Approved: April 30, 2003
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on March 5, 2003 in Room 313-S of the Capitol.

All members were present except:
Representative Dale Swenson - Excused
Representative Dan Williams - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Amy Lee, Vice President and Assistant General Counsel, Security Benefit
Roger Walter, Attorney
John Gann, Kansas Association Insurance & Financial Advisors
Larry McGill, Kansas Association of Insurance Agents
Larry Engelkemier, Greater Kansas City Chapter of Financial Planners

Hearings on **HB 2347 - Uniform Securities Act**, continued

Amy Lee, Vice President and Assistant General Counsel, Security Benefit, opposed the proposed bill due to the provisions regarding the definition of securities including variable annuities. She believes that the historical exclusion of variable insurance products from the definition of security under Kansas law should be continued. She was concerned with the proposed shared jurisdiction between the insurance office and securities commission. Currently, there are only four states that regulate variable annuities as securities. (Attachment 1)

Roger Walter, Attorney, appeared before the committee in opposition of the bill. He was concerned with the speed that the bill has taken, that it hasn't been adequately reviewed by attorneys, and that it alters fifty years of case law. Kansas has one of the best securities act in the country. Since the effective date isn't until July 2004, he doesn't see why it can't be studied throughout the summer. (Attachment 2)

John Gann, Kansas Association Insurance & Financial Advisors, was also opposed to the variable annuities provisions due to the fact that it is already the most regulated product in the financial market place.(Attachment 3)

Larry McGill, Kansas Association of Insurance Agents, believes that the Kansas Insurance Department has adequate control over variable annuities and doesn't see that there is anything that is broken that needs to be fixed. (Attachment 4)

Written testimony in opposition to the bill was provided by The Prudential company. (Attachment 5) The American Council of Life Insurers provided the committee with additional information regarding what the definition of a variable annuity as determined by Securities & Exchange Commission report (Attachment 6)

Larry Engelkemier, Greater Kansas City Chapter of Financial Planners, appeared before the committee as a proponent of the bill. Explained that the Commission on Uniform Law has worked about four years on the bill and that it had the issue of variable annuities bracketed so each state can take up that issue. Variable annuities are securities under federal law. Separate investment accounts are managed by mutual fund managers and should be registered with the SEC as an investment company. They are considered to be federally covered securities not subject to state regulations. By including them in the definition of security, it would make their sale subject to the notice of filing and anti-fraud provisions of the Uniform Act. (Attachment 7)

Commissioner David Brant and the Commission on Uniform Law have worked together and provided the committee with some proposed amendments. (Attachment 8).

Hearing on **HB 2347** was closed.

The committee meeting adjourned at 5:30 p.m. The next meeting was scheduled for 3:30 p.m. on March 6, 2003 in room 313-S.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

**House Judiciary Committee**

**Testimony of Amy Lee, Vice President and Associate General Counsel of Security Benefit Life Insurance Company**

**House Bill No. 2347**

**March 5, 2003**

Security Benefit Life Insurance Company ("Security Benefit") is a Kansas life insurance company located in Topeka, Kansas. Security Benefit offers fixed and variable annuities, retirement plans and, through its subsidiary broker/dealer, Security Distributors, Inc., a family of mutual funds. We offer fixed and variable annuities to fund both qualified and non-qualified retirement plans.

Because the variable annuity is our primary product, we would like to comment on House Bill No. 2347 and, in particular, on the proposal to include variable insurance products in the definition of security. House Bill No. 2347 is based upon the Uniform Securities Act, which provides that the term "[s]ecurity . . . does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed [or variable] sum of money either in a lump sum or periodically for life or other specified period."[1] The prefatory note to the Uniform Securities Act explains that for those states that wish to continue or adopt an exclusion for variable insurance products from

H. JUDICIARY
3-05-03
Attachment: 1

the definition of security, the brackets should be removed from the phrase "or variable." We believe that the historical exclusion of variable insurance products from the definition of security under Kansas law should be continued by including the term "or variable" in the definition of security.

House Bill No. 2347 as proposed eliminates the exclusion of variable insurance products from the definition of security under Kansas law. We believe that this change is inconsistent with the Kansas insurance code, which provides as follows:

> The [insurance] commissioner shall have the sole and exclusive jurisdiction and authority to regulate the issuance and sale of such contracts and to promulgate reasonable rules and regulations as may be necessary to carry out the purposes and provisions of this act, and such contracts, the companies which issue them, and the agents or other persons who sell them, shall not be subject to the provisions of Article 12 of Chapter 17 of the Kansas Statutes Annotated [the securities act] nor to the jurisdiction of the securities commissioner of the state.[2]

The proposed change in the definition of security would provide for the securities commissioner to have jurisdiction with regard to the sale of variable insurance products and would be inconsistent with the sole and exclusive

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[1] The Uniform Securities Act (Last Revised or Amended in 2002) as approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws ("NCCUSL").

[2] K.S.A. 40-436(l)

jurisdiction of the insurance commissioner with regard to insurance products. We believe that this change potentially adds unnecessary layers of regulation to an already highly regulated industry and creates possible regulatory conflicts and confusion on the part of insurers, sales agents and the public.

The long-standing regulatory structure for variable insurance products, which dates to the creation of variable annuity products in the 1960s, is regulation of the products as insurance at the state level[3] and as securities at the federal level. For example, an individual who wishes to sell variable insurance products in Kansas, must be licensed as an insurance agent by the state insurance commissioner and must be registered as a representative of a broker/dealer with the National Association of Securities Dealers, Inc. ("NASD"), a federal self-regulatory organization. With the proposed change in the definition, an individual would further need to be registered under the Kansas Securities Act and pay any applicable fees.

An additional layer of regulation would also be added with regard to variable insurance products, which are already regulated extensively at both the state and federal level, as set forth below.

- New insurance products are filed with the state insurance departments for review and approval prior to sale

[3] The states are the exclusive regulators of insurance in accordance with the McCarren-Ferguson Act, which generally prohibits federal statutes from preempting state insurance law.

- A registration statement must be filed and effective with the Securities and Exchange Commission ("SEC") prior to sale
- The broker/dealer distributing the variable insurance products must be registered with the SEC and a member firm of the NASD

If the definition of security is amended to include variable insurance products, insurers also would be required to make "notice" filings with the securities commissioner under new Section 12 of the proposed law. Variable insurance products, like mutual funds, are federal covered securities under Section 18(b)(2) of the Securities Act of 1933 and notice filings for such variable insurance products would be required but for the exclusion of variable insurance products from the definition of security under the current law. We are opposed to any change that, if adopted by other states, could potentially add a requirement to make "notice" filings with the 50 states for each of our variable insurance products.[4] This additional filing increases our costs and such costs ultimately may be passed on to the consumer of variable insurance products.

Security Benefit is concerned about sales practices with regard to variable insurance products, and we know, that as with any industry, there are some sales agents that are engaging in unethical sales practices. We believe, however, that the current regulatory structure can adequately address any such

[4] Such notice filings are currently required for variable insurance products in only four states: Montana, Nevada, Rhode Island, and South Dakota.

practices. Under current law, the insurance commissioner may revoke an agent's license under the following circumstances[5]:

- License was obtained by fraud or misrepresentation
- Agent misrepresented the provisions of an insurance or annuity contract
- Agent engaged in rebating or any inducement not contained in the insurance contract
- Agent intentionally omitted a material fact
- Agent made misleading representations or incomplete comparisons for the purpose of inducing a surrender of in-force insurance
- Agent has been convicted of a misdemeanor or felony involving fraud, deceit, dishonesty, intent to defraud or intent to deprive
- Agent's license does not serve the interests of the insurer or the insurable interests of the public

As part of my duties at Security Benefit, I review customer complaints, and we have seen a slight increase in the number of complaints received with regard to our variable insurance products. It appears, however, that the increase in complaints is due in large part to the volatility and overall poor performance of the securities markets. Calendar year 2002 marked the third year in a row of negative stock market performance, as measured by the S&P 500 Index, which resulted in a number of unhappy investors in both the variable insurance

[5] K.S.A. 40-242.

product and mutual fund industries. I saw only one complaint in 2002 that potentially involved an unsuitable sale and that matter was referred to the NASD for investigation under its Conduct Rules, which require that any securities transaction recommended be "suitable" with regard to the customer's financial situation and needs.[6]

We do not see compelling reasons for an additional regulator of variable insurance products, and we believe that shared regulation of the sale of such products by the insurance and securities commissioners presents potential problems, as follows:

- Potential for conflicting positions taken by the two regulators
- Difficulties in regulating the agents, without also regulating the principals, i.e., the insurance companies
- A regulatory framework that is inconsistent with the vast majority of other states
- Regulation of insurance products by a secondary regulator without insurance expertise
- Unnecessary additional regulation and the costs thereof

In conclusion, we ask that you consider whether a change in a long-standing regulatory structure is justified, taking into account the following:

---

[6] Any sales agent selling variable insurance products in Kansas would be subject to the jurisdiction of the NASD and the NASD Conduct Rules.

- Variable insurance products industry is currently regulated by the state insurance departments, SEC and NASD
- The Insurance Commissioner is the long-standing functional regulator of insurance products
- Current regulatory structure has sufficient tools to address bad conduct on the part of industry participants
- Additional regulation imposes a burden on business with very little, if any, incremental protection of the public

I appreciate the opportunity to share our views on this bill with you. We would be happy to address any questions that you may have.



1-7

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**TESTIMONY OF ROGER N. WALTER**
**BEFORE THE HOUSE JUDICIARY COMMITTEE**
**ON HB 2347**
**March 5, 2003**

I appreciate this opportunity to present these remarks with respect to House bill 2347. I am urging the committee to delay consideration of the bill, to allow further study and input by those most directly affected by it.

My name is Roger N. Walter, I am in attorney engaged in private practice with the law firm of Morris, Laing, Evans, Brock & Kennedy, Chartered. I specialize in corporate and securities matters. I have been actively involved with securities regulation, the Kansas Securities Act and other states' securities acts since 1986. From 1986 through 1999 I served as general counsel to the Kansas Securities Commissioner. From 1999 to the present I have been engaged in the private practice of law specializing in securities regulatory issues. I have a varied securities practice. I represent investors as plaintiffs in arbitration litigation against brokerage firms and investment professionals. I also represent the industry in defense of such claims and in defending regulatory matters before state agencies and the NASD. I also do transactional work for issuers and underwriters. Since 1993 I have been an adjunct professor at the Washburn University School of Law teaching the Securities Regulation class.

As a regulator I served on various special and standing committees of North American Securities Administrators Association ("NASAA"), the national organization of state securities regulators. I served on the Small Business Capital Formation Committee, the Broker-Dealer Regulation Committee, the Lloyds of London Task Force, and I was Chairman of the Special Task Force of Viatical Investment Contracts. I also served on an ad hoc committee formed to draft an amendment to the existing Uniform Securities Act in response to the federal preemption legislation passed in 1996, NSMIA.

I have serious concerns about the haste in which HB 2347 is being considered. The effect of the bill will be to repeal the entire existing Kansas Securities Act, and replace it with an entirely new act based largely on the new Uniform Securities Act (2002). The impact of this legislation is massive in scope. It has the potential of altering over 50 years of case law which has developed in interpreting provisions of the existing act. Keeping this mind, I would encourage the committee to proceed cautiously and deliberately.

Although the existing Kansas Securities Act is based largely on the 1957 Uniform Securities Act, it has been adapted and changed over the years to accommodate particular concerns and interests of Kansas constituencies. Based on my years of experience as a regulator, I believe the Kansas Securities Act is viewed as one of the best securities acts in the country, and is the envy of most other jurisdictions. The reasons are numerous and include among other things, extensive law enforcement authority provided to the Commissioner's staff and criminal prosecution authority for staff attorneys hired to enforce the act.

I understand the strong policy considerations which argue for a uniform state approach to securities regulation across the nation. I also am aware that considerable deliberation went into the adoption of the Uniform Securities Act of 2002. However, no one has thoroughly evaluated this Uniform Act from the perspective of Kansas and how it will effect existing Kansas law with respect to securities issues. If the legislature will continues the policy of adapting the Uniform Act to fit the unique demands of various constituencies in the State of Kansas, careful, study and consideration should be given before enacting this legislation.

For that reason I believe the enactment of this legislation should be delayed to allow for input from the bar, the regulated industry and investors. When wholesale revisions to the Kansas Corporation Code were proposed a study committee was formed and conducted meetings and reviews over the better part of a one year period. A revision of the Kansas Securities Act should require as least as much study.

