

MEMO# 22905

September 23, 2008

ICI Draft Comment Letter on FINRA Proposal Governing Variable Insurance Product Communications; Conference Call Sept. 26

[22905]

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TO: VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 25-08 RE: ICI DRAFT
COMMENT LETTER ON FINRA PROPOSAL GOVERNING VARIABLE INSURANCE PRODUCT
COMMUNICATIONS; CONFERENCE CALL SEPT. 26

As we previously informed you, FINRA is requesting comment on a proposed rule change to modify, simplify, and codify the guidance governing communications with the public about variable insurance products. [\[1\]](#) Specifically, the proposal would change guidelines on illustrations of tax-deferred versus taxable compounding in advertising and sales literature; shorten and simplify existing provisions regarding product identification, liquidity, and guarantee claims; address changes in variable insurance products and the manner in which they are advertised, particularly with regard to riders and hypothetical illustrations; and, require that all marketing materials clearly identify the type of variable product that is being discussed. The draft letter is attached and summarized below.

We have scheduled a conference call for Friday, September 26, at 1 p.m. Eastern Time to discuss the FINRA proposal. The dial-in number for the conference call will be 1-888-790-3287 and the passcode for the call will be 27191. If you plan to participate on the call, please contact Jennifer Odom by email at jodom@ici.org or by phone at 202-326-5833.

The draft letter supports FINRA's proposal governing communications about variable insurance products, noting that its implementation would advance consistent disclosure to variable contract owners, provide an accurate basis for comparing different products, and assist in portraying a balanced picture of variable insurance products overall.

Pre-Dated Performance

The draft letter supports the provision in the proposal that would permit presentation of pre-dated performance subject to certain conditions. It explains that investors are interested in assessing the performance of an underlying fund from its inception and not simply from the date of its inclusion as an investment option through a variable insurance contract. The letter seeks clarification with respect to the phrase "significant change" as used in one of the conditions (i.e., there may not be any significant change to the investment objectives, strategies, or policies of the investment option during the period for which performance is shown), and requests that the phrase be interpreted in conformity with SEC guidance in this area. It also seeks clarification on the interpretation of "significant change" with respect to a variable insurance contract that includes an asset allocation program as an investment option. Specifically, it asks whether a "significant change" in a portfolio included in an asset allocation program would preclude the use of pre-dated performance information for the asset allocation program.

Variable Annuity Performance and Variable Life Insurance Policy Performance

The draft letter supports the proposal relating to communications of variable annuity historical performance and the disclosure regarding which policy level fees are deducted from variable life historical performance. The letter seeks clarification that the proposal would eliminate the current requirement that variable life insurance policy performance be used only if preceded or accompanied by a statutory prospectus.

Illustrations Based on Assumed Rates of Return

The letter generally supports the provisions in the proposal regarding assumed-rate illustrations, whether they employ a single or multiple assumed rate of return, but makes several recommendations. It notes, for example, that the proposal would permit FINRA member firms to show investment results based on assumed positive gross annual rates of return up to ten percent, instead of the current twelve percent. To provide flexibility, the letter suggests that the maximum assumed rate of return be subject to prevailing market conditions instead of codified at a specific percentage. The letter also requests confirmation that illustrations may demonstrate the deduction of current charges in addition to maximum guaranteed charges.

In addition, the draft letter recommends that the proposal be revised to continue to permit the use of random rates of return for presentations of multiple assumed rates of return instead of the proposed "actual performance of a broad-based securities market

index.” It notes that the term “broad-based securities market” is not defined and seeks clarification on any limitations with respect to the term. Finally, the letter seeks confirmation and clarification that the current requirements (i.e., only if accompanied or preceded by a prospectus and accompanied by a general illustration reflecting the arithmetic average of underlying fund expenses) would no longer be imposed with respect to reflecting a weighted average of fund level expenses in variable life insurance hypothetical illustrations used with multiple customers.

Illustrations Based on Historical Performance

The letter supports the proposed use of historical performance illustrations using assumed dollar investment amounts. It notes, however, that there is no definition of “illustration” in the proposal and expresses concern that, without some limitations, the provisions of the proposal relating to “illustrations” could be read broadly to encompass product explanations that were not intended to be captured. Accordingly, it seeks clarification regarding the type of illustrations meant to be included in the proposal.

Guarantee Claims and Riders

The draft letter commends FINRA for its efforts to make discussions of riders more uniform and accurate, and supports the requirement that communications be “fair and balanced” with respect to whether a guarantee or rider will not benefit a customer. Nonetheless, the letter seeks clarification regarding the scope of the proposed disclosure so as to prevent second-guessing of what is “fair and balanced.” It also recommends that a reference in sales materials to the specific location of such disclosure in the product prospectus would be sufficient to satisfy the proposed requirement. In addition, the letter requests that further guidance be provided as to what is meant by a “discussion” of a guarantee, so that investors are not overwhelmed with an exhaustive list of limitations every time a guarantee is mentioned.

Product Identification and Liquidity

The draft letter supports the proposed prohibition that communications may not represent or imply that variable insurance products are mutual funds. It seeks clarification, however, that communications may continue to state that the product invests in mutual funds, to inform customers that a mutual fund underlies the product.

Tax-Deferred Illustrations

The letter generally supports the provisions in the proposal concerning comparative illustrations of the mathematical principle of tax-deferred versus taxable compounding contained in communications. It asks for clarification regarding the use of state income tax rates, noting that it is appropriate to include an assumed state tax rate where illustrations are not being targeted to a particular state’s investors. It specifically requests that the proposal provide that it is permissible to use an assumed state tax rate in

general communications if it is clear from the surrounding disclosure that the state tax rate used is assumed.

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[Attachment](#)

endnotes

[\[1\]](#) See Memorandum to Variable Insurance Products Advisory Committee No. 22-08, dated August 11, 2008 [22788]. See also Variable Insurance Products, “FINRA Requests Comments on Proposed New Rules Governing Communications About Variable Insurance Products,” FINRA Regulatory Notice 08-39, July 2008 (“Proposal”).

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