



November 8, 2024

**Submitted electronically to [jmatthews@naic.org](mailto:jmatthews@naic.org)**

To: NAIC Annuity Suitability Working Group

**Re: Comments on Annuity Best Interest Regulatory Guidance and Considerations -  
September 23, 2024, Chair Draft**

On behalf of our collective members, the undersigned trades write to provide comments on the Chair Draft of Annuity Best Interest Regulatory Guidance and Considerations (“Draft Guidance”). Since the National Association of Insurance Commissioners (“NAIC”) amended the Suitability in Annuity Transactions Model Regulation (“Model”) in early 2020, we have been vocal supporters of this enhanced standard. We have pursued uniform adoption across the states, and we support robust enforcement of the Model to protect consumers and to ensure compliance with the requirements. We appreciate the Working Group’s efforts to provide greater clarity on the safe harbor provisions of the Model for state examiners, and our review of the Draft Guidance is focused on ensuring consistency with the Model. It is important that any guidance fully conform to the Model without imposing any new or different requirements on the industry.<sup>1</sup> To achieve this end, we respectfully submit the comments below on the Draft Guidance for the Working Group’s consideration.

Our general recommendations and key concerns on the Draft Guidance are outlined below, but we are also including a redline document with specific recommended changes and comments for your review and consideration.

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<sup>1</sup> We’d like to note at the outset of this letter that, given that this is guidance for state examiners, the Working Group may wish to consider whether this type of guidance is more appropriate as an addendum to the NAIC Market Conduct Guidelines.

- 1) The Draft Guidance should provide greater clarity as to the distinctions between an insurer's responsibilities under the safe harbor, and the provision that permits insurers to contract with third parties to perform the insurers' supervisory obligations. The Draft Guidance should also clarify how insurers can satisfy their obligations under Section 6(C)(1) in either scenario.

The Model establishes multiple methods by which insurers can comply with their supervisory obligations:

- i. The insurer can directly supervise sales of its annuities by performing the specific requirements set forth in Section 6(C)(1) and Section 6(C)(2).
- ii. The insurer can rely on Section 6(C)(3) to contract with a third party to perform any or all of the requirements set forth in Section 6(C)(1) and Section 6(C)(2).
- iii. The insurer's distribution partner can satisfy the requirements of the safe harbor set forth in Section 6(E) by supervising sales of the insurer's annuities in compliance with a comparable standard, in which case, the requirements of Section 6(C)(2) need not be separately performed. Subsection (2) of the safe harbor requires that the insurer still satisfy its obligations under Section 6(C)(1), and subsection (3) of the safe harbor requires the insurer to monitor the conduct of the financial professional or the firm responsible for supervising the financial professional. This method is the primary focus of the Draft Guidance.

We appreciate the effort made in the Draft Guidance to acknowledge and explain these different compliance methods in the section titled, **Safe Harbor or Contracting for Performance of Supervision**, but we believe even greater clarity is necessary to avoid any confusion and duplicative supervision. To that end, we have suggested several specific modifications to the Draft Guidance in the attached redline. In particular, we believe the Draft Guidance is overbroad and misaligned with the text of the Model with respect to the interpretation of the insurer's responsibilities under Section 6(C)(1) in connection with safe harbor transactions.

In our view, the insurer can satisfy its obligations under Section 6(C)(1) by either (a) performing the required reasonable basis analysis based on information received from either the financial professional or the entity supervising the financial professional (the supervising distributor) (as permitted by Section 6(E)(2)), or (b) contracting with the supervising distributor to perform the required reasonable basis analysis on behalf of the

insurer (as permitted by Section 6(C)(3)). In the latter case, the insurer need not perform its own analysis as to whether the recommended annuity would effectively address the particular consumer's financial situation, insurance needs, and objectives, as this would be the third party's responsibility pursuant to the contract with the insurer.