I am aware of no compelling reason which requires immediate action. The Uniform Securities Act of 2002 has only been introduced in four other state legislatures at this point, Michigan, Alabama, Mississippi and Oklahoma. It has been passed out in none.

I commend the Kansas Securities Commissioner for making an attempt to seek input from a variety of interested practitioners. I was included in that group. However, that group is limited in number and was only first formed several weeks ago. There has been insufficient time for a careful deliberative process to work its way through to some logical conclusion. As we embarked on this task it became apparent to me that insufficient time was being allowed to carefully consider the ramifications of what was being proposed. There simply is no compelling reason to move this quickly without careful deliberation. I strongly encourage the committee to consider delaying enactment of this bill to allow for careful input and study from those who will be affected by it.

I have been authorized to represent to you that Professor Fred Lovitch of the University of Kansas School of Law joins me in urging this delay. Professor Lovitch has taught Securities Regulation for over 30 years and is recognized as a preeminent national authority on securities law.

I appreciate the opportunity to present this written testimony and apologize for not being here in person.

KANSAS ASSOCIATION OF
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FINANCIAL ADVISORS

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**Testimony of John Gann, LUTC**

**On behalf of the
Kansas Association of Insurance and Financial Advisors
(KAIFA)**

**Regarding House Bill 2347**

**Submitted to the House Judiciary Committee
Wednesday, February 19, 2003**

H. JUDICIARY
03-05-03
Attachment: 3

**Testimony of John Gann**
**Kansas Association Insurance and Financial Advisors**
**(KAIFA)**
**In Opposition to HB2347**
**February 19, 2003**

Mr. Chairman and Committee Members:

I appreciate the opportunity to address the House Judiciary Committee today on behalf of the members of Kansas Association of Insurance and Financial Advisors (KAIFA) in opposition of HB2347. Our membership consists of 1,200 Kansans located in all counties who are actively engaged as insurance agents and brokers.

Legislation recently proposed in several state legislatures would revise state securities laws to include variable contracts within the definition of "security". If enacted, the proposed legislation would grant the state securities commissioner jurisdiction over variable products, and persons who sell these products would be required to register and be licensed under the state securities code. The Kansas Association of Insurance and Financial Advisors (KAIFA) believes that additional regulation of these products by state securities regulators is unnecessary and that there has been no empirical evidence presented that would justify enactment of this type of proposal.

Variable life insurance and annuity contracts are already among the most heavily regulated products in the financial market place. Between state insurance departments regulating the insurance aspects of variable products and federal securities regulators governing the securities characteristics of these products, variable products are simultaneously subject to numerous layers of both state and federal regulation.

Variable products must be registered under the Investment Company Act of 1940 and the Securities Act of 1933, which are both under the jurisdiction of the U.S. Securities and Exchange Commission. These products may only be sold by the registered representatives of broker/dealers who are members of the National Association of Securities Deals (NASD). NASD rules impose tight restrictions on all aspects of the conduct and activities of these persons, ranging from strict suitability standards to the manner in which they promote their products. Advertisements pertaining to variable contracts are subject to extensive regulation under the federal securities laws, and advertisements used by sales persons licensed by the NASD are also subject to NASD approval.

On the state level, a wide range of state laws and regulations apply to variable products, and state insurance commissioners, specifically, have broad jurisdiction over all insurance products and the persons who market these products. State legislatures have enacted laws and state insurance commissioners have adopted regulations, based on the model laws and regulations of the National Association of Insurance Commissioners, which govern the development, marketing and sale of variable products.

In sum, variable products are already subject to a comprehensive federal/state regulatory regime. Subjecting a product which already falls under the jurisdiction of state insurance departments, the NASD and the SEC to state securities regulation will provide little in the way of meaningful or necessary additional regulation and will likely result in the persons who market these products being faced with conflicting and contradictory regulatory schemes.

**Testimony on House Bill 2347**
**Before the House Judiciary Committee**
**By Larry Magill**
**Kansas Association of Insurance Agents**
**March 5, 2003**

Thank you Mister Chairman and members of the Committee for the opportunity to appear today as an opponent of the variable life and annuity provisions of H.B. 2347. These provisions are found, in part, in the definitions where it does not exclude variable life and annuities from the definition of securities covered by the act on page 7. Frankly, I haven't had a chance to digest the entire 87 pages of the act and have no idea what the impact of all this is or the impact of repealing all the existing statutes this act repeals.

**Substantially Greater Change Than What Appears**
Unlike the bill introduced in 2001, this act doe not appear to affect the insurance laws governing variable life and annuities. In one sense that may be an improvement but it does then add an entirely new layer of regulation on top of the Insurance Department's oversight and licensing. It is difficult to tell the exact extent of the change since the bill simply eliminates the current carve-out under Kansas Securities laws for variable life and annuity products. With all of the new securities act now applying to these products for the first time, it is likely that the changes are very extensive.

**Yet Another License**
This would add yet another license for my members to obtain in addition to their life and health license, their series 6 and 63 NASD (National Association of Securities Dealers) licenses and now a Kansas Securities license. It would add an additional department of state government to deal with and the complexity of an entirely separate regulatory scheme to understand. Most of our members would only be selling mutual fund type products and would probably not be involved in individual securities sales or other types of investments. If they are involved in offering products other than variable life and annuities, they would need the proper securities licenses.

**Not Functional Regulation**
We are not swayed by the arguments made by the Securities Commissioner that this is simply carrying out the functional regulation called for by Gramm-Leach-Bliley. This is actually exactly what GLBA sought to avoid, the multiple jurisdiction and multiple regulation of people within the financial industry. Where currently you have only one regulator with jurisdiction over variable life and annuity products in Kansas, the Insurance Commissioner, HB 2347 would add a second layer of regulation that is unnecessary.

**No "Problem" to Fix**
We are unaware of abuses of the current system that this bill would address. If there is a fear that convicted felons would simply switch from selling securities, once they lose their securities license, to selling variable products, the Federal Violent Crime Control

and Law Enforcement Act of 1994 would apply. That act makes it illegal for anyone to engage in the business of insurance after being convicted of a felony involving a breach of trust or dishonesty. The Kansas Insurance Department confirmed for me that they are in the process of taking a person's variable life and annuities license now for conviction of a felony under the federal law.

If the Committee decides to work the rest of the bill, we urge you eliminate variable life and annuities from the act. Thank you for the opportunity to appear today. We would be happy to answer questions or provide whatever additional information the committee might need.

**Kathy Damron**

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Topeka, Kansas 66612-2205

Testimony on behalf of
The Prudential, Inc.
In opposition to
HB 2347
March 5, 2003

House Judiciary Committee

Mr. Chairman and members of the committee:

On behalf of The Prudential, I appreciate having this opportunity to share the company's opposition to HB 2347 as it is currently drafted. Our comments in this regard have been expressed before the Kansas Legislature on this matter in previous sessions when this proposal has been brought for consideration by the Securities Commissioner.

To suggest that the contents of HB 2347 as currently drafted are "uniform" is simply not the case. Rather, if enacted, HB 2347 would put Kansas out of step with most other states in terms of defining variable life insurance and variable annuities as "securities".

This proposal was introduced by Securities Commissioner Brandt in 2000 and again in 2001. At that time the Legislature reviewed the proposals and rejected them. We are asking that this legislature follow suit and remove those provisions from HB 2347.

Defining variable annuities and variable life insurance as securities would cause duplicate regulation of the same product under the state Insurance and Securities Codes. This would create expensive, unnecessary compliance burdens for life insurers and salespersons. For consumers, this would discourage activity in the marketplace.

It is for these reasons that previous attempts to add this regulation were rejected. We respectfully ask that the Judiciary Committee *reject* the variable annuity changes embodied in HB 2347.

H. JUDICIARY
03-05-03
Attachment: 5

# OFFICE OF THE KANSAS SECURITIES COMMISSIONER

618 S. Kansas Ave. Topeka, KS 66603-3804 (785) 296-3307 securities@securities.state.ks.us

Page last updated January 29, 2003

Table of Contents: skip links


- Home
- About the Agency
- Frequently Asked Questions
- Registration Requirements
- Enforcement and Compliance Divisions
- Investor Education
- Statutes and Regulations
- Administrative and Criminal Proceedings
- Press Releases
- Contact Us
- Search this Site


skip to next section

## Frequently Asked Questions


- General Information
- Stock Certificates
- Concerns, Complaints, and Fraud
- Licensing and Registration


## General Information

**How do I select a good broker? Are they reputable?**

Investigate before you invest. Although we cannot recommend one company over another, we will provide you with information as to whether an individual or a company is licensed in the state of Kansas and the disciplinary history, if any, of the individual or company. Visit our Investor Education section for a list of tip sheets that will help you learn what questions to ask as you search for brokerage firms and investment advisers. After you have selected a few potential options, contact the Office of the Kansas Securities Commissioner and ask for a background report.

**Can you help with the transfer of my retirement plan or 401K?**

If the delay is due to problems with a broker-dealer, contact the Kansas Securities Commissioner at 1-800-232-9580 or (785) 296-3307 to make a complaint. If the delay is due to the (former) employer or another party, contact the Department of Labor at 816-426-5131.

**If I have a complaint or question about my variable annuity whom do I contact?**

Kansas Insurance Department in Topeka, Kansas: 1-800-432-2484

National Association of Securities Dealers Kansas City District Office: 816-421-5700.

For information purposes, you may send a copy of any complaint or correspondence to the Kansas Securities Commissioner.

back to top



5-2

## Stock Certificates

**I found an old stock certificate, how do I find out if it still has any value?**

1. Contact the Secretary of State's office in the state where the business was incorporated to verify that the company is still in business. If the company has gone out of business, the stock likely has no value. However, if the company has merged with another company or simply changed its name, the stock may still have value.

2. Check with a broker-dealer to see if they have any information about the issuing company or visit Scripophily.com.

3. Visit the reference section of your local public library and ask for a book entitled *Directory of Obsolete Securities.* The Securities and Exchange Commission has also compiled a list of resources that may be helpful in researching old stock certificates.

**I lost my stock certificate-- what do I do?**

Contact the broker-dealer from whom you purchased the stock.

**There has been a delay in receiving my stock certificate. What can I do?**

Contact your broker-dealer or issuer. Today, many stock investments are held in "street name" at the broker-dealer. Your purchase confirmation and account statements are your evidence of ownership (along with the broker-dealer's records). If you still wish to have a stock certificate, contact your broker-dealer or issuer.

back to top

## Concerns, Complaints, and Fraud

**Have I contacted the right agency?**

**If your question concerns: Securities and investing -- Yes!** We can answer your questions and concerns regarding the registration status of securities, broker-dealers, and investment advisers.

**Certificates of Deposit, Bank trust departments or Trust Companies, Mortgage brokers, Consumer Credit, or loans--** contact the Kansas Banking Commission at 785-296-2266 or go to http://www.osbckansas.org/.

**Consumer products and services--** contact the Kansas Attorney General's Consumer Protection Division at 785-296-2215 or go to

http://www.ink.org/public/ksag/.

**Insurance products and services--** contact the Kansas Insurance Department at 800-432-2484 or go to http://www.ksinsurance.org/.

**Social Security--** contact the Social Security Administration at 800-772-1213.

**I think I have been defrauded in an investment. Can you help me?**

If someone has violated the law, we want to know. The Office of the Securities Commissioner can initiate an investigation and when appropriate, impose sanctions for violations of the Kansas Securities laws. Investors may consider filing for arbitration or civil litigation. Contact your attorney for more information about these remedies. You may also wish to contact the National Association of Securities Dealers, the American Arbitration Association or the Public Investors Arbitration Bar Association for more information.

**Do I have grounds for a complaint? If so, what should I do next?**

Typically, market losses on an investment are not grounds for a complaint. However, if you perceive that something dishonest or unethical has happened with your account, you should take these steps:

1. Send a letter describing the problem to the branch manager or compliance officer of your broker-dealer or investment adviser. Use information from your account statements and reports to support your claim. Keep a copy of the letter for your records.
2. If the problem is not corrected, contact the Kansas Securities Commissioner to file a complaint.

back to top

## Licensing and Registration

**Is the registration packet on your web site?**

Yes, go to the Registration Requirements page.

**Are the statues and regulations on your web site?**

Yes, go to the Statues and Regulations page.

