



August 3, 2018

The Honorable Jay Clayton  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Re: Regulation Best Interest, S7-07-18; Form CRS Summary, S7-07-18

Dear Chairman Clayton:

On behalf of the National Association of Insurance Commissioners (NAIC),<sup>1</sup> we write today regarding the proposed rules package published May 9, 2018, by the U.S. Securities and Exchange Commission (SEC). We commend the work done by the SEC in preparing this package to enhance retail investor protections by raising the standard of conduct for broker-dealers. Efforts to bring clarity to the terms of the relationship between broker-dealers and their clients, while preserving access to investment services and products, are laudable and if done correctly, will have a positive impact on investors. The NAIC respectfully submits the following comments to proposed rule “Regulation Best Interest.” In regard to “Form CRS – Relationship Summary,” state insurance commissioners, working through the NAIC, have begun considering whether to adopt a new disclosure summary form and believe it would be useful to coordinate with the SEC on such form once our process is further along.

Like the SEC’s proposed rules, the NAIC’s work is preliminary, ongoing, and subject to further discussion and revision. For this reason, our comments are somewhat constrained by the progress of our own thinking and work on these same issues, and we will focus to some extent on our own work in the context of what the SEC is considering, with the intent of highlighting areas where consistency and compatibility between our efforts would be most useful. We believe a continued dialogue with the SEC would be productive as we each continue to consider revisions in our respective processes.

**NAIC Annuity Suitability Revisions**

State insurance regulators have adopted laws and implemented regulations to ensure the suitability of annuity sales for policyholders. Much of this insurance regulatory framework is based on the NAIC’s *Suitability in Annuity Transactions Model Regulation* (#275) (the Suitability model), which has been widely adopted by the states. This model sets forth standards and procedures for recommendations to consumers that result in transactions involving annuity products so that the insurance needs and financial objectives of consumers at the

<sup>1</sup> Founded in 1871, the NAIC is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and the five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

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time of the transaction are appropriately addressed. The provisions of the Suitability model reflect revisions the NAIC adopted in 2010 for consistency with the Financial Industry Regulatory Authority's (FINRA) Rule 2821. As a result of increasing requests from state insurance regulators, the insurance industry, and consumers for an updated and consistent standard of care applicable to the sale of annuity products, the NAIC's Life Insurance and Annuities (A) Committee (A Committee) appointed the Annuity Suitability Working Group (Working Group) last year. The Working Group has been charged with reviewing and revising, as necessary, the Suitability model and considering how to promote greater uniformity across NAIC member jurisdictions.

The Working Group is currently drafting revisions to the model and hopes to complete its work by the end of this year. The most recent working draft is attached. After the Working Group finishes its work, it will continue moving through the NAIC's committee structure where ultimately the full NAIC membership will consider adoption.

### **Objectives**

In revising the Suitability model, the NAIC seeks to provide clear, enhanced standards for annuity sales so that consumers understand the products they are purchasing, are made aware of any potential conflicts, and are assured that those selling the products do not place their financial interests above consumers' interests. In undertaking our work, we seek to avoid excessive regulatory complexity and uncertainty in the application and enforcement of any revisions.

State insurance regulators are also concerned about the potential for confusion regarding the differences in the duties owed to consumers by insurance agents and brokers (insurance producers), investment advisers, and broker-dealers. Registered investment adviser representatives and broker-dealer representatives that also function as insurance producers may sell a broad array of financial products, including insurance and annuities.<sup>2</sup> When the sale of each of these products is regulated by different entities requiring different standards of care, it can understandably bewilder even the most informed consumer. For this reason, the NAIC believes a high degree of harmonization across regulatory platforms would be beneficial to consumers and the industry.

However, while the SEC and state insurance regulators have shared oversight for variable annuity products, there are some fundamental differences among the entities within our regulatory purview. Indeed, an insurance producer's interaction with her customer may differ from that of a registered investment adviser or a broker-dealer in significant ways. An insurance producer does not direct premium dollars or control policies in the same way a registered investment adviser manages the assets of a financial portfolio or a broker-dealer may recommend an investment strategy. Variable annuity products are similar in some ways to mutual funds, hence the Series 6 securities agent registration. But variable, fixed and fixed index annuities have insurance benefits and features and are designed to be long-term contracts that may involve annual review and only intermittent consultation. While we seek consistency among our respective rules, there may be some areas where it may be necessary for a degree of deviation.

Nevertheless, there are many areas where we believe we may be able to find common ground. There are also several open issues that are under active consideration in our process that would benefit from further discussion and coordination with the SEC.

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<sup>2</sup> 39.5 percent of broker-dealers' business lines include selling variable contracts, such as life insurance or annuities, Regulation Best Interest, 83 Fed. Reg. 21633 (proposed May 9, 2018) (to be codified at 17 C.F.R. 240).

