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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 Mr. Cameron:

Thank you for the opportunity to comment on the draft revisions to the Suitability in Annuity Transactions Model Regulation (the Model Suitability Regulation) that are being considered by the National Association of Insurance Commissioners (NAIC). Jackson National Life Insurance Company, the largest provider of individual annuities in the United States since 2012,[1] supports the strengthening of consumer protection standards that apply to sales of annuities by brokers, agents, and insurance producers who are not "specified fiduciaries" (as defined below) and offers the following suggestions to assist the NAIC with its deliberations:

- The Model Suitability Regulation should be amended to exempt recommendations to purchase, sell, or exchange a "fee-based annuity" that is made by a "specified fiduciary." A "fee-based annuity" has no front-end sales charge or surrender charge. 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.

[1] According to LIMRA's Secure Retirement Institute, Jackson National Life Insurance Company (Jackson) has been the largest provider of individual annuities in the United States each year since 2012. *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. 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.

- The NAIC should coordinate the strengthening of the suitability standard in the Model Suitability Regulation with other regulators, especially the SEC and FINRA. In particular, the NAIC should enhance the Model Suitability Regulation so that purchases, sales, and exchanges of fixed and fixed index annuities are subject to the heightened FINRA standards that presently only apply to purchases, sales, and exchanges of variable annuities.

- The NAIC should consider the technical recommendations submitted by the Insured Retirement Institute (IRI), the American Council of Life Insurers (ACLI), and The Committee of Annuity Insurers (CAI) in order to better balance the NAIC's mission to facilitate fair and equitable treatment of consumers and to promote competitive markets.

**Introduction: Do No Harm**

America is amidst a slow-rolling retirement crisis. With the decline of employer-provided pensions and the guaranteed lifetime "retirement paychecks" they provide, more Americans than ever are dependent on their personal savings and Social Security for the money they need to support themselves in retirement. They are not prepared. Only 23% of baby boomers believe that their savings will last them through the rest of their lives.[2] According to the U.S. Government Accountability Office, 41% of U.S. working households age 55 to 64 have no retirement savings; 55% of these same households have less than $25,000 in retirement savings.[3] The Center for Retirement Research at Boston College has concluded "that half of today's households will not have enough retirement income to maintain their pre-retirement standard of living, even if they work to age 65 and annuitize all their financial assets, including the receipts from a reverse mortgage on their homes."[4]

Access to professional advice is part of the solution to the retirement crisis. Studies have shown that Americans accumulate more savings when working with a financial professional, saving twice the amount over a seven- to 14-year period.[5] Working with a financial professional has a positive

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[2] Insured Retirement Institute, Boomer Expectations for Retirement 2017, p 4, https://www.myirionline.org/docs/default-source/research/iri_boomers-expectations-for-retirement-2017.pdf.

[3] U.S. GOV'T ACCOUNTABILITY OFF., GEO-15-419, MOST HOUSEHOLDS APPROACHING RETIREMENT HAVE LOW SAVINGS (May 2015), https://www.gao.gov/products/GAO-15-419. *See also*, Elyssa Kirkham, 1 in 3 Americans Have $0 Saved for Retirement, GOBANKINGRATES.com (Mar. 16, 2016), https://www.gobankingrates.com/retirement/1-3-americans-0-saved-retirement/.

[4] Alicia H. Munnell, Wenliang Hou, & Geoffrey T. Sanzenbacher, National Retirement Risk Index Shows Modest Improvement in 2016, 18-1 Center for Retirement Research at Boston College (Jan. 2018), http://crr.bc.edu/wp-content/uploads/2017/12/IB_18-1.pdf.

[5] Claude Montmarquette & Nathalie Viennot-Briot, Centre for Interuniversity Research and Analysis on Organizations (CIRANO). *Econometric Models on the Value of Advice of a Financial Advisor, p 4 (July 2012)*, http://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf.

influence on retirement planning behaviors, including increased usage of tax-advantaged savings vehicles, improved asset allocation, greater portfolio diversification and less-speculative investing.[6] Financial professionals have also been shown to help consumers earn 1.59% in additional annual returns, which over time leads to 22.8% more income in retirement.[7] Moreover, financial professionals help their clients with behavioral aspects of investing, which can add one to two percent in net annual returns.[8]

