

BEFORE THE NEW MEXICO OFFICE OF SUPERINTENDENT OF INSURANCE

IN THE MATTER OF THE ADOPTION OF)
A NEW RULE REGARDING SUITABILITY)
IN ANNUITY TRANSACTIONS)
_____)

Docket No. [2021-0069](#)

HEARING OFFICER'S FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

THIS MATTER comes before the New Mexico Office of Superintendent of Insurance (“Superintendent” or “OSI”) following a public hearing for comment pursuant to the Notice of Proposed Rulemaking (“NOPR”) filed in this docket and published as required by law in the New Mexico Register on October 13, 2021 and in the *Albuquerque Journal* on October 16, 2021 and distributed via OSI’s Newsletter to a list of potentially interested parties.

The Hearing Officer, having reviewed the NOPR and the proposed replacement rules, having conducted a public hearing, having reviewed the written comments submitted to the docket, and being otherwise fully informed in the premises, makes the following findings, conclusions, and recommendations:

FINDINGS:

1. The Superintendent has jurisdiction over the subject matter and the parties pursuant to the New Mexico Insurance Code, NMSA 1978, Sections 59A-1-1 et seq. (“Insurance Code”).
2. The Superintendent designated Richard B. Word as the Hearing Officer to preside over this matter.
3. The OSI issued a NOPR and published the NOPR in the New Mexico Register on October 13, 2021 and in the *Albuquerque Journal* on October 16, 2021, and OSI distributed the NOPR via OSI’s Newsletter to a list of potentially interested parties.

4. The NOPR gave notice of a public hearing, scheduled for November 15, 2021, to accept oral comments on the new rule.

5. The NOPR informed the parties and the public of the process by which the Hearing Officer would conduct the hearing and how parties and the public could make comments on the proposed new rule and have the comments considered.

6. The NOPR further advised that a copy of the full text of the replacement rules was available on the OSI website or the New Mexico Sunshine portal, or by requesting a copy from OSI.

7. The purpose of the proposed new rule is to establish the requirements for insurance producers to act in the best interest of consumers when making a recommendation of an annuity and to require insurers to establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of the consumer at the time of the transaction are effectively addressed.

8. Statutory authority for promulgation of the proposed replacement rule is found at NMSA 1978, Section 59A-2-9 (1997) and NMSA 1978, Chapter 59A, Article 16.

9. On November 15, 2021, OSI conducted the public hearing.

10. Margaret Caffey-Moquin, Esq., representing OSI Staff, and Michelle Carrol Foster, Regional Vice-president of the American Council of Life Insurers (“ACLI”), made brief oral comments at the public hearing.

11. Written comments on the proposed rules were timely submitted to OSI by Ms. Caffey-Moquin on behalf of OSI Staff; Jason Berkowitz, Chief Legal & Regulatory Affairs Officer and Sarah E. Wood, Director, State Policy & Regulatory Affairs, Insured Retirement Institute (“IRI”); Karen Melchert, Regional Vice President for State Relations, American Council of Life Insurers (“ACLI”); Pamela Heinrich, General Counsel and Director of Government Affairs, National

Association for Fixed Annuities (“NAFA”); Kenneth Bottari, Government Relations Chair, and Lynda Turner, Executive Director, National Association of Insurance Financial Advisors – New Mexico (“NAIFA – New Mexico”); and John R. Cronin, Vice President and Head of State Government Relations, LPL Financial.

12. OSI Staff timely submitted response comments.

13. All comments, oral and written, have been made part of the record.

14. OSI has adopted rules for rulemaking, which are applicable to this proceeding, and which state:

The superintendent may adopt, amend, or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking proceeding. Amendments to a proposed rule are within the scope of the rulemaking if the amendments:

- (1) are a logical outgrowth of the rule proposed in the notice; or
- (2) are proposed, or are reasonably suggested, by comments made during the comment period, and the 10 day response period after the close of the comment period has been provided; and
 - (a) any person affected by the adoption of the rule, if amended, should have reasonably expected that any change from the published proposed rule would affect that person's interest; or
 - (b) the subject matter of the amended rule or the issues determined by that rule are the same as those in the published proposed rule.

13.1.4.13(C) NMAC. The “10 day response period after the close of the comment period” is ten calendar days. 13.1.4.11(B) NMAC.

15. 13.1.4.13(C) NMAC contemplates that OSI may amend a proposed rule if the amendment is a “logical outgrowth” of the proposed rule *or* the amendment is proposed during the comment period, with ten calendar days to respond to the proposed amendment.

16. The NOPR informed interested parties that the comment period ended at 4:00 p.m. on November 15, 2021 and that the response comment period ended at 4:00 p.m. on November 30, 2021. Thus, the “10 day response period after the close of the comment period” was provided.

