July 21, 2022

Submitted Electronically to jmatthews@naic.org

The Honorable Doug Ommen  
Commissioner, Iowa Insurance Division  
Chairman, NAIC Life Insurance and Annuities (A) Committee  
1963 Bell Avenue, Suite 100  
Des Moines, IA 50315

Re: Chair’s Draft of Safe Harbor FAQs  
Exposure Draft dated May 12, 2022

Dear Commissioner Ommen:

The undersigned organizations appreciate the opportunity to provide comments to the National Association of Insurance Commissioners (“NAIC”) Annuity Suitability Working Group (the “Working Group”) regarding the May 12, 2022, Chair’s Draft of potential frequently asked questions (“Draft FAQs”) focused on the safe harbor established in Section 6E of the NAIC Suitability in Annuity Transactions Model Regulation (the “Model”). Attachment A hereto is a marked version of the Draft FAQs that reflects our proposed modifications. We respectfully urge the Working Group to revise the Draft FAQs as set forth in the attached markup.

In addition, we respectfully reiterate our previous request that the Working Group consider expanding the FAQs to also include guidance on the Model’s producer training requirements. We have encountered a number of challenges with implementation of the producer training provisions across the states over the past two years, so we believe additional guidance in this area would benefit the states and industry. For your convenience, we have included our suggested approach in Attachment B hereto.

If you have questions about anything in this letter, or if we can be of any further assistance in connection with this important regulatory effort, please feel free to contact any of the undersigned individuals.

Sincerely,

American Council of Life Insurers (ACLI)  
Committee of Annuity Insurers (CAI)  
Indexed Annuity Leadership Council (IALC)  
Insured Retirement Institute (IRI)  
National Association for Fixed Annuities (NAFA)  
National Association of Insurance and Financial Advisors (NAIFA)
SAFE HARBOR/COMPARABLE STANDARDS PROVISION

QXX. What types of recommendations or sales does the safe harbor provision (contained in Section 6E of the revised model) apply to?

AXX.

Joint Trades Comment: We support the inclusion of this question in the FAQs, and consistent with the joint trades’ submission dated January 26, 2022 (the “January 2022 Joint Trades Submission”), we recommend that the working group provide the following response to this question in the final FAQs:

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.

This response is consistent with the language of the Model itself and reflects the historical intent of the safe harbor. By way of background, the Model has always provided a safe harbor for recommendations of variable annuities by broker-dealers in compliance with the suitability rules imposed by the Financial Industry Regulatory Authority (“FINRA”). The Model was modified nearly ten years ago to also cover recommendations and sales of all other types of annuity products, such as fixed and fixed indexed annuities, that were voluntarily subjected to the same requirements and the same degree of oversight as variable annuities even where the recommended product was not technically covered by FINRA’s suitability rules.

This expansion of the safe harbor to include recommendations and sales of fixed and fixed indexed annuities avoids unnecessary duplication and recognizes that compliance with any comparable standard will effectively protect consumers in substantially the same way as the Model. The Working Group incorporated essentially this same approach in its 2020 revisions to the Model and gave no indication during the development of the 2020 revisions to the Model that it intended to limit the availability of the safe harbor to just those products that are technically covered by a particular comparable standard. The FAQs should accurately reflect the Working Group’s clear intent to make the safe harbor available for all annuity products.

QXX. When would a producer be considered to be acting as a financial professional for purposes of the safe harbor provision?

AXX.

Joint Trades Comment: We support the inclusion of this question in the FAQs, and consistent with the January 2022 Joint Trades Submission, we recommend that the working group provide the following response to this question in the final FAQs:

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.

If the Working Group believes that further explanation is needed, we’d recommend including an example(s), and we’d be happy to work with the Working Group to develop these.
QXX. What comparable standards meet the criteria for the safe harbor?

AXX.

**Joint Trades Comment:** We support the inclusion of this question in the FAQs, and consistent with the January 2022 Joint Trades Submission, we recommend that the working group provide the following response to this question in the final FAQs:

The NAIC considers conduct standards adopted by federal regulators under federal securities laws, ERISA, and the IRC, to be comparable standards for purposes of the revised model. A drafting note in the revised model indicates that 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.

Again, we think this response is consistent with the intent of the safe harbor and the clear language of the Model.

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.

**Joint Trades Comment:** We support the inclusion of this question in the FAQs. Based on the discussions held to date by the Working Group, we have modified the response we suggested in the January 2022 Joint Trades Submission. We now recommend that the working group provide the following response to this question in the final FAQs:

No, a financial professional who makes a recommendation or sale of an annuity in full compliance with the requirements of a comparable standard is considered to have satisfied the requirements under the revised model and is not required to separately comply with any additional obligations imposed thereunder. Importantly, 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 comply with that comparable standard when recommending or selling an annuity.

