



Independent Insurance Agents  
& Brokers of America.

July 21, 2022

The Honorable Doug Ommen  
Chairman  
Annuity Suitability Working Group  
National Association of Insurance Commissioners  
1100 Walnut Street, Suite 1500  
Kansas City, MO 64106

Dear Commissioner Ommen:

On behalf of the Independent Insurance Agents and Brokers of America (IIABA), I write to again address the draft Frequently Asked Questions document that was released on May 12. Our comments focus on the reasons why the safe harbor provision contained in the Suitability in Annuity Transactions Model Regulation does not apply and is not available to broker-dealers and registered representatives who recommend or sell annuities that are not securities.

### **The Safe Harbor's Application to Broker-Dealers and Registered Representatives**

Some life insurer advocates have urged the working group to adopt an interpretation of the model regulation suggesting that the safe harbor is available to broker-dealers and registered representatives who recommend or sell annuities that are not securities. Embracing such an interpretation is inconsistent with the plain text of the model, which is the most important and paramount concern when considering such an interpretation, but we also urge regulators to recognize the troubling outcomes that would come from such an unjustified and unwarranted perspective. Further expanding the scope of the safe harbor provision via a FAQ document in this manner would permit certain marketplace actors to opt for a lighter and less comprehensive regulatory framework than that contained in the model, exacerbate concerns related to the creation of an unlevel playing field among competitors, and represent a move toward optional federal regulation and away from the concept of functional regulation that the NAIC has historically embraced.

The model regulation makes clear that the safe harbor is not available to broker-dealers and registered representatives when the annuity being recommend or sold it not a security. Some of the reasons for this and other factors to consider are outlined below:

- A producer can only take advantage of the safe harbor or exemption provision if the recommendation or sale is "made in compliance with comparable standards" (see

Section 6(E)(1)), but there is no comparable standard that exists when a broker-dealer or registered representative recommends or sells an annuity that is not a security. The relevant definition of “comparable standard” found in Section 6(E)(5)(a) provides that broker-dealers and registered representatives may only rely on the safe harbor and avoid the model’s requirements when they comply with “applicable SEC and FINRA rules pertaining to best interest obligations and supervision of annuity recommendations and sales.”

- This text makes clear that the safe harbor, for purposes of broker-dealers and registered representatives only<sup>1</sup>, is limited to instances when a SEC or FINRA rule applies to a particular annuity recommendation (i.e. when the annuity at issue is a security). Since there are no SEC or FINRA rules that are applicable to or that pertain when an annuity is not a security, the safe harbor cannot apply and is not available to broker-dealers and registered representatives in these narrow instances.
- The safe harbor provision also requires any person seeking to rely on the safe harbor to actually comply with the comparable standard in question, and this is unachievable for a broker-dealer or registered representative recommending or selling an annuity that is not a security. It is impossible for a person recommending an annuity that is not a security to somehow comply with rules, such as Regulation Best Interest, that are specific to and limited to securities. Regulation Best Interest is tailored to securities transactions, and it applies to those “making a recommendation of any securities transaction or investment strategy involving securities” and to customers “receiv[ing] a recommendation of any securities transaction or investment strategy involving.” It does not apply to insurance or to annuities that are not securities, and a person not selling a security cannot comply with it.
- In the broker-dealer and registered representative context, the model requires any financial professional seeking to take advantage of the safe harbor to comply with federal securities rules that apply to the particular annuity product in question. The reality is that (1) there are no applicable federal securities rules that apply to transactions involving annuities that are not securities and (2) a person recommending or selling an annuity that is not a security cannot conceivably comply with such securities rules. This means broker-dealers and registered representatives cannot satisfy the conditions of the safe harbor when offering annuities that are not securities and must therefore comply with the model regulation.

Some industry advocates may observe the Section 6(E)(1) text stating that the safe harbor is available to financial professionals “that satisfy a comparable standard even if such a standard would not otherwise apply to the product or recommendation at issue.” This text, however, does not help those arguing for an expansive and unwarranted interpretation of the manner in which the safe harbor applies to broker-dealers and registered representatives. This text makes clear that compliance with a comparable standard is necessary, and, as noted above, there is no comparable standard for broker-dealers or registered representatives who recommend or sell annuities that are not securities.

---

<sup>1</sup> The safe harbor subsection of the model regulation addresses three categories of financial intermediaries – (1) broker-dealers and registered representatives, (2) investment advisors, and (3) plan fiduciaries or fiduciaries. Notably, the provisions related to broker-dealers and registered representatives are the only one of the three to limit the application of the safe harbor in a manner that requires any purported comparable federal standard and regulatory framework to actually apply to the annuity being recommended or sold.

In short, the model regulation in its current form clearly applies to all recommendations and sales of annuities that are not securities by broker-dealers and registered representatives. For this reason and because of the adverse consequences that would result from the adoption of an alternative interpretation, we urge you not to adopt a FAQ that is inconsistent with the model regulation's text.

Below, for your consideration, we once again present a possible Q&A that appropriately addresses these issues:

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." 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 or sale, which means broker-dealers and registered representatives cannot rely on the safe harbor when the annuity being recommended or sold is not a security and must comply with the requirements of the model regulation. The safe harbor is not limited to investment advisors and plan fiduciaries or fiduciaries in the same way.

## **Insurer Requirements**

Some industry colleagues also continue to surprisingly argue that the safe harbor should somehow be interpreted to extend to the basic-yet-important obligations of insurers and to effectively provide an exemption from any requirement in the model that could apply to an insurance company. Those making these bold assertions seek to effectively expand and rewrite the safe harbor and achieve an outcome that would allow them to evade the common-sense provisions contained in Section 6(C), the straightforward and seemingly non-controversial prohibitions found in Section 6(D), and even the enforcement and recordkeeping provisions of Sections 8 and 9. These advocates previously sought to convince you that the safe harbor was so sweeping that it even eliminated the need for certain agents to comply with the training requirements in Section 7, an argument that your working group appropriately dismissed, and we urge you to handle questions about the application of the insurer obligations in a similar openminded manner. Our previous comment letters address why the arguments that have been presented by our insurer colleagues misinterpret the text of the model regulation, lack a rational public policy basis, and would result in a troubling regulatory vacuum, but we wanted to once again highlight and reiterate our concerns in advance of your meeting next week.

Although Section 6(E) addresses the duties of producers making recommendations (and to insurers in transactions where no producer is involved), it does not exempt insurers from the obligations in the model that apply to them. Section 6(E)(1) affirmatively creates an exemption for intermediaries in certain instances, but there is no analogous or parallel provision for insurers. In addition to altering the model's text, expansively waiving the obligations imposed on insurers via a FAQ document raises a number of practical issues and questions.

We have previously proposed a Q&A to address this issue, and we share it once again below:

Q\_\_. Does the safe harbor exempt insurers from any of the insurer 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 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 their functions.

## **Conclusion**

IIABA appreciates having the opportunity to submit these comments. We are happy to assist your working group's consideration of these issues in any way you deem appropriate. Please feel free to contact me at 202-302-1607 or via email at [wes.bissett@iiaba.net](mailto:wes.bissett@iiaba.net) with any questions or if we can assist in any manner.

Very truly yours,

A handwritten signature in black ink that reads "Wesley Bissett". The signature is written in a cursive, flowing style.

Wesley Bissett  
Senior Counsel, Government Affairs