***Comments on Chair Draft Safe Harbor/Comparable Standards Provision FAQs***

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| **Q1. What types of recommendations or sales does the safe harbor provision (contained in Section 6E of the revised model) apply to?** | |
| ***Small Drafting Group Comments*** | ***What is the purpose of this question and the Joint Trades’ answer repeating what is in the model regulation? Drop the question because it is unnecessary? Should a question be added at the end of the FAQs to reflect the XY Planning Network answer to this FAQ, such as “Does compliance with this regulation meet all the requirements for a fiduciary?”*** |
| **Joint Trades** | **QXX. What types of recommendations or sales does the safe harbor provision (contained in Section 6E of the revised model) apply to?**  AXX. The safe harbor provision applies to all recommendations and sales of annuities made by financial professionals in compliance with business rules, controls and procedures that satisfy a comparable standard even if such standard would not otherwise apply to the product or recommendation. |
| **XY Planning Network** | **QXX. What types of recommendations or sales does the safe harbor provision (contained in Section 6E of the revised model) apply to?**  AXX. The safe harbor provision in Section 6E of the revised model would allow a producer licensed under other applicable federal or state laws to rely on the safe harbor in making a recommendation or executing an annuities transaction. If the producer is also licensed as an investment adviser representative (IAR) and the consumer in question is an existing financial planning or advisory client, the producer should be aware of recent guidance by the U.S. Securities and Exchange Commission (SEC) that their fiduciary relationship with the client applies to the entire client relationship. Thus the fiduciary duty under the Investment Advisers Act of 1940 (and similar state adviser statutes) would apply to an annuity transaction sold outside of the advisory account because the producer’s fiduciary capacity would extend to all areas of the client relationship including product transactions. The safe harbor would be available if the producer/IAR fully complied with all rules and regulations of the federal or state adviser statute.  Similarly, the Section 6E safe harbor would be available to the producer if the recommendation involved a retirement account subject to ERISA or the Internal Revenue Code and the producer was deemed to be a Sec. 3(21) fiduciary to the account holder.  A producer who is also affiliated with a broker-dealer should be aware that a fiduciary relationship may also apply under the common law in certain states, notwithstanding that this regulation disclaims fiduciary capacity for purposes of meeting the rule’s compliance requirements. As such, if a court holds that a relationship of trust and confidence exists between the producer/broker and the customer, or case law holds that a securities broker is a fiduciary, then the producer/broker may be subject to fiduciary accountability for any annuity recommendations or transactions.  A producer who is also affiliated with both a broker-dealer AND a registered investment adviser (RIA) should be aware that, as mentioned above with respect to SEC guidance, the fiduciary duty of the IAR would apply to all areas of the client relationship. The IAR’s capacity as a fiduciary under state law may also extend to other services provided, such as the sale of annuities. |
| **Q2. When would a producer be considered to be acting as a financial professional for purposes of the safe harbor provision?** | |
| ***Small Drafting Group Comments*** | ***What is the purpose of this question and the Joint Trades’ answer repeating what is in the model regulation? Drop the question because unnecessary or reword the question? Is this question really asking: “When does the safe harbor provision apply or not apply?” or is it asking: “For financial professionals, what would constitute compliance with business rules controls and procedures for purposes of the safe harbor provision?”*** |
| **Joint Trades** | **QXX. When would a producer be considered to be acting as a financial professional for purposes of the safe harbor provision?**  AXX. A producer would be considered a financial professional for purposes of the safe harbor provision if they are acting as:  1) A broker-dealer registered under federal [or state] securities laws or a registered representative of a broker-dealer;  2) An investment adviser registered under federal [or state] securities laws or an investment adviser representative associated with the federal [or state] registered investment adviser; or  3) A plan fiduciary under Section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA) or fiduciary under Section 4975(e)(3) of the Internal Revenue Code (IRC) or any amendments or successor statutes thereto. |