We also note that producers relying on the safe harbor are still required to meet their other obligations under state insurance laws, including licensing, marketing, and replacement documentation. Compliance with comparable standards does not impact producers’ obligations relative to these other requirements.

We believe producers relying on the safe harbor are not technically required to complete the NAIC-mandated training, as a plain reading of the Model language makes clear that the safe harbor covers all requirements of the Model. If the Working Group concludes that the training requirements set forth in Section 7 of the Model should nevertheless apply to all producers who recommend annuities to their clients, we would recommend adding the following language to express and explain the Working Group’s views on this question:

While the revised model states that compliance with comparable standards shall satisfy the requirements of the regulation, the training requirements outlined in Section 7 of the revised model are a key component of the regulatory framework governing the licensure and authorization of producers.
As such, all producers, including those operating under the safe harbor, should be required to satisfy these training requirements.

QXX. Are there specific conditions an insurer must meet for the safe harbor to apply?

AXX.

Joint Trades Comment: We support the inclusion of this question in the FAQs, and consistent with the January 2022 Joint Trades Submission, we recommend that the working group provide the following response to this question in the final FAQs:

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.

QXX. Do insurers have any other obligations under the revised model with respect to producers seeking to rely on the safe harbor?

AXX.

Joint Trades Comment: We support the inclusion of this question in the FAQs, and consistent with the January 2022 Joint Trades Submission, we recommend that the working group provide the following response to this question in the final FAQs:

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.

As noted above, the safe harbor provides that producers who operate in compliance with a comparable standard are not required to separately comply with the specific requirements of the Model. This is important to ensure that the safe harbor works as intended. The NAIC determined that a safe harbor provision was appropriate to include in recognition of the robust framework established by federal regulators such as the SEC, DOL, and FINRA to protect consumers. Each of the comparable standards referenced in the Model have their own supervisory requirements designed to ensure that a responsible entity is overseeing the conduct of individual financial professionals.

The supervisory requirements in Section 6C(2) of the Model were designed to ensure compliance with their obligations under Section 6A of the Model, but would not necessarily work as well in the context of a producer operating under a comparable standard. Put simply, supervisory requirements tailored to ensure compliance with one set of rules (i.e., Section 6A of the Model) cannot and should not be expected to effectively ensure compliance with alternative rules (i.e., the comparable standards).

The safe harbor recognizes this fact and thus provides, in Section 6E(3), that insurers must (a) monitor the relevant conduct for compliance with the applicable comparable standard and (b) provide information and
reports to the firm that directly supervises the producer as may be reasonably appropriate to maintain its supervision system. Layering the specific supervisory requirements set forth in Section 6C(2) on top of the corresponding requirements of the comparable standard is not required by the Model and would largely negate the benefits and purpose of the safe harbor. This approach could even force an insurer to treat a producer as non-compliant with his or her obligations under the Model even if they have fully satisfied the requirements of the applicable comparable standard. To achieve the purpose of the safe harbor, it is important that insurers be able to coordinate with broker-dealers, investment advisers, and other firms to implement compliance programs in a manner that avoids unnecessary duplication, costly redundancies, or confusion relating to supervision of covered financial professionals.

We also want to specifically address the comments made by other interested parties to the Working Group on this proposed question. In its May 23, 2022, letter to the Working Group, the Independent Insurance Agents and Brokers of America (IIABA), asserted that “[i]nsurers 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. For the reasons noted above and throughout this document, we object to and disagree with this assertion. Moreover, we believe the Working Group already settled this issue when it developed the current iteration of the Model.

IIABA implied in its letter that the joint trades believe “the safe harbor should be interpreted to expansively waive the obligations imposed on insurers.” This is not accurate. We have never sought, and are not now seeking, a waiver of insurers’ obligations. Rather, we are simply asking the Working Group to make clear, consistent with the regulation itself, that when a financial professional seeks to operate under the safe harbor, the insurer’s obligation is to monitor the conduct of the financial professional or the entity supervising the financial professional using information collected in the normal course of an insurer’s business. This is a significant and substantial obligation on the part of the insurer with meaningful consequences for violations. If an insurer does not appropriately monitor the conduct of the financial professional or the entity supervising the financial professional, and the financial professional fails to comply with the applicable comparable standard, the transaction will no longer qualify for the safe harbor, leaving the financial professional and the insurer responsible for failing to satisfy their respective obligations under the Model.

