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NAIC A Committee

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**RE: NAIC Suitability in Annuity Transactions Model Regulation – 11/5/19 Exposure Draft**

Dear Members of the NAIC A Committee:

The Fixed Annuity Consumer Choice Campaign (FACC) appreciates the opportunity to comment on the November 5, 2019 draft of the Suitability in Annuity Transactions Model Regulation which was developed by the Annuity Suitability Working Group and forwarded to A Committee for further consideration. Overall we believe the draft regulation has made significant progress towards becoming a more objective and workable regulation though we believe further improvement is possible.

As many of you know, the primary interest of FACC is ensuring any revisions to the model regulation adopting a best interest standard will ultimately be workable for the independent distribution channel consisting of insurance agents, marketing organizations, and carriers who offer fixed annuities to American consumers. We believe this is essential to ensure consumers continue to have the widest array of options available for retirement savings services and products and also avoid unnecessary disruption in the financial services marketplace to the detriment of independent producers.

We commented extensively on prior drafts of this regulation as it has evolved over the past couple years and, while we still have reservations along the lines described in those prior comment letters, we appreciate the proposed regulation is improved and headed closer to adoption by the NAIC. In this letter we wish to offer targeted suggestions to clarify certain critical points for independent producers and also comment more generally on a few seemingly open issues. Most importantly, we wish to put forward our proposed clarifications for Section 6A which we believe will make the regulation more practical and palatable for independent distribution.

*Fixed Annuity Consumer Choice Campaign, or FACC, is an alliance of insurance agents, independent marketing organizations, insurers, and industry advocates seeking to protect the availability of fixed annuities by ensuring regulators work to align any new regulations with the fixed annuity independent agency system.*



## **PROPOSED CLARIFICATIONS**

FACC is asking the A Committee to consider and adopt certain clarifications to Section 6A which we believe reflect established intent but should be made explicit to avoid any uncertainty on matters of importance to independent distribution.

One point of clarification states agents would not need to obtain any securities license or other professional licensure merely to satisfy requirements of this regulation. The other point of clarification states that producers, who are obligated under this regulation to consider the types of products they are authorized and licensed to sell, correspondingly would be held to standards applicable to producers with similar authority and licensure. These revisions are reflected in the attached red-lined proposal for Section 6A.

FACC believes it is important to clarify agents do not need to obtain any securities license in order to comply with these new regulatory requirements given the broad scope of the requisite consumer profile and overall thrust of this regulation to harmonize with securities law. This clarification is essential to ensure consumers continue having access to all financial professionals and, specifically, to independent insurance professionals. Of course producers who actually engage in selling securities or giving investment advice would be required to get securities licensed which is also clarified in the proposal.

FACC also believes it is important producers know under this regulation they will be compared to other professionals with similar authority and licensure. In talking with members of the working group, FACC affirmed these clarifications are consistent with the intent of the rule, borne out as well by comments made during working group deliberations, but it was also recognized that explicit language would help remove any lingering uncertainty.

We are hopeful the A Committee will adopt these points of clarification so all independent producers can rest assured this indeed is the intent of the regulation and be assured this is how the regulation will be enforced. This will help preserve the strength of the marketplace as these new standards and requirements come into effect.

## **OTHER OUTSTANDING ISSUES**

FACC also wishes to submit comments on a couple other issues which we understand may still be open for further consideration. Our impression from the final meeting of the working group was that these issues would receive additional attention at A Committee.

### ***Safe Harbor***

We had raised questions with the working group about the rationale for any safe harbor which exempts securities brokers from requirements of the best interest regulation and now has been expanded to exempt other financial professionals including investment advisers and ERISA fiduciaries. We remain unclear why any safe harbor is needed, whether it will cause an unlevel playing field, and whether in the end it will create a loophole from important consumer protections. We think the A Committee should reconsider the premise underlying the safe harbor.



