

# Disclosure in a Post-Spitzer World

*By Lawrence J. Rybka and Jeffrey M. Holler*

Lawrence Rybka and Jeffrey Holler explain the duties of insurance representatives, compliance with current and developing law and the mandatory full disclosure, including a written engagement agreement, in every insurance transaction.

An essential planning tool for any estate planning practice, the life insurance contract, remains the only financial vehicle that can safely provide significant tax-advantaged benefits at the client's death. However, the current standards of care for professionals providing services in this area are changing.

This article examines the evolving roles of agents and brokers in light of recent litigation and regulatory changes. It explores the additional duties—beyond those required by state insurance regulations—that may now be required of nontraditional distributors of life insurance (e.g., banks, CPAs and investment advisors). It also addresses the practical questions of how advisors can clarify who they serve in a transaction, what conflicts they may have to disclose, and how they are compensated.

One year ago, Eliot Spitzer, Attorney General of New York, brought a criminal indictment against international insurance broker Marsh & McLennan for unethical business practices involving group and property/casualty insurance. The substance of the allegations was that the firm steered business to insurance vendors from whom it received

undisclosed additional elements of compensation. Although individual life insurance products were not initially involved in the Marsh & McLennan scandal, it quickly became apparent that all insurance products would be impacted by the resulting regulations and litigation.

So far, the three largest international brokers have agreed to pay over \$1 billion in settlements.<sup>1</sup>

There are also several criminal indictments against the officers of these companies that may result in significant jail time. In the civil courts, litigation by private clients may result in damages that exceed the fines already being paid by these companies.

If there was ever any question that this fallout would extend to the life insurance industry, that question was never answered in the form of indictments and, ultimately, the settlement against Universal Life Resources and its owner Douglas Cox.<sup>2</sup> In addition, the regulations and statutes attempting to remedy these perceived problems make no distinction between types of insurance products. It is critical for the reader to note that, unlike previous class action cases involving life insurance, this litigation did not find fault with the insurance companies, but rather, with the practices of those selling the products (i.e., the brokers).

The series of indictments that descended on the insurance industry was followed by a storm of publicity (including 87 articles and three editorials in THE WALL STREET JOURNAL), creating a loud stir in what has traditionally been one of the quietest neighborhoods in the financial services community. In the January 2005 issue of THE INSURANCE FORUM,<sup>3</sup> Joseph Belth suggested that the resulting changes from this litigation would represent

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the greatest watershed change for the industry since the Armstrong Commission 100 years ago.

In the wake of the indictments and ensuing publicity, several state insurance commissioners introduced

### Exhibit A

#### **NAIC Compensation Disclosure Amendment to the Producer Licensing Model Act**

1) Where any insurance producer or any affiliate of such producer receives any compensation from the customer for the placement of insurance or represents the customer with respect to that placement, neither that producer nor the affiliate shall accept or receive any compensation from an insurer or other third party for that placement of insurance unless the producer has, prior to the customer's purchase of insurance:

- (a) Obtained the customer's documented acknowledgment that such compensation will be received by the producer or affiliate; and
  - (b) Disclosed the amount of compensation from the insurer or other third party for that placement. If the amount of compensation is not known at the time of disclosure, the producer shall disclose the specific method for calculating such compensation and, if possible, a reasonable estimate of the amount.
- (2) Subsection A (1) shall not apply to an insurance producer who:
- (a) Does not receive compensation from the customer for the placement of insurance;
  - (b) In connection with that placement of insurance represents an insurer that has appointed the producer; and
  - (c) Discloses to the customer prior to the purchase of insurance:
    - (i) That the insurance producer will receive compensation from an insurer in connection with that placement; **or\***
    - (ii) That, in connection with that placement of insurance, the insurance producer represents the insurer and that the producer may provide services to the customer for the insurer.

regulations to deal with the perceived abuse and state legislators began drafting new laws. In an attempt to bring uniformity and reasonable standards to the industry, the major insurance groups, ALCLI, NAIFA and AALU began working with the National Association of Insurance Commissioners (NAIC) to create model disclosure statutes.<sup>4</sup> The resulting "NAIC Model" is generally perceived to be much more measured in its impact compared to the proposed regulations from California, New York and Minnesota. So far, five states have enacted the NAIC Model, with more likely to follow. The preference for the NAIC Model is due, in part, to its less disruptive guidelines requiring commission disclosure only when a fee for advice is charged for the placement of insurance (see Exhibit A).

