



DIVISION OF  
TRADING AND MARKETS

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC 20549

March 12, 2015

Christopher M. Salter  
Allen & Overy LLP  
1101 New York Avenue, NW  
Washington, DC 20005

Re: NYLIFE Securities LLC

Dear Mr. Salter:

This responds to your March 6, 2015 letter, on behalf of NYLIFE Securities LLC (“NYLIFE”), requesting that the staff of the Division of Trading and Markets (the “Division”) confirm that it will not recommend enforcement action to the Securities and Exchange Commission (the “Commission”) if NYLIFE promptly transmits customer funds received in connection with sales of securities on a subscription-way basis in accordance with the Commission’s exemptive order (the “Exemptive Order”) concerning sales of deferred variable annuities.<sup>1</sup>

I understand the following facts to be pertinent to your request. NYLIFE is a Commission-registered broker-dealer under Exchange Act Section 15(b) and is a member of the Financial Industry Regulatory Authority, Inc. (“FINRA”). NYLIFE’s geographically dispersed sales force sells securities issued by affiliated and third party issuers on a subscription-way basis. Sales of securities on a subscription-way basis at NYLIFE typically involve a NYLIFE representative meeting with a customer, recommending a security, assisting the customer in completing an application for the purchase of shares, and obtaining a check payable to the issuer from the customer. The representative then forwards the application and check to NYLIFE’s corporate office where it is reviewed for suitability, among other things. NYLIFE is not an underwriter of or dealer in any redeemable security issued by an open-end registered investment company (“RIC”) that NYLIFE sells on a subscription-way basis. Nor is NYLIFE designated in any RIC’s prospectus as authorized to consummate transactions in a redeemable security issued by the RIC that NYLIFE sells on a subscription-way basis.

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<sup>1</sup> Securities Exchange Act of 1934 (“Exchange Act”) Release No. 56376, 72 FR 52400 (Sept. 13, 2007). See also Exchange Act Release No. 59772 (Apr. 15, 2009), 74 FR 18419, at 18422 n.37 (Apr. 22, 2009) (Order Approving File No. SR-FINRA-2008-019) (explaining in its order approving amendments that the Exemptive Order continues to apply, notwithstanding the new starting point for the principal review period under FINRA’s deferred variable annuity rule); FINRA *Regulatory Notice* 10-05, at 4 n.6 (Jan. 2010) (same).

You represent that NYLIFE's obligation to supervise customer subscription-way transactions under FINRA Rules 2111 and 3110 conflict with the firm's obligation to promptly transmit customer funds under Exchange Act Rule 15c3-3. FINRA Rules 2111 and 3110 require NYLIFE to supervise customer transactions to ensure, among other things, that recommended transactions are suitable. You contend that it is not possible to comply with these FINRA rules and promptly transmit customer funds under Rule 15c3-3; if NYLIFE promptly transmits customer funds it is unable to meaningfully supervise subscription-way sales.

The Commission has interpreted "promptly transmit" to mean when "transmission or delivery is made no later than noon of the next business day after the receipt of such funds or securities."<sup>2</sup> A firm "receives" customer funds when a registered representative receives a check from a customer.<sup>3</sup> Consequently, a broker-dealer is required to send all checks received by a registered representative in connection with the sale of securities on a subscription-way basis to the issuers of these products by noon of the business day following receipt.<sup>4</sup>

FINRA Rule 2111 provides that a member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation.<sup>5</sup> FINRA Rule 3110(b)(2) requires a broker-dealer to establish, maintain, and enforce written procedures for the review by a registered principal evidenced in writing of all transactions relating to the investment banking or securities business of the member, although Supplementary Material .05 to the Rule states that a member may use a risk-based review system to comply with Rule 3110(b)(2)'s requirement that a registered principal review all such transactions and further provides that a member is not required to conduct detailed reviews of each transaction if a member is using a reasonably designed risk-based system that provides a member with sufficient information that permits the member to focus on the areas that pose the greatest numbers and risks of violations.<sup>6</sup> Such

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<sup>2</sup> See Exchange Act Release No. 31511 (Nov. 24, 1992), note 11, and 17 CFR 240.15c3-1(c)(9).

<sup>3</sup> See Interpretation of Financial Responsibility Rules, Rule 15c3-3 (Exhibit A-Item 1)/18, available at <http://www.finra.org/Industry/Regulation/Guidance/FOR/>.

