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Submitted electronically to [jmatthews@naic.org](mailto:jmatthews@naic.org)

Director Jillian Froment, Ohio Department of Insurance  
Chair, Annuity Suitability Working Group

c/o Jolie H. Matthews, Senior Health and Life Policy Counsel  
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Contact: Kim O'Brien, FACC Spokesperson  
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RE: ***Request for Comment on Best Interest Standard***

Dear Director Froment:

We appreciate you have reached out and requested feedback on the following question outlined in Ms. Matthews May 22, 2019 email:

If the model would require “best interest” as the appropriate standard of conduct, how should “best interest” be defined in order to provide an objective standard for compliance and regulatory oversight?

As you know from our [previously submitted comments](#), we oppose applying a security industry “best interest” standard to fixed annuities. We remain steadfast in our position the fixed annuity marketplace is appropriately and effectively regulated by the existing Suitability Model and the wide range of other laws governing annuity sales, annuity salespeople and insurance companies. We believe the best interest regulation, as drafted, will cause real damage by inviting second guessing and litigation, chasing away fixed agents, upsetting the independent agent distribution model, and stifling innovation and consumer choice in the marketplace.

With that said, we applaud you for asking a very important question, which is how to define “best interest” in a way that would provide an objective standard for compliance and oversight. Let us be clear that we believe best interest is an inherently subjective standard that is associated with fiduciary duty and even the SEC fails to provide any meaningful definition. Adopting such a standard in the fixed insurance industry, which does not have uniform regulation nor arbitration, compounds the subjective nature of any such rule which is why the NAIC should step back and reconsider its approach.



Still we are heartened the NAIC is asking how to make best interest into an objective standard, implying there is recognition that best interest is nebulous and will be impossible to satisfy or enforce without clearer definitions and procedures. This is a step in the right direction if regulators acknowledge the proposed rule suffers from lack of specificity and that meaningful direction must be built into the rule so producers and insurers can know the rules of the road and have confidence they are complying if they follow certain processes.

With that in mind, we submit that in order for insurance companies and producers to comply with, administer, and supervise a best interest regulation for insurance products, the suitability model must incorporate specific objective criteria as follows.

### **CORE GUIDEPOSTS**

- It must be made clear the regulation includes a safe harbor or equivalent protection such that producers and insurers will be assured the law will be satisfied by meeting objective criteria and not be subject to second guessing based on subjective fiduciary-like standards.
- Objective criteria for satisfying the rule must be uniform across all states, practical so producers can continue to offer appropriate options to clients, and predictable so contours of required conduct are known. Requiring producers and insurers to act in the interests of their clients and put client interests first is too nebulous and must be made actionable with specific criteria and procedures.

### **SPECIFIC RECOMMENDATIONS**

In accord with these core guideposts, we believe the regulation must include the following specific definitions and clarifications:

1. It must be made clear producers and insurers are “deemed to satisfy” the requirements of the regulation if they satisfy specified criteria. Merely saying “complies by”, as currently written, is insufficient and must be clarified to say and mean “deemed to satisfy” so there is greater certainty that meeting the specified criteria is determinative of compliance.
2. The requirement that producers and insurers act with “reasonable care, diligence, skill, and prudence” must be defined so it is clear what is expected of producers and insurers. It should be made explicit this is achieved by (i) obtaining the consumer profile information from the client, (ii) ensuring the product recommendation is suitable, (iii) providing truthful information and reasonable disclosure to the client concerning product features, and (iv) properly documenting the recommendation. We are mindful the SEC removed prudence from its so-called Care Obligation and the NAIC might consider a similar revision in Section 6A of the proposed model, but that would not obviate the need to provide the clarity sought here to ensure the remaining terms of “care”, “diligence”, and “skill” are given concrete meaning that can be satisfied with objective criteria.



3. The regulation should be explicit on the range of products the producer or insurer must consider and compare to meet the requirements of the regulation. Producers should only be expected and required to consider in their recommendation those products the producer is appointed to sell and actually has within his or her authority to offer clients.

It might be further clarified that any recommendation should include a determination by the producer that the product is consistent with the goals and objectives of the client, within the client's risk tolerance, and represents a reasonable alternative compared to non-insurance options such as CDs, stock, bonds, mutual funds, managed portfolios, etc.

If this approach is used, a reasonable alternative should be defined to mean the producer advised the client that such options exist and with the client determined the recommended annuity has the potential to provide reasonable benefits compared to those other options for that portion of the client's portfolio based on the consumer profile information and stated needs and objectives of the client.

