SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61107; File No. SR–FINRA–2009–070]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt NASD Interpretive Material 2210–2 Into the Consolidated Rulebook as FINRA Rule 2211

December 3, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 20, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt FINRA Rule 2211 (Communications with the Public About Variable Insurance Products) as a replacement for NASD Interpretive Material 2210–2 (Communications with the Public About Variable Life Insurance and Variable Annuities), which would be deleted.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org*, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA proposes to update and consolidate the rules governing firm communications with the public about variable insurance products other than institutional sales material. The core of these rules is found in NASD Interpretive Material 2210–2 (Communications with the Public About Variable Life Insurance and Variable Annuities) (''IM–2210–2''). FINRA adopted IM–2210–2 in 1993 and has issued related interpretations in various publications since then. Through the review of communications submitted by firms to FINRA's advertising filings program, the FINRA Advertising Regulation Department (''Department'') staff has developed additional interpretations of IM–2210–2.

FINRA proposes to replace IM–2210–2 with new FINRA Rule 2211. Rule 2211 would differ from IM–2210–2 in a number of respects. Certain provisions of IM–2210–2 would be shortened and simplified. Other changes would address areas that have experienced significant changes since IM–2210–2 was first issued, particularly with respect to the use of riders and hypothetical illustrations. Proposed Rule 2211 also would codify some of the Department's interpretations of IM–2210–2 that have developed through FINRA's advertising filings program.

Definitions

Paragraph (a) of the proposed rule would define certain terms used in the proposed rule. The definitions section is not intended to define insurance-related terms in other contexts beyond the scope of this rule.[3]

Product Identification and Liquidity

Proposed paragraphs (b) and (c) would address product identification and liquidity issues raised by variable insurance product communications. These provisions would shorten and simplify the provisions currently contained in paragraphs (a)(1) and (a)(2) of IM–2210–2.

Proposed paragraph (b) would require that all communications clearly identify the type of variable insurance product discussed within the communication and would prohibit communications from representing or implying that a variable insurance product is a mutual fund.

[3] Certain other terms are defined in the text of the rule and others are defined where used below.

Proposed paragraph (c) would prohibit communications from falsely implying that variable insurance products are short-term, liquid investments. Paragraph (c) also would require any presentation regarding liquidity or access to account values to be balanced by a description of the potential effect of all charges, penalties or tax consequences resulting from a redemption or surrender. In addition, any discussion of loans and withdrawals would have to explain their impact on account values, death benefits or other contract benefits, including potential policy lapses. These requirements generally reflect provisions contained in IM–2210–2.[4]

Guarantee Claims and Riders

FINRA recognizes the need to communicate the features of guarantees and riders through sales material; however, it is equally important that these communications discuss guarantees and riders in a fair and balanced manner.

IM–2210–2 addresses claims about guarantees but does not specifically address riders. The proposal would incorporate the concepts concerning guarantee claims in IM–2210–2 and also include specific provisions regarding riders.[5]

Similar to IM–2210–2, proposed paragraph (d)(1) would prohibit firms from exaggerating the relative benefits of a guarantee or an insurance company's financial strength or credit rating. Any presentation of a guarantee would have to provide a balanced discussion of applicable limitations or qualifications. In addition, under proposed paragraph (d)(2), communications regarding guarantees would have to disclose the extent to which the investment return and principal value of an investment option are not guaranteed and will fluctuate.

Proposed paragraph (d)(3) would require communications that discuss a guarantee or rider to explain its costs and limitations, and if applicable, that it is an optional feature of the contract that may not benefit all investors.

Proposed paragraph (d)(4) would apply if a communication includes a guaranteed amount, benefit base, or similar contract accumulation value that is not available for withdrawal in cash. Typically variable insurance contracts reference benefit bases or similar accumulation values in the context of

[4] *See* NASD IM–2210–2(a)(2).

[5] The proposal would define the term ''rider'' as ''an additional provision to a contract or an additional contract that adds or excludes coverage at an identifiable cost.'' *See* proposed FINRA Rule 2211(a)(6).

guaranteed minimum withdrawal benefit (GMWB) or guaranteed minimum income benefit (GMIB) riders. Investors may be confused as to the nature of these values and believe incorrectly that they reflect the current cash withdrawal value of the investor's underlying investment options. Such communications would have to clearly disclose that the accumulation value is not available in cash or, if applicable, the restrictions to and reductions taken when receiving such value in cash.

Qualified Plans

FINRA has previously expressed concerns with recommendations to purchase a variable annuity through a tax-qualified account, such as an individual retirement account, because a variable annuity does not provide any additional tax deferred treatment of earnings beyond the treatment provided by the tax-qualified retirement plan itself. FINRA recognizes that there may be reasons other than tax deferral to recommend the purchase of a variable annuity through a tax-qualified account. However, FINRA has reminded firms that a registered representative should recommend the purchase of a variable annuity through a tax-qualified account only when other benefits, such as lifetime income payments, family protection through the death benefit or guaranteed fees, support the recommendation.[6]

The same rationale applies to communications concerning a variable insurance product offered through a tax-qualified retirement plan. Accordingly, proposed paragraph (e) would prohibit any such communication from indicating that the tax-deferred treatment of earnings is available only through investment in the contract, and would require disclosure that the variable insurance product does not provide any additional tax-deferred treatment of earnings beyond the treatment of earnings provided by the retirement plan. The proposed requirements are consistent with the review of communications by the Department.

Historical Performance

Proposed paragraph (f) would govern the various types of variable insurance product historical performance that a firm may include in communications. These provisions generally reflect positions that the Department has taken through the filings review program.

Variable Annuity Performance

Proposed paragraph (f)(1) would provide that firms may present historical performance in communications regarding registered variable annuities only in accordance with Rule 482 under the Securities Act of 1933 (''Securities Act'') or Rule 34b–1 under the Investment Company Act of 1940, as applicable.

Variable Life Insurance Policy Performance

Proposed paragraph (f)(2) would allow firms to present historical performance information in communications regarding variable life insurance policies, subject to certain conditions. The standards imposed by this paragraph generally reflect standards that the Department previously has published regarding variable life insurance policy performance information.[7] At a minimum, this performance must reflect the deduction of all fees and charges applicable at the investment option level.[8]

Communications that present variable life insurance policy performance also would have to prominently disclose:

- Whether the performance reflects the deduction of additional fees and charges disclosed in the prospectus other than at the investment option level;
- The fees and charges disclosed in the prospectus not deducted from the performance (*e.g.,* life insurance premiums); and
- That if all fees and charges disclosed in the prospectus had been deducted, the performance quoted would have been lower.

