

August 2, 2008

Mr. Jonathan G. Katz, Secretary  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549-6009

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Re: File NO. S7 - 22- 97

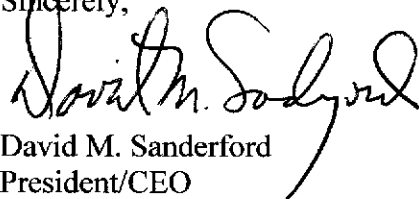
Sir:

This letter provides a response (in triplicate, attached hereto) to the Commission's request (Release No. 33 - 7438) for public "...comments on the structure of equity index insurance products, the manner in which they are marketed, and any other matters the Commission should consider in addressing federal securities law issues raised by equity index insurance products."

These comments are provided by me as a private citizen who has observed the entire history and development of the above referenced products from two different perspectives: first, as an "industry insider" with senior management positions in legal, compliance, and marketing areas for insurers and their distributors, and secondly, as an expert witness in securities and financial litigation. In my consulting practice I have been retained by the New York Stock Exchange to provide evaluation and testimony regarding "annuity sales abuses" in contested enforcement actions against registered representatives.

I believe this is an important effort the Commission is undertaking and would be pleased to make myself available for questions and/or testimony on subjects related to equity index insurance products.

Sincerely,



David M. Sanderford  
President/CEO

Attachments

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**Comments**  
**(with analysis)**

**Of**

**David M. Sanderford, J.D.**  
**The Maxford Company**

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**To**

**Securities and Exchange Commission**

**Pursuant To**  
**Release No. 33 – 7438**

**Regarding**  
**Equity Index Insurance Products**

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**August 2, 2008**

## **Preliminary Questions and Answers**

### **Is there a current problem with equity index insurance products?**

Yes. It is apparent that the SEC has embarked on this project, requesting public comments, not simply as an intellectual exercise but because the Commission has observed the tsunami wave of customer complaints, state enforcement investigations, and private litigation that has gained widespread publicity.

### **What is the nature of this “problem”?**

The substance of the problem is that many thousands of United States citizens are annually purchasing Billions of dollars of equity index insurance products, (with inadequate regulatory oversight and by use of complex and misleading representations) that are inappropriate for their age and financial circumstances. The primary risks associated with these products are generally undisclosed to the customers.

### **Is State regulation of insurance adequate to address this problem?**

No. With but few exceptions, state insurance regulation is dominated by the interests of insurance companies, and agents. To the extent that “public protection” is addressed by state agencies it is typically directed at “corporate financial adequacy” rather than consumer issues. Without an actual “theft or obvious fraud” by an agent, consumer complaints are routinely dealt with by making an inquiry of the company and agent, and closing the file upon receiving their “denial” of responsibility”. Policy form approval processes are often manipulated by insurers to escape effective review, and to gain “approval” of incrementally more complex, illiquid, and costly equity index products than those extant at the creation of Rule 151.

### **Can the Commission effectively regulate (unregistered) equity index annuity distribution through its jurisdiction over FINRA registered firms and representatives?**

No. While FINRA (and SEC) can control standards relating to the sales activities of registered firms and representatives, relating to equity index products; it should be recognized that most of the EIA sales occur through licensed insurance agents who deliberately hold no FINRA registrations.

### **Can the insurance companies (issuing the equity index products) be held effectively responsible for the sales activities of their appointed agents?**

Not likely, without treating equity index products as registered securities. The most common business plan used in the distribution of equity index products is

the “independent” agent model. Typically, the agent agreement between the insurer and the agent, gives the agent the total responsibility to determine that the product is appropriate for the customer (they don’t generally use the term “suitable”). When a “problem” arises, the insurer points in the direction of the agent, and all too often that agent is gone – gone – gone.

**What is the likely motivation of the insurance companies and agents to sell equity index products?**

Corporate and individual greed is the likely motivation. This “common EIA enterprise” between an insurer and a complicit agent to sell equity index products is one of the very few opportunities that can produce millions of commission dollars to an under trained and poorly educated person (the agent), in a very short period of time -- without any substantive standards relating to professional conduct that may restrict their tactics and results.

**What does the “common enterprise” referred to above usually consist of?**

This “common enterprise” is most often made up of the following components.

