

At the State Level, Is a Fixed-Index Annuity a Security?

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The so-called Harkin Amendment to the Dodd-Frank Act was intended to keep fixed-index annuities outside the SEC's jurisdiction. But the issue remains unsettled on the state level. For example, an Illinois state court recently upheld a determination by that state's Securities Department that a fixed-index annuity is a security under Illinois law, again raising concerns about such products' regulatory treatment. In April, the Illinois Securities Department found that Richard Lee Van Dyke, an insurance producer and registered investment adviser representative, advised clients to surrender existing fixed-index annuities to purchase new fixed-index annuities, transactions the Department found unsuitable and not in the clients' best interests. The Department also determined that the fixed-index annuities, while exempt from registration with the Department, were securities subject to the Illinois Securities Act. Van Dyke challenged this order in circuit court, arguing that the fixed-index annuities were insurance contracts properly regulated by the Department of Insurance and that the Securities Department lacked jurisdiction to regulate his activities regarding those products. In December, in *Van Dyke v. White*, the court upheld all of the Department's determinations. The *Van Dyke* decision is consistent with a prior ruling, *In re Senior Financial Strategies*, wherein the court upheld a 2012 determination by the Department that a fixed-index annuity was subject to state security law. **The court did not engage in any substantive analysis of the issue in either case, so it is difficult to determine whether all fixed-index annuities will be treated as securities by Illinois or, if only a subset, how such a subset can be identified.** Van Dyke filed a notice of appeal, raising hopes that an appellate court will have the opportunity to clarify the law on this topic.

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