Proposed Rules

Federal Register

Vol. 62, No. 166

Wednesday, August 27, 1997

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33–7438; File No. S7–22–97]

RIN 3235–AH23

Equity Index Insurance Products

AGENCY: Securities and Exchange Commission.

ACTION: Concept release; request for comments.

SUMMARY: The Securities and Exchange Commission is requesting comments on the structure of equity index insurance products, the manner in which they are marketed, and any other matters the Commission should consider in addressing federal securities law issues raised by equity index insurance products.

DATES: Comments must be received on or before November 20, 1997.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–6009. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7–22–97; this file number should be included on the subject line if E-mail is used. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549–6009. Electronically submitted comments will also be posted on the Commission's Internet site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Megan L. Dunphy, Attorney, Mark C. Amorosi, Branch Chief, or Susan Nash, Assistant Director, (202) 942–0670, Office of Insurance Products, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, N.W., Mail Stop 10–6, Washington, D.C. 20549–6009.

SUPPLEMENTARY INFORMATION: The Securities Act of 1933 (the "Securities Act") includes an "insurance exemption" that exempts "insurance policies" and "annuity contracts" from the Act's registration requirements. Equity index insurance products, recently introduced by the insurance industry, combine features of traditional insurance products and traditional securities. The Commission requests information about the structure of equity index insurance products and the manner in which they are marketed. The Commission also requests comment on any other matters the Commission should consider in addressing federal securities law issues raised by equity index insurance products.

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I. Background

The Commission is considering the status of equity index annuities and other equity index insurance products under the federal securities laws. Today the Commission is requesting public comment regarding these products.

An equity index annuity is a contract issued by a life insurance company that generally provides for accumulation of the contract owner's payments, followed by payment of the accumulated value to the contract owner in a lump sum or series of payments. During the accumulation period, the insurer credits the contract owner with a return that is based on changes in an equity index, such as the Standard & Poor's Composite Index of 500 Stocks ("S&P 500 Index"). The insurer also guarantees a minimum return to the contract owner if the contract is held to maturity.

Equity index annuities are designed to appeal to risk averse consumers who desire to participate in market increases, without sacrificing the guarantees of principal and minimum return offered in traditional fixed annuities. Other consumers may be seeking to lock in prior gains from stock market investments while retaining some exposure to the market.[1]

The first equity index annuities were introduced in 1995.[2] By the end of 1995, there were four insurers marketing equity index annuities; and, by the end of 1996, over 30 equity index annuities were available.[3] In 1997, this expansion is expected to continue with as many as 40 insurers issuing an estimated 50 equity index annuity contracts.[4] Equity index annuity sales reached $2 billion in 1996, with 1997 sales projected to be as much as $10 billion.[5] Recently, the types of equity index insurance products have proliferated, with single premium deferred annuities joined by flexible premium deferred annuities, immediate annuities, and life insurance policies.[6]

Equity index insurance products combine features of traditional insurance products (guaranteed minimum return) and traditional securities (return linked to equity markets). Depending upon the mix of features in any insurance product, including an equity index insurance product, the product may or may not be entitled to exemption from registration

[1] See, *e.g.*, Bill Harris, "Tips For Selling Indexed Annuities," National Underwriter, Aug. 5, 1996, at 12.

[2] See, *e.g.*, Linda Koco, "3 More Equity Index Annuities Make Mkt. Debuts," National Underwriter, Dec. 23, 1996, at 11.

[3] See, *e.g.*, "More Insurers Expected To Jump On Indexed Bandwagon," Bank Investment Product News, Feb. 3, 1997, at 11 [hereinafter "*Bank Investment Product News*"]; James B. Smith, Jr., "Survey Shows Strong Interest in Offering EIAs," National Underwriter, Jan. 20, 1997, at 14 [hereinafter "Survey"].

[4] See, *e.g.*, Bank Investment Product News, *supra* note 3.

[5] See, *e.g.*, Bridget O'Brian and Leslie Scism, "Equity-Indexed Annuities Score Big Hit, But They Put a High Price on Protection," Wall Street Journal, May 30, 1997, at C1.

