CARLTON FIELDS

Expect Focus Life Insurance, December 2017

Did Santa Give the Insurance Industry a Lump of Coal or a Diamond in the Rough?

FINANCIAL SERVICES REGULATORY | LIFE, ANNUITY, AND RETIREMENT SOLUTIONS | SECURITIES & INVESTMENT COMPANIES | DECEMBER 29, 2017


Ann Young Black


Jamie Bigayer

The Proposed Suitability and Best Interest Standard of Conduct in Annuity Transactions Model Regulation
As reported in our November 28 client alert, the National Association of Insurance Commissioners' (NAIC) Annuity Suitability Working Group (Suitability WG) circulated the proposed *Suitability and Best Interest Standard of Conduct in Annuity Transactions Model Regulation* (Suitability and Best Interest Model). At the 2017 Fall National Meeting, the Suitability WG heard initial "comments, including concerns" on the Suitability and Best Interest Model from state insurance regulators, consumers, insurers, agents and brokers. The Suitability WG also exposed the Suitability and Best Interest Model for a public comment period ending January 22, 2018.

The Suitability and Best Interest Model could be the gem that insurers and producers are wishing for this holiday season as it is intended to create a state based best interest standard of care that is harmonized with the Department of Labor's rules for fiduciary investment advice. However, as drafted the Suitability and Best Interest Model includes provisions that, if adopted, would raise various interpretative and practical issues giving the industry a lump of coal instead.

In general, the proposed Suitability and Best Interest Model contains inclusions that:

- Broaden the scope and arguably require insurers to determine if an annuity "is reasonable prior to issuance," even if no recommendation is made unless the transaction is exempted under Section 4.
- Include consideration of "changes in nonguaranteed elements in an annuity contract" as part of the "suitability information" that must be considered in making an annuity purchase recommendation.
- Impose additional duties for recommended annuity transactions, including requiring that the recommendation be in the consumer's best interest.

The proposed Suitability and Best Interest Model revisions define "best interest" as "acting with reasonable diligence, care, skill and prudence in a manner that puts the interest of the consumer first and foremost." It also makes clear that best interest does not require a recommendation of "the least expensive annuity product, or the annuity product with the highest stated interest rate or income payout rate, available in the marketplace at the time of the annuity transaction … or the single 'best' annuity product available in the marketplace at the time of the annuity transaction." [Put into a call-out]

- Require additional disclosures to consumers in making the annuity purchase recommendation, including disclosure of cash compensation if it exceeds 3 percent, whether by commission or fee, and disclosure of non-cash compensation if it exceeds $100 per producer per year.
- Expand the required producer training to include financial exploitation of seniors and other vulnerable adults.

Some of the interpretive and practical issues arising from the proposed Suitability and Best Interest Model are discussed in our November 28 client alert.

The summary of the Suitability WG's meeting reflects an acknowledgement of the various stakeholders' concerns. By providing a charitable comment period, the Suitability WG also appears to be willing to entertain meaningful comments and discussion on ways to facet the Suitability and Best Interest Model. There appears to be an opportunity for the Suitability WG and industry to work together and create a sparkling standard of conduct.