

MEMO# 22867

September 15, 2008

ICI Comment Letter on SEC Proposal to Clarify the Status of Certain Indexed Annuities Under the Federal Securities Laws

[22867]

September 15, 2008

TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 32-08
SEC RULES MEMBERS No. 87-08
SMALL FUNDS MEMBERS No. 55-08
VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 23-08 RE: ICI COMMENT
LETTER ON SEC PROPOSAL TO CLARIFY THE STATUS OF CERTAIN INDEXED ANNUITIES
UNDER THE FEDERAL SECURITIES LAWS

As we previously informed you, the Securities and Exchange Commission has proposed a new rule under the Securities Act of 1933 that would define certain indexed annuities as being outside the “insurance exemption” in the Securities Act, thus effectively requiring these annuity contracts to be registered with the Commission as securities. [\[1\]](#) The Commission also proposed a new rule that would exempt insurance companies from the reporting requirements of the Securities Exchange Act of 1934 with respect to indexed annuities and certain other securities that are registered under the Securities Act and regulated as insurance under state law. The Institute’s comment letter on this rulemaking is attached and briefly summarized below.

The letter expresses the Institute’s view that, as a general matter, indexed annuities should be registered with the Commission and afforded the full range of protections available under the federal securities laws. It states that, in many cases, the purchaser of an indexed annuity – and not the issuing insurance company – assumes the primary investment risk

under the contract. The letter further states that it can be difficult to fairly market certain indexed annuities as other than securities.

The letter notes that many of the Institute's insurance company members (as well as members affiliated with insurance companies) have raised concerns that the rule is drafted too broadly, such that it could require the registration of certain annuities that traditionally have been viewed as insurance products. It observes that individual insurance companies, as well as insurance industry trade associations, are carefully analyzing the scope of the proposed rule and intend to provide the Commission with specific comment on this issue. The letter calls upon the Commission to consider carefully the comments that it receives regarding the scope and application of the proposed rule. It also includes comments concerning paragraph (b) of the rule, which addresses the manner in which insurers would determine whether a particular contract would come within the proposed rule.

Finally, the letter supports the Commission's related proposal to exempt certain insurance companies from filing reports under the Exchange Act with respect to indexed annuities and certain other securities registered under the Securities Act, concurring with the Commission's assessment that the imposition of Exchange Act reporting requirements is unnecessary under these particular circumstances. It notes, however, that the proposed rule would require an insurance company to take steps reasonably designed to ensure that a trading market for the securities does not develop, including by placing certain conditions on the transferability of the securities. The letter observes that state insurance regulators have apparently sought to facilitate transfers of annuity contracts and in some cases may not approve the issuance of a contract that places limits on its transferability. The letter urges the Commission and its staff to consult with state insurance regulators regarding this issue, in order to ensure that any condition to the availability of this exemption does not conflict with the requirements placed on insurance companies by state insurance regulators.

Rachel H. Graham
Associate Counsel

[Attachment](#)

endnotes

[\[1\]](#) See Institute Memorandum to Closed-End Investment Company Members No. 24-08, SEC Rules Members No. 59-08, and Small Funds Members No. 38-08 [22676], dated July 10, 2008; Institute Memorandum to Variable Insurance Products Advisory Committee No. 21-08 [22678], dated July 10, 2008.

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