



Independent Insurance Agents
& Brokers of America.

May 11, 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 comment on your working group's continued development of a Frequently Asked Questions (FAQ) document designed to provide interpretative guidance concerning the Suitability in Annuity Transactions Model Regulation. IIABA is the largest association of insurance producers in the country and represents the industry constituency most impacted by the adoption of the model, and we have great interest in your ongoing work.

In the attachment that follows this letter, we have proposed several new FAQs and a revision to one of the FAQs approved last year by the working group and its parent committee. Our proposal addresses two primary issues.

Clarifying What is Required by the Best Interest Standard

The first issue we urge the working group to address is the nature and scope of the best interest standard established in Section 6(A) of the model and what it requires. The NAIC has noted in the past that the standard is comprised of four independent and separate obligations (i.e. the care, disclosure, conflict of interest, and documentation obligations), but the FAQ addressing the standard suggests that these four duties operate as a safe harbor. In order to avoid any confusion and to bring much-needed clarity to this question, IIABA urges the working group to clarify in FAQ #5 that the best interest standard is comprised of these four obligations. We have proposed a modest revision to the FAQ that has this effect.

Addressing the Safe Harbor

The second issue we ask the working group to address is the safe harbor provision contained in Section 6(E). This provision was proposed in late October 2019 by an industry stakeholder during the closing stages of the model's development, and it replaced a narrower safe harbor

that was tailored to address instances in which a producer was subject to multiple regulatory frameworks in the same transaction. Whereas the safe harbor previously applied only to transactions dually regulated by both insurance and securities officials, it now extends even to certain transactions in which a professional is recommending the purchase of annuity that is regulated only by state insurance law.

The effect and scope of this provision were not discussed in detail by the working group at the time, so the issuance of interpretive guidance now would be particularly helpful and instructive. The subsection presents practical questions concerning state regulatory primacy over insurance products and about how state insurance officials can implement and enforce standards adopted by regulators in other financial sectors, and your willingness to tackle these issues is greatly appreciated. IIABA did not support the inclusion of this particular provision in the model, but our interest and concern are further heightened now due to efforts by some in the industry to expand the breadth and scope of Section 6(E) via the FAQ document. The NAIC has already acknowledged (with its interpretation that the training requirements of Section 7 apply to any person selling annuities) that the safe harbor has limits and is not as sweeping as some have suggested, and we are grateful for your actions last year and your willingness to address this subsection again in 2022.

IIABA has proposed several new FAQs in the attachment that follows this letter, and we offer additional and related comments below.

Supervisory Obligations of Insurers

One of the issues we urge the working group to address is the extent to which the safe harbor affects the important supervisory obligations of insurers, especially since some of our industry colleagues have surprisingly argued that the subsection relieves insurers of most of their responsibilities. The reality is that Section 6(E) addresses the duties of producers making recommendations (and to insurers in transactions where no producer is involved) and does not exempt insurers from the model's supervisory obligations. Section 6(E)(1) affirmatively creates an exemption for intermediaries in certain instances but includes no analogous provision for insurers. And, even if the safe harbor is interpreted to exempt insurers from some of their supervisory mandates, it certainly is not as sweeping as some have proposed.

The notion that the safe harbor should be interpreted to expansively waive the obligations imposed on insurers raises a number of practical issues and questions. As you consider these topics, we recommend that you consider some of the individual provisions in the model and what the marketplace and public policy outcomes would be if insurers were deemed exempt from those requirements as a result of the safe harbor. In order to help frame this examination, we urge the working group to, for example, consider the following:

- Section 6(C)(2)(c) requires insurers to “provide product-specific training and training materials which explain all material features of its annuity products to its producers.” In transactions involving a financial professional relying on the safe harbor, are insurers exempt from the obligation to directly or indirectly provide such product-specific information to the person making the recommendation?
- Section 6(C)(2)(d) requires insurers “to establish and maintain procedures for the review of each recommendation prior to the issuance of an annuity that are designed to ensure there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer’s financial situation, insurance needs and financial

objectives.” In transactions involving a financial professional relying on the safe harbor, must insurers comply with this requirement? The fact that Section 6(E)(3)(a) conditions the application of the safe harbor on an insurer monitoring that person’s relevant conduct offers additional support for the view that this requirement would still apply.

- Section 6(C)(2)(e) requires insurers to “establish and maintain procedures to detect recommendations that are not in compliance” with key elements of the model (including Section 6(E)). In transactions involving a financial professional relying on the safe harbor, must an insurer comply with Section 6(C)(2)(e)? We presume that insurers must satisfy the requirements of this subparagraph, especially in light of the very explicit reference to Section 6(E). Stated another way, it is unclear how Section 6(E) can provide an exemption from a provision that requires insurers to detect recommendations that are not in compliance with the safe harbor itself.
- Section 6(C)(2)(g) requires insurers to “establish and maintain reasonable procedures to identify and address suspicious consumer refusals to provide consumer profile information.” Again, since Section 6(E)(3)(a) conditions the application of the safe harbor on an insurer monitoring a financial professional’s relevant conduct, this requirement would presumably apply.
- Section 6(D) prohibits insurers from engaging in certain activities, such as dissuading a consumer from providing truthful consumer profile information or filing a complaint. Although we hope that state insurance regulators would take action whenever such troubling conduct might arise, the expansive view of Section 6(E) outlined by some suggests that insurers would be exempt from this prohibition when a producer is relying on the safe harbor provision.

Some industry colleagues have previously suggested that requiring insurers to comply with some or all of the supervisory duties outlined in Section 6(C)(2) and other parts of the model would prevent them from relying on partners to supervise conduct. These concerns are misplaced because the model makes clear that an insurer can satisfy its supervisory obligations by contracting with other parties for the performance of the supervisory functions. The ability of insurance companies to rely on their distribution partners and other third parties would not be adversely affected even if the working group disregards the expansive reading of the safe harbor proposed by some.

“Comparable Standards” for Broker-Dealers and Registered Representatives

The working group should also examine the manner in which the model’s safe harbor can be utilized by broker-dealers and registered representatives. The definition of “comparable standards” 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). A plain reading of this provision indicates that the safe harbor can only be utilized by broker-dealers and registered representatives in instances when a SEC or FINRA rule applies to a particular annuity recommendation (i.e. when an annuity, such as a variable product, is dually regulated). So, for example, a registered representative cannot choose to comply with Regulation Best Interest and avoid the requirements of the model when recommending a fixed annuity because Regulation Best Interest is not an applicable rule that applies to the recommendation and sale of that annuity. The limitation is unique to broker-dealers and registered representatives, and the

ability of investment advisors and plan fiduciaries to utilize the safe harbor is not affected and limited in the same way.

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 with any questions or if we can assist you in any manner.

Very truly yours,

A handwritten signature in black ink that reads "Wesley Bissett". The signature is written in a cursive style with a clear, legible font.

Wesley Bissett
Senior Counsel, Government Affairs

Proposed Revisions and Additions to the Frequently Asked Questions Document

Q4. What is the best interest standard of conduct and how would a producer or insurer satisfy it?

A4. ~~To satisfy the~~ The best interest obligation, a producer or an insurer must satisfy 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.

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 creates 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.