[6] See, *e.g.*, Linda Koco, "Some Index Annuity Products Are Going Optional," National Underwriter, Oct. 21, 1996, at 21 [hereinafter "Going Optional"].

under the Securities Act as an ''insurance policy'' or ''annuity contract.'' To date, most equity index annuities have not been registered under the Securities Act, although commentators have acknowledged that substantial uncertainty exists whether all of these products are entitled to exemption from registration.[7]

The Commission believes that both purchasers and insurers may benefit from greater clarity in this area. With respect to products that are not covered by the insurance exemption, investors are entitled to the protections afforded by the federal securities laws—full disclosure concerning the issuer and the product and marketing through registered broker-dealers that are subject to the Commission's oversight. With respect to products that are covered by the insurance exemption, greater certainty would reduce the risk to all parties of expensive and time-consuming litigation.

The Commission is considering the issues raised by equity index insurance products. As part of its consideration, the Commission today seeks public comment on the structure of these products, the manner in which they are marketed, and any other matters the Commission should consider in addressing federal securities law issues raised by equity index insurance products.[8]

II. Description of Equity Index Insurance Products

A. Equity Index Annuities

1. Product Features

Equity index annuity contracts generally share two characteristics: (i) A return based on changes in an equity index, and (ii) a guaranteed minimum return if the contract is held to maturity. Other features of equity index annuity contracts vary from product to product.

Premium Payments. To date, the majority of products on the market are single premium deferred annuities, with the purchaser making one premium payment that is accumulated for some period prior to pay-out.[9] Some insurers offer flexible premium deferred annuities, permitting multiple premium payments in amounts determined by the purchaser, and immediate annuities, providing for immediate commencement of the pay-out period.[10]

Floor Guarantee. The guaranteed minimum return for a single premium product typically is 90% of premium accumulated at a 3% annual rate of interest, an amount that is generally required by applicable state insurance laws.[11]

Computation of Index-Based Return. The index-based return depends on the particular combination of indexing features specified in the contract. The most common indexing features are described below.[12]

- *Index.* The return of equity index annuities is typically based on the S&P 500 Index, but other domestic and international indices are also used. Some products permit the contract owner to select one or more indices from a specified group of indices.
- *Determining Change in Index.* Index growth generally is computed without regard to dividends. There are several methods for determining the change in the relevant index over the period of the contract. The ''point-to-point'' method compares the level of the index at two discrete points in time, such as the beginning and ending dates of the contract term. The ''high water mark'' or ''look-back'' method compares the highest index level reached on specified dates throughout the term of the contract (*e.g.*, contract anniversaries) to the index level at the beginning of the contract term. The ''annual reset,'' ''cliquet,'' or ''lock-in'' method compares the index level at the end of each contract year to the index level at the beginning of that year, with the gain for each year ''locked in'' even if the index declines in the following year. Averaging techniques may be used with these formulas to dampen the volatility of index changes. For example, in the point-to-point method, the ending index value could be computed by averaging index values on each of the final 90 days of the contract term.
- *Participation Rate or Spread.* Two methods typically are used to compute the extent to which a contract owner is credited with index growth. In some contracts, the participation rate, frequently between 75% and 90%, is multiplied by index growth to determine the applicable share of index appreciation to be credited. The participation rate is typically set at the time the annuity is purchased and may be reset either annually or at the start of the next contract term. Other contracts specify a percentage, called the ''margin'' or ''spread,'' that is subtracted from index growth to determine the applicable share of index appreciation to be credited.
- *Caps and Floors.* Some contracts limit the maximum (''cap'') and minimum (''floor'') index-based returns that may be credited to a contract. Caps and floors are generally guaranteed for the entire contract term, although a few equity index annuities provide for annual reset of the cap and floor.

Computation of Contractual Benefits. Equity index annuities provide a variety of benefits, including surrender values, annuitization benefits, and death benefits, each of which may be computed in a different manner.

Term of Product. Equity index annuities are issued for varying terms, including terms of three, five, seven, or nine years.

