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The Honorable Doug Ommen
Chairman
Life Insurance and Annuities Committee
National Association of Insurance Commissioners
1100 Walnut Street, Suite 1500
Kansas City, MO 64106

Dear Commissioner Ommen:

On behalf of the Independent Insurance Agents and Brokers of America (IIABA), I write to provide our association's perspective on the draft revisions to the *Suitability in Annuity Transactions Model Regulation*. IIABA is the largest association of insurance producers in the United States and represents the industry constituency most impacted by this proposal, and we have great interest in and concern with particular elements of the draft. Some may mistakenly believe that IIABA members focus almost exclusively on property-casualty products, but the reality is that our agents and brokers are incredibly active in the life insurance and annuity marketplace. Although we strongly oppose key aspects of the current draft (e.g. Sections 6(A) and 6(C)(5)), we appreciate having the opportunity to comment on these important issues.

Initial Comments and Observations

IIABA is extremely troubled by certain proposed revisions to the *Suitability in Annuity Transactions Model Regulation*, and we urge the National Association of Insurance Commissioners (NAIC) to reassess the items addressed in this letter and to plot an alternative course forward. The draft amendments presented to the Life Insurance and Annuities Committee would dramatically and indiscriminately alter the regulatory framework that applies to annuity transactions, and it would do so without proper cause or justification. Our experience suggests that consumers are generally well-protected by the combination of strong regulatory oversight and robust industry competition that exists, and evidence suggests that examples of misconduct are rare. There are undoubtedly areas where the regulatory framework for annuities can be bolstered and enhanced, but there is no basis, need, or rationale for some elements of the draft (especially the standard of care provisions included in Section 6(A)). We share your commitment to protecting consumers and eliminating improper marketplace conduct, but the proposed revisions are excessive and unwarranted. If these amendments were enacted by public policymakers, they would cause needless disruption in the marketplace and produce a series of adverse consequences for consumers and the industry that have not been discussed by the NAIC.

The sweeping nature of this proposal is surprising because producers who sell annuities are already subject to an objective and rigorous standard of care and may only recommend products

that are suitable for a customer based on that person's needs, objectives, and financial situation. The suitability framework has been in place for a relatively short period of time, and it is a clear and robust standard that helps prevent problems from arising in the first place. Before a recommendation can be made, a producer must acquire and analyze important information about the client and determine which investments are suitable in light of those facts. In short, a strong regulatory regime with meaningful market conduct, supervisory, recordkeeping, and other elements already exists, and this suitability standard is working to protect consumers. There has been no indication or showing that this system is fatally flawed or deficient, yet the proposal before your committee would largely toss this framework aside and replace it with ambiguous, unclear, and unenforceable standards that do nothing to benefit consumers.

The most commonly offered justification for amending the existing model is that it should harmonize insurance producer requirements with those that may ultimately be established for investment advisers and broker-dealers by the U.S. Securities and Exchange Commission (SEC). As described in a drafting note added to the proposal by your committee in November, the NAIC supports "a harmonized standard of conduct and has a strong preference to remain consistent with FINRA rules in connection with a recommendation of variable annuities" (emphasis added). The focus and fixation on harmonization across very different financial sectors is perplexing, and we offer three comments and observations below:

- First, and for a wide range of reasons, we disagree with the notion that insurance law should simply mirror the rules and regulations established by securities regulators. These two financial sectors and the products they offer are inherently different, and we question the logic of simply applying investment advisor and broker-dealer regulations to insurance producers who do not operate in the investment arena. The NAIC and state officials have traditionally been adamant defenders of their authority and autonomy, and we urge insurance regulators not to feel compelled or obligated to take a particular action simply because the SEC has done so in a very different context.
- Second, if harmonization with the SEC's work is a goal, then the development of amendments to this model seems premature until the securities regulators complete their work.
- Third, even if harmonization is appropriate or warranted in those areas where insurance and securities regulators have concurrent jurisdiction (i.e. with regard to variable annuities), there is no rationale for further *extending* the SEC's investment-specific framework to other insurance products (i.e. fixed annuities). The drafting note indicates the NAIC's desire to achieve regulatory consistency "in connection with a recommendation of variable annuities," where there is shared responsibility, and any harmonization with or mirroring of SEC rules (especially those related to the legal standard of conduct that applies) should therefore be restricted to those particular products only.