**Is there a deminimus exemption for state registered Investment Advisers and Broker-Dealers?**

There is no deminimus exemption for Investment Advisers located within Kansas. Out-of-state advisers with no more than five Kansas clients in the past 12 months are not required to register with the KSC. Broker-dealers and issuers are allowed up to five sales in Kansas in any 12 month period provided there is no advertising or general solicitation for these sales.

**What transactional exemptions are available for Broker-Dealers?**

See Kansas Securities Act statute 17-1262.

**What is required for Rule 506 offerings in Kansas?**

Notice filing on Form D within 15 days after the first sale in Kansas. Filing fee of $100.00.

**Do Investment Advisers need to renew annually?**

Yes. All renewals are done through the Web CRD- IARD system. Part 1 of Form ADV needs to be amended on the IARD system and Part 2 needs to be sent directly to Kansas withing 90 days of the end of your fiscal year.

**Do broker-dealers need to renew annually?**

Yes, but all renewals are done through the Web CRD system. You do not need to file anything directly with the Kansas Securities Commissioner.

**Do broker-dealers or investment advisers need to file their annual audited financial statements with your office?**

No. These are to be filed only upon request by the Kansas Securities Commissioner, and then within 5 days of the request. See Kansas Securities Regulation 81-3-1(d)(2).

**What are the initial registration fees for broker-dealers and investment advisers?**

Broker-dealer firms - $200
Agent and investment adviser representatives - $50
Investment adviser firms - $100
Investment adviser sole practitioner - $100

**What are the registration renewal fees?**

Broker-dealer firms - $200
Agent and investment adviser representatives - $50
Investment adviser firms - $100

Investment adviser sole practitioner - $100

**What are the Investment Adviser Representative examination requirements?**

Go to the Securities Registration page.

**What are the examination requirements for agents of broker-dealers?**

The Series 63 or Series 66 examination is required, in addition to at least one other examination as required by the National Association of Securities Dealers. Agent applicants must be sponsored to take the NASD examination by their employing broker-dealer. The Kansas Securities Commissioner will not sponsor an applicant to take an NASD exam.

**Can an agent be registered simultaneously with more than one broker-dealer (dual registration)?**

Dual registration is not permitted unless the management and control of the broker-dealers is substantially identical.

**Do I have to be registered with the Securities Commissioner to sell annuities in Kansas?**

Annuities are currently excluded from the definition of a security and do not require registration with the Kansas Securities Commissioner. However, if you plan to sell fixed annuities in Kansas, you must be licensed with the Kansas Insurance Department. If you plan to sell variable annuities in Kansas, you must be licensed with both the Kansas Insurance Department and the National Association of Securities Dealers, Inc. (NASD).

go back to top

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**From:** "Carl Wilkerson" <CarlWilkerson@acli.com>
**To:** <oneal@house.state.ks.us>
**Date:** Thu, Feb 27, 2003 5:27 PM
**Subject:** Supplemental materials requested by the Judiciary Committee on HB 2347

Dear Chairman O'Neal:

During the Judiciary Committee Hearing on February 19, 2003 regarding HB 2347 (Uniform Securities Act revisions), one of the committee members requested a written summary explaining variable life insurance and variable annuities. I have attached portions of the SEC's Investment Company Act Study Report which covers this subject quite well. I have also attached copies of the additional following items that are germane to the Judiciary Committee's evaluation of HB 2347:

* A copy of an NCOIL resolution passed on February 21, 2003, that supports the exclusive jurisdiction of insurance commissioners to regulate the issuance and sale of variable contracts, and supporting the exclusion of variable life insurance and variable annuities from the definition of "security;"

* An excerpt from a Securities Law Treatise authored by Washington University Law School Dean Joel Seligman (who was also the Reporter on NCCUSL's Uniform Securities Act of 2002), which explains the impact of the US Supreme Court's decision on the status of variable annuities, noting that "the insurance and investment elements could be segregated with sufficient precision so that the former might be regulated by the state insurance authorities and the latter by the Commission" [the SEC].

In a separate recent development, this week Missouri Senate and House Committees reported out HB 380 and SB 427, which exclude variable life insurance and variable annuities from the definition of "security." These bills would amend the Missouri securities laws to incorporate the new Uniform Securities Act (2002).

Could you please be so kind as to circulate this email and its attachments to your colleagues on the Committee? Please let me know if you have any questions. We greatly appreciate the opportunity to have testified before your Committee and to provide these supplemental materials.

Carl B. Wilkerson
Chief Counsel-Securities & Litigation
American Council of Life Insurers
101 Constitution Avenue, N.W., Suite 700
Washington, DC 20001-2133

H. JUDICIARY
03-05-03
Attachment: 6

PRESIDENT: Sen. William J. Larkin, Jr., NY
VICE PRESIDENT: Rep. Chris Liese, MO
SECRETARY: Rep. Kathleen Keenan, VT
TREASURER: Sen. Steven Geller, FL

# RESOLUTION IN SUPPORT OF INSURANCE COMMISSIONERS' EXCLUSIVE STATE REGULATORY AUTHORITY OVER VARIABLE LIFE INSURANCE AND VARIABLE ANNUITIES

*Adopted by the NCOIL State-Federal Relations Committee and the NCOIL Executive Committee on February 21, 2003.*

WHEREAS, variable life insurance and variable annuities are subject to a comprehensive federal and state regulatory structure, enforced by state insurance commissioners, the Securities and Exchange Commission and the National Association of Securities Dealers, which covers these products from design through their marketing and sale; and

**WHEREAS**, an overwhelming majority of the states give their insurance commissioners exclusive state jurisdiction to regulate the issuance and sale of variable life insurance and variable annuities and

**WHEREAS**, an overwhelming majority of the state securities laws exempt variable life insurance and variable annuities from state securities regulation; and

**WHEREAS**, variable life insurance and variable annuities are among the most heavily regulated products in today's financial services marketplace; and

**WHEREAS**, there has been no demonstration of empirical statistical evidence of abuses in the marketing and sale of variable life insurance and variable annuities; and

**WHEREAS**, there has been no evidence presented that state insurance commissioners are unable or unwilling to effectively and comprehensively regulate variable life insurance and variable annuities; and

**WHEREAS**, a streamlined, efficient system of regulatory oversight is necessary for insurers and producers to be competitive in today's rapidly evolving financial services marketplace; and

**WHEREAS**, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has adopted the Uniform Securities Act (2002) which, among other things, allows each legislature to determine whether to include variable life insurance and variable annuities within the definition of the term "security"; and

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EXECUTIVE COMMITTEE CHAIR: REP. CRAIG EILAND, TX; EXECUTIVE COMMITTEE: REP. SHERYL ALBERS, WI; REP. GLENN ANSARDI, LA; DEL. J.D. BEANE, WV; REP. SHIRLEY BOWLER, LA; SEN. THOMAS BOZEK, CT; SEN. NEIL BRESLIN, NY; SEN. THOMAS BUFORD, KY; REP. LON BURNAM, TX; ASSEM. NANCY CALHOUN, NY; REP. JAMES COLVIN, VT; REP. ROBERT DAMRON, KY; REP. GREGORY DAVIDS, MN; SEN. BOB DEARING, MS; SEN. FRANK DEEM, WV; REP. ANTHONY DELUCA, PA; SEN. PATRICK DELUHERY, IA; SEN. DAVID DONLEY, AK; SEN. ROBERT DUNCAN, TX; SEN. JOANNE EMMONS, MI; REP. DAVID EVANS, OH; ASSEM. DONNA FERRARA, NY; SEN. LIZ FIGUEROA, CA; REP. RICH GOLICK, GA; REP. BEN HARBIN, GA; SEN. BILLY HEWES, MS; SEN. JAY HOTTINGER, OH; REP. GEORGE KEISER, ND; REP. BRIAN KENNEDY, RI; SEN. DEAN KIRBY, MS; SEN. JERRY KLEIN, ND; SEN. MARY KRAMER, IA; REP. RICHARD LAIRD, AL; SEN. DAVID LANDIS, NE; SEN. CAL LARSON, MN; REP. ALLAN LAYSON, AL; SEN. JAMES LEWIS, JR., IN; REP. JIMMY LORD, GA; SEN. GLENN F. MCCONNELL, SC; REP. ANTHONY MELIO, PA; REP. JANET METCALF, IA; REP. VIRGINIA MILKEY, VT; REP. PHIL MONTGOMERY, WI; SEN. FRANK MRVAN, IN; SEN. JOHNNY NUGENT, IN; SEN. ALAN NUNNELEE, MS; SEN. EDWARD OLIVER, MN; REP. TIMOTHY OSMOND, IL; ASSEM. LOU PAPAN, CA; SEN. PAMELA REDFIELD, NE; REP. ANDREW RICHNER, MI; REP. STEVE RIGGS, KY; SEN. BEN ROBINSON, OK; SEN. EDWARD E. SALEEBY, SC; REP. ALAN SANBORN, MI; SEN. DALE SCHULTZ, WI; SEN. DAN SEUM, KY; SEN. JAMES SEWARD, NY; SEN. DAVID SIBLEY, TX; REP. MIKE SMITH, IN; REP. THOMAS TANGRETTI, PA; REP. FRANCIS WALD, ND; REP. DAN WARD, MO; REP. LESLIE WATERS, FL; SEN. KATHERINE WELLS-WHEELER, NH; REP. MARK YOUNG, VT; PAST PRESIDENTS AND MEMBERS OF THE EXECUTIVE COMMITTEE: REP. TERRY PARKE, IL; ASSEM. CLARE FARRAGHER, NJ; REP. DAVID COUNTS, TX; REP. LEO W. FRASER JR., NH; SEN. HARVEY TALLACKSON, ND; SEN. HAROLD BURNS, NH EXECUTIVE DIRECTOR: ROBERT MACKIN; DEPUTY EXECUTIVE DIRECTOR: SUSAN NOLAN; NATIONAL OFFICE: 139 LANCASTER STREET, ALBANY, NY 12210-1903; TEL: 518-449-3210; FAX: 518-432-5651; WEB SITE: WWW.NCOIL.ORG

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**WHEREAS**, NCCUSL rejected a proposal that would have expressly brought variable life insurance and variable annuities within the definition of the term "security," which would have subjected these products and the producers who sell them to an unnecessary, redundant and inconsistent layer of oversight by state securities commissioners; and

**WHEREAS**, in the upcoming legislative sessions, state legislatures may be considering legislation to revise their laws to conform with the Uniform Securities Act (2002); and

**WHEREAS**, the members of these state legislatures may be looking for guidance on this issue,

**NOW, THEREFORE, BE IT RESOLVED,** that the National Conference of Insurance Legislators endorses and supports state insurance commissioners having exclusive authority at the state level over the regulation of the issuance, marketing and sale of variable life insurance and variable annuities, and opposes any state legislation or regulation that would grant state securities regulators jurisdiction over the issuance and sale of such products or that would define variable life insurance or variable annuities as "securities" under state law.

FUNDAMENTALS
OF
SECURITIES

6-4

fails to take adequate account of the historic congressional policy of leaving regulation of the business of insurance entirely to the States."[119]

The *VALIC* case inevitably left a number of both conceptual and practical problems in its wake, particularly with respect to the application of the Investment Company Act. At times during and after the litigation, as it later appeared, the Commission was perhaps overinclined to analyze the variable annuity in terms of whether its investment or insurance characteristics predominated. But it soon recognized that a variable annuity was neither solely an investment contract nor solely an insurance contract, and that the insurance and investment elements could be segregated with sufficient precision so that the former might be regulated by the state insurance authorities and the latter by the Commission.

VALIC was organized to be purely a variable annuity company. The typical structure that the Commission contemplated in the case of an established insurance company that sought to sell variable annuities (backed by the assets in a legally separate account for the benefit of variable annuity contract holders) was the incorporation by the insurance company of an investment fund as an open-end management investment company that would be registered under the 1940 Act, with the insurance company holding the shares of the "investment company," and as a practical matter controlling it, but with a "pass through" of voting power from the insurance company to the contract holders; and the insurance company might enter into an advisory contract with the "investment company." Under the practice that has evolved, however, there have been certain modifications of this pattern, as we shall see.