Access to annuities is also part of the solution to the retirement crisis. Annuities allow Americans to address their greatest risk and fear in retirement: outliving their assets.[9] This is especially true of variable annuities, which offer consumers the opportunity to protect and grow their savings. Variable annuities protect savings against market and longevity risk through guaranteed lifetime income and death benefits. They also offer the opportunity to grow savings on a tax-deferred basis through the construction of a diversified portfolio of investment strategies, including fixed account options with minimum guaranteed returns. Since the majority of variable annuities are held by consumers with annual income under $100,000, they need an opportunity to grow their assets.[10]

In this context, Jackson implores the NAIC and other policymakers to carefully balance the desire to protect consumers with the need to maintain reasonable access to advice and solutions, like annuities, that provide consumers an opportunity to protect and grow their retirement savings.[11]

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[6] *Id.*

[7] David Blanchett & Paul Kaplan., *Alpha, Beta, and Now ... Gamma*, Morningstar, *p 3 (Aug. 28, 2013)*, http://corporate.morningstar.com/ib/documents/PublishedResearch/AlphaBetaandNowGamma.pdf.

[8] Francis M. Kinniry Jr., Colleen M. Jaconetti, Michael A. DiJoseph, Yan Zilbering & Donald G. Bennyhoff, *Putting a Value on Your Value: Quantifying Vanguard Advisor's Alpha*, Vanguard Research, p 16 (Sept. 2016). http://www.vanguard.com/pdf/ISGQVAA.pdf.

[9] 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.

[10] Press Release, Insured Retirement Institute, IRI Issues Third-Quarter 2015 Annuity Sales Report (Dec. 15, 2015) (on file with author).

[11] Jackson and many others have observed that the undesirable outcomes of the new DOL fiduciary rules, for example, far outweigh any benefit to consumers. *See* Letter No. 956 from James R. Sopha, President Jackson National Life Insurance Company, to Dep't. of Labor (Mar. 15, 2017), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/00952.pdf. *See also* Letter No. 256 from James R. Sopha, President Jackson National Life Insurance Company, to Dep't. of Labor (July 21, 2017), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00256.pdf; Letter No. 102 from James R. Sopha, President Jackson National Life Insurance Company to Dep't of Labor (Sept. 15, 2017), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA27/00102.pdf; SEC Comment Letter from Andrew J. Bowden, General Counsel Jackson National Life Insurance Company (Nov. 1, 2017), https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2661640-161405.pdf.

At a minimum, state insurance laws should ensure that insured lifetime income solutions compete on a level playing field with other solutions that do not offer insured protection against market, longevity, and sequence of return risk (like a diversified portfolio of mutual funds and ETFs). This is especially true when insured solutions are offered by a specified fiduciary, charge no commission, and are fully liquid (like many mutual funds and ETFs). The NAIC should ensure that fee-based variable annuities offered by fiduciaries can compete on a level regulatory playing field with non-insured mutual funds and ETFs because, in many instances, variable annuities will address consumers' greatest concern (running out of money in retirement) and therefore be in the best interest of the consumers.

**Recommendations by Fiduciaries Regarding Fee-Based Annuities Should be Exempted from the Model Suitability Regulation**

*Such recommendations do not present the potential conflicts and concerns that the Model Suitability Regulation is intended to address.*

The business of providing savings and retirement advice to consumers continues to evolve. So, too, does annuity design ... and so, too, must the Model Suitability Regulation.

Regulators have historically perceived that recommendations to purchase, sell, or exchange a commission-based annuity present potential conflicts and risks for consumers. They have focused on commission pay-outs that may be higher than other products (creating a potential conflict for the broker, agent, or insurance producer) and multi-year surrender periods that may result in the payment of surrender charges by the consumer if the annuity is surrendered within a certain number of years after purchase.[12] More recently, the DOL, the NAIC, and several states have focused on perceived deficiencies in the "suitability" standard of care with which brokers, agents, and insurance producers must comply when recommending an annuity.[13]

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[12] *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 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-LI.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*, 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.

[13] Jackson disagrees that the "suitability" standard of care, as it has evolved, offers insufficient consumer protection. The suitability standard of care requires, among other things, (i) the collection and consideration of substantial information about an investor, (ii) recommendations that meet the investor's needs based on such information, and (iii) a supervisory structure that reviews recommendations and oversees the activities of representatives. It is rigorously enforced through federal, state, and self-regulatory entities, as well as through private claims brought by consumers. FINRA takes the position that the suitability standard requires "a broker's recommendations [to] be consistent with his customers' best interests." *See In the Matter of Dane S. Faber*, Exchange Act Release No. 49216,

None of these conflicts, concerns, or perceived deficiencies in the applicable standard of care exist when a specified fiduciary recommends the purchase, sale, or exchange of a fee-based annuity.

