



April 26, 2018

SUBMITTED ELECTRONICALLY: jmatthew@naic.org

NAIC Annuity Suitability (A) Working Group
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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

* 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 proactive 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 accompli*, 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