17. Although there appears to be no New Mexico case law addressing the issue, federal courts have recognized that administrative agencies may make changes in the proposed rule after the comment period without a new round of hearings, as long as the final rule is a “logical outgrowth” of the proposed rule. *Market Synergy Group, Inc. v. U.S. Dep’t of Labor*, 885 F.3d 676, 681 (10th Cir. 2018); *Zen Magnets, LLC v. Consumer Prod. Safety Comm’n*, 841 F.3d, 1141, 1154 (10th Cir. 2016). “A final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” *Market Synergy* at 681 (internal quotation marks omitted); *Zen Magnets* at 1154.

18. In its comments ACLI recommends that the term “insurance producer” be changed to “producer” throughout the proposed rule, or alternatively that a definition of “insurance provider” be added. ACLI points out that the NAIC Model Rule uses the term “producer” and not “insurance producer”. OSI Staff did not specifically address this proposed amendment in its response but notes generally that all variations in the proposed rule from NAIC Model Rule were consistent with both state law and good public policy. The Hearing Officer notes that the term “insurance producer” is defined in the Insurance Code at Section 59A-12-2(E). The Hearing Officer finds that an amendment to the proposed rule to reference this definition in the statute is reasonable and consistent with the terminology in other rules adopted by the Superintendent. Therefore, the Hearing Officer recommends that the first line of the proposed 13.9.29.6(A) be amended read: “This rule requires an insurance producer as defined in 59A-12-2(E) NMSAA 1978 . . .”.

19. OSI Staff requested in both its comments and its response to comments that the proposed 13.9.20.2 (“Scope”) be modified to clarify that the proposed rule is not applicable solely to resident sellers of annuities. OSI Staff recommends that this section be amended to read: “This rule applies

to any sale or recommendation of an annuity in New Mexico or to a resident of New Mexico, regardless of an insurance producer's state of domicile." No other comments or responses addressed this section of the proposed rule or this issue. The Hearing Officer finds that OSI Staff's proposed amendment removes ambiguity and more clearly states the intended scope of the proposed rule and should be adopted.

20. Almost all the commenters recommended postponing the effective date of the proposed rule from January 1, 2022, as stated in the proposed 13.9.20.5. OSI Staff and NAFA recommended that the effective be changed to July 1, 2022, or in the alternative, six months after the proposed rule is adopted. ICI, ACLI, and LPL Financial all recommended the rule not go into effect until at least six months after the proposed rule is adopted. ICI noted that this is consistent with past amendments to National Association of Insurance Commissioners ("NAIC") model rules and legislation. ICI further noted, and OSI Staff agreed, that six months should be allowed for the implementation of the proposed rule by covered entities. The Hearing Officer finds that this requested amendment was proposed during the comment period and is both reasonable and justified. The Hearing Officer recommends that that the proposed 13.9.20.5 be amended to read: "EFFECTIVE DATE: October 1, 2022, unless a later date is cited at the end of a section."

21. While not referenced in the comments or response, the Hearing Officer identifies an apparent typographical error in the middle of the second line of the proposed 13.9.20.6(A). That part of this proposed subsection currently reads ". . . and *request* an insurer to establish and maintain a system . . .". (Emphasis added.) Because compliance with the proposed rule is mandatory and not permissive, the Hearing Officer finds use of the word "request" to be a typographical error and recommends that the proposed 13.9.20.6(A) be amended to delete the word "request" deleted and the word "require" substituted in its place. This minor change, in context

and to clarify the meaning of the proposed 13.9.20.6(A), meets the “logical outgrowth” test because interested parties should have anticipated that the change was possible. Therefore, the Hearing Officer recommends the adoption of this change.

22. IRI, joined by ACLI and LPL Financial, support the amendment of proposed 13.9.20.6 to add a new subsection C to provide: “Nothing herein shall be construed to create or imply a private cause of action for a violation of this regulation or to subject a producer to civil liability under the best interest standard of care outlined in Section 13.9.20.9 of this rule or under standards governing the conduct of a fiduciary or a fiduciary relationship.” The suggested language is found in the corresponding section of the National Association of Insurance Commissioners (“NAIC”) Model Rule MDL-275 (“NAIC Model Rule”) upon which the proposed rule is based. IRI, ACLI and LPL Financial offer no arguments in support of adding this new paragraph other than “to bring the proposed rule into full alignment with the latest version of the NAIC model.” OSI Staff did not specifically address this proposed amendment in its response but notes generally that all variations in the proposed rule from NAIC Model Rule were consistent with both state law and good public policy. The Hearing Officer finds that there is an insufficient showing to warrant the amendment to the proposed 13.9.20.9 urged by IRI, ACLI and LPL Financial and recommends that it be rejected and the proposed new subsection not be added to the proposed rule.

23. ACLI also recommends in its comments that the definition of “financial professional” in the proposed 13.9.20.7(H)(2) be amended by adding the phrase “registered financial advisor” following the phrase “associated with the federal or state” at the end of that section. OSI Staff does not address this suggested amendment in its response. The Hearing Officer notes that there appear to be words missing from end of the proposed 13.9.20.7(H)(2) that renders its meaning uncertain. The Hearing Officer recommends an amendment to strike the words “associate with the federal or

state” at the end of 13.9.20.7(H)(2) and substitute in their place the words “working with a registered adviser”. The Hearing Officer finds this amendment is both logical and consistent with remainder of the definition of “financial professional” and recommends that these changes be adopted.