Prudential, the early champion of the variable annuity among the traditional insurance companies, ultimately conceded that it was governed by the Supreme Court decision as far as registration under the Securities Act was concerned, notwithstanding the fact that its long established business in standard insurance would

[119] SEC v. Variable Annuity Life Ins. Co. of Am., 155 F. Supp. 521, 526 (D.D.C. 1957), *aff'd*, 257 F.2d 201, 205 (D.C. Cir. 1958), *rev'd*, 359 U.S. 65, 71, 96 (1959).

# *Protecting Investors: A Half Century of Investment Company Regulation*

**Division of Investment Management**
**United States Securities and Exchange Commission**

**May 1992**

This is a report of the Division of Investment Management. The Commission has expressed no view regarding the analysis, findings, or conclusions herein.

6-6

# Chapter 10

# Variable Insurance

## I. Introduction and Summary

The regulation of variable annuities and variable life insurance under the Investment Company Act[1] presents questions of application and interpretation that defy easy analysis.[2] In many ways, the regulation of these products under the Act is a historical anomaly. The Investment Company Act naturally presents a statutory framework for the products and services that existed in 1940. Variable insurance products did not exist then in any form, and Congress did not anticipate their creation. Though Investment Company Act regulation of these products is appropriate, the differences these products present from more traditional investment company products are significant enough that the Act is the proverbial "round hole" into which the "square peg" of insurance products is forced.

The products themselves are extremely complex. Although explained in greater detail in Part II below, a brief description at the outset may be useful. Both variable life insurance and variable annuity premium payments are allocated to investment portfolios maintained by an insurance company in a segregated or "separate account."[3] A variable life insurance policy is similar to a whole life policy, except that the cash value and/or death benefit vary depending upon the investment experience of the separate account.[4] An annuity is a contract under which an insurer, in return for a lump sum payment or a series of payments during the "accumulation" or "pay-in" period, agrees to make a series of payments to the contract owner for life or for a specified period, the "annuity" or "pay-out" phase of the contract. Under a variable annuity contract, the value of what the contract owner may receive during the pay-in and sometimes the pay-out period

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[1]Investment Company Act of 1940, 15 U.S.C. § 80a.

[2]We use the term "variable insurance" to include both variable life insurance and variable annuities.

[3]The separate account is distinct from the insurance company's general account, which funds all of the company's fixed insurance obligations. For a definition of the term "separate account," see Investment Company Act § 2(a)(37) (15 U.S.C. § 80a-2(a)(37)); see also rules 0-1(e), 6e-2(a), and 6e-3(T)(a) (17 C.F.R. § 270.0-1(e), .6e-2(a), and .6e-3(T)(a)).

[4]Unlike term insurance, which provides only a guaranteed death benefit payment, a whole life policy has both a cash value and a guaranteed death benefit. Generally, the cash value builds up to the policy face amount by age 100.



6-7

depends upon the investment performance of the separate account into which his or her payments have been invested.[5]

Because contract owners assume certain investment risks under variable contracts, the contracts are securities under the Securities Act,[6] and the separate accounts funding the contracts are investment companies under the Investment Company Act.[7] In addition, a distributor of the contracts is a broker-dealer under the Securities Exchange Act,[8] and a person rendering investment advice to the separate account, if organized as a management company, is an investment adviser under the Investment Advisers Act.[9] The contracts are also insurance contracts regulated under state law.[10]

Confronted with a product that did not fit neatly within the Investment Company Act, the Commission, in early administrative decisions, concluded that variable insurance contracts should be regulated as periodic payment plans.[11]

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[5]For descriptions of the variable annuity, see generally In re Variable Annuity Life Ins. Co. of Am., 39 S.E.C. 680, 683-685 (1960); PAUL A. CAMPBELL, THE VARIABLE ANNUITY; ITS DEVELOPMENT, ITS ENVIRONMENT & ITS FUTURE (1969); and George E. Johnson, *The Variable Annuity -- Insurance, Investment, or Both?*, 48 GEO. L. J. 641 (1960).

For descriptions of the variable life insurance contract, see generally Tamar Frankel, *Regulation of Variable Life Insurance*, 48 NOTRE DAME LAW REV. 1017 (1973); DIVISION OF INVESTMENT MANAGEMENT REGULATION, SEC, VARIABLE LIFE INSURANCE AND THE PETITION FOR THE ISSUANCE AND AMENDMENT OF EXEMPTIVE RULES (1973) [hereinafter 1973 REPORT]; and SEC Request for Comments on Issues Arising Under the Investment Company Act of 1940 Relating to Flexible Premium Variable Life Insurance, Investment Company Act Release No. 13632 (Nov. 23, 1983), 48 FR 54043.

[6]Securities Act of 1933, 15 U.S.C. §§ 77a-77aa.

[7]*See infra* notes 29-32 and accompanying text. An insurance company separate account may be organized and registered under the Investment Company Act as an open-end management company or as a unit investment trust ("UIT"). Currently, the UIT is the more popular organizational structure.

[8]Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78*ll*.

[9]Investment Advisers Act of 1940, 15 U.S.C. § 80b.

[10]*See, e.g.*, N.Y. INS. LAW § 4240 (McKinney 1985 & Supp. 1992); CAL. INS. CODE §§ 10506, 10506.3 (West 1972 & Supp. 1992); ILL. ANN. STAT. CH. 73 § 857.24 (Smith-Hurd Supp. 1991).

[11]With respect to variable annuities, see In re Prudential Ins. Co. of Am. (41 S.E.C. 335, 348 (1963), *aff'd sub nom.* Prudential Ins. Co. v. SEC, 326 F.2d 383 (3rd Cir. 1964), *cert. denied*, 377 U.S. 953 (1964)), and In re Variable Annuity Life (39 S.E.C. at 700-03)), in which the Commission considered requests for exemptions from the periodic payment plan provisions of the Investment Company Act. Similarly, since the introduction of variable life insurance contracts, the (continued...)



6-8

Periodic payment plans are, essentially, a means of purchasing investment company securities by installment and are subject to heightened Investment Company Act regulation. This enhanced regulation, which focuses on the types of sales and related charges allowed and the manner in which they may be deducted and, at times, refunded, goes beyond that imposed on ordinary mutual funds.[12]

Although variable insurance products fit within the literal definition of periodic payment plan certificates,[13] they are significantly different investment products. The net result is that the regulations applicable to periodic payment plans are in many ways ill suited for variable insurance. While the Commission has issued or adopted numerous exemptive orders and rules to address some of the inconsistencies, the basic problem, namely that these provisions were not drafted with variable insurance products in mind, persists.

Some of the resulting difficulties are primarily business concerns for the industry, and do not directly implicate the Commission's mandate to protect investors, but may harm investors mainly by reducing the choices available to them. For example, the industry argues that, because of current pricing and distribution requirements of Investment Company Act regulation, an insurer finds it difficult to price its variable life insurance contracts in a way that adequately reflects the heavy capital expenditure needed to establish and maintain a variable

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[11](...continued)
Commission has regulated them as periodic payment plans. *See* Separate Accounts of Life Insurance Companies Funding Certain Variable Life Insurance Contracts, Investment Company Act Release No. 9104 (Dec. 30, 1975), 41 FR 2556 (proposing rule 6e-2 that would require variable life separate accounts to be treated as issuers of periodic payment plan certificates).

As used in this chapter, the term "periodic payment plan" refers only to the contractual plan, one of two forms of installment investing used by investment companies. The other type, the voluntary plan, was not subject to the many abuses that resulted in the enactment of sections 26 and 27 of the Investment Company Act (15 U.S.C. §§ 80a-26, -27) and is not discussed herein. For an explanation of the differences between contractual and voluntary plans, see SEC, PUBLIC POLICY IMPLICATIONS OF INVESTMENT COMPANY GROWTH, H.R. REP. NO. 2337, 89th Cong., 2d Sess. 231-32 (1966) [hereinafter PPI REPORT]; SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. DOC. NO. 95, Pt. 4, 88th Cong., 1st Sess. 174-79 (1963).

[12]Periodic payment plans, although rare today, were the source of serious abuses prior to 1940. Under these plans, investors periodically contribute a pre-established amount to a UIT that invests in an underlying mutual fund. In the 1930's, periodic payment plans were offered primarily to low income investors who could not meet the minimum investment required by a mutual fund. *See infra* notes 37-46 and accompanying text.

[13]Both types of securities fall within the definition of periodic payment plan certificates in Investment Company Act section 2(a)(27).



6-9

life operation; nor may the insurer distribute its contracts on an equal basis with fixed-dollar life insurance. To be competitive, a variable life issuer must bear an extra burden on its capital and surplus. As a result, relatively few variable life contracts are offered to the public, and few insurers have entered the variable life insurance business.[14]

The following table[15] illustrates the estimated annual market share for new sales of scheduled premium variable life insurance and flexible premium variable life insurance[16] from 1976 to 1991.

**TABLE 10-1**

## Estimate of Annualized New Premium[1] Market Share by Product

| | 1976 | 1977 | 1978 | 1979 | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 | 1990 | 1991 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Universal Life[2] | – | – | – | – | – | 2% | 9% | 18% | 30% | 38% | 35% | 27% | 26% | 27% | 26% | 26% |
| Variable Life[3] | – | – | – | – | – | 1% | 2% | 2% | 3% | 3% | 3% | 3% | 1% | 1% | 1% | 1% |
| Variable Universal[4] | – | – | – | – | – | – | – | – | – | 1% | 3% | 7% | 7% | 6% | 6% | 5% |
| Term | 12% | 14% | 15% | 16% | 18% | 19% | 18% | 15% | 12% | 11% | 12% | 12% | 13% | 13% | 13% | 13% |
| WholeLife | 88% | 86% | 85% | 84% | 82% | 78% | 71% | 65% | 55% | 47% | 47% | 51% | 53% | 53% | 54% | 55% |
| | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% |

[1]Includes 10% of Single Premiums, excludes universal life excess (dump-in premiums).
[2]"Universal life," "term," and" whole life" are forms of life insurance that are not registered with the Commission.
[3]The first variable life (referred to in this Chapter as "scheduled premium variable life") insurance contract was sold in 1976.
[4]The first variable universal life (referred to in this Chapter as "flexible premium variable life") insurance contract was sold around 1985.

Source: Life Insurance Marketing Research Association

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[14]Approximately 36 of the more than 2,000 life insurance companies in the United States currently offer variable life products, for an estimated total net asset value at December 31, 1991, of $6.2 billion. Letter from Lipper Analytical Services, Inc. to Clifford E. Kirsch, Assistant Director, and Wendell Faria, Deputy Chief, Office of Insurance Products, Division of Investment Management, SEC (Mar. 30, 1992). Approximately 76 life insurance companies currently offer variable annuities, for an estimated total net asset value at December 31, 1991, of $101.1 billion. *Id.*

[15]Table based on data compiled from Life Insurance Marketing and Research Association ("LIMRA"), *Monthly Survey of Life Insurance Sales in the United States* and facsimile from LIMRA to Thomas Bisset, Attorney, Office of Insurance Products, Division of Investment Management, SEC (Mar. 26, 1992).

[16]For an explanation of the distinction between scheduled premium variable life insurance and flexible premium variable life insurance, see *infra* note 56.



6-10

Other problems with variable insurance regulation directly affect the Commission's responsibilities under the Act. A major concern for the Commission is the continuing need to separate "insurance-related" charges from "securities-related" charges and subject only the latter to comprehensive periodic payment plan regulation. With the enactment of the McCarran-Ferguson Act in 1945, Congress determined that regulation of the insurance industry was the exclusive prerogative of the states.[17] Primarily for this reason, the Commission seeks to focus its regulatory efforts exclusively on the securities elements of variable insurance products and to avoid regulation of the insurance elements. Securities-related charges and insurance-related charges, however, cannot be neatly divided for regulatory purposes. Some charges that the industry characterizes as insurance charges appear to have components that should be subject to Investment Company Act regulation. Further, so long as the Commission regulates only "investment-related" charges, insurance companies may evade charge limits by adjusting "insurance-related" or unregulated charges to the extent permitted by state law. These problems are compounded by significant differences in the degree of insurance protection provided by variable life insurance and variable annuities.[18]

For these and other reasons discussed below, the Division recommends a fundamental change in the regulation of variable insurance. The Division concludes that the regulation of specific charges under sections 26 and 27 of the Investment Company Act[19] is inappropriate for variable insurance, and recommends a more flexible approach in which the Commission would have jurisdiction over all contract charges in the aggregate. The Commission generally would no longer engage in an examination of individual contract charges and the manner in which they are deducted or refunded, but would have the authority to adopt whatever rules, governing the overall level of charges, become necessary. Specifically, the Division recommends that the Commission propose legislation that would grant the Commission jurisdiction over all contract charges, including discretionary rulemaking authority to establish standards for determining the reasonableness of aggregate contract charges and the manner in which they are deducted; amend sections 26 and 27 to exempt variable insurance contracts from

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[17] McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015.

