Written Testimony of
The Independent Insurance Agents of North Dakota and
The Independent Insurance Agents and Brokers of America

Concerning House Bill 1160

Submitted to the North Dakota House of Representatives
Industry, Business and Labor Committee

The Independent Insurance Agents of North Dakota (IIAND) and the Independent Insurance Agents and Brokers of America (IIABA) thank Chairman Lefor, Vice Chairman Keiser, and other Members of the Committee for the opportunity to provide testimony concerning House Bill 1160. IIABA is the nation's oldest and largest national association of insurance agents and brokers, and IIAND is its affiliate in the state. The hundreds of thousands of agents and insurance professionals that we collectively represent operate from more than 25,000 business locations and offer all types of insurance—property, casualty, life, health, employee benefit plans, and retirement products—from a variety of insurance companies. Our organizations are also longstanding and very strong proponents of state insurance regulation.

House Bill 1160 is well-intentioned proposal with merit in many respects, and our organizations do not oppose the overwhelming majority of its provisions. We do, however, have strong concern and trepidation with a narrow feature of the proposal and respectfully ask the Committee to amend the bill in one particular respect before advancing it through the legislative process.

Background

House Bill 1160 addresses and would regulate the manner in which insurance agents sell annuities, and agents are the stakeholders most affected by the revisions the bill would make to existing law. Most of the elements in the bill outline the responsibilities of an insurance agent in a clear, objective, and easily-understood way, and our members do not object to the proposed requirements crafted in this manner. Under the bill, an insurance agent would, for example, be required to do all of the following:

- Exercise reasonable diligence, care, and skill when advising a customer about a potential annuity purchase;

- Know a consumer's financial situation, insurance needs, and financial objectives;

- Collect an extensive universe of consumer profile information before making a recommendation;

- Believe that the product recommended effectively addresses the consumer's situation, needs, and objectives over the life of the product and in light of that individual's consumer profile information;

- Understand the recommendation options available to the agent and consider the types of products that address the consumer's financial situation, insurance needs, and financial objectives;

- Consider and evaluate an additional series of factors when recommending a transaction involving the exchange or replacement of an annuity;

- Ensure that the consumer has received important information about the key features of the recommended annuity;

- Provide comprehensive written disclosures outlining (1) the scope and terms of the relationship with the consumer, (2) the agent's role in the transaction, (3) the types of relevant products the agent is authorized to sell, and (4) whether the agent has access to the products of one insurer or multiple companies;

- Disclose of the sources and types of compensation an agent would receive as a result of the purchase of an annuity and provide an estimate of that compensation upon request;

- Satisfy new annuity-specific continuing education requirements; and

- Most notably, make a written record of any annuity recommendation (including the basis for the recommendation) and communicate the basis for the recommendation to the consumer.

These new requirements are extensive and comprehensive. They are the heart of House Bill 1160, and the agent community does not oppose their enactment. They will significantly raise the level of regulatory scrutiny that applies to annuity sales, enhance consumer protection, and require changes in business practices by agents.

Concerns Related to the "Best Interest" References

Our narrow concern with House Bill 1160 is that it would also impose a so-called "best interest" obligation on agents who recommend annuities, and we respectfully urge the Committee to <u>delete the references to "best interest</u>." There are numerous ways to address these concerns, and possible options for addressing the two relevant provisions are highlighted in yellow below.

> **Page 1, Line 12**
> **26.1-34.2-01.1. Scope.**
> This chapter applies to ~~any~~ <u>a sale or </u>recommendation to ~~purchase, exchange, or replace~~ <u>of</u> 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~~. This chapter may not be construed to create or imply a private cause of action for a violation of this chapter or to subject a producer to civil liability under the ~~best interest~~ standard of care outlined in section 26.1-34.2-03 or under standards governing the conduct of a fiduciary or a fiduciary relationship.

Page 5, Line 27 to Page 6, Line 2
26.1-34.2-03. Duties of insurers and insurance producers.