<sup>4</sup> The location where a check is received does not modify this requirement. For example, a broker-dealer that receives checks in multiple branch offices and forwards those checks to a central location for processing must transmit the check to the appropriate third party by noon of the next business day after the check was received by the branch office.

<sup>5</sup> FINRA Rule 2111(a).

<sup>6</sup> FINRA Rules 3110(b)(2) and 3110.05.

procedures must be reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA rules, including FINRA Rule 2111.<sup>7</sup>

You represent that, due to the nature of subscription-way sales, it is extremely difficult for NYLIFE to meaningfully supervise the sales practices of its representatives, including suitability of customer transactions, and to promptly transmit customer funds to issuers. In order for NYLIFE to supervise subscription-way sales and promptly transmit customers' checks to issuers, NYLIFE would need to perform same-day principal reviews. This would require NYLIFE to have in each of its many local offices a registered principal who has the time and expertise to review transactions for suitability. You represent, however, that it is not possible for NYLIFE to sufficiently decentralize its sales supervision function to permit a timely review of subscription-way sales and to promptly transmit customer funds.

To ensure that subscription-way sales receive a thorough suitability review that is applied consistently across NYLIFE's offices, by trained and dedicated personnel whose compensation is not based on the sales being reviewed, NYLIFE has established procedures for performing suitability and other sales practice reviews in a central location rather than in its numerous branch offices and other offices of supervisory jurisdiction ("OSJs"). This process requires representatives to forward subscription-way applications and customer checks to the central location, making it impossible for the check to be received and reviewed in that location and then transmitted to the issuer by noon of the day following receipt by the representative. As a result, in order to promptly transmit customer funds, NYLIFE is effectively obligated to review such transactions after transmitting the customers' applications and funds to the issuer. If a principal concludes that a transaction is unsuitable or otherwise should not have been executed, NYLIFE must then unwind the transaction. Unwinding transactions can be difficult and costly due to changes in market values of securities, fees — such as short term redemption fees — imposed by issuers, and potentially adverse tax consequences to the customer.

On September 7, 2007, the Commission approved NASD Rule 2821, requiring, among other things, that a principal review and approve transactions involving deferred variable annuities.<sup>8</sup> NASD Rule 2821 was subsequently recodified and consolidated into FINRA's rules as FINRA Rule 2330.<sup>9</sup> FINRA Rule 2330 requires that prior to transmitting a customer's application for the purchase of a deferred variable annuity to the issuer, but in no case later than seven business days after an OSJ receives a complete and correct application, a registered principal must review and determine whether he or she approves of a recommendation that a customer purchase or exchange a deferred variable annuity. In conjunction with originally approving NASD Rule 2821, the Commission issued the

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<sup>7</sup> FINRA Rule 3110(a).

<sup>8</sup> Exchange Act Release No. 56375, 72 FR 52403 (Sep. 13, 2007). On April 15, 2009, the Commission approved amendments to NASD Rule 2821. Exchange Act Release No. 59772, 74 FR 18419 (Apr. 22, 2009).

<sup>9</sup> Exchange Act Release No. 61122, 74 FR 65816 (Dec. 11, 2009).

Exemptive Order exempting, subject to specified conditions, broker-dealers from any additional requirements of Rule 15c3-3 due solely to a failure to promptly transmit a check made payable to an insurance company for the purchase of a deferred variable annuity product.<sup>10</sup> The Commission conditioned the relief in the Exemptive Order on the following:

1. The transaction must be subject to the principal review requirements of NASD Rule 2821 (now FINRA Rule 2330) and a registered principal must review and determine whether he or she approves of the purchase or exchange of the deferred variable annuity within the time period set forth in that rule, currently seven business days after an OSJ of the member receives a complete and correct application package;
2. The broker-dealer must promptly transmit the check no later than noon of the business day following the date a registered principal reviews and determines whether he or she approves of the purchase or exchange of a deferred variable annuity; and
3. The broker-dealer must maintain a copy of each such check and create a record of the date the check was received from the customer and the date the check was transmitted to the insurance company if approved, or returned to the customer if rejected.

Moreover, paragraph (b)(3) of Rule 2330 imposes an additional requirement. That provision states, “[p]romptly after receiving information necessary to prepare a complete and correct application package for a deferred variable annuity, a person associated with a member who recommends the deferred variable annuity shall transmit the complete and correct application package to an [OSJ] of the member.”

NYLIFE requires in its procedures that a registered principal must review and either approve or disapprove each recommended sale of a security on a subscription-way basis *prior* to sending the application and check to the issuer. However, as noted, this process takes longer to complete than is permitted by the requirement to promptly transmit customer funds.