[18] During the pay-in or accumulation phase, a variable annuity has a minimal insurance element and closely resembles a mutual fund. *See infra* Section III. D. Variable life contracts, by contrast, afford significant death benefit protection to insureds, particularly in light of recent tax law changes that eliminated important tax benefits for contracts without a significant insurance element. *See* Internal Revenue Code §§ 7702 (definition of life insurance contract), 7702A (definition of modified endowment contract), I.R.C. §§ 7702, 7702A.

[19] 15 U.S.C. §§ 80a-26, -27.



6-11

the specific charge limits of those sections; and require aggregate charges under the contracts to be reasonable and the insurer to so represent in its registration statement. The proposal would recognize that variable insurance contracts and periodic payment plan certificates are different products that should not be treated identically under the Investment Company Act. Rather, variable insurance separate accounts should be treated more like mutual funds, which are subject to more general prohibitions against excessive fees.[20] The Division's recommendation would not affect any other provision of the federal securities laws; investors would remain protected by the substantive and procedural protections of these laws.

This chapter begins with an overview of the regulation of variable insurance under the Securities Act and the Investment Company Act. The chapter then reviews the differences between periodic payment plans and variable insurance. The chapter next examines regulatory and practical problems that have developed as a result of the decision to regulate variable insurance as periodic payment plans and concludes that those problems warrant a different legislative approach for variable insurance. Finally, the chapter discusses the Division's proposal to regulate variable insurance charges on a basis more comparable to the regulation of mutual fund expenses.

## II. Variable Insurance Products under the Federal Securities Laws

### A. Variable Annuities

An annuity may be described simply as a contract under which an insurer agrees to make a series of payments for a specified period, either a fixed period or for the life of a designated individual. Under "immediate" annuities, payments begin shortly after the initial cash contribution. Under the more common "deferred" annuities, payments do not begin until some future date selected by the owner or set by the contract. Contract owners purchase these contracts by paying either single or periodic premiums.

The benefits under an annuity may be funded in one of two fundamental ways: fixed or variable. Under a fixed or "fixed-dollar" contract, the insurance company guarantees that a minimum rate of interest will be credited to the owner's account during the accumulation or pay-in period, and also guarantees that once the pay-out period begins, payments will be a certain guaranteed amount per dollar accumulated. Payments during the accumulation period of a

[20] *See, e.g.*, Investment Company Act §§ 22(b), 36(b), 15 U.S.C. §§ 80a-22(b), -35(b); rule 12b-1, 17 C.F.R. § 270.12b-1.



6.12

fixed annuity are allocated to the insurer's general account, which is invested in accordance with state law. A variable annuity contract, by contrast, provides for values that vary directly with the investment performance of the contract owner's payments. Variable annuity premiums are invested in an insurer's separate account, which offers the contract owner a number of investment options. Payments to the contract owner during the pay-out period may be variable or fixed, depending on the annuity option selected.

### B. Variable Life Insurance

Variable life insurance is similar to whole life insurance, except that the cash value and/or death benefit vary depending on the investment performance of the separate account in which the premium payments are invested. Under a whole life policy, premium payments are allocated to an insurer's general account and invested conservatively (as required by state law) to ensure that the company is able to meet its death benefit and cash value guarantees. The investment return on assets in the general account has little or no direct effect on the cash value and on the death benefit received.

Premium payments under a variable life policy, in contrast, are invested in an insurance company separate account, which is not subject to state requirements that the assets be invested conservatively. A variable life policyholder typically is offered a variety of investment options to choose from (*e.g.*, money market, equity, and bond funds). Death benefits and cash values are directly related to performance of the separate account, although typically there is a minimum below which the death benefit is guaranteed not to fall. Variable life policies have either scheduled or flexible premiums, although the flexible premium policy is more common today. Under a scheduled premium contract, premiums are fixed as to both timing and amount. Under a flexible premium policy, also called a variable universal life policy, the policyholder may vary the amount and the frequency of policy premiums as well as the level of death benefit protection.



6-13

## C. The Introduction of Variable Products

Until variable insurance was developed, there was little controversy over whether insurance contracts were securities subject to regulation under the federal securities laws.[21] Section 3(a)(8) of the Securities Act[22] exempts traditional or "fixed" insurance contracts from registration if they are issued by a corporation subject to state insurance regulation.[23] Similarly, section 3(c)(3) of the Investment Company Act[24] excepts from the definition of investment company any company organized as an insurance company that has as its primary and predominant business activity the writing of insurance and is subject to supervision by an appropriate state authority.[25]

When variable annuities were introduced in the 1950's, the Commission took the position that these products were securities. The industry disagreed. The issue was decided by the Supreme Court, which held that variable annuities are securities under the Securities Act, not exempted insurance contracts.[26] The Court determined that insurance required "some investment risk-taking on the part of the [insurance] company . . . [and] a guarantee that at least some fraction

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[21]Historically, insurance has been the exclusive preserve of state regulation. In Paul v. Virginia (75 U.S. (8 Wall.) 168, 183 (1868)), the Supreme Court determined that issuing a policy of insurance is not a transaction of commerce. The Court's decision laid the groundwork for the development of state regulation of insurance over the next several decades on the basis that Congress had no authority under the commerce clause to regulate the business of insurance. When Paul v. Virginia was subsequently overruled in United States v. Southeastern Underwriters Ass'n (322 U.S. 533 (1944)), Congress promptly enacted the McCarran-Ferguson Act to preserve state regulation of insurance.

[22]15 U.S.C. § 77c-3(a)(8).

[23]The Commission has taken the view that an insurance contract falling within section 3(a)(8) is excluded from all provisions of the Securities Act, even though the section by its terms is an exemption from only the registration provisions of the Act. *See, e.g.,* Definition of "Annuity Contract or Optional Annuity Contract," Securities Act Release No. 6558 (Nov. 21, 1984), 49 FR 46750 (proposing rule 151). The legislative history of the Securities Act supports this view (*see* HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, FEDERAL SUPERVISION OF TRAFFIC IN INVESTMENT SECURITIES IN INTERSTATE COMMERCE, H.R. Rep. No. 85, 73rd Cong., 1st Sess. 15 (1933)), as well as the Supreme Court in dicta (*see* Tcherepnin v. Knight, 389 U.S. 332, 342 n.30 (1967)), and at least one commentator (*see* LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 204-05 (2d ed. 1988)).

[24]15 U.S.C. § 80a-3(c)(3).

[25]The term "insurance company" is defined in section 2(a)(17) of the Investment Company Act.

[26]SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 71-73 (1959) [hereinafter "VALIC"].



6-14

of the benefits will be payable in fixed amounts."[27] Because the variable annuity contracts at issue placed the entire investment risk on the contract owner rather than the insurance company, the Court concluded that the contracts were securities.[28] The Court also determined that the insurance company, which sold only variable annuities, was an investment company under the Investment Company Act.[29]

A few years later, the Commission considered whether an insurance company that sold both variable annuities funded by a separate account and traditional insurance products funded by the general account was an investment company under the Investment Company Act.[30] The Commission concluded that the separate account funding the variable annuities was an investment company, but that the insurance company itself could continue to rely on the exception in section 3(c)(3).[31] On appeal, a federal court affirmed the Commission's decision.[32]

In the early 1970's, the insurance industry introduced variable life insurance. After extensive public hearings, the Commission concluded that

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[27]*Id.* at 71. Similarly, in SEC v. United Benefit Life Ins. Co. (387 U.S. 202, 211-12 (1967)), the Court held that a deferred annuity that offers an insubstantial guarantee in the accumulation phase is subject to the Securities Act.

[28]VALIC, 359 U.S. at 71-73. In a concurring opinion, Justice Brennan concluded that state insurance laws, which focus on such matters as solvency, reserves, and contract terms, are inadequate substitutes for the disclosure requirements and other protections of the federal securities laws. *Id.* at 78, 85.

[29]*Id.* at 67-68, 71-73.

[30]In re Prudential, 41 S.E.C. 335. It was unnecessary to reach the section 3(c)(3) issue in VALIC because the company in VALIC issued only variable annuities and had no basis for relying on the exemption.

[31]*Id.* at 339-41.

[32]*See* Prudential Ins. Co. v. SEC, 326 F.2d at 383. The Commission's reasoning in that case is sometimes called the "ectoplasmic theory." *See* LOSS, *supra* note 23, at 208-09; Thomas J. Finnegan & Joseph P. Garner, *The Separate Account as an Investment Company: Structural Problems of the "Ectoplasmic Theory,"* 3 CONN. L. REV. 106 (1970). Under the ectoplasmic theory, the issuer of a variable annuity is the separate account and the insurance company is deemed to be the writer of the contract (In re Prudential, 41 SEC at 345), and the creator of the fund (*id.* at 340-41). Under section 2(4) of the Securities Act (15 U.S.C. § 77(b)(4)), the depositor of a UIT is considered to be the issuer of its securities. Accordingly, a separate account organized as a UIT and the insurance company/depositor are considered co-issuers of a variable insurance contract or the units of participation in the separate account.



6-15

variable life insurance contracts are securities required to be registered under the Securities Act.[33] In light of the variable death benefit and cash value features of the contracts, the Commission concluded that variable life insurance contract owners assume a substantial investment risk.[34]

An early Commission decision noted that variable annuities, when purchased on an installment basis, provided for "periodic payments, redemption and undivided interests in a unit or fund of securities," characteristics common to periodic payment plan certificates.[35] The Commission made similar comparisons when variable life insurance was introduced.[36] In light of these comparisons, the Commission regulates variable insurance products as periodic payment plans under sections 26 and 27 of the Investment Company Act.

### D. Periodic Payment Plans

Sections 26 and 27 address the abuses that were endemic in the periodic payment plan industry prior to 1940. The plans are contracts for investing in the shares of open-end investment companies on an installment basis.[37] Before enactment of the Investment Company Act, the most serious abuses associated with the plans resulted from the manner in which the sales load was deducted. An investor purchasing shares in a mutual fund directly would typically incur a sales load deducted as a simple percentage of his or her current investment. An investor buying through a periodic payment plan, in contrast, had his or her total sales load calculated as a percentage of the total amount to be invested over the

[33]Exemption of Certain Variable Life Insurance Contracts and Their Issuers from Federal Securities Laws, Investment Company Act Release No. 7644 (Jan. 31, 1973), 38 FR 4315.

[34]*Id.*

[35]In re Prudential, 41 S.E.C. at 348. *See also* In re Variable Annuity Life, 39 S.E.C. at 683, 700-03. *Cf.* PPI REPORT, *supra* note 11, at 226-27. The Supreme Court had previously noted the resemblance of variable annuities to periodic payment plan certificates. VALIC, 359 U.S. at 85, 96 (Brennan, J., concurring, and Harlan, J., dissenting).

[36]The Division's 1973 Report on variable life insurance concluded that "the separate account formed to fund variable life insurance contracts would be an open-end management investment company issuing a periodic payment plan certificate." 1973 REPORT, *supra* note 5, at 128 (footnote omitted).

[37]The security directly purchased by an investor is the periodic payment plan certificate, which represents an undivided interest in, rather than direct ownership of, shares of an open-end investment company. *See* Investment Company Act § 2(a)(27). Plans typically have a two-tier structure under which payments are invested in a UIT, which invests in an underlying mutual fund. PPI REPORT, *supra* note 11, at 226.



