

## TO BE RESCINDED

3901-6-13

**Suitability in annuity transactions.**

## (A) Purpose

- (1) The purpose of this rule is to require insurers, including fraternal benefit societies, to establish 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 addressed.
- (2) This rule will bring Ohio law into compliance with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law Number 111-203, 111th Cong., 2d sess. (July 21, 2010).

## (B) Authority

This rule is adopted pursuant to the authority vested in the superintendent under sections 3901.041 and 3901.19 to 3901.26 of the Revised Code.

## (C) Scope

- (1) This rule shall apply to any recommendation to purchase, exchange or replace an annuity made to a consumer by an insurance agent, or an insurer, where no agent is involved, that results in the purchase, exchange or replacement recommended.
- (2) Nothing herein shall be construed to create or imply a private cause of action for a violation of this rule.

## (D) Exemptions

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

- (1) Direct response solicitations where there is no recommendation based on information collected from the consumer pursuant to this rule;
- (2) Contracts used to fund:
  - (a) An employee pension or welfare benefit plan that is covered by the "Employee Retirement and Income Security Act" (ERISA);

- (b) A plan described by sections 401(a), 401(k), 403(b), 408(k) or 408(p) of the Internal Revenue Code, as amended, if established or maintained by an employer;
- (c) A government or church plan defined in section 414 of the Internal Revenue Code, 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 Internal Revenue Code;
- (d) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor;
- (e) Settlements of or assumptions of liabilities associated with personal injury litigation or any dispute or claim resolution process; or
- (f) Formal prepaid funeral contracts, as defined in division (T) of section 4717.01 of the Revised Code, provided the consideration paid to purchase, exchange or replace the annuity is reasonable related to the price of the pre-need funeral contract, and a pre-need funeral contract is in place at the time the annuity is purchased, exchanged or replaced.

(E) Definitions

- (1) "Annuity" means an annuity that is an insurance product under state law that is individually solicited, whether the product is classified as an individual or group annuity.
- (2) "Continuing education credit" or "CE credit" means fifty minutes of educational instruction that has been specifically approved to meet the agent annuity training requirements of paragraph (G)(2) of this rule.
- (3) "Continuing education provider" or "CE provider" means an individual or entity that is approved to offer continuing education courses pursuant to rule 3901-5-02 of the Administrative Code.
- (4) "FINRA" means the "Financial Industry Regulatory Authority" or a succeeding agency.
- (5) "Insurer" means a company, including a fraternal benefit society, required to be licensed under the laws of this state to provide insurance products, including annuities.
- (6) "Insurance agent" means a person required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities.

- (7) "Recommendation" means advice provided by an insurance agent, or an insurer where no agent is involved, to an individual consumer that results in a purchase, exchange or replacement of an annuity in accordance with that advice.
- (8) "Replacement" means a transaction in which a new policy or contract is to be purchased, and it is known or should be known to the proposing agent, or to the proposing insurer if there is no agent, that by reason of the transaction, an existing policy or contract has been or is to be:
- (a) Lapsed, forfeited, surrendered or partially surrendered, assigned to the replacing insurer or otherwise terminated;
  - (b) 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;
  - (c) 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;
  - (d) Reissued with any reduction in cash value; or
  - (e) Used in a financed purchase.
- (9) "Suitability information" means information that is reasonably appropriate to determine the suitability of a recommendation, including the following:
- (a) Age;
  - (b) Annual income;
  - (c) Financial situation and needs, including the financial resources used for the funding of the annuity;
  - (d) Financial experience;
  - (e) Financial objectives;
  - (f) Intended use of the annuity;
  - (g) Financial time horizon;
  - (h) Existing assets, including investment and life insurance holdings;
  - (i) Liquidity needs;

- (j) Liquid net worth;
- (k) Risk tolerance; and
- (l) Tax status.