Based on your representations, the staff of the Division will not recommend enforcement action to the Commission if NYLIFE or any other broker-dealer in similar circumstances holds customers’ checks payable to issuers if the purpose for holding the customers’ checks is to complete principal suitability reviews of each sale of a recommended subscription-way security and:

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<sup>10</sup> See *supra* note 1. The Exemptive Order also applies to any additional requirements under Exchange Act Rule 15c3-1 due solely to a failure to promptly transmit a check made payable to an insurance company for the purchase of a deferred variable annuity product.

1. Establishes policies and procedures reasonably designed to ensure that each check is safeguarded and that a registered representative of the member who recommends a sale of a security on a subscription-way basis promptly prepares and forwards a complete and correct application package to an OSJ of the member regarding such security;
2. Causes a registered principal to perform a suitability review in accordance with FINRA Rule 2111 and determines whether he or she approves of each recommended subscription-way sale<sup>11</sup> within seven business days after an OSJ of the member receives a complete and correct application package;<sup>12</sup>
3. Transmits the check no later than noon of the business day following the date the registered principal reviews and determines whether he or she approves the transaction;
4. Maintains a copy of each such check and creates a record of the date the check was received from the customer and the date the check was transmitted to the issuer if approved, or was returned to the customer if rejected; and
5. Discloses to customers its process for handling customer checks payable to issuers for subscription-way securities transactions in advance of each transaction.

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<sup>11</sup> Although, as discussed above, FINRA Rule 3110.05 allows a member to use a risk-based review system to comply with the requirement in FINRA Rule 3110(b)(2) that a registered principal review all transactions relating to the member's investment banking or securities business, NYLIFE represents that it requires a registered principal to review and approve each sale of a subscription-way security.

<sup>12</sup> NASD Rule 2830(m)(1) requires FINRA members (including underwriters) that engage in direct retail transactions for investment company shares to transmit payments received from customers for such shares, which such members have sold to customers, to payees (i.e., underwriters, investments companies or their designated agents) by (A) the end of the third business day following a receipt of a customer's order to purchase such shares or by (B) the end of one business day following receipt of a customer's payment for such shares, whichever is the later date. Division staff has confirmed to FINRA that it will not recommend enforcement action to the Commission if FINRA permits its members to rely on the time periods set forth in this letter, rather than those specified in Rule 2830(m), to the extent the member complies with all other conditions herein. Commission staff understands that FINRA staff is preparing to issue guidance regarding FINRA rules that is similar to the relief provided herein. Broker-dealers should consult FINRA's forthcoming guidance to ensure compliance with FINRA rules.

You should be aware that this is a staff position with respect to enforcement only and does not purport to express any legal conclusions regarding the application of the federal securities laws.<sup>13</sup> This position is based solely on the foregoing description. Factual variations could warrant a different response, and any material change in the facts must be brought to the Division's attention. This position may be withdrawn or modified if the staff determines that such action is necessary for the protection of investors, in the public interest, or otherwise in furtherance of the securities laws.

Sincerely,



Mark M. Attar  
Senior Special Counsel

cc: Kris Dailey, FINRA  
Patrice Gliniecki, FINRA  
Jim Wrona, FINRA  
Holly Smith, Sutherland Asbill & Brennan LLP

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<sup>13</sup> We note that rule 22c-1(a) under the Investment Company Act of 1940 prohibits any RIC issuing any redeemable security, any person designated in the RIC's prospectus as authorized to consummate transactions in the security, and any principal underwriter of or dealer in the security from selling and redeeming the security except at a price based on the security's current net asset value next computed after receipt of an order to purchase or redeem. A broker-dealer subject to the requirements of rule 22c-1(a) that relies on the time periods set forth in this letter to transmit an order to purchase redeemable shares issued by a RIC would have to ensure that the price of the shares is based on the net asset value next computed after receipt the order (*i.e.*, the completed and correct application and check) in accordance with the rule.