- High commission product. Traditional fixed-rate annuities (without any bonus feature) relying on retail distribution channels would typically pay total commissions in the 5-7% range, variable annuities 6-8%. Equity index annuities often pay commissions as high as 10-18%.
- Multi-level marketing. Most insurers have a “commission hierarchy” that spreads this high equity index commission among agents, general agents, recruiting agents, referring agents, sub-agents, co-agents and other vague and multiple categories – most of whom have never talked to or know the customer (think “pyramid”). Significant money is made from the recruiting of agents, rather than the marketing and sale of the product itself. Audits would show that many individuals in a commission hierarchy are not appropriately licensed for these commission payments.
- Target seniors. “Free lunch” seminars are epidemic where older consumers are gathered with “come-ons” that are of specific interest to their demographics – living trusts, Medicare, social security, etc.
- Predatory sales practices. These agents in this enterprise often cloak themselves with the appearance of expertise to gain the trust and confidence of older clients and to have their recommendations accepted without undue scrutiny. The agent will use obscure (and

usually “purchased”) titles that signify expertise with “senior issues”, have books ghost written that list them as authors or contributors, host radio and television shows that pretend to offer “objective” investment advice, and advertise dubious third party testimonials. In Texas, and in the deep South, religious ties are unscrupulously used to gain trust – an agent invoked prayer often preceding the signing of transaction documents.

- Bait and switch to equity index annuities. Without other products to offer, the discussion with the senior client inevitably leads the agent to recommend these complex, illiquid and costly products to almost every prospect, regardless of differences in their ages, incomes, expenses, taxes, or investment objectives.

## ANALYSIS

**Equity Index Annuities (“EIAs”)** – Technically these products are a sub-category of fixed-rate annuities. However, EIAs are marketed and sold much differently than traditional fixed-rate products. The request for comments has described the various and complicated methods insurers use to calculate interest rates that have some “connectivity” to equity market performance. These methods are varied and often are combined with vesting and market value adjustment processes that further obscure (from the customer) the true nature of the product – and the risks associated with its purchase and ownership. *I will not attempt to lengthen this paper with any substantive comparison of policy features, others will do so.* However, I will make reference to several different interest rate calculation methods to highlight specific points that I will discuss.

Fixed-rate annuities were traditionally (from the early 1970s when the NYSE first allowed brokers to sell insurance) considered the risk equivalent of a fixed-income asset (bond), and variable annuities the risk equivalent of an equity asset (stock). Substantive interest rates were guaranteed in advance for fixed rate annuities in accordance with predictions (by insurance company management) of the insurer’s General Account earnings ability. The variable annuities were ensconced in Separate Accounts (a legally defined term that “separates” those assets from any General Account liabilities) that were invested according to a specific (equity, often long term capital appreciation) investment objective. It is this Separate Account that was the entity registered as the issuer (along with the insurer) of the “variable annuity security”.

Eventually, creative insurance company executives hatched the idea of a product that had “the best of both worlds” – guaranteed interest rates that reflected upward market results BUT no downside risk. They apparently decided to make commissions for this new product about 50% higher than either fixed-rate or variable annuities. AND, because this product will not be registered, they could complete the transaction without having to disclose the amount of these commissions to the customer.

I will not attempt to describe or evaluate the complex internal investment strategies that companies have formulated to support their interest rate calculation methods (this is beyond my competence) except to make *one comment* that I feel is important. All insurers issuing EIAs create a segregated asset account to apply their specific strategy that (while technically is part of the company’s General Account) is for all other purposes a separate (small “s”) account (small “a”) in the same practical fashion as a Separate Account designed for variable annuities.

I predict that the Commission will (as before) be swamped with comments from parties that have a vested interest in the continued manufacture (insurance companies) and distribution (agents and their agencies) of equity index annuities. By comparison, there

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will be few comments on the behalf of consumers. The obvious objectives of the insurance companies and agents will be to continue the application of Rule 151, with as little change as possible, to their EIA products and profits.

**Rule 151** – The stated purpose of this rule was to establish reasonable “safe harbor” criteria, which if met by an insurer with respect to a specific annuity product, would not require that product to be registered under the ’33 and/or ’40 Acts. Explicit in this non-registration is the understanding that the anti-fraud provisions of the ’34 Act would not be available to protect consumers.

In my opinion, it would be a mistake of the gravest order to treat the present Rule 151 elements as “reasonable criteria” upon which to build a somewhat more comprehensive standard. While I cannot speak for the Commission’s historical point of view, it was largely felt by the insurance industry at the time of the original promulgation of Rule 151, that a great victory “over regulatory oversight” had been won. The phrase used often in insurance circles was “safe haven” not “safe harbor”.

It is my opinion that Rule 151 needs to be replaced entirely, rather than being changed marginally to reflect some effort at “updating”. Not to be unkind, but the criteria used in Rule 151 are practically worthless for the Commission’s intended purpose. The public is ill served by the present state of affairs that has left them relatively defenseless against a juggernaut of insurance company legal “muscle”, and the predatory sales techniques of “independent” insurance agents. This unholy partnership operates with almost no effective regulatory oversight, and many thousands of seniors have lost much of their retirement nest eggs to the EIA sales representation – “Participate in the market, and never lose money.”