Many in the insurance industry speculate that after the NAIC Model is adopted by the states, it is not likely to mandate any significant changes for most distributors of insurance. It will simply require the distributor to procure a signed statement that the insured understands that the agent represents, and will be compensated, by the company. However, even this mild attempt to regulate insurance still brings into question the issue of "who does the professional represent in the transaction—the client or the company?"

### **Response by the States**

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The response by the states to the NAIC Model has been far from uniform. Several of the commissioners have pushed for a more stringent regulation and a clearer line between agents and brokers. Arkansas and Rhode Island, for example, have already enacted legislation that distinguishes between agents and brokers and creates a higher standard for the latter. In addition, California, New York and Minnesota have introduced bills that substantially expand the scope of duties that independent insurance producers owe their clients. Examples are cited in Exhibit B.

### **The Impact on Distributors of Life Insurance Products**

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It is anyone's guess as to what the final regulatory outcome will be in the individual states. It is obvious that the type of proposals advocated by Minnesota, New York and California would be far more restrictive than the NAIC Model and would represent a significant change. Regardless of what is enacted by the indi-

**Exhibit B****Samples of Proposed and Enacted State Regulations****New York<sup>1</sup>:**

- Requires insurance agents and brokers in New York to avoid any conflict of interest, self dealing and excessive compensation.
- Requires all insurance agents and brokers in New York to disclose the existence and nature of all compensation, to all clients or potential clients, on a form devised and distributed by the New York State Insurance Department.
- Failure to disclose compensation received would be a violation of the agent's or broker's fiduciary duty.
- Provides that, in the event an agent or broker fails to provide a client with a proposal of the best terms... duty to client breached.

**Minnesota<sup>2</sup>:**

- Most Appropriate Product. It is an unfair trade practice to recommend that a potential client purchase an insurance product based on the fact that the insurance producer will receive a higher level of compensation when the producer has another less expensive, comparable product available that will better suit the customer's needs and circumstances.

- Compensation Disclosure. It is an unfair trade practice for any producer to accept compensation or any other item of value that inures to the benefit of the producer based on an expenditure made by the insured, unless the producer has disclosed the source and nature of compensation.

**California:**

Initially, John Garamendi, the California Commissioner of Insurance, attempted to initiate sweeping reforms by introducing both a fiduciary standard and mandatory disclosure for all except those who identified themselves as brokers. There was a narrow exception for agents representing a single company.

Agent groups and insurance companies were able to successfully demonstrate in court that these regulations went far beyond the intent of the state statutes regulating insurance. Not to be deterred, Garamendi has worked to get additional bills sponsored in the legislature and has promised to introduce slightly milder rules that he purports will be within his powers to regulate. The new bills remove the initial provisions imposing a fiduciary duty on insurance but still require disclosure of compensation for those who represent the client in the transaction.

**ENDNOTES**

<sup>1</sup> Proposed New York Assembly Bills 5825, 5826, 2827, 5828.

<sup>2</sup> Concurrent Minnesota House Bills 387, 388, 2218, 2445 and Minnesota Senate Bills 1014, 1015, 2235.

vidual states, the future landscape for independent insurance practitioners will be markedly different. Accordingly, several basic trends have emerged:

- All of the proposed regulations and laws are aimed, not at the manufacturers of products, but at the distributor/client relationship. The fuzzy line that existed between agents (who, by definition, represent the company) and brokers (who, by definition, represent a client) will need to become clearer.
- Recent scandals have highlighted certain industry practices that are not acceptable, even under existing insurance laws and regulations.
- As a result of the publicity surrounding these scandals, there have been more requests by clients and their other advisors for greater transparency from insurance producers in all insurance transactions.

**Duties of Agents and Brokers**

From the beginning of the U.S. life insurance industry up until the 1980s, life insurance products were almost exclusively delivered through agents who were, to a large extent, closely associated with a single company. In this type of distribution, it was clear to the client that the insurance professional was acting in the role of agent, representing the company in the transaction. The agent's physical presence in a company agency and his or her business card usually identified him or her as being an agent of the company. This impression was supported by marketing material that was produced by the company and given to the client by the agent promoting the company's products.