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Our reference: 0018403-0000003 NY:21800490.2

March 6, 2015

Re: *Request for "No-Action" Relief From the Prompt Transmittal Requirement Under Exchange Act Rule 15c3-3*

Dear Mr. Macchiaroli:

We are writing on behalf of our client NYLIFE Securities LLC ("NYLIFE") to confirm that the staff of the Division of Trading and Markets (the "**Division**") will not recommend enforcement action to the Securities and Exchange Commission (the "**Commission**") if NYLIFE promptly transmits customer funds received in connection with sales of securities on a subscription-way basis in accordance with the Commission's exemptive order (the "**Exemptive Order**") concerning sales of deferred variable annuities.<sup>1</sup>

NYLIFE is a Commission-registered broker-dealer under Section 15(b) of the Exchange Act of 1934, as amended (the "**Exchange Act**") and is a member of the Financial Industry Regulatory Authority, Inc. ("**FINRA**").<sup>2</sup> NYLIFE utilizes a large and geographically dispersed sales force to sell, among other products, mutual fund shares and Section 529 Plans issued by affiliated and third party issuers on a subscription-way basis.<sup>3</sup> These sales of securities on a subscription-way basis at NYLIFE typically involve a NYLIFE representative meeting with a customer, recommending a security,

<sup>1</sup> Exchange Act Release No. 56,376, 72 Fed. Reg. 52,400 (Sept. 13, 2007). See also Exchange Act Release No. 59772 (Apr. 15, 2009), 74 Fed. Reg. 18,419, at 18,422 n.37 (Apr. 22, 2009) (Order Approving File No. SR-FINRA-2008-019) (explaining in its order approving amendments that the exemption order continues to apply, notwithstanding the new starting point for the principal review period under FINRA's deferred variable annuity rule); FINRA *Regulatory Notice* 10-05, at 4 n.6 (Jan. 2010) (same).

<sup>2</sup> With respect to its subscription-way business, NYLIFE relies upon the "(k)(2)(i)" exemption under Rule 15c3-3 under the Securities Exchange Act of 1934, as amended ("**Exchange Act**") and computes its regulatory capital requirement pursuant to the alternative method under the Net Capital Rule, Exchange Act Rule 15c3-1. With respect to NYLIFE's introduced brokerage accounts, it relies upon Rule 15c3-3(k)(2)(ii) and introduces such accounts to a clearing firm on a fully disclosed basis. NYLIFE's introduced brokerage accounts are not at issue in this request letter.

<sup>3</sup> NYLIFE has approximately 6,500 registered representatives located in all 50 states and operates approximately 130 offices of supervisory jurisdiction ("**OSJ**") and 2,350 branch offices.

assisting the customer in completing an application for the purchase of shares, and obtaining a check payable to the issuer or another third party on behalf of the issuer, such as a product sponsor (issuers and third parties acting on behalf of issuers are referred to in this letter collectively as the "issuer") from the customer. The representative then forwards the application and check to NYLIFE's corporate office where it is reviewed for suitability, among other things. If the transaction is approved, the check and application are forwarded to the issuer.<sup>4</sup>

### ***The Requirement to Promptly Transmit Customer Funds Conflicts with the Requirement to Supervise Sales Practices***

NYLIFE's obligation to supervise customer subscription-way transactions under FINRA Rules 2111 and 3110 conflicts with its obligation to promptly transmit customer funds under Exchange Act Rule 15c3-3. As discussed more fully below, FINRA Rules 2111 and 3110 require NYLIFE to supervise customer transactions to ensure, among other things, that recommended transactions are suitable. It is not possible for NYLIFE to comply with these FINRA rules and promptly transmit customer funds under Rule 15c3-3; if NYLIFE promptly transmits customer funds it is unable to meaningfully supervise subscription-way sales.

The requirement to promptly transmit customer funds is principally intended to reduce the risk that a broker-dealer that has possession of customer funds will convert or misuse those funds.<sup>5</sup> The Commission has interpreted "promptly transmit" to mean when "transmission or delivery is made no later than noon of the next business day after the receipt of such funds or securities."<sup>6</sup> Division staff has stated that a firm "receives" customer funds when a registered representative receives a check from a customer.<sup>7</sup> Consequently, a broker-dealer is required to send all checks received by a registered representative in connection with the sale of securities on a subscription-way basis to the issuers of these products by noon of the business day following receipt.<sup>8</sup>

FINRA Rule 2111 provides that when recommending that a customer purchase, sell or exchange any security, a broker-dealer or an associated person "must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile." Also, prior to executing the transaction, a broker-dealer must make a reasonable effort to obtain certain information, including the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such

<sup>4</sup> NYLIFE represents that NYLIFE is not an underwriter of or dealer in any redeemable security issued by an open-end registered investment company ("RIC") that NYLIFE sells on a subscription-way basis. Nor is NYLIFE designated in any RIC's prospectus as authorized to consummate transactions in a redeemable security issued by the RIC that NYLIFE sells on a subscription-way basis.

