FREEDOM TO CHOOSE
Fixed Annuities
Fixed Annuity Consumer Choice Campaign

September 30, 2019

Submitted electronically to:
Jolie Matthews at jmatthews@naic.org
Jennifer McAdam at jmcadam@naic.org

TO:	Members of the Annuity Suitability Working Group Director Jillian Froment, Ohio Department of Insurance Chair, Annuity Suitability Working Group
FROM:	Kim O'Brien, FACC Spokesperson kim@fixedannuitychoice.com 414-332-9312
RE:	September 2019 Working Group Draft Comments & Redline

Dear Members of the Annuity Suitability Working Group:

The FACC Campaign appreciates the time and effort the Group has dedicated over the past 18 months and welcomes the opportunity to comment on the newest September Working Group Draft. While there are certain features of the proposal that are improved, we are generally disappointed with the latest proposal because it suffers from the same problems as prior drafts.

FACC's number one concern is that we believe best interest amounts to a fiduciary duty. We know the working group thinks there is something "more than suitability and less than fiduciary," but we think that defies common sense when best interest is the essential building block of fiduciary duty. Best interest will ultimately need to be interpreted by the courts and in the final analysis "best" will mean best. Any requirement that agents put their client's interest first – in a legal sense – is tantamount to a fiduciary duty which everyone seems to agree should not apply to insurance agents.

Our other paramount concern – as we have stated in previous comment letters – is that the rule is too subjective because it is built around an undefined term "best interest" which is a nebulous concept that insurance agent interests may not be placed ahead of client interests and lacks concrete details on what agents must do in order to comply. The lack of objectivity in critical areas of the regulation is troublesome because without that objectivity it will be very difficult for producers to comply, carriers to supervise, and regulators to enforce fairly and consistently.

Our biggest concerns are the following:

1. The best interest standard is nebulous and must be replaced with concrete requirements;
2. The "ordinary producer" standard, or something equivalent, must be reinstated so it is clear insurance agents will be held to standards applicable to their licensure rather than that of other professionals including even fiduciaries;
3. Supervision must be limited to a carrier's own agents, products, and compensation;

4. Disclosure needs greater clarity and uniformity in order to provide certainty to agents and reliable information for consumers;
5. Non-cash compensation regulations must be more fully developed (similar to what has been done by FINRA);
6. The SEC/FINRA safe harbor must be removed because it is unjustified and unfair; plus, for similar reasons, there is no justification for any safe harbor for individually solicited annuities; and,
7. Harkin implications have not been adequately reviewed and considered.

In regard to these concerns, we take some hope from the fact that the working group has asked for comments on how to make the rule more objective, that the working group acknowledged there are many issues needing to be addressed (i.e., the parking lot), and committee members have commented many times they would not know how to enforce this subjective rule.

However, it is concerning to us that this rule keeps moving along without the necessary deliberation and the kind of changes needed to address these significant issues. That is why we have consistently advocated that the proposal needs more time and the Working Group should not feel compelled to follow any prescribed or artificial schedule; the Working Group should take whatever time is necessary to ensure this rule will enhance rather than hinder an effective and competitive marketplace that works both for producers and consumers. The Working Group must put the priority on getting it right rather than just getting it done.

There are three process points we'd like to share at the outset. First, our abbreviated redline is not meant to be definitive and may be supplemented; there are many issues that cannot simply be "redlined" without more robust conversation and deliberation. Second, we want to be clear, while our comments are focused on some of the most significant and major issues, there are many other issues that are perhaps more subtle, but nonetheless need to be addressed. And last, but not least, while we hesitated about appending our previous comments and submissions, the reality is all the work that has been done to date and comments submitted are all intertwined and we don't want them to be lost because of the reset.

KEY ISSUES

1. **Preamble, Section 6 A. and Section 6 A. (1) (a) - Best Interest**

Best interest must be removed. The proposal's main lapse in attaining an objective and workable standard is that it is built around the undefined and vague term - best interest. Best interest involves a nebulous and indeterminate concept that agent interests may not be placed ahead of client interests. Without a concrete definition, agents are unclear on what they must do to comply; leaving regulators and lawyers to divine the producer's motives.

We oppose applying a security industry "best interest" standard to the sale of fixed annuities. We believe any best interest requirement 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.

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TO
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We have heard some regulators state that they are "okay" with a best interest regulation as long as it was defined and clear. Yet, the inherent challenge the current proposal faces is that it continues to use subjective best interest terminology with no definition or specific criteria by which to administer and enforce it.

Instead, we have submitted explicit language that states a producer may not allow compensation or any material conflict of interest to affect the evaluation of the consumer's financial situation, insurance needs and financial objectives, By adopting our recommendation, the Working Group accomplishes the intent of the regulation, achieves a more stringent behavior expectation of the producer than today's suitability requirement, and provides regulators more enforcement direction with less ambiguity.

