Consumer Federation of America

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Senior Health and Life Policy Counsel
National Association of Insurance Commissioners
Executive Headquarters
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444 North Capitol Street, N.W.
Washington, DC 20001-1512

Dear Ms. Matthews:

We are writing on behalf of the Consumer Federation of America (CFA)[1] in response to the NAIC's request for comment on its proposed "Suitability and Best Interest Standard of Conduct in Annuity Transactions Model Regulation." As currently drafted, the proposal offers only limited improvements over the existing regulations governing annuities transactions. It falls well short of the true "best interest" standard that is needed to adequately protect consumers from the harmful impact of conflicts of interest in this market. It also fails to advance the goal of creating a uniform standard of conduct across all types of investment accounts and investment products. For these reasons, we urge NAIC to withdraw the current proposal so that it can be extensively revised to address these shortcomings.

Background

It has become increasingly common over the past few decades for insurance producers, like broker-dealers, to recast themselves as "financial advisors" or "retirement planners" in order to attract clients seeking objective, professional advice about their retirement and other investments. Doing so involves downplaying the sales-driven nature of the relationship and characterizing it instead as one of trust and reliance in which the interests of the customer always come first.[2] Financially unsophisticated consumers who believe these marketing messages too often end up paying excessive costs, facing unwarranted risks or illiquidity, or receiving substandard performance when the "financial advisor" they rely on recommends the investments that pay them the most, rather than those that are best for the customer. Some of the worst examples have occurred

[1] The Consumer Federation of America is a non-profit association of nearly 300 consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.
[2] Micah Hauptman and Barbara Roper, Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways, Consumer Federation of America, Jan. 18, 2017, https://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson_Report.pdf.

in the annuities market, where a combination of out-size sales incentives and complex, opaque investment products make consumers particularly vulnerable to abuse.[3]

The existing suitability standard for annuities, like the similar but somewhat stronger suitability standard for securities, has been inadequate to prevent these abuses. We have therefore long supported adoption of a clear, legally enforceable best interest standard across all types of investment accounts and products. Such a standard for insurance products would help to ensure that the legal protections consumers receive matches their reasonable expectations, based on the promotional practices insurers and producers engage in. The Department of Labor (DOL) has led the adoption of such a standard for all retirement accounts, though full implementation of that rule has been put on hold and key provisions essential to its effectiveness and enforceability are now under threat. As DOL undertakes its reevaluation of that rule, industry groups have sought to circumvent the DOL's tougher restrictions by getting weak, disclosure-based standards adopted by securities and insurance regulators.[4] If successful, they are likely either to move to have DOL revise its own conflict of interest rule to match these weaker standards or to have DOL accept those watered down insurance and securities rules as a substitute for compliance with the DOL rule.

As currently drafted, the NAIC proposal plays into that strategy. While it takes modest steps to improve existing protections for annuities transactions, it remains far weaker than the DOL conflict of interest rule. In particular, because the NAIC proposal does nothing to rein in conflicts of interest, it cannot provide the basis for a uniform standard across retirement and non-retirement accounts. After all, much of the regulatory impact assessment on which the DOL rule is based consists of an analysis of the harmful impact of conflicts of interest on advice and the inadequacy of disclosure to prevent that harm.[5] Indeed, on this crucial issue of how it handles conflicts, the NAIC proposal remains weaker than the existing suitability standard for securities transactions, continuing to permit practices, such as single-product sales contests, that are prohibited for securities transactions.[6] As such, the NAIC proposal also could not form the basis for a uniform standard between securities and insurance investments even if the Securities and Exchange Commission (SEC) were to do nothing to strengthen existing securities standards. The SEC has signaled, however, that it does intend to strengthen standards governing broker-dealers' investment recommendations, though the details of that plan are as yet unknown.[7]

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[3] *See*, e.g., Bob Veres, The Awful Consequences of Non-Fiduciary Advice, Inside Information, Vol. 27, No. 9, September 2017.

[4] *See*, e.g., Letter from Carl B. Wilkerson, Vice President & Chief Counsel, Securities & Litigation, American Council of Life Insurers, to Brent J. Fields, Secretary, Securities and Exchange Commission, regarding SEC Chairman's Request for Information on Standards of Conduct for Investment Advisers and Broker-Dealers, Oct. 3, 2017 http://bit.ly/2Dz1CfR.