## **Potential Areas of Consistency with Proposed Changes**

### **Suitability Rules**

We understand that FINRA's suitability rules were used as the foundation for the SEC's Regulation Best Interest. As described above, our own work utilizes the NAIC's Suitability model as its foundation. We urge you to continue to use the suitability rules as the basis for any revisions as we believe this approach will enhance the prospects for regulatory consistency.

### **Duty of Care**

As part of its current discussions, the majority of the NAIC's Working Group has discussed including in the draft revisions a new affirmative duty of care in which, "the producer or insurer must act with reasonable diligence, care, skill and prudence in making suitable recommendations." This is similar to the SEC's proposed care obligation to require a broker-dealer to "exercise reasonable diligence, care, skill and prudence"<sup>3</sup> in making recommendations of any securities transaction or investment strategy to a retail customer.

Regulation Best Interest states the new care obligation approach "would not require a broker-dealer to analyze all possible securities, all other products, or all investment strategies to recommend the single 'best' security or investment strategy for the retail customer, nor necessarily require a broker-dealer to recommend the least expensive or least remunerative security or investment strategy."<sup>4</sup> Similarly, the NAIC's Working Group has discussed including in the draft revisions a similar provision for annuities.

### **Duty of Loyalty and Material Conflicts of Interest**

Regulation Best Interest discusses the duty of loyalty prescribed by the 913 Study and proposes requirements that the broker or dealer "at a minimum disclose, or eliminate, all material conflicts of interest, which draws from principles of an investment adviser's duty of loyalty under the Adviser's Act."<sup>5</sup> We appreciate the SEC's approach in addressing the duty of loyalty in a way that "reflects the unique structure and characteristics of broker-dealer relationships with retail customers."<sup>6</sup> Likewise, the Working Group is discussing drawing from these same principles in a way that reflects the structure of insurance transactions.

Accordingly, consistent with the SEC's approach, the Working Group has also discussed that written policies and procedures to identify and address material conflicts of interest should be established, maintained, and enforced. The Working group is also considering draft revisions new recordkeeping requirements, a definition for the term "material conflict of interest," and new disclosure requirements with respect to such material conflicts of interest.

### **Additional Areas under Discussion**

#### **Best Interest Definition and Requirements**

The NAIC generally agrees that providing clear guidance is a better approach to address a new duty rather than creating a new, loosely defined term which may cause confusion. As you are undoubtedly aware, "best interest" has historically been a principles-based concept and it can be difficult to reconcile the various definitions of "best interest" found in state common law, and state and federal statutes and regulations. For these reasons, the Working Group is discussing not defining the term "best interest" in the revisions. Working Group members

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<sup>3</sup> Id. at 21608.

<sup>4</sup> Id. at 21609.

<sup>5</sup> Id. at 21575.

<sup>6</sup> Id.

have also considered that consumers and state courts may be confused by the term to the point where they may confuse “best interest” with a “bona fide fiduciary” duty. The fiduciary duty is often explained to a lay person as a best interest standard, which can be circular and misleading. The Working Group discussed not wanting to give a consumer the false impression that a producer or insurer is acting solely in their best interest when that standard does not correspond with the transactional, sales relationship between the producer or insurer and the consumer. Further, several members of the Working Group do not wish to substitute an entirely new “fiduciary” concept into the text of the Suitability model that may lead to a wide variety of interpretations in the courts, when preserving “suitability” offers a very firm framework upon which to build.

In lieu of defining “best interest,” the Working Group is considering draft revisions that describe the requirements needed to achieve an enhanced suitability standard equivalent to a “regulatory best interest standard.” Specifically, the Working Group is considering adding language to the Suitability model that states, “any recommendation made to the particular consumer shall be made without placing the financial or other interests of the producer, or insurer where no producer is involved, ahead of the consumer’s interests as known from the consumer’s suitability information.”

#### Disclosures

The Working Group discussed a consumer’s expectation that producers and insurers would disclose certain conflicts of interest and other information, particularly as related to compensation. Currently, the draft revisions require producers and insurers to disclose “the grounds for the recommendation and make a written record of the recommendation and the grounds for that recommendation.” The draft revisions also include requirements for an insurer “to maintain reasonable procedures to assess, prior to or upon issuance or delivery of an annuity, whether a producer has provided to the consumer the information required.”

The Working Group is considering developing a separate section on consumer disclosures that insurers and/or insurance producers would be required to provide prior to a recommendation and at the time of sale. This is an area where we believe we can work with the SEC to ensure that disclosures are mutually complementary and limit regulatory burden and duplication.

#### Fee Disclosures

The disclosure of fees has generated much discussion among the Working Group members as they consider the draft revisions. Some Working Group members expressed concern that the fees may be confusing to consumers without some additional explanation. The Working Group will continue discussing the issue and would also benefit from the perspectives of the SEC and its staff to inform such discussions.

