

STATE OF WEST VIRGINIA

Offices of the Insurance Commissioner

Allan L. McVey
Insurance Commissioner

July 19, 2022

The Honorable Mac Warner
West Virginia Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305

Re: Comments Received to Proposed Amendments to 114 CSR 11B

Dear Secretary Warner,

During the public comment period for the above-referenced Legislative Rule relating to Suitability in Annuity Transactions, the Offices of the Insurance Commissioner ("OIC") of the Department of Revenue received comment letters from three stakeholders. The comment letters are attached.

The first comment letter was submitted by the American Council of Life Insurers ("ACLI"). ACLI expressed general support and appreciation to the OIC for proposing to amend 114 CSR 11B to incorporate the National Association of Insurance Commissioners' ("NAIC") 2020 revisions to NAIC Model Regulation #275. ACLI did state that it noted some minor discrepancies between the OIC's proposed amendments and the NAIC Model Regulation and made some other general comments, which are addressed herein. Initially, ACLI noted that it hoped the effective date of the rule would be at least six months after the date the rule is filed or published in its final form. West Virginia Code §29A-3-13(b) provides that "[a] legislative rule authorized by the Legislature is effective upon filing in the State Register, or on the effective date fixed by the authorizing act or, if none is fixed by law, a later date not to exceed ninety days, as fixed by the agency." Accordingly, it is unlikely that the effective date of the rule will be greater than ninety days after the date the rule is authorized by the Legislature.

Second, ACLI questioned the purpose of the sunset provision, which was added in Section 1.5 of the rule. ACLI maintains that the sunset provision could introduce more difficulty, especially given West Virginia's uniquely complicated rulemaking process. ACLI further noted that deleting the sunset date would not prevent the OIC from amending the rule and that allowing an open-ended amount of time for the rule to remain in place would provide its members with more security and stability. West Virginia Code §29A-3-19(a) and (b) require that "[a]ny new legislative rule promulgated ... after April 1, 2016, shall include a sunset provision terminating the rule on August 1 of the fifth year following its promulgation..." and that "[a]ny legislative rule existing as of April 1, 2016, that is thereafter amended ... shall include a sunset provision terminating the rule on August 1 of the applicable year as part of the amendment." Thus, amending



114 CSR 11B makes the inclusion of a sunset date mandatory as provided by law. However, the OIC can seek Legislative approval to renew the rule prior to its sunset in 2028 for another term of years to keep the rule active.

ACLI's next comment is regarding the additional language set forth in Section 2 of the proposed rule regarding civil liability. ACLI correctly notes that in NAIC Model Regulation #275, this language is in a separate section entitled "Purpose," while in 114 CSR 11B, this language is included in the "Scope" section of the rule. ACLI asserts the subject language is more logically placed in a "Purpose" section. Of note, 114 CSR 11B does not currently have a "Purpose" section. The OIC rule has eight sections, while NAIC Model Regulation #275 has ten sections. However, substantively, the OIC rule and NAIC Model Regulation #275 are near identical. Some organizational and formatting differences are due to the West Virginia Secretary of State's rule 153 CSR 1, *Electronic Filing and Formatting of Rules*. More generally, the OIC's rules do not usually contain a separate section entitled "Purpose." Regardless, the OIC believes the inclusion of the subject language in the "Scope" section of 114 CSR 11B is the most logical place for its inclusion in the OIC rule and does not believe creating a new "Purpose" section is necessary.

ACLI noted a "typo" in the definition of "FINRA," which it states is also in NAIC Model Regulation #275. ACLI believes the term "succeeding agency" should be replaced with "successor agency." The OIC believes that both the phrase "succeeding agency," in which the word succeeding is an adjective, or the term "successor," as a noun, are acceptable in this circumstance. As such, the OIC declines to change Section 4.7 of the rule. ACLI also notes that the language of NAIC Model Regulation #275 was slightly changed in Sections 5.3.3 and 5.3.3.a of the proposed rule, but notes the language in the OIC rule to be equivalent. The OIC will address this comment more fully in response to a comment from the Insured Retirement Institute below. Finally, ACLI notes that it is supportive of Section 6.2.2. This comment from ACLI requires no response.