4. It must be made clear that producers will be compared to other producers with similar licenses selling similar products with respect to standards of care, diligence, skill, and (if applicable) prudence. This might be premised on the duty of producers to be clear with the client what the producer is licensed and authorized to sell and whatever limitations may apply in terms of products and services offered by that producer. Provided such information is properly disclosed, producer conduct should be compared to similarly licensed producers, so it is unmistakable that producers will not be directly or indirectly compelled by this law to acquire securities licenses to satisfy the care standards contained within the regulation.
5. The disclosure requirements contained in the current proposal generally appear facially reasonable including relationship and role of the producer, limitations on product offerings and insurers represented, and sources and types of compensation. However, producers and insurers need more guidance on what specifically is contemplated and required to satisfy these disclosure obligations. To achieve this, the Working Group should work on and provide more specific criteria and consider providing a template as part of the model regulation. We previously proposed a Client Relationship Summary and attach it again for your reference. It might serve as a starting for such work.
6. The requirement for disclosure of non-cash compensation is unclear and needs further development to ensure it is workable and applied even handedly. It is notable the securities industry has developed highly detailed rules and regulations governing non-cash compensation in recognition such compensation takes many forms, is often incidental or *de minimus*, and is challenging to monitor. Additionally, there are types of non-cash compensation that are not known to a producer at time of recommendation and/or cannot be quantified at that moment in time. Requiring disclosure of non-cash compensation is laudable but greater specificity is needed on exactly what is expected under the regulation.



7. The requirement to disclose “any and all material conflicts of interest” is also vague and needs better definition recognizing in most cases producers have no other conflicts of interest relative to their clients beyond compensation. It must be spelled out what is contemplated so producers and insurers can know what is expected of them. Merely saying it is a financial interest that a reasonable person would expect to influence the impartiality of a recommendation leaves producers and insurers wide open for second guessing. While exact precision may not be possible, the rule should contain guidance. For example, while it may be clear that acting as a lawyer or accountant while selling annuities is a conflict, it is unclear whether conflicts could also include any incidental non-cash compensation even below the \$500 threshold, participation in long range incentive programs, ownership in public stock of the insurer, travel or trip expenses associated with education or training purposes, familial relationships to the client, or other matters.
8. The supervisory requirements should explicitly state that insurers, or agencies on their behalf, are only responsible for supervising their own products and compensation relative to independent producers and not responsible for supervising producers relative to any other company products or compensation that is or may be received by the producer. It is not practical for insurers and their independent marketing organizations to monitor and control the conduct of producers relative to competitor products and compensation without significant risk of transgressing anti-trust boundaries.

Insurers, or agencies on their behalf, should be permitted expressly to limit such supervision to their own products and compensation with the proviso that the insurer or agency has determined the producer conduct and recommendation otherwise satisfies the requirements of the regulation, the insurer or agency obtains explicit assurance from the producer that he or she has complied with the requirements of the regulation, and the insurer or agency has no reason to believe the producer has failed to comply with requirements of the regulation.

Let us emphasize that each of the eight points above is critical unto itself as an element in making the regulation more objective rather than largely subjective. In other words, we wish to stress each point above deserves the careful attention of the Working Group, and must be incorporated or addressed in some meaningful fashion, so the rule as a whole can be converted from merely aspirational fiat to a practical and workable regulation that producers and insurers could actually understand and implement and regulators could reasonably interpret and enforce. This will entail considerable work but we think it is critically necessary to fix this rule if it is to go forward.

We would like to make one last point which may seem a digression but which we believe directly relevant. And that is, this proposed model regulation should be recast as a model law rather than regulation. It is our belief no state legislature has given authority to insurance regulators to change the longstanding historical relationship between insurance agents and their clients. That relationship has always been based on full disclosure and honest dealing and, indeed, courts have routinely denied efforts to characterize that relationship as fiduciary or create other



standards beyond what exists in statute. Given this proposed regulation would alter that relationship in fundamental ways, irrespective of whether the word fiduciary or term best interest is used, it should require an act of the legislature. Our recommendations here, addressing how to make the rule more objective, would not obviate the need for legislative action to impose higher standards upon agents even if those standards could be realized through objective criteria and processes.

In closing, while we remain deeply skeptical there is any need to change the model suitability regulation, we salute the NAIC for taking up the question of how to make the proposed rule changes more objective. It's a critical question deserving careful attention. By replacing the current proposal's subjective requirements and replacing them with objective, actionable and predictable processes, as suggested in our letter, the new model would appropriately recognize the unique structure and benefits of independent insurance distribution and ensure a vibrant and healthy fixed annuity marketplace for consumers.

