

PROPOSED MODIFICATIONS

(The following sets forth ACLI's proposed modifications to the existing model revised as proposed in the 11/19/18 NAIC Draft)

Draft: 11/19/18  
Model #275

Comments are being requested on this draft. The revisions to this draft reflect changes made from the existing model. Comments should be sent only by email to Jolie Matthews at [jmatthews@naic.org](mailto:jmatthews@naic.org) by Friday, Feb. 15, 2019.

**SUITABILITY IN ANNUITY TRANSACTIONS  
MODEL REGULATION**

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**Section 1. Purpose**

- A. The purposes of this regulation ~~are is~~ to require producers and insurers, where no producer is involved to act in the best interest of consumers when making recommendations of annuity products, to require insurers to establish a system to supervise recommendations and to set forth standards and procedures for recommendations to consumers that are suitable ~~in the consumer's interest~~ and 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.
  
- B. Nothing herein shall be construed to create or imply a private cause of action for a violation of this regulation.

**Drafting Note:** The NAIC acknowledges that the goal of the U.S. Securities and Exchange Commission's (SEC) April 2018 proposals is to move toward a harmonized best interest standard of conduct for broker-dealers and agents that substantially raises the professional obligations for recommendations, while preserving and differentiating the fiduciary standard for investment advisers. As of the November 2018 Draft of the amended *Suitability in Annuity Transactions Model Regulation* (#275), the SEC's proposed use of the term "best interest" in the actual text of the SEC's Regulation Best Interest proposal appears to describe "best interest" as including "best interest" without further definition and is not distinguished from the investment adviser fiduciary. The SEC has received many public comments on use of the phrase "best interest" and may provide greater clarity in its final rule. While the NAIC fully supports a similar goal of a harmonized standard of conduct, and has a strong preference to remain consistent with FINRA rules in connection with a recommendation of variable annuities, the NAIC is not yet convinced that this November 2018 Draft of the amended *Suitability in Annuity Transactions Model Regulation* (#275) is legally distinct from the enhanced standards that are intended by the SEC. Until such time the NAIC can evaluate any distinction in the text of the SEC proposal between a "best interest" recommendation and investment adviser fiduciary duties, and the SEC and FINRA have finalized relevant terms, definitions and related requirements, the NAIC would opt to refrain from using the phrase "best interest" in Section 6A(1) of the proposed modifications to the *Suitability in Annuity Transactions Model Regulation* (#275).

**Drafting Note:** The language of subsection B comes from the NAIC Unfair Trade Practices Act. If a State has adopted different language, it should be substituted for subsection B.

**Drafting Note:** Section 989J of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) specifically refers to this model regulation as the “Suitability in Annuity Transactions Model Regulation.” Section 989J of the Dodd-Frank Act confirmed this exemption of certain annuities from the Securities Act of 1933 and confirmed state regulatory authority. This regulation is a successor regulation that exceeds the requirements of the 2010 model regulation.

## **Section 2. Scope**

This regulation shall apply to any sale or recommendation of an annuity regardless of whether the person making the recommendation is a fiduciary under state law.

## **Section 3. Authority**

This regulation is issued under the authority of [insert reference to enabling legislation].

**Drafting Note:** States may wish to use the Unfair Trade Practices Act as enabling legislation or may pass a law with specific authority to adopt this regulation.

## **Section 4. Exemptions**

Unless otherwise specifically included, this regulation shall not apply to transactions involving:

- A. Direct response solicitations where there is no recommendation based on information collected from the consumer pursuant to this regulation;
- B. Annuities that ~~are not individually solicited and~~ are used to fund:
  - (1) An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);
  - (2) A plan described by sections 401(a), 401(k), 403(b), 408(k) or 408(p) of the Internal Revenue Code (IRC), as amended, if established or maintained by an employer;
  - (3) A government or church plan defined in section 414 of the IRC, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax-exempt organization under section 457 of the IRC; or
  - (4) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor;
- C. Settlements of or assumptions of liabilities associated with personal injury litigation or any dispute or claim resolution process; or
- D. Formal prepaid funeral contracts.

