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June 18, 2019

The Honorable Jillian Froment
Chair, Annuity Suitability Working Group
National Association of Insurance Commissioners
1100 Walnut Street, Suite 1500
Kansas City, MO 64106

Re: Draft Revisions to the Suitability in Annuity Transactions Model Regulation

Dear Director Froment:

I write on behalf of the Independent Insurance Agents and Brokers of America (IIABA) to comment on your working group's consideration of revisions to the Suitability in Annuity Transactions Model Regulation. IIABA is the largest association of insurance producers in the United States and represents the industry constituency most impacted by this proposal, and we have great interest in and concern with certain aspects of the Annuity Suitability Working Group's efforts. These written comments supplement those previously submitted by our organization, including our February 15 letter to Life Insurance and Annuities Committee Chairman Doug Ommen.

The Need for Clear and Objective Requirements

At the outset, we reiterate our strongly held view that elements of the working group's draft would establish nebulous and subjective requirements that place agents in an untenable position, fail to provide meaningful benefit to consumers, create uncertainly about the rules of the road, and result in inconsistent interpretation and a lack of uniformity. We believe any proposed changes to the regulatory framework should establish clear and objective requirements, and the working group should clarify the existing text and refrain from making any revisions that result in ambiguity or confusion. If regulators seek new outcomes and expect producers to take certain actions in connection with the recommendation of an annuity, then those obligations should be clearly set forth in any proposal.

Some commenters and observers have proposed adding to the ambiguity and controversy by creating a fiduciary duty-like "best interest" standard of care for producers that mirrors the securities industry-specific rule recently promulgated for broker-dealers. Such proposals would expose dedicated agents to new and heightened litigation exposure without altering consumer outcomes or providing any corresponding or discernable benefit to consumers. While some apparently view harmonization with securities industry regulations as the preeminent and

ultimate goal (for reasons that have never been aired or articulated[1]), blind pursuit of identical or similar rules overlooks the many differences between the two financial sectors. Foisting a new best interest standard of care on insurance agents is unjustified, unnecessary, and counterproductive, and we cannot conceive of a way in which to define such a standard that would produce the clarity or objectivity that is desperately needed. Imposing such a standard or even referencing the phrase "best interest" does not benefit any constituency, and efforts to do so will be highly controversial and strongly opposed by many policymakers and insurance industry representatives. A preferable approach would be to craft any new regulatory requirements in a clear and understandable manner and to specify to agents what will be expected of them.

Discussion of Critical Threshold Issues

The November 2018 draft appears to be based on a number of assumptions that have never been publicly discussed or validated. The working group seems to believe there is a need to dramatically revise the model and largely jettison the objective suitability framework even though there has been no examination of marketplace problems or identification of deficiencies with the existing regulatory approach. There seems to be a similar belief that the NAIC should simply adopt and extend the SEC's recently adopted securities-specific rules to purely insurance products, but there has been no discussion of why such deference is warranted or of the significant differences between the securities and insurance industries. The rush to action threatens to undermine the credibility of any final recommendations by the working group and is in contrast to the multiyear effort that preceded the issuance of the SEC best interest rule.[2]

Another significant issue that has been overlooked concerns whether state insurance officials possess the regulatory authority needed to actually promulgate the draft proposal. The working group is considering whether to recommend an array of sweeping marketplace rules and the establishment of a new standard of care for those who recommend the purchase of an annuity, but there has been no meaningful discussion of whether these notable revisions can unilaterally be imposed by rule or whether they require authorization from state legislatures. IIABA believes the typical insurance department does not possess the power to implement these measures on its own and that any attempt to do so would likely constitute a usurpation of legislative authority and a violation of the doctrine of separation of powers. Altering the legal standard of care that insurance professionals owe to their customers is not an insignificant act, and this proposal does not merely implement or provide an interpretation of some existing statute. This type of lawmaking and vast public policy change requires the authorization of elected state legislators. If the NAIC and individual regulators are able to act on their own in this manner, then it would suggest that there are no limitations on the ability of insurance departments to impose new requirements and alter existing law as they see fit.

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[1] The working group's November 2018 draft includes a drafting note indicating that the NAIC supports "a harmonized standard of conduct and has a strong preference to remain consistent with FINRA rules in connection with a recommendation of variable annuities" (emphasis added). While achieving some degree of harmonization may make sense in those narrow areas where insurance and securities regulators share jurisdiction (e.g. variable annuities), the NAIC has never formally suggested that extending the SEC's securities-specific framework to fixed annuities or other insurance products is a goal or objective of the organization.