Instead, the insurer's role is to supervise the contractual performance of the distribution partner as required by Section 6(C)(3)(a) and (b). The insurer can satisfy this supervision obligation by, for example, assessing the compliance policies and procedures of potential distribution partners before entering into selling agreements, taking steps to make sure its distribution partners are aware of and complying with the requirements of the safe harbor, and/or monitoring and exchanging information with its distribution partners. To be clear, these are just a few examples. Each insurer must have the flexibility to determine the most appropriate way to supervise the contractual performance of their distribution partners with respect to the reasonable basis analysis required under Section 6(C)(1).

We believe this is consistent with the Working Group's intention, but to avoid any confusion, we recommend making it abundantly clear in the Draft Guidance that performance of Section 6(C)(1) is permitted under the Model to be contracted out. The Draft Guidance should explicitly state that insurers can contract out their obligations under Section 6(C)(1), including to firms relying on the safe harbor under Section 6(E). Our suggested edits make it clear that in the event of such a scenario, the insurer would only be responsible for compliance with Section 6(C)(3)(a) and (b) and would not need to separately perform the other supervisory functions pursuant to the safe harbor provisions. It is crucial that the Draft Guidance not suggest otherwise. The reason for this is not to relieve insurers of their ultimate responsibility regarding recommendations and sales, but simply to ensure that the Draft Guidance is consistent with what is allowed under the Model.

The Working Group may wish to consider charting out the insurer's specific requirements depending on which provision they are operating under, as opposed to discussing it in a narrative format. This may be a clearer way to communicate the information for the state examiners that will be utilizing the Draft Guidance. In Appendix A, we provide a chart that outlines the various responsibilities or requirements, which we encourage you to utilize as appropriate.

On a related note, and as discussed in greater detail below, Section 6(C)(2)(d) makes clear that the required reasonable basis analysis can be performed through application of a screening system designed to identify selected transactions for additional review. This is true regardless of the approach used by an insurer to satisfy its obligations under Section 6(C)(1). In practice, this enables insurers to direct their resources to those transactions where additional scrutiny may be necessary or appropriate. However, the Draft Guidance,

as written, seems to assert that every single transaction must be subject to the same extensive review, which would obviously not be compatible with the use of a screening system as contemplated by Section 6(C)(2)(d). We do not believe this was the NAIC's intent in adopting the safe harbor, as it would be unnecessary and duplicative with no commensurate benefit to consumers. Our redlines to the Draft Guidance are intended to make this clear. As mentioned above, it is critically important that the Draft Guidance not change the requirements of or the options available under the Model. We do not want to impair the effectiveness of the Model, and therefore, we are focused on ensuring that examiners have the clarity they need when reviewing for compliance under the Model.

**2) The Draft Guidance should make clear that insurers do not need to separately determine that compliance with a “comparable standard” matches the requirements under the Model.**

In our redline, we recommend several key changes to make clear that insurers do not need to separately determine that compliance with a comparable standard as defined under the Model matches the specific terms and obligations under the Model. The Model distinctly enumerates three rules that are deemed to be “comparable standards.” Through its robust process in developing the updated Model, the NAIC made the determination that recommendations and sales of annuities made by financial professionals in compliance with these rules, one of which is Reg BI, satisfies the requirements of the Model. While broker-dealers have an independent obligation to comply with Reg BI and are subject to oversight from, as applicable, the SEC and FINRA, nothing in Section E limits the insurance commissioner's ability to investigate and enforce the provisions of the Model.

The insurer does not need to make a separate determination that the procedures, if they comply with a comparable standard like Reg BI, are then comparable to the requirements of the Model. Such an approach would be contradictory to the purpose of the safe harbor, which is to avoid duplicative and inefficient processes while still protecting consumers. The NAIC has already decided that the requirements of Reg BI are comparable to the Model. The insurer does need to make this redetermination. Our redline edits make this clear and are consistent with the Model.

Also, we appreciate the Draft Guidance confirming that the safe harbor is available for recommendations of annuities that are not securities, which is consistent with the language of the Model. The Draft Guidance should, however, make it clear that the Model only requires business rules, controls, and procedures to satisfy a comparable standard. The standard does not need to otherwise apply to the product or recommendation at hand. Utilizing a process for a sale of a fixed annuity that complies with Reg BI, for example, satisfies the Model, and the Draft Guidance should make this clear.