## **Section 5. Definitions**

- A. “Annuity” means an annuity that is an insurance product under State law that is individually solicited, whether the product is classified as an individual or group annuity.
- B. “Cash compensation” means any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.
- C. “Consumer” means the owner or prospective owner of an annuity contract.
- D. “Consumer profile information” means information that is reasonably appropriate to determine whether a recommendation is in furtherance of the consumer’s interests, including the following:

- (1) Age;
  - (2) Annual income;
  - (3) Financial situation and needs, including debts and other obligations;
  - (4) Financial experience;
  - (5) Financial objectives;
  - (6) Intended use of the annuity;
  - (7) Financial time horizon;
  - (8) Existing assets or financial products, including investment, annuity and insurance holdings;
  - (9) Liquidity needs;
  - (10) Liquid net worth;
  - (11) Risk tolerance, including willingness to accept non-guaranteed elements in the annuity, including variability in premium, death benefit or fees;
  - (12) Financial resources used to fund the annuity; and
  - (13) Tax status.
- E. “Continuing education credit” or “CE credit” means one continuing education credit as defined in [insert reference in State law or regulations governing producer continuing education course approval].
- F. “Continuing education provider” or “CE provider” means an individual or entity that is approved to offer continuing education courses pursuant to [insert reference in State law or regulations governing producer continuing education course approval].
- G. “FINRA” means the Financial Industry Regulatory Authority or a succeeding agency.
- H. “Insurer” means a company required to be licensed under the laws of this state to provide insurance products, including annuities.
- I. “Insurance producer” or “producer” means a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities.
- J. “Intermediary” means an entity contracted directly with an insurer or with another entity contracted with an insurer to facilitate the sale of the insurer’s annuities by producers.
- K. “Material conflict of interest” means a financial interest of the producer, or the insurer where no producer is involved, in the sale of an annuity that a reasonable person would expect to influence the impartiality of a recommendation.
- L. “Non-cash compensation” means any form of compensation that is not cash compensation, including, but not limited to, merchandise, gifts, tickets to paid events, prizes, travel expenses or meals and lodging.
- M. “Recommendation” means advice provided by a producer, or an insurer where no producer is involved, to an individual consumer that results in a purchase, an exchange or a replacement of an annuity in accordance with that advice. Recommendation does not include general communication to the public, generalized customer services assistance or administrative support, general educational information and tools, prospectuses, or other product and sales material.

N. “Replacement” means a transaction in which a new policy or contract is to be purchased, and it is known or should be known to the proposing producer, or to the proposing insurer whether or not a producer is involved, that by reason of the transaction, an existing policy or contract has been or is to be any of the following:

- (1) Lapsed, forfeited, surrendered or partially surrendered, assigned to the replacing insurer or otherwise terminated;
- (2) Converted to reduced paid-up insurance, continued as extended term insurance, or otherwise reduced in value by the use of nonforfeiture benefits or other policy values;
- (3) Amended so as to effect either a reduction in benefits or in the term for which coverage would otherwise remain in force or for which benefits would be paid;
- (4) Reissued with any reduction in cash value; or
- (5) Used in a financed purchase.

**Drafting Note:** The definition of “replacement” above is derived from the NAIC Life Insurance and Annuities Replacement Model Regulation. If a State has a different definition for “replacement,” the State should either insert the text of that definition in place of the definition above or modify the definition above to provide a cross-reference to the definition of “replacement” that is in State law or regulation.

O. “Suitable” means a recommendation of an annuity that is consistent with the consumer’s insurance needs and financial objectives based upon the facts disclosed by the consumer or known at the time of the recommendation by the producer, or insurer where no producer is involved.

#### **Section 6. Duties of Insurers and Producers**

A. (1) A producer, or an insurer where no producer is involved, when making a recommendation of an annuity, shall act in the best interests of the consumer at the time the recommendation is made, without placing the producer’s or the insurer’s financial interest ahead of the consumer’s interests.

- (2) A producer or insurer complies with paragraph (1) by:
- (a) Acting with reasonable diligence, care, skill and prudence;
  - (b) Making suitable recommendations in accordance with subsection B; and
  - (c) Making disclosures and acting in accordance with subsections C, D, E, F and H.

B. Prior to the recommendation of an annuity, a producer, or an insurer where no producer is involved, shall:

- (1) Make reasonable efforts to obtain consumer profile information from the consumer;
- (2) Consider the types of products the producer, or insurer where no producer is involved, is authorized and licensed to recommend or sell that may align with the consumer’s disclosed consumer profile information and address the consumer’s financial situation, objectives and needs; and
- (3) Have reasonable grounds for believing the recommendation is suitable for the particular consumer.