Jackson introduced its first fee-based variable annuity in 2016.[14] In September 2017, Jackson introduced the next generation of its fee-based variable annuity called Perspective Advisory II. The objective of Perspective Advisory II is increased transparency and better alignment with non-annuity fee-based product offerings. Like other non-annuity fee-based products, Perspective Advisory II includes no up-front or trailing sales charge, has no withdrawal charge fees or schedule, and utilizes Class I (Institutional) share funds that do not include 12b-1 fees. All compensation to the selling adviser will be paid directly by the consumer based upon the fee arrangement negotiated between the consumer and the adviser. Further, Jackson does not expect that there will be any variance in the fee paid to the adviser by the consumer based upon the features and benefits that the consumer chooses in the annuity. For example, a consumer purchasing Perspective Advisory II can select from over 90 investment options and an *a la carte* menu of survivor and guaranteed income benefits. Jackson expects that a selling adviser will earn the same compensation regardless of the optional benefits that the consumer selects.

Fee-based annuities are offered and sold by entities that that are subject to the highest fiduciary duties of care and loyalty, which are enforced by the SEC, the DOL, state insurance and securities departments, and private litigants.[15] Thus, consumers will have comprehensive protection, and the fiduciaries recommending fee-based annuities will be subject to standards higher than those under the proposed revisions to the Model Suitability Regulation.

*Applying the Model Suitability Regulation to such recommendations will harm consumers.*

The Model Suitability Regulation (and FINRA Rule 2330) impose significant additional requirements on sales of annuities that do not apply to sales of other products, such as mutual

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2004 SEC LEXIS 277, pp 23-24 (Feb. 10, 2004), https://www.sec.gov/litigation/opinions/34-49216.htm. *See also, Dep't of Enforcement v. Bendetsen*, No. C01020025, 2004 NASD Discip. LEXIS 13, p12 (NAC Aug. 9, 2004). *See also*, FINRA Regulatory Notice 12-25, p3 (May 2012), http://www.finra.org/sites/default/files/NoticeDocument/p126431.pdf.

This squares with Jackson's experience in the real world. Anyone in the business of advising retail investors had best be able to prove that the recommendation was in the best interest of the investor. Put another way, Jackson is unaware of any evidence indicating that broker-dealers are successfully defending themselves against claims brought by the SEC, FINRA, states, or private litigants by arguing that their recommendations may not have been in their customers' best interest but were nonetheless suitable.

[14] Jackson has identified 38 launches or filings of fee-based variable annuities in the last 24 months.

[15] States will retain the ability to investigate and enforce their anti-fraud statutes that govern the activities of investment advisers if recommendations to purchase, sell, or exchange fee-based annuities by fiduciaries are exempted from the Model Suitability Regulation.

funds. Based on an analysis prepared by Jackson, it takes approximately two days and 200 pages of documentation to complete a mutual fund transaction. In contrast, it takes approximately five days and 1,000 pages of documentation to complete a variable annuity transaction. These regulatory requirements are likely to deter specified fiduciaries from recommending a fee-based annuity and to steer the fiduciary's recommendation to other products, such as mutual funds, which require far less work. While there is nothing wrong with mutual funds, a portfolio that consists entirely of them may not be in a consumer's best interest because mutual funds (and ETFs and other non-insured products) do not mitigate market, sequence of return, or longevity risk (e.g., the risk that the consumer will be unlucky and suffer a market downturn shortly before or during retirement, and/or live longer than expected).

If specified fiduciaries are discouraged from recommending fee-based annuities because of the application of additional licensing, supervisory, and recordkeeping requirements that do not apply to other investment solutions, then market, sequence of return, and longevity risks will be increasingly "managed" through the application of simplistic and ineffective rules of thumb, such as the so-called "4 percent rule" for systematic withdrawals.[16] The "4 percent rule" promotes the construction of a diversified portfolio from which the consumer withdraws four percent per year with the goal of funding a retirement that lasts a maximum of 25 to 30 years. (In reality, many retirements last much longer.) The original and subsequent research behind the "4 percent rule," however, exposes its significant risks and inaccuracy in predicting a protected and reliable stream of retirement income for life.