The proposed amendments would have detrimental implications for consumers and the marketplace, and these adverse effects have never been fully examined by the drafters of the proposed amendments. As a result of the uncertainty associated with such an amorphous and subjective standard, higher compliance and insurance costs, and the obvious increase in liability exposure, some universe of insurance agencies will curtail or simply cease their annuities-related operations. The nebulous standard of care provisions will make the sale of an annuity a more cumbersome and expensive process, and it will force many producers to narrow their emphasis and product offerings. With less advisers serving the financial needs of the public, far fewer consumers will have the opportunity to access the variety of financial products and quality of personalized financial assistance available to affluent Americans. It is instructive to recall that

many producers were ceasing or curtailing certain activities following the promulgation of the U.S. Department of Labor's controversial Fiduciary Rule, and analogous results can be expected if states were to enact similarly vague standards in connection with the offer and sale of annuities.

The standards being considered by your committee are proposed amendments to an existing NAIC model regulation, and this implies the NAIC believes that such sweeping changes in law can and should be implemented unilaterally by state insurance regulators. The typical state insurance department does not possess the power to take such action, and any efforts to do so would likely constitute a usurpation of legislative authority and a violation of the doctrine of separation of powers. Altering the legal standard of care that insurance professionals owe to their customers is not an insignificant act, and this type of lawmaking and vast public policy change is reserved for legislatures. If the NAIC and individual regulators are able to act on their own in this manner, then it would suggest that there are no limitations on the ability of insurance departments to impose new requirements and alter existing law as they see fit. IIABA encourages the NAIC to recognize that such actions require legislative action and to advise its members accordingly.

The measure of success for any model law is the extent to which it is enacted by state legislatures, but the proposal before your committee faces an uncertain future if adopted by the NAIC in its current form. The ambiguous standard of care provisions will adversely affect consumers and those producers who offer annuity products, and their inclusion jeopardizes the chances that such a proposal will be enacted consistently and uniformly. Most leading associations that represent producers (including the American Bankers Association, the National Association of Health Underwriters, the National Association of Professional Insurance Agents, and IIABA) and other organizations will be compelled to oppose this controversial proposal and alert legislators to the inherent problems with establishing uncertain standards of care.

IIABA is not urging the NAIC to halt work on this initiative or to take no action. To the contrary, we believe the NAIC has the ability and opportunity to enhance its existing model regulation without including the unnecessary and abstract standard of care provision. The proposed amendments to the model also include a series of comprehensive disclosure requirements and a new mandate that producers make a written record of their recommendations and the grounds for those recommendations. These elements are significant, and, taken together, they would help eliminate any consumer confusion that may exist and enable regulators to more effectively investigate bad actors and take enforcement actions in those rare instances when wrongdoing occurs. These changes alone would bolster the model in powerful ways, and we urge your committee to move forward with these core components and to delete the nebulous and subjective standard provisions that serve as poison pills and undermine your efforts.

Comments on Key Provisions

Section 4(A) – Exemption for “Direct Response Solicitations

The model includes an unwarranted and complete exemption for “[d]irect response solicitations where there is no recommendation based on information collected from the consumer pursuant to this regulation.” IIABA questions the merits of this provision and urges the NAIC to remove it. Section 6(F)(1) already provides a limited exemption for instances in which no recommendation is made to a consumer, and there is no need for an additional exemption that applies only to certain marketplace competitors.

Recommendation – IIABA urges the NAIC to delete Section 4(A).

