



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

7/19/2022 2:08:56 PM

Office of West Virginia
Secretary Of State

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-
MAKING REVIEW COMMITTEE**

AGENCY: Insurance Commission TITLE-SERIES: 114-11B
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No
RULE NAME: 114-11B Suitability in Annuity Transactions

PRIMARY CONTACT

NAME: Erin K Hunter
ADDRESS: 900 Pennsylvania Ave 9th Floor
Charleston, WV 25302
EMAIL: erin.k.hunter@wv.gov
PHONE NUMBER: 304-414-8487

CITE STATUTORY AUTHORITY: W.Va. Code 33-2-10

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

W.Va. Code 33-2-10 provides that the Insurance Commissioner is authorized to promulgate and adopt rules relating to insurance as are necessary to discharge his or her duties and exercise his or her powers and to effectuate the provisions of Chapter 33 of the West Virginia Code to protect and safeguard the interests of policyholders and the public of this state.

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? No

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/2/2022

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/5/2022

COMMENTS RECEIVED: Yes

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

N/A.

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

The changes to this rule are based upon the National Association of Insurance Commissioners (NAIC) Suitability in Annuity Transactions Model Regulation #275, as amended in the 1st quarter of 2020. The existing version of this rule was based upon the 2010 NAIC model Regulation #275. Changes include additional definitions and amendments to existing definitions, including the addition of definitions for cash compensation, non-cash compensation, consumer profile information, intermediary, material conflict of interest, non-guaranteed elements, and SEC. The scope is also expanded to provide that nothing in the rule shall be construed to create or imply a private cause of action for a violation of the rule, subject a producer to civil liability under the best interest standard of care outlined in section 5 of this rule or under standards governing the conduct of a fiduciary or a fiduciary relationship. Changes also include the repeal of the existing duty standard for producers (agents) in favor of a new best interest model standard for the sale of annuities products. The best interest standard includes care obligations, disclosure obligations, conflict of interest obligations, standards for transactions not based upon recommendations, and a supervision system for insurers. There are also updates to the required training for producers (agents) to sale annuities, compliance mitigation and enforcement, and enhanced recordkeeping requirements for oral disclosures to consumers.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

The NAIC revised its Model Regulation #275 in response to the U.S. Securities and Exchange Commissions (SEC) Regulation Best Interest rule, which was finalized in June 2019. The final SEC rule established a consumer best interest standard of conduct for broker-dealers in regard to variable annuities. The 2020 NAIC Model Regulation #275 also contains a compatible best interest standard that requires all recommendations by insurance agents and carriers to be in the best interests of the consumer and that consideration of the consumers interest must always be placed ahead of any financial interest that the agent or carrier may have in the transaction.

Also, Section 989J of the Harkin amendment of the Dodd-Frank Act confirms states authority to regulate the sale of fixed and fixed indexed annuities and further provides an exemption from federal securities regulation when certain conditions are met, including when a state in which the annuity contract is issued or the state in which the insurer issuing the annuity contract is domiciled has adopted requirements that substantially meet or exceed the NAICs Model Regulation #275 and any successor modification to Model Regulation #275 within five (5) years of being adopted by the NAIC. As such, to continue to maintain the exemption from federal securities regulation for fixed and fixed indexed annuities, states must adopt the 2020 version of Model Regulation #275 by February 2025. At present, 21 states have fully adopted the 2020 amendments to NAIC Model Regulation #275, and nine (9) states have rules or legislation pending to adopt the amendments to the model.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

None know.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

None known.

C. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

None known.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2022 Increase/Decrease (use "-")	2023 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			

2. Estimated Total Revenues

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

N/A.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Anoop Bhasin -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 114
LEGISLATIVE RULE
OFFICES OF THE INSURANCE COMMISSIONER

SERIES 11B
SUITABILITY IN ANNUITY TRANSACTIONS

Section.

- 114-11B-1. General.
- 114-11B-2. Scope.
- 114-11B-3. Exemptions.
- 114-11B-4. Definitions.
- 114-11B-5. Duties of Insurers and ~~Insurance~~ Producers.
- 114-11B-6. ~~Insurance~~ Producer Training.
- 114-11B-7. Compliance Mitigation; Penalties; Enforcement.
- 114-11B-8. Recordkeeping.

Appendix A. Insurance Agent (Producer) Disclosure for Annuities.

Appendix B. Consumer Refusal to Provide Information.

Appendix C. Consumer Decision to Purchase an Annuity Not Based on a Recommendation.

TITLE 114
LEGISLATIVE RULE
OFFICES OF THE INSURANCE COMMISSIONER

SERIES 11B
SUITABILITY IN ANNUITY TRANSACTIONS

§114-11B-1. General.

1.1. Purpose. -- The purpose of this rule is to require producers, as defined in this rule, to act in the best interest of the consumer when making a recommendation of an annuity and to require insurers to establish and maintain a system to supervise recommendations and to set forth standards and procedures for recommendations to consumers that result in transactions involving annuity products so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately effectively addressed. This rule is based on the National Association of Insurance Commissioners' "Suitability in Annuity Transactions Model Regulation" (Model 275), as amended in the 1st quarter of 2010 2020.