William Bengen's original research in 1994, which is believed to have established the "4 percent rule," was premised upon asset class returns <u>without taking into account</u> fees and taxes.[17] Using Bengen's original research, but taking into account the fact that consumers will have to pay fees and taxes in addition to the desired 4 percent withdrawal (assuming advisory fees and taxes of 2 percent per annum), the "4 percent rule" would have failed and resulted in consumers running out of money in retirement in 61 percent of historical 30-year periods.

More recent research, which accounts for the current low interest rate environment, demonstrates that the risk of systematic withdrawal plans like the 4 percent rule has increased considerably over the last two decades. For example, a research study in 2013 that examined the effect of low

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[16] PWC, *Leveraging Behavioral Simulation to Enhance the Four Percent Rule*, p 2 (Mar. 2015), noting:

> "[I]t is important to point out that many rules of thumb such as the Four Percent Rule ... are based on mortality assumptions that are undergoing constant revision. The Four Percent Rule makes the assumption that households spend 25 years in retirement. However, The Economist reports that life expectancy in wealthier nations has been revised upwards by about 2.5 years every decade for the past 50 years."

https://www.pwc.com/us/en/insurance/publications/assets/pwc-behavioral-simulation-four-percent-rule.pdf.

[17] William P. Bengen, *Determining Withdrawal Rates Using Historical Data* 7 (4) J. Fin. Planning: 171–180 (1994), http://www.retailinvestor.org/pdf/Bengen1.pdf.

interest rates on systematic withdrawal strategies concluded, "The success of the 4 percent rule in the U.S. may be an historical anomaly, and clients may wish to consider their retirement income strategies more broadly than relying solely on systematic withdrawals from a volatile portfolio."[18] Subsequent research by David Blanchett shows that the addition of guaranteed income through annuities and pensions drastically increases the amount of sustainable income a retiree can take while maintaining the same risk level. Under his model's assumptions, those with a moderate income stability preference (income risk tolerance) can take only 2.5% systematic withdrawals if they have no guaranteed income, but as much as 4.2% withdrawals with 50% guaranteed income and 6.8% withdrawals with 95% guaranteed income.[19]

The application of the Model Suitability Regulation to sales of fee-based annuities by fiduciaries will therefore harm consumers by reducing their ability to eliminate their market, sequence of return, and longevity risks through pooling. Variable annuities provide consumers with the opportunity to transfer these risks to an insurance company's balance sheet. The insurance company pools the risks of its investors. Pooling reduces a consumer's risk, for example, of living longer than expected simply because some other person in the pool may live a shorter life than expected. But annuity providers also supplement the value of pooling mortality and other risks by employing sophisticated hedging strategies to mitigate the risk of stock market declines and interest rate movements that are beyond the capabilities and budgets of individual consumers. Such a sophisticated solution is something a consumer could never execute or afford on his or her own through the application of the 4 percent rule or anything like it.

For these reasons, the NAIC should exempt fee-based annuities recommended by specified fiduciaries from the Model Suitability Regulation.[20] It is a win for consumers, who will continue to be protected under existing fiduciary standards and who will have insured retirement solutions considered and recommended by specified fiduciaries on a level regulatory playing field with other solutions. It is also a win for regulators and policy makers, and a win for American businesses offering investment advice to consumers. As explained more fully below, exemption of fee-based annuities sold by fiduciaries from the Model Suitability Regulation promotes a more simple, uniform regulatory environment amongst the states, FINRA, the SEC, and the DOL.

## The NAIC Should Coordinate with Other Regulators

The current bramble bush of federal, state, and self-regulation that governs businesses that advise retail investors is overly complex to consumers and the industry. It unfairly tilts the playing field in favor of certain products and business models, increases costs, and discourages innovation and new market entrants. The NAIC should therefore closely coordinate any changes to the Model

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[18] Michael Finke et al., *The 4 Percent Rule Is Not Safe in a Low-Yield World*, 26 (6) J. Fin. Planning: 46–55 (2013), https://davidlukasfinancial.com/wp-content/uploads/2015/08/4-percent-rule-not-safe.pdf.

[19] David M. Blanchett, *The Impact of Guaranteed Income and Dynamic Withdrawals on Safe Initial Withdrawal Rates*, 30 (4) J. Fin. Planning: 42–52 (2017).