This form of agency distribution started to change in the early 1980s with rising consumer expect-

tations, a proliferation of product types, wider ranges of underwriting classifications, and the introduction of concept-specific products (e.g., minimum deposit insurance). These developments made it advantageous for insurance professionals and their clients to represent multiple life insurance companies at the same time. Even in this early form of independent distribution, one could make a cogent argument that the insurance producer was still acting as an agent of the insurance company. The producer might be representing different companies for different types of products, but he or she was still serving as an agent for a company in a given transaction. For example, a producer might present a client with one company for term insurance and another for universal life but he or she was still recommending one product and representing the company.

In today's environment, there are still some captive agents who represent a single company. However, most independent insurance professionals make representations that put them much closer to the definition of broker rather than agent. In fact, many independent insurance firms actually emphasize to clients the advantages of their ability to help clients "choose products from several companies." It is not uncommon for producers to present multiple product choices to clients in order to "help" them choose the best coverage. Internet comparison spreadsheets implicitly signal to the client that the insurance professional is acting on their behalf. No matter what form the marketing message takes, overt claims of independence, finding the best product or best underwriting give the impression that the producer is acting as a broker on behalf of the client.

In the face of this market development, state insurance licensing and company contracts have not kept pace with the new reality. Most states do not distinguish between agents and brokers in the types of licenses they offer. However, in most states, the courts have continued to draw a higher standard for brokers versus agents. This distinction is almost always based on representations made by the licensed professional to the client. Indeed, this is the exact type of representation made by Marsh & McLennan and Aon, which triggered the Spitzer indictments and subsequent lawsuits. The January issue of *Insurance Forum* contained the following text taken from the actual indictments citing company Web sites, brochures, requests-for-proposals and e-mails to clients and potential clients<sup>5</sup>:

- "Our guiding principal is to consider our client's best interest in all placements."
- "We are our clients' advocates and represent them."
- "We do not represent insurance companies but the client."
- "Our approach to client service begins with establishing credibility and trust."
- "We are our clients' trusted business partner, not simply an insurance agent."

Up until now, it has been convenient for marketers of life insurance products to claim, on the one hand, the advantages of having access to multiple companies—while, on the other, asking to be held to the standard of being an agent of the company. Regardless of regulatory outcome, the days of this comfortable ambiguity are gone. Going forward, producers must make a conscious choice of what role they will play and clearly communicate this to the client or prospect. A clear understanding of the distinctions between agent and broker and the different expectations of these positions is a critical business consideration for life insurance professionals going forward.

## Definitions of Insurance Distributors

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**Agent.** This term refers to a person who acts for another. In the case of insurance, the agent is legally obligated to act on behalf of the insurance company—his or her "principal" in the transaction. The NAIC Model disclosure regulation requires written documentation if the insurance producer wishes to act in this role. This documentation must include acknowledgement by the potential policy owner that he or she understands that the agent's compensation will come from the insurance company. Under established insurance law, an agent's primary duty and allegiance is to the insurance company. The agent has minimal legal obligations to the insured and policy owner, other than representing the product accurately and transmitting the policy owner's money to the company.<sup>6</sup>

**Broker.** This term refers to a person or entity who acts as an agent for the policy owner when negotiating and procuring the issuance of a life insurance contract. In the eyes of the law, the broker is requested by the prospective insured or policy owner to act on his or her behalf first, although the broker's compensation often comes from the insurance company.

Some of the proposed regulations are specifically designed to distinguish brokers acting on behalf of the client from agents acting on behalf of the insurance company.<sup>7</sup>

**Consultant.** A consultant is paid a fee by the client for advice. Under the NAIC Model regulation and all of the state proposals, the role of consultant automatically raises his or her duty to that of a broker. In accordance with the NAIC Model, any person who charges a fee for the placement of insurance is required to disclose all compensation that he or she receives from a vendor or third party.

A limited number of states have established a separate insurance license for consultants. Many of these same states prohibit the same person from holding both a producer license (to receive compensation) and a consultant license. Going forward, it is clear that insurance consultants will need to be painstakingly complete in their disclosures if they wish to be additionally compensated by an insurance company or third party. These newest state proposals almost uniformly will require actual dollar disclosure.

There is an added complication for consultants who are Registered Investment Advisors and provide separate account products (those involving equities). In this case, they must also comply with the Federal 1940 Investment Advisors Act and the state companion acts which require a comprehensive written disclosure through a Form ADV as well as a written contract with the client. When functioning in this role, the consultant not only has a duty to disclose compensation, but must also meet a fiduciary standard in his or her client relationships.