[5] DOL, Regulating Advice Markets, Definition of the Term "Fiduciary," Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions, April 2016, http://bit.ly/2mT9Gfq.

[6] For example, FINRA Rule 2320(g)(4) bans single-product sales contests for variable contracts of an insurance company. FINRA has proposed Rule 3321, which would strengthen and expand this ban on sales contests. See, FINRA Regulatory Notice 16-29, Gifts, Gratuities and Non-Cash Compensation Rules, August 2016, http://bit.ly/2bVOUHG. Such contests, which are permitted under insurance regulations, contribute to a sales-driven culture in the annuities market. See, e.g., Office of Elizabeth Warren, Villas, Castles and Vacations: How Perks and Giveaways Create Conflicts of Interest in the Annuity Industry, October 2015, http://bit.ly/2nNgb8t.

[7] *See*, e.g., Bruce Kelly, Day after DOL delay, SEC's Jay Clayton calls a fiduciary rule a priority, InvestmentNews, Nov. 28, 2017 http://bit.ly/2Ar93Sn

At the very least, the NAIC should delay its actions to ensure that any standard it adopts is at least as rigorous as the standard adopted by the SEC. Ideally, both the SEC and NAIC would model their regulatory approaches on the DOL rule, which had already begun to bring significant benefits to retirement savers before the current stay and reconsideration brought those pro-investor innovations screeching to a halt. Before the future of the DOL rule was called into question, broker-dealers and insurers alike had already shown that they could develop a more pro-investor model for delivering commission-based advice – with reduced conflicts and improved product menus – without sacrificing their ability to serve smaller accounts or to offer a variety of investment options.[8] NAIC and SEC should seek to do the same in their respective jurisdictions, but to do so will require you to stand up to industry lobbyists intent on winning adoption of a rule that allows them to claim to be subject to a best interest standard without actually having to meet that standard.

The remainder of this letter details shortcomings in the NAIC proposal that would need be corrected in order to provide the true "best interest" standard for insurance investments that consumers need and deserve.

- **The proposed "best interest" standard is both vague and weak.**

The proposal amends the existing suitability standard for annuities recommendations by adding a requirement that recommendations be "in the best interest" of the consumer. However, the proposal is missing several key elements of a true best interest standard. As a result, it gives lip service to requiring producers to act in customers' best interests without actually requiring the changes in industry practice that would bring that about.

First, the proposal fails to make clear that the standard requires the producer to recommend, from among the available options, the annuity that best suits the needs of the consumer.[9] In this way, it fails to make a fundamental distinction between a suitability standard and a true best interest standard. A suitability standard can be satisfied by the recommendation of any of the potentially large number of annuities that would appropriately address the insurance needs and financial objectives of the consumer. The producer operating under a suitability standard would, for example, be free to recommend the annuity that pays the highest compensation or the one that is most profitable for the firm, as long as it meets the test of being generally "suitable" for the consumer. In contrast, a true best interest standard would require the producer to recommend an annuity, from among those he or she has available to recommend, whose particular mix of features and cost best matches the needs and objectives of the consumer.[10] Nowhere in the proposal does NAIC make clear that this is its intent in adding a best interest requirement to its suitability standard. On the contrary, it leaves unchanged the stated purpose of the standard which, consistent with its origins as a suitability standard, is to "result in transactions involving annuity products so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed."

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[8] *See*, e.g., Letter from Barbara Roper and Micah Hauptman, Consumer Federation of America, to Office of Regulations and Interpretations, Employee Benefits Security Administration, Department of Labor, regarding RIN 1210-AB79, Fiduciary Rule Examination, April 17, 2017, at 60-91, http://bit.ly/2mZITzQ.

[9] We use the term "available options" to mean, not all those available in the marketplace, but all those investment options that the producer has available to recommend.

[10] It is possible that more than one annuity would meet this standard, but not all those that are generally suitable would be equally beneficial.

Other shortcomings in the proposed "best interest" standard flow from this same source. For example, nowhere does the proposal clearly state that the producer must consider factors such as cost, payout rate, and other product features in determining which is the best available option for the consumer. Nor does it clearly state that the producer must base recommendations on reasonable assumptions and document the basis on which the producer concluded that the annuity recommended was the best available option for this particular consumer. The proposal does include a requirement that the producer have a reasonable basis for believing that the "particular annuity as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or exchange of the annuity, and riders and similar product enhancements, if any" are in the best interest of the consumer. Absent a clear requirement to recommend the best available option, however, this language fails to create a clear, enforceable best interest standard.