Proposed paragraph (f)(2)(C) would require communications that present variable life insurance policy performance to urge investors to obtain a personalized hypothetical illustration. Upon such investor request, a firm would be required to provide an illustration that reflects all applicable fees and charges disclosed in the prospectus, including the cost of insurance. The illustration also would have to conform to the provisions governing assumed rate hypothetical illustrations contained in proposed paragraph (g) discussed below, and would have to be customized to reflect an individual investor's characteristics and preferences.[9]

Presentations of investment option performance in variable life insurance communications would have to be consistent with the standards for the presentation of registered open-end management investment company performance in paragraphs (b)(3), (b)(4), (b)(5), (d), (e) and (g), as applicable, of Securities Act Rule 482. Thus, such performance would have to be accompanied by the same required performance-related disclosures contained in Securities Act Rule 482(b)(3) and (b)(4) (as applicable), and be presented in a manner that satisfies the requirements of Securities Act Rule 482(b)(5). Quotations of performance would have to meet the standards of Securities Act Rule 482(d) (in the case of non-money market funds) or (e) (in the case of money market funds), and would have to be current to the most recent calendar quarter ended prior to the submission of the communication for publication as required by Securities Act Rule 482(g). These proposed requirements reflect current industry practice with respect to communications containing variable life insurance performance.

Pre-Dated Performance

Proposed paragraph (f)(3) would allow, but not require, firms to present the performance of an investment option that occurred during the period prior to its availability through the separate account of a variable insurance product. For example, this provision would allow a firm to show an investment option's entire performance history, even if the investment option became available through the separate account subsequent to its inception. This provision reflects current FINRA policy to permit pre-dated performance,[10] subject to certain conditions.

First, any such presentation would have to meet the requirements of paragraphs (f)(1) and (f)(2), as applicable.

Second, the pre-dated performance could not reflect the performance of a fund that is not available as an investment option through the separate account. Thus, presentation of the performance of a similar ''clone'' fund

[6] *See* Notice to Members 99–35 (May 1999) (The NASD Reminds Firms Of Their Responsibilities Regarding The Sales Of Variable Annuities).

[7] *See* ''Presentation of Variable Life Insurance Performance In Member Communications,'' *Regulatory & Compliance Alert* (Winter 2001) pp. 3–4.

[8] ''Investment option'' would be defined as ''a registered open-end management investment company (or series thereof) offered through the separate account.'' *See* proposed FINRA Rule 2211(a)(3). Thus, this provision would require, at a minimum, the deduction of expenses imposed at the underlying fund (sub-account) level, but not the deduction of expenses imposed at the separate account or contract level.

[9] *See* proposed FINRA Rule 2211(a)(5).

[10] *See* IM–2210–2(b)(1). *See also* ''Variable Annuity Performance,'' *Regulatory & Compliance Alert* (Summer 2002) pp. 8–9.

that is not available through the separate account would not be permitted.

Third, for pre-dated performance for registered variable annuities:

- If the investment option had been available through the separate account for more than one year, the pre-dated performance would have to be accompanied by the investment option's performance commencing on the date it became available through the separate account;
- The performance would have to be, or be accompanied by performance that is, net of all expenses that are required to be deducted from standardized performance under Securities Act Rule 482; and
- The communication would have to identify the period during which the pre-dated performance occurred.

Combined Historical Performance

Proposed paragraph (f)(4) would allow, but not require, a firm to present combined performance reflecting a static allocation of multiple investment options. This provision would allow firms to show performance based on a one-time allocation of multiple investment options at the beginning of the illustrated time period, subject to certain conditions.

First, the communication would have to present the individual performance of each investment option included within the combined performance. This performance would have to be consistent with the requirements of paragraphs (f)(1), (f)(2) and (f)(3), as applicable.

Second, the communication would have to disclose the names of the investment options included in the combined performance, the investment percentage allocated to each investment option for purposes of the combined performance calculation, and that the combined historical performance is hypothetical because it is based on assumed investment allocations.

Historical Performance Illustrations

Proposed paragraph (f)(5) would allow, but not require, a firm to present an illustration based on the historical performance of individual investment options or combination of investment options using assumed dollar investments, subject to certain conditions.

First, the illustration would have to be accompanied by historical performance that satisfies the requirements of paragraphs (f)(1), (f)(2), (f)(3) and (f)(4), as applicable. Second, the illustration would have to present dollar values that are net of fees imposed at the investment option level, and for registered variable annuity illustrations, net of all expenses that are required to be deducted from standardized performance under Securities Act Rule 482. Third, the illustration would have to prominently explain that the illustration is based on a hypothetical dollar investment and that it is not intended to predict or project future performance.

Historical Performance of Selected Investment Options

Under proposed paragraph (f)(6), in some cases, a firm may present the performance of one or more investment options without presenting the performance of all investment options available through the separate account. In such situations, the firm would have to disclose that the investment options depicted are not the only ones offered within a product.

Illustrations Based on Assumed Rates of Return

Proposed paragraph (g) would address the use of illustrations that are based on assumed rates of return rather than on investment options' historical performance. Currently, IM–2210–2 provides standards for assumed rate illustrations for communications concerning variable life insurance policies in order to demonstrate how the product operates. Through its review of communications in the filings program, the Department has permitted assumed rate illustrations for variable annuities that demonstrate how the product operates where the communications adhere to the standards set forth in IM–2210–2.[11] Under the proposal, firms could present hypothetical illustrations based on assumed rates of return to demonstrate the way any variable insurance product operates, subject to a number of conditions.

Requirements for All Assumed Rate Illustrations

First, the proposal preserves the requirement that all illustrations must show investment results that are based on an assumed gross annual rate of return of 0%. Second, the illustration would have to be presented in a format that is readily understandable and depicts, at a minimum, year-by-year account values. Third, the illustration would have to clearly label and define all values and disclose the gross and net rates of return depicted.[12]

Fourth, the illustration would have to reflect either an arithmetic average of all investment option expenses or a weighted average of investment option expenses.[13] If a firm chose to use a weighted average, the illustration would have to identify the investment options being used and the investment amount allocated to each option. In addition, if a firm used an illustration that employed a weighted average of expenses with more than one customer, the illustration would have to reflect the current actual weighted average of investment options held by all investors through the separate account.[14]

Fifth, the illustration would have to reflect the maximum guaranteed charges for each assumed gross annual rate of return shown in the illustration.[15] The proposal also would permit illustrations to show each assumed gross annual rate of return net of the variable insurance product's current charges in addition to the maximum guaranteed charges.[16]

[11] Historically, the SEC staff has permitted some assumed rate illustrations in variable annuity prospectuses to illustrate the pay-out phase.

[12] FINRA asserts that because the SEC's registration statement of separate accounts organized as unit investment trusts that offer variable life insurance policies (Form N–6) no longer requires a registrant to include a hypothetical illustration, FINRA has proposed to eliminate the current requirement that the methodology and format of hypothetical illustrations be modeled after the required illustrations in the prospectus. *See* NASD IM–2210–2(b)(5)(A)(i).

[13] The proposal would define ''arithmetic average of investment option expenses'' as ''the number obtained by dividing the sum of all investment option expenses by the number of investment options offered through the separate account.'' See proposed FINRA Rule 2211(a)(1). The proposal would define ''weighted average of investment option expenses'' as an average of investment option expenses that is proportional to the allocation of assets to each investment option.