**Registered Representative.** Because variable life insurance policies are considered both insurance policies and “securities,” the agent or broker must comply with securities regulations in addition to those imposed by state insurance departments. In order to offer these products, a registered representative must hold an NASD Series 6 or Series 7 securities license and work through a broker dealer that is regulated by the National Association of Securities Dealers (NASD).

Variable products already are subject to a very high level of disclosure because they require that each client receive a prospectus that is filed with the Securities and Exchange Commission (SEC). The prospectus contains a detailed disclosure of how the product works and all charges to the contract. The disclosure includes not only explicit sales charges, but also all other related costs of the policy, and goes

far beyond even the most comprehensive attempts at insurance reform. Additionally, the NASD requires that “every penny of investor money must be accounted for” in confirmation statements itemizing all charges associated with the policy premium.

Those acting as registered representatives also have a duty to know their clients and to make certain that each sale is suitable for the client’s unique goals and financial circumstances. As added assurance of suitability for the consumer, the NASD requires the broker dealer affiliated with the registered representative to independently verify the suitability of each transaction. Under the new NASD Notice to Members 05-50, all index life products will need to meet these new standards in the future.

**Fiduciary.** A fiduciary refers to a business or person who may act for another in the capacity of a “caretaker” of another’s rights, assets and/or well being. For example, a trustee is a fiduciary for the trust beneficiaries. The fiduciary owes an obligation to carry out its responsibilities with the utmost degree of “good faith, honesty, integrity, loyalty and undivided service of the beneficiary’s interest.” “Good faith” imposes an obligation to act reasonably in order to avoid negligent handling of the beneficiary’s interests, as well as the duty to not favor anyone else’s interest (including the fiduciary’s own interest) over that of the beneficiary.<sup>8</sup>

While some of the proposed regulations seek to impose this level of fiduciary duty on insurance brokers, it can be interpreted that there are other insurance distributors, particularly “alternative distributors,” who are already required to operate under this standard. Examples include bank insurance operations, particularly their introductions to bank clients and work performed for other bank divisions such as a bank trust department. Professionals in the qualified plan market are also subject to this higher standard as well as the unique disclosure rules imposed by ERISA on qualified plans.<sup>9</sup> Finally, those who serve clients as investment advisors must also meet this standard. Investment advisors need to take extra precautions that their ADV and engagement agreements distinguish the work done for the client in the investment or planning area so that it doesn’t inadvertently extend to the work performed in the insurance engagement.

**CPA Firms.** Increasingly, a number of CPA firms have chosen to offer their clients financial service products, including life insurance. In these instances, they are often acting in a dual role as both a CPA and

a licensed insurance professional. Additionally, the partners in the CPA firm may own an interest in a related insurance agency. All but a handful of states have enacted legislation enabling CPAs and their firms to offer insurance as well as investment products. However, these enabling statutes create a mandatory duty to disclose compensation. Those serving in this dual role must not only meet the changing requirements of the state insurance laws, but also must meet the state board of accountancy ethics and disclosure requirements. While CPAs may theoretically serve as an agent in an insurance transaction, they still have a duty to disclose compensation according to the ethics rules imposed on them by the American Institute of Certified Professional Accountants.<sup>10</sup>

## **New Realities and Duties to Clients**

The Spitzer investigations and their resulting fallout glaringly highlighted how certain insurance practices are in conflict with existing law. Insurance practitioners who fail to adapt to new heightened standards will find themselves at risk. Further, those who are unwilling to examine their current practices should not take comfort in thinking that their errors and omissions coverage will protect them against these lapses in the event of litigation or enforcement actions. Most E&O policies exclude violations of laws, regulatory fines, and penalties from defense and coverage. In a recent speech to top executives in the life insurance industry, James Benson, President and CEO of John Hancock Life Insurance Company observed, “Formerly defensible practices, if left undisclosed in today’s environment, have become completely indefensible.”<sup>11</sup> Close study of the indictments, regulations, and subpoenas issued to insurance distributors highlight six practices that should be significantly modified for those who might be deemed to be acting as brokers or who imply that they serve the client in a transaction:

### **1. Not Presenting a Quote or Intentionally Misquoting a Vendor**

If an insurance professional seeks quotes from several companies and fails to supply the client with a quote that was more competitive than the one presented, or misquotes a company’s price—he or she is engaging in the very activities that were at the heart of the Marsh McLennan and Aon scandals.