These shortcomings in the proposal are further underscored by the entirely procedural nature of the "best interest" definition itself. The proposal defines "best interest" as "acting with reasonable diligence, care, skill and prudence in a manner that puts the interest of the consumer first and foremost." Because the proposed standard does not include or even imply a requirement to recommend the best available option, this strongly suggests that the standard can be met by following a reasonably diligent process, rather than being judged as well on the outcome of that process. While following a proper procedure is an essential element of a best interest standard, it is not an end in itself.

Furthermore, NAIC's procedural definition is less rigorous than the DOL definition in two important ways. DOL defines the prudent process aspect of the best interest standard as being met when "the Adviser and Financial Institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party." Unlike DOL, NAIC fails to include an impartial expert or prudent person standard against which the required process and its outcome would be measured. Instead, the proposal suggests that compliance with the best interest standard turns on whether the producer, having followed a reasonably diligent process, "believes the recommendation is in the best interest of the consumer." By deferring in this way to the judgement and beliefs of the producer, the NAIC proposal would inevitably result in a standard that is weak, imprecise, and unenforceable.

Second, in describing the reasonably diligent process on which its "best interest" standard is based, NAIC has chosen to disregard language from Section 913 of the Dodd-Frank Act and the DOL rule requiring the producer to act "without regard to" his or her own financial interests or the interests of the insurer. This language is central to defining the duty of loyalty component of the fiduciary standard, sending an important message that conflicts of interest should not be allowed to influence recommendations. Instead, NAIC has opted to use language – "puts the interests of the consumer first and foremost" – that is reminiscent of FINRA's guidance on the meaning of

suitability.[11] NAIC gives no indication what it means by that phrase. NAIC fails to indicate, for example, whether it intends to set a higher bar than FINRA has set in interpreting its suitability standard, or whether it intends to set a lower bar than Congress and the DOL did when they adopted "without regard to" as the appropriate standard for the duty of loyalty.

It is worth noting that the recent proposal from New York State Department of Financial Services is stronger than the NAIC proposal on both points.[12] Under the New York proposal, the producer or insurer is deemed to act in the best interests of the customer when "the producer's or insurer's recommendations to the consumer are based on an evaluation of the suitability information of the consumer that reflects the care, skill, prudence, and diligence that a prudent person familiar with such matters would use under the circumstances without regard to the financial or other interests of the producer, insurer, or any other party." We urge the NAIC to adopt this language in place of the relevant portion of its own definition of best interest. Failure to do so would send the message that NAIC intends to adopt a weaker standard that would continue to permit many of the practices a true best interest standard would be designed to eradicate.

The impression that NAIC intends only minimal changes to its suitability standard is reinforced by language in the definition of best interest spelling out what the standard does *not* require. Specifically, it makes clear that best interest "does not mean a resulting recommendation is the least expensive annuity product, or the annuity product with the highest stated interest rate or income payout rate, available in the marketplace at the time of the annuity transaction." Nor does it require recommendation of "the single 'best' annuity product available in the marketplace at the time of the annuity transaction." We accept this interpretation, as far as it goes. And we have supported a definition of best interest based on recommending the best of the options the producer has available to sell rather than the single best option available anywhere in the market. But by focusing on what the standard does not require, rather than what it does, NAIC sends a troubling signal that it is more concerned with limiting the impact of the proposal than with transforming harmful industry practices.

As a supplement to the best interest standard, the NAIC proposal includes a prohibition on misleading statements, which we support. Such statements have been all too common in the marketing of annuities. As such, this provision has the potential to bring real benefits to investors. For this to occur, however, state insurance regulators need to be prepared to enforce it. For example, state insurance regulators should make clear that statements that fixed indexed annuities are risk-free or can be purchased at no cost to the consumer are misleading. NAIC should clarify that it intends that statements such as these would be prohibited under the revised rule. Failure to do so could result in continued ambiguity on this point.