The key feature of our proposal is that it avoids use of the term "best interest" and eliminates the highly subjective concept of putting client interest ahead of the agent's interest. However, it specifically seeks to achieve the true goal of this regulation – as we have heard it explained – by addressing concerns over the influence of compensation. We think this proposal helps bridge the gap between the idea that something more is needed beyond suitability and the desire by some to avoid creating a new untested legal standard, i.e., "best interest."

As you will see, our proposal modifies the rule's preamble and section 6.A.1 (a) to remove "best interest" terminology. Then – and this is the key - we define the care obligation so that it would obligate producers to perform their suitability analysis without being affected by compensation or material conflicts as they make their recommendation for the client. This is intended specifically so "best interest" can be removed and replaced with a more actionable and tangible requirement.

2. Section 6 A. (1) (b) Comparison to Like Professionals

The Working Group has removed any standard by which regulators will determine if an agent acted with requisite skill, care and diligence. It must be made clear that insurance agents are to be compared only to other insurance agents, as opposed to being compared to investment advisers or perhaps higher-level fiduciaries such as trust officers or ERISA managers. If the clarification is not expressed this rule is rendered even more subjective and approaches a kind of strict liability depending on how regulators (or courts) decide to enforce a best interest claim with ill-defined requirements. The standard that makes the most sense for making a compliance determination is comparison to a similarly licensed insurance professional; without an explicit standard of comparison the rule is open to other interpretations.

We remain baffled by those who say – in support of the rule – such a standard is not needed because "this is more art than science" and thus it would be difficult from a compliance standpoint to say whether other producers would or would not have made the same recommendation. They go even further, saying this is "more aligned with litigation than a regime based on supervision and regulation." We hope regulators fully absorb those statements and understand that saying the determination of whether a sale was in the best interest of a consumer can only be resolved through a battle of experts in a courtroom is in fact saying this rule is not conducive to regulation. If that's true and, ironically, we agree with them, then it makes our very point as to why this regulation should not move forward in its current form.

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3. Section 6. C. Supervision

Supervision by insurance companies of independent insurance professionals does not fit the paradigm of this regulation. Insurance companies do not and cannot provide comprehensive oversight of insurance agents who sell multiple products for multiple companies; insurance companies supervise sales of their own products but are not in a position to supervise agents relative to competitor products or the compensation derived there from. Insurance companies are prevented by anti-trust laws from controlling activities of independent agents involved in other carriers' products.

For these reasons, in order for the regulation to be administratively feasible, it needs to specify and acknowledge insurers will only be responsible for the supervision of their own agents, their own compensation offerings, and their own products.

To be clear, it is important that this provision go beyond the simple point that an insurer can only supervise its own producers and its own products. The real concern is that insurers cannot supervise the process by which producers compare products across multiple insurers or would be paid by those different insurers for sale of those different products. The rule must make clear that insurance companies are not required to supervise the manner in which agents are compensated or incentivized by other companies and make clear also that an insurance company cannot adjudicate between other carrier products compensation offerings in ways that could transgress anti-trust laws. We have included such language in our abbreviated redline.

4. Section 6 A. (2) Disclosure

The FACC has long upheld that creating tools for consumers that help them evaluate recommendations and the producers who provide them in concert with "rules of the road" that are clear to producers is the most effective way to create a virtuous marketplace for choosing fixed annuities. As early as June of 2018 we provided a concise redline of standards that supported enhanced disclosure designed to shed light on the producer's motivations, duties and obligations and enabling consumers to judge whether agent recommendations are unduly influenced by self-interest.

In addition, the FACC created a meaningful user-friendly disclosure document that empowers consumers and sensitizes producers to concerns over alignment of agent and consumer interests. We believe the proposed "Producer Relationship Summary" is too vague and does not adequately disclose the information consumers need to adequately determine if the relationship and/or the recommendation addresses their financial goals and needs. Clear and concise statements of the producer's relationships and services; a description of the type(s) of compensation the producer receives and what it means to the consumer; and, what other fees (e.g., rider) the consumer needs to consider must be incorporated to fully empower the consumer.

5. Section 6 A. (2) Non-Cash Compensation

This area needs much more clarification and guidance. FINRA has multiple rules and offers over twenty-two pages in a separate guidance memo on non-cash compensation. While, insurance regulation does not need to mirror FINRA requirements, it should devote the same serious and robust study to outline objective requirements and guidance.

Compensation related issues are particularly sensitive and deserve careful consideration beyond what is contained in the model proposal. Cash and noncash compensation issues are addressed in detail by FINRA and other regulatory bodies. The time possibly has come for NAIC to do something similar, so standards and protocols are established for the life insurance industry. Such a regulation, for example, could address issues of proper disclosure as well as exceptions for certain kinds of noncash compensation such as de minimus gifts, occasional meals and entertainment that do not influence product recommendations, and covering expenses for bona fide training events. Given the complexity and seriousness of these matters, such issues would best be addressed in a separate regulation.