6-16

life of the plan (often ten or more years), rather than as a percentage of each individual payment. The plans deducted a proportionately higher amount from early payments, in order to encourage marketing efforts by salesmen. The net result was that little of the early payments under the plans was left for actual investment. Frequently, plans either were terminated or lapsed long before completion of planned payments. Since there was no requirement to refund excess sales loads, investors paid effective loads substantially in excess of the loads contemplated for completed plans. In other words, an investor who stopped making payments under a plan ended up paying a sales load on a larger investment than he actually made.[38]

The structure of the plans caused other abuses as well. Plan investors paid double sales loads: a primary sales load when they purchased interests in the unit investment trust ("UIT") and a second load when the trust purchased shares of the underlying mutual fund.[39] These double loads also were paid on dividend reinvestments.[40] In addition, the sponsor often deducted a fee for "managing" the UIT assets even though these were non-discretionary accounts and management fees were paid to the adviser of the underlying fund.[41] Plan investors paid other miscellaneous fees, such as withdrawal fees and a trustee's charge.[42]

Although section 27 permits the higher initial sales loads needed to market periodic payment plans, it addresses abuses common to the plans by establishing a maximum sales load, the manner of deducting sales charges, and refund requirements that return a portion of the load paid by planholders that terminate early.[43] It also subjects a periodic payment plan certificate issued by a

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[38]SEC, INVESTMENT TRUSTS AND INVESTMENT COMPANIES, COMPANIES SPONSORING INSTALLMENT INVESTMENT PLANS, H.R DOC. NO. 482, 76th Cong., 2d Sess. 33-34 (1940) [hereinafter INSTALLMENT INVESTMENT PLAN STUDY].

[39]*Id.* at 40. If the underlying fund was not affiliated with the plan's sponsor, the plan sponsor typically kept the commission or discount included in the underlying fund's offering price rather than passing the discount on to plan investors. If the plan sponsor also managed the underlying fund, the sponsor typically assessed a full load when the trust purchased the fund's shares.

[40]*Id.* at 45.

[41]*Id.* at 38.

[42]*Id.* at 37, 43.

[43]Investment Company Act §§ 27(a), 27(d), 15 U.S.C. § 80a-27(a), -27(d). In addition, section 2(a)(35) of the Act prevents duplicative sales loads by requiring sales loads at the underlying fund level and the trust level to be combined for the purpose of meeting statutory limits.



6-17

management company to the charge limitations established for UITs under section 26.[44] Section 26 prohibits the payment of any amount from trust assets to the depositor or principal underwriter for the trust unless the payment qualifies as reasonable compensation for performing certain bookkeeping or other administrative services.[45] Section 26 also limits the trustee's or custodian's fees to those fees and expenses set forth in the trust instrument and actually incurred.[46] No other charges are allowed.

### E. Application of Sections 26 and 27 to Variable Insurance Products

#### 1. Variable Annuities

A typical variable annuity contract assesses four types of charges: (1) front-end, deferred, and/or contingent deferred sales loads; (2) administrative expense charges; (3) mortality and expense risk charges; and (4) investment related charges, such as investment advisory fees. Advisory fees are subject to the fiduciary obligations imposed under section 36(b) of the Investment Company Act, which applies generally to all investment companies.[47] Sales loads, administrative charges, and mortality and expense risk charges, however, are regulated primarily under sections 26 and 27 of the Investment Company Act.

##### a. Sales Loads

The sales load limitations for periodic payment plans, and therefore variable annuities, are complex. Section 27(a)(1) limits issuers to a load not to exceed nine percent of total premium payments.[48] Section 27(a)(2) permits an issuer to deduct more than nine percent from a particular premium (as much as fifty percent of the first twelve monthly premiums) but only if: (1) no subsequent sales load deduction exceeds a prior one;[49] (2) the contract contains a provision

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[44] Investment Company Act § 27(c)(2), 15 U.S.C. § 80a-27(c)(2).

[45] Investment Company Act § 26(a)(2), 15 U.S.C. § 80a-26(a)(2).

[46] *Id.*

[47] Section 36(b) is described in greater detail in Chapters 7 and 8.

[48] *But see* NATIONAL ASSOCIATION OF SECURITIES DEALERS MANUAL - RULES OF FAIR PRACTICE, Art. III, § 29(c) (1984) (limiting the maximum sales charge for variable annuities to 8.5% of total payments) [hereinafter NASD RULES].

[49] Investment Company Act § 27(a)(3), 15 U.S.C. § 80a-27(a)(3). This is known as the "stair step provision."



6-18

that permits the owner to surrender the contract within the first eighteen months and obtain a refund of some portion of the excess sales load assessed;[50] and (3) the period over which the life of the contract is measured for compliance with the nine percent limitation does not exceed twelve years.[51] An issuer may elect to use a "spread load" design, in accordance with the requirements of sections 27(g) and (h), and thus avoid the refund requirements of section 27(d).[52]

### b. Administrative Expenses

Administrative expenses under a variable annuity are regulated closely. Under section 26(a)(2)(C), administrative fees must be reasonable, as determined by the Commission. Rule 26a-1 defines reasonable administrative expenses for a separate account funding variable annuities, in essence providing that sponsors may not make a profit on administrative expenses. The rule limits administrative fees to the cost of services to be provided for one year in cases where the separate account reserves the right to increase the fee, or to the average expected cost for a specified period where the fee is guaranteed not to increase for that time.

### c. Mortality and Expense Risk Charges

Variable annuity issuers deduct a mortality and expense risk charge from the assets of a separate account to compensate the insurer for the "mortality" risks and "expense" risks it assumes under the contracts. The insurer assumes a mortality risk when it guarantees annuity rates to contract owners. These annuity rates are based on mortality projections for future annuitants. In the event that actual mortality rates differ from projections (*i.e.*, annuitants live longer than expected), the insurer remains obligated to pay annuity benefits as guaranteed in the contract. Some insurers also assume a mortality risk by agreeing to pay a

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[50]Section 27(d) requires the insurer to refund any sales load exceeding 15% of gross premiums paid by a contract owner. To assure payment of refunds, rule 27d-1 requires the insurer to keep certain reserves in a segregated account. 17 C.F.R. § 270.27d-1. Alternatively, under rule 27d-2 the insurer may undertake to refund excess sales load if it meets certain capital and reporting requirements.

[51]This third restriction is imposed by rule 27a-1. 17 C.F.R. § 270.27a-1. Certain notice requirements regarding surrender and withdrawal rights also must be observed. *See* Investment Company Act §§ 27(e), 27(f), 15 U.S.C. §§ 80a-27(e), -27(f).

[52]Under a "spread load" design, an issuer may deduct a maximum of 20% of any payment, or an average of 16% of the first 48 monthly payments, provided that the overall load does not exceed nine percent of total payments and certain other conditions are met. The periodic payment spread load should not be confused with the spread load used by some mutual funds, which consists of a rule 12b-1 fee and a contingent deferred sales load. *See* Chapter 8.



6-19

death benefit if the annuitant dies before a specified time. The insurer assumes an expense risk when an annuity contract guarantees that administrative charges under the contract will not increase even if actual administrative costs increase during the life of the contract.

Risk charges are not compensation for performing bookkeeping or other administrative services under section 26(a) and therefore are prohibited. Attempts to adopt a rule to permit the deduction of these charges have been unsuccessful; consequently, a variable annuity issuer must obtain an exemptive order to deduct risk charges.[53]

### 2. Variable Life Insurance

When variable life insurance was first introduced in the early 1970's, the Commission decided to exempt the product from regulation under the Investment Company Act on the assumption that state insurance law would be adapted to provide protections comparable to those afforded under the Act.[54] Shortly thereafter, because of dissatisfaction with the state regulatory effort, the Commission adopted rule 6e-2 for certain scheduled premium variable life insurance contracts.[55] Rule 6e-2 seeks to accommodate the insurance elements of variable life contracts without sacrificing Investment Company Act regulation. It exempts a qualifying separate account, principal underwriter, and depositor from many sections of the Act that are inconsistent with the operation of variable life insurance.

Rule 6e-2 does not deal with the particular problems presented by flexible premium variable life insurance, a product developed in the early 1980's. In 1983, the Commission proposed rule 6e-3, which was designed to accommodate the

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[53]*See infra* notes 87-90 and accompanying text. Applicants for exemptive relief from sections 26(a)(2) and 27(c)(2) to deduct risk charges must represent, among other things, that the charge is within the range of industry practice for comparable contracts or reasonable in relation to the risks assumed. If an applicant anticipates that sales loads under the contract will not cover sales expenses, and consequently that proceeds of risk charges may be used to pay for distribution costs, the insurance company also must represent that there is a reasonable likelihood the distribution financing arrangement under the contract will benefit contract owners and the separate account.

[54]Inv. Co. Act Rel. 7644, *supra* note 33. The Commission was concerned particularly with uniform valuation of portfolio securities, annual reporting requirements, unauthorized changes in investment policies, excessive fees, and affiliated transactions. *Id.*

[55]Separate Accounts of Life Insurance Companies Funding Certain Variable Life Insurance Contracts, Investment Company Act Release No. 9482 (Oct. 18, 1976), 41 FR 47023 (adopting rule 6e-2). *See also* Inv. Co. Act Rel. 9104, *supra* note 11 (proposing release).



6-20

unique features of flexible premium variable life insurance contracts.[56] In 1984, the Commission adopted rule 6e-3(T) on a temporary basis in order to gain some experience with flexible premium variable life insurance.[57] The variable life insurance rules offer insurers needed relief from those provisions of the Investment Company Act that are incompatible with the operation of insurance contracts.

The main charges deducted under a typical variable life insurance contract are: (1) front-end, deferred, and/or contingent deferred sales loads; (2) administrative expense charges; (3) cost of insurance charges (the cost of death benefit protection); (4) mortality and expense risk charges; and (5) investment related charges, such as investment advisory fees. Regulation of cost of insurance is left to state law because of the insurance nature of the charges. Sales loads, administrative charges, and mortality and expense risk charges are regulated under sections 26 and 27 of the Investment Company Act. Advisory fees are subject to section 36(b) of the Act.

#### a. Sales Loads

The sales load assessed under a variable life contract is regulated by section 27 and rules 6e-2 or 6e-3(T). Each rule provides that the sales load may not exceed nine percent of total premiums paid or expected to be paid over the lesser of twenty years or the life expectancy of the insured. An insurer may comply with this provision in one of two ways. It may choose a "level" load and deduct no more than nine percent from each premium payment,[58] or it may use an "excess" load and deduct a percentage that exceeds nine percent of payments

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[56]Inv. Co. Act Rel. 13632, *supra* note 5. Flexible premium contracts permit a contract owner to vary the timing and/or amount of premium payments and to adjust the level of death benefit protection. Rule 6e-3(T)(c)(1), 6e-3(T)(d)(2), 17 C.F.R. § 270.6e-3(T)(c)(1), .6e-3(T)(d)(2). Scheduled contracts generally require a contract owner to adhere to a premium payment plan and do not permit adjustments in the level of death benefit protection (except to the extent it varies with the investment experience of the separate account). Rule 6e-2(c)(1), 17 C.F.R. § 270.6e-2(c)(1).

[57]Separate Accounts Funding Flexible Premium Variable Life Insurance Contracts, Investment Company Act Release No. 14234 (Nov. 14, 1984), 49 FR 47208. Rule 6e-3(T) has been amended twice since 1984. Separate Accounts Funding Flexible Premium Variable Life Insurance Contracts, Investment Company Act Release Nos. 14625 (July 10, 1985), 50 FR 28930 and 15651 (Mar. 30, 1987), 52 FR 11187.

[58]Rule 6e-3(T)(b)(13)(i)(B), 17 C.F.R. §§ 270.6e-3(T)(b)(13)(i)(B). While there is no corresponding provision in rule 6e-2, an insurer under a scheduled premium contract may choose a level sales load in compliance with Investment Company Act sections 27(a)(1) and 27(h)(1).



6-21

made in the early contract years but decreases in later contract years to remain within the aggregate limit.[59]

An excess load structure for a variable life insurance contract with scheduled premiums is easy to monitor. Premiums under a scheduled contract are paid in a predictable pattern, usually in level amounts. Because it is known what payments are expected to be made over the life of the contract, it can readily be determined whether the loads assessed will exceed nine percent of total premium payments.

An excess load structure for a flexible premium contract, on the other hand, is more difficult to monitor because the contract gives the owner the right to vary the timing and amount of premium payments. It is not possible to predict accurately the total amount of premium payments that will be made under the contract. To assure compliance with the nine percent limit, Rule 6e-3(T) uses the concept of a "guideline annual premium," which simulates a pattern of fixed payments over a specified period based on certain assumptions.[60]

Whether premiums are scheduled or flexible, considerable limits are imposed on the use of excess loads. For example, sales loads deducted during the first twelve contract months may never exceed fifty percent of any one payment or, for flexible contracts, one guideline annual premium. In addition, under "stair step" provisions, the proportionate amount of any sales load deducted from any payment generally may not exceed the proportionate amount deducted from any prior payment.[61] Finally, to the extent a variable life insurance contract has an excess load, an issuer must allow the contract owner to surrender the contract during the first twenty-four months and receive a refund of "excess" loads paid.[62] The contract owner must get back the amount of any load in excess of thirty percent of first year payments (or of the guideline annual premium for

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[59]Rules 6e-2(b)(13)(i), 6e-3(T)(b)(13)(i)(A), 17 C.F.R. §§ 270.6e-2(b)(13)(i), .6e-3(T)(b)(13)(i)(A). Variable life insurers frequently use excess load designs. The use of a 20 year term enables the Commission to assure compliance with the nine percent limit for variable life contracts having an excess load design. Without the use of an artificial maximum term, the nine percent limit could be easily circumvented by an insurer through the use of an unreasonably long period over which to "average" sales load deductions.