~~1.2. Nothing in this rule creates or implies a private cause of action for a violation of this rule.~~

~~1.3.~~ 1.2. Authority. -- W. Va. Code §§33-2-10 and 33-11-6.

~~1.4.~~ 1.3. Filing Date. -- May 10, 2011.

~~1.5.~~ 1.4. Effective Date. -- July 1, 2011.

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect on August 1, 2028.

§114-11B-2. Scope.

This rule applies to any ~~recommendation to purchase, exchange or replace an annuity made to a consumer by an insurance producer, or an insurer where no producer is involved, that results in the purchase, exchange or replacement recommended~~ sale or recommendation of an annuity. Nothing in this rule shall be construed to create or imply a private cause of action for a violation of this rule or to subject a producer to civil liability under the best interest standard of care outlined in section 5 of this rule or under standards governing the conduct of a fiduciary or a fiduciary relationship.

§114-11B-3. Exemptions.

Unless otherwise specifically included, this rule does not apply to transactions involving:

3.1. Direct response solicitations where there is no recommendation based on information collected from the consumer pursuant to this rule;

3.2. Contracts used to fund:

~~3.2.a.~~ 3.2.1. An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA), 29 U.S.C. Section 1001 *et seq.* as amended;

~~3.2.b.~~ 3.2.2. A plan described by Sections 401(a), 401(k), 403(b), 408(k) or 408(p) of the Internal Revenue Code (IRC), as amended, if established or maintained by an employer;

~~3.2.e.~~ 3.2.3. A government or church plan defined in Section 414 of the IRC, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under Section 457 of the IRC; or

~~3.2.d.~~ 3.2.4. A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor;

~~3.2.e.~~ 3.3. Settlements or assumptions of liabilities associated with personal injury litigation or any dispute or claim resolution process; or

~~3.2.f.~~ 3.4. Formal prepaid funeral contracts.

§114-11B-4. Definitions.

4.1. “Annuity” ~~includes a fixed annuity or variable~~ means an annuity that is an insurance product under state law which is individually solicited, whether the product is classified as an individual or group annuity.

4.2. “Cash compensation” means any discount, concession, fee, service fee, commission, sales charge, loan, override or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary or directly from the consumer.

4.3. “Commissioner” means the Insurance Commissioner of West Virginia.

4.4. “Consumer profile information” means information that is reasonably appropriate to determine whether a recommendation addresses the consumer’s financial situation, insurance needs and financial objectives, including, at a minimum, the following:

4.4.1. Age;

4.4.2. Annual income;

4.4.3. Financial situation and needs, including debts and other obligations;

4.4.4. Financial experience;

4.4.5. Insurance needs;

4.4.6. Financial objectives;

4.4.7. Intended use of the annuity;

4.4.8. Financial time horizon;

4.4.9. Existing assets or financial products, including investment, annuity and insurance holdings;

4.4.10. Liquidity needs;

4.4.11. Liquid net worth;

4.4.12. Risk tolerance including, but not limited to, willingness to accept non-guaranteed elements in the annuity;

4.4.13. Financial resources used to fund the annuity; and

4.4.14. Tax status.

~~4.2.~~ 4.5. “Continuing education credit” or “CE credit” means one continuing education credit from a course of instruction on a Commissioner-approved subject, taught by a continuing education provider registered with and approved by the Commissioner in accordance with W. Va. Code §33-12-8 and W. Va. Code of State Rules §114-42-1 *et seq.*

~~4.3.~~ 4.6. “Continuing education provider” or “CE provider” means an individual or entity that is approved to offer continuing education courses pursuant to W. Va. Code §33-12-8 and W. Va. Code of State Rules §114-42-1 *et seq.*

~~4.4.~~ 4.7. “FINRA” means the Financial Industry Regulatory Authority or a succeeding agency.

~~4.5.~~ 4.8. “Insurer” means a company required to be licensed under the laws of this state to provide insurance products, including annuities.

4.9. “Intermediary” means an entity contracted directly with an insurer or with another entity contracted with an insurer to facilitate the sale of the insurer’s annuities by producers.

4.10. “Material conflict of interest” means a financial interest of the producer in the sale of an annuity that a reasonable person would expect to influence the impartiality of a recommendation. “Material conflict of interest” does not include cash compensation or non-cash compensation.

4.11. “Non-cash compensation” means any form of compensation that is not cash compensation, including, but not limited to, health insurance, office rent, office support and retirement benefits.

4.12. “Non-guaranteed elements” means the premiums, credited interest rates (including any bonus), benefits, values, dividends, non-interest based credits, charges or elements of formulas used to determine any of these, that are subject to company discretion and are not guaranteed at issue. An element is considered non-guaranteed if any of the underlying non-guaranteed elements are used in its calculation.

~~4.6.~~ 4.13. “Insurance producer” “Producer” means a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities. For purposes of this rule, “producer” includes an insurer where no producer is involved.

~~4.7.~~ 4.14. “Recommendation” means advice provided by an insurance producer, or an insurer where no producer is involved, a producer to an individual consumer that results was intended to result or does result in a purchase, or an exchange or a replacement of an annuity in accordance with that advice. “Recommendation” does not include general communication to the public, generalized customer services assistance or administrative support, general educational information and tools, prospectuses, or other product and sales material.