24. ACLI further recommends in its comments that the phrase “consumer profile information”, which is defined in the proposed 13.9.20.7(D), be used consistently in the proposed rule. Specifically, ACLI points to the slightly modified forms of that phrase used in the proposed 13.9.20.9(A)(1)(c) and 13.9.20.9(D)(2)(d). ACLI suggests changing the phrase “in the consumer profile” to “in the consumer profile information” in the proposed 13.9.20.9(A)(1)(c) and changing “confirmation of the consumer’s consumer profile information” to “confirmation of the consumer’s consumer profile information” in the proposed 13.9.20.9(D)(2)(d). OSI Staff does not address these suggested amendments in its response. The Hearing Officer notes that this proposed amendment by ACLI would also apply to the proposed 13.9.20.9(D)(1). The Hearing Officer finds that these proposed amendments to 13.9.20.9(A), (D)(1) and D(2)(d) add both consistency and clarity to the proposed rule. These recommended changes were made during the comment period and the ten-day response period was provided and may be adopted, and the Hearing Officer recommends that they be adopted.

25. In addition, ACLI’s comments request amendments to the proposed 13.9.20.9(A) regarding a producer’s recommendations for annuities with the lowest compensation structure. ALCI cites to “13.9.20.9A.(1)(i)(ii)” in the proposed rule, which does not exist. The Hearing Officer concludes ACLI intended to direct this comment to the proposed 3.9.20.9(A)(i)(ii), which provides that the care obligations in this proposed rule “do not require recommendation in all situations of an annuity with the lowest one-time or multiple occurrence compensation structure.”

ACLI urges that this language be amended to read: “do not mean that the annuity with the lowest one-time or multiple occurrence compensation structure should necessarily be recommended.” ACLI asserts its proposed language more closely tracks the language in the NAIC Model Rule, and that the language in the proposed rule could be interpreted to impose a more restrictive standard. Although OSI Staff did not address this specific recommendation in its response, it noted that departures in the proposed rule from the exact language of NAIC Model Rule were consistent with both state law and good public policy, while preserving the best of the NAIC model and strengthening its protections for consumers. The Hearing Officer finds little if any substantive difference in meaning between the proposed 3.9.20.9(A)(i)(ii) and the alternative language offered by ACLI and recommends that ACLI’s proposed amendment to that subpart be rejected.

26. IRI recommended revising certain references to “the rule” within the proposed rule to more particular references to specific sections or subsections or the phrase “this section” or “this subsection”. IRI states that this approach is more consistent with the NAIC model rule which is the basis of the proposed rule. OSI Staff did not directly address this recommendation in their response although it did make a general statement that differences between the proposed rule and the NAIC Model Rule were consistent with both state law and good public policy. The Hearing Officer recognizes that other OSI rules routinely utilize the more general reference to the “rule” rather to specific sections or subsections and recommends that this proposed amendment not be adopted.

27. OSI Staff’s comments and response both call for an amendment to clearly establish an ongoing requirement for continuing education relating to the sale and recommendation of annuities. Tracking the NAIC Model Rule, the proposed 13.9.20.10(A)(1) requires only a “one-time four-credit training course approved by OSI” for producers who seek to sell or recommend

annuity products. No other comments were received on this question. In its response, OSI Staff recommend that the proposed 13.9.20.10(A)(1) be amended to specify that the four-credit continuing education training on annuities must be completed every biennial renewal period. In support of this proposal, the OSI Staff response states generally that the proposed amendment enhance consumer protection and would help ensure that brokers selling annuity products have the knowledge needed to comply with the rule. However, the OSI Staff response also notes that no other state has imposed a recurring continuing education requirement beyond the initial four hours required in the NAIC Model Rule, and staff recommends limiting its proposed amendment to resident producers only. The Hearing Officer finds that OSI Staff's comments and response do not provide a sufficient basis for requiring producers to complete a four-credit continuing education training on annuities every two years and recommends against adopting this proposed amendment.

28. The OSI Staff response also recommends that there be no "grandfather exemption" for the continuing education requirements contained in the proposed 13.9.20.10(A). Currently, the OSI website provides that "Any licensee, that has been continuously licensed and in good standing for 25 years or more *without a lapse of more than 90 days*, is eligible to apply for a Grandfather Exemption." See: <https://www.osi.state.nm.us/index.php/producers/producer-licensing/continuing-education/> (last visited February 23, 2022) Under this provision a licensee may be granted an exemption from some continuing education requirements upon submission of a written application establishing that these requirements are met. In its response OSI Staff recommends that the proposed rule be amended to preclude such an exemption from being granted. The Hearing Officer notes that no comments have been submitted relating in any way to the question of exemptions to one-time mandatory four-credit annuity training. The Hearing Officer further notes that the OSI rule governing rulemaking hearings provides that responses are