The second comment letter was received from the Insured Retirement Institute ("IRI"). The IRI stated that it was supportive of the amendments to 114 CSR 11B, and noted that the proposed amendments are well-aligned with the updated NAIC Model Regulation #275. However, the IRI did offer two suggestions. First, the IRI noted that Section 5.3.3.a had slightly different language than NAIC Model Regulation #275 and suggested the proposed language be amended to ensure consistency with the model to avoid confusion about the duties of insurers. The OIC agrees and will amend the language in 5.3.3.a as follows:

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.

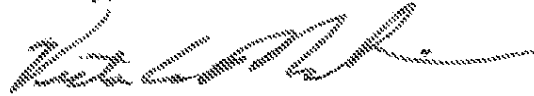
IRI's second comment is regarding the effective date of the rule. The OIC responded to a substantially similar comment from ACLI hereinabove. As previously stated, due to the provisions of W.Va. Code §29A-3-13(b), it is unlikely that the effective date of the rule will be greater than ninety days after the date the rule is authorized by the Legislature.

The third and final comment letter was received by the Federation of Americans for Consumer Choice ("FACC"). This comment letter endorsed the proposed amendments to 114 CSR 11B and provided that FACC "fully supports the efforts of West Virginia to adopt the updated

NAIC Model regulation #275.” However, while FACC made no suggestions regarding changes to the language of 114 CSR 11B, it did suggest that two changes be made to the Statement of Circumstances, which was submitted with the proposed rule amendments when the rule was filed for public comment on June 2, 2022. Specifically, FACC agrees that failure to adopt the 2020 updates to NAIC Model Regulation #275 could subject fixed and fixed index annuities sold in West Virginia to federal regulation. However, FACC avers that it would be more precise to note that failure to adopt the 2020 updates to NAIC Model Regulation #275 could subject these annuities to both federal and state regulation, as opposed to suggesting that state regulation would be entirely preempted by federal regulation. Second, FACC asserts that where the Statement of Circumstances provides that the NAIC model “also incorporates a best interest standard,” such language could create the impression that NAIC model requirements are the same as SEC requirements when there are differences appropriate to dissimilar products and distribution systems. FACC noted that the NAIC has used the word “compatible” to convey that the NAIC and SEC standards are compatible, but not identical. FACC recognized that these comments were somewhat minor and technical but offered them to create a complete underlying record. The OIC appreciates the comments and, while it is unable to revise language in the Statement of Circumstances filed on June 2, 2022, will endeavor to incorporate these considerations in the future.

The OIC would like to thank all the entities that submitted comments. Their attention and time spent on this matter is greatly appreciated.

Sincerely,



Victor A. Mullins
Associate Counsel
West Virginia Offices of the Insurance Commissioner

Attachments



Hunter, Erin K <erin.k.hunter@wv.gov>

Comments on Annuity Suitability Draft

1 message

Laura Leigh Latta <LauraLeighLatta@acli.com>
 To: "erin.k.hunter@wv.gov" <erin.k.hunter@wv.gov>

Fri, Jul 1, 2022 at 4:33 PM

Hi Erin,

My name is Laura Leigh Latta, and I represent the American Council of Life Insurance (ACLI). West Virginia is one of the states that I cover, and I wanted to offer some comments on the proposed annuity suitability rule issued by the Department.

First of all—it's very nice to meet you! I am still relatively new to West Virginia, and I am really looking forward to getting to know you and the rest of the Department in the coming months. Second, thank you for all your work in introducing this rule. I know how much effort goes into introducing a model like this, and I greatly appreciate your hard work!

