



National Planning  
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Member NASD, SIPC

Jonathan G. Katz, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-9303

**Re: Comment Letter For SEC Release 34-52046A - Proposed NASD Conduct Rule 2821**

Dear Mr. Katz:

National Planning Holdings, Inc (NPH) offers this comment letter on behalf of its member firms:

- Invest Financial Corporation (IFC) CRD – 12984
- Investment Centers of America (ICA) CRD – 16443
- National Planning Corporation (NPC) CRD – 29604
- SII Investments (SII) CRD – 2225

The four fully disclosed retail broker-dealers are registered to conduct business in all domestic jurisdictions, with over 2500 Registered Representatives offering securities services through nearly 400 Offices of Supervisory Jurisdiction. As the President and CEO of both NPC and the NPH network, I appreciate the opportunity to submit comments on the issues raised in SEC Release 34-52046A regarding proposed NASD Conduct Rule 2821.

After careful review of the proposed requirements set forth in NTM 04-45 and subsequent revised proposal SR-NASD-2004-183, and SEC Release 34-52046A, we provide the following comments based on the four primary components of proposed NASD Conduct Rule 2821:

**I. Requirements Governing Recommendations**

Based on existing NASD Conduct Rule 2310 and SEC Rule 17a-3(a)(17), representatives must already gather data relevant to a client's current financial situation in an effort to make appropriate suitability assessments and product recommendations. We are in agreement that this process is a crucial component of the suitability process to ensure clients are properly aligned with the products and services that best meet their individual needs. In addition, the act of memorializing this suitability determination is also of great value to the client, the registered representative and the firm.

However, we are concerned with the NASD's proposal to isolate the requirements specific to deferred variable annuities from other types of securities products. It is critically important to acknowledge that each client's individual suitability determination is generally more art than science. In many cases, as discussed further below, we believe variable annuities could well be considered suitable investments, even though a client may not have stated a long-term investment objective. We believe that the suitability of variable annuities must be determined not solely by the time horizon of an

investor, but also by each investor's specific needs, goals and financial situation, and the ability of a variable annuity's special features and benefits to help the investor meet their specific needs and goals. While an investor's time horizon is an important factor in helping to determine suitability, it by no means should be an exclusive factor at the expense of all other reasonable suitability considerations.

Variable annuities can be, in many cases, a suitable investment for someone over the age of 65. Additionally, many of the features of variable annuities are beneficial to seniors. For example:

- Death benefit protection is typically offered by most variable annuities – the owner's heirs will receive at least the amount deposited into the variable annuity less any withdrawals. This feature provides protection to the heirs from the owner passing during a down market.
- Surrender charges on most variable annuities are waived upon death of the owner.
- Variable annuity payouts bypass probate providing for a relatively quick transfer of assets to heirs.
- The long-term returns of equities can provide a good inflation hedge to carry seniors through their retirement years. Many of the larger mutual fund companies have started offering Retirement Income funds that allocate between 20 and 43% to equities throughout retirement.
- The current tax code allows for an annuity to be 'stretched' by an owner's beneficiaries upon the owner's death. In essence, the beneficiary is able to take advantage of the tax deferral offered by the variable annuity by stretching the assets over their lifetime.
- Variable annuities can provide for a lifetime income that provides seniors peace of mind of not outliving their assets. This can be particularly important to those that live beyond their life expectancy.
- Depending on one's definition of long-term, many seniors are now faced with a longer life expectancy. Generally married couples are planning their retirement with a long-term time horizon in mind. According to the Society of Actuaries 2000 Annuity Mortality Table:
  - The life expectancy for the last survivor of a 65 year old couple is 27 years or beyond age 92

Establishing a requirement suggesting "...only clients with long term investment objectives are suitable for the purchase of variable annuities..." could have unforeseen and negative impacts to clients. We urge the NASD to consider the severe limitations this type of finite requirement will place on clients who may not embody the NASD's profile of an average deferred variable annuity owner, but may otherwise be a suitable candidate and could benefit from the purchase of a deferred variable annuity.

In addition, the NASD should consider the potentially adverse impacts to product sponsors who could be required to revise their policies (i.e. application processes) in

order to assist broker-dealers in complying with this new standard. Ultimately, this requirement may have far-reaching impacts beyond the representative and broker-dealer environment, requiring further coordination and standardization throughout the industry. However, if the

NASD is intent on mandating a long-term time horizon despite other factors that make the investment suitable, the NASD must specifically and unambiguously define the standard of "long-term investment objective" so that firms may know how to categorically comply.