Surrender Charges. Surrender charges are commonly deducted from withdrawals, but these charges often are eliminated for a 30 to 45 day window at the end of each index term. There may also be a limited free withdrawal privilege.

Vesting. Vesting schedules are often implemented to deter early surrenders of contracts that credit the index-based return periodically throughout the term of the contract. Typically, a small percentage of the index-based return is available for withdrawal in the first year, with the percentage increasing over time until the entire return is available at the end of the term.

2. Funding of Insurer's Obligation

Equity index annuities typically are backed by assets held in the insurance company's general account. A portion of the general account assets is invested in fixed income instruments to support the minimum return guarantee. Insurance companies typically purchase

[7] See, *e.g.*, Jeffrey S. Puretz and Christopher M. Gregory, ''Should Equity Index Annuities Be Registered?,'' National Underwriter, Jan. 20, 1997, at 22; Stephen E. Roth and Kimberly J. Smith, ''Emerging Developments Relating to Fixed Insurance Products Under the Federal Securities Laws,'' ALI–ABA Conference on Life Insurance Company Products 45, 65–95 (1996). The equity index annuities that have been registered contain features that could reduce amounts received by contract owners below the floor typically guaranteed by equity index annuities. See, *e.g.*, Pre-Effective Amendment No. 1 to Registration Statement on Form S–1 of Keyport Life Insurance Company (File No. 333–13609) (filed Feb. 7, 1997); Pre-Effective Amendment No. 1 to Registration Statement of Valley Forge Life Insurance Company (File No. 333–02093) (filed Oct. 17, 1996).

[8] The Commission's consideration of whether equity index insurance products are exempt from registration as ''insurance products'' or ''annuity contracts'' does not relate to the status under the federal securities laws of index products issued by non-insurers to which the insurance exemption is inapplicable.

[9] See, e.g., Survey, supra note 3.

[10] See, e.g., Going Optional, supra note 6.

[11] See, e.g., Michelle Clayton, ''How Product Marketers Stylize Equity Indexed Annuities,'' Bank Mutual Fund Report, Mar. 10, 1997, at 1.

[12] See, e.g., Thomas F. Streiff, ''Three Basic Ways of Achieving Equity Indexing,'' National Underwriter, Nov. 4, 1996, at 18; William Harris, ''A Selling Perspective on Equity Indexed Annuities,'' National Underwriter, Nov. 4, 1996, at 16; Going Optional, supra note 6; Albert B. Crenshaw, ''A Rising Investment Star: Equity-Indexed Annuities,'' Washington Post, Oct. 20, 1996, at H1.

derivatives to hedge their indexed-based return obligations, although insurers vary in the degree to which they hedge these obligations.

3. Distribution Channels

The most frequently used channels of distribution for equity index annuities have been banks and insurance agents who are not licensed as registered representatives of a broker-dealer. To date, broker-dealers have played a less significant role.[13]

B. Equity Index Life Insurance

Equity index life insurance policies have been introduced recently.[14] The available policies are universal life insurance policies that permit the holder to vary the amount and timing of premium payments and change the death benefit. The cash value of an equity index life insurance policy is credited with a return that is based on changes in an equity index. As with equity index annuities, the insurer also guarantees a minimum return on the policy's cash value. Equity index life insurance policies typically offer annual crediting of index-based interest and index participation rates that are reset annually and are generally lower than those for equity index annuities.[15] At least two companies currently offer equity index life insurance policies, and it is estimated that as many as 25 companies are developing these products.[16]

III. Applicability of the Federal Securities Laws to Equity Index Insurance Products

Section 3(a)(8) of the Securities Act exempts from the registration requirements of the Act any ''insurance policy'' or ''annuity contract'' issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or similar state regulatory authority.[17] The exemption, however, is not available to all products labelled ''insurance policies'' or ''annuity contracts.'' For example, ''variable annuities,'' which pass through to the contract owner the investment performance of a pool of assets, are securities rather than exempt annuity contracts.[18]

The Commission and the courts have addressed the insurance exemption on a number of occasions. Under existing case law, factors that are important to a determination of a contract's status under Section 3(a)(8) include (1) the allocation of investment risk between insurer and contract owner and (2) the manner in which the contract is marketed.