Although not related to disclosures, the Working Group is considering developing a separate section on producer and insurer prohibited practices, which could include prohibited practices regarding both cash and non-cash compensation.

The Working Group is aware that FINRA suitability rules have prohibited non-cash compensation, with certain exceptions, for decades. Currently, the draft revisions include a requirement that a producer disclose non-cash compensation that exceeds a value of \$500 per producer per year they receive from an insurer or intermediary that is connected to the sale of the annuity.

With respect to cash compensation, the working group has discussed including a requirement for a producer or insurer to disclose a description of the sources of and types of cash compensation to be received by the producer, including whether the producer is to be compensated for the sale of an annuity through commission as part of the premium or other payment from the insurer, intermediary or other producer or by contract fees for advice or consulting services.

## Conclusion

The current draft revisions to the NAIC's Suitability model reflect many of the same principles contained in the SEC's Regulation Best Interest. While our work is ongoing and any revisions are still subject to change, it is essential that the SEC and state insurance regulators continue a productive dialogue in order to find areas in which we can create compatibility, clarity, and efficiency through our respective regulatory developments and enforcement activities to provide robust consumer protection. We look forward to continuing our ongoing dialogue as we continue to consider this important but complex issue. Should you have any questions, do not hesitate to contact Ethan Sonnichsen, Managing Director of government relations, at esonnichsen@naic.org, Mark Sagat, Assistant Director Financial Policy and Legislation, at msagat@naic.org or Heather Eilers-Bowser, Financial Policy and Legislative Counsel, at heilersbowser@naic.org, or (202) 471-3990.

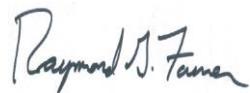
Sincerely,



Julie Mix McPeak  
NAIC President  
Commissioner  
Tennessee Department of  
Commerce & Insurance



Eric A. Cioppa  
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Superintendent  
Maine Bureau of Insurance



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Commissioner  
Insurance Division  
Hawaii Department of Commerce  
and Consumer Affairs



Michael F. Consedine  
Chief Executive Officer  
National Association of Insurance  
Commissioners

cc: The Honorable Kara M. Stein  
The Honorable Robert J. Jackson, Jr.  
The Honorable Hester M. Peirce

Draft: 6/14/18

Model #275

The revisions to this draft reflect changes made from the existing model.

## **SUITABILITY IN ANNUITY TRANSACTIONS MODEL REGULATION**

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**NOTE: WORKING GROUP HAS NOT DISCUSSED POTENTIAL REVISIONS TO SECTIONS 1-5 AND SECTIONS 7- 10.**

#### **Section 1. Purpose**

- A. The purpose of this regulation is to require insurers to establish a system to supervise recommendations and to set forth standards and procedures for recommendations to consumers that result in transactions involving annuity products so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.
- B. Nothing herein shall be construed to create or imply a private cause of action for a violation of this regulation.

**Drafting Note:** The language of subsection B comes from the NAIC Unfair Trade Practices Act. If a State has adopted different language, it should be substituted for subsection B.

#### **Section 2. Scope**

This regulation shall apply to any recommendation to purchase, exchange or replace an annuity made to a consumer by an insurance producer, or an insurer where no producer is involved, that results in the purchase, exchange or replacement recommended.

#### **Section 3. Authority**

This regulation is issued under the authority of [insert reference to enabling legislation].

**Drafting Note:** States may wish to use the Unfair Trade Practices Act as enabling legislation or may pass a law with specific authority to adopt this regulation.

#### **Section 4. Exemptions**

Unless otherwise specifically included, this regulation shall not apply to transactions involving:

- A. Direct response solicitations where there is no recommendation based on information collected from the consumer pursuant to this regulation;
- B. Contracts used to fund:
  - (1) An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);
  - (2) A plan described by sections 401(a), 401(k), 403(b), 408(k) or 408(p) of the Internal Revenue Code (IRC), as amended, if established or maintained by an employer;

- (3) A government or church plan defined in section 414 of the IRC, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under section 457 of the IRC;
- (4) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor;
- (5) Settlements of or assumptions of liabilities associated with personal injury litigation or any dispute or claim resolution process; or
- (6) Formal prepaid funeral contracts.