1. A producer, if making a recommendation of an annuity, shall satisfy ~~act in the best interest of the consumer under the circumstances known at the time the recommendation is made, without placing the producer's or the insurer's financial interest ahead of the consumer's interest. A producer has acted in the best interest of the consumer if they haven satisfied~~ the following obligations regarding care, disclosure, conflict of interest and documentation:

or

Page 5, Line 27 to Page 6, Line 2
26.1-34.2-03. Duties of insurers and insurance producers.

1. A producer, if making a recommendation of an annuity, shall act ~~in the best interest of the consumer~~ under the circumstances known at the time the recommendation is made, without placing the producer's or the insurer's financial interest ahead of the consumer's interest~~. A producer has acted in the best interest of the consumer if they have satisfied~~ and a producer does so by satisfying the following obligations regarding care, disclosure, conflict of interest and documentation:

Agents, not surprisingly, desire clear obligations and unambiguous rules of the road. House Bill 1160 generally sets forth with clarity what will be required of agents, but the additional "best interest" references in these two sections establish an obligation that is abstract, nebulous, and subjective. This text may seem innocuous, but creating such a duty opens the door to considerable uncertainty and other adverse consequences. The addition of this requirement would place agents in an untenable position because it does not specify what additional actions or compliance measures it would require or what behavior it would prohibit. The North Dakota Supreme Court and other observers equate an obligation to act in one's best interest with a fiduciary duty (an outcome House Bill 1160 seeks to avoid), and the bill offers no insight into what these "best interest" references mean or how such a standard differs from a fiduciary one. Insurance is an intangible product, and the lack of clarity means agents who acted properly at the time of a recommendation will risk having their actions and judgment second-guessed by regulators and courts in hindsight and be forced to defend their actions in costly proceedings.

Fortunately, the references to a "best interest" standard are few and are not necessary parts of House Bill 1160. They do not benefit consumers, and they can be deleted without any negative impact or repercussions. The other provisions of the bill (which we identified above) already outline in detail the robust obligations that an agent would be required to satisfy, and the "best interest" text does not provide any additional impact or value. We urge the Committee to allow the clear and objective requirements of House Bill 1160 to stand on their own and not require agents – on top of this comprehensive framework – to ambiguously act in a customer's best interest. There are no adverse consequences for consumers or any other stakeholders if this text is removed, and we ask the Committee to incorporate the narrow revisions we have proposed.

Some might argue that the "best interest" references are simply extraneous and present no cause for worry. Our concern with this suggestion is that words have meaning, and courts and regulators are likely to give effect to all provisions and avoid outcomes where particular requirements are ignored or overlooked. This canon of statutory interpretation – the rule against surplusage – assumes that policymakers do not include unnecessary or redundant elements in the law and directs those interpreting the law to give effect to each provision.

Our concerns with the “best interest” references are being addressed by state officials in proposals under consideration in numerous other states, and they echo similar concerns that have been raised by members of the National Council of Insurance Legislators during that organization’s meetings in recent years. The topic has been discussed at every NCOIL meeting between March 2018 and March 2020, and numerous legislators in those sessions have expressed concern with the subjective and vague nature of the provision and the manner in which it will be interpreted and enforced.

We are happy to share more information about this issue with the Committee, including copies of comment letters that concerned organizations submitted to the National Association of Insurance Commissioners during its development of the model proposal on which House Bill 1160 is based. One such letter – submitted jointly by the American Bankers Association, the Independent Insurance Agents and Brokers of America, the National Association of Health Underwriters, and the National Association of Professional Insurance Agents – is included as an attachment.

Ensuring a Level Playing Field and the Primacy of State Insurance Regulation

While our most serious concern with House Bill 1160 is the inclusion of the “best interest,” references, we also encourage the Committee to examine the text found on Page 15, Line 10 to Page 16, Line 7. The purpose and effect of this provision – which seems to alter existing law in significant ways – is potentially troubling.

Some have suggested this provision would allow certain financial intermediaries (e.g. broker-dealers and investment advisers) to recommend and sell any annuity (even products that fall exclusively within the four corners of the insurance code) without satisfying the requirements of the chapter. It has even been suggested by some that this provision exempts such intermediaries from completing the simple and straightforward annuity training that all traditional insurance agents must complete. A narrow exemption for transactions that are dually regulated by both federal and state officials may make sense, but a much broader exemption (especially one that extends to training obligations) would create an unfair playing field and undermine the principles of functional regulation and state regulatory authority over insurance.