In 1986, faced with the proliferation of annuity contracts commonly known as ''guaranteed investment contracts,'' the Commission adopted Rule 151 under the Securities Act to establish a safe harbor for certain annuity contracts that will not be deemed subject to the federal securities laws.[19] The factors that determine an annuity contract's eligibility for the safe harbor include the applicability of state insurance regulation, the assumption of investment risk by the insurer, and the manner of marketing the contract. In situations when the Rule 151 safe harbor is not applicable, the status of a contract may be analyzed by reference to the principles discussed in Rule 151 and the accompanying releases and to judicial precedents construing Section 3(a)(8).[20] This would include, for example, an annuity that does not fall within the safe harbor or a life insurance policy.

This section discusses the factors that have been used by the Commission and courts to determine whether a product is entitled to the insurance exemption, and the manner in which those factors may apply to equity index insurance products. Commenters are asked to provide detailed information on the structure, operation, and marketing of equity index insurance products. Commenters should specifically discuss the application to equity index insurance products of the factors that have been used by the Commission and the courts to determine whether a product is entitled to the insurance exemption.

A. Applicability of State Insurance Regulation

To gain the benefit of the Rule 151 safe harbor, an annuity contract is required to be issued by a corporation subject to the supervision of a state insurance commissioner, bank commissioner, or similar state regulator.[21] In addition, the contract itself is required to be subject to state regulation as an annuity or insurance.[22] Equity index insurance products on the market today generally are issued by companies subject to state insurance regulation, thereby appearing to meet this threshold requirement for insurance status.

Commenters are requested to address the status under state law of equity index insurance products. Are all of these contracts regulated as annuities or insurance? For contracts that are regulated as annuities or insurance, commenters are asked to describe the provisions of state law that apply, *e.g.*, regulation of reserves, investment restrictions, approval of contract forms, illustration requirements, market conduct standards, applicability of state insurance guaranty laws. How does the applicability of state insurance regulation to equity index insurance products affect the need for federal securities regulation of these products?

B. Investment Risk

1. Case Law

Under existing case law, the allocation of investment risk between insurer and contract owner is significant in determining whether a particular contract is insurance for purposes of the federal securities laws. In *SEC* v. *Variable Annuity Life Insurance Co.* (hereinafter ''*VALIC*''), the Supreme Court determined that absent some element of fixed return, *i.e.*,''some investment risk-taking on the part of the company,'' an annuity contract is outside the scope of Section 3(a)(8).[23] The *VALIC* court found a variable annuity contract to be a security, not insurance, when the insurer invested premiums in a pool of common stocks

[13] See, *e.g.*, Survey, *supra* note 3; Cerulli Associates, Inc. and Lipper Analytical Services, Inc., The Cerulli-Lipper Analytical Report: The State of the Variable Annuity and Variable Insurance Markets 37–40 (1996).

[14] See, *e.g.*, Linda Koco, ''Transamerica Occidental Unveils Equity-Indexed UL,'' National Underwriter, Jan. 6, 1997, at 25 [hereinafter ''Transamerica Occidental'']; Linda Koco, ''Two More Index UL Policies Make Their Debuts,'' National Underwriter, Mar. 10, 1997, at 9.

[15] See, *e.g.*, ''Transamerica Occidental,'' *supra* note 14.

[16] See, *e.g.*, Linda Koco, ''Equity Index Market Shows Signs of Fierce Competition,'' National Underwriter, Jan. 27, 1997, at 9.

[17] The Commission has previously stated its view that Congress intended any insurance contract falling within Section 3(a)(8) to be excluded from all provisions of the Securities Act notwithstanding the language of the Act indicating that Section 3(a)(8) is an exemption from the registration but not the antifraud provisions. Definition of ''Annuity Contract or Optional Annuity Contract,'' Securities Act Rel. No. 6558 (Nov. 21, 1984) [49 FR 46750, 46753 (Nov. 28, 1984)] [hereinafter ''Proposing Release''].