responses to comments. As stated in the relevant part of 13.1.4.11(B) NMAC: “For purposes only of *responses to written comments or oral comments at the public hearing*, the public response period will extend at least 10 calendar days beyond the public hearing or close of the 30 day comment period, whichever is later. . .”. (Emphasis added.) Similarly, 13.1.4.11(C) NMAC provides in relevant part: “A person may submit, by mail or electronic form, written comments or *responses to comments* on a proposed rule, and those comments or responses shall be made part of the record.” (Emphasis added.) The Hearing Officer interprets 13.1.4.11 NMAC to mean that the scope of responses filed in a rulemaking proceeding are limited to questions or issues raised in comments filed the record. Therefore, the Hearing Officer recommends that this proposed amendment not be adopted.

29. OSI Staff’s response also identified an apparent typographical error in the first line of the first sentence of the proposed 13.9.20.10(A)(5), where the word “topic” should be in the plural form, “topics”. The Hearing Officer finds that this minor change to correct a grammatical or typographical error meets the “logical outgrowth” test because interested parties should have anticipated that the changes were possible. Therefore, the Hearing Officer recommends that the change be adopted.

30. IRI, supported by ACLI and LPL Financial, also suggests adding a new subsection “C” to the proposed 13.9.20.12 to provide: “The authority to enforce compliance with this rule is vested exclusively with the superintendent.” Similar language appears in the NAIC Model Rule. OSI Staff do not address this amendment in their response, but as noted above, asserts that differences between the proposed rule and the NAIC Model Rule were consistent with both state law and good public policy. The Insurance Code is silent on the issue of whether the Superintendent of Insurance has exclusive authority to enforce compliance with rules promulgated by the Superintendent.

NMSA 1978, Section 59A-2-9 expressly refers to the superintendent in connection with the making (Subsection A) and filing (Subsection C) of rules and regulations under the Insurance Code. Significantly, Section 59A-2-9(D) provides for penalties for the willful violation of rules promulgated under the Insurance Code but does not reference the Superintendent or otherwise suggest only the Superintendent can enforce compliance with such rules. The Hearing Officer finds that it is for New Mexico courts to decide whether the superintendent has exclusive authority to enforce the proposed rule and recommends against adopting this amendment to the proposed rule.

31. IRI, joined by ACLI and LPL Financial, also suggest in their comments amending the title to disclosure form attached to the proposed rule as Appendix A. IRI recommends changing the title from “CONSUMER DISCLOSURE” to “INSURANCE AGENT (PRODUCER) DISCLOSURE FOR ANNUITIES”. The recommendation is made in the form of a redline-strikeout copy of the text of the proposed Appendix A, without supporting statements or arguments. OSI Staff’s response does not address the proposed edit. The Hearing Officer finds that the current title of the form more clearly conveys the purpose of the form, which is to provide important information about the producer. The Hearing Officer recommends that this proposed amendment be rejected.

32. To the extent that the Administrative Law Division may require formatting of the final rules different from originally proposed, the Hearing Officer recommends following those formatting requirements.

CONCLUSIONS:

- A. The Superintendent has jurisdiction over the subject matter and the parties.

B. OSI caused the NOPR to be published on October 13, 2021 in the New Mexico Register and on October 16, 2021 in a newspaper of general circulation in compliance with NMSA 1978, Section 14-4-5.2.

C. The NOPR provided interested persons and the public appropriate notice of the hearing and the opportunity to offer oral and written comments.

D. The Hearing Officer has considered all oral and written comments.

E. The proposed rules should be adopted, with changes set forth above, effective October 1, 2022.

WHEREFORE, in light of the findings and conclusions above, the Hearing Officer **RECOMMENDS** that the Superintendent should sign a Final Order that adopts the proposed rules attached hereto as Exhibit A.

The Hearing Officer also **RECOMMENDS** that a copy of this Hearing Officer's Findings, Conclusions, and Recommendations, with its attachments, be sent to all interested persons.

ISSUED at Santa Fe, New Mexico this 24th day of February, 2022.

OFFICE OF SUPERINTENDENT OF INSURANCE

A handwritten signature in blue ink, appearing to read "Richard Word", is written over a horizontal line.

Richard B. Word, Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 24th day of February 2022, I filed the forgoing *Hearing Officer's Findings, Conclusions, and Recommendations* through the OSI's e-filing system, which caused the parties to be served by electronic means, as more fully reflected on the eService recipients list for this case.