Let’s take a brief look at the present criteria of the Rule 151 safe harbor.

**Applicability of State Insurance Regulation**

Since 100% of all organizations issuing annuity policies are insurance companies regulated by the various states (find me one that isn’t), meeting this standard is a fore gone conclusion. Enough said.

**Investment risk**

Acknowledging the VALIC and United Benefit cases, it would appear that the Commission has historically yielded on this point to any situation where the product is not tied to a Separate Account (as opposed to a separate segregated asset account that is captured within the company’s General Account, see other remarks).

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The Commission is mistaken (in my opinion) in referring to the common 3% interest on 90% of the purchase payments as a "floor guarantee". This "3% on 90%" threshold is (unless I misunderstand) the typical State's calculation basis necessary to meet its standard non-forfeiture values for this classification of annuity. The insurer's contractual guarantees are different although the policy may also make reference to the "3% on 90%". The Commission is also mistaken in its belief that the "3% on 90%" means that the insurer has made a "typical 10% deduction" for sales and other expenses. The amount of "acquisition expenses" (the biggest portion of which is made up of commissions) varies wildly between companies and may be as high as 20% of the purchase payment(s). No matter the actual level of commissions paid out by a specific company, the commissions are unrelated to the "3% on 90%" calculation.

I have seen lower guaranteed values than the above. If you will do the simple math of applying 3% interest compounded yearly to 90% of a purchase payment, you will see clearly that the value doesn't "cross over" (or exceed) the original investment until sometime in the 4<sup>th</sup> policy year. I have attached a copy of the **Allianz MasterDex 5** "Contract Summary" that shows (page 2) a "Guaranteed Cash Surrender Value" that doesn't equal or exceed the "Initial Premium" until the 7<sup>th</sup> policy year. It would appear that this result is attained by applying 2% interest to 87.5% of the purchase payment. This policy deserves a closer look as it is marketed very aggressively in my region. I have also attached (to be fair) the "Statement of Understanding" that Allianz apparently asks each customer to sign.

In the Allianz MasterDex 5 annuity, this is what happens:

- You make a payment
- You receive a 5% "premium increase" (a bonus that may be forfeit)
- You receive annual interest (that may or may not be forfeit), either
  - The "floor guarantee" (the Commission's term), or
  - A "minimum guarantee (set by insurer, usually less than money market rates), or
  - The much hyped "participation in the market rate" ("can't lose", you know)
- You withdraw funds (you lose interest and possibly principal under a withdrawal fee schedule that lasts 10 years and is 15% for the first 4 years).
- When you withdraw, a "market value adjustment" can be made that could further increase the amount of fee (or lost interest).

**In this MasterDex 5, the best 'guaranteed' scenario for someone that does not withdraw any funds over a 10 year period is to receive an annual return of 0.67% for their purchase payment.** (See the chart of values on page 2 of the "contract summary") Of course, Allianz might pay higher interest, and of course that higher interest may be offset or eliminated entirely because of withdrawal fees and market value adjustments.

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Honestly now, would any responsible financial analyst conclude that any company taking an investment of \$X and making only a guarantee of an annual return of 0.67% over 10 years would be undertaking any investment risk in that transaction? I don't think so.

More importantly, would anyone honestly look at the two documents that I have attached (the Allianz "contract summary" and the "statement of understanding") and think that an "average" investor could both understand and reconcile those documents? I don't think so.

Obviously, there are many different equity index annuity variations in the market, and each may be better or worse than the one I identified in this paper. And, if you made the same calculation for 10 years in the "3% on 90% situation, the average annual return would be 2.10%, less than average money market rates which carry no investment risk.

**UPDATE NOTE:** I have just received a copy of another EIA policy during discovery in a pending law suit that significantly sets the "guaranteed interest" bar much lower than Allianz. **The National Western (Austin, Texas) "Ultra Classic" annuity guarantees 1% on 87.5% -- which allows the original purchase payment to be guaranteed only during the 14<sup>th</sup> year.** The withdrawal fees in this EIA last 13 years, and this product was sold to a 75 year old male.

It would seem self-admitted, that the Commission has operated (to date) on the unfounded premise that any insurer whose EIA assets reside in their General Account, and where they make an interest rate guarantee equal to the State's requirement for determining standard non-forfeiture values --- has undertaken a significant investment risk in the policy.

**With all due respect, a continuation of the Commission's position cannot in any fair analysis, be justified.** Rule 151 should be scrapped and driven to the dustbin of history before thousands more hard working citizens are damaged at the hands of unscrupulous agents and asset-hungry insurers.