[18] *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959); *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202 (1967).

[19] 17 CFR 230.151; Definition of Annuity Contract or Optional Annuity Contract, Securities Act Rel. No. 6645 (May 29, 1986) [51 FR 20254 (June 4, 1986)] [hereinafter ''Adopting Release'']. A guaranteed investment contract is a deferred annuity contract under which the insurer pays interest on the purchaser's payments at a guaranteed rate for the term of the contract. In some cases, the insurer also pays discretionary interest in excess of the guaranteed rate.

[20] Adopting Release, *supra* note 19, 51 FR at 20255 n.4, 20261.

[21] 17 CFR 230.151(a)(1). This requirement is parallel to the language of Section 3(a)(8).

[22] Adopting Release, *supra* note 19, 51 FR at 20255.

[23] 359 U.S. 65, 71 (1959).

and other equities and the value of the contract owner's benefit payments varied directly with the success of the underlying investments.

The Supreme Court subsequently clarified that a contract could provide for some assumption of investment risk by the insurer, but nonetheless be a security. In *SEC* v. *United Benefit Life Ins. Co.* (hereinafter ''*United Benefit*''), the insurer guaranteed that the cash value of its variable annuity contract would never be less than 50% of purchase payments made and that, after ten years, the value would be no less than 100% of payments.[24] The Court determined that this contract, under which the insurer did assume some investment risk through minimum guarantees, was a security. In making this determination, the Court distinguished a contract ''which to some degree is insured'' from a contract of ''insurance.'' [25]

Commenters are requested to discuss generally how investment risk is allocated between insurer and contract owner in equity index insurance products. Commenters should also compare this allocation of risk to other insurance products and discuss how this allocation of investment risk affects the application of the federal securities laws to equity index insurance products.

2. Rule 151

To gain the benefit of the Rule 151 safe harbor, an insurer is required to assume the investment risk under the contract.[26] For purposes of the safe harbor, an insurer is deemed to assume the investment risk if the following conditions are satisfied.

a. Contract Value not Tied to Separate Account. The safe harbor requires that the value of the contract not vary according to the investment experience of a separate account, a separately managed pool of assets operating independently of the investment experience of the insurer's general account.[27] Equity index annuities typically are general account products, whose value does not vary according to the investment experience of a separate account. These products therefore appear to satisfy the first condition of the Rule 151 investment risk test.

Commenters are requested to describe the investments used by an insurer to support its obligations under an equity index insurance product. Commenters should also address how the nature of these investments affects the analysis of equity index insurance products under the federal securities laws. For example, should the relative levels of a contract owner's purchase payment allocated to the floor guarantee and the index-based benefit affect the status of a contract as insurance under the federal securities laws? Is the status of an equity index insurance product affected by whether, or the degree to which, an insurer hedges its obligations to pay the index-based benefit? To the extent an insurer's obligations are hedged, does it bear investment risk with respect to those obligations? In the alternative, is there, in essence, a pass-through of performance from insurer to contract owner, with the contract owner experiencing the performance of the hedging instruments that the insurer purchased to hedge the contract?

b. *Guarantee of Purchase Payments and Credited Interest.* The safe harbor requires that the insurer, for the life of the contract, guarantee the principal amount of purchase payments and credited interest, less any deduction for sales, administrative, or other expenses or charges.[28] For equity index annuities, insurers generally guarantee 90% of purchase payments and annual interest of 3%. Commenters should address whether the typical floor guarantee for equity index annuities, by itself, satisfies the investment risk requirement, or whether there must be some additional guarantee. Commenters are requested to address whether, and under what circumstances, the typical 10% deduction from purchase payments is attributable to sales, administrative, or other expenses or charges and therefore falls within the rule's parameters. Commenters should also address whether there are equity index annuities that reduce the floor guarantee by charges of any type, and how any such charges affect the investment risk analysis.[29] Commenters should also discuss any floor guarantees in equity index annuities that are different from 90% of purchase payments with annual interest of 3%. Commenters should address how the different floor guarantees affect the investment risk analysis.