| **XY Planning Network** | **QXX. When would a producer be considered to be acting as a financial professional for purposes of the safe harbor provision?**  AXX. The producer would be considered acting as a ‘financial professional’ under Sec. 6E(4) of the revised model rule and thereby subject to the other comparable standard (i.e., applicable law) at the time the recommendation was made. |
| **Q3. What comparable standards meet the criteria for the safe harbor?** | |
| ***Small Drafting Group Comments*** | ***What is the purpose of this question? Should this question be redrafted to describe the provisions (business rules) that must be in a comparable standard to satisfy the best interest requirements under the revised model?*** |
| **Joint Trades** | **QXX. What comparable standards meet the criteria for the safe harbor?**  AXX. The NAIC considers conduct standards adopted by federal regulators under federal securities laws, ERISA, and the IRC to be comparable standards to Model #275. The revised model includes a drafting note indicating states may wish to consider state securities laws as a comparable standard as well. The revised model also makes clear that the safe harbor will apply even if the comparable standard would not otherwise apply to the product or recommendation at issue. For example, a registered representative of a broker-dealer who complies with the requirements of the SEC’s Regulation Best Interest when recommending a fixed or fixed indexed annuity (which are not securities under federal securities laws) would be covered by the safe harbor even though Regulation Best Interest does not directly apply to those products. |
| **XY Planning Network** | **QXX. What comparable standards meet the criteria for the safe harbor?**  AXX. The comparable standards in the safe harbor are Regulation Best Interest (and any subsequent amendments) as promulgated by the U.S. Securities and Exchange Commission; under the antifraud provisions of Section 206 of the Investment Advisers Act of 1940, similar state statutes (including states that have adopted NASAA’s Unethical Business Practices of Investment Advisers *et al*, as amended), and the applicable fiduciary duty obligations thereto; and with prohibited transaction exemptions (PTEs) and applicable fiduciary duties under ERISA and the Internal Revenue Code. |
| **Q4. If a financial professional makes a recommendation or sale of an annuity in full compliance with a comparable standard, does the financial professional also have to satisfy all of the specific requirements of the revised model?** | |
| ***Small Drafting Group Comments*** | ***What does “full compliance” mean? Suggest rewriting the question to refer to business rules, such as: “If a financial professional falls under the safe harbor provision by complying with a comparable standard, does the financial professional have to comply with other provisions of the revised model, such as the one-hour and four-hour training requirements and product-specific training requirements? To determine whether a financial professional meets the requirements of the safe harbor provision through compliance with a comparable standard depends on the business rules in the comparable standard that meet the intent of the best interest standard in the revised model. “*** |
| **Joint Trades** | **QXX. If a financial professional makes a recommendation or sale of an annuity in full compliance with a comparable standard, does the financial professional also have to satisfy all of the specific requirements of the revised model?**  AXX. No, a financial professional who fully satisfies the requirements of a comparable standard is considered to have met their obligations under the revised model, and does not need to also comply with any additional obligations imposed by the revised model. However, actual compliance with the applicable comparable standard is required; state insurance departments retain the authority to examine and investigate the conduct of a financial professional who is relying on the safe harbor to ensure compliance with the applicable comparable standard and can take enforcement action against a producer who fails to fully comply with that comparable standard when recommending or selling an annuity. |
| **XY Planning Network** | **QXX. If a financial professional makes a recommendation or sale of an annuity in full compliance with a comparable standard, does the financial professional also have to satisfy all of the specific requirements of the revised model?**  AXX. If a consumer complaint is brought to the attention of the state insurance commissioner, depending on the facts and circumstances of the disputed transaction the commissioner may investigate and enforce the provisions of this regulation. |
| **Q5. Are there specific conditions an insurer must meet for the safe harbor to apply?** | |