If NAIC's goal truly is to create a best interest standard, it should start by clearly stating that the goal of the standard is to require producers to recommend, from among the products they have

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[11] *See*, e.g., FINRA, Regulatory Notice 11-02, Know Your Customer and Suitability, January 2011, http://bit.ly/1LnB6DU. The release references case law indicating that a broker's recommendations "must be consistent with his customers' best interests" and notes that this "prohibits a broker from placing his or her interests ahead of the customer's interests."

[12] New York State Department of Financial Services, Proposed First Amendment to 11 NYCRR 224 (Insurance Regulation 187), Suitability in Life Insurance and Annuity Transactions, http://on.ny.gov/2mPp0LH.

available to recommend, the option that is best for the investor. The standard should make clear that the producer must weigh such factors as product costs, interest rates or income payout rates, and other relevant product features in determining which of the available options best meets the needs of the consumer. Compliance with the standard must be based on what an impartial expert, operating under like circumstances and without regard to their own interests or the interests of the firm, would deem to be in the customer's best interests. In order to support effective supervision and enforcement, the standard must require that the producer clearly document the facts, assumptions, and analysis that led the producer to conclude that the recommended annuity represents the best available option for the investor. And this must not be allowed to devolve into a check-the-box exercise. Without these changes, the NAIC proposal would create an unenforceable best interest standard in name only that could end up doing more to undermine than to strengthen protections for annuity investors.

- **The proposal fails to rein in harmful conflicts of interest.**

The NAIC proposal prohibits producers from basing their recommendations "on the producer's or insurer's own financial interests." This is good as far as it goes, but NAIC fails to back up that provision with concrete requirements that would make it enforceable and effective. First, as discussed above, it fails to define a clear set of objective obligations producers must meet to comply with the best interest standard. And it fails to require producers to document the facts, assumptions, and analysis that led them to conclude that a particular recommendation is in the customer's best interests. Without this information, it will be difficult if not impossible for regulators and supervisors to determine with any certainty whether or to what degree the recommendation may have been motivated by self-interest.

Second, the proposal doesn't do anything to rein in common industry practices that encourage and reward recommendations that are *not* in investors' best interests. That includes the significant discrepancies in cash compensation that producers can receive depending on which type of annuity or which specific annuity product they choose to recommend. But it also includes things like sales quotas and sales contests, with lavish prizes, that are designed to promote the sale of particular products without regard to whether that product is the best option for the consumer. Simple common sense tells us that incentives such as these influence producers' recommendations. After all, if they didn't work, insurers wouldn't continue to offer them. But we don't have to rely on common sense alone. A wealth of research bears this out, showing that conflicts of interest influence financial professionals' recommendations and do so in ways that are often harmful to consumers.[13]

That is why, when investor and consumer advocates wrote to NAIC last summer, we urged you to "recognize the role of the producer compensation structure in aligning or misaligning insurer and producer interest with the best interest of consumers" and to incorporate meaningful restrictions on conflicts of interest in your revised standard. In urging NAIC to restrict conflicts of interest, we did not take the unrealistic approach of suggesting all types of conflicts could or should be banned. Instead, we drew a distinction between certain types of conflicts of interest that can reasonably be addressed through disclosure – such as being paid by commission or selling from a limited menu of

[13] Jeremy Burke, Angela A. Hung, Jack W. Clift, Steven Garber, and Joanne K. Yoong, Impacts of Conflicts of Interest in the Financial Services Industry, RAND Working Paper, August 2014, at 13, http://bit.ly/2w8gzOt.

products – and those that require stricter limits. In the latter category, we included practices, such as paying differential compensation or using sales quotas or contests to promote the sale of particular products, that encourage producers to base their recommendations on factors other than the consumer's best interest. It simply makes no sense to say as a matter of policy that we want producers to act in customers' best interests but then continue to permit them to be compensated in ways that reward them when they don't put the customer's interests first. Unfortunately, that is precisely what this proposal does when it fails to include even the most modest of restrictions on conflicts.