[20] The specific language recommended by Jackson is attached at Exhibit A.

Suitability Regulation with other regulators, especially the SEC and FINRA, given the overlap and similarity between state annuity suitability regulations (modeled after the Model Suitability Regulation) and FINRA Rule 2330 (which applies exclusively to recommendations regarding variable annuities).

It would likely come as a surprise to almost all consumers that when they meet with someone offering advice about insured retirement solutions, that person can be subject to four or more different regulatory regimes and standards during the same conversation (e.g., state insurance, FINRA, SEC, DOL, Office of the Comptroller of the Currency).[21] For example, assume that Cathy Consumer meets with Sue Smith, an individual offering investment and retirement planning products and solutions (who, for the sake of simplicity, is not associated with a bank or trust company). Assume, also, that after speaking with Consumer and collecting a wide range of information about her, Smith offers a range of insured solutions and offers Consumer the option of paying for services through commissions or asset-based fees.[22] The following high level, grossly simplified scenarios describe the regulatory maze:

(1) If Smith offers Consumer a fixed or fixed income annuity that Consumer would like to purchase on a commission basis, then Smith must be licensed and registered as an insurance producer in the state where the recommendation is made. Smith and her employer must also comply with that state's marketing, suitability, supervision, and recordkeeping requirements that apply to the sale of annuities.[23]

(2) If Smith offers Consumer a variable annuity that Consumer would like to purchase on a commission basis, then, in addition to complying with the state insurance and annuity requirements described in scenario #1, Smith's employer must register as a broker-dealer with the SEC and become a member of a Self-Regulatory Organization (usually FINRA). Smith's employer and Smith will also usually have to register as a broker-dealer and a broker-dealer representative, respectively, in every state where they conduct business. Smith must comply with all FINRA and SEC rules that apply to sales of securities, as well as

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[21] All four of these regimes have unique requirements that govern the disclosures that must be made to Consumer (usually resulting in Consumer receiving a tome of disclosures that she does not read), the form and content of marketing material that may be used, the standard of conduct with which Smith must comply, and supervision of Smith that is required by her employer. Three of the regimes have unique licensing and registration requirements (state insurance, FINRA, and SEC).

[22] This should be a matter of personal preference for Consumer. She may not want to establish an ongoing relationship with Smith and may only want to interact with Smith once, or periodically at her discretion. In this instance, Consumer may prefer to "pay as she goes" and conclude that this will be the most cost effective way for her to interact with Smith. Conversely, Consumer may choose to establish an ongoing relationship with Smith that includes the payment of an ongoing asset-based fee. Importantly, Consumer may choose to establish an advisory relationship even if she concludes that it will cost her more money. She may value access to Smith, as well as regular and continuous oversight of her assets. She also may not want to create incentives for Smith or herself to take, or fail to take, action because the action might trigger the payment of a commission.

[23] Most of these state requirements are modeled after the Model Suitability Regulation.

special FINRA rules that apply specifically to variable annuities (e.g., FINRA Rules 2330, 2211, and 2320). These FINRA rules establish several requirements in addition to (or in lieu of) the state annuity suitability rules that apply in scenario #1, including prohibiting certain forms of cash and non-cash compensation, requiring additional supervisory procedures (including a requirement to have the transaction reviewed and approved by a licensed principal), and specifying required and prohibited disclosures.

(3) If Smith offers Consumer a fixed, fixed index, or variable annuity that Consumer would like to purchase on a fee basis as part of an advisory relationship, then, depending on the size of the business with which Smith is associated, Smith's employer must be registered and licensed as an investment adviser with either (a) the SEC or (b) the state where the recommendation was made. Additionally, Smith must be registered as an investment adviser representative in every state where she conducts business. Smith and her employer must also comply with the SEC's or the state's rules and regulations that govern the activities of investment advisers and investment adviser representatives. It is unsettled, but likely to be the view of many states, that Smith and her employer must also comply with all the state annuity suitability requirements that apply in scenarios #1 and #2. It is unsettled, but likely to be the view of FINRA, that if Smith also happens to be registered as a broker-dealer representative (in addition to her investment adviser representative registration), then Smith and the broker-dealer with which she is associated must also comply with the special FINRA rules that apply to sales of variable annuities, particularly if Consumer's source of funds originate from a brokerage account subject to FINRA requirements.