[14] FINRA has permitted firms to reflect a weighted average of fund level expenses in variable life insurance hypothetical illustrations used with more than one customer, subject to certain conditions. The illustration must be accompanied or preceded by a policy prospectus, and the illustration must be accompanied by a general illustration that reflects the arithmetic average of underlying fund expenses. *See* ''Fund Level Expenses in Variable Life Hypothetical Illustrations,'' *Regulatory & Compliance Alert* (Spring 2002) p. 12. FINRA proposes to alter the requirements applicable to the use of a weighted average of expenses with more than one customer by no longer requiring that they be accompanied by a prospectus, and by requiring the illustration to reflect the current actual weighted average of investment options held by all investors through the separate account.

[15] The proposal would define ''maximum guaranteed charges'' as ''the maximum recurring and non-recurring charges as disclosed in the prospectus of a variable insurance product that all investors incur at the variable insurance contract level. If an illustration is intended to demonstrate the way an optional rider operates, 'maximum guaranteed charges' also includes the maximum recurring and non-recurring charges applicable to the rider. This term includes the cost of insurance for purposes of a communication concerning a variable life insurance policy.'' *See* proposed FINRA Rule 2211(a)(4).

[16] IM–2210–2 also permits a firm illustration to reflect a variable insurance product's current

Sixth, the illustration would have to explain prominently that its purpose is to show how the performance of the investment accounts could affect the policy cash value and contract benefits, that the illustration is hypothetical and that it does not project or predict future performance.

Proposed paragraph (g)(7) would allow firms to present in illustrations results based on assumed gross annual rates of return in addition to the 0% return required by paragraph (g)(1). Firms may show either results based on a single assumed positive or negative rate of return, or multiple assumed rates of return reflecting the historical performance of a broad-based securities index. In all cases, assumed rates of return would have to be net of maximum guaranteed charges.[17]

Single Assumed Rates of Return

Proposed paragraph (g)(7)(A) would allow firms to show investment results based on an assumed positive gross annual rate of return of up to 10%.[18] If an illustration assumes that a customer's money is invested in a particular investment option or options, the assumed rate of return would have to be reasonable given the investment option's objectives. For example, generally it would not be reasonable to assume a 10% rate of return if the illustration assumed that the customer invested only in a money market investment option.

Proposed paragraph (g)(7)(B) would allow firms to show investment results based on an assumed negative gross annual rate of return. Typically, firms have requested the ability to present a negative assumed annual gross rate of return to show the benefits of a rider that is intended to protect investors in a down market. If a negative assumed rate of return is used, the illustration also would have to show separate hypothetical results that are based on an assumed positive gross annual rate of return of at least 5% and not more than 10%. The illustration would not have to show investment results that are based on an assumed 0% gross annual rate of return as otherwise required by proposed paragraph (g)(1).

The purpose of requiring the presentation of investment results based on a positive rate of return in addition to the negative return is because, over the long term (despite the recent downturn), market returns have been positive. FINRA does not believe it is useful to show illustrations where the annual rate of return is constantly negative without balancing such an illustration by also showing a positive rate of return.

Multiple Assumed Rates of Return

Proposed paragraph (g)(7)(C) would allow a firm to present an illustration based on multiple assumed rates of return that vary year by year. Currently, the Department allows multiple-rate illustrations based on so-called ''random'' rates that are determined by the firm. Under proposed paragraph (g)(7)(C), any illustration that used multiple rates of return would have to be based on the actual performance of a broad-based securities market index for the period shown by the illustration. ''Random-rate'' illustrations would no longer be allowed.

The broad-based securities market index would have to be one that is used as a basis for comparison in discussions of fund performance in prospectuses of available investment options. Thus, for example, if the prospectus for an equity investment option shows the performance of the Standard & Poor's 500 Index as the basis of comparison, the actual performance of this index could be used in an assumed rate illustration.[19] The illustration also would have to disclose the broad-based securities market index used and that the index does not reflect the performance of any investment option. Additionally, the performance of the broad-based securities index would have to be current as of at least the most recent calendar year ended prior to the date of use of the illustration.

FINRA believes that requiring firms to use the actual performance of a broad-based securities market index, rather than so-called ''random'' rates, is appropriate for two reasons. First, the historical performance of market indices allows investors to see how a variable insurance product would have operated under actual market conditions, rather than under some assumed random series of returns. Second, the use of broad-based securities market indices would enhance comparisons between products, since many illustrations would use the same index.

Use of Rankings

Proposed paragraph (h) would address the use of rankings in variable insurance products communications. This provision would permit firms to include rankings of investment options in advertisements and sales literature, provided that their use is consistent with the standards contained in NASD Interpretive Material 2210–3 (Use of Rankings in Investment Companies Advertisements and Sales Literature).

Investment Analysis Tools

Proposed paragraph (i) would address the use of investment analysis tools in connection with the offer or sale of variable insurance products. Investment analysis tools are interactive technological tools that present the likelihood of various investment outcomes for named investments or investment strategies. Often these tools employ Monte Carlo simulations[20] to project a range of possible outcomes for certain investments. Proposed paragraph (i) would allow the use of such tools, provided that the firm complies with NASD Interpretive Material 2210–6 (Requirements for the Use of Investment Analysis Tools). Illustrations that were created through the use of an investment analysis tool would have to comply with the provisions of proposed paragraph (g), and the investment analysis tool could not project performance based on rates of return that exceed those permitted by proposed paragraph (g). In addition, firms would have to either employ a tool, the results of which reflected the deduction of maximum guaranteed charges, or employ a tool that provided the user with a personalized hypothetical illustration that reflects these charges.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[21] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will help ensure that firm communications about

charges in addition to its maximum guaranteed charges. *See* NASD IM–2210–2(b)(5)(iii).

[17] *See* proposed Rule 2211(g)(5).

[18] FINRA has permitted assumed rates of return of up to 12% per annum, as long as they are accompanied by illustrations showing a 0% assumed rate of return. *See, e.g.,* ''Internal Rates of Return in Variable Life Hypothetical Illustrations,'' *Regulatory & Compliance Alert* (Winter 1998), pp. 31–32. FINRA proposes to decrease the maximum single assumed rate of return to 10% per annum.

[19] Assumed rates of return based on the actual performance of a broad-based securities market index would not be subject to the 10% maximum set forth in paragraph (g)(2). In addition, to the extent a broad-based securities market index reflects negative performance in certain years, the illustration would not be required also to show an assumed positive rate of return as required under paragraph (g)(3).

[20] A Monte Carlo simulation is a method for evaluating particularly complex models.

[21] 15 U.S.C. 78o–3(b)(6).

variable insurance products are fair, balanced and not misleading.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

In July 2008, FINRA published *Regulatory Notice* 08–39 (the ''Notice'') requesting comment on the proposed rule, as well as on certain proposed changes to NASD Interpretive Material 2210–1 (Guidelines to Ensure That Communications With the Public Are Not Misleading).[22] A copy of the Notice is attached as Exhibit 2a.[23] The comment period expired on September 30, 2008. FINRA received 16 comments in response to the Notice. A list of the commenters in response to the Notice is attached as Exhibit 2b, and copies of the comment letters received in response to the Notice are attached as Exhibit 2c.[24] Commenters generally supported the proposed rule change, but had comments on a number of specific provisions. A summary of the comments and FINRA's response is provided below.