### **2. Use of “Dial-a-Comp” Products in a Spreadsheet**

Some insurance companies offer a form of life insurance product that creates an uncomfortable choice for the insurance professional. These “dial-a-comp products” enable the insurance professional to design a product that offers the producer the choice of lowering compensation in order to provide a lower guaranteed premium. These products go beyond traditional term riders because there is no offsetting benefit for the higher premium. Rather, they set the stage for a “broker wins/client loses” or “client wins/broker loses” scenario and create an inherent conflict between compensation and price.

When a producer claims to represent the client or purports to assist the client in choosing between multiple companies, there is no way that he or she can present these products without either offering the lowest compensation or disclosing compensation. For example, if the producer presents the client with two choices: Company A at \$99,000 of premium per year or Company B at \$95,000 per year, the client would naturally choose Company B as the lower-priced alternative. However, if that producer failed to disclose that he or she could have configured Company A at a premium of \$93,000 per year with a lower commission, he or she has engaged in the exact form of bid rigging that was present in the Marsh & McLennan case.

The use of comparison spreadsheets compounds this problem. Comparing the prices of products from several companies clearly makes the case that the producer is acting as a broker. However, there is a potential conflict of interest when a producer lists a single price for a “dial-a-comp product.”

### **3. Undisclosed Reinsurance Agreements**

Another practice that is likely to change is the use of undisclosed reinsurance agreements between distributors and product manufacturers. If the producer steers business to companies with special reinsurance agreements—without disclosing the potential additional compensation from these arrangements—the producer has put himself at risk. As an outgrowth of the Spitzer investigations, The Washington Legal Foundation has prompted the Attorney Generals in several states to investigate this very practice.<sup>12</sup> Most separate account products have adequate disclosure of these arrangements in their prospectuses, however, most general account products do not.

#### 4. Undisclosed Payments to Third Parties

In an era when life insurance is offered by banks, stock brokerage firms, CPA firms and other providers, it is not uncommon for those with proper licensing to share life insurance revenue with others in the firm. If these revenue payments are not acknowledged by the client in writing, and if one or more of the parties owes the client a duty of loyalty in the transaction—there would likely be a cause for action against both parties. If the revenue recipient is not licensed, there would not only be a potential breach of duty, but also a violation of law. The financial ramifications of such actions would be dire since neither is covered under errors and omissions insurance. Prudent practice requires that all who receive compensation not only be licensed, but also make certain that there is adequate disclosure regarding any third parties that will be compensated.

#### 5. Better Disclosure on Policy Exchanges

Life insurance and annuity products carry a unique risk in circumstances when the client doesn't understand that new loads will be imposed on the sale of replacement products. While there may be considerable benefits to the client for exchanging products in the right circumstances, the client may incur a significant new load or surrender charge that is not well disclosed in the product literature. This risk is most acute when existing life insurance policies with cash values are exchanged for new ones. Other than the fine print in the sales illustration, there is generally no written notice to clients that they may not only be giving up their cash value, but also may be limiting their options in the future.

For separate account products, the NASD has instituted various reforms that address this dilemma, including required confirmation statements that provide a specific accounting of these loads. Likewise, New York State has imposed its own required notice. On the other hand, when working with general account products (outside of New York), insurance professionals should consider going beyond what is required by regulation or company practice regarding client communications. A specific example is a written client acknowledgment of the impact that the exchange will have on contract values.

#### 6. Better Disclosure of Life Settlements

One area where an insurance producer will most likely be acting as a broker is in the area of life settlements. The very nature of this market and the element of negotiated compensation presents great risk to the unwary professional. State regulation of this fast-growing industry varies greatly. Some states treat the product as a security; others require disclosure of compensation; while others issue life settlement broker licenses. At a minimum, prudent professionals will need to consult state law, their broker-dealer's policy relating to these transactions, and their errors and omissions policy for coverage. Once professionals understand the duties imposed by their individual circumstances, they should also consider using a written engagement letter that fully explains their role to the client.

#### Opportunity in the Midst of Change

In his 2005 speech to the International Forum, John Hancock President and CEO James Benson observed, "There are no professional life insurance buyers."<sup>13</sup> His point centers on the fact that other insurance products, such as group or property and casualty insurance, have a standardized process for comparison. Life insurance—one of the most complex financial products—does not.

Objective evaluation of these products is complicated by a number of factors such as:

- the vast number of product variations;
- subtle differences between product manufacturers;
- a complete lack of standardization in the products and policy forms; and
- the requirement for individual underwriting and customization with each product.

