

## **CHAPTER 26.1-34.2 ANNUITY TRANSACTION PRACTICES**

### **26.1-34.2-01. Exemptions.**

Unless otherwise specifically included, this chapter does not apply to recommendations involving:

1. Direct response solicitations if there is no recommendation based on information collected from the consumer pursuant to this chapter; and
2. Contracts used to fund:
  - a. An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act;
  - b. A plan described by section 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 a dispute or claim resolution process; or
  - f. Formal prepaid funeral contracts.

### **26.1-34.2-01.1. Scope.**

This chapter applies to any recommendation to purchase, exchange, or replace an annuity made to a consumer by an insurance producer, or an insurer when no producer is involved, that results in the purchase, exchange, or replacement recommended.

### **26.1-34.2-02. Definitions.**

1. "Annuity" 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.
2. "Insurance producer" means a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance, including annuities.
3. "Insurer" means a company required to be licensed under the laws of this state to provide insurance products, including annuities.
4. "Recommendation" means advice provided by an insurance producer, or an insurer when no producer is involved, to an individual consumer which results in a purchase, replacement, or exchange of an annuity in accordance with that advice.
5. "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 producer, or to the proposing insurer if there is no producer, 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.
6. "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.

**26.1-34.2-03. Duties of insurers and insurance producers.**

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 when 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 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:
    - (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;
    - (2) The consumer would benefit from product enhancements and improvements; and
    - (3) The consumer has had another annuity exchange or replacement and, in particular, an exchange or replacement within the preceding thirty-six months.
2. Before the execution of a purchase, replacement, or exchange of an annuity resulting from a recommendation, an insurance producer, or an insurer when no producer is involved, shall make reasonable efforts to obtain the consumer's suitability information.
3. Except as permitted under subsection 4, an insurer may 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 subdivision b, neither an insurance producer, nor an insurer, has any obligation to a consumer under subsection 1 or 3 related to any annuity transaction if:
  - (1) A recommendation was not made;
  - (2) A recommendation was made and was later found to have been prepared based on materially inaccurate information provided by the consumer;
  - (3) A consumer refuses to provide relevant suitability information and the annuity transaction is not recommended; or
  - (4) A consumer decides to enter an annuity transaction that is not based on a recommendation of the insurer or the insurance producer.
- b. An insurer's issuance of an annuity subject to subdivision a must be reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.
5. An insurance producer or, when no insurance producer is involved, the responsible insurer representative, at the time of sale shall:
  - a. Make a record of any recommendation subject to subsection 1;
  - 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 an annuity transaction that is not based on the insurance producer's or insurer's recommendation.
6. a. An insurer shall establish a supervision system that is reasonably designed to achieve the insurer's and the insurer's insurance producers' compliance with this chapter, including the following:
  - (1) The insurer shall maintain reasonable procedures to inform the insurer's insurance producers of the requirements of this chapter and shall incorporate the requirements of this chapter into relevant insurance producer training manuals.
  - (2) The insurer shall establish standards for insurance producer product training and shall maintain reasonable procedures to require the insurer's insurance producers to comply with the requirements of section 26.1-34.2-03.1.
  - (3) The insurer shall provide product-specific training and training materials that explain all material features of the insurer's annuity products to the insurer's insurance producers.
  - (4) The insurer shall maintain procedures for review of each recommendation before issuance of an annuity which 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 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) The insurer shall maintain reasonable procedures to detect recommendations that are not suitable. This may include confirmation of consumer suitability information, systematic customer surveys, interviews, confirmation letters, and programs of internal monitoring. This paragraph does not prevent an insurer from complying with this paragraph by applying sampling procedures or by confirming suitability information after issuance or delivery of the annuity.
  - (6) Annually, the insurer shall 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. (1) This subsection does not restrict an insurer from contracting for performance of a function, including maintenance of procedures, required under subdivision a. An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to section 26.1-34.2-04, regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with paragraph 2.
  - (2) An insurer's supervision system under subdivision a must include supervision of contractual performance under this subsection. This includes 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 the insurer's system of supervision an insurance producer's recommendations to consumers of products other than the annuities offered by the insurer.
7. An insurance producer may not dissuade, or attempt to dissuade, a consumer from:
- a. Responding truthfully 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 the financial industry regulatory authority requirements pertaining to suitability and supervision of annuity transactions must satisfy the requirements under this chapter. This subsection applies to financial industry regulatory authority broker-dealer sales of variable annuities and fixed annuities if the suitability and supervision is similar to those applied to variable annuity sales. However, this subsection does not limit the insurance commissioner's ability to enforce, including investigate, this chapter.
- b. For subdivision a to apply, an insurer shall:
- (1) Monitor the financial industry regulatory authority member broker-dealer using information collected in the normal course of an insurer's business; and
  - (2) Provide to the financial industry regulatory authority member broker-dealer information and reports that are reasonably appropriate to assist the financial industry regulatory authority member broker-dealer to maintain its supervision system.

