FREEDOM TO CHOOSE Fixed Annuities
Fixed Annuity Consumer Choice Campaign

September 30, 2019

Submitted electronically to:
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TO: Members of the Annuity Suitability Working Group
Director Jillian Froment, Ohio Department of Insurance
Chair, Annuity Suitability Working Group

FROM: Kim O'Brien, FACC Spokesperson
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RE: September 2019 Working Group Draft Comments & Redline

Dear Members of the Annuity Suitability Working Group:

The FACC Campaign appreciates the time and effort the Group has dedicated over the past 18 months and welcomes the opportunity to comment on the newest September Working Group Draft. While there are certain features of the proposal that are improved, we are generally disappointed with the latest proposal because it suffers from the same problems as prior drafts.

FACC's number one concern is that we believe best interest amounts to a fiduciary duty. We know the working group thinks there is something "more than suitability and less than fiduciary," but we think that defies common sense when best interest is the essential building block of fiduciary duty. Best interest will ultimately need to be interpreted by the courts and in the final analysis "best" will mean best. Any requirement that agents put their client's interest first – in a legal sense – is tantamount to a fiduciary duty which everyone seems to agree should not apply to insurance agents.

Our other paramount concern – as we have stated in previous comment letters – is that the rule is too subjective because it is built around an undefined term "best interest" which is a nebulous concept that insurance agent interests may not be placed ahead of client interests and lacks concrete details on what agents must do in order to comply. The lack of objectivity in critical areas of the regulation is troublesome because without that objectivity it will be very difficult for producers to comply, carriers to supervise, and regulators to enforce fairly and consistently.

Our biggest concerns are the following:

1. The best interest standard is nebulous and must be replaced with concrete requirements;
2. The "ordinary producer" standard, or something equivalent, must be reinstated so it is clear insurance agents will be held to standards applicable to their licensure rather than that of other professionals including even fiduciaries;
3. Supervision must be limited to a carrier's own agents, products, and compensation;

4. Disclosure needs greater clarity and uniformity in order to provide certainty to agents and reliable information for consumers;
5. Non-cash compensation regulations must be more fully developed (similar to what has been done by FINRA);
6. The SEC/FINRA safe harbor must be removed because it is unjustified and unfair; plus, for similar reasons, there is no justification for any safe harbor for individually solicited annuities; and,
7. Harkin implications have not been adequately reviewed and considered.

In regard to these concerns, we take some hope from the fact that the working group has asked for comments on how to make the rule more objective, that the working group acknowledged there are many issues needing to be addressed (i.e., the parking lot), and committee members have commented many times they would not know how to enforce this subjective rule.

However, it is concerning to us that this rule keeps moving along without the necessary deliberation and the kind of changes needed to address these significant issues. That is why we have consistently advocated that the proposal needs more time and the Working Group should not feel compelled to follow any prescribed or artificial schedule; the Working Group should take whatever time is necessary to ensure this rule will enhance rather than hinder an effective and competitive marketplace that works both for producers and consumers. The Working Group must put the priority on getting it right rather than just getting it done.

There are three process points we'd like to share at the outset. First, our abbreviated redline is not meant to be definitive and may be supplemented; there are many issues that cannot simply be "redlined" without more robust conversation and deliberation. Second, we want to be clear, while our comments are focused on some of the most significant and major issues, there are many other issues that are perhaps more subtle, but nonetheless need to be addressed. And last, but not least, while we hesitated about appending our previous comments and submissions, the reality is all the work that has been done to date and comments submitted are all intertwined and we don't want them to be lost because of the reset.

KEY ISSUES

1. **Preamble, Section 6 A. and Section 6 A. (1) (a) - Best Interest**

Best interest must be removed. The proposal's main lapse in attaining an objective and workable standard is that it is built around the undefined and vague term - best interest. Best interest involves a nebulous and indeterminate concept that agent interests may not be placed ahead of client interests. Without a concrete definition, agents are unclear on what they must do to comply; leaving regulators and lawyers to divine the producer's motives.

We oppose applying a security industry "best interest" standard to the sale of fixed annuities. We believe any best interest requirement will cause real damage by inviting second guessing and litigation, chasing away fixed agents, upsetting the independent agent distribution model, and stifling innovation and consumer choice in the marketplace.

We have heard some regulators state that they are "okay" with a best interest regulation as long as it was defined and clear. Yet, the inherent challenge the current proposal faces is that it continues to use subjective best interest terminology with no definition or specific criteria by which to administer and enforce it.

Instead, we have submitted explicit language that states a producer may not allow compensation or any material conflict of interest to affect the evaluation of the consumer's financial situation, insurance needs and financial objectives, By adopting our recommendation, the Working Group accomplishes the intent of the regulation, achieves a more stringent behavior expectation of the producer than today's suitability requirement, and provides regulators more enforcement direction with less ambiguity.

The key feature of our proposal is that it avoids use of the term "best interest" and eliminates the highly subjective concept of putting client interest ahead of the agent's interest. However, it specifically seeks to achieve the true goal of this regulation – as we have heard it explained – by addressing concerns over the influence of compensation. We think this proposal helps bridge the gap between the idea that something more is needed beyond suitability and the desire by some to avoid creating a new untested legal standard, i.e., "best interest."

As you will see, our proposal modifies the rule's preamble and section 6.A.1 (a) to remove "best interest" terminology. Then – and this is the key - we define the care obligation so that it would obligate producers to perform their suitability analysis without being affected by compensation or material conflicts as they make their recommendation for the client. This is intended specifically so "best interest" can be removed and replaced with a more actionable and tangible requirement.

2. Section 6 A. (1) (b) Comparison to Like Professionals

The Working Group has removed any standard by which regulators will determine if an agent acted with requisite skill, care and diligence. It must be made clear that insurance agents are to be compared only to other insurance agents, as opposed to being compared to investment advisers or perhaps higher-level fiduciaries such as trust officers or ERISA managers. If the clarification is not expressed this rule is rendered even more subjective and approaches a kind of strict liability depending on how regulators (or courts) decide to enforce a best interest claim with ill-defined requirements. The standard that makes the most sense for making a compliance determination is comparison to a similarly licensed insurance professional; without an explicit standard of comparison the rule is open to other interpretations.

We remain baffled by those who say – in support of the rule – such a standard is not needed because "this is more art than science" and thus it would be difficult from a compliance standpoint to say whether other producers would or would not have made the same recommendation. They go even further, saying this is "more aligned with litigation than a regime based on supervision and regulation." We hope regulators fully absorb those statements and understand that saying the determination of whether a sale was in the best interest of a consumer can only be resolved through a battle of experts in a courtroom is in fact saying this rule is not conducive to regulation. If that's true and, ironically, we agree with them, then it makes our very point as to why this regulation should not move forward in its current form.

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3. Section 6. C. Supervision

Supervision by insurance companies of independent insurance professionals does not fit the paradigm of this regulation. Insurance companies do not and cannot provide comprehensive oversight of insurance agents who sell multiple products for multiple companies; insurance companies supervise sales of their own products but are not in a position to supervise agents relative to competitor products or the compensation derived there from. Insurance companies are prevented by anti-trust laws from controlling activities of independent agents involved in other carriers' products.

For these reasons, in order for the regulation to be administratively feasible, it needs to specify and acknowledge insurers will only be responsible for the supervision of their own agents, their own compensation offerings, and their own products.

To be clear, it is important that this provision go beyond the simple point that an insurer can only supervise its own producers and its own products. The real concern is that insurers cannot supervise the process by which producers compare products across multiple insurers or would be paid by those different insurers for sale of those different products. The rule must make clear that insurance companies are not required to supervise the manner in which agents are compensated or incentivized by other companies and make clear also that an insurance company cannot adjudicate between other carrier products compensation offerings in ways that could transgress anti-trust laws. We have included such language in our abbreviated redline.

4. Section 6 A. (2) Disclosure

The FACC has long upheld that creating tools for consumers that help them evaluate recommendations and the producers who provide them in concert with "rules of the road" that are clear to producers is the most effective way to create a virtuous marketplace for choosing fixed annuities. As early as June of 2018 we provided a concise redline of standards that supported enhanced disclosure designed to shed light on the producer's motivations, duties and obligations and enabling consumers to judge whether agent recommendations are unduly influenced by self-interest.

In addition, the FACC created a meaningful user-friendly disclosure document that empowers consumers and sensitizes producers to concerns over alignment of agent and consumer interests. We believe the proposed "Producer Relationship Summary" is too vague and does not adequately disclose the information consumers need to adequately determine if the relationship and/or the recommendation addresses their financial goals and needs. Clear and concise statements of the producer's relationships and services; a description of the type(s) of compensation the producer receives and what it means to the consumer; and, what other fees (e.g., rider) the consumer needs to consider must be incorporated to fully empower the consumer.

5. Section 6 A. (2) Non-Cash Compensation

This area needs much more clarification and guidance. FINRA has multiple rules and offers over twenty-two pages in a separate guidance memo on non-cash compensation. While, insurance regulation does not need

to mirror FINRA requirements, it should devote the same serious and robust study to outline objective requirements and guidance.

Compensation related issues are particularly sensitive and deserve careful consideration beyond what is contained in the model proposal. Cash and noncash compensation issues are addressed in detail by FINRA and other regulatory bodies. The time possibly has come for NAIC to do something similar, so standards and protocols are established for the life insurance industry. Such a regulation, for example, could address issues of proper disclosure as well as exceptions for certain kinds of noncash compensation such as de minimus gifts, occasional meals and entertainment that do not influence product recommendations, and covering expenses for bona fide training events. Given the complexity and seriousness of these matters, such issues would best be addressed in a separate regulation.

6. Safe Harbors

The SEC/FINRA safe harbor is unwarranted and should be removed as it will result in there being winners and losers. It will tilt the playing field against fixed products and independent insurance-only agents who will be required to satisfy these new requirements while other agents are excused from them. There is no reason why variable agents should be exempt from these new insurance requirements when in fact variable agents comply with both insurance and securities laws all the time. The safe harbor for FINRA is nothing but a vestige from a different time when securities suitability was considered somehow superior but that is no longer the case. If there is a real conflict in insurance and securities laws, then address the real conflict, but giving securities agents a free pass is unfair and a real disservice to the fixed agents who will be forced to live with these new rules. To that end, Section 6. E. should be struck from the draft. No redline has been submitted to illustrate this point since it is a wholesale deletion.

Similarly, for comparable reasons, there is no justification for any safe harbor or exemptions for individually solicited annuities. As such, Section 4.B. should be revised to state:

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Contracts that are not individually solicited and are used to fund:

7. Impact on Harkin Amendment – Dodd Frank

As the Drafting Note states, Section 989J of the Dodd-Frank Act confirmed the exemption of certain annuities from the Securities Act of 1933 and confirmed state regulatory authority. The note considers "this regulation is a successor regulation that exceeds the requirements of the 2010 model regulation." However, the FACC is concerned that this assumption has not been adequately researched and there has been no discussion on whether an NAIC model "in name only" but separate from Suitability would preserve Harkin protections. In addition, we have not seen any consideration of the 5-year clause in Harkin and the impact to products in states that fail to adopt this proposal.

OTHER ISSUES

In addition to the above issues we wish to comment as well on several other issues of importance. And, as noted above our abbreviated redline is not intended to be definitive. We will continue to participate constructively in this process and may provide additional redline language for consideration as these important issues are deliberated and developed.

License Clarification

Any rule must make it clear that all requirements can be satisfied without a securities license; i.e., insurance-only agents will not be compared to securities agents; insurance-only agents can gather investment information; and, insurance-only agents can perform analysis and provide advice without being deemed investment advisers.