C. Prior to or at the time of the recommendation or sale of an annuity, the producer, or insurer where no producer is involved, shall prominently disclose to the consumer:

- (1) A description of the scope and terms of the relationship with the consumer and the role of the producer in the transaction;
- (2) Disclose to the consumer any limitations the producer or the insurer has in regard to the following:

- (a) The type of products that the producer is authorized and licensed to recommend or sell; and
  - (b) Whether only specific insurer company products or a limited range of annuity products may be offered;
- (3) (a) A description of the sources and types of cash compensation to be received by the producer, including whether the producer is to be compensated for the sale of a recommended annuity by commission as part of premium or other remuneration received from the insurer, intermediary or other producer or by fee as a result of a contract for advice or consulting services or fee.
- (b) ~~To satisfy subparagraph (a) of this paragraph,~~ Upon request of the consumer, the producer also shall disclose:
- (i) A reasonable estimate of the amount of cash compensation, which may be stated as a range of amounts or percentages; and
  - (ii) Whether the cash compensation is a one-time or multiple occurrence amount, and if a multiple occurrence amount, the frequency and amount of the occurrence, which may be stated as a range of amounts or percentages;
- (4) The type of non-cash compensation that exceeds \$500 per producer per year the producer may receive from an insurer or intermediary that is connected to the sale of the annuity; and
- (5) Any and all material conflicts of interest.
- D. (1) In making a recommendation the producer, or insurer where no producer is involved, shall at the time of the recommendation have a reasonable basis to believe all of the following:
- (a) The consumer has been reasonably informed of various features of the annuity, such as the potential surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, potential changes in non-guaranteed elements of the annuity, insurance and investment components and market risk;

**Drafting Note:** If a State has adopted the NAIC Annuity Disclosure Model Regulation, the State should insert an additional phrase in subparagraph (a) above to explain that the requirements of this section are intended to supplement and not replace the disclosure requirements of the NAIC Annuity Disclosure Model Regulation.

- (b) The consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization or death or living benefit;
- (c) 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 suitable (and in the case of an exchange or replacement, the transaction as a whole is suitable) for the particular consumer; and
- (d) In the case of an exchange or replacement of an annuity, the exchange or replacement is suitable including taking into consideration whether:
  - (i) The consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits (such as death, living or other contractual benefits), or be subject to increased fees, investment advisory fees or charges for riders and similar product enhancements;
  - (ii) The replacing product will provide a **substantial** benefit to the consumer in comparison to the replaced product over the life of the product; and

- (iii) The consumer has had another annuity exchange or replacement and, in particular, an exchange or replacement within the preceding 60 months.
  - (2) The requirements under this section do not mean the annuity with the lowest one-time or multiple occurrence compensation structure shall necessarily be recommended, but the recommendation shall be diligently focused on whether the product costs, rates, benefits, features and other contractual provisions of the annuity, and any other factors that differentiate the insurer, are consistent with the consumer's insurance needs and financial objectives based upon the facts disclosed by the consumer or known at the time of the recommendation by the producer or insurer where no producer is involved. ~~the actual financial situation, objectives and needs of the particular consumer.~~
  - (3) The consumer profile information, insurer characteristics, and product costs, rates, benefits and features to be considered are those factors generally relevant in making a suitability determination, but the level of importance of each factor may vary depending on the facts and circumstances of a particular case. However, each factor shall not be considered in isolation.
- E. Except as permitted under subsection F, an insurer shall not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity is suitable based on the consumer's consumer profile information.
- F.
  - (1) Except as provided under paragraph (2) of this subsection, neither a producer, nor an insurer, shall have any obligation to a consumer under subsections A or E related to any annuity transaction if:
    - (a) No recommendation is made;
    - (b) A recommendation was made and was later found to have been prepared based on materially inaccurate information provided by the consumer;
    - (c) A consumer refuses to provide relevant consumer profile information and the annuity transaction is not recommended; or
    - (d) A consumer decides to enter into an annuity transaction that is not based on a recommendation of the insurer or the producer.
  - (2) An insurer's issuance of an annuity subject to paragraph (1) shall be reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.
- G. A producer or, insurer where no insurance producer is involved, shall at the time of recommendation or sale:
  - (1) Make a written record of any recommendation and the grounds for the recommendation subject to this regulation;
  - (2) Orally, or in writing, describe to the consumer the basis or bases of the recommendation;
  - (3) Obtain a customer signed statement documenting a customer's refusal to provide the consumer profile information, if any; and
  - (4) Obtain a customer signed statement acknowledging that an annuity transaction is not recommended if a customer decides to enter into an annuity transaction that is not based on the producer's or insurer's recommendation.
- H.
  - (1) An insurer shall establish a supervision system that is reasonably designed to achieve the insurer's and its producers' compliance with this regulation, including, but not limited to, the following:

- (a) The insurer shall maintain reasonable procedures to inform its producers of the requirements of this regulation and shall incorporate the requirements of this regulation into relevant producer training manuals;
  - (b) The insurer shall establish standards for producer product training and shall maintain reasonable procedures to require its producers to comply with the requirements of section 7 of this regulation;
  - (c) The insurer shall provide product-specific training and training materials which explain all material features of its annuity products to its producers;
  - (d) The insurer shall maintain procedures for review of each recommendation prior to issuance of an annuity that are designed to ensure that there is a reasonable basis to determine that a recommendation is suitable. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including, but not limited to, physical review. Such an electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria;
  - (e) The insurer shall maintain reasonable procedures to detect recommendations that are not suitable. This may include, but is not limited to, confirmation of the consumer's consumer profile information, systematic customer surveys, interviews, confirmation letters and programs of internal monitoring. Nothing in this subparagraph prevents an insurer from complying with this subparagraph by applying sampling procedures, or by confirming the consumer profile information after issuance or delivery of the annuity; and
  - ~~(f) The insurer shall maintain reasonable procedures to assess, prior to or upon issuance or delivery of an annuity, whether a producer has provided to the consumer the information required to be provided under this section; and~~
  - (fg) The insurer shall annually provide a report to senior management, including to the senior manager responsible for audit functions, which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any.
- (2) (a) Nothing in this subsection restricts an insurer from contracting for performance of a function (including maintenance of procedures) required under paragraph (1). An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to section 8 of this regulation regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with subparagraph (b) of this paragraph.
- (b) An insurer's supervision system under paragraph (1) shall include supervision of contractual performance under this subsection. This includes, but is not limited to, the following:
- (i) Monitoring and, as appropriate, conducting audits to assure that the contracted function is properly performed; and
  - (ii) Annually obtaining a certification from a senior manager who has responsibility for the contracted function that the manager has a reasonable basis to represent, and does represent, that the function is properly performed.
- (3) An insurer is not required to include in its system of supervision a producer's recommendations to consumers of products other than the annuities offered by the insurer.

I. Neither a producer nor an insurer shall dissuade, or attempt to dissuade, a consumer from:

- (1) Truthfully responding to an insurer's request for confirmation of the consumer profile information;
  - (2) Filing a complaint; or
  - (3) Cooperating with the investigation of a complaint.
- J. (1) Sales made in compliance with FINRA rules pertaining to suitability and supervision of annuity transactions shall satisfy the requirements under this regulation. This subsection applies to FINRA broker-dealer sales of annuities if in connection with the sale of an annuity, the broker-dealer and the producer, who also is appropriately registered as a representative with FINRA, have complied with the business rules, controls and procedures at least as effective as those required under this regulation. However, nothing in this subsection shall limit the insurance commissioner's ability to investigate and enforce the provisions of this regulation.

**Drafting Note:** Non-compliance with FINRA requirements means that the broker-dealer transaction is subject to compliance with the suitability requirements of this regulation.

- (2) For paragraph (1) to apply, an insurer shall:
  - (a) Monitor the FINRA member broker-dealer using information collected in the normal course of an insurer's business; and
  - (b) Provide to the FINRA member broker-dealer information and reports that are reasonably appropriate to assist the FINRA member broker-dealer to maintain its supervision system.

~~*NOTE TO WORKING GROUP: THE WORKING GROUP DISCUSSED THE ITALICIZED LANGUAGE BELOW SUGGESTED BY NEW YORK DURING ITS OCTOBER INTERIM MEETING, BUT DEFERRED ADDING THE LANGUAGE AS AN OFFICIAL PROVISION IN THE DRAFT REVISIONS UNTIL IT COULD DISCUSS FURTHER.*~~

~~*K. Any requirement applicable to a producer under this section Part shall apply to every producer who has materially participated in the making of a recommendation and received compensation as a result of the sales transaction, regardless of whether the producer has had any direct contact with the consumer, provided that product wholesaling or product support based on generic client information, or the provision of education or marketing material, does not constitute participating in the making of a recommendation.*~~

## **Section 7. Producer Training**

- A. A producer shall not solicit the sale of an annuity product unless the producer has adequate knowledge of the product to recommend the annuity and the producer is in compliance with the insurer's standards for product training. A producer may rely on insurer-provided product-specific training standards and materials to comply with this subsection.
- B. (1) (a) A producer who engages in the sale of annuity products shall complete a one-time four (4) credit training course approved by the department of insurance and provided by the department of insurance-approved education provider.
- (b) Producers who hold a life insurance line of authority on the effective date of this regulation and who desire to sell annuities shall complete the requirements of this subsection within six (6) months after the effective date of this regulation. Individuals who obtain a life insurance line of authority on or after the effective date of this regulation may not engage in the sale of annuities until the annuity training course required under this subsection has been completed.
- (2) The minimum length of the training required under this subsection shall be sufficient to qualify for at least four (4) CE credits, but may be longer.
- (3) The training required under this subsection shall include information on the following topics:

- (a) The types of annuities and various classifications of annuities;
  - (b) Identification of the parties to an annuity;
  - (c) How product specific annuity contract features affect consumers;
  - (d) The application of income taxation of qualified and non-qualified annuities;
  - (e) The primary uses of annuities; and
  - (f) Appropriate standard of conduct, sales practices, replacement and disclosure requirements.
- (4) Providers of courses intended to comply with this subsection shall cover all topics listed in the prescribed outline and shall not present any marketing information or provide training on sales techniques or provide specific information about a particular insurer's products. Additional topics may be offered in conjunction with and in addition to the required outline.
- (5) A provider of an annuity training course intended to comply with this subsection shall register as a CE provider in this State and comply with the rules and guidelines applicable to producer continuing education courses as set forth in [insert reference to State law or regulations governing producer continuing education course approval].
- (6) Annuity training courses may be conducted and completed by classroom or self-study methods in accordance with [insert reference to State law or regulations governing producer continuing education course approval].
- (7) Providers of annuity training shall comply with the reporting requirements and shall issue certificates of completion in accordance with [insert reference to State law or regulations governing to producer continuing education course approval].
- (8) The satisfaction of the training requirements of another State that are substantially similar to the provisions of this subsection shall be deemed to satisfy the training requirements of this subsection in this State.
- (9) The satisfaction of the components of the training requirements of any course or courses with components substantially similar to the provisions of this subsection shall be deemed to satisfy the training requirements of this subsection in this state.
- (10) An insurer shall verify that a producer has completed the annuity training course required under this subsection before allowing the producer to sell an annuity product for that insurer. An insurer may satisfy its responsibility under this subsection by obtaining certificates of completion of the training course or obtaining reports provided by commissioner-sponsored database systems or vendors or from a reasonably reliable commercial database vendor that has a reporting arrangement with approved insurance education providers.

**Section 8. Compliance Mitigation; Penalties**

- A. An insurer is responsible for compliance with the requirements of this regulation applicable to the insurer and responsible for compliance by producers in connection with recommendations of the insurer's annuity products. If a violation occurs, either because of the action or inaction of the insurer or its producer, the commissioner may order:
- (1) An insurer to take reasonably appropriate corrective action for any consumer harmed by a failure to comply with this regulation by the insurer, an entity contracted to perform the insurer's supervisory duties or by the producer;
  - (2) A general agency, independent agency or the producer to take reasonably appropriate corrective action for any consumer harmed by the producer's violation of this regulation; and

(3) Appropriate penalties and sanctions.

- B. Any applicable penalty under [insert statutory citation] for a violation of this regulation may be reduced or eliminated [, according to a schedule adopted by the commissioner,] if corrective action for the consumer was taken promptly after a violation was discovered or the violation was not part of a pattern or practice.

**Drafting Note:** Subsection B above is intended to be consistent with the commissioner’s discretionary authority to determine the appropriate penalty for a violation of this regulation. The language of subsection B is not intended to require that a commissioner impose a penalty on an insurer for a single violation of this regulation if the commissioner has determined that such a penalty is not appropriate.

**Drafting Note:** A State that has authority to adopt a schedule of penalties may wish to include the words in brackets. In that case, “shall” should be substituted for “may” in the same sentence. States should consider inserting a reference to the NAIC Unfair Trade Practices Act or the State’s statute that authorizes the commissioner to impose penalties and fines.

## **Section 9. Recordkeeping**

- A. Insurers, general agents, independent agencies and producers shall maintain or be able to make available to the commissioner records of the information collected from the consumer, disclosures made to the consumer and other information used in making the recommendations that were the basis for insurance transactions for [insert number] years after the insurance transaction is completed by the insurer. An insurer is permitted, but shall not be required, to maintain documentation on behalf of a producer.

**Drafting Note:** States should review their current record retention laws and specify a time period that is consistent with those laws. For some States this time period may be five (5) years.

- B. Records required to be maintained by this regulation may be maintained in paper, photographic, micro-process, magnetic, mechanical or electronic media or by any process that accurately reproduces the actual document.

**Drafting Note:** This section may be unnecessary in States that have a comprehensive recordkeeping law or regulation.

## **Section 10. Effective Date**

The amendments to this regulation shall take effect [X] months after the date the regulation is adopted or on [insert date], whichever is later.

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