MELISSA Y. GUTIERREZ, Law Clerk
Office of Legal Counsel
Office of Superintendent of Insurance

EXHIBIT A

TITLE 13 INSURANCE
CHAPTER 9 LIFE INSURANCE AND ANNUITIES
PART 20 SUITABILITY IN ANNUITY TRANSACTIONS

13.9.20.1 ISSUING AGENCY: The New Mexico Office of Superintendent of Insurance (“OSI”).
[13.9.20.1 NMAC – N, 10/1/2022]

13.9.20.2 SCOPE: This rule applies to any sale or recommendation of an annuity in New Mexico or to a resident of New Mexico, regardless of an insurance producer’s state of domicile.
[13.9.20.2 NMAC – N, 10/1/2022]

13.9.20.3 STATUTORY AUTHORITY: Chapter 59A, Article 16 NMSA 1978 and Section 59A-2-9 NMSA 1978.
[13.9.20.3 NMAC – N, 10/1/2022]

13.9.20.4 DURATION: Permanent.
[13.9.20.4 NMAC – N, 10/1/2022]

13.9.20.5 EFFECTIVE DATE: October 1, 2022, unless a later date is cited at the end of a section.
[13.9.20.5 NMAC – N, 10/1/2022]

13.9.20.6 OBJECTIVE:

A. This rule requires an insurance producer as defined in Section 59A-12-2E NMSA 1978 to act in the best interest of a consumer when making a recommendation of an annuity and require an insurer to establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of the consumer at the time of the transaction are effectively addressed.

B. Another objective of this rule is to regulate trade practices in the insurance business and related businesses in accordance with the intent of Congress, as expressed in the Act of Congress approved March 9, 1945, being c. 20, 59 Stat. 33, also designated as 15 U.S.C. Sections 1011 to 1015, inclusive, by defining, or providing for determination of, practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices so defined or determined.
[13.9.20.6 NMAC – N, 10/1/2022]

13.9.20.7 DEFINITIONS: For the purposes of this rule:

A. “**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.

B. “**Cash compensation**” means any discount, concession, fee, service fee, commission, sales charge, loan, override or cash benefit received by an insurance producer in connection with the recommendation or sale of an annuity from an insurer, intermediary or directly from the consumer.

C. “**Comparable standards**” means:

(1) for broker-dealers and registered representatives of broker-dealers, applicable SEC and FINRA rules pertaining to best interest obligations and supervision of annuity recommendations and sales, including, but not limited to, the most current version of Regulation Best Interest as promulgated by the SEC and codified at 84 F.R. 33318, and any amendments or successor rules thereto;

(2) for investment advisers registered under federal or state securities laws or investment adviser representatives, the fiduciary duties and all other requirements imposed on such investment advisers or investment adviser representatives by contract or under the Investment Advisers Act of 1940 or the New Mexico Uniform Securities Act, Section C of Chapter 58, Article 13 NMSA 1978, including but not limited to, SEC Form ADV and interpretations; and

(3) for plan fiduciaries or fiduciaries, the duties, obligations, prohibitions and all other requirements attendant to such status under ERISA or the IRC and any amendments or successor statutes thereto.

D. “**Consumer profile information**” means information that is reasonably appropriate to determine whether a recommendation addresses the consumer’s financial situation, insurance needs and financial objectives including, at a minimum, the following:

- (1) age;
- (2) annual income;

- (3) financial situation and needs, including debts and other obligations;
- (4) financial experience;
- (5) insurance needs;
- (6) financial objectives;
- (7) intended use of the annuity;
- (8) financial time horizon;
- (9) existing assets or financial products, including investment, annuity and insurance holdings;
- (10) liquidity needs;
- (11) liquid net worth;
- (12) risk tolerance, including but not limited to, willingness to accept non-guaranteed elements in the annuity;
- (13) financial resources used to fund the annuity; and
- (14) tax status.

E. “Continuing education credit” or “CE credit” means one continuing education credit hour as defined in 13.4.7.7 NMAC.

F. “Continuing education provider” or “CE provider” means an individual or entity that is approved to offer continuing education courses pursuant to Section 59A-12-26 NMSA 1978 and 13.4.7 NMAC.

G. “ERISA” means the federal Employee Retirement and Income Security Act.

H. “Financial professional” means an insurance producer who is regulated and acting as:

- (1) a broker-dealer registered under federal or state securities laws or a registered representative of a broker-dealer;
- (2) an investment adviser registered under federal or state securities laws or a representative of an investment adviser working with a registered adviser; or
- (3) a plan fiduciary, as defined in ERISA or IRC.

I. “FINRA” means the financial industry regulatory authority or a succeeding agency.

J. “Intermediary” means an entity contracted directly with an insurer or with another entity contracted with an insurer to facilitate the sale of the insurer’s annuities by insurance producers.

K. “IRC” means the Internal Revenue Code.

L. “Material conflict of interest” means a financial interest of an insurance producer in the sale of an annuity that a reasonable person would expect to influence the impartiality of a recommendation. It does not include cash compensation or non-cash compensation.

M. “Non-cash compensation” means any form of compensation that is not cash compensation, including but not limited to health insurance, office rent, office support and retirement benefits.

N. “Non-guaranteed elements” means the premiums, credited interest rates (including any bonus), benefits, values, dividends, non-interest-based credits, charges or elements of formulas used to determine any of these that are subject to company discretion and are not guaranteed at issue. An element is considered non-guaranteed if any of the underlying non-guaranteed elements are used in its calculation.