Model Law versus Model Rule

This has not been adequately discussed or analyzed. The wholesale reconstruction of the fixed annuity distribution and marketplace warrants more consideration and study on the cost/benefit of this proposal and the need for legislative authority before adoption.

Section 6. (1) (a) Over Life of the Product

This new concept under the Care Obligation introduces even more ambiguity and subjectivity to the requirements by requiring the agent to consider issues of maturity, non-guaranteed elements, surrender schedule, etc. What is the intent of this language and how do we avoid future second guessing?

Timetable to Review the Customer's Profile Information

The working group also asked whether to include a time frame for a producer to review a consumer's consumer profile information. The FACC strongly opposed any such requirement. The customer profile information clearly identifies a time horizon for the consideration of and uses for an annuity. Section 5. Definitions of the Consumer Profile Information and Section 6.(1) The Care Obligation requires that the planning time horizon be obtained and considered when making a recommendation. Section 6. (2) (c) requires the disclosure of costs, benefits and features of the annuity. These may include the customer's right to make changes to their annuity. Therefore, any new review is unnecessary and excessively burdensome to the insurance producer and insurance company.

Harmonization

We are puzzled by the Working Group's attempt to "harmonize" a new insurance standard with the SEC's investment standard. The NAIC and state officials have traditionally been adamant about preserving their insurance authority and autonomy. In applying a "mirror" regulation that includes an undefined best interest standard to insurance products seems like it is abdicating that authority and may lead to a decision by the securities industry to absorb the oversight duties and enforcement obligations.

The FACC disagrees with idea that insurance law should mirror the rules and regulations established by securities regulators. We question the logic of applying investment advisor and broker-dealer regulations to insurance producers who do not operate in the investment marketplace. We continue to believe the securities industry and insurance industry are apples and oranges in important respects, most uniquely, the products they offer are inherently different and provide different financial solutions to consumers.

CONCLUSION

We hope that you will agree that the FACC have been constructive in our work with the Working Group. We especially tried to assist the Working Group in achieving its stated goal of making this rule more objective. In addition to our many detailed comment letters, we have frequently offered specific wording suggestions. This has all been in an effort to build specific criteria that producers can follow - and insurance companies may rely on to administer - to ensure consumers are provided recommendations that specifically address and enhance their financial goals.

While the Working Group has made progress, we believe there is much more work to be done. We believe such work while challenging will bring us closer to achieving objective and clear regulation that enhances consumer protection without disrupting independent producers and annuity distribution.

Thank you again for consideration of these comments and our abbreviated redline suggestions.

Respectfully submitted,

Kim O'Brien
FACC Campaign
Vice Chair Americans for Asset Protection

Draft: 9/17/19
FACC Abbreviated Redline 9/30/2019

NOTE: This mark –up is not meant to be definitive. Rather, it is meant to be illustrative of some, but not all, of our points raised in our comment letter. It is subject to continuing analysis and development.

Model #275

Comments are being requested on this draft. The revisions to this draft reflect changes made from the existing model. Comments should be sent only by email to Jolie Matthews at jmatthews@naic.org by Monday, Sept. 30, 2019.

SUITABILITY IN ANNUITY TRANSACTIONS MODEL REGULATION

Table of Contents

Section 1. Purpose

A. The purpose of this regulation is to require that producers abide by obligations regarding care, disclosure, conflict of interest, and documentation ~~to act in the best interest of the consumer~~ when making a recommendation of an annuity and to require insurers to establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.

B. Nothing herein shall be construed to create or imply a private cause of action for a violation of this regulation.

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Section 6. Duties of Insurers and Producers

A. ~~Best Interest~~ Recommendation Obligations. A producer, when making a recommendation of an annuity, ~~shall act in the best interest of the consumer under the circumstances known at the time the recommendation is made, without placing the producer's or the insurer's financial interest ahead of the consumer's interest. A producer~~ is deemed to comply with this subsection by satisfying the following obligations regarding care, disclosure, conflict of interest and documentation:

(1) (a) Care Obligation. The producer, in making a recommendation shall exercise reasonable diligence, care and skill to:

(i) Know the consumer's financial situation, insurance needs and financial objectives;

(ii) Understand the available recommendation options after making a reasonable inquiry into options available to the producer;

(iii) Have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives ~~over the life of the product~~, as evaluated in light of the consumer profile information; ~~and~~

(iv) Not allow producer compensation or any material conflict of interest to affect the evaluation described in clause (iii) in forming the recommendation; and,

(~~i~~v) Communicate a reasonable summary of the basis or bases of the recommendation.

(b) The requirements under subparagraph (a) of this paragraph include making reasonable efforts to obtain consumer profile information from the consumer prior to the recommendation of an annuity.

(c) The requirements under subparagraph (a) of this paragraph require a producer to consider the types of products the producer is authorized and licensed to recommend or sell that address the consumer's financial situation, insurance needs and financial objectives. This does not require analysis or consideration of any products outside the authority and license of the producer or other possible alternative products or strategies available in the market at the time of the recommendation.

(d) The requirement for a reasonable basis under subparagraph (a) (iii) of this paragraph does not necessarily mean a majority of all insurance and investment professionals could agree that the recommended option was the single best option, but only that it was reasonable for an ordinary producer in similar circumstances and with similar authority and license, to believe that the recommended annuity would effectively address the consumer's financial situation, insurance needs and financial objectives as evaluated in light of the consumer profile information.

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(3) Conflict of interest obligation. A producer shall identify and ~~avoid or otherwise reasonably manage~~ prominently disclose to the consumer to the consumer material conflicts of interest, including material conflicts of interest related to an ownership interest.

(4) Documentation obligation. A producer shall at the time of recommendation or sale:

(a) Make a written reasonable summary record of any recommendation and the basis for the recommendation subject to this regulation;

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C. Supervision system.

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(4) Notwithstanding the foregoing, an insurer is not required to include in its system of supervision:

(a) a producer's recommendations to consumers of products other than the annuities offered by the insurer;

(b) consideration of or comparison to products other than annuities offered by the insurer; and,

(c) compensation relating to products recommended, considered, or compared other than annuities offered by the insurer. Nothing herein, however, shall override an insurer's obligations to comply with applicable replacement regulations.

January 22, 2018

SUBMITTED ELECTRONICALLY: jmatthew@naic.org

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RE: Proposed "Best Interest" Revisions to NAIC Annuity Suitability Regulation

Dear Working Group Members:

The Fixed Annuity Consumer Choice Campaign (FACC)* was organized to address certain issues impacting fixed annuities in connection with Department Labor (DOL) fiduciary rule. While generally FACC focuses its attention on DOL rule deliberations, we have reviewed the NAIC proposal to incorporate concepts of "best interest" into the NAIC's model suitability regulation, and wish to comment on one particular point that may not otherwise be addressed by trade associations representing the industry.

While we have a number of concerns about the NAIC best interest proposal, this letter is to urge the NAIC to give consideration to its overall approach to the concept of "best interest". Specifically, it is our belief the suitability regulation is working and need not be disturbed to address "best interest" concerns which could be better addressed through a separate regulation.

* The FACC Campaign is an unincorporated alliance of insurance agents, independent marketing organizations, insurers, and industry advocates seeking to protect the availability of fixed annuities by ensuring all fixed annuity products are included in Prohibited Transaction Exemption 84-24 or an equivalent exemption under the DOL fiduciary rule that is compatible with the independent agent distribution system.

Insurance companies and agents have spent years developing appropriate systems and protocols to comply with suitability. We propose the NAIC minimize any changes to the suitability regulation to avoid disruption, confusion, and costly administrative overhauls.

It is widely understood that "best interest" (an outgrowth of fiduciary duty) consists of two components - prudence and loyalty. Suitability largely addresses the prudence component of best interest by requiring that any insurance agent (or company) selling any annuity determine there are reasonable grounds to believe the annuity is appropriate for the consumer based on the consumer's disclosed insurance needs and financial objectives.

Loyalty is the other component of best interest which is aimed at ensuring an agent's recommendation of any product is motivated by the consumer's needs and objectives rather than solely the agent's own self-interest or pecuniary gain. These loyalty issues are purely a function of the compensation paid to and received by the agent, including both cash and noncash compensation, that might influence the agent's recommendations or color the agent's decision-making for a consumer.

We urge the NAIC to consider developing a model regulation to address cash and noncash compensation issues separate and apart from the existing suitability regulation. We believe the suitability regulation should stand on its own and should not be diluted or encumbered with other kinds of requirements (e.g., best interest, conflict of interest, compensation, non-cash compensation). We believe the compensation issues implicated by "best interest" are distinct and better handled through a freestanding regulation that more directly addresses the need for proper disclosure of agent compensation and establishing appropriate standards and protocols addressing any potential conflicts of interest (e.g., non-cash compensation) without upsetting existing suitability regulations.

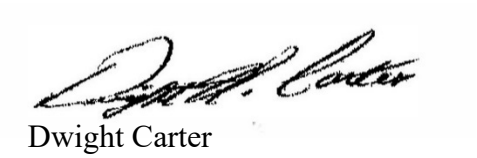
We submit that compensation related issues are particularly sensitive and deserve careful consideration beyond what is contained in the model proposal. Cash and noncash compensation issues are addressed in detail by FINRA and other regulatory bodies. The time possibly has come for NAIC to do something similar so standards and protocols are established for the life insurance industry. Such a regulation, for example, could address issues of proper disclosure as well as exceptions for certain kinds of noncash compensation such as de minimus gifts, occasional meals

and entertainment that do not influence product recommendations, and covering expenses for *bona fide* training events. Given the complexity and seriousness of these matters, such issues would best be addressed in a separate regulation.

In closing, we appreciate inertia may favor continuing on the track of engrafting "best interest" onto the suitability regulation. However, our impression is that the NAIC deliberations are still in their early phases, and we would urge NAIC to step back and consider carefully whether the preferable approach would be to create a separate regulation addressing compensation issues as described above.

Your consideration of these views is much appreciated. Should you have any questions, please feel free to contact me or my FACC colleague and co-founder, Kim O'Brien, at the numbers or emails indicated above

Sincerely,



Dwight Carter
Chairman, FACC Campaign

February 11, 2019

Submitted electronically to jmatthews@naic.org

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RE: November 2018 Exposure Draft
Proposed Amendments to Suitability in Annuity Transactions Model Regulation

Dear A Committee and Working Group Members:

Thank you for the opportunity to comment on your November 2018 exposure draft amendments to the Suitability in Annuity Transactions Model Regulation.

The Fixed Annuity Consumer Choice (FACC) Campaign has previously expressed its deep concerns about the current direction of the NAIC on this issue and remains profoundly worried that the Working Group approach is flawed and should be revisited. We believe the NAIC is headed down the wrong path which, even if motivated by good intentions, will harm fixed products, the agents and agencies who sell them, and consumers who have benefited for decades from their guaranteed features and other valuable attributes designed specifically for aging consumers seeking financial security and peace of mind.

We believe adoption of the draft proposal in its present form would have long term consequences harmful to consumers by establishing unrealistic standards for insurance agents, causing disruption in the marketplace, reducing consumer choice, and inviting unnecessary litigation. This is not exaggeration. We believe these are real marketplace concerns that have not received sufficient attention by the NAIC as it determines the proper course forward in addressing the role of insurance regulation in the larger financial services industry context. We do not agree with the premise that somehow insurance regulation must be harmonized or parallel to securities regulation when there are real differences with respect to the underlying value proposition offered by fixed products and their method of distribution.

In this letter we wish to divide our commentary into three parts. First, we wish to further explain our philosophical opposition to the NAIC best interest proposal. Second, we wish to address specific areas of concern about the proposed regulation which we believe at a minimum should be fixed. Third, we wish to describe our own proposal for improving regulation of the annuity marketplace in ways that we think will truly benefit consumers. We are hopeful dividing our comments in this manner will facilitate your review and ensure all three parts of our message – the inherent flaws of this rule, the need for essential fixes, and introduction of our own alternative approach - will each receive due consideration.

FACC Perspective on the NAIC Best Interest Proposal

FACC has already commented extensively in prior submissions on our view that the NAIC is trying to fix what is not broken. We cannot agree the model suitability regulation should be modified when all evidence indicates it is working as an effective standard and compliance system for the insurance marketplace – indeed every commissioner that we have spoken with has agreed the model suitability regulation works.

It is our view the rule proposal – establishing some nebulous best interest standard – only serves to perpetuate concepts arising out of the now discredited Department of Labor fiduciary rule that sought to impose ill-fitting fiduciary and investment adviser standards upon insurance agents and fixed life and annuity products. While we recognize an aura of inevitability may be building around this rule proposal, which we believe is largely driven by outside pressure rooted in the "need to do something", we still wish to explain our fundamental opposition to the approach taken by this proposal.

We maintain these concerns have not received adequate attention and will continue our effort to elevate these concerns for consideration whether by the Working Group, A Committee, or full membership of the NAIC.

- While perhaps well intentioned, the NAIC proposal plays into and perpetuates a false narrative that today's fixed annuity sales practices are unsound and consumers are being abused when there is no evidence of that and in fact the overwhelming evidence says suitability works and consumers are satisfied. In truth the marketplace today is strong and these proposals will harm fixed annuities, independent agents, and consumers. Insurance regulators have acknowledged the current suitability model is effective and we believe regulators have the tools necessary to protect consumers in relatively rare instances where a sale was inconsistent with the best interests of the consumer.

- The NAIC proposal – whether it uses the words "best interest" or not – seeks to create a new standard for agents that is vague and uncertain. This new standard will undoubtedly become grist for second guessing regulation and treasure hunting litigation. The rule as presently written requires that agents put client interests ahead of their own interests

without explanation of what that means. We believe it is a fiduciary duty and will be construed as such by regulators and courts. It crosses an important line by going beyond the proper standard in a free and competitive marketplace which is full disclosure and suitability. Comparison of agent and consumer interests in a sales transaction – where the agent does not manage or oversee client assets or otherwise serve as a fiduciary – is inherently ambiguous and an open invitation to second guessing and litigation.

- The NAIC proposal will potentially force agents to become investment advisors. The requirement that agents must act with "reasonable diligence, care, skill, and prudence" invites interpretation that agents must act in the same manner as securities agents and investment advisers. But insurance agents play a different role compared to securities professionals who take on responsibility for client accounts and investment performance and in many cases act as true fiduciaries with paternal responsibility for client portfolios. By contrast, insurance agents sell fixed products managed and guaranteed by insurance companies and as such have no authority or influence on the performance of the annuity nor control of client assets. Insurance-only agents provide limited advice to clients about the advantages and disadvantages of guaranteed products which does not make the advice any less valuable or necessary but should not require insurance-only agents be compared to investment advisers who purport to advise across a client's full portfolio. In short, these are two entirely different businesses and standards of conduct should reflect the differences rather than regulate them in the same manner. Best interest standards that apply to securities brokers and advisers apply for a reason and are not applicable and do not translate to insurance agents that only sell fixed annuities and other guaranteed products.

- The NAIC proposal fails to recognize the unique structure of independent distribution which consists of agents and marketing organizations working for multiple carriers. As with the DOL rule, the supervision requirements of the NAIC proposal are built on the broker dealer model which presupposes a single broker dealer overseeing an agent's book of business across all products and services. However, independent insurance agents are not controlled by any single insurance company and are not subject to the kind of oversight that is contemplated by the NAIC rule. To comply with this new rule, as written, insurance companies would have to restructure their independent distribution channel which could very well mean dismantling independent distribution and causing considerable disruption in the marketplace and reduction in competition and product offerings.

Many of these concerns were articulated in our prior submissions to the Working Group over the course of its proceedings. We are attaching copies of those submissions which we ask be reviewed and considered by the A Committee.

FACC Urges Certain Minimum Fixes

While FACC is steadfast in its belief the current NAIC proposal is misguided and should not be adopted, we urge the A Committee (or Working Group as applicable) to consider certain partial

fixes that would help ameliorate but not eliminate the proposal's harmful effects on the marketplace. This is not intended as an exhaustive commentary on the provisions of the rule but does highlight some of the more prominent trouble spots with the rule and how they might be addressed to alleviate harmful effects on the marketplace.

1. Requiring that agents act "in the interests of the consumer" and not place their own financial interests "ahead of the consumer's interests" is ambiguous and easily interpreted as a fiduciary duty. The rule proposal should state explicitly that nothing in the rule is intended to be construed as making insurance agents into fiduciaries. The proposal should further clarify that the agent is not required to act in the *exclusive* interest of the client which could be easily inferred by the absence of any qualifier to the contrary. Beyond that, the rule should make clear an agent does not violate this nebulous duty by attempting to sell products within the agent's portfolio when there are less costly or differently configured products available in the marketplace that are arguably "in the interest of the client" but not offered by the agent. Absent such clarifications, the question arises in every case whether this rule demands an agent do what is "best" for the client which can always be construed to mean the agent should have surveyed the entire marketplace and only sold the most economically superior product which of course is subjective and the epitome of second guessing.

2. Requiring that agents act with "reasonable diligence, care, skill, and prudence" invites direct comparison to standards that apply to investment advisers and other agents and fiduciaries involved in delivery of financial services. This is unfair to insurance-only agents. The rule proposal should be clarified by stating that insurance-only agents carrying out their responsibilities under this regulation will be compared only to other insurance-only agents in determining whether they have satisfied these duties of diligence, care, skill, and prudence. Failing to provide such clarification will likely mean that every insurance agent must become an investment adviser in order to demonstrate the proper care was exercised in the course of selling any fixed product even though the agent only sells insurance products and the agent does not seek to give advice concerning the client's entire investment portfolio.

3. Requiring that an insurer "establish a system of supervision that is reasonably designed to achieve . . . . its producers' compliance" with the newly expanded regulation is impossible for insurers that oversee independent agents and marketing organizations. That independent distribution channel accounts for the vast majority of fixed indexed product sales today and will be put in jeopardy by this proposal. Clarification should be added that insurance companies are not required to supervise anything other than their own products and their own compensation paid to independent agents. Absent such clarification, insurance companies are put in the position where they must ensure agents have satisfied their obligations under the rule with respect to all products sold and compensation received by the agent from all insurers represented by that agent. That defies the current structure of independent distribution – i.e., insurers do not monitor how agents sell competitor products or what compensation agents receive from competitor insurers - and seemingly could only do so through violation of antitrust

laws whereby insurers would coordinate to regulate independent agents. We submit this must be fixed or independent distribution could be lost.

4. Providing an exemption for "sales made in compliance with FINRA rules pertaining to suitability and supervision of annuity transactions" is wholly unnecessary and constitutes an unfair loophole. It is ironic – to say the least – that the stated purpose of this rule is to create harmonization across the securities and insurance industries (at the urging of the securities industry) but those who operate in compliance with FINRA (i.e., the securities industry) are excused wholesale from these rules. There is no justification for such an exemption and it should be removed. The NAIC deference to FINRA under the old suitability rule was justifiable to the extent securities suitability at one time was considered more advanced but those days are long gone. The fact is there are many overlapping laws that apply to both securities and insurance, and where applicable, insurers and agents must comply with both regimes. It is also a fact that today it is unknown what rules might be adopted by FINRA with respect to "best interest" and thus any carte blanch exemption is unwarranted. The only circumstance which would warrant special treatment for representatives registered with FINRA would be if the NAIC rules and FINRA rules were in actual conflict but that seems unlikely, and even if that were the case, the conflict should be isolated and addressed rather than providing free passes based on FINRA compliance. This rule, if adopted, will fall hard on insurance-only agents and to ensure semblance of a level playing field there should be no special exemptions.

FACC Offers an Alternative Approach

FACC recognizes there is always room for improvement in sales practices and acknowledges the growing desire among regulators to address possible divergence of interests as between consumers and insurance agents. While FACC believes these concerns are overstated and notes the genesis for such concerns emanates from the securities industry, FACC is not a naysayer and we have put forward our own detailed proposal to address these issues.

FACC's proposal consists of enhancements to the NAIC Annuity Disclosure Model Regulation. Our proposal has three components consisting of a client relationship summary similar to what is being developed by the SEC, a notice of producer compensation similar to what has been adopted in New York, and provisions addressing non-cash compensation. While some are quick to dismiss "more disclosure", we believe our proposal is much more than that, consisting of a smartly designed disclosure-oriented framework that will bring about alignment of consumer expectations and agent practices.

Instead of tampering with the standard of care, FACC believes the better approach is to provide agents and consumers with the tools and framework to communicate more effectively about compensation and conflicts. We believe our proposal can create what we would call "a more virtuous marketplace" that facilitates flow of information and encourages true alignment of consumer and agent interests. Our proposal is concrete, will provide meaningful value to

consumers, and avoid unnecessary and costly disruption to the marketplace. For regulators, consumers, and industry, this can indeed be a win-win-win.

A copy of our proposal is attached to this submission.

FACC has been urging the NAIC to step back from this process – and reconsider the direction of these efforts – mostly because we believe the emerging proposal suffers from a lack of clear purpose. It remains unclear what problem is being solved. It remains unclear why the existing suitability model has been deemed inadequate. It remains unclear how consumers are *not* being served by existing laws. It remains unclear what the SEC will do and why insurance regulation must be harmonized with securities regulation. While there have been vague suggestions that regulators need more tools, we maintain insurance regulators currently have ample tools at their disposal to take action against any company or agent found to be acting purely out of self-interest in a manner contrary to what is right for the client.

This lack of clear purpose is perhaps a symptom and result of the manner in which this process has been unfolding. The NAIC Procedures for Model Law Development would ordinarily require that any new model law or amendment be reviewed and approved for development first by the NAIC Executive Committee but apparently that has not happened. While there is an exception under those procedures for federally-mandated state laws, there is no federal mandate here, given there has been no action by Congress, the DOL Fiduciary rule was struck down by the courts, and the SEC is pursuing rules only directed at securities professionals. We believe the NAIC would benefit from a more fulsome discussion at Executive Committee or even plenary on threshold questions concerning the need for this type of regulation and what options are possible.

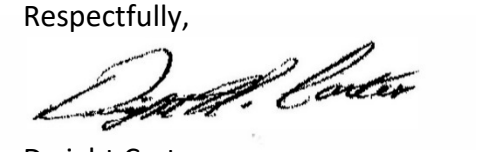
Instead this proposal has traveled on a rather narrow and circuitous path. It was developed primarily at two Working Group meetings where language was proposed and incorporated in a series of straw votes with no formal motion or adoption. The draft was then elevated to A Committee still without any formal motion or vote by the Working Group. This ad hoc process has enabled the proposal to proceed forward without confronting core questions of whether the rule proposal is even needed, whether it has support by NAIC leadership, whether it has broad based support among commissioners, and whether there might be better alternatives.

We point this out – not to be critical or merely raise technical objections - but to underscore the need for wider and deeper review of this proposal. FACC has met individually with many of the Working Group members as well as members of the A Committee and Executive Committee who agree privately that the existing model suitability regulation is working and question whether additional regulation is truly needed. We believe the NAIC needs a more open discussion on these questions because the stakes are high and the impact of this regulation would be far-reaching.

FACC cannot overstate its concern that the adverse effects of this proposal could be significant in the absence of any clear or tangible benefits, forcing structural changes to the fixed annuity industry, turning insurance agents into fiduciaries, subjecting companies and agents to excessive litigation, compelling insurance agents to become investment advisers, upending long standing distribution models that have served the public well, and ultimately hurting consumers by reducing choices in delivery of insurance services and product availability. We hope A Committee will proceed with utmost caution as it considers this regulation and keep an open mind as to how best to address the needs of consumers without causing unnecessary and costly disruption to the annuity industry.

Thank you for the opportunity to be heard.

Respectfully,



Dwight Carter
Chair

Attachments: Proposed Model Annuity Disclosure Regulation
Prior FACC Submissions to the Working Group

April 26, 2018

SUBMITTED ELECTRONICALLY: jmatthews@naic.org

NAIC Annuity Suitability (A) Working Group
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414-332-9312	919-210-7364	515-330-3302

RE: Proposed Revisions to NAIC Annuity Suitability Regulation

Dear Working Group Members:

The Fixed Annuity Consumer Choice Campaign (FACC Campaign)* was originally organized to address issues impacting fixed annuities in connection with Department Labor (DOL) fiduciary rule. While we were very pleased to see the Fifth Circuit strike down the DOL fiduciary rule, we are deeply concerned that state and federal regulators are now rushing to fill what they may perceive as a vacuum, thereby perpetuating inherent flaws and false justifications of the DOL fiduciary rule that led to its demise. We ask - first and foremost - that the NAIC pause and step back from this rush to regulate based on a now largely debunked notion that the financial services industry is monolithic and somehow a new uniform "best interest" standard is the solution to what remains a largely undefined problem.

In our prior letter to this Working Group on January 22, 2018, we urged this Working Group to rethink its approach to "best interest" and consider leaving the suitability regulation alone, focusing instead on better disclosure and clearer rules around compensation and conflicts of interest. We believe - more than ever - this is what the NAIC should do in order to focus on real

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* The FACC Campaign is an unincorporated alliance of insurance agents, independent marketing organizations, insurers, and industry advocates seeking to protect the availability of fixed annuities by ensuring any standard of conduct regulations adopted by applicable regulators recognize and appropriately align with fixed annuity distribution through independent agents and marketing organizations.

solutions for consumers, rather than expending all its energies on establishing a theoretical "standard of care" that propagates a false sense of security that laws can mandate good behavior and potentially ushers in a regulatory environment hostile to innovation while creating a platform for ruinous litigation. It is particularly regrettable that "suitability", a relative newcomer to the insurance industry, is suddenly dismissed as inadequate and viewed even with contempt, when in fact all evidence indicates suitability works and the real issues worthy of consideration all boil down to helping consumers better understand the identity of their financial professionals, what services they offer, how they are compensated, and disclosing material conflicts of interest.

Our primary purpose in writing today is to urge this Working Group to proceed cautiously and resist the temptation to charge ahead with a "best interest" rule when there is so much uncertainty surrounding these matters including a newly released SEC rule proposal that is nothing more than that - a proposal. Needless to say, it is impossible for the NAIC to harmonize with the SEC or other regulatory authorities - ostensibly the goal of the Working Group - when securities regulators too are grappling with and exploring optional approaches as evidenced by the SEC's rule *proposal* which was accompanied by dozens of open ended questions. There is no telling where the SEC rule proposal will ultimately land especially since several SEC Commissioners vocalized deep reservations about what they essentially characterized as staff's proposal, making clear the Commissioners are interested in public and industry feedback and reserving judgment on the shape and content of any final rule. Given this situation, while we appreciate the NAIC wishes to be pro-active and provide leadership, the circumstances call for patience and the NAIC should take the necessary time to fully assess and analyze the SEC proposal, both its content and its uncertain path forward, while at the same time considering the full breadth of alternatives for improving insurance regulation without being constrained by largely political considerations that have propelled the concept of "best interest" as some kind of ideal preordained outcome.

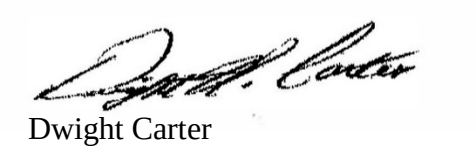
We have only begun to analyze the SEC rule, but our initial impressions are not favorable. We suspect others will share similar concerns as the rule receives more scrutiny in the weeks and months ahead. Based on our initial review, the rule is quite complicated with many parts and subparts. The commentary is nearly 1000 pages which illustrates how complex these new rules are contrary to the SEC's desired goal for simplicity. There is no definition as such of "best interest" though it is evident that best interest is virtually equivalent to fiduciary duty. The supposed safe harbor is not a true safe harbor because all the elements (disclosure obligation, care obligation, conflict of interest obligations) are themselves subjective requirements thus leaving financial professionals at risk of violating the rule's idealistic ill-defined standards. The SEC indicates it intends not to create private right of action, but it is unclear whether that would hold

true for a rule that redefines consumer expectations. The rule is particularly ill-suited for the fixed annuity industry, suffering many of the same deficiencies as the DOL fiduciary rule, including a reliance on broker-dealers to supervise and mitigate financial incentives given to their exclusively controlled salespersons, which is a construct that simply does not translate to the independent agent system which is the backbone of fixed annuity distribution. If applied as a uniform standard to the fixed annuity industry, it would be particularly imbalanced, given the securities industry is largely protected by an arbitration system that tempers the effects of a high standard like "best interest" whereas the insurance industry faces judges and juries under state law without the inherent safeguards of arbitration under uniform national regulation. We could go on identifying concerns, but the larger point is that the rule is complex, it is not well suited to the insurance industry, it should not be viewed as *fait acompli*, and the NAIC should seize this opportunity to reconsider the effects of any such rule on the insurance industry.

We recognize the Working Group has its own best interest proposal and there is considerable inertia to keep that moving along. We recognize too that some trade groups are supporting best interest as a panacea to market conduct issues even though we think that is wrongheaded and mostly based on self interest in creating a supposed level playing field (which in fact would be un-level and unfair vis-à-vis fixed annuity providers). That said, we remain steadfast in our view that the NAIC should reconsider its approach, using this interlude while the SEC considers its own best interest proposals, to zero in on real issues of disclosure and compensation practices. In other words, we urge the NAIC to "hit the pause button" on best interest, leave the suitability rule intact, turn its attention to more concrete and meaningful regulatory gaps in areas of disclosure and compensation practices, and develop model regulations that will actually help consumers without unnecessarily harming the insurance industry.

We appreciate your consideration of our views. We would like to reserve the right to submit additional comments in the next few weeks as we study the SEC rule more closely, see what is said by other commenters, and get a better sense of the direction of this Working Group.

Sincerely,



Dwight Carter
Chairman, FACC Campaign

FREEDOM TO CHOOSE Fixed Annuities
Fixed Annuity Consumer Choice Campaign

June 11, 2019

Submitted electronically to jmatthews@naic.org

Director Jillian Froment, Ohio Department of Insurance
Chair, Annuity Suitability Working Group

c/o Jolie H. Matthews, Senior Health and Life Policy Counsel
National Association of Insurance Commissioners
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NW Washington, D.C. 2001-1512

Contact: Kim O'Brien, FACC Spokesperson
kim@fixedannuitychoice.com 414-332-9312

RE: ***Request for Comment on Best Interest Standard***

Dear Director Froment:

We appreciate you have reached out and requested feedback on the following question outlined in Ms. Matthews May 22, 2019 email:

> If the model would require "best interest" as the appropriate standard of conduct, how should "best interest" be defined in order to provide an objective standard for compliance and regulatory oversight?

As you know from our previously submitted comments, we oppose applying a security industry "best interest" standard to fixed annuities. We remain steadfast in our position the fixed annuity marketplace is appropriately and effectively regulated by the existing Suitability Model and the wide range of other laws governing annuity sales, annuity salespeople and insurance companies. We believe the best interest regulation, as drafted, will cause real damage by inviting second guessing and litigation, chasing away fixed agents, upsetting the independent agent distribution model, and stifling innovation and consumer choice in the marketplace.

With that said, we applaud you for asking a very important question, which is how to define "best interest" in a way that would provide an objective standard for compliance and oversight. Let us be clear that we believe best interest is an inherently subjective standard that is associated with fiduciary duty and even the SEC fails to provide any meaningful definition. Adopting such a standard in the fixed insurance industry, which does not have uniform regulation nor arbitration, compounds the subjective nature of any such rule which is why the NAIC should step back and reconsider its approach.

Still we are heartened the NAIC is asking how to make best interest into an objective standard, implying there is recognition that best interest is nebulous and will be impossible to satisfy or enforce without clearer definitions and procedures. This is a step in the right direction if regulators acknowledge the proposed rule suffers from lack of specificity and that meaningful direction must be built into the rule so producers and insurers can know the rules of the road and have confidence they are complying if they follow certain processes.

With that in mind, we submit that in order for insurance companies and producers to comply with, administer, and supervise a best interest regulation for insurance products, the suitability model must incorporate specific objective criteria as follows.

CORE GUIDEPOSTS

- It must be made clear the regulation includes a safe harbor or equivalent protection such that producers and insurers will be assured the law will be satisfied by meeting objective criteria and not be subject to second guessing based on subjective fiduciary-like standards.
- Objective criteria for satisfying the rule must be uniform across all states, practical so producers can continue to offer appropriate options to clients, and predictable so contours of required conduct are known. Requiring producers and insurers to act in the interests of their clients and put client interests first is too nebulous and must be made actionable with specific criteria and procedures.

SPECIFIC RECOMMENDATIONS

In accord with these core guideposts, we believe the regulation must include the following specific definitions and clarifications:

1. It must be made clear producers and insurers are “deemed to satisfy” the requirements of the regulation if they satisfy specified criteria. Merely saying “complies by”, as currently written, is insufficient and must be clarified to say and mean “deemed to satisfy” so there is greater certainty that meeting the specified criteria is determinative of compliance.
2. The requirement that producers and insurers act with “reasonable care, diligence, skill, and prudence” must be defined so it is clear what is expected of producers and insurers. It should be made explicit this is achieved by (i) obtaining the consumer profile information from the client, (ii) ensuring the product recommendation is suitable, (iii) providing truthful information and reasonable disclosure to the client concerning product features, and (iv) properly documenting the recommendation. We are mindful the SEC removed prudence from its so-called Care Obligation and the NAIC might consider a similar revision in Section 6A of the proposed model, but that would not obviate the need to provide the clarity sought here to ensure the remaining terms of “care”, “diligence”, and “skill” are given concrete meaning that can be satisfied with objective criteria.

3. The regulation should be explicit on the range of products the producer or insurer must consider and compare to meet the requirements of the regulation. Producers should only be expected and required to consider in their recommendation those products the producer is appointed to sell and actually has within his or her authority to offer clients.

   It might be further clarified that any recommendation should include a determination by the producer that the product is consistent with the goals and objectives of the client, within the client's risk tolerance, and represents a reasonable alternative compared to non-insurance options such as CDs, stock, bonds, mutual funds, managed portfolios, etc.

   If this approach is used, a reasonable alternative should be defined to mean the producer advised the client that such options exist and with the client determined the recommended annuity has the potential to provide reasonable benefits compared to those other options for that portion of the client's portfolio based on the consumer profile information and stated needs and objectives of the client.

4. It must be made clear that producers will be compared to other producers with similar licenses selling similar products with respect to standards of care, diligence, skill, and (if applicable) prudence. This might be premised on the duty of producers to be clear with the client what the producer is licensed and authorized to sell and whatever limitations may apply in terms of products and services offered by that producer. Provided such information is properly disclosed, producer conduct should be compared to similarly licensed producers, so it is unmistakable that producers will not be directly or indirectly compelled by this law to acquire securities licenses to satisfy the care standards contained within the regulation.

5. The disclosure requirements contained in the current proposal generally appear facially reasonable including relationship and role of the producer, limitations on product offerings and insurers represented, and sources and types of compensation. However, producers and insurers need more guidance on what specifically is contemplated and required to satisfy these disclosure obligations. To achieve this, the Working Group should work on and provide more specific criteria and consider providing a template as part of the model regulation. We previously proposed a Client Relationship Summary and attach it again for your reference. It might serve as a starting for such work.

6. The requirement for disclosure of non-cash compensation is unclear and needs further development to ensure it is workable and applied even handedly. It is notable the securities industry has developed highly detailed rules and regulations governing non-cash compensation in recognition such compensation takes many forms, is often incidental or *de minimus*, and is challenging to monitor. Additionally, there are types of non-cash compensation that are not known to a producer at time of recommendation and/or cannot be quantified at that moment in time. Requiring disclosure of non-cash compensation is laudable but greater specificity is needed on exactly what is expected under the regulation.

7. The requirement to disclose "any and all material conflicts of interest" is also vague and needs better definition recognizing in most cases producers have no other conflicts of interest relative to their clients beyond compensation. It must be spelled out what is contemplated so producers and insurers can know what is expected of them. Merely saying it is a financial interest that a reasonable person would expect to influence the impartiality of a recommendation leaves producers and insurers wide open for second guessing. While exact precision may not be possible, the rule should contain guidance. For example, while it may be clear that acting as a lawyer or accountant while selling annuities is a conflict, it is unclear whether conflicts could also include any incidental non-cash compensation even below the $500 threshold, participation in long range incentive programs, ownership in public stock of the insurer, travel or trip expenses associated with education or training purposes, familial relationships to the client, or other matters.
8. The supervisory requirements should explicitly state that insurers, or agencies on their behalf, are only responsible for supervising their own products and compensation relative to independent producers and not responsible for supervising producers relative to any other company products or compensation that is or may be received by the producer. It is not practical for insurers and their independent marketing organizations to monitor and control the conduct of producers relative to competitor products and compensation without significant risk of transgressing anti-trust boundaries.

   Insurers, or agencies on their behalf, should be permitted expressly to limit such supervision to their own products and compensation with the proviso that the insurer or agency has determined the producer conduct and recommendation otherwise satisfies the requirements of the regulation, the insurer or agency obtains explicit assurance from the producer that he or she has complied with the requirements of the regulation, and the insurer or agency has no reason to believe the producer has failed to comply with requirements of the regulation.

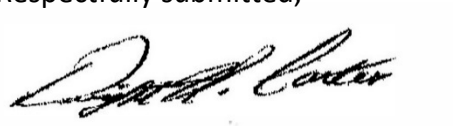
Let us emphasize that each of the eight points above is critical unto itself as an element in making the regulation more objective rather than largely subjective. In other words, we wish to stress each point above deserves the careful attention of the Working Group, and must be incorporated or addressed in some meaningful fashion, so the rule as a whole can be converted from merely aspirational fiat to a practical and workable regulation that producers and insurers could actually understand and implement and regulators could reasonably interpret and enforce. This will entail considerable work but we think it is critically necessary to fix this rule if it is to go forward.

We would like to make one last point which may seem a digression but which we believe directly relevant. And that is, this proposed model regulation should be recast as a model law rather than regulation. It is our belief no state legislature has given authority to insurance regulators to change the longstanding historical relationship between insurance agents and their clients. That relationship has always been based on full disclosure and honest dealing and, indeed, courts have routinely denied efforts to characterize that relationship as fiduciary or create other

standards beyond what exists in statute. Given this proposed regulation would alter that relationship in fundamental ways, irrespective of whether the word fiduciary or term best interest is used, it should require an act of the legislature. Our recommendations here, addressing how to make the rule more objective, would not obviate the need for legislative action to impose higher standards upon agents even if those standards could be realized through objective criteria and processes.

In closing, while we remain deeply skeptical there is any need to change the model suitability regulation, we salute the NAIC for taking up the question of how to make the proposed rule changes more objective. It's a critical question deserving careful attention. By replacing the current proposal's subjective requirements and replacing them with objective, actionable and predicable processes, as suggested in our letter, the new model would appropriately recognize the unique structure and benefits of independent insurance distribution and ensure a vibrant and healthy fixed annuity marketplace for consumers.

Respectfully submitted,



Dwight Carter, Chair, FACC Campaign

Attachment: Client Relationship Summary

ANNUITY DISCLOSURE MODEL REGULATION

TABLE OF CONTENTS

Section 1. Purpose

The purpose of this regulation is to provide standards for the disclosure of certain minimum information about annuity contracts and producers who recommend annuity contracts in order to protect consumers and foster consumer education. ~~The~~With regard to annuity contracts, the regulation specifies the minimum information which must be disclosed, the method for disclosing it, and the use and content of illustrations, if used, in connection with the sale of annuity contracts. With regard to producers, the regulation provides for standardized disclosure of information about the relationship of the producer to the consumer, the form and amount of compensation received by the producer for sale of the annuity, and exposure of any material conflicts of interest that could affect recommendations made by the producer. The goal of this regulation is to ensure that annuity purchasers ~~of annuity contracts~~ understand certain basic features of annuity contracts~~.~~ and are aware of the role and compensation paid to the producers who recommend annuity contracts. Through fuller disclosure and other requirements, consumers will be in a better position to select the annuity that meets their needs and objectives and assess the quality of any recommendation made by a producer.

Section 2. Authority

This regulation is issued based upon the authority granted the commissioner under Section [cite any enabling legislation and state law corresponding to Section 4 of the NAIC Unfair Trade Practices Act].

Section 3. Applicability and Scope

This regulation applies to all group and individual annuity contracts and certificates except:

A. Immediate and deferred annuities that contain no non-guaranteed elements;

B. (1) Annuities used to fund:

(a) An employee pension plan which is covered by the Employee Retirement Income Security Act (ERISA);

(b) A plan described by Sections 401(a), 401(k) or 403(b) of the Internal Revenue Code, where the plan, for purposes of ERISA, is established or maintained by an employer,

(c) A governmental or church plan defined in Section 414 or a deferred compensation plan of a state or local government or a tax exempt organization under Section 457 of the Internal Revenue Code; or

(d) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor.

(2) Notwithstanding Paragraph (1), the regulation shall apply to annuities used to fund a plan or arrangement that is funded solely by contributions an employee elects to make whether on a pre-tax or after-tax basis, and where the insurance company has been notified that plan participants may choose from among two (2) or more fixed annuity providers and there is a direct solicitation of an individual employee by a producer for the purchase of an annuity contract. As used in this subsection, direct solicitation shall not include any meeting held by a producer solely for the purpose of educating or enrolling employees in the plan or arrangement;

C. Non-registered variable annuities issued exclusively to an accredited investor or qualified purchaser as those terms are defined by the Securities Act of 1933 (15 U.S.C. Section 77a et seq.), the Investment Company Act of 1940 (15 U.S.C. Section 80a-1 et seq.), or the regulations promulgated under either of those acts, and offered for sale and sold in a transaction that is exempt from registration under the Securities Act of 1933 (15 U.S.C. Section 77a et seq.).

/ / / /

(1) The assumed growth rate of the index in accordance with Subsection F(9);

(2) The assumed values for the participation rate, cap and spread, if applicable; and

(3) The assumed allocation between indexed-based segments and declared-rate segment, if applicable, in accordance with Subsection F(9).

L. If the contract is issued other than as applied for, a revised illustration conforming to the contract as issued shall be sent with the contract, except that non-substantive changes, including, but not limited to changes in the amount of expected initial or additional premiums and any changes in amounts of exchanges pursuant to Section 1035 of the Internal Revenue Code, rollovers or transfers, which do not alter the key benefits and features of the annuity as applied for will not require a revised illustration unless requested by the applicant.

Section 7. Client Relationship Summary

A. A producer who offers annuities must prepare a client relationship summary document (CRS) that is delivered to each prospective client at time of initial engagement prior to taking any annuity application.

(1) Only one CRS is required during the course of the relationship with the client.

(2) If the producer has a website, a copy of the CRS shall be posted on the website.

(3) The CRS shall be short as practicable and written in plain English.

(4) The CRS must be updated if there is any material change in the information contained on the CRS. A copy of the updated CRS shall be provided to existing clients on the earlier of (a) the next meeting between the producer and client or (b) the date of the next sale of an annuity to the client. The updated CRS shall be posted to the producer website, if applicable, within 30 days.

(5) The CRS shall contain the information set forth in subsection B and presented in the order described there.

(6) A standardized CRS set forth in the appendix of this regulation may be used by the producer to meet these requirements provided it is adapted as necessary to ensure all information is accurate.

(7) A producer is exempt from this section if the producer provides a comparable client relationship summary to the client in accordance with requirements of the Securities and Exchange Commission.

(8) A producer may rely on information provided by an insurer if the insurer is the source of relevant information for any part of the CRS. Insurers are required to provide reasonable assistance to producers in assembling necessary information for the CRS.

B. The CRS shall contain the following information:

(1) Title.

(a) The CRS shall be titled "Client Relationship Summary".

(b) The title or preamble shall include the name of the producer and provide the date the CRS was prepared.

(2) Introduction.

(a) The introduction shall indicate the producer is a licensed insurance agent or agency.

(b) It shall state what types of products and services are offered by the producer.

(c) It shall state, if applicable, that the producer is not a securities broker or investment adviser and that the prospective client may wish to consider the advantages and disadvantages of working with other kinds of financial services professionals.

(3) Relationships and Services.

(a) This section shall describe in further detail what products and services are provided by the producer and the nature of the relationship with the client.

(b) To the extent applicable, it shall state the producer will be paid commission by the insurance company for each product purchased by the client.

(c) It shall state that the producer only provides advice that is incidental to the purchase of insurance and the producer is not a disinterested adviser.

(d) It shall make clear that the producer may recommend products for purchase but the ultimate decision is made by the client.

(e) To the extent applicable, it shall make clear that the producer is an agent for the insurer and not the client and the producer does not have a continuing obligation to the client after the sale of an annuity.

(f) It shall explain the producer is only appointed to represent certain insurance companies and the range of products offered by the producer are limited.

(4) Obligations to the Client.

(a) This section shall explain the producer abides by certain laws and regulations in interactions with the client.

(b) It shall explain the producer's obligation to treat the client fairly and provide full and accurate information about any product recommended by the producer.

(c) It shall explain that the producer will only recommend an annuity that is suitable in meeting the needs and objectives of the client based on disclosed information.

(d) It shall disclose that interests of the producer may conflict with interests of the consumer because the agent is compensated for each sale and compensation may vary by product and insurer.

(e) To the extent applicable, it shall explain the producer is not a fiduciary and not obligated to act in the best interests of the client as defined by law. It shall indicate that the client is free to seek services of a fiduciary or financial services professional who may be subject to higher standards of care under the law.

(5) Summary of Fees and Costs

(a) This section shall explain the agent is paid commission by the insurer and that the client does not directly pay compensation to the producer for sale of an annuity.

(b) It shall explain that some annuities contain fees for certain features often offered as a rider and any such fees are disclosed during the sales process.

(c) It shall explain that under law the producer cannot rebate commissions to ensure all clients who are similarly situated pay the same costs and receive the same benefits under an annuity product.

(d) It shall disclose there are other kinds of payment arrangements used by other financial professionals which may be based on assets under management or other factors not tied to product sales.

(e) It shall indicate that additional information about compensation will be provided in a notice of producer compensation at time of sale of each annuity.

(6) Comparisons

(a) This section shall advise the client to consider shopping and comparing products and services offered by the producer with products and services offered by other insurance producers and other types of financial professionals.

(b) It shall explain annuities have unique features that may be of interest to the prospective client but in the alternative there are other options including securities and banking products that may be of interest to the client.

(7) Conflicts of Interest

(a) This section shall disclose any material conflicts of interest (other than receipt of commissions) that the producer may have relative to interests of the client.

(b) It shall explain that material conflicts of interest, if any, may affect the producer's judgement in recommending annuity products.

(c) Material conflicts of interest include but are not limited to an ownership interest in any insurer, profit-sharing connected to certain products, participation in long term incentive programs connected to certain insurers or products, or remuneration in the form of non-cash compensation that may be based on volume of sales production including prizes, entertainment, travel expenses, meals, or other items of value.

(d) It shall provide a description of any material conflicts of interest to prospective clients in sufficient detail so prospective clients can assess the extent to which material conflicts of interest may affect recommendations made by the producer. However, the producer is not required to disclose specific dollar amounts.

(e) In the alternative, the producer may satisfy this obligation concerning disclosure of material conflicts of interest by providing such information as part of and in accordance with the Notice of Producer Compensation described in Section 8 below.

(8) Additional Information

(a) This section shall indicate additional information is available upon request.

(b) It shall indicate how the prospective client may obtain further information about the producer and topics covered by the CRS (for example, by reference to a website of the producer or an affiliated agency or insurer).

(c) It shall also provide information about how to look up the producer's license and appointments if such information is available on-line or otherwise from the state insurance department.

(d) It shall also indicate the prospective client may contact the state insurance department if there are any concerns or questions about the producer, annuity products offered by the producer, applicable laws or regulations, or any disclosures in the CRS.

Section 8. Notice of Producer Compensation

A. A producer shall disclose the following information to an applicant orally or in writing at or prior to the time of application for an annuity:

(1) A description of the role of the producer in the sale of the annuity including the fact that the producer is a licensed insurance agent;

(2) That the producer will receive compensation from the selling insurer or other third party for sale of the annuity contract if applicable;

(3) That the producer will be paid compensation in the form of commission if applicable;

(4) That compensation paid to the producer may vary depending on certain factors including, to the extent applicable, the annuity contract selected by the applicant, the insurer selected by the applicant, and the amount of premium paid by the applicant;

(5) If not already disclosed in a CRS provided to the applicant, that the producer has certain material conflicts of interest including, to the extent applicable, ownership interest in certain insurers, profit-sharing connected to certain products, participation in long term incentive programs connected to certain insurers or products, remuneration through non-cash compensation that may be based on volume of sales production including prizes, entertainment, travel expenses, meals, or other items of value;

(6) That the applicant may obtain more information about the compensation that the producer will be paid for sale of the annuity (and, if applicable, any material conflicts of interest) upon request;

(7) That upon specific request the applicant may obtain information about compensation that would be paid to the producer for alternative annuity products that are quoted or presented by the producer.

B. If the applicant requests more information about the producer's compensation for sale of the annuity prior to issuance of the annuity, the producer shall disclose the following information to the purchaser in writing at or prior to issuance of the annuity:

(1) A description of the nature, amount, and source of any compensation to be received by the producer as a result of the sale of the annuity (or a reasonable estimate thereof);

(2) A description of the nature, amount, and source of any compensation to be received by any other producer including any agency as a result of the sale of the annuity (or a reasonable estimate thereof), or in the alternative an indication that such information may be obtained from the applicable insurer;

(3) A description of the nature and extent of any material conflicts of interest relating directly or indirectly to the sale of the annuity (if not otherwise disclosed in a CRS provided to the applicant);

(4) A description of the nature, extent, and source of any non-cash compensation received in the prior twelve months or reasonably expected to be received in the ensuing twelve months from any single source associated with the annuity sale (e.g., insurer, agency) if the value of the non-cash compensation exceeds or is expected to exceed $500 during the period;

(5) If specifically requested, a description of the nature, amount, and source of any compensation that would be expected to be received by the producer for sale of any alternative annuity product quoted or presented by the producer along with corresponding information material conflicts of interest and non-cash compensation that would apply in connection to sale of the alternative annuity products.

C. If the applicant requests more information about the producer's compensation within 30 days after issuance of the annuity, then the producer shall disclose the information required by Section 7.B. within the following ten business days.

D. If the exact nature, scope, or amount of compensation to be disclosed by the producer, or any part thereof, is not known at the time of disclosure required hereunder, then the producer shall include in the disclosure as to that part of the compensation which is unknown:

(1) A description of the circumstances that may determine the receipt and amount or value of such compensation; and

(2) A reasonable estimate of the amount or value, which may be stated as a range of amounts or values.

E. An insurance producer shall not make statements to an applicant that contradict the disclosures required by this Section 7 nor make any other misleading or knowingly inaccurate statements about the role of the insurance producer in the sale or compensation to be received by or paid to the producer or any other party as a result of the sale of the annuity.

F. Insurers are required to provide reasonable assistance to producers in assembling necessary information for the notice of consumer compensation which shall include the following:

(1) Providing timely and accurate information on compensation paid by the insurer for any of its products as needed by the producer to prepare the notice required by Section 7.A.

(2) Providing timely and accurate information on material conflicts of interest and non-cash compensation pertaining to the insurer or its products as needed by the producer to prepare the notice required by Section 7.A.

(3) Providing timely and accurate information on compensation paid to any other agents or agencies in connection with an annuity sale, if requested by the applicant, as required under Section 7.B.(2).

(4) Providing to the producer timely and accurate information on compensation, non-cash compensation, and material conflicts of interest to the extent such information is requested by the applicant and is not otherwise available to the producer to satisfy the requirements of Section 7.B.

G. 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 reimbursement for marketing or advertising expenses. Insurers may only offer non-cash compensation to producers that is variable or dependent based on total volume of annuity sales production giving equal weight to all annuity products offered by the insurer. Non-cash compensation, for purposes of Sections 6 and 7, shall not include gifts for infrequent life events such as weddings, birth of a child, or bereavement; occasional meals or tickets for entertainment that may be business related but are not tied to production goals; any expenses in connection with training or education that takes place at the offices of the producer, an intermediary agency, or the insurer's headquarters or other bona fide business location.

Section 9. ~~Section 7.~~ **Report to Contract Owners**

For annuities in the payout period that include non-guaranteed elements, and for deferred annuities in the accumulation period, the insurer shall provide each contract owner with a report, at least annually, on the status of the contract that contains at least the following information:

A. The beginning and end date of the current report period;

B. The accumulation and cash surrender value, if any, at the end of the previous report period and at the end of the current report period;

C. The total amounts, if any, that have been credited, charged to the contract value or paid during the current report period; and

D. The amount of outstanding loans, if any, as of the end of the current report period.

Section 10. ~~Section 8.~~ **Penalties**

In addition to any other penalties provided by the laws of this state, an insurer or producer that violates a requirement of this regulation shall be guilty of a violation of Section [cite state's unfair trade practices act].

Section 11. ~~Section 9.~~ **Separability**

If any provision of this regulation or its application to any person or circumstance is for any reason held to be invalid by any court of law, the remainder of the regulation and its application to other persons or circumstances shall not be affected.

Section 12. ~~Section 10.~~ **[Optional] Recordkeeping**

A. Insurers or insurance producers shall maintain or be able to make available to the commissioner records of the information collected from the consumer and other information provided in the disclosure statement (including illustrations) for [insert number] years after the contract is delivered 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.

B. Records required to be maintained by this regulation may be maintained in paper, photographic, microprocess, 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 13. ~~Section 11.~~ **Effective Date**

This regulation shall become effective [insert effective date] and shall apply to contracts sold on or after the effective date.

Client Relationship Summary
For Insurance Licensed Agents

Date: _____

INSURANCE AGENT/PRODUCER INFORMATION ("Me", "I", "My")

First Name: _____ Last Name: _____

Firm Name: _____ Website: _____

Insurance License #_____

CLIENT INFORMATION ("You", "Your")

First Name: _____Last Name: _____

INSURANCE AUTHORIZATION

I am licensed and authorized to sell life insurance including annuities in [*State*] in accordance with state laws. I offer the following products:

□ Fixed Index Annuity □ Fixed Rate Annuity □ Fixed Life Insurance □ Other

RELATIONSHIPS & SERVICES

I am an insurance agent with [*xx*] years of experience advising clients about insurance and annuity products. I strive to provide my clients with suitable annuity products and sound advice in meeting their financial goals. I am required by law to be trained in the benefits, features and fees of any annuity product I recommend, and I satisfy continuing education requirements to maintain my licensure. As an insurance agent, I am appointed with and represent various insurance companies. Those insurance companies do not restrict the insurance products I sell or recommend but the range of products I offer are limited to products available from those insurance companies. Any advice that I provide to you is incidental to the purchase of insurance, and because I am paid commission, I do not act as a disinterested adviser. I may recommend products for purchase but the ultimate decision to purchase or not to purchase is made by you. If you decide to purchase a product from me, you will be issued an annuity contract from the insurance company and I will continue working with you as long as I am agent of record. I am not a securities broker or investment adviser. You may wish to consider the advantages and disadvantages of working with other kinds of financial services professionals.

OTHER SERVICES

_____
_____
_____

MY OBLIGATIONS TO YOU

I will comply with state insurance laws and regulations in my interactions with you. I am obligated to treat you fairly and provide full and accurate information about any product that I recommend to you. I will only recommend an annuity that is suitable in meeting your needs and objectives based on information you have disclosed to me.

I will disclose any of my interests that may conflict with your interests including, but not limited to, my compensation for each sale. I am not a fiduciary and I am not subject to a best interest standard of care as those terms are defined by law. You are free to seek services of a fiduciary or financial services professional who may be subject to different or higher standards of care.

SUMMARY OF FEES & COSTS

COMPENSATION

The compensation an insurance company pays me when you purchase an annuity is called "commission." This commission covers, in part, my cost of doing business and providing services to you. Typically, the commission amount will vary based on the type of annuity you purchase, the amount of premium you pay for the annuity, and the commission schedule of the insurance company.

You do not pay commission directly and instead all of your premium is applied to the annuity. Commission is one of many costs which the insurance company factors into the pricing of its products which also includes guaranteed and non-guaranteed benefits and other features offered under that annuity.

The insurance company may pay commission to other agents or third parties such as marketing organizations who assist in supporting the relationship between me and the insurance company. These third parties may pay me part of their commission. An insurance company or third party may offer additional incentives (called non-cash compensation) to me that are not based on the sale of an individual product, but rather based on my overall sales with the insurance company or third party. These may include, but are not limited to, entertainment, merchandise, gifts and prizes, travel expenses or meals and lodging, and reimbursement for marketing or advertising expenses.

Additional information about my compensation will be provided to you in a Notice of Producer Compensation at time of sale of each annuity.

OTHER FEE & COST INFORMATION

Some annuities contain fees for certain features often offered as a rider and any such fees are disclosed during the sales process. Under law I cannot rebate commissions to ensure all clients who are similarly situated pay the same costs and receive the same benefits under an annuity product. There are other kinds of payment arrangements used by other financial professionals which may be based on assets under management or other factors not tied to product sales.