Moreover, as we note elsewhere in this document, the plain language of the safe harbor makes abundantly clear that “compliance with comparable standards shall satisfy the requirements under this regulation.” This statement includes no caveats, exclusions, carve-outs, or exceptions. We can recall no proposal or suggestion to insert any caveat, exclusion, carve-out, or exception ever being made by any member of the Working Group, any other regulator, or any interested party. IIABA may now regret its failure to raise this issue during the Working Group’s inclusive and collaborative multi-year effort to develop the revised version of the Model, but the Working Group should not permit IIABA to use its current work to develop these FAQs as a forum to relitigate this settled issue.

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.

Joint Trades Comment: In order for the safe harbor to apply, Section 6.E(3)(a) of Model requires insurers to “[m]onitor the relevant conduct of the financial professional seeking to rely on [the safe harbor] or the entity responsible for supervising the financial professional...using information collected in the normal course of an insurer’s business.” However, the Model does not explicitly prescribe any particular type of documentation or methodology for insurers to follow in order to ensure that the producer is meeting his or her obligations under the comparable standard. The Working Group rightfully opted to provide flexibility for insurers to work with
their distribution partners to implement appropriate oversight and surveillance mechanisms that fit their respective needs and business models. As a practical matter, insurers often have written agreements with the firms supervising the financial professionals that govern the conduct of the producers recommending and selling the insurers’ products, and the FAQs should not impair the ability of insurers and distributors to set the terms and conditions for their business relationship. Accordingly, this question and the next four questions are not necessary and could create unnecessary confusion.

If the Working Group nevertheless determines to include one or more of these questions despite our recommendation to omit them, the answers should clearly indicate that 1) while the practices referenced in these questions could be included as elements of the process for oversight of compliance with comparable standards, insurers are not required to employ any of those practices for that purpose, 2) there is no one-size-fits-all approach to ensuring compliance with a comparable standard, and 3) insurers and distributors should work together to develop and implement an approach that satisfies the requirements of the Model and works for their particular circumstances.

**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.**

**Joint Trades Comment:** As noted above, we do not believe this question is necessary. If the Working Group nevertheless decides to include this question in the FAQs, we recommend that the Working Group provide the following response:

Yes. See response to QXX regarding insurers’ other obligations under the revised model with respect to financial professionals seeking to rely on the safe harbor. This includes the requirement for insurers to monitor relevant conduct and provide necessary information and reports to assist any supervising entity. Insurers may satisfy these requirements in various ways, including but not limited to audits or any other reasonable methods for monitoring compliance with Model requirements under the safe harbor.

**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.**

**Joint Trades Comment:** As noted above, we do not believe this question is necessary. If the Working Group nevertheless decides to include this question in the FAQs, we recommend that the working group provide the following response:

No. See response to QXX regarding insurers’ other obligations under the revised model with respect to producers seeking to rely on the safe harbor.

**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?**

**AXX.**

**Joint Trades Comment:** As noted above, we do not believe this question is necessary. If the Working Group nevertheless decides to include this question in the FAQs, we recommend that the working group provide the following response:
No. See response to QXX regarding insurers’ other obligations under the revised model with respect to producers seeking to rely on the safe harbor. However, to support its obligation to monitor relevant conduct, an insurer may, but is not required to, include such a statement in its new business forms as a means by which the financial professional recommending and selling the annuity confirms making the recommendation/sale in compliance with a comparable standard or in compliance with the revised model, as applicable.

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.

Joint Trades Comment: As noted above, we do not believe this question is necessary. If the Working Group nevertheless decides to include this question in the FAQs, we recommend that the working group provide the following response:

No. See response to QXX regarding insurers’ other obligations under the revised model with respect to producers seeking to rely on the safe harbor.

The purpose of the safe harbor for comparable standards is to avoid imposing comparable but duplicative requirements on producers and insurers; specifically, producers utilizing the safe harbor have their own recordkeeping requirements imposed under the comparable standards they are utilizing that are appropriately tailored to their respective specific requirements, e.g., FINRA or SEC Reg BI standards. In addition, the insurance laws and regulations of most states already impose basic recordkeeping requirements on producers and/or insurers (e.g., the requirement for producers to maintain copies of all materials shared with and information obtained from consumers). These long-standing regulations exist alongside any requirements under the Model. As to annuity contract applications, to the extent the application is made part of the annuity contract, insurers would be required to maintain those records.