Given these and many other complexities, there is a need for clients and other advisors to turn to experienced life insurance professionals for objective advice. However, today's environment calls for these same professionals to provide greater transparency and to disclose potential conflicts of interest. The best way to accomplish this objective is in the form of a written engagement agreement with every client. This formal vetting of key issues in the relationship will, in the long term, serve both clients and professional insurance advisors.

With the assistance of co-author Jeff Holler and a select handful of other leading industry advisors, we have helped create a prototype agreement termed *The Clearview Engagement Agreement*<sup>®</sup>. It contains an identification of the role that the independent firm will play in the transaction (*i.e.*, agent, broker, limited broker<sup>™</sup> or independent agent). This role is defined by contract so that there are clear expectations for both parties. For example, one of the Clearview prototype documents defines a “limited broker<sup>™</sup>” as one that will seek coverage from a limited number of insurance carriers that are approved in advance by the client. “Quotes” are specifically defined as underwriting offers that are translated into tentative proposed premiums that use uniform product specifications.

Regarding the disclosure of compensation, our company’s associated independent firms have taken several approaches. All of those firms using the Clearview prototype have chosen to define both the source and nature of all compensation in the transaction. Our prototype agreements also spell out the involvement of all parties in the transaction, including associated agencies, the broker-dealer, and any other parties sharing transaction-based compensation.

Some firms have elected to go beyond this point and make actual dollar disclosure before the collection of the first premium. Others have chosen to give the client a range of compensation that may result from the transaction given the customized nature of life insurance products, multiple underwriting offers

and varying product configurations. At a minimum, best practices should disclose the possibility of soft dollar payments, bonuses and overrides. As a practical matter, it is very difficult to quantify how an individual transaction might impact some of these elements. In all cases, however, the disclosure should make clear that compensation will come from the insurance vendors.

Dr. Belth was portentous in his statement that October 14, 2005 was a watershed date for the insurance industry. While it marks an era of substantive change for independent insurance professionals, it does not represent the end, but rather, a new beginning. Smart, ethical insurance professionals have an opportunity to be proactive in creating clear expectations with clients. This means removing the ambiguities that exist in our business, beginning with a clarification of who the producer serves in the transaction. In light of impending regulation, insurance professionals should not wait for regulation or litigation to define how they work with their clients. Rather, they should seize the competitive opportunity to be among the first to begin utilizing a policy of full disclosure including a written engagement agreement with each client. While some of the proposed regulations are extremely restrictive in their prescriptions for how independent producers should interact with clients, they ultimately will serve as a catalyst for creating much needed clarity in our industry.

ENDNOTES

- <sup>1</sup> Ian McDonald, *Marsh, Spitzer Settle With \$850 Million, An Apology to Clients*, WALL ST. J., Feb. 1, 2005.
- <sup>2</sup> *Eliot Spitzer and The Insurance Industry*, 32 THE INSURANCE FORUM 144 (Jan. 2005).
- <sup>3</sup> *Id.*
- <sup>4</sup> *Life Insurance Industry Expresses Support for Approach Adopted in December by the NAIC and Urges Against Imposition of Additional Requirements*, AALU WASHINGTON REPORT, Jan. 21, 2005, AALU Bulletin No. 05-08.
- <sup>5</sup> *Supra* note 2.
- <sup>6</sup> EDWARD GRAVES, MCGILL’S LIFE INSURANCE, at 805–07 (1994).
- <sup>7</sup> *Id.*, GRAVES, at 808.
- <sup>8</sup> Moody’s Directory, 2004.
- <sup>9</sup> JOHN TRAIN, INVESTING AND MANAGING TRUSTS UNDER THE NEW PRUDENT INVESTOR RULE (1999). ERISA section 3(21)(A) provides that a person is a fiduciary with respect to an employee benefit plan to the extent that such a person does any of the following: Exercises any discretionary authority or control over the management of a plan, or over the management or disposition of plan assets; Renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan; or Has any discretionary authority or discretionary responsibility in the administration of such plan.
- <sup>10</sup> Lawrence J. Rybka, *A Case For Variable Life*, J. FIN’L SERVICES PROFESSIONALS, Nov. 1997.
- <sup>11</sup> James Benson, *22 Keys to Sales Success*, International Forum 2005 Annual Meeting, Scottsdale, Arizona, Speech, 2005.
- <sup>12</sup> *Supra* note 2.
- <sup>13</sup> *Supra* note 11.

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