JACKSON

April 27, 2018

Director Dean Cameron
Idaho Department of Insurance
Chair, NAIC Annuity Suitability Working Group
Via e-mail to Ms. Jolie Matthews (jmatthews@naic.org)

Re: Comments on Proposed Revisions to the Suitability in Annuity Transactions Model Regulation

Dear Director Cameron:

The undersigned insurance carriers thank the National Association of Insurance Commissioners (NAIC) for the opportunity to comment on the Suitability in Annuity Transactions Model Regulation (the Model Suitability Regulation). A brief profile of each of the undersigned is attached as Exhibit A.

We support the enhancement of the standards that apply to recommendations of traditional annuities[1] by a broker, agent, or insurance producer whose recommendation is not subject to a fiduciary standard of care. We have joined to write and submit this letter, however, to urge the NAIC to exempt recommendations of fee-based annuities[2] by a "specified fiduciary" from the application of the Model Suitability Regulation. A "specified fiduciary" is an entity acting, registered, and regulated under a fiduciary standard of care as (1) a bank, (2) a trust company, or (3) an investment adviser under the Investment Advisers Act of 1940 or equivalent state law.

As demonstrated more fully below, exempting recommendations of fee-based annuities by specified fiduciaries from the Model Suitability Regulation will help consumers. Conversely, continuing to apply the Model Suitability Regulation to these recommendations harms consumers.

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[1] For purposes of this letter, "traditional annuities" are fixed, fixed index, or variable annuities that are characterized by either of the following:

- They include a sales charge or commission expense; and/or
- They include a surrender charge.

[2] For purposes of this letter, "fee-based annuities" are characterized by both of the following:

- They have no sales charge or commission expense; and
- They have no surrender charge.

Annuities Address Consumers' Biggest Worry About Retirement

Annuities allow consumers to address their greatest risk and fear in retirement: outliving their assets.[3] Nevertheless, policy makers have historically perceived that recommendations to purchase, sell, or exchange a traditional annuity present potential conflicts of interest for financial professionals who recommend them and risks for consumers who acquire them. Policy makers have focused on commission payments that may be higher than those of other investment products and multi-year surrender periods that may result in charges to the consumer if the annuity is surrendered within a certain number of years after purchase.[4] More recently, the Department of Labor (DOL), the NAIC, several states, and now the Securities and Exchange Commission (SEC) have sought to address perceived deficiencies in the "suitability" standard of care with which brokers, agents, and insurance producers must currently comply when recommending a traditional annuity.

Fee-Based Annuities Address Consumers' and Policy Makers' Biggest Concerns About Annuities

Fee-based annuities sold by specified fiduciaries address all these concerns. They do not have sales charges or commissions and have no surrender period or surrender charges. They are fully liquid and can be redeemed at any time by the owner without charge. A specified fiduciary has no financial incentive to offer a fee-based annuity on an absolute basis or relative to any other kind of investment solution. A fiduciary also has no financial incentive to offer any, some, or all of the optional benefits that are often available with a fee-based annuity.

In addition, a specified fiduciary who recommends a fee-based annuity is already subject to duties of care and loyalty that go beyond, and are separate and distinct from, the suitability standard of care. In recommending any type of financial product, a specified fiduciary must put the client's interest first and act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent expert acting in a like capacity and familiar with such matters would use.

Thus, a fiduciary recommending a fee-based annuity is offering a solution that has none of the characteristics and potential conflicts that gave rise to the creation of the Model Suitability Regulation in

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[3] Chris Arnold, *How to Not Run Out of Money in Retirement*, NPR: Your Money & Your Life (Apr. 27, 2016), http://www.npr.org/2016/04/26/475759586/how-to-not-run-out-of-money-in-retirement.