For the reasons above, we do not believe it would be necessary or appropriate to require insurers and producers to adhere to duplicate recordkeeping requirements under the Model when they are operating under a comparable standard. As with the insurer supervision question discussed above, we are concerned that layering on duplicative recordkeeping requirements is unnecessary, potentially confusing, and would thwart the regulatory intent of the comparable standard safe harbor provisions.
Producer Training and Reciprocity Under 2020 Version of NAIC MDL 275

The National Association of Insurance Commissioners (NAIC) *Suitability in Annuity Transactions Model Regulation (MDL 275)* has, since 2010, required insurance producers who recommend and sell annuities to consumers to complete a one-time, four credit hour training course that covers general annuity principles – including the types and uses of annuities, how annuity contract features affect consumers, and tax implications – as well as information about the requirements of the Model.

The Model also provides that a producer who completes a course that meets the training requirement in one state would not need to re-take the training in other states that impose substantially similar requirements. This is generally referred to as “reciprocity.”

The 2020 amendments to the Model expanded the topics to be covered by the required training to include information about the new best interest standard of conduct applicable to producers when they recommend and sell annuities. In recognition of the fact that many producers completed the required training before this new requirement was added, the Model allows such producers to remain in compliance by taking a one-time, one credit hour course that covers the applicable standard of conduct. The insurance departments in some states where the revised Model has been adopted or enacted have opted to discontinue this one credit hour option after a set period of time, while the others have not set an end-date for this option.

The producer training provision has been the source of significant confusion for the industry and the regulators in several states where the revised Model has been enacted or adopted. This confusion is largely attributable to the fact that any individual producer’s actual training obligations will vary based on when and where the producer is licensed, as well as whether and when the producer has completed any or all of the required training.

The NAIC issued a set of *frequently asked questions (FAQs)* in July 2021 that, among other things, addressed a number of questions related to the producer training requirement. As a supplement to those FAQs and to further assist the industry and the regulators in navigating this complex situation, a coalition of industry trade organizations developed the following chart to outline precisely what training would be required under a number of different scenarios. Note that this chart does not include every conceivable scenario, but we believe it covers the most common scenarios.
<table>
<thead>
<tr>
<th>Licensing Status</th>
<th>Training Status</th>
<th>Training Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SCENARIO #1</strong></td>
<td>Producer applies for license in 2020 Model state (“State A”) on or after effective date AND Producer is NOT licensed in any other 2020 Model state before effective date</td>
<td>Producer has NOT completed any version of annuity training course</td>
</tr>
<tr>
<td><strong>SCENARIO #2</strong></td>
<td>Producer applies for a license in 2020 Model state (“State B”) on or after effective date AND Producer is licensed in any other 2020 Model state (“State C”) before effective date</td>
<td>Producer has NOT completed any version of annuity training course</td>
</tr>
<tr>
<td><strong>SCENARIO #2-A</strong></td>
<td></td>
<td></td>
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<tr>
<td><strong>SCENARIO #2-B</strong></td>
<td>Producer has completed prior 4-credit course in State C before effective date AND Producer has NOT completed new 4-credit course OR new 1-credit course in State C (if not discontinued prior to completion) before effective date</td>
<td>Within six months after effective date, producer must complete one of the following in State B or any other 2020 Model state where licensed: (a) new 4-credit course OR (b) new 1-credit course (if not discontinued in state where taken)</td>
</tr>
<tr>
<td><strong>SCENARIO #2-C</strong></td>
<td>Before effective date, Producer has completed either: (a) new 4-credit course in State C OR (b) prior 4-credit course AND new 1-credit course in State C</td>
<td>NONE (covered by reciprocity)</td>
</tr>
<tr>
<td><strong>SCENARIO #3</strong></td>
<td>Producer is licensed to sell annuities in 2020 Model state (“State D”) before effective date AND Producer is NOT licensed to sell annuities in any other 2020 Model state before effective date</td>
<td>Producer has NOT completed any version of annuity training course</td>
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<tr>
<td><strong>SCENARIO #3-A</strong></td>
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<tr>
<td><strong>SCENARIO #3-B</strong></td>
<td>Producer has completed prior 4-credit course in State D prior to effective date</td>
<td>Within six months after effective date, producer must complete one of the following in State D: (a) new 4-credit course OR (b) new 1-credit course</td>
</tr>
</tbody>
</table>

1 “2020 Model State” means a state in which the 2020 version of MDL 275 has been enacted by legislation or adopted by regulation.
2 “Effective date” means, for each 2020 Model State, the date on which the 2020 version of MDL 275 takes effect.
3 “Prior 4-credit course” means a course that met the requirements of the 2010 version of MDL 275.
4 “New 4-credit course” means a course that meets the requirements of the 2020 version of MDL 275.
5 “New 1-credit course” means a course that meets the requirements for the 1-credit option in the 2020 version of MDL 275.
6 At least one 2020 Model State adopted the 2020 version of MDL 275 without the six month grace period for existing producers. In such states, the specified training must be completed by all producers seeking to recommend or sell annuities after the effective date.