Application of Proposed Rule

The proposal would apply to all communications with the public about variable insurance products other than institutional sales material. The CAI[25] opposed applying the proposed rule to correspondence, and requested guidance as to whether the proposal would apply to group variable contracts. The CAI and the ICI also recommended that FINRA amend NASD Rule 2211(d)(1) to make clear that the proposal would not apply to institutional sales material.

FINRA believes that it is appropriate to apply the proposal to all communications that reach retail investors. The current definition of ''correspondence'' includes any written letter or electronic mail message and any market letter distributed by a firm to (A) one or more existing retail customers; and (B) fewer than 25 prospective retail customers within any 30 calendar-day period. Because correspondence is sent to retail investors, FINRA believes it is important that they receive the same level of protection as investors that view other communication categories, such as advertisements and sales literature.

The proposal would apply to communications concerning group variable contracts, unless otherwise specified. FINRA Rule 0150 provides that business activities relating to exempted securities (which include group variable contracts) are subject to IM–2210–2. FINRA therefore believes it is appropriate to continue to apply the proposal to communications concerning group variable contracts.

FINRA does not believe it is necessary to amend NASD Rule 2211(d)(1). NASD Rule 2211 is not the subject of this rule filing, and the proposal already expressly excepts from its coverage institutional sales material.

Definitions

The CAI recommended that the definitions of ''arithmetic average of investment option expenses'' and ''weighted average of investment option expenses'' be revised to clarify that they refer to investment option expenses after reimbursements and waivers of such expenses. While FINRA does not believe it is necessary to revise the definitions, generally the Department currently permits expense averages to be net of waivers and reimbursements. FINRA intends to continue this practice.

New York Insurance suggested revised language for the definition of ''cost of insurance'' to refer to ''the actual mortality charges deducted according to the terms of the contract from premiums, account values or taken as a reduction of investment credits,'' rather than ''the actual cost of life insurance protection for a variable life insurance policy.'' While FINRA acknowledges that New York Insurance's recommended language is technically correct under normal circumstances, FINRA is concerned that firms may attempt to categorize insurance costs as falling outside the definition if it is too technical. Accordingly, FINRA is retaining the current definition.

The CAI and Transamerica questioned how the definition of ''maximum guaranteed charges'' would apply to a contract that has optional features that are not riders to the contract. In such a situation, FINRA would expect firms to select the most expensive option in calculating a contract's maximum guaranteed charges.

New York Insurance sought clarification that a personalized hypothetical illustration is a communication with the public for purposes of NASD Rule 2210. Written (including electronic) communications prepared for delivery to a single retail customer are considered to be correspondence under NASD Rules 2210 and 2211 and therefore fall within the definition of communication with the public.[26]

New York Insurance suggested adding ''at an identifiable cost'' to the end of the definition of ''rider.'' The CAI noted that riders generally are separate from an insurance contract. FINRA has revised the definition of ''rider'' to reflect these comments.

The CAI recommended that FINRA define ''guarantee.'' Because what constitutes a guarantee will always be based on the facts and circumstances, FINRA believes it best not to define this term within the rule.

Product Identification

Proposed paragraph (b) would prohibit communications from representing or implying that variable insurance products are mutual funds. The CAI, the ICI, and Mutual Trust all argued that firms should be permitted to describe underlying investment options of variable insurance products as mutual funds. CLWLC supported the prohibition, and recommended that the provision be revised to require registered representatives to identify in what ways variable insurance products differ from mutual funds. People's supported the requirement that communications clearly identify the type of product discussed.

IM–2210–2 currently prohibits communications from representing or implying that a variable insurance product or its underlying account is a mutual fund. FINRA has found that investors often are confused about the differences between variable products and mutual funds, and accordingly believes that it is important to maintain this prohibition. The proposal only addresses communications concerning variable insurance products, and does not address sales practices.[27]

[22] FINRA is proposing separate changes to other rules governing communications with the public, including NASD IM–2210–1 but excluding NASD IM–2210–2. *See Regulatory Notice* 09–55 (Sept. 2009). Accordingly, the proposed changes to NASD IM–2210–1 have been removed from this rule proposal.

[23] The Commission notes that although Exhibit 2a was attached to the rule filing made by FINRA it is not attached to this notice.

[24] The Commission notes that although Exhibit 2c was attached to the rule filing made by FINRA it is not attached to this notice.

[25] Please refer to attached Exhibit 2b for a list of abbreviations assigned to commenters.

[26] *See Notice to Members* 03–38 (July 2003), page 386.

[27] NASD Rule 2821, which the SEC approved in 2007, specifically addresses broker-dealers' compliance and supervisory responsibilities concerning the sale of deferred variable annuities. See *Regulatory Notice* 07–53 (Nov. 2007) (SEC Approves New NASD Rule 2821 Governing Deferred Variable Annuity Transactions).

Accordingly, FINRA does not believe it would be appropriate to modify the proposal to impose sales practice obligations on registered representatives.

Liquidity

The AARP, CLWLC, New York Insurance and People's all supported the prohibition in proposed paragraph (c) on falsely implying that variable insurance products are short-term liquid investments. Mutual Trust opposed this requirement, arguing that some variable insurance products do not have surrender charges.

CLWLC favored the current language in IM–2210–2(a)(2) regarding surrender charges and taxes over the proposed language.[28] CLWLC also argued that communications should be required to disclose that the death benefit offered by many variable products is of little benefit, since it is very unlikely that the aggregate value of sub-account investments net of withdrawals will have declined since the initial investment. In addition, CLWLC recommended that the proposal require disclosure regarding the tax penalty consequences of early withdrawals.

New York Insurance recommended that the provision be revised to require a description of the potential effects of a withdrawal on contract benefits, such as the termination of a no-lapse provision. New York Insurance recommended that the provision's language reference the potential impact on contract benefits as well as death benefits. PIABA recommended requiring a mandatory plain English disclosure in lieu of the proposal's more general language.

In response to these comments, FINRA has revised the last sentence of paragraph (c) to reference the potential impact of early withdrawals on account values, death benefits or other contract benefits, and to specifically reference potential policy lapses. FINRA believes the prohibition of falsely implying that a variable contract is short-term and liquid is reasonable. This provision only prohibits *false* statements; moreover, most variable insurance products are not designed to be short-term, liquid investments.

FINRA does not agree that a variable insurance product's death benefit is of little value, particularly given the recent market downturn. FINRA also believes the proposal already requires disclosure regarding the tax consequences of early withdrawal. While FINRA supports plain English disclosure, FINRA believes that each firm should tailor its disclosure based on the features of the product being promoted.

Guarantee Claims and Riders

Proposed paragraph (d)(1) originally provided that a communication may not exaggerate the relative benefits of a guarantee or an insurer's financial strength or rating, and provided that discussions of guarantees must disclose all material applicable limitations or qualifications. The ICI opposed the requirement to disclose all material applicable limitations and qualifications every time a guarantee is mentioned. PIABA recommended that the proposal require a disclosure that, if an insurance company fails, a guarantee may not be paid.