## **Section 5.**

### **Definitions**

- A. “Annuity” means an annuity that is an insurance product under State law that is individually solicited, whether the product is classified as an individual or group annuity.
- B. “Continuing education credit” or “CE credit” means one continuing education credit as defined in [insert reference in State law or regulations governing producer continuing education course approval].
- C. “Continuing education provider” or “CE provider” means an individual or entity that is approved to offer continuing education courses pursuant to [insert reference in State law or regulations governing producer continuing education course approval].
- D. “FINRA” means the Financial Industry Regulatory Authority or a succeeding agency.
- E. “Insurer” means a company required to be licensed under the laws of this state to provide insurance products, including annuities.
- F. “Insurance producer” or “producer” means a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities.
- G. “Recommendation” means advice provided by an insurance producer, or an insurer where no producer is involved, to an individual consumer that results in a purchase, exchange or replacement of an annuity in accordance with that advice.
- H. “Replacement” means a transaction in which a new policy or contract is to be purchased, and it is known or should be known to the proposing producer, or to the proposing insurer if there is no producer, that by reason of the transaction, an existing policy or contract has been or is to be:
  - (1) Lapsed, forfeited, surrendered or partially surrendered, assigned to the replacing insurer or otherwise terminated;
  - (2) Converted to reduced paid-up insurance, continued as extended term insurance, or otherwise reduced in value by the use of nonforfeiture benefits or other policy values;
  - (3) Amended so as to effect either a reduction in benefits or in the term for which coverage would otherwise remain in force or for which benefits would be paid;
  - (4) Reissued with any reduction in cash value; or
  - (5) Used in a financed purchase.

**Drafting Note:** The definition of “replacement” above is derived from the NAIC Life Insurance and Annuities Replacement Model Regulation. If a State has a different definition for “replacement,” the State should either insert the text of that definition in place of the definition above or modify the definition above to provide a cross-reference to the definition of “replacement” that is in State law or regulation.

- I. “Suitability information” means information that is reasonably appropriate to determine the suitability of a recommendation, including the following:
  - (1) Age;

- (2) Annual income;
- (3) Financial situation and needs, including the financial resources used for the funding of the annuity;
- (4) Financial experience;
- (5) Financial objectives;
- (6) Intended use of the annuity;
- (7) Financial time horizon;
- (8) Existing assets, including investment and life insurance holdings;
- (9) Liquidity needs;
- (10) Liquid net worth;
- (11) Risk tolerance; and
- (12) Tax status.

**NOTE TO WORKING GROUP: BELOW ARE SUGGESTED ADDITIONAL DEFINITIONS FOR THE WORKING GROUP TO CONSIDER WHEN IT BEGINS DISCUSSION OF THIS SECTION BECAUSE THESE TERMS ARE USED IN THE PROPOSED REVISIONS TO SECTION 6.**

(IOWA): “Cash compensation” means any discount, concession, fee, service fee, commission, sales charge, loan, override, cash benefit, or other remuneration received by producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.

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(CEJ/CFA): “Consumer” means an applicant or an existing policyholder of a life insurance policy or annuity contract.

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(NYS): “Consumer” means the owner or prospective owner of a policy.

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(CA): “Intermediary” means an entity contracted with the insurance company to facilitate a producer’s and/or insurer’s sale of an annuity.

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(IOWA): “Intermediary” means an entity contracted with an insurer or another intermediary to facilitate the sale of the insurer’s annuities by producers.

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(CA): (1) “Material conflict of interest” means a financial interest of an insurance producer and/or insurer that a reasonable person would expect to effect the ability of the producer and/or insurer to: (a) exercise his/hers/its best judgment; and (2) put the consumer’s interests before the producer’s and/or insurer’s own interest.

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(2) “Material conflict of interest” includes financial incentives or rewards available to, offered to or received by an insurance producer, or a direct interest or ownership in an insurer by an insurance producer or an immediate family member of an insurance producer. It also includes non-cash compensation available to, offered to or received by a producer or intermediary as a result of meeting target sales levels.

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(CEJ/CFA): “Material conflict of interest” means a financial or other interest of an insurance producer, or the insurer where no producer is involved, that a reasonable person would expect could affect the impartiality of the recommendation or the ability of the insurer or producer to act in the consumer’s best interest.

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(IOWA): “Material conflict of interest” means a financial interest of the producer, or the insurer where no producer is involved, in the sale of an annuity that a reasonable person would expect to influence a recommendation of the producer or insurer, including financial incentives or rewards offered to or received by the producer, or a direct interest or ownership in an insurer by the producer or an immediate family member of the producer.

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(CA): “Non-cash compensation” means any form of compensation that is not cash compensation, including but not limited to, merchandise, gifts, tickets to paid events, prizes, travel expenses or meals and lodging.

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(IOWA): “Non-cash compensation” means any form of compensation received by the producer from an insurer or intermediary that is not cash compensation, but is variable or dependent on the volume of annuity sales production, including but not limited to, entertainment, merchandise, gifts and prizes, travel expenses or meals and lodging, and marketing or advertising expenses.

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(ACLI): “Suitable” means a recommendation of an annuity that is consistent with the consumer’s insurance needs and financial objectives based on the information set forth in the consumer profile information at the time of the recommendation.