~~4.8.~~ 4.15. “Replacement” means a transaction in which a new policy or contract annuity is to be purchased, and it is known or should be known to the proposing producer, or to the proposing insurer if there is no producer whether or not a producer is involved, that by reason of the transaction, an existing policy or contract annuity or other insurance policy has been or is to be any of the following:

~~4.8.a. 4.15.1.~~ Lapsed, forfeited, surrendered or partially surrendered, assigned to the replacing insurer or otherwise terminated;

~~4.8.b. 4.15.2.~~ Converted to reduced paid-up insurance, continued as extended term insurance, or otherwise reduced in value by the use of nonforfeiture benefits or other policy values;

~~4.8.c. 4.15.3.~~ Amended so as to effect either a reduction in benefits or in the term for which coverage would otherwise remain in force or for which benefits would be paid;

~~4.8.d. 4.15.4.~~ Reissued with any reduction in cash value; or

~~4.8.e. 4.15.5.~~ Used in a financed purchase.

~~4.9. “Suitability information” means information that is reasonably appropriate to determine the suitability of a recommendation, including the following:~~

~~4.9.a. Age;~~

~~4.9.b. Annual income;~~

~~4.9.c. Financial situation and needs, including the financial resources used for the funding of the annuity;~~

~~4.9.d. Financial experience;~~

~~4.9.e. Financial objectives;~~

~~4.9.f. Intended use of the annuity;~~

~~4.9.g. Financial time horizon;~~

~~4.9.h. Existing assets, including investment and life insurance holdings;~~

~~4.9.i. Liquidity needs;~~

~~4.9.j. Liquid net worth;~~

~~4.9.k. Risk tolerance; and~~

~~4.9.l. Tax status.~~

4.16. “SEC” means the United States Securities and Exchange Commission.

§114-11B-5. Duties of Insurers and Insurance Producers.

~~5.1. In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the insurance producer, or the insurer where no producer is involved, must have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to his or her investments and other insurance products and his or her financial situation and needs, including the consumer’s suitability information, and that there is a reasonable basis to believe all of the following:~~

~~5.1.a. The consumer has been reasonably informed of various features of the annuity, such as the potential surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, insurance and investment components and market risk. The requirements of this section are intended to supplement and not replace the disclosure requirements found in W. Va. Code of State Rules §114-11E-1 et. seq.;~~

~~5.1.b. The consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization or death or living benefits;~~

~~5.1.c. The particular annuity as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or exchange of the annuity, and riders and similar product enhancements, if any are suitable (and in the case of an exchange or replacement, the transaction as a whole is suitable) for the particular consumer based on his or her suitability information; and~~

~~5.1.d. In the case of an exchange or replacement of an annuity, the exchange or replacement is suitable including taking into consideration whether:~~

~~5.1.d.1. 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;~~

~~5.1.d.2. The consumer would benefit from product enhancements and improvements; and~~

~~5.1.d.3. The consumer has had another annuity exchange or replacement and in particular, an exchange or replacement within the preceding 36 months.~~

~~5.2. Prior to the execution of a purchase, exchange or replacement of an annuity resulting from a recommendation, an insurance producer, or an insurer where no producer is involved, shall make reasonable efforts to obtain the consumer's suitability information.~~

~~5.3. Except as permitted under subsection 5.4 of this rule, an insurer shall not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity is suitable based on the consumer's suitability information.~~

~~5.4.~~

~~5.4.a. Except as provided under subdivision b of this subsection, neither an insurance producer, nor an insurer where no producer is involved, has any obligation to a consumer under subsections 5.1 or 5.3 of this section if:~~

~~5.4.a.1. No recommendation is made;~~

~~5.4.a.2. A recommendation was made and was later found to have been prepared based on inaccurate material information provided by the consumer;~~

~~5.4.a.3. A consumer refuses to provide relevant suitability information and the annuity transaction is not recommended; or~~

~~5.4.a.4. A consumer decides to enter into an annuity transaction that is not based on a recommendation of the insurer or the insurance producer.~~

~~5.4.b. An insurer's issuance of an annuity subject to subdivision a of this subsection shall be reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.~~

~~5.5. An insurance producer or, where no insurance producer is involved, the responsible insurer representative shall at the time of sale:~~

~~5.5.a. Make a record of any recommendation subject to subsection 5.1 of this rule;~~

~~5.5.b. Obtain a customer signed statement documenting a customer's refusal to provide suitability information, if any; and~~

~~5.5.c. Obtain a customer signed statement acknowledging that an annuity transaction is not recommended if a customer decides to enter into an annuity transaction that is not based on the insurance producer's or insurer's recommendation.~~

~~5.6.~~

~~5.6.a. An insurer shall establish a supervision system that is reasonably designed to achieve the insurer's and its insurance producers' compliance with this rule, including at a minimum, but not limited to, the following:~~

~~5.6.a.1. The insurer shall maintain reasonable procedures to inform its insurance producers of the requirements of this rule and shall incorporate the requirements of this regulation into relevant insurance producer training manuals;~~