Some in the insurer community have also recently argued that the revisions proposed to existing law by House Bill 1160 would have the effect of eliminating nearly all of the supervisory and oversight requirements that apply to carriers when an annuity is sold by other types of financial professionals. These insurer requirements are located on Page 12, Line 9 to Page 14, Line 26, and we are uncertain what the public policy rationale would be for applying these rules when a traditional insurance agent sells an annuity but not in similar transactions involving other types of intermediaries. This appears to be a weakening of existing consumer protections and to distort the marketplace, and these elements of the bill warrant additional scrutiny and review.

Conclusion

IIAND and IIABA thank Representative Keiser for his good work on this important issue and the Chairman and Committee for their consideration of our views. House Bill 1160 is a commendable proposal that would establish a wide range of new and robust requirements for agents who sell annuities. Those provisions can and should stand on their own, and we urge the Committee to remove the ambiguous and subjective references to a “best interest” duty that run counter to efforts to clearly and objectively identify what is required of agents.

ATTACHMENT

American Bankers Association
Independent Insurance Agents and Brokers of America
National Association of Health Underwriters
National Association of Professional Insurance Agents

April 27, 2018

The Honorable Dean Cameron
Idaho Department of Insurance
700 West State Street, 3rd Floor
Boise, Idaho 83720

The Honorable Doug Ommen
Iowa Insurance Division
601 Locust Avenue, 4th Floor
Des Moines, Iowa 50309

Re: Potential Revisions to the NAIC Annuity Suitability Model Regulation

Dear Director Cameron and Commissioner Ommen:

On behalf of the national trade associations identified above, we write to you in your capacities as Chairman and Vice Chairman of the National Association of Insurance Commissioners (NAIC) Annuity Suitability Working Group and in response to your recent request for comment. Our organizations collectively represent hundreds of thousands of insurance producers, and our members would be the stakeholders most affected by any revisions to the *Suitability in Annuity Transactions Model Regulation.* We recognize your good intentions and thank you for the opportunity to comment on these important issues. We also thank you for your consideration of our perspective and look forward to working with you and commenting further in the weeks and months to come.

Initial Comments

Our coalition of associations wants to be responsive to your request for input, but it has been a challenge for us to devise solutions and suggestions for addressing problems that have not been identified. Some have called for dramatic and extensive revisions to the rules that apply to annuity transactions, but our experience suggests that many of these proposals are unnecessary, excessive, and disproportionate in nature. Consumers are very well-protected today by the combination of a strong insurance regulatory framework and robust industry competition, and examples of misconduct are rare. A case has not been made for sweeping revisions to the existing model, and we encourage the working group to identify the specific marketplace problems that regulators see and allow us to propose solutions to any regulatory gaps. Our associations certainly share your commitment to protecting consumers from improper conduct where it exists, but we also want to avoid a rush to judgement or an unwarranted regulatory response that could cause disruption in the marketplace and carry adverse and unintended consequences for consumers and the industry.

The most commonly articulated justification for reopening the existing model is that it needs to be revised to harmonize insurance producer requirements with those that may ultimately be established for investment advisers and broker-dealers by the U.S. Securities and Exchange Commission (SEC). Regardless of the merits of extending the application of any federal regulations to all annuity transactions (and to fixed annuity products in particular), the reality is that the pursuit of harmony with SEC rules is simply unachievable at this time. The SEC only recently released its voluminous proposed package of new requirements for investment advisers and broker-dealers, and it will be challenging to meaningfully consider whether the NAIC should alter its model in response to the SEC's action until the Commission promulgates its final rule. To the extent that potential harmonization with SEC investment adviser and broker-dealer regulations is a potential goal for the working group, the SEC proposal is an unfinished product at the moment.