O. “Recommendation” means advice provided by an insurance producer to an individual consumer that is intended to result or does result in a purchase, exchange or replacement of an annuity in accordance with that advice. Recommendation does not include general communication to the public, generalized customer service assistance or administrative support, general educational information and tools, prospectuses or other product and sales material.

P. “Replacement” means a transaction in which a new annuity is to be purchased and it is known or should be known to the proposing insurance producer, or to the proposing insurers whether or not an insurance producer is involved, that because of the transaction, an existing annuity or other insurance policy has been or is to be any of the following:

- (1) lapsed, forfeited, surrendered or partially surrendered, assigned to the replacing insurer or otherwise terminated;
- (2) 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;
- (3) amended so as to effect either a reduction in benefits or in the term for which coverage would otherwise remain in force or which benefits would be paid;
- (4) reissued with any reduction in cash value; or
- (5) used in a financed purchase.

Q. “SEC” means the United States securities and exchange commission.

[13.9.20.7 NMAC – N, 10/1/2022]

13.9.20.8 EXCEPTIONS: Unless otherwise specifically stated, this rule shall not apply to transactions involving:

- A.** a direct response solicitation when there is no recommendation based on information collected from the consumer pursuant to this rule;
- B.** a contract used to fund:
 - (1) an employee pension or welfare benefit plan that is covered by ERISA;
 - (2) a plan described by Sections 401(a), 401(k), 403(b), 408(k) or 408(p) of the IRC, as amended, if established or maintained by an employer;
 - (3) a government or church plan defined in Section 414 of the IRC, 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 IRC; or
 - (4) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor;
- C.** a settlement of or assumption of liability associated with personal injury litigation or any dispute or claim resolution process; or
- D.** a formal prepaid funeral contract.

[13.9.20.8 NMAC – N, 10/1/2022]

13.9.20.9 DUTIES OF INSURERS AND INSURANCE PRODUCERS:

A. Best interest obligations. An insurance producer, when 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 insurance producer's or the insurer's financial interest ahead of the consumer's interest. An insurance producer has acted in the best interest of the consumer if the insurance producer has satisfied the following obligations regarding care, disclosure, conflict of interest and documentation as outlined in this rule.

- (1) **Care obligation.** An insurance producer, in making a recommendation, shall exercise reasonable diligence, care and skill to:
 - (a) know the consumer's financial situation, insurance needs and financial objectives;
 - (b) understand the available recommendation options after making a reasonable inquiry into options available to the insurance producer;
 - (c) have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives over the life of the product, after consideration of the information provided in the consumer profile information;
 - (d) communicate the basis or bases of the recommendation;
 - (e) make reasonable efforts to obtain consumer profile information from the consumer before the recommendation of an annuity;
 - (f) consider the types of products the insurance producer is authorized and licensed to recommend or sell that address the consumer's financial situation, insurance needs and financial objectives. This does not require analysis or consideration of any products outside the authority and license of the insurance producer or other possible alternative products or strategies available in the market at the time of the recommendation. An insurance producer shall be held to standards applicable to insurance producers with similar authority and licensure;
 - (g) consider the consumer profile information, characteristics of the insurer and product cost, rates, benefits and features in making a determination whether an annuity effectively addresses the consumer's financial situation, insurance needs and financial objectives, while understanding that:
 - (i) the level of importance of each factor of the care obligation may vary depending on the facts and circumstances of a particular case; and
 - (ii) each factor shall not be considered in isolation.
 - (h) in the case of an exchange or replacement of an annuity, consider the whole transaction, which includes consideration of 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 replacing product would substantially benefit the consumer in comparison to the replaced product over the life of the product; and

(iii) the consumer has had another annuity exchange or replacement and in particular, an exchange or replacement within the preceding 60 months.

(i) The care obligation requirements of this rule:

(i) include having a reasonable basis to believe the consumer would benefit from certain features of the annuity, such as annuitization, death or living benefit or other insurance-related features; apply to a particular annuity as a whole and to the underlying subaccounts to which funds are allocated at the time of annuity purchase or exchange and to riders and similar producer enhancements, if any;

(ii) do not require recommendation in all situations of an annuity with the lowest one-time or multiple occurrence compensation structure;

(iii) do not impose additional ongoing monitoring obligations on a producer, but such obligations may be separately owed under the terms of a fiduciary, consulting, investment advising or financial planning agreement between the producer and a consumer; and

(iv) do not create a fiduciary obligation or relationship.

