

NASD Tweaks Proposed Variable Annuity Suitability Rule (Again)

BY MARILYN SPONZO

Formidable proposed NASD Conduct Rule 2821 has undergone additional revisions in response to industry comments. Significant changes in the most recent amendment (filed November 15) include:



I've had a makeover!

- **Timing of principal approval.** A principal would have to approve a transaction within 2 business days after transmittal to the insurance company, or 5 business days if additional contact with the customer or registered representative is necessary. This change coordinates principal review with the “2 day/5 day” processing requirement under the SEC’s rules.
- **Authorization of non-recommended transactions.** There would be a safe harbor for a principal to approve a transaction the principal believes is unsuitable. In such a case, the principal must independently determine that: 1) the transaction was not recommended; 2) the customer has been informed why the principal believes the transaction is unsuitable; and 3) the customer affirms transaction.
- **Surveillance of registered representative exchange rates.** A broker-dealer could review representatives’ rates of effecting VA exchanges periodically through exception reporting (rather than each time a principal reviews a transaction).

Insurance companies and broker-dealers should not underestimate the profound infrastructure changes that Rule 2821 may require, including: 1) creation of analytical tools to determine and document suitability; 2) use of additional disclosure documents at point of sale; 3) implementation of automated surveillance tools to detect sales practice improprieties, especially relating to exchanges; and 4) enhanced training programs for registered representatives who sell, principals who approve, and supervisors who monitor, VA sales.

Revolving Door Turbulence Financial Firms Feud Over Departing Employees

BY JIM SCONZO

Broker-dealers regularly grow by acquiring registered representatives (and the reps’ clients) from other firms. It is now common that the former firm, in an effort to maintain its clients and protect its confidential business information, commences litigation against the departing rep and the new firm.

The former firm will likely assert its rights under non-compete and confidentiality agreements that are now customary. Non-contractual theories are also likely to be asserted, including that the rep is violating duties of loyalty or misappropriating the former firm’s property, trade secrets and other confidential business information. All of this is well illustrated by a recent lawsuit filed by Robert W. Baird & Co. against three former employees who left to start their own rival firm (see Jordan Burt client email alert of November 21, 2006 at www.jordenburt.com/news).

In this increasingly turbulent environment, broker-dealers are finding that careful planning and attention to detail can greatly reduce the potential legal fallout that can accompany reps coming from other firms.

Variable Products Escape Ban on Payment Plans

BY GARY COHEN

Congress has amended the Investment Company Act to ban registered investment companies from issuing or selling periodic payment plans—except variable insurance contracts.

The amendment came under the radar. It was part of the Military Personnel Financial Services Protection Act. That Act protects members of the U.S. Armed Forces from unscrupulous practices in the sale of financial products. However, the ban on periodic payment plans applies to sales to anyone—whether on or off military bases.

The SEC, in its effort to fit a square peg in a round hole, has always treated variable insurance contracts as periodic payment plans. So, a ban on periodic payment plans could ban variable insurance contracts.

But the ban is subject to an exclusion for any registered separate account funding variable insurance contracts, the sponsoring life insurance company and principal underwriter.