Instead of restricting conflicts, NAIC requires only that any limitations on the producers' product offerings be disclosed prior to the recommendation and that all material conflicts of interest be disclosed when a recommendation is made. Research tells us, however, that disclosure alone cannot adequately protect consumers from the harmful impact of conflicts of interest.[14] There are a variety of reasons for this. Consumers often fail to understand the disclosures they receive, perhaps because they are highly technical or complex, are presented in opaque legal language, or are provided too late in the interaction to influence the purchase decision. The conflict disclosures required under the proposal are likely to suffer from all of these shortcomings. Even if consumers read and understood such disclosures, which is highly unlikely to occur, most would lack the high level of financial sophistication necessary to determine whether and to what extent the recommendation had been influenced by the conflict or how they might be harmed as a result. Extensive research has shown that a large majority of Americans lack basic financial literacy skills, let alone the financial sophistication necessary to understand a product as complex and opaque as annuities can be.[15]

Research further indicates that conflict disclosures are not just ineffective, they can actually have the perverse effect of worsening the harmful impact of conflicts on investors. A 2005 study found, for example, that in certain situations, disclosure can lead advisers to give more biased advice by providing them with "moral license" to engage in self-interested behavior.[16] The results of this study were confirmed by subsequent research, which found that, absent other conditions, disclosure lessens moral reluctance to provide biased advice.[17] At the same time, researchers have found that investors feel increased pressure to follow the recommendations where conflicts have been disclosed, motivated in part by their "reluctance to appear unwilling to help the advisors once the advisors' interests were publicly disclosed."[18] This research suggests that NAIC's proposed regulatory approach based on conflict of interest disclosure could backfire, doing more to harm than

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[14] *See*, e.g., Angela A. Hung, Min Gong, and Jeremy Burke, Effective Disclosures in Financial Decisionmaking, RAND Research Report, July 2015, http://bit.ly/2wbYOO0.

[15] Staff of the Securities and Exchange Commission, Study Regarding Financial Literacy Among Investors (As Required by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act), August 2012. *See also*, Siegel & Gale, LLC, Investor Research Report, Submitted to the Securities and Exchange Commission on July 26, 2012, http://1.usa.gov/1MfBbss. *See also*, IFF Research Ltd, Investment Disclosure Research, prepared for the Financial Services Authority by IFF Research Ltd. (November 2006), http://bit.ly/1LmSJ6Z.

[16] Daylian M. Cain, George Loewenstein, and Don A. Moore, "The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest," Journal of Legal Studies, vol. 34 (January 2005), http://bit.ly/2f7RUHm.

[17] George Loewenstein, Daylian M. Cain, and Sunita Sah, The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest, American Economic Review: Papers and Proceedings 2011, 101:3, 423–428, http://bit.ly/2eOGd8i.

[18] *Id.* at 426.

to help investors. There is certainly no basis to conclude that such disclosures would provide a check on pervasive conflicts adequate to support a rigorous best interest standard.

The proposal suffers from other inexplicable omissions in its measures to address conflicts and compensation. It requires that cash compensation be "reasonable," but does not apply that same standard to non-cash compensation. How is allowing unreasonable non-cash compensation consistent with a best interest standard? The proposal requires disclosure of the amount of cash compensation above three percent, but it doesn't require disclosure of compensation below that amount. To the degree that cash compensation levels above three percent are common in the industry today, this could have the beneficial effect of driving those compensation levels down to three percent, so that compensation amounts would remain hidden. But it would all but guarantee that compensation levels went no lower than the three percent level that results in non-disclosure. Furthermore, the proposal allows compensation to be disclosed as a percentage, rather than as a dollar amount, undermining the likelihood that the disclosures, where they do occur, will be understood by investors.

When it comes to non-cash compensation, the proposal requires only that "information regarding" the non-cash compensation be disclosed. As the Office of Senator Elizabeth Warren noted in its 2015 report, "Villas, Castles, and Vacations: How Perks and Giveaways Create Conflicts of Interest in the Annuity Industry," the disclosures currently provided regarding these practices do little or nothing to provide annuity investors with useful, actionable information.[19] The report found that:

> "[C]ompanies typically provide disclosures through annuity prospectuses, and that these prospectuses describe the rewards only in the broadest and most vague terms. Among the companies that provide perks such as free travel, no company clearly described the nature and type of rewards, or the locations of annual trips provided to agents, in its annuity prospectuses. None of the disclosures clearly reveal that these perks may create incentives for the agent to put his or her own interests ahead of those of the customer. The limited disclosures that are provided to consumers are buried deep within the prospectuses in complex legalese, rather than being provided in an easily available and understandable fashion."[20]

Nothing in the NAIC's proposal to require disclosure of "information regarding" non-cash compensation would address those concerns. While we question the likely effectiveness of even well designed, timely and prominent disclosures, this requirement falls far short of meeting that standard.