| ***Small Drafting Group Comments*** | ***Suggest combining this question with the question below (Q6.), such as “Are there specific conditions and obligations an insurer must meet with respect to dually licensed producers seeking to rely on the safe harbor?” Also, suggest combining the answers from the two questions. Also, the Joint Trades suggested answer needs to be clarified on what “relevant” conduct is being contemplated. Is “relevant” conduct intended to mean conduct “to ensure compliance with the business rules developed for compliance with the revised model”?*** |
| **Joint Trades** | **QXX. Are there specific conditions an insurer must meet for the safe harbor to apply?**  AXX. Yes, a financial professional will only be able to rely on the safe harbor if the insurer whose product is being recommended or sold:  1) Monitors the relevant conduct of the financial professional or the entity responsible for supervising the financial professional; and  2) Provides the entity responsible for supervising the financial professional with information and reports that will assist that entity with its supervision efforts. |
| **XY Planning Network** | **QXX. Are there specific conditions an insurer must meet for the safe harbor to apply?**  AXX. As noted in Sec. 6C(2)(i) of the regulation, the insurer shall provide a written report to senior management that details a review, with appropriate testing, to determine the effectiveness of the insurer’s policies and procedures with respect to annuity recommendations and transactions. By extension, these conditions would necessarily require that the producers under its supervision furnish documentation demonstrating compliance with the comparable standard, including a written determination why the annuity recommendation was in the best interest of the consumer. |
| **Q6. Do insurers have any other obligations under the revised model with respect to producers seeking to rely on the safe harbor?** | |
| ***Small Drafting Group Comments*** | ***This question seems to be very similar to Q5. Suggest deleting it and combining it with Q5.*** |
| **IIABA** | **QXX. Do insurers have any other obligations under the revised model with respect to producers seeking to rely on the safe harbor?**  *Recommended Answer* – Yes. The safe harbor expressly applies to the recommendations and sales activities of certain producers, and, regardless of whether one of its producers relies on the safe harbor, insurers remain responsible for complying with the supervisory requirements of Section 6(C), the prohibitions of Section 6(D), the enforcement provisions of Section 8, and the recordkeeping obligations of Section 9. While insurers are ultimately responsible for a producer’s actions and compliance with the regulation, they are permitted by Section 6(C)(3) to enter into arrangements and contracts with other parties for the performance of supervisory functions. |
| **Joint Trades** | **QXX. Do insurers have any other obligations under the revised model with respect to producers seeking to rely on the safe harbor?**  AXX. Yes, insurers remain subject to the obligation under Section 6C(1) to “not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity would effectively address the particular consumer’s financial situation, insurance needs and financial objectives based on the consumer’s consumer profile information.” However, insurers may base their analysis on information received from either the financial professional or the entity supervising the financial professional and are not otherwise required to also perform all of the specific supervisory functions outlined in Section 6C(2) as long as the financial professional’s conduct is being supervised (whether by the insurer or by another entity with responsibility for supervision of the financial professional) in accordance with the relevant comparable standard. |
| **XY Planning Network** | **QXX. Do insurers have any other obligations under the revised model with respect to producers seeking to rely on the safe harbor?**  This question is redundant to the one immediately above and unnecessary. |
| **Q7. Are insurers required to obtain documentation from the financial professional or entity supervising the financial professional to determine that the professional’s or entity’s policies and procedures support a comparable standard?** | |
| ***Small Drafting Group Comments*** | ***Is the XY Planning Network answer to this question appropriate for one of the previous questions?***  ***Should this question and Questions 8-11 be redrafted to outline an insurer’s responsibilities under the safe harbor provision based on the insurer’s transactional obligation and the insurer’s supervision obligation? Should there be a list of what an insurer should be doing with respect to the safe harbor as part of its monitoring obligation?*** |