<sup>5</sup> See *supra* note 1. The potential for the loss of customer funds, however, is extremely low when checks are made payable to issuers and not to broker-dealers. It is extremely difficult for a registered representative to cash a check made payable to an issuer. In the event that a registered representative were able to cash such a check, the bank, not the customer, the issuer or the brokerage firm, would suffer the loss. Under the Uniform Commercial Code the forged signature endorsing the check on behalf of the issuer would not entitle the bank accepting the check to the right to receive funds, thereby protecting the customer from loss. See U.C.C. § 3-403 (2001).

<sup>6</sup> See Exchange Act Release No. 31,511 (Nov. 24, 1992), n.11, and 17 CFR § 240.15c3-1(c)(9).

<sup>7</sup> See Interpretation of Financial Responsibility Rules, Rule 15c3-3 (Exhibit A-Item 1)/18, available at <http://www.finra.org/Industry/Regulation/Guidance/FOR/>.

<sup>8</sup> The location where a check is received does not modify this requirement. For example, a broker-dealer that receives checks in multiple branch offices and forwards those checks to a central location for processing must transmit the check to the appropriate third party by noon of the next business day after the check was received by the branch office.

recommendation.<sup>9</sup> FINRA Rule 3110(b)(2) requires a broker-dealer to establish, maintain, and enforce written procedures for the review by a registered principal, evidenced in writing, of all transactions relating to the investment banking or securities business of the broker-dealer, although Supplementary Material .05 to the Rule states that a broker-dealer may use a risk-based review system to comply with Rule 3110(b)(2)'s requirement that a registered principal review all such transactions and further provides that a broker-dealer is not required to conduct detailed reviews of each transaction if a member is using a reasonably designed risk-based system that provides a broker-dealer with sufficient information that permits the member to focus on the areas that pose the greatest numbers and risks of violations.<sup>10</sup> Such procedures must be reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA rules, including FINRA Rule 2111.<sup>11</sup>

Due to the nature of subscription-way sales, it is extremely difficult for NYLIFE to meaningfully supervise the sales practices of its representatives, including suitability of customer transactions, and to promptly transmit customer funds to issuers. As previously discussed, subscription-way sales involve a representative meeting with a customer, assisting the customer to complete the subscription-way application and, at the close of the meeting, taking the application and a check with him to forward to the issuer. In order for NYLIFE to supervise subscription-way sales and promptly transmit customers' checks to issuers, NYLIFE needs to be able to perform same-day principal reviews. Because NYLIFE requires a registered principal to review and approve each sale of a subscription-way security, this would require NYLIFE to have in each of its many local offices a registered principal who has the time and expertise to review transactions for suitability. It is not possible, however, for NYLIFE to sufficiently decentralize its sales supervision function to permit a timely review of subscription-way sales and to promptly transmit customer funds.

In order to ensure that subscription-way sales receive a thorough suitability review that is applied consistently across NYLIFE's offices, by trained and dedicated personnel whose compensation is not based on the sales being reviewed, NYLIFE has established procedures for performing suitability and other sales practice reviews in a central location rather than in its numerous branch offices and other offices of supervisory jurisdiction ("OSJs"). This process requires representatives to forward subscription-way applications and customer checks to the central location, making it impossible for the check to be received and reviewed in that location and then transmitted to the issuer by noon of the day following receipt by the representative.

As a result, in order to promptly transmit customer funds, NYLIFE is effectively obligated to review such transactions after transmitting the customers' applications and funds to the issuer. If a principal concludes that a transaction is unsuitable or otherwise should not have been executed, NYLIFE must then unwind the transaction. Unwinding transactions can be difficult and costly due to changes in market values of securities, fees — such as short term redemption fees — imposed by issuers, and potentially adverse tax consequences to the customer.

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<sup>9</sup> FINRA Rule 2111(a). FINRA Rule 2111 requires the broker-dealer to obtain the customer's investment profile, which includes: "the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose" that is relevant to the recommendation.

<sup>10</sup> FINRA Rules 3110(b)(2) and 3110.05.

<sup>11</sup> FINRA Rule 3110(a).