(IOWA): “Suitable” means in the furtherance of a consumer’s objectives and needs under the circumstances then prevailing and based upon the facts disclosed by the consumer, or known at the time of the recommendation by the producer, or insurer where no producer is involved, as to the annuities, insurance, investment, and financial products the producer is authorized and licensed to recommend or sell, and as to the consumer’s financial situation, objectives and needs, including the consumer’s suitability information.

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(NYS): “Suitable” means in the furtherance of a consumer’s needs and objectives under the circumstances then prevailing based upon the suitability information provided by the consumer and all products, services and transactions available to the producer.

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(JACKSON/AXA): “Specified fiduciary” means an entity acting, registered, and regulated under a fiduciary standard of care as: (1) a bank; (2) a trust company; or (3) an investment adviser under the Investment Advisers Act of 1940 or equivalent state law, and a person acting as an associated person of a specified fiduciary.

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**Section 6. Duties of Insurers and of Insurance Producers**

A. (1) A producer, or an insurer where no producer is involved, shall not place the producer’s or the insurer’s financial interest above the consumer’s interest when making a recommendation of an annuity product.

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(2) A producer or insurer complies with paragraph (1) by:

(a) Acting with reasonable diligence, care, skill and prudence;

(b) Making suitable recommendations in accordance with subsection B; and

(c) Making disclosures and acting in accordance with subsections C, D, E, F and H.

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NOTE TO THE WORKING GROUP: THE ALTERNATIVE LANGUAGE FOR SUBSECTION A ABOVE IS THE TENNESSEE SUGGESTED LANGUAGE AND WOULD REQUIRE RENUMBERING OF THE FOLLOWING SUBSECTIONS.

A. (1) In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the ~~insurance~~ producer, or the insurer where no producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the ~~particular~~ consumer ~~on the basis of the facts disclosed by the consumer as to his or her investments and other insurance products and as to his or her financial situation and needs, including the consumer’s suitability information, and that there is a reasonable basis to believe all of the following:~~.

(2) For purposes of this section, “reasonable grounds for believing that a recommendation is suitable” requires ~~fair dealing and reasonable competence, trustworthiness, diligence, care, skill and prudence by the producer, or the insurer where no producer is involved.~~

(3) Any recommendation made to the particular consumer shall be made without placing the financial or other interests of the producer, or insurer where no producer is involved, ahead of the consumer’s interests as known from the consumer’s suitability information.

(4) The requirements under this section do not mean the annuity product with the lowest one-time or multiple occurrence compensation structure shall necessarily be recommended, but the recommendation shall be ~~diligently focused on whether the product costs, rates, benefits, features and other contractual provisions of the annuity address the actual financial situation, objectives and needs of the particular consumer.~~

- (5) (a) The producer, or insurer where no producer is involved, shall consider all factors, including the consumer's suitability information, product costs rates, benefits, features and other contractual provisions.

(b) The factors to be considered are those factors generally relevant in making a suitability determination, but the level of importance of each factor may vary depending on the facts and circumstances of a particular case. However, each factor shall not be considered in isolation.

(6) To satisfy the requirements of this section, the producer, or insurer where no producer is involved, shall orally, or in writing, describe to the consumer the grounds for the recommendation and make a written record of the recommendation and the grounds for that recommendation.

**NOTE TO WORKING GROUP: THE LANGUAGE BELOW IN PROPOSED PARAGRAPH (7) WAS SUGGESTED BY THE INDUSTRY COALITION AND THE WORKING GROUP WANTED TO DISCUSS FURTHER.**

- (7) Nothing contained in this section shall be deemed to:

  - (a) Cause any producer or insurer to be treated as a fiduciary, or impose a duty of loyalty on any producer or insurer, under common law or any federal or state law or regulation;
  - (b) Require a producer or an insurer to determine that the recommended product is the “best” or “cheapest” product;
  - (c) Require or prohibit the use of any particular form or type of compensation or compensation arrangement, or any particular type of annuity distribution model (such as proprietary distribution or third party distribution);
  - (d) Require disclosure of, or impose any restrictions or prohibitions on, the health, retirement or other employee benefits to which a producer may be entitled; or
  - (e) Impose on a producer or an insurer any continuing obligation to the consumer after the recommended annuity is issued.

**B. Prior to the recommendation of an annuity, a producer, or an insurer where no producer is involved, shall do all of the following:**

- (1) Make reasonable efforts to obtain suitability information from the consumer; and

(2) Consider the types of products the producer, or insurer where no producer is involved, is authorized and licensed to recommend or sell that may align with the consumer's disclosed suitability information and address the consumer's financial situation, objectives and needs.

