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<u>VIA E-MAIL</u>

September 19, 2005

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

RE: Comments to Proposed NASD Rule 2821
Sales Practice Standards and Supervisory Requirements
For Transactions in Deferred Variable Annuities
<u>(File No. SR-NASD-2004-183)</u>

Dear Mr. Katz:

New York Life Insurance and Annuity Corporation ("NYLIAC"), a wholly owned subsidiary of New York Life Insurance Company, and NYLIFE Securities, Inc. ("NYLIFE Securities"), a broker-dealer and affiliate of NYLIAC, appreciate the opportunity to express our views in response to a request for comments on proposed National Association of Securities Dealers, Inc. ("NASD") Rule 2821 ("Proposed Rule"). The Proposed Rule addresses sales practice standards and supervisory requirements, including an enhanced suitability obligation, principal review and approval requirements, and training requirements tailored specifically to transactions in deferred variable annuities.

NYLIAC and NYLIFE Securities support the NASD and the SEC in their efforts to insure that customers who purchase a deferred variable annuity are treated fairly. However, we believe this version of the Proposed Rule, which selectively reflects certain industry comments on an earlier draft, provides no additional benefit to customers and places an undue burden on the issuer and selling broker of the deferred variable annuity. We are concerned that the Proposed Rule would expand the scope of a member's obligation to make a suitable recommendation to a client to include a determination of which investment product is the *most suitable*. We are requesting specific changes to the Proposed Rule, as set forth below.

I. <u>**Expansion of the Suitability Obligation**</u>

Currently, sales of deferred variable annuities are subject to NASD Conduct Rule 2310, which "requires an associated person of a member to make an independent determination of whether an investment is suitable for a particular customer, taking into account the customer's investment objectives and financial needs."[1] The Proposed Rule, on the other hand, requires that associated persons and principals determine whether a customer appears to have a need for the unique features of a deferred variable annuity (e.g. tax-deferred growth, a guaranteed future income stream and death benefits) *as compared with other investment vehicles*.[2] Under the Proposed Rule, the member would need to establish that a deferred variable annuity is more suitable than another investment vehicle or a different deferred variable annuity. In our view, the proposed requirement to compare the deferred variable annuity with other investment vehicles is an unreasonable expansion of the scope of NASD Conduct Rule 2310. We oppose this requirement.

The required use of a comparative analysis seems to redefine a suitable purchase or exchange as the purchase of, or exchange for, the *more* or *most* suitable product. We find this problematic because a member could potentially be found liable for poor product selection, even if the member has made a good faith suitability determination after considering the customer's best interests. Suitability determinations would require very subjective judgments that would always be subject to second-guessing.

In connection with exchanges, from a practical point of view, a comparison by the distributing broker-dealer of a NYLIAC deferred variable annuity with another insurer's deferred variable annuity can be extraordinarily difficult. The Proposed Rule would require a comparison of product features in addition to fees. To comply with the Proposed Rule's additional requirements, criteria would have to be developed to evaluate product features that are subjective and vary by member. In addition, insurers would need to make significant modifications to current systems for managing and documenting replacements. Since each comparison would contain unique information about the competitive product and the NYLIAC product, a procedure for obtaining competitive product information and generating a side-by-side comparison would have to be developed. Even if insurers could obtain information about a competitor's products, it would not be possible to assure the accuracy of that information.

The requirements in the Proposed Rule exceed those currently set forth in Regulation 60 under New York insurance law, which requires *disclosure of comparative fees* for

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[1] NASD Notice to Members 99-35, *The NASD Reminds Members of Their Responsibilities Regarding the Sales of Variable Annuities.*

[2] Proposed Rule 2821(b)(1)(C), (c)(1)(A) and (d)(1). SEC Release No. 34-52046A ("Release") states that in the context of the initial purchase of a deferred variable annuity, these provisions "might necessitate a general comparison with other types of investment products . . . but it would not have to be a side-by-side comparison . . . " On the other hand, in the context of an exchange of one deferred variable annuity for another, a side-by side comparison "would be necessary." (Release at footnote 20.)

variable products involved in exchanges made in the State of New York. NYLIAC and NYLIFE Securities comply with Regulation 60 and, thus, have experience in obtaining product information from other insurers from which we make the following observations. Although insurers are required to provide information in a standard format, they do not always do so. Also, the replacing insurer is not in a position to determine the accuracy or adequacy of the information provided. In addition, certain factors that may be important to a customer, such as the financial strength and integrity of the insurer, are not quantifiable.