### ***FINRA Rule 2330, NASD Rule 2821 and the Exemptive Order***

On September 7, 2007, the Commission approved NASD Rule 2821, requiring, among other things, that a principal review and approve transactions involving deferred variable annuities.<sup>12</sup> NASD Rule 2821 was subsequently recodified and consolidated into FINRA's rules as FINRA Rule 2330.<sup>13</sup> FINRA Rule 2330 requires that prior to transmitting a customer's application for the purchase of a deferred variable annuity to the issuer, but in no case later than seven business days after an OSJ receives a complete and correct application, a registered principal must review and determine whether he or she approves of a recommendation that a customer purchase or exchange a deferred variable annuity.<sup>14</sup> In conjunction with originally approving NASD Rule 2821, the Commission issued the Exemptive Order exempting, subject to specified conditions, broker-dealers from any additional requirements of Rule 15c3-3 due solely to a failure to promptly transmit a check made payable to an insurance company for the purchase of a deferred variable annuity product.<sup>15</sup> The Commission conditioned the relief in the Exemptive Order on the following:

1. The transaction must be subject to the principal review requirements of NASD Rule 2821 (now FINRA Rule 2330) and a registered principal must review and determine whether he or she approves of the purchase or exchange of the deferred variable annuity within the time period set forth in that rule, currently seven business days after an OSJ of the member receives a complete and correct application package;
2. The broker-dealer must promptly transmit the check no later than noon of the business day following the date a registered principal reviews and determines whether he or she approves of the purchase or exchange of a deferred variable annuity; and
3. The broker-dealer must maintain a copy of each such check and create a record of the date the check was received from the customer and the date the check was transmitted to the insurance company if approved, or returned to the customer if rejected.

Moreover, paragraph (b)(3) of Rule 2330 imposes an additional requirement. That provision states, "[p]romptly after receiving information necessary to prepare a complete and correct application package for a deferred variable annuity, a person associated with a member who recommends the deferred variable annuity shall transmit the complete and correct application package to an [OSJ] of the member."

### ***Request for Relief***

Similar to FINRA Rule 2330, FINRA Rule 2111 and FINRA Rule 3110 require firms to, among other things, establish procedures for a registered principal to review and endorse all securities transactions, and to have reasonable grounds for believing that recommended transactions are suitable for the customer based on the circumstances presented. NYLIFE has concluded that in order to meaningfully supervise and review subscription-way sales, it must review such transactions prior to sending the application and the check to the issuer, and NYLIFE would like to require in its procedures

<sup>12</sup> Exchange Act Release No. 56,375, 72 Fed. Reg. 52,403 (Sept. 13, 2007). On April 15, 2009, the Commission approved amendments to NASD Rule 2821. Exchange Act Release No. 59772, 74 Fed. Reg. 18,419 (Apr. 22, 2009).

<sup>13</sup> Exchange Act Release No. 61,122, 74 Fed. Reg. 65,816 (Dec. 11, 2009).

<sup>14</sup> FINRA Rule 2330 also requires the registered representative who recommends the deferred annuity to promptly transmit the complete and correct application to the OSJ.

<sup>15</sup> See *supra* note 1. The Exemptive Order also applies to any additional requirements under Exchange Act Rule 15c3-1 due solely to a failure to promptly transmit a check made payable to an insurance company for the purchase of a deferred variable annuity product.

that a registered principal must review and either approve or disapprove each recommended sale of a security on a subscription-way basis prior to sending the application and check to the issuer. However, as noted, this process would likely take longer to complete than is permitted by the requirement to promptly transmit customer funds.

Accordingly, we are requesting that the staff of the Division not recommend enforcement action to the Commission if NYLIFE holds customers' checks payable to issuers if the purpose for holding the customers' checks is to complete principal suitability reviews of each sale of a recommended subscription-way security and NYLIFE:

1. Establishes policies and procedures reasonably designed to ensure that the check is safeguarded and that a registered representative of the member who recommends a sale of a security on a subscription-way basis promptly prepares and forwards a complete and correct application package to an OSJ of the member regarding such security;
2. Causes a registered principal to perform a suitability review in accordance with FINRA Rule 2111 and determine whether he or she approves of each recommended subscription-way sale within seven business days after an OSJ of the member receives a complete and correct application package;
3. Transmits the check no later than noon of the business day following the date the registered principal reviews and determines whether he or she approves the transaction;
4. Maintains a copy of each such check and creates a record of the date the check was received from the customer and the date the check was transmitted to the issuer if approved, or returned to the customer if rejected; and
5. Discloses to customers its process for handling customer checks payable to issuers for subscription-way securities transactions in advance of each transaction.

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Please contact me at (202) 683-3851 if you have any questions.

Sincerely,



Christopher M. Salter

cc: Mark Attar

Mark Gomez  
Stephen Brennan