E. Safe harbor.

(1) Recommendations and sales of annuities made in compliance with comparable standards shall satisfy the requirements under this regulation. This subsection applies to all recommendations and sales of annuities made by financial professionals in compliance with business rules, controls and procedures that satisfy a comparable standard regardless of whether the particular recommendation or sale is required to otherwise comply with such comparable standard. However, nothing in this subsection shall limit the insurance commissioner’s ability to investigate and enforce the provisions of this regulation.

Drafting Note: Non-compliance with comparable standards means that the recommendation or sale is subject to compliance with the requirements of this regulation.

(2) Nothing in paragraph (1) shall limit the insurer’s obligation to comply with paragraph 6C(1), although the insurer may base its analysis on information received from either the financial professional or the entity supervising the financial professional.

(3) For Paragraph (1) to apply, an insurer shall:

(a) Monitor the relevant conduct of the financial professional seeking to rely on paragraph (1) or the entity responsible for supervising the financial professional, such as the financial professional’s broker-dealer or an investment adviser registered under federal [or state] securities laws using information collected in the normal course of an insurer’s business; and

(b) Provide to the entity responsible for supervising the financial professional seeking to rely on paragraph (1), such as the financial professional’s broker-dealer or investment adviser registered under federal [or state] securities laws, information and reports that are reasonably appropriate to assist such entity to maintain its supervision system.

(4) For purposes of this subsection, “financial professional” means a producer that is regulated and acting as:

(a) A broker-dealer registered under federal or state securities laws or a registered representative of a broker-dealer;

(b) An investment adviser registered under federal [or state] securities laws or an investment adviser representative; or

(c) A plan fiduciary under Section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA) or Section 4975(f)(8)(J)(i) of the Internal Revenue Code (IRC).
Drafting Note: The requirement that a producer be “regulated and acting” as a broker-dealer, an registered representative of a broker-dealer, an investment adviser, an investment advisory representative or a plan fiduciary means that a producer who is not explicitly acting in compliance with the relevant comparable standards, as specified in paragraph (4) below, is not eligible for this safe harbor and is subject to compliance with the requirements of this regulation.

(45) For purposes of this subsection, “comparable standards” means:

(a) With respect to broker-dealers and registered representatives of broker-dealers, applicable SEC and FINRA rules pertaining to best interest obligations and supervision of annuity recommendations and sales, including, but not limited to, Regulation Best Interest and any amendments or successor regulations thereto;

(b) With respect to investment advisers registered under federal [or state] securities laws or investment advisory representatives, the fiduciary duties and all other requirements imposed on such investment advisers or investment advisory representatives by contract or under the Investment Advisers Act of 1940 [or applicable state securities law], including but not limited to, SEC the Form ADV and SEC interpretations. Notwithstanding the foregoing, recommendations of annuities by a state registered investment adviser or investment advisory representative shall only be eligible for the safe harbor provided under this subsection if the state in which the investment adviser or investment advisory representative is registered has adopted rules consistent with SEC Rule 206(4)-7 and any amendments or successor regulations thereto; and

Drafting Note: SEC Rule 206(4)-7 requires investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violation of the federal securities laws, review those policies and procedures annually for their adequacy and the effectiveness of their implementation, and designate a chief compliance officer to be responsible for administering the policies and procedures. State-registered investment advisers in this safe harbor are included in brackets so that each individual state that implements this Model may determine whether they should be included. Given the varying treatment of annuities, particularly variable annuities, under state law, the varying structures of states securities and insurance departments, and the varying levels of cooperation between two entities, this is a decision best made in each individual state between the state securities administrator and director of the insurance division.

(c) With respect to plan fiduciaries, means the fiduciary duties and all other requirements attendant to such status under ERISA or the IRC and any amendments or successor statutes thereto.