C. Prior to or at the time of the recommendation of an annuity, the producer, or insurer where no producer is involved, shall prominently disclose to the consumer:

- (1) A description of the scope and terms of the relationship with the consumer and the role of the producer in the transaction;

(2) Disclose to the consumer any limitations the producer or the insurer has in regard to the following:

  - (a) The type of products that the producer is authorized and licensed to recommend or sell; and
  - (b) Whether only specific insurer company products or a limited range of annuity products may be offered;

(3) (a) A description of the sources and types of cash compensation to be received by the producer, including whether the producer is to be compensated for the sale of a recommended annuity by commission as part of premium or other remuneration received from the insurer, intermediary or other producer or by fee as a result of a contract for advice or consulting services or fee.

(b) To satisfy subparagraph (a) of this paragraph, the producer shall disclose:

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- (i) A reasonable estimate of the amount of cash compensation, which may be stated as a range of amounts, percentages or values; and
- (ii) Whether the cash compensation is a one-time or multiple occurrence amount, and if a multiple occurrence amount, the frequency and amount of the occurrence, which may be stated as a range of amounts, percentages or values;
- (4) The type of non-cash compensation that exceeds \$500 per producer per year the producer may receive from an insurer or intermediary that is connected to the sale of the annuity; and
- (5) Any and all material conflicts of interest.

D. In making a recommendation the producer, or insurer where no producer is involved, shall at the time of the recommendation have a reasonable basis to believe all of the following:

- (1) The consumer has been reasonably informed of various features of the annuity, such as the potential surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, potential changes in non-guaranteed elements of the annuity, insurance and investment components and market risk;
- (2) The consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization or death or living benefit;
- (3) The particular annuity as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or exchange of the annuity, and riders and similar product enhancements, if any, are suitable (and in the case of an exchange or replacement, the transaction as a whole is suitable) for the particular consumer based on his or her suitability information; and
- (4) In the case of an exchange or replacement of an annuity, the exchange or replacement is suitable including taking into consideration whether:
  - (a) The consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits (such as death, living or other contractual benefits), or be subject to increased fees, investment advisory fees or charges for riders and similar product enhancements;
  - (b) The consumer would benefit from product enhancements and improvements replacing product will provide a substantial benefit to the consumer in comparison to the replaced product over the life of the product; and
  - (c) The consumer has had another annuity exchange or replacement and, in particular, an exchange or replacement within the preceding 360 months.

B. Prior to the execution of a purchase, exchange or replacement of an annuity resulting from a recommendation, an insurance producer, or an insurer where no producer is involved, shall make reasonable efforts to obtain the consumer's suitability information.

- C.E. Except as permitted under subsection D.E., an insurer shall not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity is suitable based on the consumer's suitability information.
- D.E. (1) Except as provided under paragraph (2) of this subsection, neither an insurance A producer, nor an insurer, shall have any obligation to a consumer under subsection s A or C.E related to any annuity transaction if:
  - (a) No recommendation is made;
  - (b) A recommendation was made and was later found to have been prepared based on materially inaccurate information provided by the consumer;

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- (c) A consumer refuses to provide relevant suitability information and the annuity transaction is not recommended; or
- (d) A consumer decides to enter into an annuity transaction that is not based on a recommendation of the insurer or the insurance producer.
- (2) An insurer's issuance of an annuity subject to paragraph (1) shall be reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.
- E.G. ~~An insurance~~A producer or, ~~insurer~~ where no insurance producer is involved, ~~the responsible insurer representative~~, shall at the time of ~~recommendation or~~ sale:
- (1) ~~Make a record of any recommendation and the grounds for the recommendation~~ subject to ~~seetion 6A of~~ this regulation;
- (2) ~~Disclose to the consumer the basis or bases of the recommendation;~~
- (2)(3) Obtain a customer signed statement documenting a customer's refusal to provide suitability information, if any; and
- (2)(4) Obtain a customer signed statement acknowledging that an annuity transaction is not recommended if a customer decides to enter into an annuity transaction that is not based on the ~~insurance~~-producer's or insurer's recommendation.
- F.H. (1) An insurer shall establish a supervision system that is reasonably designed to achieve the insurer's and its ~~insurance~~-producers' compliance with this regulation, including, but not limited to, the following:
- (a) The insurer shall maintain reasonable procedures to inform its ~~insurance~~-producers of the requirements of this regulation and shall incorporate the requirements of this regulation into relevant insurance producer training manuals;
- (b) The insurer shall establish standards for ~~insurance~~-producer product training and shall maintain reasonable procedures to require its ~~insurance~~-producers to comply with the requirements of section 7 of this regulation;
- (c) The insurer shall provide product-specific training and training materials which explain all material features of its annuity products to its ~~insurance~~-producers;
- (d) The insurer shall maintain procedures for review of each recommendation prior to issuance of an annuity that are designed to ensure that there is a reasonable basis to determine that a recommendation is suitable. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including, but not limited to, physical review. Such an electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria;
- (e) The insurer shall maintain reasonable procedures to detect recommendations that are not suitable. This may include, but is not limited to, confirmation of consumer suitability information, systematic customer surveys, interviews, confirmation letters and programs of internal monitoring. Nothing in this subparagraph prevents an insurer from complying with this subparagraph by applying sampling procedures, or by confirming suitability information after issuance or delivery of the annuity; ~~and~~
- (f) ~~The insurer shall maintain reasonable procedures to assess, prior to or upon issuance or delivery of an annuity, whether a producer has provided to the consumer the information required to be provided under this section; and~~
- (f)(g) The insurer shall annually provide a report to senior management, including to the senior manager responsible for audit functions, which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any.