6. Safe Harbors

The SEC/FINRA safe harbor is unwarranted and should be removed as it will result in there being winners and losers. It will tilt the playing field against fixed products and independent insurance-only agents who will be required to satisfy these new requirements while other agents are excused from them. There is no reason why variable agents should be exempt from these new insurance requirements when in fact variable agents comply with both insurance and securities laws all the time. The safe harbor for FINRA is nothing but a vestige from a different time when securities suitability was considered somehow superior but that is no longer the case. If there is a real conflict in insurance and securities laws, then address the real conflict, but giving securities agents a free pass is unfair and a real disservice to the fixed agents who will be forced to live with these new rules. To that end, Section 6. E. should be struck from the draft. No redline has been submitted to illustrate this point since it is a wholesale deletion.

Similarly, for comparable reasons, there is no justification for any safe harbor or exemptions for individually solicited annuities. As such, Section 4.B. should be revised to state:

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Contracts that are not individually solicited and are used to fund:

7. Impact on Harkin Amendment – Dodd Frank

As the Drafting Note states, Section 989J of the Dodd-Frank Act confirmed the exemption of certain annuities from the Securities Act of 1933 and confirmed state regulatory authority. The note considers “this regulation is a successor regulation that exceeds the requirements of the 2010 model regulation.” However, the FACC is concerned that this assumption has not been adequately researched and there has been no discussion on whether an NAIC model “in name only” but separate from Suitability would preserve Harkin protections. In addition, we have not seen any consideration of the 5-year clause in Harkin and the impact to products in states that fail to adopt this proposal.

OTHER ISSUES

In addition to the above issues we wish to comment as well on several other issues of importance. And, as noted above our abbreviated redline is not intended to be definitive. We will continue to participate constructively in this process and may provide additional redline language for consideration as these important issues are deliberated and developed.

License Clarification

Any rule must make it clear that all requirements can be satisfied without a securities license; i.e., insurance-only agents will not be compared to securities agents; insurance-only agents can gather investment information; and, insurance-only agents can perform analysis and provide advice without being deemed investment advisers.

Model Law versus Model Rule

This has not been adequately discussed or analyzed. The wholesale reconstruction of the fixed annuity distribution and marketplace warrants more consideration and study on the cost/benefit of this proposal and the need for legislative authority before adoption.

Section 6. (1) (a) Over Life of the Product

This new concept under the Care Obligation introduces even more ambiguity and subjectivity to the requirements by requiring the agent to consider issues of maturity, non-guaranteed elements, surrender schedule, etc. What is the intent of this language and how do we avoid future second guessing?

Timetable to Review the Customer's Profile Information

The working group also asked whether to include a time frame for a producer to review a consumer's consumer profile information. The FACC strongly opposed any such requirement. The customer profile information clearly identifies a time horizon for the consideration of and uses for an annuity. Section 5. Definitions of the Consumer Profile Information and Section 6.(1) The Care Obligation requires that the planning time horizon be obtained and considered when making a recommendation. Section 6. (2) (c) requires the disclosure of costs, benefits and features of the annuity. These may include the customer's right to make changes to their annuity. Therefore, any new review is unnecessary and excessively burdensome to the insurance producer and insurance company.

Harmonization

We are puzzled by the Working Group's attempt to "harmonize" a new insurance standard with the SEC's investment standard. The NAIC and state officials have traditionally been adamant about preserving their insurance authority and autonomy. In applying a "mirror" regulation that includes an undefined best interest standard to insurance products seems like it is abdicating that authority and may lead to a decision by the securities industry to absorb the oversight duties and enforcement obligations.

The FACC disagrees with idea that insurance law should mirror the rules and regulations established by securities regulators. We question the logic of applying investment advisor and broker-dealer regulations to insurance producers who do not operate in the investment marketplace. We continue to believe the securities industry and insurance industry are apples and oranges in important respects, most uniquely, the products they offer are inherently different and provide different financial solutions to consumers.

CONCLUSION

We hope that you will agree that the FACC have been constructive in our work with the Working Group. We especially tried to assist the Working Group in achieving its stated goal of making this rule more objective. In addition to our many detailed comment letters, we have frequently offered specific wording suggestions. This has all been in an effort to build specific criteria that producers can follow - and insurance companies may rely on to administer - to ensure consumers are provided recommendations that specifically address and enhance their financial goals.

While the Working Group has made progress, we believe there is much more work to be done. We believe such work while challenging will bring us closer to achieving objective and clear regulation that enhances consumer protection without disrupting independent producers and annuity distribution.

Thank you again for consideration of these comments and our abbreviated redline suggestions.

Respectfully submitted,

Kim O'Brien
FACC Campaign
Vice Chair Americans for Asset Protection