(4) If Smith offers Consumer a fixed, fixed index, or variable annuity that Consumer would like to purchase on a commission or fee basis and Consumer's source of funds originate from a qualified plan or a retirement account, then all the conversations and interactions between Consumer and Smith are also subject to the requirements of the DOL's fiduciary rules, including the Impartial Conduct Standards. The starting point for Consumer is that any transaction Smith suggests to her is prohibited by ERISA. So, Smith must offer advice and effect any transaction in compliance with the disclosure, compensation, and conduct requirements of one (or more) of the "prohibited transaction exemptions" that have been adopted by the DOL. Smith may currently utilize Prohibited Transaction Exemption 84-24 (PTE 84-24) or the Transition Best Interest Contract Exemption. If the new fiduciary rules go into full effect on July 1, 2019, as currently planned, then, thereafter, Smith may rely on PTE 84-24 or the Best Interest Contract Exemption (BICE) if she suggests a fixed annuity, but Smith must comply with the "more stringent conditions of the [BICE]" (in the words of the DOL) if she suggests a fixed index or variable annuity.[24]

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[24] DOL Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters, 81 Fed. Reg. 21147 (Apr. 8, 2016), (to be codified at 29 C.F.R. pt. 2550), https://www.gpo.gov/fdsys/pkg/FR-2016-04-08/pdf/2016-07928.pdf

In the famous words of former Miami Herald columnist and humorist, Dave Barry, we are not making this up. This is the "bramble bush" referenced earlier to which Consumer and Smith are subject. Consumers like Cathy most likely have no idea of the different standards and requirements that are governing a conversation about investing as they move from solution to solution, payment model to payment model, and possible source of funds to possible source of funds. The bramble bush results in consumers receiving a tome of required disclosures. Worse, it is reasonable to assume that some people in Smith's position may shape their communications and relationships with consumers to travel the path of least regulatory resistance, which may not conform to what would be best for consumers.

For example, Jackson and others are observing that many businesses are deciding not to offer investment advice and services to consumers who have not accumulated a relatively large pool of assets or are requiring consumers to pay more for the advice and services they provide. A 2016 study by A.T. Kearney found that, by 2020, broker-dealer firms will stop serving the majority of the $400 billion currently held in low-balance retirement accounts.[25] Another recent study conducted by CoreData Research found that 71% of financial advisors plan to disengage from some retirement savers as a result of the fiduciary rule.[26] A 2017 survey by the National Association of Insurance and Financial Advisors found that nearly 90% of financial professionals believe consumers will pay more for professional advice services, and 75% have seen or expect to see increases in minimum account balances for the clients they serve.[27]

As for Smith and others like her, who want to operate a business that helps Americans save and plan for retirement, the examples above are a gross simplification of the regulations and regulatory frameworks with which they must comply, at significant cost and risk. Jackson didn't count the pages of statutes, rules, regulations, guidance, and advisory opinions that Smith must comprehend to run her business in a fully compliant way, but we estimate that it's in the tens of thousands ... and it's constantly growing and changing.

Which brings us to our point. The proposed revisions to the Model Suitability Regulation being contemplated by the NAIC make the situation described above worse. They move state annuity suitability requirements further from current FINRA requirements. The changes will make the

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[25] A.T. Kearney, *A.T. Kearney study: The $20 billion impact of the new fiduciary rule on the US. wealth management industry*, (Oct. 2016), https://www.atkearney.com/documents/10192/7041991/DOL+Perspective+-+August+2016.pdf/b2a2176b-c821-41d9-b12e-d3d2b0807d69

[26] VW Staff, *Fiduciary rule to leave US mass-market investors stranded, study shows*, ValueWalk (Nov. 28, 2016), https://www.valuewalk.com/2016/11/fiduciary-rule-bad/.

[27] National Association of Insurance and Financial Advisors, NAIFA Survey Gauges Impacts of DOL Fiduciary Rule, April 2017, https://www.naifa.org/news-publications/naifa-blog/april-2017/naifa-survey-gauges-impacts-of-dol-fiduciary-rule.

regulatory environment even more confusing, fraught, and expensive for consumers and businesses that offer to help them.[28] Above all else, the NAIC and other regulators should be striving to make regulations more uniform and clear.[29]

*Conform the Model Suitability Regulation with FINRA Requirements that Apply to Sales of Variable Annuities*

Towards that end, if the NAIC is going to make any changes to the Model Suitability Regulation in addition to exempting sales of fee-based annuities by specified fiduciaries, it should conform the Model Suitability Regulation with FINRA requirements that apply to sales of variable annuities.