(F) Duties of insurers, including fraternal benefit societies and insurance agents

- (1) In recommending to a consumer the purchase, exchange or replacement of an annuity that results in another insurance transaction or series of insurance transactions, the insurance agent, or the insurer where no agent is involved, shall 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 the consumer's investments and other insurance products and as to the consumer's financial situation and needs, including the consumer's suitability information, and that there is a reasonable basis to believe all of the following:
  - (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;
  - (b) The consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization or death or living benefit;
  - (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 the consumer's suitability information; and
  - (d) In the case of an exchange or replacement of an annuity, the exchange or replacement is suitable, including 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 consumer would benefit from product enhancements and improvements; and
  - (iii) The consumer has had another annuity exchange or replacement and, in particular, an exchange or replacement within the preceding thirty-six months.
- (2) Prior to the execution of a purchase, exchange or replacement of an annuity resulting from a recommendation, an insurance agent, or an insurer where no agent is involved, shall make reasonable efforts to obtain the consumer's suitability information.
- (3) Except as permitted under paragraph (F)(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.
- (4)
  - (a) Except as provided under paragraph (F)(4)(b) of this rule, neither an insurance agent, nor an insurer, shall have any obligation to a consumer under paragraph (F)(1) or (F)(3) of this rule related to any annuity transaction if:
    - (i) No recommendation is made;
    - (ii) A recommendation was made and was later found to have been prepared based on materially inaccurate information provided by the consumer;
    - (iii) A consumer refuses to provide relevant suitability information and the annuity transaction is not recommended; or
    - (iv) A consumer decides to enter into an annuity transaction that is not based on a recommendation of the insurer or the insurance agent.
  - (b) An insurer's issuance of an annuity subject to paragraph (F)(4)(a) of this rule shall be reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.
- (5) An insurance agent or, where no insurance agent is involved, the responsible insurer representative, shall at the time of sale:
  - (a) Make a record of any recommendation subject to paragraph (F)(1) of this rule;

- (b) Obtain a customer signed statement documenting a customer's refusal to provide suitability information, if any; and
  - (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 agent's or insurer's recommendation.
- (6)
- (a) An insurer shall establish a supervision system that is reasonably designed to achieve the insurer's and its insurance agents' compliance with this rule, including, but not limited to, the following:
    - (i) The insurer shall maintain reasonable procedures to inform its insurance agents of the requirements of this rule and shall incorporate the requirements of this rule into relevant insurance agent training manuals;
    - (ii) The insurer shall establish standards for insurance agent product training and shall maintain reasonable procedures to require its insurance agents to comply with the requirements of paragraph (G) of this rule;
    - (iii) The insurer shall provide product-specific training and training materials that explain all material features of its annuity products to its insurance agents;
    - (iv) 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;
    - (v) The insurer shall maintain reasonable procedures to detect recommendations that are not suitable. These may include, but are 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

- (vi) 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.

(b)

- (i) Nothing in this paragraph restricts an insurer from contracting for performance of a function (including maintenance of procedures) required under paragraph (F)(6)(a) of this rule. An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to paragraph (H) of this rule regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with paragraph (F)(6)(b)(ii) of this rule.

- (ii) An insurer's supervision system under paragraph (F)(6)(a) of this rule shall include supervision of contractual performance under this paragraph. This includes, but is not limited to, the following:

- (a) Monitoring and, as appropriate, conducting audits to assure that the contracted function is properly performed; and

- (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.

- (c) An insurer is not required to include in its system of supervision an insurance agent's recommendations to consumers of products other than the annuities offered by the insurer.

(7) An insurance agent shall not dissuade, or attempt to dissuade, a consumer from:

- (a) Truthfully responding to an insurer's request for confirmation of suitability information;

- (b) Filing a complaint; or
- (c) Cooperating with the investigation of a complaint.

(8)

(a) Sales made in compliance with FINRA requirements pertaining to suitability and supervision of annuity transactions shall satisfy the requirements under this rule. This paragraph 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 paragraph shall limit the insurance superintendent's ability to enforce (including investigate) the provisions of this rule.

(b) For paragraph (F)(8)(a) of this rule to apply, an insurer shall:

- (i) Monitor the FINRA member broker-dealer using information collected in the normal course of an insurer's business; and
- (ii) Provide to the FINRA member broker-dealer information and reports that are reasonably appropriate to assist the FINRA member broker-dealer to maintain its supervision system.

(G) Insurance agent training

(1) An insurance agent shall not solicit the sale of an annuity product unless the insurance agent has adequate knowledge of the product to recommend the annuity and the insurance agent is in compliance with the insurer's standards for product training. An insurance agent may rely on insurer-provided product-specific training standards and materials to comply with this paragraph.

(2) In addition to the requirements in paragraph (G)(1) of this rule, insurance agents subject to this rule shall comply with the following continuing education requirements:

(a) An insurance agent who engages in the sale, solicitation or negotiation of annuity products shall complete a one-time four credit training course provided by a department of insurance approved continuing education provider.