Respectfully submitted,

Dwight Carter, Chair, FACC Campaign

Attachment: Client Relationship Summary

## Client Relationship Summary For Insurance Licensed Agents

Date: \_\_\_\_\_

### INSURANCE AGENT/PRODUCER INFORMATION (“Me”, “I”, “My”)

First Name: \_\_\_\_\_ Last Name: \_\_\_\_\_

Firm Name: \_\_\_\_\_ Website: \_\_\_\_\_

Insurance License # \_\_\_\_\_

### CLIENT INFORMATION (“You”, “Your”)

First Name: \_\_\_\_\_ Last Name: \_\_\_\_\_

### INSURANCE AUTHORIZATION

I am licensed and authorized to sell life insurance including annuities in [State] in accordance with state laws. I offer the following products:

Fixed Index Annuity    Fixed Rate Annuity    Fixed Life Insurance    Other

### RELATIONSHIPS & SERVICES

I am an insurance agent with [xx] years of experience advising clients about insurance and annuity products. I strive to provide my clients with suitable annuity products and sound advice in meeting their financial goals. I am required by law to be trained in the benefits, features and fees of any annuity product I recommend, and I satisfy continuing education requirements to maintain my licensure. As an insurance agent, I am appointed with and represent various insurance companies. Those insurance companies do not restrict the insurance products I sell or recommend but the range of products I offer are limited to products available from those insurance companies. Any advice that I provide to you is incidental to the purchase of insurance, and because I am paid commission, I do not act as a disinterested adviser. I may recommend products for purchase but the ultimate decision to purchase or not to purchase is made by you. If you decide to purchase a product from me, you will be issued an annuity contract from the insurance company and I will continue working with you as long as I am agent of record. I am not a securities broker or investment adviser. You may wish to consider the advantages and disadvantages of working with other kinds of financial services professionals.

### OTHER SERVICES

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## **MY OBLIGATIONS TO YOU**

I will comply with state insurance laws and regulations in my interactions with you. I am obligated to treat you fairly and provide full and accurate information about any product that I recommend to you. I will only recommend an annuity that is suitable in meeting your needs and objectives based on information you have disclosed to me.

I will disclose any of my interests that may conflict with your interests including, but not limited to, my compensation for each sale. I am not a fiduciary and I am not subject to a best interest standard of care as those terms are defined by law. You are free to seek services of a fiduciary or financial services professional who may be subject to different or higher standards of care.

## **SUMMARY OF FEES & COSTS**

### **COMPENSATION**

The compensation an insurance company pays me when you purchase an annuity is called “commission.” This commission covers, in part, my cost of doing business and providing services to you. Typically, the commission amount will vary based on the type of annuity you purchase, the amount of premium you pay for the annuity, and the commission schedule of the insurance company.

You do not pay commission directly and instead all of your premium is applied to the annuity. Commission is one of many costs which the insurance company factors into the pricing of its products which also includes guaranteed and non-guaranteed benefits and other features offered under that annuity.

The insurance company may pay commission to other agents or third parties such as marketing organizations who assist in supporting the relationship between me and the insurance company. These third parties may pay me part of their commission. An insurance company or third party may offer additional incentives (called non-cash compensation) to me that are not based on the sale of an individual product, but rather based on my overall sales with the insurance company or third party. These may include, but are not limited to, entertainment, merchandise, gifts and prizes, travel expenses or meals and lodging, and reimbursement for marketing or advertising expenses.

Additional information about my compensation will be provided to you in a Notice of Producer Compensation at time of sale of each annuity.

### **OTHER FEE & COST INFORMATION**

Some annuities contain fees for certain features often offered as a rider and any such fees are disclosed during the sales process. Under law I cannot rebate commissions to ensure all clients who are similarly situated pay the same costs and receive the same benefits under an annuity product. There are other kinds of payment arrangements used by other financial professionals which may be based on assets under management or other factors not tied to product sales.

**COMPARISON TO OTHER PROVIDERS**

You may want to consider shopping and comparing products and services offered by me with products and services offered by other insurance producers and other types of financial professionals. Annuities have unique features that may be of interest to you but there are other options including securities and banking products that may be of interest to you. I will only recommend an annuity to you if I believe it meets your financial needs and goals.

**MATERIAL CONFLICTS OF INTEREST**

Below I have identified any material conflicts of interest that could affect my recommendations. If there are no material conflicts of interest, other than my compensation as described above, it says “none.” I want you to be aware of any material conflict of interest so you can evaluate the quality of my recommendation. Material conflicts of interest include such things as ownership interest in an insurer, receiving profits for certain products, participation in long term incentive programs offered by insurers, or payment in the form of non-cash compensation based on volume of sales production including prizes, entertainment, travel expenses, meals, or other items of value. My material conflicts of interest, if any, are listed below:

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**ADDITIONAL INFORMATION**

You may obtain further information about me and the topics covered here at [*website of producer or affiliated agency or insurer*].

You may verify my licensing authorization and my insurance company appointments and research any other concerns or questions you may have about me or applicable laws or regulations at [*state insurance department website and phone number*].

Upon application for purchase of an annuity from me, you will be given a Notice of Producer Compensation which will provide further details on my compensation and other relevant information about my practices.

**CERTIFICATION & ACKNOWLEDGEMENT**

I certify and acknowledge that I have and read and understand this Client Relationship Summary. I understand that I may seek products and services from other financial professionals at my discretion and am under no obligation to purchase an annuity or other insurance product from the agent named above. I understand that this document is not a contract and creates no contractual obligation between you and me or any other third party.

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Date