Section 6(A) – Standard of Care Provisions

IIABA is most concerned by and opposed to the standard of care provisions found in Section 6(A) of the proposal. This subsection would require a producer making a recommendation of an annuity to (1) “act in the interests of the consumer at the time the recommendation is made, without placing the producer’s ... interest ahead of the consumer’s interests” and (2) act “with reasonable diligence, care, skill, and prudence.” These amendments may seem innocuous to some, but they have significant implications.

Regulatory requirements should make clear what marketplace actions and conduct are permitted and prohibited, but Sections 6(A)(1) and (2)(a) do not achieve this result. The proposal employs standards that are inherently nebulous and subjective, and producers will need to guess and speculate about what is needed to comply. This is unacceptable in any statute or regulation, and producers must know what their obligations and responsibilities are and have guidance on how to conduct themselves. The failure of these provisions to identify the actions and compliance measures that are required is bad public policy and potentially the basis for a legal challenge.

The vague nature of Sections 6(A)(1) and (2)(a) also raises questions about how regulators will enforce these abstract standards and how they would make objective and consistent determinations about whether particular conduct violates the regulation. These provisions are unclear for producers who must comply with them, and they are equally so for those charged with enforcing them. In the absence of any discernable guidance or direction, they raise a variety of fairness, equal protection, and due process concerns and would provide regulators with boundless discretion to take enforcement actions. There are a myriad of legal and practical problems associated with these standards, and these implications have never been thoroughly considered by the drafters of this proposal. The “rules of the road” should be clear for producers and regulators alike, and we urge the NAIC to jettison these misguided standards and replace them with clear, objective, and straightforward mandates.

The establishment of these standards will not improve the experience of consumers or the recommendations made by producers, especially since they do not specify what new actions or tasks an agent would need to perform that are not routinely performed today. As IIABA has noted previously, imposing these types of vague requirements will result in regulatory uncertainty and unnecessary litigation. Determinations about what these standards actually mean and how they should be applied would vary dramatically, and they are likely to be interpreted in conflicting and inconsistent ways from state to state, court to court, and regulator to regulator. This lack of consistency and clarity is troubling, and it will open the door to second-guessing and retrospective scrutiny years after an initial recommendation is made. The adoption of these standards will increase the costs and legal exposure of agents without providing commensurate and meaningful benefit to consumers.

In addition, the construction of Section 6(A) is peculiar, and, regardless of whether more significant revisions are made, IIABA urges you to simplify and clarify this subsection. Section 6(A)(1) would require a producer making a recommendation of an annuity to “act in the interests of the consumer at the time the recommendation is made, without placing the producer’s ... interest ahead of the consumer’s interests.” The following paragraph then identifies three elements that must be met in order to comply with the standard set forth in paragraph (1), and one of these obligations is the requirement that a producer act “with reasonable diligence, care, skill, and prudence.” If the intention is for producers and others to satisfy one of the standards of care, then the proposal should simply say this and eliminate the unnecessary inclusion of a second standard.

IIABA believes these nebulous standards should be removed from the draft, but we also urge the NAIC to at least provide some clarity if either or both are retained. Producers will struggle to understand what is required of them if a standard of this nature is adopted, and incorporating some minimal guidelines and parameters would be extremely helpful. Specifically, if such a standard remains, the draft should be amended to expressly state that the newly added provisions (1) do not treat producers as fiduciaries, (2) do not require producers to identify and recommend only the “best” or “cheapest” products, and (3) do not impose continuing obligations or ongoing duties on producers after a recommended annuity is issued.

Recommendation – IIABA strongly urges the NAIC to delete Sections 6(A)(1) and 6(2)(a). If these provisions are retained, the draft should expressly state that the standards (1) do not treat producers as fiduciaries, (2) do not require producers to identify and recommend only the “best” or “cheapest” products, and (3) do not impose continuing obligations or ongoing duties on producers after a recommended annuity is issued.

Section 6(C)(1) – Disclosure of the Scope and Terms of the Relationship with the Consumer

As we have noted in this letter and in prior comments, IIABA believes any revisions to this model should be clearly crafted and provide greater clarity about the actions that are required to achieve compliance. Section 6(C)(1) would require the disclosure of “a description of the scope and terms of the relationship with the consumer and the role of the producer in the transaction,” but it is not clear to us what the drafters expect producers to disclose. We urge the committee to clarify what is intended and to perhaps offer sample disclosure statements that would satisfy this requirement.