(2) **Disclosure obligation.** Before or at the time of the recommendation or sale of an annuity, an insurance producer shall have a reasonable basis to believe the consumer has been 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; any annual fees, potential charges for and features of riders or other options of the annuity limitations on interest returns, potential changes in non-guaranteed elements of the annuity, insurance and investment components and market risk. These requirements are intended to supplement and not replace other disclosure requirements of this rule. Before the recommendation or sale of an annuity, an insurance producer shall prominently disclose to a consumer on a form substantially similar to Appendix A located at the end of this rule the following information:

(a) a description of the scope and terms of the insurance producer's relationship with the consumer and the role of the insurance producer in the transaction;

(b) an affirmative statement of whether the insurance producer is licensed and authorized to sell the following products:

(i) fixed annuities;

(ii) fixed indexed annuities;

(iii) variable annuities;

(iv) life insurance;

(v) mutual funds;

(vi) stocks and bonds; and

(vii) certificates of deposit;

(c) an affirmative statement describing the insurers for which the insurance producer is authorized, contracted or appointed, or otherwise able to sell insurance products, using the following descriptions:

(i) from one insurer;

(ii) from two or more insurers; or

(iii) from two or more insurers although primarily contracted with one insurer;

(d) a description of the sources and types of cash compensation and non-cash compensation to be received by the insurance producer, including whether the insurance producer is to be compensated for the sale of a recommended annuity by commission as part of a premium or other remuneration received from the insurer, intermediary or other insurance producer or by a fee as a result of a contract for advice or consulting services; and

(e) a notice of a consumer's or consumer's representative's right to request additional information regarding cash compensation that discloses:

(i) a reasonable estimate of the amount of cash compensation to be received by the insurance producer, which may be stated as a range of amounts or percentages; and

(ii) whether the cash compensation is a one-time or multiple occurrence amount, and if a multiple occurrence amount, the frequency and amount of the occurrence, which may be stated as a range of amounts or percentages.

(3) **Conflict of interest obligation.** An insurance producer shall identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts of interest related to an ownership interest.

(4) **Documentation obligation.** At the time of recommendation or sale an insurance producer shall:

- (a) make a written record of any recommendation and the basis for the recommendation subject to this rule;
- (b) obtain a consumer signed statement on a form substantially similar to Appendix B located at the end of this rule documenting:
 - (i) a consumer's refusal to provide the consumer profile information, if any; and
 - (ii) a consumer's understanding of the ramification of not providing their consumer profile information or providing insufficient consumer profile information; and
- (c) obtain a consumer signed statement on a form substantially similar to Appendix C acknowledging that the annuity transaction is not recommended if a consumer decides to enter into an annuity transaction that is not based on the insurance producer's recommendation.

B. Application of the best interest obligation. Any requirement applicable to an insurance producer under this section shall apply to every insurance producer who has exercised material control or influence in the making of a recommendation and has received direct compensation as a result of the recommendation or sale, regardless of whether the insurance producer has had any direct contact with the consumer. Activities such as providing or delivering marketing or educational material, product wholesaling or other back-office product support and general supervision of an insurance producer do not, in and of themselves, constitute material control or influence.

C. Transactions not based on a recommendation.

- (1) Except as provided in this rule, an insurance producer shall have no obligation to a consumer under the care obligation related to any annuity transaction if:
 - (a) no recommendation is made;
 - (b) a recommendation was made and was later found to have been prepared based on materially inaccurate information provided by the consumer;
 - (c) a consumer refuses to provide relevant consumer profile information and the annuity transaction is not recommended; or
 - (d) a consumer decides to enter into an annuity transaction that is not based on a recommendation of the producer.
- (2) An insurer's issuance of an annuity under the above conditions shall be reasonable under all circumstances known to the insurer at the time the annuity is issued.

D. Supervision system.

- (1) Except as permitted in circumstances of transactions not based on a recommendation, an insurer may not issue an annuity recommendation to a consumer unless there is a reasonable basis to believe the annuity would effectively address the consumer's financial situation, insurance needs and financial objectives based on the consumer's profile information.
- (2) An insurer shall establish and maintain a supervision system that is reasonably designed to achieve the insurer's and its insurance producers' compliance with this rule, including, but not limited to developing and implementing the following:
 - (a) procedures to inform its insurance producers of the requirements of this rule and incorporate the requirements of this rule into relevant insurance producer training manuals;
 - (b) product-specific training and training materials which explain all material features of its annuity products and requirements of this rule to its insurance producers;
 - (c) procedures for the review of each recommendation prior to issuance of an annuity that are designed to ensure there is a reasonable basis to determine that the recommended annuity would effectively address the consumer's financial situation, insurance needs and financial objectives. Such review procedures may apply a screening system to identify 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;
 - (d) reasonable procedures to detect recommendations that are not in compliance with this rule. This may include, but is not limited to, confirmation of the consumer's consumer profile information, systematic consumer surveys, insurance producer and consumer interviews, confirmation letters, insurance producer statements or attestations and programs of internal monitoring and sampling procedures and may be accomplished after the issuance or delivery of an annuity;

(e) reasonable procedures to assess, prior to or upon issuance or delivery of an annuity, whether an insurance producer has provided to the consumer the information required by this rule;

(f) reasonable procedures to identify and address suspicious consumer refusals to provide consumer profile information; and

(g) reasonable procedures to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited time period. The requirements of this rule are not intended to prohibit the receipt of health insurance, office rent, office support, retirement benefits or other employee benefits by employees as long as those benefits are not based upon the volume of sales of a specific annuity within a limited time period.