My comments are relatively minor, but I did want to note a few discrepancies and thoughts, in case helpful:

- **Filing and Effective Date:** Obviously, the filing and effective dates of the rule have not yet been inserted. We would hope the effective date is at least six months after the date the rule is "filed" or published in final form to give companies time to comply.
- **Sunset Provision:** There is a sunset provision in the "Purpose" subsection 114-11B-1.5 of 8/1/2028, which is only six years away. The current rule in West Virginia does not have a sunset provision, so this would be a new inclusion and I'm not sure what purpose it would serve—i.e., there is no reason of which I am aware why the rule would need to be revised or deleted by six years from its implementation date, and this could introduce more difficulty, especially with West Virginia's uniquely complicated rulemaking process.
 - To note, deleting the sunset provision would not prevent the Department from moving to amend its rule in the future; however, allowing an open-ended amount of time for the updated rule to remain in place would provide our members with more security and stability as they set up the many new and upgraded systems and oversight processes necessary to be in compliance with the revised requirements.
- **Private Right of Action:** The new draft moves the language protecting insurers and producers from private rights of action and civil liability from the "Purpose" section, where it is included under the Model, to the "Scope" section in the West Virginia draft rule.
 - We would request the language be reinserted in Section B.1 1.1, so as to align with the Model law language.
 - Our feeling is that the "Purpose" section is the most logical place for such language, because its requirements strengthen and reinforce the regulatory authority of the Commissioner to protect consumers considering annuities.
- **Some Additional Notes:**

- There is a small typo in the definition of "FINRA," which is found in the Model law language as well. The definition should refer to a "successor" agency, rather than a "succeeding" agency.
- Model language has been edited/changed in Section 5.3.3. and 5.3.3.a. We believe this language to be equivalent to the Model law language, but just wanted to note the difference.
- Section 6.2.2. gives producers holding licenses as of the effective date of the new rule an additional six months to complete their CLE training, which is language that we support. We appreciate this inclusion.

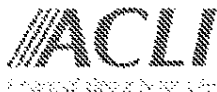
As I mentioned, I think these are relatively minor comments, but I did want to note these few areas of discrepancy and our general thoughts on the draft.

Thank you so much, again, for taking up this complicated issue and bringing forward a draft rule in-state.

Please let me know if I can follow up or provide anything that would be helpful to you. I hope you have a great long weekend ahead, and enjoy the fireworks!

Sincerely,

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Electronically Submitted to erin.k.hunter@wv.gov

July 5, 2022

Ms. Erin K. Hunter
West Virginia Offices of the Insurance Commissioner
900 Pennsylvania Avenue
Charleston, WV 25302

Re: Proposed Changes to the Suitability in Annuity Transactions Rule

Dear Ms. Hunter:

On behalf of our members, the Insured Retirement Institute (IRI)¹ writes in support of the proposed regulation changes to Series 11B, Suitability in Annuity Transactions. These rules establish the standards that must be followed by an insurance agent or insurer when recommending or selling an annuity, and the proposed amendments are well-aligned with the enhanced Suitability in Annuity Transactions Model Regulation approved by the National Association of Insurance Commissioners ("NAIC") in early 2020. We are pleased to support the proposed amendments, and we respectfully request that the Commissioner consider certain changes to the proposed amendments, as outlined below.

As you know, the revised NAIC model is consistent with the heightened standards of conduct imposed by the U.S. Securities and Exchange Commission's Regulation Best Interest (Reg BI), which went into effect as of June 30, 2020. Similar to Reg BI, the revised model requires insurance producers to act in the best interest of the consumer under the circumstances known at the time a recommendation is made, without placing the producer's or the insurer's financial interest ahead of the consumer's interest. In addition to the enhancements to the applicable standard of conduct and supervisory requirements, the revised model also reflects important adjustments to the training provisions and the FINRA safe harbor included in the prior version of the model.

