

# BINGHAM

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**Via Electronic Mail to Rule-Comments@sec.gov**

Ms. Nancy M. Morris, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington DC 20549-109009

**Re: File Number SR-NASD-2004-183; Proposed Rule 2821, as amended**

Dear Ms. Morris:

We appreciate the opportunity to comment on FINRA's Proposed Rule 2821 (the "Proposed Rule"), as amended, which would dramatically alter the way that sales of deferred variable annuities are conducted. We understand FINRA's desire to remedy problematic variable annuity sales practices, but we write to point out the disproportionate impact that the Proposed Rule will have on broker dealers who do what is commonly known as "check and application" business. The seven day principal review period set forth in the Proposed Rule is too short and will put these firms at a serious competitive disadvantage. There is also reason to fear that the seven day review limit will lead to unintended consequences and thus do a disservice to the very investors the Rule was designed to protect. Accordingly, we respectfully submit that the Securities and Exchange Commission's approval of the Proposed Rule is not in keeping with its Congressionally mandated, statutory responsibility to evaluate the economic and competitive impact of proposed SRO rules pursuant to Exchange Act sections 3(f), 6(b)(8), 23(a)(2), and 15C(b)(6) and (9). Furthermore, the Proposed Rule fails to comport with the assurances that the NASD gave in seeking approval of the NYSE merger that it would eschew procrustean rules that fail to accommodate different business models.<sup>1</sup>

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<sup>1</sup> For example, on November 28, 2006, NASD Chairman and CEO Mary Schapiro stated that "[t]his new entity will be committed to being more efficient and effective for all 5,100 securities firms in the United States that do business with the public, not just the 200 that are dually regulated. For smaller firms, this will mean finding ways to pass along the savings that a single SRO will create and finding ways to reduce their regulatory burden without weakening investor protection. And, it will mean adopting a uniform set of rules *flexible enough to accommodate the different business models* and sizes of firms that exist within the industry." (Emphasis added.)

The “check and application” method of doing business is quite different from that used by other firms. These broker dealers usually are “introducing” firms that do not hold customer funds or securities and conduct their variable annuity business on a fully disclosed basis directly with the provider. Their registered representatives live in the communities that they serve and often work out of small offices that lack elaborate, state of the art technology and communications facilities. In the typical sale, the agent meets with the client in the client’s home after regular business hours. They discuss the proposed transaction across the kitchen table and, if the customer wishes to make the purchase, fill out the application together. The next time the agent is back in the office (which may not be the next business day because of other appointments), she processes the paperwork and mails the completed application and the customer’s check to the issuing company, which generally receives the package within three to five days. If the firm has centralized trade review for variable annuity transactions, the issuing company would then image the application and send it back to the broker dealer’s home office for principal review.

The Proposed Rule requires that a licensed principal review each annuity purchase before the application and the customer’s check are sent to the issuing company. The time allowed for the completion of this review is only seven business days from the date the customer signs the application. Even assuming that the application is sent out by overnight delivery the day after the contract is signed and that it takes just another day or so to route the application to the reviewer, the required principal review would begin no sooner than two to three business days after the customer signs the application, leaving the principal only four or five days to complete the review. Because the Proposed Review mandates what will amount to a detailed *de novo* review of the purchase and the contract, the principal may feel compelled to contact the agent, the customer, the issuer, or all three, to ask questions and obtain additional information. While it may be assumed that information will be readily available from the issuing insurance company, if either the representative or the customer is unreachable for even a short period of time the review process can be stalled by days. In the case of an exchange, the reviewing principal may feel the need to seek additional information from the company that issued the contract to be replaced, and that issuer may not respond in a timely fashion.

There are, then, many circumstances that could make it impossible for the principal to complete the detailed review that the Proposed Rule contemplates within the time permitted. That will leave firms with two unpalatable choices: reject suitable purchases that could not be reviewed within the required period, thus causing further delay while the agent goes back to the customer for fresh signatures and a new check; or skimp on the thorough analytical review that the Proposed Rule is intended to achieve. Neither course is in the customer’s best interest.

In order to allow “check and application” firms to continue to do variable annuity business, we respectfully urge that the time allotted for principal review be extended to no fewer than ten business days from the date that the customer signs the application. Also, we recommend allowing firms to extend the review period by a few more days if customer consent is obtained. These changes are essential to ensuring that a vital

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component of FINRA's membership is able to continue to participate in this important and rapidly growing business and thus afford consumers the broadest possible range of products, services, and firms from which to choose. Thank you very much for your consideration.

Very truly yours,



Donald S. Davidson