**3) The Draft Guidance should make clear that insurers reviewing recommendations falling under the safe harbor can rely on a screening system, as allowed by the Model.**

For recommendations falling under the safe harbor, where the insurer has not contracted for the performance of functions under Section 6(C), the **Reasonable Basis** section should make clear that an insurer's "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." This language is consistent with Section 6(C)(2)(d) of the Model and should be included in the Draft Guidance as a way for insurers to meet their obligation under Section 6(C)(1). The current language implies that insurers would need to review and separately analyze each recommendation, which goes beyond what is required under the Model even for non-safe harbor transactions. Where the insurer has not contracted for the performance of the functions under Section 6(C), utilizing a screening system or sampling is one option to meet an insurer's obligations under Section 6(C)(1), and the Draft Guidance should make this clear. A screening system is also appropriate as the insurer is relying on a broker-dealer to run their recommendations through its Reg BI process, which already requires supervision of a financial professional by his/her broker-dealer under FINRA rules. As such, we strongly recommend that the Working Group incorporate our redline edits for this section.

**4) The Draft Guidance should provide adequate flexibility for companies to develop compliance programs that meet their particular business models and circumstances.**

We appreciate that the Working Group has provided examples throughout the Draft Guidance and overall, we are supportive of the clarification provided for state examiners. The Draft Guidance, however, should take a principles-based approach and avoid being too prescriptive in a manner that is inconsistent with the Model. An insurer should be able to determine what makes the most sense for its business and its distribution partners while still complying with the Model. Several of our suggested edits are meant to make it clear that the listed examples/approaches are simply some ways in which an insurer could satisfy its obligations under the Model, and that such examples/approaches are not intended to be prescriptive. One example of this is in the **Provide Information and Reports** section, where we suggest removal of the specific list of items that could be provided. Our members indicated that there are numerous other data points that they could or would potentially provide, so rather than trying to have a comprehensive list of all possible data points, we suggest deleting the list and focusing this section on ensuring that the examiners understand the objective of the section. This ensures less of a "check

the box” approach when it comes to what specific data is being provided, and more of a broader view of the importance of data sharing.

A principles-based approach allows insurers and distributors to develop robust compliance programs that meet their particular business models and circumstances. This is consistent with the intent of the Model.

### **Impact on Financial Professionals and Consumers**

On a final note, we’d also like to briefly address the impact on financial professionals and consumers. We appreciate the Working Group’s effort to clarify the safe harbor provisions of the Model. However, without addressing the concerns outlined above, changes to the Model requirements could place an undue burden on financial professionals, and therefore their clients, by adding obligations that may be both confusing and duplicative when making an annuity recommendation. Safeguards are certainly necessary to ensure consumer protection, but they should not make compliance so difficult as to create confusion for consumers. The Model’s compliance standards are designed to protect consumers, but inconsistent requirements beyond the Model could undermine this goal by complicating the regulatory landscape. Clear and consistent guidance for insurers, as reflected in our suggestions, would promote more uniform annuity sales practices, reduce consumer confusion and make sure their needs are adequately considered during recommendation.

We appreciate your consideration of our recommendations as described above, and we recommend that the Working Group expose another draft with any changes made for stakeholder comments ahead of finalizing any guidance. We look forward to continuing engagement on the Working Group’s efforts. Should you have any questions or concerns, please reach out to Sarah Wood at the Insured Retirement Institute at [swood@irionline.org](mailto:swood@irionline.org).

Submitted on behalf of the following trades,

American Council of Life Insurers (ACLI)  
Committee of Annuity Insurers (CAI)  
Finseca  
Financial Services Institute (FSI)  
Indexed Annuity Leadership Council (IALC)  
Institute for Portfolio Alternatives (IPA)  
Insured Retirement Institute (IRI)  
National Association for Fixed Annuities (NAFA)  
National Association for Insurance and Financial Advisors (NAIFA)  
Securities Industry and Financial Markets Association (SIFMA)

## Appendix A

### **Defined Terms**

**NAIC Model** means the requirements and obligations set forth under the NAIC Suitability in Annuity Transaction Model Regulation, as updated in 2020.

