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## Update: Illinois Department of Securities Action

NAFA Members,

As you are all aware, NAFA has long been following the developments in the Illinois Department of Securities action against Richard Lee Van Dyke (d/b/a Dick Van Dyke Registered Investment Advisor). NAFA believed strongly that getting a legal determination that fixed indexed annuities be recognized as insurance products and not securities under Illinois law was paramount to our industry, and we engaged an Illinois law firm to represent NAFA in an amicus curiae brief to make that argument to the Court.

I am very pleased to report that the Illinois Appellate Court has just issued a ruling stating just that: according to the “plain language” of the Illinois Securities Act, indexed annuities issued by insurance companies authorized to do business in Illinois are not securities under Illinois law. The State may still decide to seek an appeal of this decision to the Illinois Supreme Court, but this critical and unanimous decision is a big victory.

On behalf of NAFA, I wanted to thank you, the NAFA membership, for your support in making this legal challenge. We need your continued support to be successful in our fight for fixed annuities.

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Pam Heinrich, NAFA’s General Counsel, has provided the following summary of the Court’s decision, as well as the anticipated next steps in the case.

On July 29, 2016, a 3-judge panel of the Appellate Court of Illinois for the Fourth District issued a unanimous Order reversing the circuit court’s decision and the Illinois Secretary of State’s final order against Richard Lee Van Dyke (d/b/a Dick Van Dyke Registered Investment Advisor), finding that the evidence presented failed to establish that Van Dyke had violated the Illinois Securities Law of 1953 (“the Act”) in the sale of the fixed indexed annuities at issue in the case and that he perpetrated a fraud on his clients. In so finding, the Court reversed the administrative order issued by the Illinois Secretary of State/Illinois Securities

Department, which revoked Van Dyke's investment adviser registration, prohibited him from selling securities in Illinois, and assessed fines and fees in excess of \$350,000.

Importantly, the Court also found that fixed indexed annuities are not securities under Illinois securities law.

The Court's opinion echoed arguments set forth in NAFA's amicus curiae brief (and the amicus brief submitted by Fidelity & Guaranty Life and joined by the IALC), finding that under the Act, "the term 'security' is defined to include a 'face amount certificate,'"...which itself includes "any form of annuity contract (other than an annuity contract issued by a life insurance company authorized to transact business in [Illinois]). Here, the indexed annuities in question are annuities issued by insurance companies authorized to transact business in Illinois. Thus, they are not securities under Illinois law. To hold otherwise would go against the plain language of the Act." (§ 25. Emphasis added.)

The Court also found that because Van Dyke was acting as both an investment adviser and a license insurance producer that he was subject to the legal duties under the Illinois securities and insurance regulatory regimes, including the Act's anti-fraud provisions – in other words, the Illinois Securities Department did have jurisdiction over his activities as he was an Illinois RIA and marketed and held himself out to clients as an RIA. (§ 31.) However, the Court ultimately found that the Secretary failed to prove fraud and that the Department's findings of fraud were arbitrary, capricious, and against the manifest weight of the evidence. (§§ 34, 37.)

As a Rule 23 Order, the Court's decision in the Van Dyke matter is not a published decision, and NAFA plans to join with the other amicus parties and support a motion to have the decision published. The State of Illinois has 35 days from the time that the decision was filed on July 29th to bring an appeal to the Illinois Supreme Court, although that time may be tolled during the pendency of the Court's consideration of the publication motion.

Best Regards,

Chip Anderson  
NAFA Executive Director

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#### **About NAFA**

NAFA, the National Association for Fixed Annuities, is the premier trade association exclusively dedicated to fixed annuities. Our mission is to promote the awareness and understanding of fixed annuities. We educate annuity salespeople, regulators, legislators, journalists, and industry personnel about the value of fixed annuities and their benefits to consumers. NAFA's membership represents every aspect of the fixed annuity marketplace covering 85% of fixed annuities sold by independent agents, advisors and brokers. NAFA was founded in 1998. For more information, visit [www.nafa.com](http://www.nafa.com).