Commenters should describe any floor guarantees provided by equity index life insurance products and how the guarantees affect their status under the federal securities laws. Commenters should address whether an equity index life insurance policyholder is dependent on cash value growth in excess of guaranteed minimums to gain the anticipated benefits under the policy.

c. Specified Rate of Interest. The safe harbor requires that the insurer credit a specified rate of interest, in an amount at least equal to the minimum rate required by applicable state law.[30] Equity index annuities typically appear to satisfy this condition by guaranteeing a minimum interest rate of 3%, which is generally equal to the minimum rate required by state law. Commenters should describe the minimum guaranteed rate on various equity index insurance products. Do the guaranteed rates satisfy this condition of the safe harbor?

d. Excess Interest. The safe harbor requires that the insurer guarantee that the rate of any interest to be credited in excess of the guaranteed minimum rate not be modified more frequently than once per year.[31] Rule 151, as originally proposed, would have excluded from the safe harbor any annuity that linked excess interest to an index. The Commission reasoned that an insurer that uses an index feature externalizes its discretionary excess interest rate, shifting to the contract owner all of the investment risk regarding fluctuations in that rate.[32] In adopting Rule 151, the Commission extended the rule's coverage to permit insurers to make limited use of index features in determining the excess interest rate, so long as the excess rate is not modified more frequently than annually.[33] Specifically, the insurer could specify an index to which it would refer, no more often than annually, to determine the excess rate that it would guarantee under the contract for the next 12-month or longer period. In addition, an insurer could not change the terms of the index feature used for calculating the excess rate more frequently than once per year.

Commenters are requested to discuss how the use of an index-based formula for calculating contract values under equity index annuities affects the allocation of investment risk between insurer and contract owner. How does the use of an indexed-based return determined retrospectively by reference to a formula that is established prospectively affect the status of these contracts as securities or insurance? Commenters are specifically requested

[24] 387 U.S. 202, 205 (1962).

[25] *Id.* at 211.

[26] 17 CFR 230.151(a)(2).

[27] 17 CFR 230.151(b)(1).

[28] 17 CFR 230.151(b)(2)(i).

[29] See Registration Statement of Valley Forge Life Insurance Company (File No. 333–02093) (filed Mar. 29, 1996) (minimum guaranteed value of registered equity index annuity reduced by rider charge for equity index feature).

[30] 17 CFR 230.151(b)(2)(ii) and (c).

[31] 17 CFR 230.151(b)(3).

[32] Proposing Release, *supra* note 17, 49 FR at 46753 n.19.

[33] Adopting Release, *supra* note 19, 51 FR at 20260.

to address the Commission's expressed concern with shifting the risk of fluctuations in an index rate to a contract owner and the Commission's decision to limit the benefit of Rule 151 to situations where an index is used to fix a specific excess interest rate in advance. Additionally, comment is requested on how the nature of particular indexing formulas and the duration of any guarantees of caps, floors, participation rates, margins, or other terms affect the allocation of investment risk between the contract owner and the insurer.

C. Marketing

Marketing is another significant factor in distinguishing insurance from a security. In *United Benefit,* the Supreme Court, in holding an annuity contract to be outside the scope of Section 3(a)(8), found significant the fact that the contract was ''considered to appeal to the purchaser not on the usual insurance basis of stability and security but on the prospect of 'growth' through sound investment management.''[34] Under these circumstances, the Court concluded ''it is not inappropriate that promoters' offerings be judged as being what they were represented to be.''[35] Rule 151 incorporates a ''marketing'' test.[36] As a condition to the safe harbor, the contract must not be ''marketed primarily as an investment.'' The Commission is concerned that the nature of equity index insurance products may make it particularly difficult to market these products without primary emphasis on their investment aspects.

