

Public Investors Arbitration Bar Association

September 30, 2008

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VIA E-MAIL TO PUBCOM@FINRA.ORG

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1500

Re: FINRA Regulatory Notice No. 08-39
Variable Insurance Products

Dear Ms. Asquith:

The Public Investors Arbitration Bar Association ("PIABA") appreciates the opportunity to comment on the above-referenced rule proposal to rewrite IM-2210-2, regarding communications with the public about variable annuities and variable life insurance policies.

PIABA is a bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums. Our members and their clients have a strong interest in FINRA rules relating to the advertising and sale of variable insurance products, due to their extremely large annual sales volume and widespread sales practice abuses by the brokerage industry in marketing these products.

We recognize that the proposed rule will effect important changes in the marketing of variable insurance products by the brokerage industry and that any proposed rule will be subject to SEC publication for public comment. We also appreciate that the sale of variable insurance products is an extremely lucrative business for the brokerage industry and that the proposed rule may be considered controversial to the extent it affects current brokerage sales practices. We therefore offer our comments with the acknowledgment that PIABA may submit additional and more detailed commentary at such time as the SEC publishes the proposal.

Our members have extensive experience working with the victims of sales practice abuses associated with variable insurance products, and we generally support adoption of the proposed new language for IM-2210-2, which should give the public better information before buying a variable insurance product. However, the proposed language is inadequate to address some widespread and serious abuses which are commonly visited upon members of the investing public.

Sales Commissions

The large commissions salespeople receive for selling variable insurance products create a substantial incentive to recommend them to customers through misrepresentations and where the investments may be unsuitable based on the customers' financial situation, needs, and other investments. Customers are seldom advised that the salesperson often has a material economic incentive for recommending the variable insurance product. Indeed, rather than being told of the broker's commission, customers are commonly assured that they are paying no commission in connection with the sale.

To assure full and accurate disclosure to the customer, PIABA urges that new IM-2210-2 require that written disclosure to the customer include an up-front, clear, and prominent statement similar to the following:

The salesperson will be paid a commission by the insurance company equal to one-half of the first year's planned premium.¹ The sales load/deferred contingent sales charge and a portion of the annual charges assessed to you under the contract reimburse the company for this commission payment to the salesperson.

Investment vs. Insurance

Customers simply looking for investment advice, with no interest in insurance or an annuity, are often sold variable insurance products described as tax-advantaged investments, with the insurance touted as an extra benefit over and above the investment returns. IM-2210-2 should require that communications with the public include a clear and prominent statement that:

This is an *insurance* product. It is not primarily intended as an investment. If your objective is to invest your funds, instead of buying insurance, it may be more advantageous to purchase investments that do not include an insurance component.

¹ Obviously the description of the payment would change according to the sales structure involved with each particular product.

Risks – Insurance Company Failure

Salespeople frequently market variable insurance products by stressing *guarantees* against principal loss, or guarantees of a certain minimum stream of income. Particularly in light of recent unsettling economic events, when discussing any “guaranteed” benefit, communications with the public should disclose that if the insurance company fails or becomes unable to pay, then the benefit is not guaranteed and may not be paid.

Liquidity

One of the most common abuses in the sale of variable insurance products is the salesperson’s failure to adequately explain the limitations on the customer’s access to his or her funds. Proposed IM-2210-2(c) provides:

Presentations regarding access to account values must be balanced by a description of the potential effect of all charges, penalties, or tax consequences resulting from redemption or surrender.

This limited generalization will permit descriptions which are less than clear and may even result in misrepresentation of the impact of limitations on liquidity. The new interpretive memo should prescribe mandatory language for a liquidity disclosure, in bold type, such as:

You may not have ready access to money you commit to this product. You may incur substantial penalties on early withdrawal.

The rule should also specifically state that the salesperson must explain clearly limitations and charges that apply should the customer withdraw money.

Qualified Plans

The addition of material at IM-2210-2(e) concerning qualified plans is particularly important. Variable insurance products are routinely sold to IRA accounts and other retirement plans which themselves provide tax-deferred treatment of earnings. While IM-2210-2(e) will prohibit disclosure that tax-deferred treatment is available only through investment in the contract and also requires disclosure that the contract does not provide additional tax-deferred treatment of earnings beyond that provided in the tax-qualified retirement plan, this language does not go far enough.

While in theory the investment objectives of a customer may justify purchasing a variable insurance product inside an IRA or a retirement plan, the experience of PIABA's members in representing victims of improper variable insurance product sales through such plans indicates that such sales typically are made for a very simple reason: that is where the money is. Our observations are that the vast majority of variable insurance product sales in tax-qualified accounts are unsuitable. Accordingly, we believe that specific written disclosure is necessary to address this issue. The interpretive memo should prescribe minimum mandatory language such as:

Generally, variable insurance products are not suitable for purchase in an IRA or other retirement account. Variable insurance products provide no tax deferral beyond that already provided in an IRA or retirement account.

Illustrations

Proposed IM-2210-2(f) permits historical performance to be shown without including the effect of "fees and charges disclosed in the prospectus other than at the investment option level," so long as the communication discloses that such fees are not included in the illustration. IM-2210-2(g) similarly permits the use of hypotheticals that consider only "the maximum guaranteed charges." It is difficult for many customers to understand charts and graphs. Simply including a proviso noting that a chart or graph does not consider the effect of certain fees is inadequate to inform the customer of the potential magnitude of the those fees, or how those fees might affect the customer's account over time. A second hypothetical should be required, taking into account the effect of all of the fees that could be charged in connection with the product at issue.

Conclusion

PIABA appreciates the opportunity to comment on this rule change before it is submitted to the SEC, and subject to our comments above, we support the FINRA rewrite of IM-2210-2. Due to the importance of this rule proposal, we anticipate that we may have further substantive comments at the time the proposal is published by the SEC for comment.

Marcia E. Asquith
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Thank you for considering these comments.

Respectfully,

PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION

s/Laurence S. Schultz

Laurence S. Schultz
President, 2007-2008

Contact Information:

Laurence S. Schultz, Esq.
Driggers, Schultz & Herbst, P.C.
2600 West Big Beaver Road, Suite 550
Troy, Michigan 48084
Phone: (248) 649-6000
Fax: (248) 649-6442
E-mail: LSSARB@AOL.COM