combination contracts is long-standing and recognized by the Commission staff.⁶

Similarly, fixed annuity contracts often offer multiple allocation options. They can offer a choice of guarantee periods, a choice of market value adjustment options, a choice of interest crediting formulas, and/or the availability of a traditional guaranteed interest rate option. As with variable annuities, the insurance industry and the Commission staff have typically analyzed different allocation options in fixed annuities

⁴ The Commission recognizes that Congress intended any insurance contract falling within Section 3(a)(8) to be excluded from all provisions of the 1933 Act. See footnote 27 of the Proposing Release.

⁵ The variable subaccounts are registered on Form N-4, and a separate registration statement, either Form S-1 or Form S-3, is filed for the fixed account.

⁶ In a generic or industry-wide "Dear Sir/Madam" letter dated January 31, 1984, the Commission staff instructed that for "combination fixed and variable annuity contracts whose fixed portion is not registered under the 1933 Act, any prospectus disclosure regarding the fixed portion" must meet certain standards.

separately for purposes of Section 3(a)(8) without requiring that the entire annuity contract be deemed a security.

The Committee believes that, in the context of proposed rule 151A, the Commission should not provide that a determination that one allocation option is not an annuity for purposes of Section 3(a)(8) would mean that the entire contract is not an annuity eligible for Section 3(a)(8). Such a position would have significant unintended consequences for many types of insurance products beyond fixed indexed annuities. Doing so could mean, for example, that a traditional guaranteed interest fixed account that qualifies for the Rule 151 safe harbor would not be an annuity if another, separate allocation option in the contract was determined to be a security. As noted above, such an outcome would be inconsistent with longstanding Section 3(a)(8) jurisprudence.

However, while as noted above it is clear that the status of one allocation option should not cause the entire contract to be deemed a security, the Committee also believes it is important to note that there could be circumstances in the context of a fixed annuity contract (without variable options) where the entire contract might be entitled to rely on Section 3(a)(8) based on an analysis at the contract level. For instance, guarantees and minimum values on fixed annuities are often calculated at the contract level by reference to the total amount of premium paid under the contract. Importantly, standard non-forfeiture laws mandate that nonforfeiture values be calculated at the contract level, and most charges are calculated, and most benefits are provided, at the contract level. These factors, as well as other facts and circumstances, may make it appropriate to approach the Section 3(a)(8) analysis at the contract level.

Analysis of Contracts with a Variety of Contract Benefits

Annuity contracts typically offer a variety of benefits, such as lump sum cash withdrawals, annuity payments for life or some other period, death benefits, spousal continuation, waivers of charges for disability or nursing home confinement, guaranteed minimum withdrawal benefits, and other riders. The Proposing Release asks if separate determinations should be made for different benefits, and if so should the rule prescribe that if any one of these benefits is not an annuity for Section 3(a)(8) purposes, then the entire contract is not an annuity. However, if such a position were taken for purposes of the proposed rule, then logically it would apply to any Section 3(a)(8) analysis, and that could lead to results that are troubling.

The Committee believes that contract “benefits” must be analyzed as part of the total facts and circumstances, and should not be looked at as if they were separate from the entire contract. Requiring insurers to make a separate determination for each benefit, with the possibility that if any one benefit is not an annuity, then the entire contract fails Section 3(a)(8), would be both unprecedented and could lead to distorted outcomes. Minor features rarely invoked would be given the same weight as features that predominate, and could lead to a traditional fixed annuity contract being deemed a security. For instance, if it was determined that a long-term care benefit under an

unregistered market value adjustment allocation was a security, but no other benefit or allocation option in the contract was determined to be a security, should that contract be deemed to be a security?

Historically, the Commission has shown restraint, employing a totality of the facts and circumstances test for analyzing the availability of the Section 3(a)(8) exemption. In the 1984 release proposing Rule 151, for instance, SEC explained the necessity of assessing investment risk under a more complex facts and circumstances analysis noting that:

Determining the status under the [1933] Act of any guaranteed investment contract involves certain factual and legal questions, *e.g.*, whether the insurer or the contractowner is assuming the investment risk under the contract. . . . Since under a guaranteed investment contract the insurer and the contractowner may share the investment risk to varying degrees, depending on the facts and circumstances involved, this type of contract cannot always readily be characterized either as “insurance” or as a “security” for purposes of section 3(a)(8).⁷

It should be noted that Section 3(a)(8) on its face does not exempt “benefits,” it exempts “contracts.” Making separate determinations for various insurance benefits would simply be inconsistent with the clear wording of the statute.

Dissecting annuity contracts by benefit would also be inconsistent with the state insurance regulation of annuities (and life insurance contracts). Such regulation generally applies to the contract as a whole. For instance, and as noted above, nonforfeiture requirements that mandating minimum guaranteed values apply to the entire contract, and not to benefits individually.

For these reasons, the Committee believes that with respect to various features and benefits available under an annuity contract, the contract should be treated as a whole, and the Commission should not take a different position for purposes of the proposed rule.

Comment Period Procedures

The Proposing Release provided that the comment period would expire on September 10, 2008. On August 5, 2008, the Committee submitted a request for an extension of the comment period for 90 days, until December 9, 2008, with an explanation of why more time was needed to analyze and comment meaningfully on the

⁷ See Definition of Annuity Contract or Option Annuity Contract, Securities Act Release No. 6558, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,710 at 87,160 (Nov. 21, 1984) (“Release 6558”) (proposing Rule 151) at 87,162.

proposed rules. Numerous other interested parties, including federal and state government officials, also requested a meaningful extension and provided sound grounds for such an extension. Nevertheless, as of the September 10 deadline, the Commission had not responded to those requests for extension, the deadline passed, and there was no indication that the Commission would extend or re-open the comment period. Accordingly, the Committee submitted what comments it was able to on September 10 and, since the comment period had ended and the Committee (and the life insurance industry in general) had no reason to think it would be re-opened, the Committee essentially 'stood down' and ceased actively working on comments, including stopping work on a proposed alternative rule. Then the Commission re-opened the comment period one month later for a mere 30 days after Federal Register publication of its release.

For the reasons stated in its August 5 letter and because of the brevity of the new 30-day comment period when coupled with the lack of any indication from the Commission that it would re-open the comment period, the Committee believes that the November 17th deadline for submitting additional comments, as a practical matter, does not provide adequate time for groups such as the Committee to meaningfully comment on critical and far-reaching aspects of the Proposing Release and proposed rule 151A itself.

For these reasons, the Committee again requests a meaningful extension or re-opening of the comment period, as stated in its August 5th letter, of 90 days after publication of the notice.

* * *

If you have any questions or if additional information would be helpful, please contact Steve Roth at 202.383.0158 (steve.roth@sutherland.com), Mary Jane Wilson-Bilik at 202.383.0660 (mj.wilson-bilik@sutherland.com) or Fred Bellamy at 202.383.0128 (fred.bellamy@sutherland.com).

Respectfully Submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: Stephen E. Roth

BY: Fred Bellamy

BY: Mary Jane Wilson-Bilik

FOR THE COMMITTEE OF ANNUITY INSURERS

cc: The Honorable Christopher Cox
The Honorable Kathleen L. Casey
The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
The Honorable Troy A. Paredes

Andrew J. Donohue, Director, Division of Investment Management
Susan Nash, Associate Director, Division of Investment Management
William J. Kotapish, Assistant Director, Division of Investment Management
Keith E. Carpenter, Special Senior Counsel, Division of Investment Management
Michael L. Kosoff, Attorney, Division of Investment Management