As explained above, a broker or agent offering advice to a retail investor regarding securities (e.g., mutual funds, ETFs, variable annuities) is presently subject to different conduct standards than an insurance producer offering advice regarding non-securities (e.g., fixed annuities, fixed index annuities). The former is subject to rules and regulations adopted and enforced by the SEC and FINRA. The latter by the states. The standards differ. For example, the states do not regulate distribution-related activities, including permissible forms of cash and non-cash compensation, in the same way as FINRA.[30] Jackson urges the NAIC to work with state insurance commissioners and other regulators to ensure that standards governing advice regarding securities are extended to, and harmonized with, the standards that govern advice regarding insurance (i.e., non-securities) so that, for example, an insurance producer selling a fixed annuity is subject to the same conduct standards as a broker-dealer representative selling a mutual fund or a variable annuity.

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[28] Among other things, the proposed changes to the Model Suitability Regulation would move it further from existing FINRA requirements on issues such as permissible forms of compensation, required supervision of recommendations, and required disclosures. Many of the technical corrections requested by the IRI, ACLI, and CAI, which Jackson supports, are intended to harmonize the Model Suitability Regulation and FINRA requirements.

[29] Jackson refers the NAIC to the comment letter that Jackson submitted to the SEC on November 1, 2017, regarding the SEC's efforts to reform the bramble bush. Jackson's letter offers, among other things, eleven principles that ought to guide regulatory reform, the first of which is, "Do no harm. Do not enact regulatory 'reform' that exacerbates the retirement crisis." SEC Comment Letter from Andrew J. Bowden, General Counsel Jackson National Life Insurance Company (Nov. 1, 2017), https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2661640-161405.pdf..

[30] U.S. Senator Elizabeth Warren issued related studies in 2015 and 2017 that focused on certain sales practices and incentives used by a minority of organizations selling non-securities insurance products, which are not subject to the FINRA rules that apply to sales of insurance products that are deemed securities. *See* U.S. Sen. Elizabeth Warren, *Villas, Castles, and Vacations: How Perks and Giveaways Create Conflicts of Interest in the Annuity Industry*, 2 (Oct. 2015), https://www.warren.senate.gov/files/documents/2015-10-27_Senator_Warren_Report_on_Annuity_Industry.pdf; *See also*, U.S. Sen. Elizabeth Warren, *Villas, Castles, and Vacations 2017 Edition: Americans' New Protections from Financial Adviser Kickbacks, High Fees, & Commissions are at Risk*, (Feb. 2017), https://www.warren.senate.gov/files/documents/2017-2-3_Warren_DOL_Rule_Report.pdf.

**Technical Adjustments**

In addition to complicating the business of providing advice by creating more differences among regulations, the revisions to the Model Regulation being considered by the NAIC do not optimally balance the NAIC's mission to facilitate fair and equitable treatment of consumers and to promote competitive markets. For example, the proposed revisions would require an insurance producer (or an insurer where no producer is involved):

- To evaluate all types of products that might be appropriate for a consumer (even if the insurance producer does not offer some of those products);
- To demonstrate that a replacement product would provide a "substantial financial benefit" to the consumer (when any net financial benefit to the consumer might justify the recommendation of a replacement product); and
- To disclose the basis or bases of every recommendation (something no other regulator requires).

The breadth and vagueness of these requirements would impose costs and risks on insurance producers and insurers that would outweigh any potential benefit to consumers. The result will be that insurance producers and insurers will be less likely to offer advice, especially to consumers with smaller amounts to invest, and to charge more for their advice when it is offered.

Jackson therefore urges the NAIC to consider the technical recommendations made by the IRI, ACLI, and CAI in the comment letters they have filed and to balance the enhancement of consumer protections with the realities of the marketplace and the imperative to ensure that consumers can access high quality, affordable advice.

Jackson appreciates the opportunity to share our view and hopes that this letter is helpful to the NAIC. We are happy to answer any questions you have or to provide additional information.

Very truly yours,

Andrew J. Bowden
Senior Vice President and General Counsel

**EXHIBIT A**

Revisions to the Model Suitability Regulation recommended by Jackson National Life 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.