All of the above discussion begs the primary issue of whether the insurance company has made a significant interest rate guarantee IN ADVANCE. While the insignificant "floor guarantee" is made in advance -- I know of no EIA that provides a guarantee of specific "current" rates (based on its specific index formula) IN ADVANCE. Only the formula (which assures that the insurer will not have to pay more than it has earned in the segregated asset account established for its EIA products) is guaranteed. It is important to keep in mind that it is these current rate expectations that form the basis for the sale.

Marketing

This has been, to date, a toothless benchmark. Every insurer who issues equity index annuities has carefully included in their marketing material several references to the “retirement income” possibilities of the product, or some other “traditional” annuity reference that it can point to in order to deflect criticism that it is marketing the product “primarily as an investment”.

Perhaps it has occurred, but I know of no insurer that has been forced to register equity index annuities as securities because of how they were marketed. I know of some that were “slapped on the wrist” and such action caused them (probably) to insert some more self-serving statements in sales literature that no one reads.

The real mischief is made at the level of the “independent agent” engaged by the insurer to sell their EIAs. And, much of this mischief happens on a yellow sheet of paper at the kitchen table of Americans that are 65 - 90 years old. Of course, this yellow sheet is never signed by the agent, seldom is left with the customer, and the customer’s memory of it is later (should they complain) shouted down by the agent and insurer as they point to their printed (and confusing) literature.

If what I say is true, the question must be asked, “Why would any reasonably intelligent person ever entrust their hard earned retirement money to someone for a product they do not understand?” Many thousands of people do, and most often the equity index annuity (if you applied security related standards of suitability) would be found to be not suitable for a majority of these customers. I will attempt to explain the dynamics of the “equity index sales scheme” that prompts these decisions later in this paper.

**Commissions** – At the heart of any practical analysis of equity index annuities, there must be an understanding of the role that commissions play, and their effect on agents, and policy design. Again, I will not attempt to discuss the internal investment strategy of the insurer.

With any annuity product, the insurer must plan for the recapture of their acquisition expenses (commissions, marketing and promotion costs) incurred in putting a policy “on the books”. Thereafter, there are relatively small maintenance expenses to cover. Lastly, the insurer must have an “after tax return on invested capital” goal (usually a minimum of 15%) for the “book” of business within that annuity product design.

To successfully “manage” this book of business, it is fundamental for the insurer to predict accurately how long an average policy will stay on the books, so that these expenses can be amortized and the profit goal met. The most common way to “encourage” policy owners to keep their annuities is to penalize them via withdrawal fees (and potential market value adjustments) for cashing in their annuities.

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For perspective, the Commission should understand that the "3% on 90%" standard does not in any way indicate that the insurer has 10% deducted for the expenses I mention above. In any given state, an insurer that had 0% acquisition expenses and one that had 20% acquisition expenses would have to meet the same "3% on 90%" non-forfeiture standard.

The amount and length of the withdrawal fee schedule can be predictive of the overall commissions paid by the insurer. The initial year withdrawal fee will be set within a couple of percentage points from the commissions that have been paid. As an example, with a 15% first year withdrawal fee, it is reasonable to assume that its total commissions for that EIA are between 12% and 18%. I doubt that any insurer providing comments to the Commission will (without being requested) give copies of their commission schedules and agent commission agreements.

It should be also noted that there is no regulation that I am aware of that requires an agent to reveal to the customer the amount of commission they receive on a transaction of this sort. **THE CUSTOMER ALWAYS PAYS THE COMMISSIONS: THE HIGHER THE COMMISSION -- THE HIGHER THE FEES AND GREATER RESTRICTIONS ON LIQUIDITY.** If the above statement is true, and it is. Why isn't the customer given information that is truly helpful to their purchase decision? An appropriate industry wide commission disclosure could be easily developed.

It is the insurer's need to recapture its commission expenses that produces the esoteric vesting schedules, the long withdrawal fee period, the market value adjustments, the caps and market averaging formulas, and other restrictions on liquidity. Equity index products do not have to be so complex -- and the complexity exists to obscure the product's commission cost.

**Suitability** – Today, agents and insurers largely feel that (because the EIAs will eventually pay back more than the original purchase payment) that "there is no risk" and that the product is suitable for "everyone", without restrictions. This is, of course, nonsense.

The primary areas of suitability concern in the sale of EIAs are as follows:

Overage Sales

While there is some concern about the sale of a complex product to someone of advanced age because of diminished capacity, the real issue is liquidity. If an EIA with a 12 year withdrawal fee schedule was sold to a 75 year old male, the liquidity restrictions would be longer than his life expectancy (9.6 years). The risks associated with restricted liquidity should be fully disclosed.