CFA Consumer Federation of America

June 21, 2010

Protect Investors: Oppose the Harkin Amendment to Exempt Equity-Indexed Annuities and Similar Hybrid Products from Securities Regulation

Dear Conferee:

We are writing to express our strong opposition to the Harkin amendment to exempt equity-indexed annuities from securities regulation. If adopted, this amendment would open a gaping hole in investor protections without any assurance that the insurance regulation relied on in its place is adequate or effective. And it would do so for one of the most abusively sold products on the market today. It has no place in a bill designed to restore investor confidence and market integrity.

The following are among the most harmful provisions of the amendment, which should at a minimum be fixed if conferees insist on moving forward with this anti-investor proposal:

- **The definition is overly broad.** The amendment is written to cover a broad range of products that combine insurance with securities. As a result, insurance companies will be able to exploit this exemption to design new products with equity-like features and to market the products as new and improved ways to participate in the securities market without having those products subject to appropriate regulation as securities. While the best option for investors would be for conferees to reject the amendment outright, at the very least the amendment should apply only to equity-indexed annuities and should not provide a prospective preemption of securities regulation for products not yet introduced.

- **The amendment encourages a race to the bottom in state standards.** The amendment would defer to state insurance regulation for any contract that satisfies a state's nonforfeiture law. If this approach were adopted, it would encourage a race to the bottom among states with regard to such laws. At a minimum, the amendment should be revised to apply only to contracts in compliance with the current model standard.

- **The amendment relies on NAIC model rules that do not provide the full range of investor protections.** By by-passing securities regulation, the amendment will allow the sale of these securities by insurance agents who lack an understanding of securities markets essential to making the basic suitability assessment those rule require. It will also exempt these products from additional protections, such as mandatory securities disclosure requirements and FINRA rules on excessive compensation, which are particularly relevant to these often exorbitantly expensive products. And it will sideline state, federal, and FINRA securities regulators who could otherwise bring additional regulatory resources to bear to end abusive practices and police compliance. At the very least, the amendment should require NAIC model rules to be strengthened to match these basic protections of securities laws, and the deadline for state adoption of these standards should be moved up.

- **The amendment could permit even weaker state insurance laws to prevail.** The amendment provides the exemption where states have adopted rules that "substantially meet" the minimum requirements of the NAIC model suitability rules. This vague language does not make clear who will determine whether the rules "substantially meet" the minimum standards or what variation will be permitted from those standards. Depending on how it is interpreted, this could provide a substantial watering down of the already weak investor protections provided under this amendment. At a minimum, the amendment should be revised to apply only where states adopt rules that "meet or exceed" the current requirements of the NAIC model. In addition, the amendment should make clear that no weakening of the NAIC model standards would be permitted.

- **The amendment would permit companies to self-certify their compliance.** The amendment would defer not only to insurance department regulation in states that have "substantially" adopted the NAIC model, but also to industry assurances that they are in compliance with those standards in states that have not adopted the model rules. In other words, it would prevent securities regulation of these products even where there is no effective insurance regulation in place. This provision of the amendment is patently absurd and should be eliminated entirely. Barring that, such self-certification should be permitted only where the insurance company is domiciled in a state that has adopted the model rules, examines the company for compliance, and is authorized to bring enforcement actions for non-compliance.

Because this amendment is proposed to be added to the bill with no opportunity for a full legislative hearing, we have no way to know whether the relatively untested NAIC model rules will be effective in protecting investors. What assurance do we have, for example, that state insurance departments will effectively enforce the standards? What assurance do we have that inherently abusive versions of the product will disappear from the market as a result? What efforts will be made to determine whether disclosures provided regarding the products are effective and whether investors in the products are able to make informed decisions? And how will company self-certification be monitored? Ideally, conferees would refuse to decide this issue without an opportunity to first gain answers to the above questions. If conferees insist on moving forward with this amendment, in the face of strong opposition from investor advocates, senior advocates, and state and federal securities regulators, at the very least we urge you to put in place some basic reporting requirements that will allow Congress to monitor the effect of this amendment on investor protection.

This amendment weakens investor protection in a bill that is designed to strengthen those protections. It does so without an adequate basis for believing the insurance regulation it relies on to protect investors is adequate or its enforcement is effective. We urge you to reject this amendment. But absent an outright rejection, we urge you to at least adopt the changes outlined above to limit its harmful effects.

Respectfully submitted,

Barbara Roper

Barbara Roper
Director of Investor Protection