If NAIC is serious about developing a standard that will result in best interest recommendations to annuities investors, it must not only clarify and strengthen the best interest standard itself, as discussed above, it must also back up that standard with real restrictions on conflicts of interest that undermine that goal. Toward that end, the proposal should limit or ban practices, such as extremes in differential compensation, sales competitions, and sales quotas, that directly and significantly conflict with the requirement to act in customers' best interests. Other

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[19] Office of Elizabeth Warren, Villas, Castles and Vacations: How Perks and Giveaways Create Conflicts of Interest in the Annuity Industry, October 2015, http://bit.ly/2nNgb8t.
[20] *Id.* at 6.

conflicts, such as earning commission compensation and selling from a limited menu of products, should be addressed through disclosure, as is currently required under the proposal. However, NAIC should strengthen its disclosure requirements to ensure that required disclosures are complete, clear, timely, accessible, and written in plain English. To the degree that non-cash compensation continues to be permitted, it should be subject to the same "reasonable compensation" requirement as cash compensation, and the disclosure requirements regarding non-cash compensation should be strengthened to address current serious short-comings in such disclosures. Without these changes, there is no reason to believe the revised standard will produce the best interest advice it purports to require.

- **The scope of the proposal is too narrow.**

Another flaw of the NAIC proposal is its too narrow scope. NAIC's proposed "best interest" standard applies only to annuities and applies only at the point of sale. As a result, it fails to cover all insurance products sold as investments and all interactions with producers and insurers that are likely to be perceived and relied on as advice by insurance consumers. In contrast, the New York proposal applies to life insurance as well as annuities and applies to "any transaction or recommendation with respect to a proposed or in-force policy." We urge NAIC to follow New York's lead on both points.

The expanded application of the best interest standard to life insurance proposed by New York is particularly important. As you know, life insurance companies routinely sell certain types of insurance products, such as variable and indexed universal life insurance, based at least in part on their value as investment and savings vehicles. The following are just a few examples we found through a quick Google search:

- In marketing materials for its variable universal life insurance aimed at producers, BMO Insurance states, "Not all your clients have the same investment goals and risk tolerance. And, when their lives change, their insurance needs and investment goals should also be re-evaluated. You can use the Investor Profile Questionnaire to guide your clients through a simple step-by-step evaluation of their risk profile to help them find a universal life investment portfolio that is appropriate for them … so that you can customize an investment approach that suits the needs of each of your clients."[21]
- New York Life notes on its website that its variable universal life insurance is designed for those who "want life insurance protection but are also investment-minded and desire the potential for greater cash value accumulation than generally available in a fixed insurance product."[22]

[21] *See*, BMO Insurance, Universal Life Investment Options, https://www.bmo.com/advisor/universal-life-investment-options-adv_162_43420.html (last visited January 22, 2018).
[22] *See*, New York Life, Variable Universal Life: a policy that emphasizes flexibility, https://www.newyorklife.com/products/insure/variable-universal-life/variable-universal-life-flexibility/ (last visited January 22, 2018).

- Nationwide describes variable universal life insurance as "a life insurance product with investment options. It's designed to help you protect your family's future — and give you access to professionally managed investments that can help you accumulate assets."[23]
- MassMutual promotes its variable universal life insurance based on the variety of investment options available. A variable universal life policy "provides access to many different investment options, which allows you to choose options that align with your goals and tolerance for market and investment risk."[24]
- Pacific Life similarly touts the "broad range of investment options" it offers with its variable life insurance products. It goes on to state, "The variable investment options shown near the top of this chart may provide you with the potential reward of greater returns, if you are willing to take on additional risk. When evaluating these investment options, you and your financial professional should select your investment options based on your unique investment objectives, financial circumstances, and willingness to tolerate risk."[25]
- Prudential states, "If you want protection and the potential to accumulate policy cash value, variable universal life insurance gives you both. The potential to accumulate more cash value occurs through investment features called underlying investment options."[26]
- Thrivent states, "You can build a financial strategy around your financial goals by allocating your variable universal life insurance premiums in one or more professionally managed portfolios that have specific investment objectives."[27]