The exemption in the current suitability model regulation is a vestige from a different time period when suitability standards and supervisory procedures established by FINRA for brokers and their representatives were considered more advanced. Insurance suitability then was considered redundant relative to securities brokers and variable products. Today that no longer is the case as insurance regulation has caught up with and in some ways surpassed securities regulation. Today insurance regulators have established unique criteria for what is considered suitable with respect to annuity sales, what is considered in the best interest of consumers, and what is expected of insurers for supervision.

Certainly it is appropriate to address any conflicts with securities law. However, we are not aware there is any conflict or inconsistency as between the NAIC model and SEC Reg BI especially given the attention to harmonization. Absent any actual conflict, typically both regulatory regimes apply, and regulated parties routinely comply with overlapping regimes. The NAIC Model Regulation concerning advertisements reflects this approach saying “(i)n variable contracts and other registered products where disclosure requirements are established pursuant to federal regulation, this regulation shall be interpreted so as to eliminate conflict with federal regulation.”

It is important to consider also that the proposed NAIC model regulation contains consumer protections not found in Reg BI. A few examples are:

1. The proposed NAIC model regulation requires risk tolerance include consideration of a client’s willingness to accept NGEs.
2. The NAIC model regulation imposes a “substantially benefit” standard to justify any replacement.
3. The NAIC model regulation requires producers to provide a reasonable estimate of compensation upon request of the consumer.
4. The NAIC model regulation requires producers to provide a standardized Relationship Disclosure Form to consumers.

Extending the safe harbor beyond securities brokers to investment advisers seems even more questionable. The investment advisory business is not subject to the same supervisory requirements as the broker industry nor regulated by an organization like FINRA. Stretching the safe harbor yet further to transactions “regardless of whether the particular recommendation or sale is required to otherwise comply with such comparable standard” looks like a potentially sizeable loophole though we are unclear exactly what it means. Even calling this provision a “safe harbor” – a term not presently used in the model suitability regulation - seems rather sweeping in giving a large percentage of producers the prerogative to ignore the NAIC model regulation.

We think these matters deserve closer scrutiny and we are hopeful that the A Committee will reconsider the safe harbor given the potential for creating an unlevel playing field and potentially compromising the consumer protections afforded by the regulation.



### **Harkin Amendment**

We wish to express our concerns about the effect of any revisions to the NAIC model suitability regulation on the Harkin Amendment (“Harkin”), more formally known as Section 989J of the Dodd Frank Act. We think it is critical the NAIC account for implications of amending the model suitability regulation and only adopt amendments if there is a high degree of confidence the amendments will be adopted broadly by the states, thereby avoiding any diminution of protections afforded by Harkin.

Harkin was adopted by Congress to make clear that states regulate fixed products exclusively as long as those products are written out of the insurer’s general account, comply with nonforfeiture, and sold in compliance with the NAIC model suitability regulation. The Harkin provisions relating to compliance with the NAIC model suitability regulation are nuanced but contemplate that any change in the regulation must be adopted by states within five years in order to preserve the state’s exclusive jurisdiction over fixed products. If the NAIC adopts a successor model, a five-year clock begins anew, requiring states to adopt the model revisions or otherwise put the Harkin exemption at risk

The suitability working group never had a full public discussion about Harkin and instead referred the matter to the NAIC legal department. There seemed to be some question about whether the drafting note should characterize the revised regulation as a “successor” under Harkin but FACC believes that is inescapable regardless of what the drafting note says. Harkin refers to the “NAIC Suitability in Annuity Transactions Model Regulation (Model 275), and any successor thereto” so revisions to Model 275 *ipso facto* constitute a successor.

FACC believes (and always has) that Harkin issues might be avoided if the NAIC would extract any new provisions and move them to a separate regulation compatible with – but different from – the suitability regulation. However, at this stage, we presume that is not likely and so it is vital that NAIC leaders be mindful of potential ramifications of adopting a “successor” regulation. While 5 years may seem a long time, in some states these changes may require legislation, and in either case changes in law can sometimes hit unexpected roadblocks. Also there is no telling whether states will adopt the NAIC model as is or adopt permutations. These could all be factors in determining whether Harkin protections of state sovereignty over fixed products remain intact.