We request that the provisions requiring that associated persons and principals have a reasonable basis to believe that a customer needs the features of a deferred variable annuity as compared with other investment vehicles or another deferred variable annuity be deleted. Our view is that such comparisons are not necessary to establish suitability. Associated persons and principals should only be required to determine that a deferred variable annuity is "suitable," taking into account the customer's investment objectives and financial needs, and that the customer *wants* the unique features of a particular deferred variable annuity. The requirement set forth in paragraph (b)(1)(D) of the Proposed Rule, that the annuity and the underlying subaccounts must be suitable for the customer, captures the essence of Rule 2310 while allowing sufficient flexibility for members to consider all relevant factors to establish suitability for a purchase or exchange.

II. Investment Time Horizon

The Proposed Rule requires that the associated person have a reasonable basis for believing that the customer has a long-term investment objective.[3] Investment time horizon is an important factor in determining suitability, and it should be taken into consideration when making a recommendation to a customer. However, it is not always necessary for a deferred variable annuity policyowner to have a long-term investment objective. For example, NYLIAC offers a product that has no surrender charges and is designed for policyowners who want immediate access to their money along with the benefits offered by a deferred variable annuity. This is one example of circumstances under which a long-term investment objective may or may not be appropriate. The interplay of the applicable surrender charge period with a customer's time horizon will impact the appropriateness of any product recommendation, but a long-term investment objective is not always necessary.

III. Customer Information to be Obtained

The Proposed Rule describes the type of customer information that an associated person must consider in determining the suitability of an investment in a deferred variable annuity including: age, annual income, financial situation and needs, investment experience, investment objectives, intended use of the deferred variable annuity,

[3] See Proposed Rule 2821(b)(1)(B).

investment time horizon, existing investment and insurance holdings, liquidity needs, liquid net worth, risk tolerance and tax status.[4] While we agree that such information may be helpful in making suitability determinations, we find that several of the categories are overlapping and vague. More specifically, a customer's financial situation and needs should be deleted from the Proposed Rule because they are essentially the same as a customer's liquidity needs, annual income and liquid net worth.

IV. Principal Review and Approval

The Proposed Rule requires that a registered principal review and, if appropriate, approve a purchase or exchange of a deferred variable annuity prior to the time that an application is submitted to the issuing insurance company.[5] In the Release, a statement is made that the NASD believes this requirement provides flexibility while ensuring that a principal reviews the application before a contract is issued. Like many other broker-dealers affiliated with insurance companies, suitability determinations for purchases and exchanges of NYLIAC's deferred variable annuities are made by registered principals of the broker-dealer housed at the insurer's home office. The registered principals are at the home office, while the registered representatives are at various locations throughout the country. The initial suitability review and determination is performed by the registered representative in the field. The registered principal review takes place at the location of the insurer's home office after an application is submitted but before a contract is issued. We agree that principal review of a suitability analysis should be done prior to issuance of a contract and that a timely review is consistent with an adequate supervisory system. Since this provision is addressing the concern that principal review and approval take place prior to issuing the contract, our view is that the Proposed Rule should be amended to state that the review must be concluded prior to contract issuance (not necessarily prior to the time the application is submitted to the issuing insurance company).

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[4] Proposed Rule 2821(b)(2).
[5] Proposed Rule 2821(c)(1).

For the reasons described above, we are requesting that further refinement be made to the Proposed Rule. Certain requirements should be deleted, while others need further clarification. Most fundamentally, we are concerned that the Proposed Rule will impose a new "most suitable" standard that represents an unwarranted and unworkable extension of the existing concept of suitability. NYLIAC and NYLIFE Securities appreciate the opportunity to express our views to the Commission.

Respectfully submitted,

NEW YORK LIFE INSURANCE AND ANNUITY CORPORATION

By:______________________________
Name: John R. Meyer
Title: Senior Vice President

NYLIFE SECURITIES, INC.

By:______________________________
Name: Gerard Rocchi
Title: Chairman & CEO