[4] *See* NAIC Minutes, *Proceedings of the NAIC Commissioners, 2003, Second Quarter*, p 9 (June 21, 2003) (on file with author); U.S. SEC/NASD Report, *Joint SEC/NASD Staff Report on Examination Findings Regarding Broker-Dealer Sales of Variable Insurance Products*, (June 9, 2004), https://www.sec.gov/news/studies/secnasdvip.pdf; *See also*, NAIC, *Suitability of Sales of Life Insurance and Annuities*, pp 11, 15 (June 2000), http://www.naic.org/store/free/SOS-L1.pdf; U.S. SEC, *Self-Regulatory Organizations; National Association of Securities Dealers Notice of Filing of Proposed Rule and Amendment No. 1 Thereto Relating to Sales Practice Standards and Supervisory Requirements for Transactions in Deferred Variable Annuities; Corrected*, https://www.federalregister.gov/documents/2005/07/21/E5-3903/self-regulatory-organizations-national-association-of-securities-dealers-notice-of-filing-of; Release No. 34-52046A, (July 19, 2005), https://www.sec.gov/rules/sro/nasd/34-52046a.pdf; *See also*, FINRA, 2015 Regulatory and Examination Priorities Letter (Jan. 6, 2015), http://www.finra.org/industry/2015-exam-priorities-letter.

the first instance and is voluntarily choosing to be regulated under a fiduciary standard of care that is more exacting than any suitability standard.

An Exemption Does Not Equal Unregulated

Exempting recommendations of fee-based annuities by specified fiduciaries from the Model Suitability Regulation does not mean that such recommendations will go unregulated. To the contrary, specified fiduciaries are subject to the professional duties of care and loyalty, which are enforced by the SEC, the DOL, state insurance and securities departments, and private litigants. Even if an exemption is established, State Insurance Departments will retain the ability to investigate and enforce the consumer protection provisions within their insurance codes (which generally prohibit the use of any fraudulent, deceptive, or manipulative device in connection with the sale of insurance) as part of their oversight of fee-based annuity transactions. States will also retain the ability to investigate and enforce their securities anti-fraud statutes that govern the sale of variable annuities insofar as they regulate variable annuities as securities, as most states do.

Thus, consumers will have comprehensive protection provided by federal and state regulation, and fiduciaries recommending fee-based annuities will be required to comply with standards higher than those contemplated under the proposed revisions to the Model Suitability Regulation, if the exemption we are recommending is adopted.

Declining to Include an Exemption Will Harm Consumers

The Model Suitability Regulation imposes significant prescriptive requirements on sales of annuities that do not apply to specified fiduciaries' recommendations of other retirement solutions. Fiduciaries are subject to principles-based regulation that requires them to put their clients' interests first and to act as a "prudent expert" regardless of the investment products they recommend. The scope and application of these fiduciary principles and standards have been shaped and informed over the years by jurisprudence, regulatory enforcement, and guidance. In contrast, fiduciaries are generally not subject to prescriptive requirements like those found in the Model Suitability Regulation when they recommend investment options to consumers. Indeed, a specified fiduciary may offer consumers mutual funds, ETFs (including inverse, levered ETFs), options, futures, hedge funds, private equity funds, and even bitcoin investments without being subject to any prescriptive regulations or requirements because, at the end of the day, the specified fiduciary must be able to demonstrate that its recommendations satisfy its duties of loyalty and care.[5]

Thus, requiring specified fiduciaries to comply with the Model Suitability Regulation, in addition to the separate fiduciary standards, has resulted in an uneven regulatory playing field that tends to discourage fiduciaries from recommending insured solutions. While there is nothing wrong with non-insured solutions, a portfolio that consists entirely of them may not be in a consumer's best interest because those products do not mitigate market, sequence of return, or longevity risk (such as the risk that the consumer will suffer a market downturn shortly before or during retirement, and/or live longer than expected).

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[5] Not all fiduciaries offer all these solutions. They may decide for any number of reasons to limit the range of investments they offer. They may also impose their own, internal policies and procedures designed to ensure the appropriate use of these solutions.

Conclusion

The insurance and financial advisory industry is attempting to move in the direction long urged by consumers, consumer advocates, and policy makers by offering insurance solutions free of conflicts and liquidity restrictions and whose sale will be subject to the exacting fiduciary standards of care and loyalty. It would be ironic, and extremely detrimental to the retirement savings marketplace in this country, if this attempted evolution is squelched by the continued imposition of unnecessary, prescriptive regulation that was designed for products with very different characteristics, which discourage fiduciary advisors from offering insured lifetime income solutions.