A "Best Interest" Standard vs. Clear and Objective Requirements

Most notably, our coalition of organizations writes to express strong opposition to the establishment of a so-called "best interest" standard of care for all annuity transactions and to reiterate the reasons why such an approach is misguided. Some regulators and even insurer representatives have suggested that insurance producers should be required to make recommendations concerning the purchase of an annuity that are "in the best interest" of a consumer. Requiring producers by law to act in the best interest of a customer may seem innocuous and unremarkable, but the reality is that such a standard is abstract, nebulous, subjective, and replete with adverse consequences. Mandating adherence to such a standard in connection with fixed annuity sales will not alter the manner in which producers serve the needs of customers or result in an improved consumer experience, and it is unclear what new actions, steps, or tasks an agent would need to perform that are not routinely performed today.

Imposing a best interest or similar standard upon the producer community in this manner would result in regulatory uncertainty and produce increased litigation. Determinations about what such a vague standard means and how it should be applied would vary dramatically, and the mandate could be interpreted in conflicting and inconsistent ways from state to state, court to court, and regulator to regulator. This lack of consistency and clarity is troubling, and it will open the door to second-guessing and retrospective scrutiny years after an initial recommendation is made. Such a standard will increase the costs and legal exposure of agents without providing commensurate benefit to consumers. Its contentious nature would also jeopardize efforts to adopt a revised model on a consistent and uniform basis at the state level.

If confronted with amorphous standards, higher compliance and insurance costs, and increased liability exposure, many main street producers can be expected to curtail or simply cease any annuity-related activities. A significant number of businesses, especially smaller entities, had ended or were wrapping up their engagement in the retirement space when the Fifth Circuit Court of Appeals struck down the U.S. Department of Labor's controversial Fiduciary Rule, and similar marketplace outcomes in the annuity world can be expected if an analogous standard is established for insurance producers. This will be especially true for agencies and providers that do not generate a substantial amount of revenue from annuity sales, and it could force many such entities to stop offering annuity products altogether. With a smaller universe of professionals serving the financial needs of the general public, far fewer consumers will have the opportunity to access the variety of financial products and quality of personalized financial assistance available to affluent Americans. Such a drastic measure will reduce competition and have severe consequences for many small businesses and the consumers who rely on these qualified and accountable providers for their financial needs.

Rather than establish a best interest or some other abstract standard of care, our associations urge the working group to consider an alternative and more straightforward approach. We urge you to identify any specific marketplace problems or regulatory gaps that exist and respond to those items with clear and objective requirements that producers must adhere to. The adoption of a nebulous standard of care serves no meaningful purpose, and it creates regulatory uncertainty.

Revisions to the model should not require guesswork and speculation from producers, and any amendments should instead make clear what actions and compliance measures are required. To that end, our associations would welcome the opportunity to assist the working group with devising consumer protection solutions directed at a specifically identified regulatory gap.

For example, some have suggested that consumers are confused by or unaware of the manner in which producers are compensated in annuity transactions, and the working group could implement an objective and process-based approach for addressing these issues. The working group could consider the implementation of new requirements that reasonably mandate the disclosure of the sources and types of compensation received by a producer, the nature of the producer's role in a transaction, how the customer can request additional information, and other relevant information. Similarly, producers could also be required to disclose any material ownership interests they have in the insurer issuing the annuity contract. We recommend this type of tailored approach because it would respond to regulatory gaps that may be identified, bolster and build upon the existing suitability framework, and make the "rules of the road" clear and unambiguous to producers.

Any revisions to the existing model should also offer benefits to consumers that outweigh any new burdens or costs imposed on the industry and any adverse marketplace effects that arise. Any new mandates imposed on the producer community will have an impact on the operations of many agencies, and they might also result in fewer producers offering annuities and hinder consumer choice and access to annuity products. The more burdensome, arduous, and expensive the sale of an annuity becomes, the fewer providers there will be to offer annuities. These effects must be considered as revisions to the model are contemplated.

Conclusion

On behalf of our respective organizations and insurance producers across the country, we sincerely thank you for the opportunity to submit these comments. We are happy to assist your further consideration of these issues in any way you deem appropriate. Please contact us at any time if you have any questions or if we can assist you in any manner.

Very truly yours,

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