~~5.6.a.2. The insurer shall establish standards for insurance producer product training and shall maintain reasonable procedures to require its insurance producers to comply with the requirements of section 6 of this rule;~~

~~5.6.a.3. The insurer shall provide product specific training and training materials which explain all material features of its annuity products to its insurance producers;~~

~~5.6.a.4. The insurer shall maintain procedures for review of each recommendation prior to issuance of an annuity that are designed to ensure that there is a reasonable basis to determine that a recommendation is suitable. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including, but not limited to, physical review. Such an electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria;~~

~~5.6.a.5. The insurer shall maintain reasonable procedures to detect recommendations that are not suitable. This may include, but is not limited to, confirmation of consumer suitability information, systematic customer surveys, interviews, confirmation letters and programs of internal monitoring. Nothing in this paragraph prevents an insurer from complying with this paragraph by applying sampling procedures, or by confirming suitability information after issuance or delivery of the annuity; and~~

~~5.6.a.6. The insurer shall annually provide a report to senior management, including to the senior manager responsible for audit functions, which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any.~~

~~5.6.b.~~

~~5.6.b.1. Nothing in this subsection restricts an insurer from contracting for performance of a function (including maintenance of procedures) required under subdivision a of this subsection. An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to section 7 of this rule regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with paragraph 2 of this subdivision.~~

~~5.6.b.2. An insurer's supervision system under subdivision a of this subsection shall include supervision of contractual performance under this subsection. This includes, but is not limited to, the following:~~

~~5.6.b.2.A. Monitoring and, as appropriate, conducting audits to assure that the contracted function is properly performed; and~~

~~5.6.b.2.B. Annually obtaining a certification from a senior manager who has responsibility for the contracted function that the manager has a reasonable basis to represent, and does represent, that the function is properly performed.~~

~~5.6.e. An insurer is not required to include in its system of supervision an insurance producer's recommendations of products other than the annuities offered by the insurer.~~

~~5.7. An insurance producer shall not dissuade, or attempt to dissuade, a consumer from:~~

~~5.7.a. Truthfully responding to an insurer's request for confirmation of suitability information;~~

~~5.7.b. Filing a complaint; or~~

~~5.7.c. Cooperating with the investigation of a complaint.~~

~~5.8.~~

~~5.8.a. Sales made in compliance with the FINRA requirements pertaining to suitability and the supervision of annuity transactions satisfies the requirements of this regulation. This subsection applies to FINRA broker-dealer sales of variable annuities and fixed annuities if the suitability and supervision is similar to those applied to variable annuity sales. However, nothing in this subsection limits the Insurance Commissioner's ability to enforce (including investigations) the provisions of this rule.~~

~~5.8.b. For subdivision a of this subsection to apply, an insurer shall:~~

~~5.8.b.1. Monitor the FINRA member broker-dealer using information collected in the normal course of an insurer's business; and~~

~~5.8.b.2. Provide the FINRA member broker-dealer information and reports that are reasonably appropriate to assist the FINRA member broker-dealer to maintain its supervision system.~~

5.1. 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:

5.1.1. Care obligation.

5.1.1.a. The producer, in making a recommendation, shall exercise reasonable diligence, care and skill to:

5.1.1.a.1. Know the consumer's financial situation, insurance needs and financial objectives;

5.1.1.a.2. Understand the available recommendation options after making a reasonable inquiry into options available to the producer;

5.1.1.a.3. 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

5.1.1.a.4. Communicate the basis or bases of the recommendation.

5.1.1.b. The requirements under subdivision 5.1.1.a. of this rule include making reasonable efforts to obtain consumer profile information from the consumer prior to the recommendation of an annuity.

5.1.1.c. The requirements under subdivision 5.1.1.a. of this rule 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.

5.1.1.d. The requirements under subsection 5.1.1. of this rule do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this rule.

5.1.1.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.

5.1.1.f. The requirements under subdivision 5.1.1.a. of this rule 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.

5.1.1.g. The requirements under subdivision 5.1.1.a. of this rule 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 product enhancements, if any.

5.1.1.h. The requirements under subdivision 5.1.1.a. of this rule do not mean the annuity with the lowest one-time or multiple occurrence compensation structure shall necessarily be recommended.

5.1.1.i. The requirements under subdivision 5.1.1.a. of this rule do not mean the producer has ongoing monitoring obligations under the care obligation, 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.

5.1.1.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:

5.1.1.j.1. 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;

5.1.1.j.2. The replacing product would substantially benefit the consumer in comparison to the replaced product over the life of the product; and

5.1.1.j.3. The consumer has had another annuity exchange or replacement and, in particular, an exchange or replacement within the preceding sixty months.

5.1.1.k. Nothing in this rule should be construed to require a 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 rule; 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.