[60]Rule 6e-3(T)(c)(8), 17 C.F.R. § 270.6e-3(T)(c)(8).

[61]Investment Company Act §§ 27(a)(3), 27(h)(3), 15 U.S.C. §§ 80a-27(a)(3), -27(h)(3); rules 6e-2(b)(13)(ii), 6e-3(T)(b)(13)(ii), 17 C.F.R. §§ 270.6e-2(b)(13)(ii), .6e-3(T)(b)(13)(ii).

[62]Investment Company Act section 27(d), 15 U.S.C. § 80a-27(d); rules 6e-2(b)(13)(v), 6e-3(T)(b)(13)(v), 17 C.F.R. §§ 270.6e-2(b)(13)(v), .6e-3(T)(b)(13)(v).



6-22

flexible contracts), ten percent of second year payments (or guideline annual premium), and nine percent of any additional payments made during the twenty-four month period.

### b. Administrative Expenses

Rules 6e-2 and 6e-3(T) provide relief from sections 26(a)(1), 26(a)(2), and 27(c)(2) to permit the deduction of certain charges from separate account assets and to permit various custodial activities regarding those assets. Unlike variable annuities, the administrative expenses under scheduled premium variable life contracts are not limited to cost, but must be reasonable in relation to the services rendered and expenses incurred.[63] The fees for administrative services performed under a flexible premium contract, on the other hand, must be limited to the cost of the services provided.[64]

### c. Mortality and Expense Risk Charges

Mortality and expense risk charges under variable life insurance contracts compensate the insurer for the risk that actual mortality rates will differ from actuarial projections or that actual expenses will exceed guaranteed rates. In contrast to variable annuities, the insurer's mortality risk is the risk that the insured will die sooner than projected and thus before the expected amount of

[63]Rule 6e-2(b)(13)(iii)(C), 17 C.F.R. § 270.6e-2(b)(13)(iii)(C). Despite the language of that section, the industry apparently views it as requiring that administrative expenses under a scheduled premium contract be limited to cost, similar to the requirement in rules 26a-1 and 6e-3(T) for variable annuities and flexible premium contracts, respectively. *See, e.g.*, Letter on behalf of Prudential Ins. Co. of Am. to Jonathan G. Katz, Secretary, SEC 70, 77-78 (Oct. 2, 1990), File No. S7-11-90 [hereinafter Prudential Study Comment]. (Documents referred to in this chapter as "Study Comments" were submitted to the Commission in response to its request for comments on reform of the regulation of investment companies. Investment Company Act Release No. 17534 (June 15, 1990), 55 FR 25322.)

[64]Rule 6e-3(T)(b)(13)(iii)(A), 17 C.F.R. § 270.6e-3(T)(b)(13)(iii)(A). Rule 6e-2 was adopted before the Commission established the "at cost" standard in rule 26a-1 for variable annuities. When rule 6e-3(T) was later adopted, the requirements of rule 26a-1 were incorporated into that rule. The industry apparently views both forms of variable life contracts as subject to the "at cost" standard. *See, e.g.*, Prudential Study Comment, *supra* note 63, at 70, 77-78.

# FUNDAMENTALS OF SECURITIES REGULATION

Fourth Edition

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6-24

fails to take adequate account of the historic congressional policy of leaving regulation of the business of insurance entirely to the States."[119]

The *VALIC* case inevitably left a number of both conceptual and practical problems in its wake, particularly with respect to the application of the Investment Company Act. At times during and after the litigation, as it later appeared, the Commission was perhaps overinclined to analyze the variable annuity in terms of whether its investment or insurance characteristics predominated. But it soon recognized that a variable annuity was neither solely an investment contract nor solely an insurance contract, and that the insurance and investment elements could be segregated with sufficient precision so that the former might be regulated by the state insurance authorities and the latter by the Commission.

VALIC was organized to be purely a variable annuity company. The typical structure that the Commission contemplated in the case of an established insurance company that sought to sell variable annuities (backed by the assets in a legally separate account for the benefit of variable annuity contract holders) was the incorporation by the insurance company of an investment fund as an open-end management investment company that would be registered under the 1940 Act, with the insurance company holding the shares of the "investment company," and as a practical matter controlling it, but with a "pass through" of voting power from the insurance company to the contract holders; and the insurance company might enter into an advisory contract with the "investment company." Under the practice that has evolved, however, there have been certain modifications of this pattern, as we shall see.

Prudential, the early champion of the variable annuity among the traditional insurance companies, ultimately conceded that it was governed by the Supreme Court decision as far as registration under the Securities Act was concerned, notwithstanding the fact that its long established business in standard insurance would

[119] SEC v. Variable Annuity Life Ins. Co. of Am., 155 F. Supp. 521, 526 (D.D.C. 1957), *aff'd*, 257 F.2d 201, 205 (D.C. Cir. 1958), *rev'd*, 359 U.S. 65, 71, 96 (1959).

**Greater Kansas City Chapter**

# FPA

THE FINANCIAL
PLANNING
ASSOCIATION

Date: Wednesday February 19, 2003

To: House Judiciary Committee, Michael R, O'Neil Chairman

From: Larry F. Engelkemier, CFP - *President of Greater Kansas FPA Chapter*

Jim Reardon, J.D.,CFP-Director, *Governmental Affairs*

**RE: House Bill 2347 The Kansas Uniform Securities Act**

*Chairman O'Neil, and Committee Members:*

Thanks for your invitation to appear before you today at the request of Kansas Securities Commissioner David Brant and on behalf of the Greater Kansas City Chapter of The Financial Planning Association as well as the National Office in Washington, D.C.

Kansas was the first state in the country to recognize that there is fraudulent activity at a level that eludes federal law protection. Without state regulation accompanied by civil and criminal enforcement of the law in state courts, there would be little hope of redress for many victims of securities fraud. Beginning with the groundbreaking *"blue sky"* laws, Kansas has always been a leader and innovator in protecting its citizens from securities fraud and deceptive practices. It's no surprise that Kansas is one of the first states to consider The Uniform Securities Act of 2002 drafted in cooperation with state and federal securities regulators, and trade industry groups such as FPA.

Four years of intensive consideration and drafting have gone into the creation of this Act. It is a carefully balanced result of compromise and concurrence. The bill reflects a consensus support from most representatives of the broad array of government and private sectors interests that participated in the process.

Securities regulation exists to prevent fraud in securities transactions and adequate enforcement powers must be given to the appropriate regulatory agencies. These powers include the ability to:

- Make rules and regulations,
- Issue stop orders,
- Bring criminal prosecutions and pursue civil actions in court

H. JUDICIARY
03-05-03
Attachment: 7

The 2002 Uniform Act brings all of these powers up-to-date with the reasonable expansion of enforcement authority at the state level. The Act modernizes the Uniform Securities Act of 1956 to reflect an increasingly global securities market and conforms state law to recent amendments in federal securities laws.

The 2002 Act provides state securities regulators with substantial tools to:

- Protect investors,
- Promote uniformity among the states and,
- Address recent technological innovations

**Financial Planning Association (National)**

The national FPA is in favor of uniformity among state laws regulating financial planners and investment advisors wherever possible. It opposes broadening of industry exemptions or other modifications that would affect the uniformity of the act. In this regard, I am attaching a letter received today from Robert H, Neill, Jr. Assistant Director of Governmental Relations and Counsel of the Financial Planning Association in Washington D.C. to be submitted with our testimony.

**An area of controversy**

In the interest of brevity, I will address only one provision of the act, which might be deemed controversial by your committee and the conferees. The definition of "security" largely determines the scope of the Act. For example, the new Act addresses:

- *Uncertified* **as** well as *certified* securities
- Limited liability companies as well as limited partnerships
- Viatical settlements of insurance contracts

...and other areas in which abuses have been detected.

Following federal law, interests in pension plans subject to **ERISA** are excluded from the definition of "security" as are fixed insurance contracts also regulated under other laws.

The new Act, as did the 1956 Act, leaves open for resolution state by state whether variable annuity contracts issued by insurance companies should be excluded from the definition of "security." Variable annuities, which operate like and compete with mutual funds, are securities under federal law. Because the separate investment accounts of variable annuities are often managed by mutual fund managers, they would likely be registered with the **SEC** as investment companies. They are considered to be federally covered securities not currently subject to state registration. Including them within the definition of "security" would have the effect of making their sale subject to the notice filing and antifraud provisions of the 2002 Uniform Act and would require agent registration for their sellers.

It is important for you to know that both the National Financial Planning Association and the Greater Kansas City Chapter of the Financial Planners Association have gone on record as supporting the inclusion of variable annuities within the definition of securities to be regulated by the Kansas Securities Commissioner. We stand united on this issue.

A polling of our board indicates that most of our board are licensed under both the insurance and securities regulators. While variable insurance products are a hybrid of the insurance and securities industries, they are marketed as investments and perceived as such by the public. It is our opinion that the uninformed public is only vaguely aware of the differences between mutual funds and variable annuities. Therefore, we believe that the Securities Commissioner of Kansas should specifically regulate- the marketing of variable annuities.

**Education is important**

We believe strongly that education is a potent weapon against fraud and deceit and we join FPA in calling for the use of the proceeds from fraud settlements to fund financial literacy and investor education.

We are appreciative of your interest in our views regarding HB 2347 and we would be pleased to respond to questions.

FPA
THE FINANCIAL PLANNING ASSOCIATION

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February 19, 2003

Honorable Michael R. O'Neal
Chair, Judiciary Committee
House of Representatives
Statehouse
300 SW 10th Ave.
Topeka, KS 66612-1504

***Re:*** ***House Bill 2347, An Act Enacting the Kansas Uniform Securities Act***

Dear Chairman O'Neal:

The Financial Planning Association ("FPA[1]") would like to submit formal comments on House Bill 2347, a bill to enact the Uniform Securities Act 2002 (the "Act"). FPA enjoys an excellent working relationship with the Kansas Securities Commission, and we look forward to working with you and the other members of the Judiciary Committee on this legislation as well. In general we support key provisions of the Act that benefit the financial planning profession and enhance consumer protection; however, there are a few issues of particular concern to FPA that we would like to bring to your attention:

**New Section 2 (15): Definition of Investment Adviser.** The FPA is opposed to the inclusion of an exemption from the definition of "investment adviser" in subparagraph (vi) that would allow "savings institutions" to avoid regulation as investment advisers under the Act. Historically, the term "investment adviser" as defined in federal law in section 202(a)(11) of Investment Advisers Act of 1940[2] (the "Advisers Act") has excluded all "banks" and "bank holding companies," but the exclusion was not extended to thrift institutions. After the enactment of the Gramm-Leach-Bliley Act[3] (the "GLB Act"), the exclusion for banks was narrowed so that banks acting as investment advisers to investment companies are no longer excluded from the definition. FPA would like to see this exclusion for banks eliminated entirely as banks have increasingly started to offer investment

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[1] The Financial Planning Association is the largest organization in the United States representing financial planners and affiliated firms. FPA is domiciled in Washington, D.C., with administrative offices in Atlanta and Denver, and represents more than 28,000 financial planners and 99 local chapters throughout the United States, including approximately 400 members in the state of Kansas.

[2] 15 U.S.C. §§ 80b-1 to 80b-2 (2000); 54 Stat.847 (1940).

[3] Pub. L. No. 106-102, 113 Stat. 1338 (1999).

FEB. 28. 2003 6:40PM COMMERCE BANK NO. 089 P. 7

advisory services. FPA believes that in a time when investors are increasingly concerned about disclosure of conflicts of interest by financial institutions, banks should not be exempt.