- (i) Insurance agents who hold a life insurance or variable annuity line of authority on the effective date of this rule and who desire to sell annuities shall complete the annuity training course required under

paragraph (G)(2)(a) of this rule within six months after the effective date of this rule.

- (ii) Insurance agents who hold a life insurance or variable annuity line of authority on the effective date of this rule, but did not complete the annuity training course requirements within six months after the effective date of this rule may not engage in the sale of annuities until the annuity training course required under paragraph (G)(2)(a) of this rule has been completed.
  - (iii) Individuals who obtain a life insurance or variable annuity line of authority after the effective date of this rule may not engage in the sale of annuities until the annuity training courses required under paragraphs (G)(1) and (G)(2) of this rule have been completed.
- (b) The minimum length of the training required under paragraph (G)(2) of this rule shall be sufficient to qualify for at least four CE credits, but may be longer.
- (c) The training required under this paragraph shall include information on the following topics:
- (i) The types of annuities and various classifications of annuities;
  - (ii) Identification of the parties to an annuity;
  - (iii) How fixed, variable and indexed annuity contract provisions affect consumers;
  - (iv) The application of income taxation of qualified and non-qualified annuities;
  - (v) The primary uses of annuities; and
  - (vi) Appropriate sales practices, replacement and disclosure requirements.
- (d) Providers of courses intended to comply with paragraph (G)(2) of this rule shall cover all topics listed in the prescribed outline 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.

- (e) A provider of an annuity training course intended to comply with paragraph (G)(2)(a) of this rule shall register as a CE provider in this state and comply with the rules and guidelines applicable to insurance agent and continuing education courses as set forth in rule 3901-5-02 of the Administrative Code.
- (f) Annuity training courses may be conducted and completed by classroom or self-study methods in accordance with rule 3901-5-03 of the Administrative Code.
- (g) Providers of annuity training shall comply with the reporting requirements and shall issue certificates of completion in accordance with rule 3901-5-04 of the Administrative Code.
- (h) For Ohio non-resident agents, the satisfaction of the training requirements of another state that are substantially similar to the provisions of paragraph (G)(2)(a) of this rule shall be deemed to satisfy the training requirements of this paragraph in this state.
- (i) An insurer shall verify that an insurance agent has completed the four hour annuity training course required under paragraph (G)(2)(a) of this rule before allowing the agent to sell an annuity product for that insurer. An insurer may satisfy its responsibility under this paragraph by obtaining certificates of completion of the training course or obtaining reports provided by superintendent-sponsored database systems or vendors or from a reasonably reliable commercial database vendor that has a reporting arrangement with approved insurance education providers.

(H) Compliance mitigation; penalties

- (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 agent the superintendent may order:
  - (a) An insurer to take reasonably appropriate corrective action for any consumer harmed by the insurer's or by its insurance agent's, violation of this rule;
  - (b) A general agency, business entity, independent agency or the insurance agent to take reasonably appropriate corrective action for any consumer harmed by the insurance agent's violation of this rule; and
  - (c) Appropriate penalties and sanctions.

- (2) Any applicable penalty under the Unfair and Deceptive Trade Practices Act, sections 3911.19 to 3911.26 of the Revised Code, for a violation of this rule may be reduced or eliminated if corrective action for the consumer was taken promptly after a violation was discovered or the violation was not part of a pattern or practice.

(I) Record keeping

- (1) Insurers, independent agencies, business entity agents and insurance agents shall maintain or be able to make available to the superintendent records of the information collected from the consumer and other information used in making the recommendations that were the basis for insurance transactions for eight years after the insurance transaction is completed by the insurer. An insurer is permitted, but shall not be required, to maintain documentation on behalf of an insurance agent.
- (2) Records required to be maintained by this rule may be maintained in paper, photographic, micro-process, magnetic, mechanical or electronic media or by any process that accurately reproduces the actual document.

(J) Severability

If any paragraph, term or provision of this rule is adjudged invalid for any reason, such judgment shall not affect, impair or invalidate any other paragraph, term or provision of this rule, but the remaining paragraphs, terms and provisions shall be and continue in full force and effect.

Effective:

Five Year Review (FYR) Dates: 11/30/2020

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Certification

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Date

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