- (2) (a) Nothing in this subsection restricts an insurer from contracting for performance of a function (including maintenance of procedures) required under paragraph (1). An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to section 8 of this regulation regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with subparagraph (b) of this paragraph.
- (b) An insurer's supervision system under paragraph (1) shall include supervision of contractual performance under this subsection. This includes, but is not limited to, the following:
- (i) Monitoring and, as appropriate, conducting audits to assure that the contracted function is properly performed; and
  - (ii) Annually obtaining a certification from a senior manager who has responsibility for the contracted function that the manager has a reasonable basis to represent, and does represent, that the function is properly performed.
- (3) An insurer is not required to include in its system of supervision ~~an insurance producer's~~ producer's recommendations to consumers of products other than the annuities offered by the insurer.

- GJ.** ~~Neither a producer nor an insurer shall~~ An insurance producer shall not dissuade, or attempt to dissuade, a consumer from:
- (1) Truthfully responding to an insurer's request for confirmation of suitability information;
  - (2) Filing a complaint; or
  - (3) Cooperating with the investigation of a complaint.

**NOTE TO WORKING GROUP: THE LANGUAGE IN SUBSECTION J BELOW IN ITALICS IS THE JACKSON/AXA SUGGESTED LANGUAGE. THE WORKING GROUP PLANS TO CONTINUE DISCUSSION OF THE LANGUAGE.**

- HJ.** (1) Sales made in compliance with FINRA ~~requirements~~rules pertaining to suitability and supervision of annuity transactions *and sales made by a specified fiduciary in compliance with applicable U.S. Securities and Exchange Commission (SEC) and/or federal banking requirements.* shall satisfy the requirements under this regulation. This subsection applies to FINRA broker-dealer sales of annuities if *in connection with the sale of an annuity, the broker-dealer and the producer, who also are appropriately registered as a representative with FINRA, have complied with the business rules, controls and procedures at least as effective as those required under this regulation the suitability and supervision is similar to those applied to variable annuity sales.* However, nothing in this subsection shall limit the insurance commissioner's ability to *investigate and enforce (including investigate)* the provisions of this regulation.

**Drafting Note:** Non-compliance with FINRA requirements means that the broker-dealer transaction is subject to compliance with the suitability requirements of this regulation.

- (2) For paragraph (1) to apply, an insurer shall:
- (a) Monitor the FINRA member broker-dealer using information collected in the normal course of an insurer's business; and
  - (b) Provide to the FINRA member broker-dealer information and reports that are reasonably appropriate to assist the FINRA member broker-dealer to maintain its supervision system.

**NOTE TO THE WORKING GROUP: DURING ITS SECTION 6 DISCUSSIONS, THE WORKING GROUP DISCUSSED BUT DEFERRED ON ADDING THE FOLLOWING ADDITIONAL SECTIONS:**

**Consumer Disclosure Requirements (which would include language addressing compensation issues)**

**Prohibited Practices (which would include language addressing compensation issues)**

**Insurer Supervision of Producers**

**THE WORKING GROUP ALSO DISCUSSED, BUT DEFERRED ADDING THE LANGUAGE BELOW FROM NYS:**

*A producer shall not state or imply to the consumer that a recommendation to enter into a sales transaction is financial planning, comprehensive financial advice, investment management or related services unless the producer has a specific certification or*

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professional designation in that area. A producer shall not use a title or designation of financial planner, financial advisor or similar title unless the producer is properly licensed or certified and actually provides securities or other non-insurance financial services.

Any requirement applicable to a producer pursuant to this Part shall apply to every producer who has participated in the making of a recommendation and received compensation as a result of the sales transaction, regardless of whether the producer has had any direct contact with the consumer.