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In conclusion, subject to addressing the above concerns, FACC believes this latest exposure draft represents progress towards a workable regulation that enhances consumer protection while preserving choice and avoiding unnecessary disruption in the marketplace especially for independent producers. We will continue to monitor and comment as appropriate but FACC recognizes how far the proposal has come. We greatly appreciate the attention the Working Group members have given to our concerns and wish to acknowledge the leadership of A Committee Chair Ommen and Working Group Chair Froment in moving this initiative forward.

Sincerely,

A handwritten signature in black ink, appearing to read "Kim O'Brien", is positioned below the word "Sincerely,".

Kim O'Brien

**SUITABILITY IN ANNUITY TRANSACTIONS  
MODEL REGULATION**

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

- A. Best Interest Obligations. A producer, when making a recommendation of an annuity, shall act in the best interest of the consumer under the circumstances known at the time the recommendation is made, without placing the producer's or the insurer's financial interest ahead of the consumer's interest. A producer has acted in the best interest of the consumer if they have satisfied the following obligations regarding care, disclosure, conflict of interest and documentation:
- (1) (a) Care Obligation. The producer, in making a recommendation shall exercise reasonable diligence, care and skill to:
    - (i) Know the consumer's financial situation, insurance needs and financial objectives;
    - (ii) Understand the available recommendation options after making a reasonable inquiry into options available to the producer;
    - (iii) Have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives over the life of the product, as evaluated in light of the consumer profile information; and
    - (iv) Communicate the basis or bases of the recommendation.
  - (b) The requirements under subparagraph (a) of this paragraph include making reasonable efforts to obtain consumer profile information from the consumer prior to the recommendation of an annuity.
  - (c) The requirements under subparagraph (a) of this paragraph require a producer to consider the types of products the producer is authorized and licensed to recommend or sell that address the consumer's financial situation, insurance needs and financial objectives. This does not require analysis or consideration of any products outside the authority and

license of the producer or other possible alternative products or strategies available in the market at the time of the recommendation. [Producers shall be held to standards applicable to producers with similar authority and licensure.](#)

- (d) The requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation.
- (e) The consumer profile information, characteristics of the insurer, and product costs, rates, benefits and features are those factors generally relevant in making a determination whether an annuity effectively addresses the consumer's financial situation, insurance needs and financial objectives, but the level of importance of each factor under the care obligation of this paragraph may vary depending on the facts and circumstances of a particular case. However, each factor may not be considered in isolation.
- (f) The requirements under subparagraph (a) of this paragraph include having a reasonable basis to believe the consumer would benefit from certain features of the annuity, such as annuitization, death or living benefit or other insurance-related features.
- (g) The requirements under subparagraph (a) of this paragraph apply to the particular annuity as a whole and the underlying subaccounts to which funds are allocated at the time of purchase or exchange of an annuity, and riders and similar producer enhancements, if any.
- (h) The requirements under subparagraph (a) of this paragraph do not mean the annuity with the lowest one-time or multiple occurrence compensation structure shall necessarily be recommended.
- (i) The requirements under subparagraph (a) of this paragraph do not mean the producer has ongoing monitoring obligations under the care obligation under this paragraph, although such an obligation may be separately owed under the terms of a fiduciary, consulting, investment advising or financial planning agreement between the consumer and the producer.
- (j) In the case of an exchange or replacement of an annuity, the producer shall consider the whole transaction, which includes 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 would substantially benefit 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.
- (k) [Nothing in this regulation should be construed to require an insurance producer to obtain any license other than a producer license with the appropriate line of authority to sell, solicit, or negotiate insurance in this state, including but not limited to any securities license, in order to fulfill the duties and obligations contained in this regulation; provided the producer does not give advice or provide services that are otherwise subject to securities laws or engage in any other activity requiring other professional licenses.](#)