The undersigned therefore urge the NAIC to exempt recommendations of fee-based annuities by specified fiduciaries by incorporating the revisions to the Model Suitability Regulation presented in Exhibit B. In the alternative, we urge the NAIC to expand the existing safe harbor in Section 6.H of the Model Suitability Regulation to provide that sales made by specified fiduciaries in compliance with SEC and federal banking requirements shall be deemed to satisfy the requirements of the Model Suitability Regulation.

Thank you for the opportunity to share our views. We hope this letter is helpful to the NAIC and are happy to answer any questions you have or to provide additional information.

Very truly yours,

Jackson National Life Insurance Company

Andrew J. Bowden
Senior Vice President and General Counsel

AXA Equitable Life Insurance Company

Dave S. Hattem
Senior Executive Director,
Secretary and General Counsel

EXHIBIT A

Jackson National Life Insurance Company

Jackson National Life Insurance Company (Jackson) is the largest provider of individual annuities in the United States since 2012.[6] Jackson and its U.S. affiliates manage more than $200 billion in fixed and variable annuities for over 1.5 million investors. Jackson's insurance products are offered by more than 150,000 financial advisers affiliated with more than 600 independent broker-dealers, wirehouses, financial institutions and independent insurance agents. Thus, Jackson has a unique perspective as a leading manufacturer of annuity products.

AXA Equitable Life Insurance Company

AXA is the brand name of AXA Equitable Financial Services, LLC and its family of companies. AXA companies offer financial protection and wealth management and are premier providers of advice, retirement strategies, employee benefits, and life insurance. AXA's primary life insurance company, AXA Equitable Life Insurance Company was founded in 1859 and is among the largest life insurance and retirement savings companies in the United States, with nearly 2.5 million client households nationwide.

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[6] *See* LIMRA Secure Retirement Institute, US Individual Annuity Sales Survey, 2012, http://www.limra.com/uploadedFiles/limracom/Posts/PR/Data_Bank/_PDF/AnnuityCompanyRankings-Q4-2012.pdf; LIMRA Secure Retirement Institute, US Individual Annuity Sales Survey, 2013, http://www.limra.com/uploadedFiles/limra.com/LIMRA_Root/Posts/PR/Data_Bank/_PDF/Annuity-Company-Rankings-2013-Q4.pdf; LIMRA Secure Retirement Institute, US Individual Annuity Sales Survey, 2014, http://www.limra.com/uploadedFiles/limra.com/LIMRA_Root/Posts/PR/Data_Bank/_PDF/2014_year-end_AnnuityCompanyRankings.pdf; LIMRA Secure Retirement Institute, US Individual Annuity Sales Survey, 2015, http://www.limra.com/uploadedFiles/limra.com/LIMRA_Root/Posts/PR/_Media/PDFs/2015-Top-20-Rankings.pdf; LIMRA Secure Retirement Institute, US Individual Annuity Sales Survey, 2016, http://www.limra.com/Posts/PR/Data_Bank/_PDF/2016-Q4-Annuity-Company-Rankings.aspx.

EXHIBIT B

Revisions to the Model Suitability Regulation to exempt recommendations to purchase, sell, or exchange a fee-based annuity by a specified fiduciary:

ADD the following language as new Section 4(C):

C. Any recommendation by a Specified Fiduciary provided that:

(1) No sales compensation is received by the Specified Fiduciary, not including any compensation paid directly by the consumer to the Specified Fiduciary; and

(2) The annuity has no surrender period or surrender charge.

ADD the following language to Section 5 (Definitions):

"Specified Fiduciary" means an entity acting, registered, and regulated under a fiduciary standard of care as (i) a bank, (ii) a trust company, or (iii) an investment adviser under the Investment Advisers Act of 1940 or equivalent state law, and a person acting as an associated person of a Specified Fiduciary.

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IN THE ALTERNATIVE TO ADDING NEW SECTION 4(C), amend Section 6.H as follows:

Sales made in compliance with FINRA requirements pertaining to suitability and supervision of annuity transactions, <u>and sales made by a Specified Fiduciary in compliance with applicable Securities and Exchange Commission and/or federal banking requirements,</u> shall satisfy the requirements under this regulation....