

3901-6-13

Suitability in annuity transactions.**(A) Purpose**

The purpose of this rule is to set forth standards and procedures for recommendations to consumers that result in a transaction involving annuity products so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.

(B) Authority

This rule is promulgated pursuant to the authority vested in the superintendent under sections 3901.041, and 3901.19 to 3901.21 of the Revised Code.

(C) Scope

This rule shall apply to any recommendation to purchase or exchange an annuity made to a consumer by an insurance agent, or an insurer where no agent is involved, that results in the purchase or exchange recommended.

(D) No private cause of action

Nothing herein shall be construed to create or imply a private cause of action for a violation of this rule.

(E) Exemptions

Unless otherwise specifically included, this rule shall not apply to recommendations 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 of 1974 (29 U.S.C. section 1001 et seq.) (ERISA);
 - (b) A plan described by sections 401(a), 401(k), 403(b), 408(k) or 408(p) of the Internal Revenue Code of 1986, as amended, (I.R.C.) (26 U.S.C. section 401(a) et seq.), if established or maintained by an employer;
 - (c) A government or church plan defined in section 414 of the I.R.C., 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 I.R.C.;

- (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, provided the consideration paid to purchase or exchange the annuity is reasonably related to the price of the preneed funeral contract, as defined by the Revised Code, and a preneed funeral contract is in place at the time the annuity is purchased or exchanged.

(F) Definitions

- (1) "Annuity" means a fixed annuity or variable annuity that is individually solicited, whether the product is classified as an individual or group annuity.
- (2) "Independent agent" or "independent agency" means a person defined in section 3905.49 of the Revised Code.
- (3) "Insurer" means a company required to be licensed under the laws of this state to provide insurance products, including annuities.
- (4) "Insurance agent" means a person required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities.
- (5) "Managing general agent" means a person defined in section 3905.71 of the Revised Code.
- (6) "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 or exchange of an annuity in accordance with that advice.

(G) Duties of insurers and of insurance agents

- (1) In recommending to a consumer the purchase of an annuity or exchange 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 his or her investments and other insurance products and as to his or her financial situation and needs.

- (2) Prior to the execution of a purchase or exchange of an annuity resulting from a recommendation, an insurance agent, or an insurer where no agent is involved, shall make reasonable efforts to obtain information concerning:
 - (a) The consumer's financial status;
 - (b) The consumer's tax status;
 - (c) The consumer's investment objectives; and
 - (d) Such other information used or considered to be reasonable by the insurance agent, or the insurer where no agent is involved, in making recommendations to the consumer.
- (3) Except as provided under paragraph (G)(4) of this rule, neither an insurance agent, nor an insurer where no agent is involved, shall have any obligation to a consumer under paragraph (G)(1) of this rule related to any recommendation if a consumer:
 - (a) Refuses to provide relevant information requested by the insurer or insurance agent;
 - (b) Decides to enter into an insurance transaction that is not based on a recommendation of the insurer or insurance agent; or
 - (c) Fails to provide complete or accurate information.
- (4) An insurer or insurance agent's recommendation subject to paragraph (G)(3) of this rule shall be reasonable under all the circumstances actually known to the insurer or insurance agent at the time of the recommendation.
- (5) An insurer either shall assure that a system to supervise recommendations that is reasonably designed to achieve compliance with this rule is established and maintained by complying with paragraphs (G)(7) to (G)(9) of this rule, or shall establish and maintain such a system, including, but not limited to:

- (a) Maintaining written procedures; and
 - (b) Conducting periodic reviews of its records that are reasonably designed to assist in detecting and preventing violations of this rule.
- (6) A general agent and independent agency either shall adopt a system established by an insurer to supervise recommendations of its insurance agents that is reasonably designed to achieve compliance with this rule, or shall establish and maintain such a system, including, but not limited to:
- (a) Maintaining written procedures; and
 - (b) Conducting periodic reviews of records that are reasonably designed to assist in detecting and preventing violations of this rule.
- (7) An insurer may contract with a third party, including a general agent or independent agency, to establish and maintain a system of supervision as required by paragraph (G)(5) of this rule with respect to insurance agents under contract with or employed by the third party.
- (8) An insurer shall make reasonable inquiry to assure that the third party contracting under paragraph (G)(7) of this rule is performing the functions required under paragraph (G)(5) of this rule and shall take such action as is reasonable under the circumstances to enforce the contractual obligation to perform the functions. An insurer may comply with its obligation to make reasonable inquiry by doing all of the following:
- (a) The insurer annually obtains a certification from a third party senior manager who has responsibility for the delegated functions that the manager has a reasonable basis to represent, and does represent, that the third party is performing the required functions; and
 - (b) The insurer, based on reasonable selection criteria, periodically selects third parties contracting under paragraph (G)(7) of this rule for a review to determine whether the third parties are performing the required functions. The insurer shall perform those procedures to conduct the review that are reasonable under the circumstances.
- (9) An insurer that contracts with a third party pursuant to paragraph (G)(7) of this rule and that complies with the requirements to supervise in paragraph (G)(8) of this rule shall have fulfilled its responsibilities under paragraph (G)(5) of

this rule.

- (10) An insurer, general agent or independent agency is not required by paragraph (G)(5) or (G)(6) of this rule to:
 - (a) Review, or provide for review of, all insurance agent solicited transactions; or
 - (b) Include in its system of supervision an insurance agent's recommendations to consumers of products other than the annuities offered by the insurer, general agent or independent agency.
- (11) A general agent or independent agency contracting with an insurer pursuant to paragraph (G)(7) of this rule shall promptly, when requested by the insurer pursuant to paragraph (G)(8) of this rule, give a certification as described in paragraph (G)(8) of this rule or give a clear statement that it is unable to meet the certification criteria.
- (12) No person may provide a certification under paragraph (G)(8)(a) of this rule unless:
 - (a) The person is a senior manager with responsibility for the delegated functions; and
 - (b) The person has a reasonable basis for making the certification.
- (13) Compliance with the national association of securities dealers (NASD) conduct rules pertaining to suitability shall satisfy the requirements under paragraph (G) of this rule for the recommendation of variable annuities. However, nothing in paragraph (G) of this rule shall limit the insurance superintendent's ability to enforce the provisions of this rule.

(H) Penalty

In addition to any other penalties provided by the laws of this state, a violation of this rule by an insurer or agent shall be considered a violation an unfair and deceptive trade practice and shall be subject to any one or more penalties set forth in sections 3901.19 to 3901.221 of the Revised Code.

(I) Mitigation of responsibility

(1) 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) An insurance agent to take reasonably appropriate corrective action for any consumer harmed by the insurance agent's violation of this rule; and
- (2) A general agency or independent agency that employs or contracts with an insurance agent to sell, or solicit the sale, of annuities to consumers, to take reasonably appropriate corrective action for any consumer harmed by the insurance agent's violation of this rule.
- (3) Any applicable penalty under sections 3901.19 to 3901.221 of the Revised Code for a violation of paragraph (G)(1), (G)(2) or (G)(4) of this rule may be reduced or eliminated, if corrective action for the consumer was taken promptly after a violation was discovered.

(J) Recordkeeping

- (1) Insurers, general agents, independent agencies 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, microprocess, magnetic, mechanical or electronic media or by any process that accurately reproduces the actual document.

(K) Severability

If any provision of this rule or the application thereof to any person or circumstances is for any reason held to be invalid, the remainder of the rule and the application of such provision to other persons or circumstances shall not be affected thereby.

Effective: 01/01/2009

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CERTIFIED ELECTRONICALLY

Certification

12/22/2008

Date

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