| **XY Planning Network** | **QXX. Are insurers required to obtain documentation from the financial professional or entity supervising the financial professional to determine that the professional’s or entity’s policies and procedures support a comparable standard?**  AXX. Yes. Unlike the regulation, which doesn’t require analysis or consideration of products or investment strategies outside the authority or license of the producer, Regulation Best Interest, certain PTEs under ERISA or the federal tax code, and under an IAR’s fiduciary duty, generally require documentation of reasonable alternatives considered by the agent in addition to the final recommendation. Consistent with the supervisory requirements of the Section 6E safe harbor, the insurer should establish policies and procedures that are appropriate in maintaining oversight of annuity transactions under this regulation. As such, written documentation confirming that a reasonable alternative(s) was considered under the comparable standard, and that the final recommendation was in the best interest of the client should be available to the insurer upon request. |
| **Q8. Are insurers required to conduct regular audits, or otherwise verify, that the financial professional or entity supervising the financial professional is complying with the comparable standard?** | |
| **XY Planning Network** | **QXX. Are insurers required to conduct regular audits, or otherwise verify, that the financial professional or entity supervising the financial professional is complying with the comparable standard?**  AXX. Under Section 6C(2)(i) of the regulation, insurers are required to conduct periodic audits by random sampling of annuity transactions of producers subject to the insurer’s supervisory authority. |
| **Q9. Do insurers have to require a financial professional or the entity supervising the financial professional to utilize the specific insurer’s suitability form?** | |
| **XY Planning Network** | **QXX. Do insurers have to require a financial professional or the entity supervising the financial professional to utilize the specific insurer’s suitability form?**  AXX. Insurers may require a financial professional to utilize the specific insurer’s suitability form as necessary and in addition to any requirements under the comparable standard subject to the Section 6E safe harbor. |
| **Q10. Does Section 6E(2) allow an insurer to simply rely upon a statement by the financial professional or entity supervising the financial statement that the annuity recommendation complies with a comparable standard?** | |
| **XY Planning Network** | **QXX. Does Section 6E(2) allow an insurer to simply rely upon a statement by the financial professional or entity supervising the financial statement that the annuity recommendation complies with a comparable standard?**  A. No. As discussed in QXX (regarding the Sec. 6C(2)(i) requirement to provide a written report to senior management with respect to compliance), the insurer should obtain documentation from the financial professional demonstrating compliance with the comparable standard. For example, if the producer is also an IAR relying on the Advisers Act safe harbor, the insurer could ask for random copies of disclosures and analyses related to the annuity recommendation. A statement alone by the financial professional that he or she complied with the comparable standard would not satisfy the supervisory obligations of the insurer. |
| **Q11. Do the record-keeping obligations of the revised model apply when the safe harbor provision is invoked? Is the insurer required to maintain a copy of the consumer’s financial information and annuity application or may it rely upon the entity supervising the financial professional?** | |
| **IIABA** | **QXX. Do the record-keeping obligations of the revised model apply when the safe harbor provision is invoked?**  *Recommended Answer* – Yes. The safe harbor creates an exemption from certain of the model’s affirmative requirements, but it does not affect the application of the recordkeeping, training, enforcement, and similar provisions. |
| **XY Planning Network** | **QXX. Do the record-keeping obligations of the revised model apply when the safe harbor provision is invoked? Is the insurer required to maintain a copy of the consumer’s financial information and annuity application or may it rely upon the entity supervising the financial professional?**  AXX. An insurer is not required to maintain a copy of the consumer’s personally identifiable financial information inasmuch as a financial professional who is a fiduciary under federal or state securities laws may violate his or her confidentiality obligations to the client. This prohibition on access to certain client data is especially significant since the IAR’s fiduciary duty applies to the entire client relationship. However, the insurer should obtain any general suitability information as needed (such as the client’s age, investment experience, time horizon, and specific financial goals related to the annuity recommendation) in order to evaluate compliance with the safe harbor under Section 6E of this regulation. |
| **Suggested Additional FAQs** | |