In response to the ICI's comment, FINRA has revised the second sentence of paragraph (d)(1) to provide, ''[p]resentations of guarantees must provide a balanced discussion of applicable limitations and qualifications.'' FINRA does not believe it is necessary to reference an insurance company's possible failure, as the proposal already prohibits exaggeration of an insurance company's financial strength and rating.

New York Insurance recommended specific language to address discussions of benefit bases or contract accumulation values that are not available for withdrawal in connection with riders. FINRA has added a new paragraph (d)(4) based on the suggested language.

Proposed paragraph (d)(2) originally required communications that discuss guarantees to disclose that the investment return and principal value of the investment option are not guaranteed and will fluctuate. New York Insurance recommended adding ''the extent to which'' before ''the investment return.'' FINRA has added this language.

Proposed paragraph (d)(3) originally required communications that discussed the circumstances under which a guarantee or rider will benefit the customer to be fair and balanced considering the circumstances under which the guarantee or rider will not benefit the customer. The CAI, NAVA, Transamerica and the ICI all opposed this provision as unclear, unworkable and unnecessary given that Rule 2210 already imposes a fair and balanced standard on all communications. In light of these comments, FINRA has deleted this paragraph.

Proposed paragraph (d)(4) originally provided that any communication that discusses a rider must explain the rider, its costs and limitations, and the fact that the rider is an optional feature of the contract. The CAI opposed this requirement as unnecessary in light of Rule 2210's fair and balanced standard, and commented that the provision should exclude riders that are of an insurance nature that are governed by state law, such as nursing home riders. Princor opposed the provision, arguing that customers should rely on the prospectus. CLWLC supported the provision.

In light of these comments, FINRA has revised this paragraph (now numbered paragraph (d)(3)) to provide that communications that discuss a guarantee or rider must explain its costs and limitations, and if applicable, that it is an optional feature of the contract that may not benefit all investors. FINRA does not agree that this provision should exclude riders governed by state insurance law, since that would exclude all communications concerning riders. FINRA also does not agree that disclosure is unnecessary in communications given that customers can read the prospectus. FINRA always has judged a communication based on the language contained in the communication itself.

Qualified Plans

The CAI, CLWLC, and People's all supported proposed paragraph (e)'s requirements concerning communications that promote investment in a variable insurance product through a tax-qualified plan, subject to certain comments. The CAI argued that this provision is not relevant to a group variable contract. CLWLC argued that the provision should require a firm to perform a suitability analysis before a sale through a qualified plan. PIABA argued that the rule should require a disclosure that insurance products generally are not suitable for IRAs.

While it is true that group variable contracts are sold only through tax-qualified plans, FINRA believes that it is important that a customer understand that the variable insurance product offers no additional tax benefits. NASD Rules 2310 and 2821 already require firms to perform a suitability analysis before recommending a variable insurance product, so FINRA does not

[28] NASD IM–2210–2(a)(2) provides that, ''[c]onsidering that variable life insurance and variable annuities frequently involve substantial charges and/or tax penalties for early withdrawals, there must be no representation or implication that these are short-term, liquid investments. Presentations regarding liquidity or ease of access to investment values must be balanced by clear language describing the negative impact of early redemptions. Examples of this negative impact may be the payment of contingent deferred sales loads and tax penalties, and the fact that the investor may receive less than the original invested amount. With respect to variable life insurance, discussions of loans and withdrawals must explain their impact on cash values and death benefits.''

believe it would be either necessary or appropriate to impose suitability requirements via this rule. In light of these disclosure and suitability requirements, FINRA also finds it unnecessary to require an additional disclosure that insurance products are generally not suitable for IRAs. With regard to suitability obligations, for instance, FINRA has emphasized that firms recommending that a customer purchase a deferred variable annuity to fund an IRA (or other tax deferred account or vehicle) ''must ensure that features other than tax deferral make the purchase of the deferred variable annuity for the IRA (or other tax deferred account or vehicle) appropriate.'' [29]

Historical Performance

Variable Annuity Performance

Proposed paragraph (f)(1) originally provided that firms may present the historical performance of variable annuities only in accordance with the requirements of Securities Act Rule 482 and Rule 34b–1 under the Investment Company Act of 1940. The ICI supported this provision. The CAI and NAVA requested clarification that this provision does not apply to unregistered variable annuities. The provision has been revised to refer only to registered variable annuities, since Rules 482 and 34b–1 do not apply to unregistered variable annuities.

Variable Life Insurance Policy Performance

Proposed paragraph (f)(2) originally set forth standards for presenting the performance of investment options available through variable life insurance products. Proposed paragraph (f)(2)(C) requires such presentations to urge investors to obtain a personalized hypothetical illustration that reflects all applicable fees and charges disclosed in the prospectus. Proposed paragraph (f)(2)(D) required any presentation of investment option performance to be consistent with the standards for mutual fund performance presentations under Securities Act Rule 482.

The ICI requested clarification that such performance need not be accompanied by a statutory prospectus, since a previous *Regulatory and Compliance Alert* article on this topic required that such performance be accompanied or preceded by a prospectus. PIABA argued that any performance must also be net of all expenses imposed at the insurance contract level. Transamerica commented that paragraph (f)(2)(C) should be revised to specify which fees and charges must be deducted. Transamerica also requested that FINRA reference the specific provisions of Rule 482 with which investment option performance presentations must comply.

Proposed paragraph (f)(2) would not require a firm to accompany the performance of a variable life insurance contract investment option with the contract's prospectus. FINRA does not believe it would be appropriate to require any investment option performance to be net of insurance contract-level expenses, given that policy premiums will vary widely based on the age, health and gender of the insured. Instead, the rule would require the communication to urge investors to obtain a personalized hypothetical illustration that is net of insurance contract-level expenses. FINRA does not believe it is either necessary or appropriate to try to enumerate all insurance-related expenses that must be deducted from a personalized illustration, since they will vary by issuer and contract. Paragraph (f)(2)(D) has been revised specifically to reference the Securities Act Rule 482 standards with which presentations of investment option performance must comply.

Pre-Dated Performance

Proposed paragraph (f)(3) sets forth the requirements for the presentation of the performance of an investment option that occurred during the period prior to its availability through the separate account of a variable insurance product (''pre-dated performance''). Paragraph (f)(3)(A) originally provided that, if the investment option has been available through the separate account for more than one year, the pre-dated performance must be accompanied by performance of the investment option for the period commencing on the date the investment option became available through the separate account.

The CAI argued that this provision should be deleted as redundant, since Securities Act Rule 482 already requires performance beginning when an investment option becomes available through the separate account. The ICI requested clarification that this provision simply requires the presentation of ''standardized'' performance under Rule 482. The CAI and the ICI also commented that this provision should not apply to the performance of an investment option in variable life insurance sales material, since it is not subject to Rule 482.