[2] When issuing its best interest rule recently, the SEC noted that "the Commission has been studying and carefully considering the issues related to the broker-dealer-client relationship and the related standard of conduct for broker-dealers for many years, which led to the development of the Proposing Release and the economic analysis therein."

There is some recognition in the proposal that regulatory action requires legislative authorization, and it retains a preexisting drafting note from earlier versions of the model indicating that "[s]tates may wish to use the Unfair Trade Practices Act as enabling legislation or may pass a law with specific authority to adopt this regulation."[3] While the NAIC's Unfair Trade Practices Model Act and related state statutes may have provided states with the necessary authority to establish the narrower requirements contained in the existing model regulation, there is no provision in these laws that authorizes and directs the much broader and significant changes in the law that are currently under consideration. It is also notable that very similar proposals adopted by the NAIC in the past (including the producer compensation disclosure provisions approved in 2005[4]) have taken the form of NAIC model acts and have recognized the need for legislative action.

The suggestion that the proposed revisions to the model can be adopted without express legislative authority is in contrast to the manner in which the SEC's best interest rule was developed. The SEC acted pursuant to the clear and unambiguous approval of Congress, which came in the form of Section 913(f) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. That provision of federal law empowered the SEC to "*commence a rulemaking, as necessary or appropriate to the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide), to address the legal or regulatory standards of care for brokers, dealers … [and] persons associated with brokers or dealers … for providing personalized investment advice about securities to such retail customers*." Whatever one's views of the SEC's recent action, it was clearly and plainly authorized by Congress. There is, however, no analogous authorization for state insurance regulators to promulgate the measures under consideration by the working group.

The proposed revisions to the model are contentious, and the working group will only add to the controversy if it crafts its proposal as a model regulation and suggests that state insurance departments possess the necessary authority to unilaterally implement these items. Measures of this nature require legislative action, and IIABA urges the working group to designate its proposal as a model *law* and not a model *regulation.*

There are additional reasons why the proposed revisions should not be grafted onto the Suitability in Annuity Transactions Model Regulation, including the threat that doing so poses to state autonomy and regulatory jurisdiction. Section 989J of the Dodd-Frank Act exempts equity indexed annuities from SEC jurisdiction and affirms state insurance regulatory authority over these products when certain conditions are met. Perhaps most notably, the Section 989J exemption applies when states adopt rules "govern[ing] suitability requirements" related to the sale of such annuities that meet or exceed the minimum requirements of the 2010 version of the Suitability in Annuity Transactions Model Regulation or any successor. In order for a jurisdiction to preserve oversight over equity indexed annuities and to forestall SEC regulation, the minimum requirements of any successor modifications to the model regulation must be implemented by a state within five years of NAIC approval.

State regulators risk losing jurisdiction over indexed annuity products if (1) the proposal under consideration is deemed to be a successor to the Suitability in Annuity Transactions Model Regulation and (2) the new provisions are deemed to be "minimum requirements" (i.e. mandatory elements) of the updated model. A drafting note included in Section 1 of the document suggests that the proposal is intended to be a successor regulation to the existing

[3] NAIC Suitability in Annuity Transactions Model Regulation, Section 3.
[4] NAIC Producer Licensing Model Act, Section 18.

model, but the adoption of such a framework has repercussions that have never been discussed.

The draft amendments to the model regulation are highly controversial, and there are significant differences of opinion about the need for them and their marketplace consequences. Recent history suggests that officials and policymakers in some (and perhaps even most) jurisdictions are unlikely to impose subjective and fiduciary duty-like standards of care on insurance producers, and they should not be forced to relinquish oversight of indexed annuity products as a result of such a decision. In other words, states that do not believe the proposed amendments are in the best interest of their consumers or the marketplace should not be threatened with a loss of regulatory jurisdiction if they choose not to enact them. This result can easily be avoided by either incorporating the working group's proposal into a new or different model law or by making clear that the most controversial revisions to the existing model (including Section 6(A)(1)) most notably) are not "minimum requirements" or must-enact provisions. We urge the working group to consider these important topics and threshold issues at the earliest opportunity.

Conclusion

On behalf of the hundreds of thousands of insurance professionals that we represent, IIABA sincerely thanks you for the opportunity to submit these comments. We look forward to participating in this week's working group meeting and are happy to assist your further 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 if you have any questions or if we can assist you in any manner.

Very truly yours,

Wesley Bissett
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