## **II. Principal Review and Approval Obligations**

As discussed previously, NASD Conduct Rule 2310 already holds members accountable to ensure that reasonable grounds exist for believing an investment recommendation is suitable for an investor, based on all relevant facts and circumstances. We believe that the NASD's inclination to arbitrarily establish different review and approval parameters for deferred variable annuities, versus those for other types of securities products, will have unintended and unnecessary consequences. The application of arbitrary suitability and supervisory rules for a single type of investment sets a bad precedence that will very likely cause wide confusion for broker-dealers, registered representatives, registered principals and the investing public, leading to breakdowns in the effectiveness of a firm's surveillance and enforcement techniques, without providing any tangible benefit to the investing public. In addition, due to the fact that broker-dealers operate under many different types of business and supervisory structures (i.e. financial institution programs, independent contractor models, wire houses) the NASD should consider the various impacts this requirement will have to the supervisory hierarchy and transaction review process of member firms.

## **III. Written Supervisory Procedures**

All firms are required to maintain adequate written policies and procedures related to the scope of the firm's securities business. We have no issue with this general requirement. However, again we raise the concern of creating a separate and unique set of supervisory requirements related to deferred variable annuities. By creating additional and exclusive standards for one type of securities product over another, challenges will almost certainly develop for member firms attempting to comply with multiple sets of product specific requirements.

To clarify, we do not believe in a "one size fits all approach", however we ask the NASD to strive towards balance. We understand and appreciate the complexities inherent in deferred variable annuity products, but implementing product specific procedures and requirements produces the risk that member firms will hyper-focus on procedures related to specific products such as deferred variable annuities, while neglecting other areas of their overall mix of products and services that deserve equal attention. The development of a holistic, well-balanced, and global approach towards client disclosure, suitability, and supervision of all securities products may well create the desired result.

## **IV. Training**

Our firms have great esteem for the NASD's dedication towards proactive training tools and platforms made available for the support of clients, representatives, and member firms. The array of online compliance tools provided by the NASD for use by

investors and member firms are invaluable. In addition, we believe that great strides will be made with the creation of the NASD's Investor Education Foundation, focusing on ways to further enhance the client's role in determining appropriate practices related to product disclosure.

Specific to the training requirement set forth in proposed NASD Conduct Rule 2821, we firmly believe that this important component has the ability to completely transform many of the ailments the NASD is seeking to rectify within the deferred variable annuity channel. If additional emphasis can be placed on representative training and client education, we feel many of the symptoms related to deferred variable annuity abuses will drastically decrease. We are suggesting that improvements based solely on training and education without any of the additional requirements outlined in Conduct Rule 2821, are capable of changing the landscape of regulatory issues related to deferred variable annuities. It is our opinion that the lack of training and education, paired with lack of enforcement of current NASD Conduct Rules and guidelines (i.e. Rule 2310, NTM 99-35), are the primary sources of deferred variable annuity abuses in today's regulatory environment.

In conclusion, the SEC and NASD have always upheld the goal and intent of refraining from using enforcement as the basis for rulemaking. We ask that the SEC and NASD reevaluate the proposals set forth in SEC Release 34-52046A regarding the potentially adverse impacts to clients and member firms. Specifically, NASD should thoughtfully consider whether the requirements of this rule proposal will actually accomplish the goal of reducing abuses pertaining to deferred variable annuity sales practices, or if they will merely create additional requirements for the financial industry that will be confusing and difficult to enforce with relatively insignificant benefit to clients.

Should NASD Conduct Rule 2821 be approved, we suggest that the timing of its implementation and effective date be deferred in order to consider the potential impacts of SEC Rule proposal SEC 33-8544 (Point of Sale Disclosure Requirements and Confirmation Requirements for Transactions in Mutual Funds, College Savings Plans, and Certain Other Securities). We believe a shared commitment by the SEC, NASD, product sponsors, and member firms towards training, education and enhanced disclosure requirements has the ability to welcome a new era in the securities industry related to sales practice standards for *all* securities products, not solely deferred variable annuities.

We appreciate the SEC's and NASD's consideration of our comments and anticipate further communication on this subject.

Sincerely,



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National Planning Corporation