The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 22311

March 10, 2008

ICI Letter to SEC on Mixed and Shared Funding Orders

[22311]

March 10, 2008

TO: VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 11-08
SEC RULES MEMBERS No. 21-08 RE: ICI LETTER TO SEC ON MIXED AND SHARED FUNDING ORDERS

As we previously informed you, the SEC staff has been reviewing the current "mixed and shared funding" regulatory regime for separate accounts funding variable life insurance ("VLI") contracts. In response to the review, the Institute has filed the attached letter, which is summarized below.

The letter urges the Commission to eliminate the need for exemptive relief with respect to funds that underlie VLI contracts. Specifically, the letter recommends that the Commission (1) dispense with the mixed and shared funding exemptive order process for relief from the provisions of Sections 13(a), 15(a), and 15(b) of the Investment Company Act of 1940 and (2) eliminate the conditions currently imposed in exemptive orders granting relief from Section 9 of the Act. To ensure a level playing field among industry participants, the letter recommends that the Commission publicly state that mixed and shared funding orders are unnecessary and funds with existing orders no longer need to comply with the conditions in those orders.

In the near term, the letter supports an SEC staff suggestion that it issue an interpretive letter ("staff letter") stating that the original concerns regarding conflicts that could arise between the interests of VLI and variable annuity ("VA") contractholders are unwarranted. The letter recommends that the staff letter explain that underlying funds, their advisers,

and participating insurers, have not needed to rely upon the relief provided in the mixed and shared funding exemptive orders from Sections 13(a), 15(a), and 15(b) of the Act, but instead obtained them out of an abundance of caution. In addition, the staff letter should state that the Commission will not issue further exemptive orders, or amendments to existing exemptive orders, for this type of relief. The staff letter also should explain that relief from Section 9(a) of the Act will not require compliance with the currently imposed conditions and future exemptive orders under that section will not include those conditions.

In addition, the letter suggests that the staff letter state that a mixed and shared funding exemptive order is not required for, and will not be issued to, a fund underlying a VLI account to offer its shares to: VA contracts, other VLI contracts, qualified pension plans, the underlying fund's investment adviser or its affiliate, the insurer, funds-of-funds, 529 plans or any permitted investor for diversification purposes under IRS Code Section 817(h). Further, to provide comfort to the industry with respect to the proposed revised interpretation regarding the mixed and shared funding regulatory regime, the letter recommends that the staff letter address the implications of the interpretation on various issues such as participation agreements and other contractual documents between the participating insurer and the underlying fund.

As a long-term solution, the letter recommends that the Commission pursue rulemaking to eliminate the need for exemptive relief under Sections 13(a), 15(a), and 15(b) of the Act with respect to open-end management investment companies that underlie separate accounts funding VLI contracts. It also recommends that, as part of the rulemaking, the Commission eliminate all of the conditions currently imposed in the mixed and shared funding exemptive orders for relief from Section 9(a) of the Act. Finally, the letter suggests that the Commission withdraw existing mixed and shared funding orders and consolidate Rules 6e-2 and 6e-3(T) under the Act to simplify the rules and eliminate the unnecessary distinctions between the VLI and VA regulatory regimes.

Heather L. Traeger
Assistant Counsel

Attachment