5.1.2. Disclosure obligation.

5.1.2.a. Prior to the recommendation or sale of an annuity, the producer shall prominently disclose to the consumer on a form substantially similar to Appendix A of this rule and approved by the Commissioner:

5.1.2.a.1. A description of the scope and terms of the relationship with the consumer and the role of the producer in the transaction;

5.1.2.a.2. An affirmative statement on whether the producer is licensed and authorized to sell the following products:

5.1.2.a.2.A. Fixed annuities;

5.1.2.a.2.B. Fixed indexed annuities;

5.1.2.a.2.C. Variable annuities;

5.1.2.a.2.D. Life insurance;

5.1.2.a.2.E. Mutual funds;

5.1.2.a.2.F. Stocks and bonds; and

5.1.2.a.2.G. Certificates of deposit;

5.1.2.a.3. An affirmative statement describing the insurers for which the producer is authorized, contracted (or appointed), or otherwise able to sell insurance products for, using the following descriptions:

5.1.2.a.3.A. From one insurer;

5.1.2.a.3.B. From two or more insurers; or

5.1.2.a.3.C. From two or more insurers, although primarily contracted with one insurer.

5.1.2.a.4. A description of the sources and types of cash compensation and non-cash compensation to be received by the producer, including whether the producer is to be compensated for the sale of a recommended annuity by commission as part of premium or other remuneration received from the insurer, intermediary or other producer or by fee as a result of a contract for advice or consulting services; and

5.1.2.a.5. A notice of the consumer's right to request additional information regarding cash compensation described in subdivision 5.1.2.b. of this rule.

5.1.2.b. Upon request of the consumer or the consumer's designated representative, the producer shall disclose:

5.1.2.b.1. A reasonable estimate of the amount of cash compensation to be received by the producer, which may be stated as a range of amounts or percentages; and

5.1.2.b.2. Whether the cash compensation is a one-time or multiple occurrence amount, and if a multiple occurrence amount, the frequency and amount of the occurrence, which may be stated as a range of amounts or percentages; and

5.1.2.c. Prior to or at the time of the recommendation or sales of an annuity, the producer shall have a reasonable basis to believe the consumer has been informed of various features of the annuity, such as the potential surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity, mortality and expense fees, investment advisory fees, potential charges for and features of riders or other options of the annuity, limitations on interest returns, potential changes in non-guaranteed elements of the annuity, insurance and investment components and market risk. The requirements of this section are intended to supplement and not replace the disclosure requirements found in W. Va. Code of State Rules §114-11E-1 *et seq.*

5.1.3. Conflict of interest obligation.

5.1.3.a. A producer shall identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts of interest related to an ownership interest.

5.1.4. Documentation obligation.

5.1.4.a. A producer shall at the time of recommendation or sale:

5.1.4.a.1. Make a written record of any recommendation and the basis for the recommendation subject to this rule;

5.1.4.a.2. Obtain a consumer signed statement on a form substantially similar to Appendix B of this rule and approved by the Commissioner documenting:

5.1.4.a.2.A. A customer's refusal to provide the consumer profile information, if any;
and

5.1.4.a.2.B. A customer's understanding of the ramifications of not providing his or her consumer profile information or providing insufficient consumer profile information; and

5.1.4.a.3. Obtain a consumer signed statement on a form substantially similar to Appendix C of this rule and approved by the Commissioner acknowledging the annuity transaction is not recommended if a consumer decides to enter into an annuity transaction that is not based on the producer's recommendation.

5.1.5. Application of the best interest obligation. Any requirement applicable to a producer under section 5.1. of this rule shall apply to every producer who has exercised material control or influence in the making of a recommendation and has received direct compensation as a result of the recommendation or sale, regardless of whether the producer has had any direct contact with the consumer. Activities such as providing or delivering marketing or educational materials, product wholesaling or other back-office product support, and general supervision of a producer do not, in and of themselves, constitute material control or influence.

5.2. Transactions not based on a recommendation.

5.2.1. Except as provided under subsection 5.2.2. of this rule, a producer shall have no obligation to a consumer under subsection 5.1.1. of this rule related to any annuity transaction if:

5.2.1.a. No recommendation is made;

5.2.1.b. A recommendation was made and was later found to have been prepared based on materially inaccurate information provided by the consumer;

5.2.1.c. A consumer refuses to provide relevant consumer profile information and the annuity transaction is not recommended; or

5.2.1.d. A consumer decides to enter into an annuity transaction that is not based on a recommendation of the producer.

5.2.2. An insurer's issuance of an annuity subject to subsection 5.2.1. of this rule shall be reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.

5.3. Supervision system.

5.3.1. Except as permitted under section 5.2. of this rule, an insurer may not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity would effectively address the particular consumer's financial situation, insurance needs and financial objectives based on the consumer's consumer profile information.

5.3.2. An insurer shall establish and maintain a supervision system that is reasonably designed to achieve the insurer's and its producers' compliance with this rule, including at a minimum, but not limited to, the following:

5.3.2.a. The insurer shall establish and maintain reasonable procedures to inform its producers of the requirements of this rule and shall incorporate the requirements of this rule into relevant producer training manuals;

5.3.2.b. The insurer shall establish and maintain standards for producer product training and shall establish and maintain reasonable procedures to require its producers to comply with the requirements of section 6 of this rule;

5.3.2.c. The insurer shall provide product-specific training and training materials which explain all material features of its annuity products to its producers;

5.3.2.d. The insurer shall establish and maintain procedures for the review of each recommendation prior to issuance of an annuity that are designed to ensure there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer's financial situation, insurance needs and financial objectives. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including, but not limited to, physical review. Such an electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria;

5.3.2.e. The insurer shall establish and maintain reasonable procedures to detect recommendations that are not in compliance with sections 5.1., 5.2., 5.4. and 5.5. of this rule. This may include, but is not limited to, confirmation of the consumer's consumer profile information, systematic customer surveys, producer and consumer interviews, confirmation letters, producer statements or attestations and programs of internal monitoring. Nothing in this subdivision prevents an insurer from complying with this subdivision by applying sampling procedures, or by confirming consumer profile information or other required information under section 5 of this rule after issuance or delivery of the annuity;

5.3.2.f. The insurer shall establish and maintain reasonable procedures to assess, prior to or upon issuance or delivery of an annuity, whether a producer has provided to the consumer the information required to be provided under section 5 of this rule;

5.3.2.g. The insurer shall establish and maintain reasonable procedures to identify and address suspicious consumer refusals to provide consumer profile information;

5.3.2.h. The insurer shall establish and maintain reasonable procedures to identify and eliminate any sales contests, sales quotas, bonuses and non-cash compensation that are based on the sales of specific annuities within a limited period of time. The requirements of this subdivision are not intended to prohibit the receipt of health insurance, office rent, office support, retirement benefits or other employee benefits by employees as long as those benefits are not based upon the volume of sales of a specific annuity within a limited period of time; and

5.3.2.i. The insurer shall annually provide a written report to senior management, including to the senior manager responsible for audit functions, which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any.

5.3.3. Nothing in section 5.3. of this rule restricts an insurer from contracting for performance of a function (including maintenance of procedures) required under section 5.3. of this rule.

5.3.3.a. An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to section 7 of this rule regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with subdivision 5.3.3.b. of this rule.

5.3.3.b. An insurer's supervision system under section 5.3. of this rule shall include supervision of contractual performance under said section. This includes, but is not limited to, the following:

5.3.3.b.1. Monitoring and, as appropriate, conducting audits to assure that the contracted function is properly performed; and

5.3.3.b.2. Annually obtaining a certification from a senior manager who has responsibility for the contracted function that the manager has a reasonable basis to represent, and does represent, that the function is properly performed.

5.3.4. An insurer is not required to include in its system of supervision:

5.3.4.a. A producer's recommendations to consumers of products other than the annuities offered by the insurer; or

5.3.4.b. Consideration of or comparison to options available to the producer or compensation relating to those options other than annuities or other products offered by the insurer.

5.4. Prohibited Practices.

5.4.1. Neither a producer nor an insurer shall dissuade, or attempt to dissuade, a consumer from:

5.4.1.a. Truthfully responding to an insurer's request for confirmation of the consumer profile information;

5.4.1.b. Filing a complaint; or

5.4.1.c. Cooperating with the investigation of a complaint.

5.5. Safe Harbor.

5.5.1. Recommendations and sales of annuities made in compliance with comparable standards shall satisfy the requirements of this rule. This subsection applies to all recommendations and sales of annuities made with financial professionals in compliance with business rules, controls and procedures that satisfy a comparable standard even if such standard would not otherwise apply to the product or recommendation at issue. However, nothing in this subsection limits the Commissioner's ability to investigate and enforce the provisions of this rule.

5.5.2. Nothing in subsection 5.5.1. of this rule shall limit the insurer's obligation to comply with subsection 5.3.1. of this rule, although the insurer may base its analysis on information received from either the financial professional or the entity supervising the financial professional.

5.5.3. For subsection 5.5.1. of this rule to apply, an insurer shall:

5.5.3.a. Monitor the relevant conduct of the financial professional seeking to rely on subsection 5.5.1. of this rule or the entity responsible for supervising the financial professional, such as the financial professional's broker-dealer or an investment adviser registered under federal or state securities laws using information collected in the normal course of an insurer's business; and

5.5.3.b. Provide to the entity responsible for supervising the financial professional seeking to rely on subsection 5.5.1. of this rule, such as the financial professional's broker-dealer or investment adviser registered under federal or state securities laws, information and reports that are reasonably appropriate to assist such entity to maintain its supervision system.

5.5.4. For purposes of section 5.5. of this rule, "financial professional" means a producer that is regulated and acting as:

5.5.4.a. A broker-dealer registered under federal or state securities laws or a registered representative of a broker-dealer;

5.5.4.b. An investment adviser registered under federal or state securities laws or an investment adviser representative associated with the federal or state registered investment adviser; or

5.5.4.c. A plan fiduciary under Section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA) or fiduciary under Section 4975(e)(3) of the Internal Revenue Code (IRC) or any amendments or successor statutes thereto.

5.5.5. For purposes of section 5.5. of this rule, “comparable standards” means:

5.5.5.a. With respect to broker-dealers and registered representatives of broker-dealers, applicable SEC and FINRA rules pertaining to best interest obligations and supervision of annuity recommendations and sales including, but not limited to, Regulation Best Interest and any amendments or successor regulations thereto;

5.5.5.b. With respect to investment advisers registered under federal or state securities laws or investment adviser representatives, the fiduciary duties and all other requirements imposed on such investment advisers or investment adviser representatives by contract or under the Investment Advisers Act of 1940 or applicable state securities law, including, but not limited to, the Form ADV and interpretations; and

5.5.5.c. With respect to plan fiduciaries or fiduciaries, the duties, obligations, prohibitions and all other requirements attendant to such status under ERISA or the IRC and any amendments or successor statutes thereto.

§114-11B-6. ~~Insurance~~ Producer Training.

~~6.1. No individual may sell, solicit or negotiate annuities unless he or she is licensed as a producer for life insurance and has completed a one-time training course that meets the requirements of subsection 6.2 of this section. *Provided*, That a producer selling, soliciting or negotiating annuities on July 1, 2011 is permitted to continue such activities and must complete the one-time training course prior to December 31, 2011.~~

~~6.2. The training required under this subsection shall be equivalent to least four (4) continuing education credits and shall include information on the types of annuities and various classifications of annuities; identification of the parties to an annuity; how fixed, variable and indexed annuity contract provisions affect consumers; the application of income taxation of qualified and non-qualified annuities; the primary uses of annuities; and appropriate sales practices, replacement and disclosure requirements. *Provided*, That the training required by this section may not include training that is insurer or company product specific or that includes any sales or marketing information, materials or training, other than those required by state or federal law.~~

6.1. A producer shall not solicit the sale of an annuity product unless the producer has adequate knowledge of the product to recommend the annuity and the producer is in compliance with the insurer’s standards for product training. A producer may rely on insurer-provided product-specific training standards and materials to comply with this section.

6.2. Training requirements.

6.2.1. A producer who engages in the sale of annuity products shall complete a one-time training course providing four CE credits and provided by a CE provider.

6.2.2. Producers who hold a life insurance line of authority on the effective date of this rule and who desire to sell annuities shall complete the requirements of subsection 6.2.1. of this rule within six months after the effective date of this rule. Individuals who obtain a life insurance line of authority on or after the effective date of this rule may not engage in the sale of annuities until the annuity training course required under subsection 6.2.1. of this rule has been completed.

6.2.3. The minimum length of the training required under subsection 6.2.1. of this rule shall be sufficient to qualify for at least four CE credits but may be longer.

6.2.4. The training required under subsection 6.2.1. of this rule shall include information on the following topics:

6.2.4.a. The types of annuities and various classifications of annuities;

6.2.4.b. Identification of the parties to an annuity;

6.2.4.c. How product specific annuity contract features affect consumers;

6.2.4.d. The application of income taxation of qualified and non-qualified annuities;

6.2.4.e. The primary uses of annuities; and

6.2.4.f. Appropriate standard of conduct, sales practices, replacement and disclosure requirements.

6.2.5. Continuing education providers of courses intended to comply with this section shall cover all topics listed in the prescribed outline as set forth in subsection 6.2.4. of this rule and shall not present any marketing information or provide training on sales techniques or provide specific information about a particular insurer's products. Additional topics may be offered in conjunction with and in addition to the required outline.

6.2.6. A producer who has completed an annuity training course approved by the Commissioner prior to the effective date of this rule shall, within six months after the effective date of this rule, complete either:

6.2.6.a. A new four CE credit training course provided by a CE provider after the effective date of this rule; or

6.2.6.b. An additional one-time one CE credit training course provided by a CE provider on appropriate sales practices, replacement and disclosure requirements under this rule.

6.2.7. Annuity training courses may be conducted and completed by classroom or self-study methods in accordance with the Board of Insurance Agent Education in the manner set forth in W. Va. Code §33-12-8.

~~6.3.~~ 6.2.8. The training required by this section may be approved for continuing education credit by the Board of Insurance Agent Education in the manner as set forth in W. Va. Code §33-12-8.

~~6.4.~~ 6.2.9. The satisfaction of the training requirements of another state that are substantially similar to the provisions of this ~~subsection~~ section shall be deemed to satisfy the training requirements of this ~~subsection~~ section in this state.

6.2.10. The satisfaction of the components of the training requirements of any course or courses with components substantially similar to the provisions of this section shall be deemed to satisfy the training requirements of this section in this state.

~~6.5.~~ 6.2.11. An insurer subject to this rule shall verify that each producer appointed to sell its annuity products is compliant with this section before the producer is permitted to sell such products, shall maintain records supporting the verification as long as appointed by the company and for five years thereafter, and shall make the records available to the Commissioner upon request. An insurer may satisfy its verification responsibility under this subsection by obtaining certificates of completion of the training course or obtaining reports provided by Commissioner-sponsored database systems or vendors or from a reasonably reliable commercial database vendor that has a reporting arrangement with approved insurance education providers.

§114-11B-7. Compliance Mitigation; Penalties; Enforcement.

7.1. An insurer is responsible for compliance with this rule. If a violation occurs, either because of the action or inaction of the insurer or its ~~insurance~~ producer, the Commissioner may order:

~~7.1.a.~~ 7.1.1. An insurer ~~insurance producer, and insurance agency producer~~ to take reasonably appropriate corrective action for any consumer harmed by the insurer's, or by its ~~insurance producer's~~ violation of this rule a failure to comply with this rule by the insurer, an entity contracted to perform the insurer's supervisory duties or the producer;

7.1.2. A general agency, independent agency or the producer to take reasonably appropriate corrective action for any consumer harmed by the producer's violation of this rule; and

~~7.1.b.~~ 7.1.3. Appropriate penalties and sanctions under Chapter 33 of the West Virginia Code or legislative rules promulgated pursuant to said Chapter.

7.2. The ~~Insurance~~ Commissioner may reduce or eliminate any penalty under W. Va. Code §33-12-24 for a violation of ~~subsection 5.1, subsection 5.2, or subdivision b of subsection 5.3~~ permitted by section 7.1. of this rule if corrective action for the consumer is taken promptly after a violation is discovered or the violation was not part of a pattern or practice.

7.3. The authority to enforce compliance with this rule is vested exclusively with the Commissioner.

§114-11B-8. Recordkeeping.

8.1. Insurers, insurance agencies and ~~insurance~~ producers shall maintain or be able to make available to the ~~Insurance~~ Commissioner records of the information collected from the consumer, disclosures made to the consumer, including summaries of oral disclosures, and other information used in making the recommendations that were the basis for insurance transactions for ten ~~(10)~~ years after the transaction was completed.

8.2. An insurer is permitted, but is not required, to maintain documentation on behalf of ~~an insurance~~ a producer.

8.3. Records required to be maintained by this rule may be maintained in paper, photographic, microprocess, magnetic, mechanical or electronic media or by any process that accurately reproduces the actual document.

APPENDIX A

INSURANCE AGENT (PRODUCER) DISCLOSURE FOR ANNUITIES

Do Not Sign Unless You Have Read and Understand the Information in this Form

Date: _____

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

First Name: _____ Last Name: _____

Business\Agency Name: _____ Website: _____

Business Mailing Address: _____

Business Telephone Number: _____

Email Address: _____

National Producer Number in West Virginia: _____

CUSTOMER INFORMATION (“You”, “Your”)

First Name: _____ Last Name: _____

What Types of Products Can I Sell You?

I am licensed to sell annuities to You in accordance with state law. If I recommend that You buy an annuity, it means I believe that it effectively meets Your financial situation, insurance needs, and financial objectives. Other financial products, such as life insurance or stocks, bonds and mutual funds, also may meet Your needs.

I offer the following products:

- Fixed or Fixed Indexed Annuities
- Variable Annuities
- Life Insurance

I need a separate license to provide advice about or to sell non-insurance financial products. I have checked below any non-insurance financial products that I am licensed and authorized to provide advice about or to sell.

- Mutual Funds
- Stocks/Bonds
- Certificates of Deposits

Whose Annuities Can I Sell to You?

I am authorized to sell:

<input type="checkbox"/> <u>Annuities from Only One (1) Insurer</u>	<input type="checkbox"/> <u>Annuities from Two or More Insurers</u>
<input type="checkbox"/> <u>Annuities from Two or More Insurers although I primarily sell annuities from:</u>	

How I'm Paid for My Work:

It's important for You to understand how I'm paid for my work. Depending on the particular annuity You purchase, I may be paid a commission. If You have questions about how I'm paid, please ask Me.

Depending on the particular annuity You buy, I will or may be paid cash compensation as follows:

- Commission, which is usually paid by the insurance company or other sources. If other sources, describe:

- Other (Describe): _____

If You have questions about the above compensation I will be paid for this transaction, please ask me.

I may also receive other indirect compensation resulting from this transaction (sometimes called "non-cash" compensation), such as health or retirement benefits, office rent and support, or other incentives from the insurance company or other sources.

By signing below, You acknowledge that You have read and understand the information provided to You in this document.

Customer Signature

Date

Agent (Producer) Signature

Date

APPENDIX B

CONSUMER REFUSAL TO PROVIDE INFORMATION

Do Not Sign Unless You Have Read and Understand the Information in this Form

Why are You being given this form?

You're buying a financial product – an annuity.

To recommend a product that effectively meets Your needs, objectives and situation, the agent or company needs information about You, Your financial situation, insurance needs and financial objectives.

If You sign this form, it means You have not given the agent or company some or all the information needed to decide if the annuity effectively meets Your needs, objectives and situation. You may lose protections under the Insurance Code of West Virginia and applicable rules if You sign this form or provide inaccurate information.

Statement of Purchaser:

- I REFUSE to provide this information at this time.
- I have chosen to provide LIMITED information at this time.

Customer Signature

Date

APPENDIX C

Consumer Decision to Purchase an Annuity NOT Based on a Recommendation

Do Not Sign This Form Unless You Have Read and Understand It

Why are You being given this form? You are buying a financial product – an annuity.

To recommend a product that effectively meets Your needs, objectives and situation, the agent or company has the responsibility to learn about You, Your financial situation, insurance needs and financial objectives.

If You sign this form, it means You know that You're buying an annuity that was not recommended.

Statement of Purchaser:

I understand that I am buying an annuity, but the agent or company did not recommend that I buy it. If I buy it **without a recommendation**, I understand I may lose protections under the Insurance Code of West Virginia and applicable rules.

Customer Signature

Date

Agent (Producer) Signature

Date