Strong, consistent regulation is important to protect consumers and to preserve consumers' choice of financial advice and products that meet their financial and retirement planning needs.

¹ The Insured Retirement Institute (IRI) is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, and distributors such as broker-dealers, banks and marketing organizations. IRI members account for more than 95 percent of annuity assets in the U.S., include the top 10 distributors of annuities ranked by assets under management, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community.

This regulation is an important enhancement to the standard that applies when producers recommend annuities to their clients. We commend West Virginia for undertaking to adopt the latest version of the NAIC model, and we hope to see other states follow your lead.

With all this in mind, we respectfully offer the following comments on the proposed amendments:

1. In order to ensure consistency with the NAIC model and avoid confusion about the duties of insurers, we recommend that ~~§114-11B-5.3.3.a.~~ be adjusted as follows:

~~5.3.3.a. An if a violation of this rule occurs and is known or could be reasonably known by the insurer, the 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.~~

2. Effective implementation of the significant enhancements embodied in the proposal will require substantial efforts by our member companies operating in West Virginia. Past amendments to the NAIC model have provided six months for implementation, and we believe the same time period would be appropriate here. As such, we respectfully request that the proposal be modified so that the date for compliance with the new requirements under the revised regulation (the effective date) is six months after the date the revised regulation is adopted.

In conclusion, we are pleased to support the draft proposed amendments to the Suitability in Annuity Transactions rule, and we appreciate your consideration of our recommended changes as described above. We look forward to working with the Commissioner on implementation of these important revisions.

Sincerely,

Sarah E. Wood

Sarah Wood
Director, State Policy & Regulatory Affairs
Insured Retirement Institute
swood@irionline.org



July 5, 2022

The Honorable Mac Warner
Office of West Virginia Secretary of State
Administrative Law Division

Attn: Erin K. Hunter via email erin.k.hunter@wv.gov

Re: Suitability in Annuity Transactions W. Va. Code §§33-2-10 and 33-11-6

FACC, the Federation of Americans for Consumer Choice, fully supports the efforts of West Virginia to adopt the updated NAIC Model regulation #275. We appreciate that West Virginia has proposed adopting the model regulation in full to enhance consumer protection and promote uniformity.

However, we note that there is an accompanying Statement of Circumstances which we think contains certain information that could be improved for clarity. If the Statement of Circumstances is still open to editing for purposes of the record, we would suggest two small changes.

First, the statement about the Harkin Amendment suggests adoption is needed to avoid federal preemption, but to be more precise, failure to adopt the model regulation would mean that annuities sold in West Virginia could become subject to federal regulation such that there would be dual regulation. We suggest it say: "If West Virginia does not adopt the updates to Model Regulation #275, the regulation of fixed and fixed indexed annuities in West Virginia may be subject to preempted by federal securities laws regulation."

Second, the statement saying the NAIC model "also incorporates a best interest standard" could create the wrong impression that NAIC model requirements are the same as SEC requirements, when there are differences appropriate to the different products and distribution systems. The NAIC has used the word "compatible" to convey they are similar but not the same. It might be helpful to make the following edit: "The 2020 NAIC Model Regulation #275 ~~also incorporates~~ 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."

We recognize these are somewhat minor technical changes but wanted to offer them just to create the proper underlying record. We also recognize that the Statement of Circumstances at this point may no longer be editable in which case we understand if these suggestions are not able to be considered.

In any event we appreciate the opportunity to comment and again thank the Department for proceeding with this regulation.

Sincerely,

Kim O'Brien, CEO

The Federation of Americans for Consumer Choice, Inc. (FACC) is a 501(c)6 non-profit organization incorporated in the state of Texas whose members are independent marketing organizations and agencies engaged in the distribution of fixed insurance and annuity products. FACC promotes public policy recognizing the value of guaranteed insurance solutions and preserving freedom of choice for consumers who seek products and services from independent agents representing multiple carriers and product options.