The congressional enactment of the GLB Act supports the concept of functional regulation where regulators essentially retain authority over functional areas of activity, irrespective of the financial institution providing the product or service. FPA opposes expansion of the banking exemption to thrifts as an unwise step backwards from functional regulation. As noted above, FPA is concerned that expanding the exemption to include thrifts reduces investor protection by eliminating the disclosure of conflicts of interest, information on the adviser's qualifications, and other critical information that clients of investment advisers but not thrifts must receive. Excluding thrifts from registration will erode the level playing field for investment advisers and financial planners by adding to the list of exempted industries that wish to provide identical or similar advisory services. Creating an exemption for thrifts will provide an unfair disadvantage to investment advisers subject to registration and regulation under the Act. FPA actively opposed H.R. 3951, a bill that was proposed in Congress that would have created a similar exemption for thrifts on the federal level. H.R. 3951 failed to pass, and FPA opposes creating a similar exemption on the state level.

**New Section 2 (28): Definition of Security.** FPA is aware that the insurance industry strongly opposes harmonizing the federal definition of "Security" under state law as proposed in this Act.[4] We understand that language may be introduced to amend the definition of security to remove sales of variable annuity products from the scope of the Office of Financial and Insurance Services' fraud enforcement authority. Paragraph (B) of Section 2(28) of the Act reads:

> (A) *The term does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or other specified period.*

FPA opposes the insertion of additional language to this section to exclude variable annuity products from the definition of "security". Variable insurance products are a hybrid, part insurance product and part securities product, but they are marketed as investments. As such, we believe that the Act should provide for functional regulation of agents selling variable products.

**New Section 27 (a): Filing Fees.** Section 27 creates a $300 cap on filing fees for investment advisers and creates a $100 cap on filing fees for investment adviser representatives. We recognize that these statutory caps do not create an immediate increase in current filing fees which are $100 for investment adviser firms and $50 for investment adviser representatives; however, FPA is opposed to any resulting regulatory increase in fees for advisers or representatives at this time. We appreciate the fact that Kansas lawmakers listen to the concerns of financial planners licensed in the state. We acknowledge that the Securities Commission adopted a $100 fee

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[4] The leading case for the proposition that a variable product is subject to regulation as a security is <u>SEC v. Variable Annuity Life Insurance Company of America</u>, 359 U.S. 65 (1959).

reduction for investment advisers in 2001 to counteract increased fees imposed on advisers at that time. This fee reduction was a result of a new $100 online registration fee for a new required online adviser registration system that began in 2001. As a result total fees for advisers in Kansas remained stable instead of increasing by $100 per adviser. FPA members registered as investment advisers with the state of Kansas are typically small businesses subject to ongoing compliance, continuing education and other licensing costs to do business in the state. Increasing their registration and licensing fees in this economic environment is not in the best interest of these independent businesses or their clients and will be actively opposed by FPA.

**New Section 40 (d): Investor Education.** FPA supports the concept of an investor education fund to develop and implement investor education initiatives to inform the public about investing in securities and the prevention and detection of securities fraud. FPA believes that the best defense against securities fraud is financial literacy and the ability to make informed financial decisions. We are pleased to acknowledge that state regulators have recognized the benefits of financial literacy programs and have become proactive in the area of investor education in recent years. As you are probably aware, the North American Securities Administrators Association ("NASAA") and each individual state recently received a total of $100 million as the result of a settlement with Merrill Lynch concerning analyst conflicts of interest related to its investment banking business; the state of Kansas received $500,000. FPA hopes to see at least a portion of any future settlements from investor fraud used to fund financial literacy and investor education, and we have pledged our support to state regulators interested in working to amend state laws to provide greater resources for investor education.

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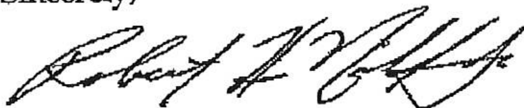
In closing, we offer our support for HB 2347, yet we urge you to fully consider our views and to evaluate the investor protection benefits of each of the sections that we have outlined. FPA sincerely appreciates your consideration of our comments regarding HB 2347, and we would be pleased to respond to any questions you may have at your convenience. Please do not hesitate to contact the undersigned at 202.626.8772.

Sincerely,



Robert H. Neill, Jr.
Assistant Director of Government Relations and Counsel

Cc: David Brant, Kansas Securities Commissioner

# <u>Amendments to House Bill 2347</u>

The following technical amendments should be made to the bill:

1. On page 26, line 35, "15(I)" should be changed to "15(i)".
2. On page 56, line 7, "registrant" should be changed to "person".

In addition, the Kansas Securities Commissioner has agreed to support the following amendments:

1. Page 4, line 10. Amend subsection 2(11) by deleting the word "or" at the end of paragraph (N), inserting the following language into paragraph (O), and moving the existing language in paragraph (O) into a new paragraph (P).

   any other person, other than an individual, of institutional character with total assets in excess of $10,000,000 not organized for the specific purpose of evading this act; or

2. Page 5, line 19. Amend subsection 2(16)(C) to insert the portion that is underlined below:

   (C) is employed by or associated with a federal covered investment adviser, unless the individual has a "place of business" in this State <u>as that term is defined by rule adopted under Section 203A of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-3a)</u> and is
   (i) an "investment adviser representative" as that term is defined by rule adopted under Section 203A of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-3a); or
   (ii) not a "supervised person" as that term is defined in Section 202(a)(25) of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-2(a)(25)); or

3. Page 14, line 39. Amend section 7 to insert the following paragraph as subsection 7(20) and renumber the successive subsections.

   (20) an offer or sale of a security through a broker-dealer registered under this act to a person not a resident of this state and not present in this state if the offer or sale does not constitute a violation of the laws of the state or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful plan or scheme to evade this act;

4. Page 16, line 11. Amend section 9 to place the existing language within subsection 9(a) and insert the following as subsection 9(b):

   (b) Knowledge of order required. A person does not violate section 11, 13 through 16, 33, or 39, and amendments thereto, by an offer to sell, offer to purchase, sale, or purchase



H. JUDICIARY
03-05-03
Attachment: 8

effected after the entry of an order issued under this section if the person did not know, and in the exercise of reasonable care could not have known, of the order.

5. Page 16, line 25. Amend subsection 11(1) by removing the following phrase: "and, if required by section 12, and amendments thereto, notice or documents have been filed and the fee has been paid"

6. Page 18, line 7. Amend subsections 13(b)(2) and (3) by inserting the portions underlined below:

   (2) a copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect; a copy of any agreement with or among underwriters; a copy of any indenture or other instrument governing the issuance of the security to be registered; and a specimen, copy, or description of the security <u>that is required by rule adopted or order issued under this *act*</u>;
   (3) copies of any other information or any other records filed by the issuer under the Securities Act of 1933 <u>requested by the administrator</u>; and

7. Page 61, line 28. Amend section 49 by inserting the following language into subsection (e), and moving the existing language in subsection (e) into a new subsection (f).

   (e) Publications, radio, television, or electronic communications. An offer to sell or to purchase is not made in this state when a publisher circulates or there is circulated on the publisher's behalf in this state a bona fide newspaper or other publication of general, regular, and paid circulation that is not published in this state, or that is published in this state but has had more than two thirds of its circulation outside this state during the previous 12 months or when a radio or television program or other electronic communication originating outside this state is received in this state. A radio or television program, or other electronic communication is considered as having originated in this state if either the broadcast studio or the originating source of transmission is located in this state, unless:
   (1) the program or communication is syndicated and distributed from outside this state for redistribution to the general public in this state;
   (2) the program or communication is supplied by a radio, television, or other electronic network with the electronic signal originating from outside this state for redistribution to the general public in this state;
   (3) the program or communication is an electronic communication that originates outside this state and is captured for redistribution to the general public in this state by a community antenna or cable, radio, cable television, or other electronic system; or
   (4) the program or communication consists of an electronic communication that originates in this state, but which is not intended for distribution to the general public in this state.

8. Amend subsections 29(c)(3), 42(b)(2)(C), and 43(b)(1) to change the maximum fine for a single violation to $25,000 and establish a cap of $1,000,000 for multiple violations, and

amend subsection 41(c)(6) to change the maximum fine to $25,000 for noncompliance with a subpoena, as follows:

29(c)(3): Page 39, line 29.
(3) a civil penalty up to ~~a maximum of $10,000 for each violation~~ $25,000 for a single violation or up to $1,000,000 for more than one violation;

41(c)(6): Page 54, line 1.
(6) impose a civil penalty of not greater than ~~$10,000~~ $25,000 for each violation; and

42(b)(2)(C): Page 55, line 21.
(C) imposing a civil penalty up to ~~$10,000 per violation~~ $25,000 for a single violation or up to $1,000,000 for more than one violation;

43(b)(1): Page 56, line 9.
(1) A civil penalty up to ~~a maximum of $10,000 for each violation~~ $25,000 for a single violation or up to $1,000,000 for more than one violation;

9. Amend the following subsections to change the interest rate from 15 percent to the judgment rate of interest as set forth in K.S.A. 16-204.

29(c)(4): Page 39, line 32.
(4) an order requiring the registrant to pay restitution for any loss or disgorge any profits arising from a violation, including, in the administrator's discretion, the assessment of interest ~~not to exceed 15% per annum~~ from the date of the violation at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto;

38(b)(1): Page 46, line 42.
(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest ~~at 15% per annum~~ from the date of the purchase at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto, costs, and reasonable attorneys' fees determined by the court, upon the tender of the security, or for actual damages as provided in paragraph (3).

38(b)(3): Page 47, line 9.
(3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest ~~at 15% per annum~~ from the date of the purchase at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto, costs, and reasonable attorneys' fees determined by the court.

38(c)(3): Page 47, line 33.
(3) Actual damages in an action arising under this subsection are the difference between the price at which the security was sold and the value the security would

have had at the time of the sale in the absence of the purchaser's conduct causing liability, and interest ~~at 15% per annum~~ from the date of the sale of the security at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto, costs, and reasonable attorneys' fees determined by the court.

38(e): Page 48, line 2.

(e) Liability of unregistered investment adviser and investment adviser representative. A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of section 20(a), 21(a), or 35, and amendments thereto, is liable to the client. The client may maintain an action to recover the consideration paid for the advice, interest ~~at 15% per annum~~ from the date of payment at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto, costs, and reasonable attorneys' fees determined by the court.

38(f)(1): Page 48, line 17.

(1) The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest ~~at 15% per annum~~ from the date of the fraudulent conduct at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto, costs, and reasonable attorneys' fees determined by the court, less the amount of any income received as a result of the fraudulent conduct.

39(1)(B): Page 50, line 7.

(B) if the basis for relief under this section may have been a violation of section 38(b), and amendments thereto, an offer to repurchase the security for cash, payable on delivery of the security, equal to the consideration paid, and interest ~~at 15% per annum~~ from the date of the purchase at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto, less the amount of any income received on the security, or, if the purchaser no longer owns the security, an offer to pay the purchaser upon acceptance of the offer damages in an amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it, and interest ~~at 15% per annum~~ from the date of the purchase at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto, in cash equal to the damages computed in the manner provided in this subsection;

39(1)(C): Page 50, line 18.

(C) if the basis for relief under this section may have been a violation of section 38(c), and amendments thereto, an offer to tender the security, on payment by the seller of an amount equal to the purchase price paid, less income received on the security by the purchaser and interest ~~at 15% per annum~~ from the date of the sale at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto; or if the purchaser no longer owns the security, an offer to pay the seller upon acceptance of the offer, in cash, damages in the amount of the difference between the price at which the security was purchased and the value the security would have had at the time of the purchase in the absence of the purchaser's conduct that may have

caused liability and interest ~~at 15% per annum~~ from the date of the sale at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto;

39(1)(E): Page 50, line 33.

(E) if the basis for relief under this section may have been a violation of section 38(e), and amendments thereto, an offer to reimburse in cash the consideration paid for the advice and interest ~~at 15% per annum~~ from the date of payment at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto; or

39(1)(F): Page 50, line 37.

(F) if the basis for relief under this section may have been a violation of section 38(f), and amendments thereto, an offer to reimburse in cash the consideration paid for the advice, the amount of any actual damages that may have been caused by the conduct, and interest ~~at 15% per annum~~ from the date of the violation causing the loss at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto;

43(b)(3): Page 56, line 12.

(3) an order requiring the person to pay restitution for any loss or disgorge any profits arising from the violation, including, in the administrator's discretion, the assessment of interest ~~not to exceed 15% per annum~~ from the date of the violation at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto;