February 21, 2021

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

Dear Commissioner Ommen:

On behalf of the Independent Insurance Agents and Brokers of America (IIABA), I write to comment on your working group's consideration of a Frequently Asked Questions (FAQ) document designed to provide guidance concerning the Suitability in Annuity Transactions Model Regulation. I apologize for providing these comments so close to your meeting tomorrow, but we wanted to submit this letter after reviewing the input provided recently by some of our industry colleagues.

Background

Our comments address the implementation of the exemption or safe harbor provision that is contained in Section 6(E). This provision was proposed in late October 2019 by an industry stakeholder during the closing stages of the model's development, and it was not discussed at length by the working group. The revised subsection replaced a narrower safe harbor that was tailored to address instances in which a producer was subject to multiple regulatory frameworks in the same transaction.

The new provision is very different and much broader. Whereas the safe harbor previously applied only to transactions dually regulated by both insurance and securities officials, it now extends even to transactions in which a professional is recommending the purchase of annuity that is regulated only by insurance officials. The unprecedented adoption of such a provision arguably runs counter to the principles of functional regulation and state regulatory primacy over insurance products and raises practical questions about how state insurance officials can effectively implement and enforce standards adopted by regulators in other financial sectors. IIABA already had concerns with the broadened safe harbor, but some in the industry are now asking the NAIC to effectively expand the breadth and scope of Section

6(E) even further through interpretative guidance. We urge the working group to resist these calls.

Training

Some of our industry colleagues are asking you to interpret the model in a way that would require some producers selling annuities to complete the training requirements of Section 7 while exempting other producers from those obligations. We do not believe even the most sweeping interpretation of Section 6(E) would allow such an outcome, especially since any financial professional taking advantage of the safe harbor must be a licensed producer in good standing. The adoption of such an interpretation would allow a person to recommend an annuity without having completed the state-mandated training coursework required of his/her competitors and would create an unlevel playing field. We can think of no public policy purpose or rationale for this dissimilar treatment, and it would call into question the benefit and utility of the Section 7 training altogether. The training provides basic instruction on the sorts of issues that anyone selling an annuity should know, such as the types and uses of annuities, how product specific annuity contract features affect consumers, and tax implications. If a financial professional wants to recommend the purchase of an annuity, we see no reason to jettison the principle of functional regulation and allow that person to be exempt from the same core training requirements that apply to others. For these reasons, we urge the working group to make clear that the training requirements apply evenly and fairly to any producer making a recommendation.

Supervisory Obligations of Insurers

Industry colleagues have also argued that the exemption or safe harbor provision also broadly relieves insurers of most their supervisory duties. Our interpretation of Section 6(E) is that it is limited to the duties of a producer making a recommendation (and to an insurer in transactions where no producer is involved) and that it does not exempt insurers from the model's supervisory obligations. Section 6(E)(1) affirmatively creates an exemption for intermediaries that satisfy certain obligations but includes no analogous provision for insurers. Even if the safe harbor is interpreted to exempt insurers from some of their supervisory mandates, it certainly is not as sweeping as some have suggested.

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

- Section 6(C)(2)(c) requires insurers to "provide product-specific training and training materials which explain all material features of its annuity products to its producers." In transactions involving a financial professional relying on the safe harbor, are insurers exempt from the obligation to directly or indirectly provide such product-specific information to the person making the recommendation?

- Section 6(C)(2)(d) requires insurers "to establish and maintain procedures for the review of each recommendation prior to the issuance of an annuity that are designed

to ensure there is a reasonable basis to determine that the recommended annuity would effective address the particular consumer's financial situation, insurance needs and financial objectives." In transactions involving a financial professional relying on the safe harbor, must insurers comply with this requirement? Since Section 6(E)(3)(a) conditions the application of the safe harbor on an insurer monitoring that person's relevant conduct, we presume this requirement would still apply.

- Section 6(C)(2)(e) requires insurers to "establish and maintain procedures to detect recommendations that are not in compliance" with key elements of the model (including Section 6(E)). In transactions involving a financial professional relying on the safe harbor, must an insurer comply with Section 6(C)(2)(e)? We presume that insurers must satisfy the requirements of this subparagraph at least in part, especially in light of the very explicit reference to Section 6(E). Stated another way, it is unclear how Section 6(E) can provide an exemption from a provision that requires insurers to detect recommendations that are not in compliance with the safe harbor itself.

- Section 6(C)(2)(g) requires insurers to "establish and maintain reasonable procedures to identify and address suspicious consumer refusals to provide consumer profile information." Again, since Section 6(E)(3)(a) conditions the application of the safe harbor on an insurer monitoring a financial professional's relevant conduct, this requirement would presumably apply.

- Section 6(D) prohibits insurers from engaging in certain activities, such as dissuading a consumer from providing truthful consumer profile information or filing a complaint. Although we hope that state insurance regulators would take action whenever such troubling conduct might arise, the expansive view of Section 6(E) outlined by some suggests that insurers would be exempt from this prohibition in sales relying on the safe harbor provision.

- Section 9 establishes basic recordkeeping requirements, and the working group might also use the FAQ to clarify that those mandates are not affected by the Section 6(E) safe harbor.

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

"Comparable Standards" for Broker-Dealers and Registered Representatives

As the working group develops the FAQ document, one of the issues it might also consider – perhaps as a threshold issue – is the manner in which the model's safe harbor can be utilized by broker-dealers and registered representatives. The definition of "comparable standards" provides that broker-dealers and registered representatives may only rely on the

safe harbor when they comply with "applicable SEC and FINRA rules pertaining to best interest obligations and supervision of annuity recommendations and sales" (emphasis added). The strongest interpretation of this text and the reference to "annuity recommendations and sales" is that it limits the safe harbor, for purposes of broker-dealers and registered representatives only, to instances when a SEC or FINRA rule already applies to a particular annuity recommendation (i.e. when an annuity, such as a variable product, is dually regulated). The issuance of such an interpretation, which is consistent with how the safe harbor operated in the past, would address numerous concerns with the safe harbor and its potential application.

Conclusion

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

Very truly yours,

Wesley Bissett
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