COMPARISON TO OTHER PROVIDERS

You may want to consider shopping and comparing products and services offered by me with products and services offered by other insurance producers and other types of financial professionals. Annuities have unique features that may be of interest to you but there are other options including securities and banking products that may be of interest to you. I will only recommend an annuity to you if I believe it meets your financial needs and goals.

MATERIAL CONFLICTS OF INTEREST

Below I have identified any material conflicts of interest that could affect my recommendations. If there are no material conflicts of interest, other than my compensation as described above, it says "none." I want you to be aware of any material conflict of interest so you can evaluate the quality of my recommendation. Material conflicts of interest include such things as ownership interest in an insurer, receiving profits for certain products, participation in long term incentive programs offered by insurers, or payment in the form of non-cash compensation based on volume of sales production including prizes, entertainment, travel expenses, meals, or other items of value. My material conflicts of interest, if any, are listed below:

_____

_____

_____

_____

ADDITIONAL INFORMATION

You may obtain further information about me and the topics covered here at [*website of producer or affiliated agency or insurer*].

You may verify my licensing authorization and my insurance company appointments and research any other concerns or questions you may have about me or applicable laws or regulations at [*state insurance department website and phone number*].

Upon application for purchase of an annuity from me, you will be given a Notice of Producer Compensation which will provide further details on my compensation and other relevant information about my practices.

CERTIFICATION & ACKNOWLEDGEMENT

I certify and acknowledge that I have and read and understand this Client Relationship Summary. I understand that I may seek products and services from other financial professionals at my discretion and am under no obligation to purchase an annuity or other insurance product from the agent named above. I understand that this document is not a contract and creates no contractual obligation between you and me or any other third party.

_____ _____

Signed Date

July 10, 2019

Submitted electronically to jmatthews@naic.org

Director Jillian Froment, Ohio Department of Insurance
Chair, Annuity Suitability Working Group

c/o Jolie H. Matthews, Senior Health and Life Policy Counsel
National Association of Insurance Commissioners
Hall of the States Building, Suite 700,
444 North Capitol Street,
NW Washington, D.C. 2001-1512

Contact: Kim O'Brien, FACC Spokesperson & Americans for Annuity Protection, Vice Chair
kim@fixedannuitychoice.com 414-332-9312

RE: ***Request for Comment on Conflict of Interest and Care Obligation***

Dear Director Froment:

We first wish to commend you for delving more deeply into issues surrounding the NAIC's best interest regulatory proposals – in this case tackling the definition of conflict of interest and the care obligation. We believe existing proposals are lacking in clarity in many respects and most importantly on what exactly would be expected of affected parties under these proposals, including regulators themselves who may be left with vague new standards and enforcement responsibilities. Thus we welcome a more deliberative process to dig deeper into these proposals and ensure eyes are wide open on how these proposals would affect our industry and the customers we serve.

Indeed, we believe there is lengthy list of issues needing deeper consideration, and hopeful the NAIC will be dealing with all these issues in due course in an orderly and deliberative manner. These issues include – among others - how to make requirements more objective (which we commented on previously), ensuring everyone is on a level playing field (there should be few if any exemptions), going much deeper on exactly what disclosures are expected of companies and agents (we continue to be believe a template should be developed), developing clearer rules relating to non-cash compensation (FINRA has detailed guidelines in this regard), and clarifying the standard of care itself (formulations like "best suited" and "putting client interests first" are ill-defined and ultimately litigation traps).

Given the many comment letters already submitted by the FACC Campaign and others, we appreciate you are likely already aware of the issues and intending to tackle them in a purposeful way. We only want to stress here that we think these issues are critical to address and resolve so there is far more clarity and certainty than what has been put forward so far. The insurance industry is not the securities industry and it is important regulators fully consider the implications of this kind of regulation on all parts of our industry, including the independent agent channel.

As we have stated on many occasions in writing and at meetings, the FACC Campaign remains resolute in its belief the suitability model works and applying a securities-based standard to insurance sales is incongruous and wrongheaded. Instead we have advocated for more focused intelligent disclosure that would help align agent and consumer interests without creating artificial legal liability. We will not repeat our arguments – we have made them many times – but we are hoping this current work by the NAIC delving deeper into discrete issues will help the NAIC see the inherent problems with "best interest" and help the NAIC see there are better approaches.

With all that said, we wish to offer the following reactions in response to your specific inquiries in this round of comments:

Topic: Conflict of Interest

Question 1: *What constitutes a material conflict of interest when recommending annuities?*

We believe the definition of conflict of interest put forth in the Iowa proposal is sensible[1]:

> "**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 the **impartiality** of a recommendation.

We put in bold the words that are important and help distinguish it from the SEC definition which we think is severely flawed. First, this definition applies to material conflicts which is important so trivial or attenuated conflicts cannot be used as pretext to reverse sales of annuities. Second, this definition applies to a financial interest which is important to avoid encompassing obscure non-financial matters. Third, this definition applies a reasonable person standard which is proper as opposed to the absurd "consciously or unconsciously" standard adopted by the SEC. Fourth, the definition looks to whether the effect is to influence impartiality of a recommendation, which seems proper.

However, while we think this definition appears sensible, we also think the NAIC must come up with guidance that is specific and operational for the industry. It is important that there be clarity on what amounts to a conflict and what must be disclosed. For example, if an agent receives extra training from a company, is that a conflict. If the agent attends a training course at the company headquarters, is that a conflict. If the agent owns a small amount of stock in the insurance company, is that a conflict? If the agent gets a wedding gift from an officer of an insurance company, is that a conflict? Are such conflicts time bound so they only apply to "incentives" received within the prior year or some other reasonable period. And to the extent there are real

[1] The nature of these questions require us to set aside our more fundamental objections. In this instance, while FACC could support the Iowa definition of "conflict of interest", that should not be mistaken with support for current proposals addressing conflicts of interest. FACC maintains that better disclosure is needed for compensation and for conflicts of interest but approaches establishing a supposedly higher standard of care (i.e., best interest) are too subjective, unworkable, and tantamount to fiduciary duty.

conflicts, such as where an agent might also be an accountant or attorney, what disclosures are required by the NAIC.

These are just a few examples to help illustrate the need for guidance. While we have our own views on each point, what is important is for regulators to address these issues and come up with specific directions on what amounts to a conflict and what must be disclosed. While we recognize it is not possible to come up with exhaustive guidance and to some extent discretion will be required of affected agents and insurers, we think the NAIC must provide reasonable guideposts so there is common understanding on what these rules would truly require. This could also be addressed in part through adoption of a disclosure template as we have suggested a number of times.

Question 2: *When a material conflict of interest exists, how should an insurer and/or a producer avoid or otherwise reasonably mange the conflict?*

We believe this is potentially perilous concept absent much more clarity.

It conflates a number of issues that must be disassembled and addressed individually. That is, requiring insurers and agents to "avoid or otherwise reasonably manage" conflicts endeavors to address a wide spectrum of issues in one fell swoop with no distinction between conflicts that are avoidable and/or should be avoided, conflicts that can and should be addressed through disclosure, and conflicts that might lend themselves to being managed by a supervisory authority. Lumping all conflicts together and ordering everyone to deal with conflicts as they see fit is not reasonable or realistic.

It is self-evident this topic of conflicts is complex and has engendered lengthy treatment by FINRA and the SEC over the years relative to brokers and advisors. We welcome the NAIC attempt to address these conflict issues for the insurance industry but it must be recognized this topic does not lend itself to quick or simple solutions. We think the notion of managing conflicts is especially fraught with peril absent much more deliberation and attention to detail, but we can offer a few preliminary perspectives.

First, we think the general requirement should be to disclose conflicts, and disclosure should be deemed proper and sufficient absent an express prohibition against specified conflicts. The NAIC should consider whether there are any conflicts that are so egregious they should be prohibited; otherwise the default should be disclosure. For example, to the extent sales contests favoring a single product are conflicts that must be avoided, the regulation should state this explicitly. Second, as discussed above, we think the NAIC should define what disclosure is needed and consider adopting a template. Agents and insurers need to know exactly what is expected of them to identify and address conflicts through disclosure. Third, we believe the concept of managing conflicts beyond disclosure is elusive and creates an unattainable "touch the clouds" compliance

obligation for industry in the absence of precisely delineated expectations and responsibility. The notion of "reasonably managing" conflicts is patently subjective and can never be satisfied short of removing the conflict completely which is unrealistic in most cases. We urge the NAIC to remove any requirement to "reasonably manage" conflicts unless objective rules and parameters can be established.

With regard to managing conflicts of interest, it is worth emphasizing there are inherent problems for the insurance industry not applicable to the securities industry. Notably, in its final rule, the SEC put the responsibility to mitigate conflicts on the broker-dealer and not the registered representative, recognizing that managing conflict is a supervisory function. Of course that supervisory structure does not exist in the insurance industry and requiring individual insurance agents to "reasonably manage" their own conflicts seems like a non-sequitur. By the same token, insurers do not necessarily control agents, especially in the independent agent model, so insurers too have limited capability to manage conflicts for agents who represent multiple carriers and multiple products across many compensation arrangements. It should also be recognized that commission schedules ranging across a spectrum of annuity products is more complex than a relatively simpler compensation scheme applicable to sale of stocks, bonds, and mutual funds, and this further adds to the challenge for the insurance industry. We continue to believe the securities industry and insurance industry are apples and oranges in important respects and urge the NAIC to proceed cautiously to avoid creating major disruption.

Let us also comment on disclosure of compensation because, again, we are concerned this has not received the attention it deserves. While we believe the existing proposals are confusing in regard to disclosure of compensation, we hope there is general agreement that any "conflict" relating to compensation can be addressed through disclosure, but the question remains what exactly must be disclosed. What is left unaddressed in particular is the extent to which an agent would be expected to disclose compensation for products that were *not* recommended or sold to the consumer. The products that were not recommended or sold of course would constitute the alternative products might have resulted in less compensation to the agent and thus are the supposed basis for a conflict. We believe it should suffice for the agent to disclose in general terms that she or he may have earned more commission for sale of certain products versus others. But industry needs to know, and regulators must decide, whether the expectation is that the agent must share details on compensation across all products in order for the consumer to have been given sufficient disclosure. We think this is one of many challenging questions left unaddressed in existing proposals.

We apologize to the extent we raise more questions than provide answers but it is our view that these proposals remain vague and need considerable work. We reserve our right to provide additional comment as we continue to study and reflect on these issues.

Topic: Care Obligation

***Question 1**: Should the care obligation of a producer include "prudence"?*

We believe not. The term "prudence" is redundant, nebulous, and invites elevation of these obligations to a fiduciary standard. However, we believe the terms care, skill, and diligence are problematic as well. These are all imprecise words that represent minimal standards for any professional and indeed are ordinarily expected of any licensed agent. The question is whether these terms take on new or additional meaning when used in this regulation in a manner that will invite second-guessing and litigation. In our view, instead of using such ill-defined terms, the regulation should be simply state what actions are required from agents and insurers. Or if these terms are used, then it should be made clearer what exactly constitutes "care", "skill", and "diligence" relative to these requirements.

***Question 2** "Reasonable for an ordinary producer in a similar circumstance to recommend." Is this an appropriate standard for a producer when making a recommendation?*

We believe "reasonableness" is an appropriate standard provided it is also clear the measure of reasonableness is based on comparison to insurance agents with the same or similar licenses. We believe the November 2018 proposal was not clear in this regard; we believe the Iowa proposal is an improvement in seeking to clarify that agents are to be compared to agents with the *same or similar* licensing authority for purposes of this law. We think "same or similar" may need further clarification to ensure insurance-only agents are compared only to other insurance-only agents.