**26.1-34.2-03.1. Insurance producer training.**

- 1. An insurance producer may not solicit the sale of an annuity product unless the insurance producer has adequate knowledge of the product to recommend the annuity and the insurance producer is in compliance with the insurer's standards for product training. An insurance producer may rely on insurer-provided product-specific training standards and materials to comply with this subsection.
- 2. a. (1) An insurance producer who engages in the sale of annuity products shall complete a one-time, four-hour training course.
- (2) An insurance producer who holds a life insurance line of authority on August 1, 2011, and who desires to sell annuities shall complete the requirements of this subsection within twelve months after August 1, 2011. An individual who obtains a life insurance line of authority on or after August 1, 2011, may not engage in the sale of annuities until the annuity training course required under this subsection has been completed.
- b. The training required under this subsection must include information on the following topics:

- (1) The types of annuities and various classifications of annuities;
  - (2) Identification of the parties to an annuity;
  - (3) How fixed, variable, and indexed annuity contract provisions affect consumers;
  - (4) The application of income taxation of qualified and nonqualified annuities;
  - (5) The primary uses of annuities; and
  - (6) Appropriate sales practices, replacement, and disclosure requirements.
- c. Providers of courses intended to comply with this subsection shall cover all topics listed in the prescribed outline and may 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.
  - d. Providers of annuity training shall issue certificates of completion.
  - e. The satisfaction of the training requirements of another state which are substantially similar to the provisions of this subsection are deemed to satisfy the training requirements of this subsection in this state.
  - f. An insurer shall verify that an insurance producer has completed the annuity training course required under this subsection before allowing the producer to sell an annuity product for that insurer. An insurer may satisfy the insurer's responsibility under this subsection by obtaining certificates of completion of the training course or obtaining reports from a reasonably reliable commercial database vendor that has a reporting arrangement with insurance education providers.

**26.1-34.2-04. Mitigation of responsibility - Penalty.**

1. An insurer is responsible for compliance with this chapter. If a violation occurs, either because of the action or inaction of the insurer or the insurer's insurance producer, the commissioner may order:
  - a. An insurer to take reasonably appropriate corrective action for any consumer harmed by the insurer's or by the insurer's insurance producer's violation of this chapter;
  - b. A general agency, independent agency, or the insurance producer to take reasonably appropriate corrective action for any consumer harmed by the insurance producer's violation of this chapter; and
  - c. Appropriate penalties and sanctions.
2. Any applicable penalty under section 26.1-01-03.3 for a violation of subsection 1 or 2 or subdivision b of subsection 3 of section 26.1-34.2-03 may be reduced or eliminated, according to a schedule adopted by the commissioner, if corrective action for the consumer was taken promptly after a violation was discovered.

**26.1-34.2-05. Recordkeeping.**

1. Insurers, general agents, independent agencies, and insurance producers shall maintain or be able to make available to the commissioner a record of the information collected from the consumer and other information used in making the recommendations that were the basis for insurance transactions for ten years after the insurance transaction is completed by the insurer. An insurer is permitted, but is not required, to maintain documentation on behalf of an insurance producer.
2. Records required to be maintained by this chapter may be maintained in paper, photographic, microprocess, magnetic, mechanical, or electronic media, or by any process that accurately reproduces the actual document.