| **IIABA** | **Q\_. Must producers that qualify for and rely on the safe harbor comply with the “requirements” that are established by the model?**  A\_. No. There are differences and distinctions between the obligations established under the model and the duties imposed by the “comparable standards” identified in Section 6(E)(5). The model may in some ways apply more robust consumer protections upon producers that recommend annuities than the “comparable standards.” States that are concerned with establishing uniformity in annuity transactions (and the market conduct regulatory implications of not doing so) and applying consistent obligations on producers who make such recommendations may wish to consider narrowing the scope of the safe harbor and/or expressly applying certain elements of the model to those producers who seek to rely on it.  **Q\_\_. Does the safe harbor provision relieve a producer or insurer from any applicable duty imposed by Section 6(D) (related to prohibited practices), Section (8) (related to regulatory enforcement authority and penalties), and Section 9 (related to recordkeeping).**  A\_\_. No. The safe harbor create es an exemption from certain of the model’s affirmative “requirements,” but it does not affect the application of these provisions.  **Q\_\_. When may a broker-dealer or registered representative rely on the safe harbor?**  A\_\_. The definition of “comparable standards” in Section 6(E)(5) provides that broker-dealers and registered representatives may only rely on the safe harbor when they comply with “applicable SEC and FINRA rules pertaining to best interest obligations and supervision of annuity recommendations and sales” (emphasis added). In other words, broker-dealers and registered representatives may only take advantage of the safe harbor when a SEC or FINRA rule *applies* on its own to a particular annuity recommendation. The safe harbor is not limited to investment advisors and plan fiduciaries or fiduciaries in the same way.  **Q\_\_. Does the safe harbor exempt insurers from any of the supervisory or other requirements established by the model?**  A\_\_. No. The safe harbor expressly applies to the recommendations and sales activities of certain producers, and, regardless of whether one of its producers relies on the safe harbor, insurers remain responsible for complying with the supervisory requirements of Section 6(C), the prohibitions of Section 6(D), the enforcement provisions of Section 8, and the recordkeeping obligations of Section 9. While insurers are ultimately responsible for a producer’s actions and compliance with the regulation, they are permitted to enter into arrangements and contracts with other parties for the performance of supervisory functions.  **Q\_\_. Does the safe harbor provision have any effect on licensing or other regulatory requirements?**  A\_\_. No. Any person selling, soliciting, or negotiating annuities, including any financial professional relying or intending to rely on the safe harbor, must be licensed as an insurance producer. The safe harbor only affects requirements established by the model itself and has no effect on the application of other requirements and obligations. |
| **Suggested Revisions to Existing FAQs** | |
| **BEST INTEREST STANDARD OF CONDUCT**  **Q4. What is the best interest standard of conduct and how would a producer or insurer satisfy it?**  A4. To satisfy the best interest obligation, a producer or an insurer must satisfy four obligations: 1) care; 2) disclosure; 3) conflict of interest; and 4) documentation.  To satisfy the four obligations, when making a recommendation, producers must:   * Know the consumer’s financial situation, insurance needs and financial objectives; * Understand the available recommendation options; * Have a reasonable basis to believe the recommended option effectively addresses the consumer’s financial situation, insurance needs and financial objectives; * Communicate the basis of the recommendation to the consumer; * Disclose their role in the transaction, their compensation, and any material conflicts of interest; and * Document, in writing, any recommendation and the justification for such recommendation. | |
| **IIABA** | **Q4. What is the best interest standard of conduct and how would a producer or insurer satisfy it?**  A4. The best interest obligation is comprised of four separate obligations: 1) care; 2) disclosure; 3) conflict of interest; and 4) documentation.  To satisfy the four obligations, when making a recommendation, producers must:   * Know the consumer’s financial situation, insurance needs and financial objectives; * Understand the available recommendation options; * Have a reasonable basis to believe the recommended option effectively addresses the consumer’s financial situation, insurance needs and financial objectives; * Communicate the basis of the recommendation to the consumer; * Disclose their role in the transaction, their compensation, and any material conflicts of interest; and * Document, in writing, any recommendation and the justification for such recommendation. |