Commenters should describe how equity index insurance products are marketed and how the marketing factor applies to equity index insurance products. Given the structure and purposes of equity index insurance products, can they be marketed without focusing primarily on their investment aspects? Comments should address both written sales materials and oral sales presentations, including the ability of an insurer to train and monitor its sales force to ensure that equity index insurance products are not marketed with primary focus on their investment aspects. Commenters are requested to identify the distribution channels that are used in marketing equity index insurance products and discuss whether the use of particular distribution channels affects an insurer's ability to market these products without focusing primarily on their investment aspects. Commenters are also asked to identify the products that are viewed as competitive alternatives to equity index annuities and address how the nature of these other products (*e.g.,* whether securities or insurance) affects the manner in which equity index insurance products are marketed.

D. Mortality Risk

When the Commission adopted the Rule 151 safe harbor, it determined not to include a requirement that the insurer assume some mortality risk through, for example, guaranteeing annuity purchase rates for the life of the contract. The Commission noted, however, that in a Section 3(a)(8) facts and circumstances analysis of contracts outside the Rule 151 safe harbor, the presence or absence of mortality risk may be an appropriate factor to consider.[37]

Commenters are requested to describe with specificity the nature of the mortality risks assumed by insurers in connection with equity index insurance products. For equity index annuities, commenters should describe the terms of any guaranteed annuity purchase rates, whether those rates are comparable to rates available in more traditional annuity contracts, and the likelihood that contract owners will annuitize. Comment is also requested on the significance of mortality risk in determining whether an equity index insurance product is exempted by Section 3(a)(8). Is mortality risk a relevant factor and, if so, what weight should it be given?

IV. Request for Comments

All interested persons are invited to submit written comments on equity index insurance products. Whenever possible, submissions should describe particular equity index insurance products with specificity and include sample sales literature and contracts. Commenters should address the ways in which equity index insurance products are similar to or different from traditional fixed annuities and life insurance, on the one hand, and variable annuities and variable life insurance, on the other. Particular emphasis should be placed on the factors described above, including state insurance law, investment risk, marketing, and mortality risk.

The Commission also requests that commenters address the following:

- Are there features that all equity index insurance products share that result in all of them being covered by the insurance exemption or, in the alternative, not covered by the insurance exemption? If so, commenters should identify the features that cause all equity index insurance products to be classified together. If not, commenters should identify the features that distinguish equity index insurance products that are covered by the insurance exemption from those that are not.
- Are there differences between broad types of equity index insurance products that are relevant to the analysis of their status under the federal securities laws? If so, commenters should separately address different types of products, *e.g.,* single premium products versus flexible premium products or annuities versus life insurance. For example, commenters should address any differences in mortality risk between equity index annuities and life insurance.

The Commission also requests comment on the implications for small business of federal securities law issues raised by equity index insurance products.

V. Conclusion

The Commission is requesting comments on a number of specific issues raised by equity index insurance products. In addition, commenters are encouraged to address any other matters that they believe merit examination.

Dated: August 20, 1997.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–22597 Filed 8–26–97; 8:45 am]

BILLING CODE 8010–01–P

[34] *United Benefit,* 387 U.S. 202, 211 (1962).

[35] *Id.* For other cases applying a marketing test, see *Berent* v. *Kemper Corp.,* 780 F.Supp. 431 (E.D. Mich. 1991), *aff'd,* 973 F.2d 1291 (6th Cir. 1992); *Associates in Adolescent Psychiatry* v. *Home Life Ins. Co.,* 729 F.Supp. 1162 (N.D. Ill. 1989), *aff'd,* 941 F.2d 561 (7th Cir. 1991); *Grainger* v. *State Security Life Ins. Co.,* 547 F.2d 303 (5th Cir. 1977).

[36] 17 CFR 230.151(a)(3).

[37] Adopting Release, *supra* note 19, at 20255–56. See also Proposing Release, *supra* note 17, at 46752 (requesting comment on whether mortality risk assumption should be a required element of the Rule 151 safe harbor); General Statement of Policy Regarding Exemptive Provisions Relating to Annuity and Insurance Contracts, Securities Act. Rel. No. 6051 (Apr. 5, 1979) [44 FR 21626, 21627–28 (Apr. 11, 1979)] (predecessor interpretive release to Rule 151 stating that meaningful mortality risk by insurer was prerequisite to determination that contract was ''insurance,'' not ''security'').