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July 27, 2005

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
Room 6184, Stop 6-9
450 Fifth Street, N.W.
Washington, D.C. 20549

RE: Release No. 34-52046A; File No. SR-NASD-2004-1183; *Proposed NASD Rule Concerning Supervision and Suitability in the Sale of Variable Annuities; Extended Comment Period Needed.*

Dear Mr. Katz:

The American Council of Life Insurers respectfully requests that the comment period on Release No. 34-52046A be extended for 60 days to provide an opportunity for careful analysis and constructive comment on the proposal. The Release invites comment on a proposed NASD Conduct Rules 2821 that would create a suitability obligation, principal review and approval requirements, and supervisory and training requirements tailored to transactions in deferred variable annuities. The release appeared in the Federal Register Vol. 70, No. 139, dated July 21, 2005, and contained a 21-day comment period expiring August 11, 2005.

The American Council of Life Insurers ("Council") is a national trade association with 399 members representing 77 percent of all United States life insurance companies. Many of our member companies offer and distribute variable annuities, variable life insurance and mutual funds directly or through affiliated and independent broker/dealers. Over 50% of the NASD's 661,780 registered representatives work for broker-dealers affiliated with life insurance companies. The initiative would have a significant impact on our industry.

We have actively participated in a numerous NASD rulemaking initiatives. SEC oversight of SRO rule proposals ensures balanced regulations in the public interest, and provides an important protection against SRO rules that may impede competition. The full execution of SEC oversight and public comment is fundamental to sound rulemaking.

Our member companies and their broker/dealer affiliates have concerns with the NASD's proposed variable annuity suitability and supervision rule. The nominal 21-day comment period provides neither adequate opportunity for meaningful analysis of the proposal, nor a meaningful time within which to formulate comments for submission. Accordingly, we would like to have a reasonable opportunity to provide input on the proposed amendments.

The recent modifications to the proposal merit thorough discussion and analysis. The newly proposed rule changes are significant and have been evolving since August 2004, when the NASD invited comment on the initiative at an earlier stage. The release does not reference any emergency regulatory situations needing immediate action. The fundamental focus of the rule amendments is currently addressed by various NASD rules and Notices to Members. A regulatory void, therefore, does not exit. Active public input should not be shortchanged.

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The proposal may have an anticompetitive impact on limited purpose broker-dealers. Several aspects of the initiative provoke procedural and administrative rulemaking concerns.

A 21-day comment period is insufficient to address the issues raised in the release. As a practical matter, most observers will have fewer than 21 days to digest the proposal following its July 21, 2005, printing date due to time consumed in delivery and dissemination of the Federal Register. Moreover, the comment period occurs during the peak of the summer vacation season, which reduces the initiative's exposure to scrutiny. Some of the provisions appeared for the first time in the release, and will require substantial time to analyze.

These factors support a reasonable extension to the comment period. Industry groups like our trade association circulate regulatory proposals, elicit membership input, develop a consensus, and circulate a draft letter of comment before submission. This is a worthwhile, but time intensive, process that is difficult to execute in 21 days.

The special time burdens confronting regulated industries and large organizations in digesting regulatory proposals were explicitly recognized by the Administrative Conference of the United States in its publication entitled *A Guide to Federal Agency Rulemaking*, which observes:

> The 60-day period established by Executive Order 12044 for significant regulations (and no longer in effect unless adopted by agency rule) is a more reasonable *minimum* time for comment. However a longer time may be required if the agency is seeking information on particular subjects or counter-proposals from regulated industry. *"Interested persons" often are large organizations and they need time to coordinate and approve an organizational response or to authorize expenditure of funds to do the research needed to produce informed comments.*[1]

The NASD itself spent nearly twelve months (approximately 343 days) analyzing and revising the proposal after the initial comment period ended. In light of this lengthy time period for NASD review of the proposal, industry commentators should be entitled to a reasonable period of comment longer than 21 days.

There are several additional reasons that a comment extension should be granted.

- The initial proposal elicited 1,129 letters of comment on the proposal. According to the release, only fourteen of the commentators fully supported the proposal, and twenty offered partial or qualified support.[2] Using the NASD's numbers, approximately 97% of the commentators opposed the initiative. This volume of negative comment was a lightning rod for broad regulatory concern. Given the scope of the issues and the range of commentators, the initiative merits a functional opportunity to evaluate the revisions. In essence, the NASD is rushing to judgment on a proposal that only 3% of commentators supported.

- Notwithstanding the release's assertion that the NASD has considered the rule's impact on competition, some of the changes in the proposal could unreasonably burden competition. A longer comment period will allow the SEC to execute its responsibilities under the Securities Exchange Act to evaluate SRO impairments to competition. Congress provided guideposts to evaluating proposed rulemaking under the Exchange Act and helping to intelligently balance the costs and burdens of compliance against the

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[1] *See, A Guide to Federal Agency Rulemaking* (1983) at 124 (emphasis added).

[2] In a gesture of commendable candor, the NASD accurately noted that "the overwhelming majority of commentators opposed the proposal." *See* Release No. 34-52046A at 42128.

goals of new regulation. Section 23(a) of the Exchange Act requires the SEC to consider the anti-competitive effects of rule changes, and to balance any impact against the regulatory benefit to be obtained. The short time period does not allow commentators to raise sufficiently concerns about the proposal's impact on competition.

- The proposed rule may have a significant negative impact on broker-dealers affiliated with life insurance companies. It may thwart enterprise wide uniformity in compliance procedures. Several aspects of the rule are mechanically unworkable and may contradict state insurance laws.

- The NASD has failed to provide an economic impact statement. SRO rule changes need careful evaluations of economic burdens to properly balance them against the regulatory goals of the initiative.

- The NASD has not quantified the scope of the regulatory problem it seeks to solve in the rule proposal. Instead, the NASD offers general observations without any statistical or numerical validation. Good rulemaking demands more.

- We are concerned that the proposal published in the Federal Register does not contain the actual rule text, but only a narrative summary. The release simply cross references the text of the rule proposal on the NASD's website. Indirect reference to the actual text of a proposed rule is insufficient to elicit robust commentary, and may be profoundly misleading because the brief summary of the proposal in the release does not cover some of the proposal's more controversial features. There may be, therefore, fundamental deficiencies under the purpose and intent of noticed SRO rulemaking, as well as the legislative goals of the Administrative Procedure Act.

An extended comment period will not unduly lengthen this regulatory matter, and will foster constructive, thoughtful input on the issues raised in the release. The regulatory process and the public interest will be better served by a deliberative, not rushed, review of the NASD's rule amendments. These regulatory modifications are too important to miss full exposure to public scrutiny.

For these reasons, we respectfully request that the Commission extend the comment period on Release No. 34-52046A for a 60-day period. It would be most constructive to publish notice of a rule extension formally, so that members of the public will not be discouraged from submitting comments after the expiration of the release's 21-day comment period.

We greatly appreciate your attention to our concerns. If any questions develop, please call.

Sincerely,

Carl B. Wilkerson

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CBW/pm

cc: The Honorable Cynthia Glassman, Acting Chairman

The Honorable Paul S. Adkins, Commissioner
The Honorable Roel C. Campos, Commissioner
Annette L. Nazareth, Director, Division of Market Regulation