The purpose of this provision is to make clear that pre-dated performance that appears in variable annuity sales material is ''non-standardized'' performance, which must be accompanied by the investment option's standardized performance: that is, an investment option's performance beginning on the date it became available through the separate account. Although, in FINRA's view, this requirement duplicates those under Rule 482, FINRA believes it is useful to remind firms of their obligations to show standardized performance. FINRA believes that variable life insurance sales material is not subject to Rule 482, and accordingly, FINRA has moved this language to new paragraph (f)(3)(C), which sets forth the requirements that apply to pre-dated variable annuity performance.

Proposed paragraph (f)(3)(B) originally required pre-dated performance of variable annuities to be, or be accompanied by performance that is, net of the product's maximum guaranteed charges. The CAI, the ICI, NAVA and Transamerica all objected to the required deduction of maximum guaranteed charges for pre-dated performance on the ground that this standard is inconsistent with Rule 482. Given this concern, FINRA has revised this provision to no longer require the deduction of maximum guaranteed charges. Instead, the proposal now would require in paragraph (f)(3)(C)(ii) that pre-dated variable annuity performance be, or be accompanied by performance that is, net of all expenses required to be deducted from the performance of an investment option pursuant to Rule 482.

Proposed paragraph (f)(3)(C) originally provided that pre-dated performance would be allowed only if there has been no significant change to the investment objectives, strategies or policies of the investment option during the period for which performance is shown. The CAI and ICI objected to this provision, asserting that is inconsistent with SEC policy regarding when investment company past performance may be presented. New York Insurance suggested additional clarifying language. FINRA did not intend to create a standard that differs from SEC policy. Accordingly, this paragraph has been deleted.

Proposed paragraph (f)(3)(D) (now renumbered as paragraph (f)(3)(B)) would prohibit the inclusion of performance of a fund that is not available as an investment option through the separate account. The CAI and the ICI requested clarification that this provision would not prohibit the

[29] SEC Approves New NASD Rule 2821 Governing Deferred Variable Annuity Transactions, *Regulatory Notice* 07–53 (Nov. 2007).

use of feeder fund performance that incorporates a master fund's prior track record if the feeder fund is available for investment through the separate account. So long as SEC rules and interpretations permit the feeder fund to incorporate a master fund's prior track record, this provision would not prohibit the use of such performance.

FINRA also has revised proposed paragraph (f)(3)(E) (now renumbered as paragraph (f)(3)(C)(iii)), which originally required communications to identify the period during which the pre-dated performance occurred and to explain that the performance pre-dates the availability of the investment option through the separate account. Paragraph (f)(3)(C)(iii) now only applies to registered variable annuity pre-dated performance, and requires only that the communication identify the period during which the pre-dated performance occurred.

Combined Historical Performance

Proposed paragraph (f)(4) addresses the presentation of the combined performance of multiple investment options. The CAI requested clarification that this provision would not require ''standardized'' combined investment option performance for purposes of Rule 482, since the provision already would require presentation of the standardized performance of each individual investment option that is included in the combined performance. FINRA has deleted language in this paragraph to make clear that combined performance would not have to be ''standardized'' performance for purposes of Rule 482.

New York Insurance suggested additional language to address situations in which combined performance reflects periodic rebalancing of investment option allocations. FINRA did not intend to permit this provision to allow combined performance to reflect periodic rebalancing of investment options. Accordingly, FINRA has added language to make clear that this provision only allows combined performance reflecting a static allocation of multiple investment options.

Historical Performance Illustrations

Proposed paragraph (f)(5) sets forth the requirements for an illustration that uses the historical performance of one or more investment options. Paragraph (f)(5)(A) originally required performance used in historical illustrations to be net of fees imposed at the investment option level, and for variable annuity illustrations, net of maximum guaranteed charges. The CAI, NAVA and Princor objected to the requirement to deduct maximum guaranteed charges for variable annuity historical illustrations, asserting that Rule 482 does not require deduction of such expenses for historical performance. As with paragraph (f)(3), FINRA has revised paragraph (f)(5)(A) to require for variable annuity historical illustrations the deduction of all expenses required to be deducted under Rule 482.

Proposed paragraph (f)(5)(B) originally would have required such illustrations to present year-by-year account values in a tabular or bar-chart format. The CAI and Transamerica objected to this standard, asserting that it differs from the standard for assumed-rate illustrations under proposed paragraph (g)(5). FINRA has eliminated this paragraph.

The ICI suggested that the proposal define the term ''illustration'' and clarify that it does not apply to step-by-step examples of how guaranteed withdrawal benefits work if such examples resemble similar examples contained in variable annuity prospectuses. Because what qualifies as an illustration will always be based on the facts and circumstances, FINRA does not believe it would be useful or appropriate to define the term ''illustration'' in the rule. FINRA also believes that the factual scenario presented by the ICI is best resolved through the Department's filings review program.

Illustrations Based on Assumed Rates of Return

General Comments

Paragraph (g) sets forth the requirements for variable insurance product illustrations that employ an assumed rate of return. Regardless of the assumed rate used, like IM–2210–2, the proposal would require the illustration to show results that are net of a product's maximum guaranteed charges. The CAI, the ICI, NAVA, PMLI, Princor and Transamerica all opposed the requirement to deduct a product's maximum guaranteed charges, and argued that the rule should permit assumed rate illustrations to employ a product's current charges instead. Several commenters requested clarification that a firm could show an assumed-rate illustration that deducts a product's current charges if accompanied by an illustration that is net of the maximum guaranteed charges. These commenters noted that IM–2210–2 permits such illustrations.

FINRA believes that it is important to maintain IM–2210–2's requirement to deduct a product's maximum guaranteed charges. The purpose of an assumed rate illustration is to show how the product would perform based on certain assumptions. FINRA believes that an investor should have available an illustration showing what would happen if a product's expenses were increased to the maximum permissible level. FINRA, however, intends to continue to allow illustrations to show results that are net of the current charges if accompanied by results that are net of the maximum guaranteed charges. Accordingly, new proposed paragraph (g)(5) has been added to make this standard clearer.

The CAI requested clarification that the proposal would not require firms to deliver a variable insurance product prospectus with an assumed-rate illustration. The proposal would not require delivery of a prospectus unless separately required by SEC rules.

The term ''gross annual rate of return'' is used in proposed paragraph (g) to describe a product's hypothetical return prior to the deduction of expenses. New York Insurance recommended that the proposal be modified to add a definition of this term in proposed paragraph (a) to make clear that it is not net of either investment option-level expenses or contract-level expenses. While this description is correct, FINRA does not believe a definition is necessary. The proposal requires results based on any gross rate of return used in an assumed-rate illustration to be net of both the product's maximum guaranteed charges and either an arithmetic or weighted average of its investment option expenses. Accordingly, FINRA believes that these requirements eliminate the need for such a definition.

PIABA commented that illustrations should show results that are net of all charges imposed on a customer, including insurance related charges. The term ''maximum guaranteed charges'' includes charges for insurance, so FINRA believes the proposal already meets this standard.