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**THE WORKING GROUP ENDED ITS DISCUSSION OF THE COMMENTS AT THIS POINT IN THE DRAFT.**

**Section 7. Insurance Producer Training**

- A. An insurance producer shall not solicit the sale of an annuity product unless the insurance producer has adequate knowledge of the product to recommend the annuity and the insurance producer is in compliance with the insurer's standards for product training. An insurance producer may rely on insurer-provided product-specific training standards and materials to comply with this subsection.
- B. (1) (a) An insurance producer who engages in the sale of annuity products shall complete a one-time four (4) credit training course approved by the department of insurance and provided by the department of insurance-approved education provider.
  - (b) Insurance producers who hold a life insurance line of authority on the effective date of this regulation and who desire to sell annuities shall complete the requirements of this subsection within six (6) months after the effective date of this regulation. Individuals who obtain a life insurance line of authority on or after the effective date of this regulation may not engage in the sale of annuities until the annuity training course required under this subsection has been completed.
- (2) The minimum length of the training required under this subsection shall be sufficient to qualify for at least four (4) CE credits, but may be longer.
- (3) The training required under this subsection shall include information on the following topics:
  - (a) The types of annuities and various classifications of annuities;
  - (b) Identification of the parties to an annuity;
  - (c) How product specific annuity contract features affect consumers;
  - (d) The application of income taxation of qualified and non-qualified annuities;
  - (e) The primary uses of annuities; and
  - (f) Appropriate sales practices, replacement and disclosure requirements.
- (4) Providers of courses intended to comply with this subsection shall cover all topics listed in the prescribed outline and shall not present any marketing information or provide training on sales techniques or provide specific information about a particular insurer's products. Additional topics may be offered in conjunction with and in addition to the required outline.
- (5) A provider of an annuity training course intended to comply with this subsection shall register as a CE provider in this State and comply with the rules and guidelines applicable to insurance producer continuing education courses as set forth in [insert reference to State law or regulations governing producer continuing education course approval].
- (6) Annuity training courses may be conducted and completed by classroom or self-study methods in accordance with [insert reference to State law or regulations governing producer continuing education course approval].
- (7) Providers of annuity training shall comply with the reporting requirements and shall issue certificates of completion in accordance with [insert reference to State law or regulations governing producer continuing education course approval].

- (8) The satisfaction of the training requirements of another State that are substantially similar to the provisions of this subsection shall be deemed to satisfy the training requirements of this subsection in this State.
- (9) An insurer shall verify that an insurance producer has completed the annuity training course required under this subsection before allowing the producer to sell an annuity product for that insurer. An insurer may satisfy its responsibility under this subsection by obtaining certificates of completion of the training course or obtaining reports provided by commissioner-sponsored database systems or vendors or from a reasonably reliable commercial database vendor that has a reporting arrangement with approved insurance education providers.

#### **Section 8. Compliance Mitigation; Penalties**

- A. An insurer is responsible for compliance with this regulation. If a violation occurs, either because of the action or inaction of the insurer or its insurance producer, the commissioner may order:
  - (1) An insurer to take reasonably appropriate corrective action for any consumer harmed by the insurer's, or by its insurance producer's, violation of this regulation;
  - (2) A general agency, independent agency or the insurance producer to take reasonably appropriate corrective action for any consumer harmed by the insurance producer's violation of this regulation; and
  - (3) Appropriate penalties and sanctions.
- B. Any applicable penalty under [insert statutory citation] for a violation of this regulation may be reduced or eliminated [, according to a schedule adopted by the commissioner,] if corrective action for the consumer was taken promptly after a violation was discovered or the violation was not part of a pattern or practice.

**Drafting Note:** Subsection B above is intended to be consistent with the commissioner's discretionary authority to determine the appropriate penalty for a violation of this regulation. The language of subsection B is not intended to require that a commissioner impose a penalty on an insurer for a single violation of this regulation if the commissioner has determined that such a penalty is not appropriate.

**Drafting Note:** A State that has authority to adopt a schedule of penalties may wish to include the words in brackets. In that case, "shall" should be substituted for "may" in the same sentence. States should consider inserting a reference to the NAIC Unfair Trade Practices Act or the State's statute that authorizes the commissioner to impose penalties and fines.

#### **Section 9. [Optional] Recordkeeping**

- A. Insurers, general agents, independent agencies and insurance producers shall maintain or be able to make available to the commissioner records of the information collected from the consumer and other information used in making the recommendations that were the basis for insurance transactions for [insert number] years after the insurance transaction is completed by the insurer. An insurer is permitted, but shall not be required, to maintain documentation on behalf of an insurance producer.

**Drafting Note:** States should review their current record retention laws and specify a time period that is consistent with those laws. For some States this time period may be five (5) years.

- B. Records required to be maintained by this regulation may be maintained in paper, photographic, micro-process, magnetic, mechanical or electronic media or by any process that accurately reproduces the actual document.

**Drafting Note:** This section may be unnecessary in States that have a comprehensive recordkeeping law or regulation.

#### **Section 10. Effective Date**

The amendments to this regulation shall take effect six (6) months after the date the regulation is adopted or on [insert date], whichever is later.