Like variable universal policies, index universal life insurance policies are sold based in part on their potential to build cash value. In discussing when an index universal life policy might be appropriate, for example, Transamerica highlights the "Upside potential of an index account option."[28] Voya describes the benefits of index universal life insurance this way, "Indexed universal life insurance provides death benefit protection and the opportunity to build money inside your policy, called cash value, based in part on the increases of market indexes."[29] Allianz describes the benefits of its fixed index universal life insurance by highlighting "the opportunity to earn cash value based on indexed interest utilizing a variety of crediting methods and allocation options."[30]

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[23] *See*, Nationwide, Variable Universal Life Insurance, https://www.nationwide.com/variable-universal-life-insurance.jsp (last visited January 22, 2018).
[24] *See*, MassMutual, Variable Universal Life Insurance, https://www.massmutual.com/insurance/life-insurance/variable-life (last visited January 22, 2018).
[25] *See*, Pacific Life, Funds and Performance, Risk-Reward Spectrum, https://www.pacificlife.com/life_insurance/fund_performance/variable_inv_options.html (last visited January 22, 2018).
[26] *See*, Prudential, Prudential's Variable Universal Life Insurance Policies, https://www.prudential.com/personal/life-insurance/find-life-insurance-policy/variable-universal-life-insurance (last visited January 22, 2018).
[27] *See*, Transamerica Premier Life, Why Index Universal Life, https://premier.transamerica.com/portal/public/tpl/!ut/p/a0/04_Sj9CPykssy0xPLMnMz0vMAfGjzOKNA1xMPLwsjNzdQ5xNDDwNzbzM3M1cDQx8DPQLsh0VAVxUy88!/ (last visited January 22, 2018).
[28] *See*, Thrivent Financial, Thrivent Variable Universal Life Insurance Investment Options, https://www.thrivent.com/products/insurance/life-insurance/permanent-life-insurance/thrivent-variable-universal-life-investment-options.html (last visited January 22, 2018).
[29] *See*, Voya Financial, Indexed Universal Life, https://www.voya.com/products-services/life-insurance/indexed-universal-life (last visited January 22, 2018).
[30] *See*, Allianz, Fixed index universal life insurance, https://www.allianzlife.com/life-insurance/fixed-index-universal-life (last visited January 22, 2018).

We are not suggesting that these descriptions are misleading or deceptive. On the contrary, our point here is that these life insurance policies are marketed based on features that are virtually indistinguishable from the features of annuities. Given these similarities, it makes no sense to adopt a best interest standard for one type of insurance investment, annuities, and exempt other types of insurance investments, variable and indexed universal life insurance, from that standard.

That is why, when we and others wrote to the NAIC last July, we urged the NAIC to include all insurance products sold as investments in any standard it adopts. As we wrote at the time, "The same standard of care – best interest of the consumer – is clearly as appropriate for investment-type life insurance – for example, indexed universal life – as it is for annuity products." This is particularly true in the current context, when the adoption of a best interest standard is motivated in large part by the push to create a consistent standard across all types of accounts and all types of investment products. It makes no sense, and risks encouraging regulatory arbitrage, for insurance regulators to apply different standards to different products that are sold for the same or similar purposes. Here again, New York State has shown with its proposal that it is possible to apply this standard more broadly. We encourage NAIC, if it moves forward with this proposed standard, to follow New York's lead.

Conclusion

Savers and investors have been led by financial professionals of all stripes, including insurance producers, to expect objective, professional advice about the investment products they recommend. With the notable exception of the DOL conflict of interest rule, regulations have not kept pace, either by prohibiting salespeople from marketing themselves as advisers or by holding them to the best interest standard appropriate to the advisory role. While a move to a universal best interest standard could serve to close that regulatory gap, it will only do so if the best interest standard is clear and enforceable and is backed by real restrictions on practices that undermine that goal. A standard that merely gives lip service to best interest without changing harmful industry practices would do more harm than good. As currently drafted, the NAIC proposal falls into the latter category. We urge you to adopt the changes outlined above to create a strong, enforceable best interest standard that would benefit investors and promote consistency across different types of accounts and investment products. Unless and until you are prepared to adopt such changes, however, we urge you to withdraw the current proposal as likely to do more harm than good.

Respectfully submitted,

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