Single Assumed Rates of Return

Proposed paragraph (g)(2) (renumbered as paragraph (g)(7)(A)) would cap the maximum positive assumed rate of return that an illustration may employ at 10% per annum. Currently IM–2210–2 allows assumed rate illustrations to employ a positive rate of return of up to 12% per annum. The CAI and NAVA questioned the need to reduce this maximum rate absent a compelling explanation. New York Insurance, on the other hand, commented that the maximum should be further lowered to 8% per annum. The ICI agreed with the 10% cap, but recommended that FINRA monitor

market conditions going forward to see if further changes may be necessary. FINRA believes that historical trends indicate that a 10% cap is sufficiently high to show how a product may operate in the future and is not inclined to raise this cap.

The CAI also argued that paragraph (g)(7)(A) should be modified to allow multiple fixed-rate illustrations, such as allowing 10% per annum for the first 15 years and 6% thereafter. FINRA has proposed a separate provision (paragraph (g)(7)(C)) for multiple-rate illustrations and does not believe it necessary or appropriate to create a rule allowing multiple fixed-rate illustrations.

Proposed paragraph (g)(2) originally stated that positive assumed rates of return had to be ''reasonable considering market conditions and the available investment options.'' The CAI objected to the ''reasonableness'' standard, since it is impossible for firms to predict whether future market returns will be higher or lower. In light of this concern, FINRA has modified this provision (now contained in paragraph (g)(7)(A)) to require only that an assumed rate of return be reasonable in light of the investment objectives of any particular investment option or options that are named in the illustration.

Lerner recommended that all illustrations be required to use the same low, middle and high gross annual rates of return to promote a level playing field. FINRA does not believe it is either necessary or appropriate to require illustrations to employ the same rates of return, since they may be used to illustrate different time periods and different investment strategies or options.

Proposed paragraph (g)(3) (now renumbered as paragraph (g)(7)(B)) originally would have permitted an illustration to employ a negative assumed gross rate of return, provided that it was accompanied by illustrations showing results based on a 0% gross rate of return and a positive gross rate of return between 5% and 10% per annum. The CAI, Princor and Transamerica all argued that requiring an illustration employing a 0% gross rate of return in addition to an illustration employing a positive gross rate of return was unnecessary. FINRA agrees that showing a positive assumed gross rate of return in addition to a negative assumed gross rate of return is sufficient to balance the illustration, and accordingly the proposal has been revised to delete the 0% assumed rate requirement for negative assumed rate illustrations.

Multiple Assumed Rates of Return

Proposed paragraph (g)(7)(C) would permit for the first time assumed-rate illustrations that employ the returns of a broad-based securities market index. The CAI, the ICI, NAVA and Transamerica all supported this provision, but requested clarification of what the term ''broad-based securities market index'' means. The CAI and the ICI requested that FINRA substantially delay implementation of this provision assuming the SEC approves it given the lead time firms will need to revise their internal systems. JNSC recommended that this provision be modified to permit the use of the actual returns of various asset classes published by independent third parties. Lerner suggested that FINRA create and publish its own benchmarks to be used in illustrations. New York Insurance opposed this provision because of the risks of relying on historical performance.

FINRA intends the term ''broad-based securities market index'' to refer to an index that can be used as a basis for comparison to an investment company's own performance in its prospectus. SEC Form N–1A defines the term ''broad-based securities market index'' as ''one that is administered by an organization that is not an affiliated person of the Fund, its investment adviser, or principal underwriter, unless the index is widely recognized and used.'' [30] The term ''broad-based securities market index'' as used in paragraph (g)(7)(C) has the same definition. FINRA does intend to give firms sufficient time to adjust their internal systems to comply with this provision. FINRA does not agree that the actual returns of asset classes should be permitted due to the difficulty of verifying such data. FINRA does not wish to create and publish performance benchmarks for assumed-rate illustrations.

While FINRA recognizes New York Insurance's concerns regarding historical performance, FINRA believes that the use of the actual performance of a broad-based securities index will reduce the likelihood that a firm will ''game'' an illustration by selecting multiple assumed rates that produce the highest possible results for the illustration. FINRA also has added to paragraph (g)(7)(C) a requirement that the performance of the broad-based securities market index must be current as of at least the most recent calendar year ended prior to the date of use of the illustration.

[30] SEC Form N–1A, Item 27(b)(7), Instruction 5, under the Investment Company Act of 1940.

Other Assumed-Rate Illustration Requirements

Proposed paragraph (g)(2) would require that illustrations be presented in a format that is readily understandable and depicts, at a minimum, year-by-year account values. The CAI opposed the requirement to show year-by-year account values, and recommended that the rule permit line graphs to accompany a table. The rule would permit the use of line graphs; however, FINRA believes it is important for investors to see how a product would work on a year-by-year basis.

Proposed paragraph (g)(4) would require an illustration to either reflect an arithmetic average of all investment option expenses, or reflect a weighted average of expenses. If a weighted average is employed, the illustration would have to identify the investment options being used and the amount of investment allocated to each option, and if used with more than one customer, the illustration would have to reflect the current actual weighted average of investment options held by all investors through the separate account.

The AARP supported this standard, but recommended that it require delivery of a prospectus to each investor who receives the illustration. The CAI recommended that the provision be modified so that an illustration used with multiple customers could reflect the weighted average of expenses based on investors in a particular product, if the product employs a separate account used for multiple products. The CAI also requested clarification of what expenses must be deducted if an investor requests an illustration of specific fund or funds, and suggested that other methodologies for calculating expenses be allowed. The CAI, the ICI and Transamerica requested clarification that the current requirement to deliver an illustration based on an arithmetic average of expenses no longer applies with regard to weighted average illustrations used with multiple customers.

FINRA believes that requiring delivery of a prospectus would not assist a customer in understanding an illustration. Instead, FINRA believes that all disclosure necessary for an investor to understand an illustration should appear in the illustration itself. The CAI's comments regarding separate accounts used with multiple products appear to be technical in nature and best resolved through the Department's filings review program rather than through rule language. If a single customer requested an illustration of a particular investment option or options,

the proposal would permit the illustration to be net of weighted average of those options' expenses. FINRA does not favor allowing other methods of calculating expenses, since it could result in misleading or inconsistent illustrations. The proposal would not require delivery of an arithmetic average illustration with a weighted average illustration that complied with the proposal's requirements.

Paragraph (g)(6) (previously numbered paragraph (g)(8)) originally would have required disclosure that the illustration's purpose is to show how performance of the investment accounts could affect the policy cash value and death benefits. The CAI and New York Insurance noted that illustrations also are used to show how performance can affect other contract benefits in addition to the death benefit. FINRA has substituted the term ''contract benefits'' for ''death benefits'' in this paragraph.

Investment Analysis Tools

Proposed paragraph (i) would allow firms to use investment analysis tools in connection with the offer and sale of variable insurance products, subject to certain conditions, including the deduction of maximum guaranteed charges from the results based on any assumed rates of return. The CAI argued that this provision should allow a firm to deduct current charges instead of the maximum guaranteed charges. For the same reasons FINRA does not agree with this comment regarding assumed rate illustrations, FINRA is not making this change to paragraph (i).