We have explained the importance of this clarification in prior comment letters. Absent such clarification, we fear insurance agents would be unfairly compared to other kinds of financial professionals, which would put insurance-only agents at legal and regulatory risk, and ultimately force insurance agents to become securities licensed merely for defensive purposes. We believe this would be harmful to our industry and more importantly harmful to consumers.

***Question 3** "Provide an oral or written description of the basis of the recommendation to the consumer." When considering this requirement for a producer, is it appropriate to allow both oral and/or written descriptions?*

We believe this question is somewhat academic because as a practical matter most or all agents will keep written documentation. We think oral documentation would only suffice if it is recorded or captured in some way.

More importantly, we are concerned with the unqualified requirement that agents provide "the basis" for a recommendation. We believe in most cases the basis for a recommendation is complex and involves many elements, some obvious and some more subtle. We think the requirement should be to provide a "description of the primary reason or reasons for the recommendation" or words to that effect. In other words, the obligation should be to explain the

key reasons for the recommendation but leave room for the possibility that there could be multiple reasons for any recommendation and sometimes it is not practical to list out every possible consideration in the course of a transaction.

In closing, we wish to emphasize each of FACC's previously submitted comment letters identify critical issues and include suggestions for making the regulation more objective and administratively manageable. Addressing all these areas in a meaningful fashion would help convert the proposed rule into a more practical and workable regulation that producers and insurers could actually understand and implement, and regulators could reasonably interpret and enforce.

While we remain adamant that best interest is a faulty concept, we will do our best to help the NAIC craft a potentially workable proposal, in the hope that would help protect our industry and most importantly our clients.

Respectfully submitted,

Dwight Carter, Chair, FACC Campaign

July 31, 2019

Submitted electronically to jmatthews@naic.org

TO: Members of the Annuity Suitability Working Group
Director Jillian Froment, Ohio Department of Insurance
Chair, Annuity Suitability Working Group

Contact: Kim O'Brien, FACC Spokesperson & Americans for Annuity Protection, Vice Chair
kim@fixedannuitychoice.com 414-332-9312

Re: Section 6 A (1) (d)

Dear Members of the Annuity Suitability Working Group

We wish to follow up on an important issue considered in this week's phone call concerning the Care Obligation and ask for reconsideration.

We hope not to strain the patience of the Working Group, but we are perplexed by the decision to remove section 6 A (1) (d). While, admittedly we were the only interested party to speak in favor consistent with our previously submitted written comments, the justification for removing this provision was unclear and only a handful of working group members spoke out on this issue such that we are left to wonder if the matter was sufficiently considered given the implications of removing such important language.

We wonder too if it is even clear what was decided. Was the decision to remove the entire section or select wording highlighted on the agenda. The agenda identified only an excerpt from the section in question – i.e., "reasonable for an ordinary producer in a similar circumstance to recommend." But this section contains other critical elements including clarification agents would only be compared to other agents with similar authority and licenses. Thus, we are left wondering what exactly was decided and why.

As you know by our comments, we support the standard put forward by Iowa in Section 6 A (1) (d), or something similar, because it provides a benchmark for determining what is meant by so many other undefined and open-ended terms like "best interest", "best suited", "care", "skill", "diligence" etc. The inherent challenge facing this rule is its use of entirely subjective words with no defined meanings. In absence of clarification or definition, a provision as Iowa proposed is imperative. The provision establishes a standard that any judgement about whether a producer has met the rule's requirements will be made by reference to what is reasonable for the ordinary producer in a similar circumstance and with similar authority and licensing, while also recognizing it is not necessarily the case "a majority of all insurance and investment professionals could agree that the recommended option was the single best option."

During the meeting it was noted the requirements of producers are expressed, albeit vaguely, elsewhere under the Care Obligation, but that doesn't answer by what standard regulators will determine if an agent acted with requisite skill, care and diligence. We fear if it is not made clear that insurance agents are to be compared only to other insurance agents, as opposed to being compared to investment advisers or perhaps higher level fiduciaries such as trust officers or ERISA managers, then this rule is rendered even

more subjective and approaches a kind of strict liability depending on how regulators (or courts) decide to enforce these new ill-defined requirements. The standard that makes the most sense for making a determination of compliance is comparison to a similarly licensed insurance professional but the rule is open to other interpretations absent an explicit standard.

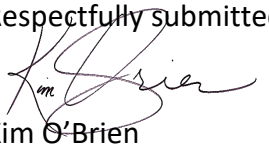
We are particularly baffled by those who say – in support of the rule – such a standard is not needed because "this is more art than science" and thus it would be difficult from a compliance standpoint to say whether other producers would or would not have made the same recommendation. They go even further, saying this is "more aligned with litigation than a regime based on supervision and regulation." We hope regulators fully absorb those comments and understand that is saying whether a sale is in the best interest of a consumer can only be resolved through a battle of experts in a courtroom and does not lend itself to regulation. If that's true and, ironically, we agree with them, then it makes our very point as to why this should not be a regulation in the first place. However, if the NAIC proceeds with this rule, then objective standards are needed so regulators have some point of reference when deciding whether an agent did or did not do what is required of them.

Let us be clear. We have never been supporters of a best interest standard. We think it does not lend itself to regulation and will turn quickly into a litigation trap. We think these very debates prove the rule is far too subjective and carries these risks. Nonetheless, if the rule goes forward, we believe it should stipulate that the standard for meeting the care obligation is one of reasonableness as applied to an ordinary producer. Words can be changed to "peer professional" or "insurance professional" to capture other concerns, but the litmus test must be against what others with similar profiles might have done. Beyond that it must be made explicit that insurance agents will only be compared to other insurance agents and not held to standards required of securities brokers, investment advisers, trustees, or other kinds of fiduciaries. This is the only way to ensure the rule is workable and applied fairly as possible.

We believe the rule must be made as objective as possible so insurers and producers will understand exactly what is expected of them and so regulators will know how to determine adherence and compliance. Our impression is many on the Working Group share this view and this concern even formed the basis for a request for comment. However, it seems the working group took a step backward in any quest for objectivity by removing a provision designed specifically to provide some guideposts on how conduct will be judged under this rule. We urge the Working Group to reconsider this. At a minimum, we would ask that the substance of our concerns addressed through Section 6 A (1) (d) be considered and incorporated into other sections of the draft proposal.

Thank you for your consideration of our concerns.

Respectfully submitted,



Kim O'Brien

FREEDOM TO CHOOSE Fixed Annuities
Fixed Annuity Consumer Choice Campaign

July 31, 2019

Submitted electronically to jmatthews@naic.org

TO: Jolie Matthews
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Re: Supplemental List of Parking Lot Issues

We have been instructed by the Ohio Department of Insurance to submit our attached Supplemental List of Parking Lot issues directly to you for dissemination.

We created this list in response to Director Forment's direct request to help make the Model objective and a reliable tool for regulator interpretation and enforcement, insurance company administration and supervision, and producer compliance. While, document is by no means an exhaustive list (nor should it be considered the only items requiring further objectification), believe it is a good first step to identifying subjective areas of the current draft. The Fixed Annuity Consumer Choice Campaign created it as a working road map of our top concerns and suggestions to help the Working Group in its quest for a workable, objective standard.

We have shared this list and discussed our concerns already with a number of members of the Suitability Working Group. We have also shared this document with Director Froment earlier this summer. Please make this list public to the Suitability Working Group, interested parties and other stakeholders.

Thank you for your time and efforts, as always.

Respectfully,

Kim O'Brien

FACC Supplemental List of Parking Lot Issues*

as of August 29, 2019

General Issues	
1. Making the Rule Objective	Consider comment letters; includes defining what is meant by "diligence, care, skill, and prudence."
2. SEC/FINRA Safe Harbor	Consider impact on level playing field especially if (unlike suitability standards) there will be substantive differences between securities and insurance requirements.
3. Impact on Harkin Amendment	Need to understand impact; consider whether NAIC model separate from Suitability would preserve Harkin protections.
4. Model Law versus Model Rule	Analyze and consider need for legislative action.
5. Other Exemptions	E.g., annuities not individually solicited and fee-based annuities; need to consider impact on level playing field.
Definitions – Section 5	
6. Material Conflict of Interest	Need for clear cut definition; what must be disclosed; consider excluding compensation other than non-cash compensation and other non-commission incentives.
7. Lack of definition of Best Interest	Should there be a definition; should term be removed; how does one evaluate whose interests have been put first; highly subjective standard that could be removed entirely.
8. Other definitions	E.g., definition of "intermediary" is too broad; definition of "risk tolerance" meanders into NGE disclosure; definition of "existing assets" spills into investments.
Best Interest Obligation – Section 6 A	
9. Deemed to Comply	Good clarification contained in Iowa proposal so compliance with obligations definitively satisfies standard.
Care Obligation – Section 6 A (1)	
10. Standard of Care	Whether to remove "prudence"; what is meant by "diligence, care, and skill"; need for objectivity; address and avoid litigation trap; see definition of best interest above.
11. Best Suited vs. Best Interest	Best Suited introduces new concept; what does it mean; how is it measured.
12. Over Life of the Product	Introduces ambiguity; evaluation of any product takes into account issues of maturity, non-guaranteed elements, surrender schedule, and such; what is intended; how to avoid future second guessing.
13. Range of Products	What ranges and types of products must be considered by agent; products within agent's portfolio vs. products within agent's licensure vs. products outside agent's sphere; clarity needed.
14. Ordinary Producer	What standard is used to judge agent compliance; need to avoid holding insurance agents to standards applicable to securities agents or fiduciaries. (See FACC Comment on Section 6 A (1) (d))
15. Explicit No Fiduciary Duty	Need for clarity the rule creates no fiduciary obligation.
Conflict of Interest– Section 6 A (2)	
16. Avoid or Manage Conflict of Interest	Need for specificity; analysis of feasibility; sufficiency of disclosure.

Disclosure– Section 6 A (3)	
17. Compensation Disclosure – Producers	What must be disclosed about products sold; what disclosure is required for products not sold.
18. Disclosure of intermediaries	Impact/implications of including intermediaries or other producers; how would this be done; does it include intermediaries for products not sold; what kinds of information on compensation and conflicts.
19. Non-Cash Compensation	Big issue that has not been discussed in any detail; compare to FINRA requirements; what is included; how should it be disclosed.
20. Disclosure Template	Consider need for template for disclosure of compensation, non-cash compensation, and conflicts; similar to client relationship summary prepared by SEC; consider FACC draft.
Documentation– Section 6 A (4)	
21. Basis of Recommendation	E.g., oral versus written; clarify exactly what agents must keep; whether company suitability forms are sufficient; clarify that reasonable disclosure of primary basis suffices.
22. Nothing Requires Securities License	Rule must be clear that all requirements can be satisfied without a securities license; i.e., insurance-only agents will not be compared to securities agents; i.e., insurance-only agents can perform analysis and provide advice without being investment advisers.
Supervision – Section 6 C	
23. Supervision – Own Agents, Products & Compensation Only	Insurance companies can only supervise their own agents, products, and compensation; clarify limitation on supervision obligation and liability; avoid anti-trust issues; carrier duties to oversee patterns or practices should be spelled out.

* FACC created this supplemental list of parking lot issues list to help identify issues it believes to be still open and unresolved by discussion and consensus agreement. The list is not exhaustive and may be updated. FACC remains opposed to the best interest rule proposal as articulated in its comment letters to the NAIC. Nothing herein should be construed to the contrary. FACC maintains better disclosure is needed for compensation and conflicts of interest but proposals establishing a supposedly higher standard of care (i.e., best interest) are too subjective, unworkable, and tantamount to fiduciary duty.