**NAIC Model Supervision** means the insurer supervisory requirements as outlined in Section 6C of the NAIC Model.

- Section 6C(1) outlines the requirement of the insurer to ensure there is a reasonable basis for the recommendation.
- Section 6C(2) outlines the supervisory requirements of the insurer when they are not relying upon the Safe Harbor for supervision of annuities.
- Section 6C(3) outlines the requirements of the insurer when they have contracted with a third-party to perform the supervisory function.
  - The insurer must: (1) monitor and, as appropriate, conduct audits, and (2) obtain an annual certification from a senior manager who has responsibility for the contracted function that they have a reasonable basis to represent that the function is being properly performed.

**Comparable Standard** as defined in Section 6E(5) of the NAIC Model, includes, but is not limited to, Regulation Best Interest, and the fiduciary duties and requirements imposed under the Investment Advisers Act of 1940, and the duties, obligations, prohibitions, and other requirements imposed upon plan fiduciaries under ERISA or the IRC.

**Comparable Standard Supervision** means the supervisory function performed by the entity (e.g., BD) responsible for supervising the financial professional's conduct under a Comparable Standard.

**Safe Harbor** as defined in Section 6E of the NAIC Model, allows the sales of annuities made in compliance with a Comparable Standard to be viewed as satisfying the requirements of the NAIC Model.

- Section 6E outlines the requirements of insurer when they are relying upon the Safe Harbor for supervision of annuities.
  - The insurer must: (1) monitor the relevant conduct of the financial professional relying upon the Safe Harbor or the entity responsible for supervision of the financial professional, (2) provide information and reports to the entity responsible for supervision of the financial professional that assist the entity in maintaining its supervision system, and (3) comply with Section 6C(1).

**Contracting for Performance of a Function (Contracting)** refers to when the insurer contracts with a third-party for the performance of all or part of the NAIC Model Standard Supervision.

NAIC Model Supervision	Safe Harbor Supervision	Contracting Supervision
<p>The insurer must comply with all requirements of the NAIC Model, which includes the supervisory requirements under Section 6C of the NAIC Model.</p> <ul style="list-style-type: none"> <li>• The insurer is not relying upon the Safe Harbor for supervision of annuity sales and recommendations.</li> <li>• The insurer has not contracted the NAIC Model Supervision function to a third party.</li> </ul>	<p>The insurer must comply with the Safe Harbor requirements listed under Section 6E, which includes compliance with Section 6C(1).</p> <ul style="list-style-type: none"> <li>• The insurer does not need to comply with Section 6C(2) because the financial professional is subject to Comparable Standard with respect to recommendation, sales, and supervision by the supervising entity.</li> <li>• The insurer has not contracted the NAIC Model Standard Supervision function to a third-party.</li> <li>• Recommendations and sales of annuities are made in compliance with a Comparable Standard.</li> </ul>	<p>The insurer has contracted with a third-party to perform its supervisory obligations under Section 6(C)(3) of the NAIC Model. The third party is responsible for complying with the appropriate supervision requirements as outlined in the NAIC Model.</p> <ul style="list-style-type: none"> <li>• If the third party is <u>not</u> relying upon the Safe Harbor, they must comply with the NAIC Model Supervision requirements.</li> <li>• If the third-party is relying upon the Safe Harbor, they must comply with the Safe Harbor supervision requirements, including compliance with Section 6C(1).</li> </ul> <p>In the above scenarios, the insurer must comply with the requirements under Section 6C(3).</p>
<p>The financial professional must act in the best interest of the consumer, as defined in Section 6A the NAIC Model, which includes compliance with the Care, Disclosure, Conflict of Interest, and Disclosure Obligations.</p>	<p>The financial professional must conduct business in compliance with the requirements of a Comparable Standard, which would satisfy the requirements set forth under Section 6A of the NAIC Model.</p>	<p>The financial professional must conduct business in compliance with the appropriate standard as set forth by Section 6A of the NAIC Model or a Comparable Standard.</p>