New York Insurance recommended that the results produced by an investment analysis tool be subject to the assumed-rate illustration limitations of paragraph (g). FINRA agrees that an investment analysis tool should not be a vehicle to evade the requirements otherwise applicable to assumed-rate illustrations. Accordingly, paragraph (i) has been revised to provide that illustrations created through the use of an investment analysis tool must comply with the provisions of paragraph (g) and the tool may not project performance based on rates of return that exceed those permitted by paragraph (g).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2009–070 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2009–070. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–FINRA–2009–070 and should be submitted on or before December 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Florence E. Harmon,

Deputy Secretary.

Exhibit 2b

Alphabetical List of Written Comments Regulatory Notice 08–39 (July 2008)

1. Letter from Albert Akerman, David Lerner Associates, Inc. (''Lerner'') (September 29, 2008)
2. Letter from Jed Bandes, Mutual Trust Co. of America Securities (''Mutual Trust'') (August 14, 2008)
3. Letter from Dennis P. Beirne, People's Securities (''People's'') (September 23, 2008)
4. Letter from Franklin L. Best, Jr., Penn Mutual Life Insurance Company (''PMLI'') (September 30, 2008)
5. Letter from David Certner, AARP (''AARP'') (September 29, 2008)
6. Letter from Michael P. DeGeorge, NAVA, Inc. (''NAVA'') (September 30, 2008)
7. Letter from Craig A. Hawley, Jefferson National Securities Corp.(''JNS'') (September 30, 2008)
8. Letter from William A. Jacobson Esq., Cornell Law School Securities Law Clinic (''CLWLC'') (September 30, 2008)
9. Letter from Courtney John, Transamerica Capital, Inc. (''Transamerica'') (September 29, 2008)
10. Letter from Dennis P. Lauzon, State of New York Insurance Department (''New York Insurance'') (September 30, 2008)
11. Letter from Ronald Nelson (''Nelson'') (August 15, 2008)
12. Letter from Chad Oppedal, Princor Financial Services Corp. (''Princor'') (September 30, 2008)
13. Letter from H. Mark Saunders (''Saunders'') (August 14,2008)
14. Letter from Laurence S. Schultz, Public Investors Arbitration Bar Association (''PIABA'') (September 30, 2008)
15. Letter from Sutherland Asbill & Brenan, Committee of Annuity Insurers (''Cal'') (September 30, 2008)
16. Letter from Heather Traeger, Investment Company Institute (''ICI'') (September 30, 2008)

[31] 17 CFR 200.30–3(a)(12).

17. Letter from Carl B. Wilkerson, ACLI Financial Security (''ACLI'') (September 30, 2008)

[FR Doc. E9–29338 Filed 12–8–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61087; File No. SR–FINRA–2009–078]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Update Certain Cross-References Within Certain FINRA Rules

December 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 13, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to update cross-references within certain FINRA rules to reflect changes adopted in the consolidated FINRA rulebook and to make non-substantive technical changes to certain FINRA and NASD rules.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA is in the process of developing a new consolidated rulebook (''Consolidated FINRA Rulebook'').[4] That process involves FINRA submitting to the Commission for approval a series of proposed rule changes over time to adopt rules in the Consolidated FINRA Rulebook. The phased adoption and implementation of those rules necessitates periodic amendments to update rule cross-references and other non-substantive technical changes in the Consolidated FINRA Rulebook.

The proposed rule change would update rule cross-references to reflect changes adopted in the Consolidated FINRA Rulebook. Specifically, the proposed rule change would update FINRA Rule 0150 to reflect the incorporation into the Consolidated FINRA Rulebook of NASD Rule 3330 (Payment Designed to Influence Market Prices, Other than Paid Advertising) as FINRA Rule 5230 (Payments Involving Publications that Influence the Market Price of a Security),[5] NASD Rule 2250 as FINRA Rule 2269 (Disclosure of Participation or Interest in Primary or Secondary Distribution) [6] and certain paragraphs of NASD Rule 2330 (Customers' Securities or Funds) as FINRA Rule 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts).[7]

Similarly, rule cross-references in FINRA Rule 6635 (FINRA Rules) would be updated to reflect the adoption of NASD Rule 2240 as FINRA Rule 2262 (Disclosure of Control Relationship with Issuer),[8] NASD Rule 2250 as FINRA 2269 (Disclosure of Participation or Interest in Primary or Secondary Distribution),[9] certain paragraphs of NASD Rule 2330 (Customers' Securities or Funds) as FINRA Rule 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts) [10] and NASD Rule 3340 as FINRA Rule 5260 (Prohibition on Transactions, Publication of Quotations, or Publication of Indications of Interest During Trading Halts).[11]

The proposed rule change also would amend FINRA Rules 2357 (Communications with the Public and Customers Concerning Index Warrants, Currency Index Warrants and Currency Warrants) and 9551 (Failure to Comply with Public Communication Standards) to reflect the adoption of NASD Rule 2220 as FINRA Rule 2220 (Options Communications) in the Consolidated FINRA Rulebook.[12] Moreover, the proposed rule change would update FINRA Rule 2357 (Communications with the Public and Customers Concerning Index Warrants, Currency Index Warrants and Currency Warrants) to delete references to NASD Rule 2220(c)(5) and (d)(2)(C)(v) as these subparagraphs will not be transferred into the Consolidated FINRA Rulebook as part of FINRA Rule 2220. These subparagraphs were deleted by SR–FINRA–2008–013, which became effective on March 4, 2009.[13]

Additionally, the proposed rule change would make non-substantive technical changes to paragraphs (e) and (f) of NASD Rule 2320 (Best Execution and Interpositioning) to reflect changes approved by the Commission in SR–FINRA–2007–024, which became effective on September 8, 2009,[14] and to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[5] *See* Securities Exchange Act Release No. 60648 (September 10, 2009), 74 FR 47837 (September 17, 2009) (Order Approving File No. SR–FINRA–2008–048).

[6] *See* Securities Exchange Act Release No. 60659 (September 11, 2009), 74 FR 48117 (September 21, 2009) (Order Approving File No. SR–FINRA–2009–044).

[7] *See* Securities Exchange Act Release No. 60701 (September 21, 2009); 74 FR 49425 (September 28, 2009) (Order Approving File No. SR–FINRA–2009–014).

[8] *See* note 6.

[9] *See* note 6.

[10] *See* note 7.

[11] *See* note 6.

[12] *See* Securities Exchange Act Release No. 60534 (August 19, 2009), 74 FR 44410 (August 28, 2009) (Order Approving File No. SR–FINRA–2009–036).

[13] *See* Securities Exchange Act Release No. 58738 (October 6, 2008); 73 FR 60371 (October 10, 2008) (Order Approving File No. SR–FINRA–2008–013).

[14] *See* Securities Exchange Act Release No. 60635 (September 8, 2009); 74 FR 47302 (September 15, 2009) (Order Approving File No. SR–FINRA–2007–024).