Recommendation – IIABA urges the NAIC to review and clarify this disclosure requirement.

Section 6(C)(2) – Disclosure of Product “Limitations”

Section 6(C)(2) is another newly added consumer notice provision that would require the disclosure of any “limitations” a producer has in regard to (1) “[t]he types of products that the producer is authorized and licensed to recommend or sell,” and (2) “[w]hether only specific insurer company products or a limited range of annuity products may be offered.” This provision is very confusing in its current form, and it raises questions about its purpose, the marketplace problem it is intended to rectify, and how compliance could be achieved. Some of our observations and questions concerning this paragraph are noted below:

- What is it that the drafters hope to convey to a consumer as a result of this provision? Without knowing more about the underlying objectives of this requirement, it is difficult to offer thoughtful input or alternative text. If the goal is to require producers to disclose certain information about the types of annuity products that they are authorized to sell, then the provision should be revised to simply say as much.
- This paragraph requires disclosure of one’s “limitations,” but is it practical and meaningful to craft the provision in this way? What types of limitations would need to be disclosed? It is unlikely that any producer has access to every conceivable annuity product available in the marketplace, so every agent and broker has some limitations.
- It is also unclear what universe of products the notice requirement relates to. Would a producer be required to make disclosures about all of the insurance and non-insurance products that he/she is authorized to sell, or is this intended to apply only to annuity options that potentially respond to the needs and objectives of the consumer in that particular transaction? We certainly hope it is the latter, and it would be odd if the model required

producers to disclose that they offer crop insurance, surety bonds, health coverage, or other products that have nothing to do with the objectives and wishes of the customer.

- Section 6(C)(2)(b) seems intended to require consumer disclosure if a producer only offers the products from one insurer, but the provision should be revised to make this a straightforward requirement and not a disclosure of “limitations.” We are also unclear about what is intended by the use of the phrase “a limited range of annuity products.” Every producer offers only a limited range of products, and requiring agents to disclose this fact in connection with all transactions would not offer any discernable benefit to consumers.

Recommendation – IIABA urges the committee to review the public policy purpose and intended outcomes of this provision and to revise this provision accordingly.

Section 6(C)(5) – Disclosure of “Material Conflicts of Interest”

This paragraph requires producers to disclose “material conflicts of interest,” a term that is defined elsewhere to mean “a financial interest of the producer ... in the sale of an annuity that a reasonable person would expect to influence the impartiality of a recommendation.” IIABA opposes this provision because it does not clearly identify the information that must be disclosed and puts agents in the untenable position of trying to deduce what information is required by this paragraph. Other paragraphs of this subsection already require producers to make disclosures about their role and relationship to the consumer, the cash and non-cash compensation they expect to receive, and whether they only offer proprietary products, and it is unclear what additional information this paragraph is intended to address. If there are additional pieces of information that regulators believe should be disclosed to consumers (such as whether a producer has a material ownership interest in the insurer issuing the annuity contract), then the model should identify these items and specifically require their disclosure. This provision was added to the model without meaningful discussion and will result in confusion and inconsistent interpretations, and we urge the NAIC to reconsider its inclusion in its current form.

Recommendation – IIABA urges the NAIC to eliminate Section 6(C)(5) and to replace it, if appropriate, with explicit and objective disclosure requirements (e.g. a requirement that producers disclose any material ownership or other financial interests they have in the insurer issuing the annuity contract).

Conclusion

On behalf of independent insurance agents and brokers across the country, we sincerely thank you for the opportunity to submit these comments. We are happy to assist your further consideration of these issues in any way you and your colleagues deem appropriate. Please feel free to contact me at 202-302-1607 or via email at wes.bissett@iiaba.net if you have any questions or if we can assist you in any manner.

Very truly yours,



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