(3) An insurer shall annually provide a written 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.

(4) Nothing in this rule restricts an insurer from contracting for the performance of a function (including maintenance of procedures). An insurer shall take appropriate corrective action and may be subject to sanctions and penalties pursuant to Section 59A-1-18 NMSA 1978 regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with this rule.

(5) An insurer's supervision system shall include supervision of contractual performance. 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.

(6) An insurer is not required to include the following in its supervision system:

(a) an insurance producer's recommendations to a consumer of products other than the annuities offered by the insurer; and

(b) consideration of or comparison to options available to the insurance producer or compensation relating to those options other than annuities or other products offered by the insurer.

E. Prohibited practices. Neither an insurance producer nor an insurer shall dissuade, or attempt to dissuade a consumer from:

(1) truthfully responding to an insurer's request for confirmation of the consumer profile information;

(2) filing a complaint; or

(3) cooperating with the investigation of a complaint.

F. Safe harbor. Recommendations and sales of annuities made in compliance with comparable standards shall satisfy the requirements of this rule. This provision applies to all recommendations and sales of annuities made by financial professionals in compliance with business rules, controls and procedures that satisfy a comparable standard even if such standard would not otherwise apply to the product or recommendation at issue.

(1) This provision shall not limit the superintendent's ability to investigate and enforce the provisions of this rule.

(2) This provision shall not limit the insurer's obligation to comply with this rule, although the insurer may base its analysis on information received from either the financial professional or the entity supervising the financial professional.

(3) For this safe harbor to apply, an insurer shall:

(a) monitor the relevant conduct of the financial professional seeking to rely on safe harbor, or the entity responsible for the supervision of the financial professional, such as the financial professional's broker-dealer or an investment adviser registered under the federal or state securities laws using information collected in the normal course of business; and

(b) provide to the entity responsible for supervising the financial professional seeking to rely on this safe harbor, such as the financial professional's broker-dealer or investment-adviser registered under federal or state securities laws, information and reports that are reasonably appropriate to assist such entity to maintain its supervision system.

[13.9.20.9 NMAC – N, 10/1/2022]

13.9.20.10 INSURANCE PRODUCER TRAINING:

A. An insurance producer shall 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 rule.

(1) An insurance producer who engages in the sale of annuity products shall complete a one-time four-credit training course approved by OSI and provided by an OSI-approved education provider.

(2) An insurance producer who holds a life insurance line of authority on the effective date of this rule and who desires to sell annuities shall complete the requirements of this section within six months of the effective date of this rule. An insurance producer who obtains a life insurance line of authority on or after the effective date of this rule may not engage in the sale of annuities until the required annuity training course has been completed.

(3) The minimum length of the training required under this rule shall be sufficient to qualify for at least four CE credits but may be longer.

(4) The training required under this rule shall include information on the following topics:

- (a) the types of annuities and various classifications of annuities;
- (b) identification of the parties to an annuity;
- (c) how product-specific annuity contract features affect consumers;
- (d) the application of income taxation of qualified and non-qualified annuities;
- (e) the primary uses of annuities; and
- (f) appropriate standards of conduct, sales practices, replacement and disclosure

requirements.

(5) A provider of courses intended to comply with this Section 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.

(6) A provider of an annuity training course intended to comply with this rule shall register as a CE provider in this state and shall comply with the rules and guidelines applicable to insurance producer continuing education courses as set forth in Section 59A-12-26 NMSA 1978 and 13.4.7 NMAC.

(7) An insurance producer who has completed an annuity training course approved by OSI prior to the effective date of this rule shall, within six months of the effective date of this rule, complete either:

(a) a new four-credit training course approved by OSI after the effective date of this rule; or

(b) An additional one-time, one-credit training course approved by OSI and provided by an OSI-approved education provider on appropriate sales practices, replacement and disclosure requirements under this rule.

(8) Annuity training courses may be conducted and completed by classroom or self-study methods in accordance with Section 59A-12-26 NMSA 1978 and 13.4.7 NMAC.

(9) A provider of annuity training shall comply with the reporting requirements and shall issue certificates of completion in accordance with Section 59A-12-26 NMSA 1978 and 13.4.7 NMAC.

(10) Satisfaction of the training requirements of another state that are substantially similar to the provisions of this rule shall be deemed to satisfy the training requirements of this rule.

(11) Satisfaction of the components of the training requirements of any course or courses with components substantially similar to the provisions of this rule shall be deemed to satisfy the training requirements of this rule.

(12) An insurer shall verify that an insurance producer has completed the annuity training course required by this rule before allowing the insurance producer to sell an annuity product for that insurer. An insurer may satisfy its responsibility under this rule by obtaining certificates of completion of the training course or obtaining reports provided by OSI-sponsored database systems or vendors or from a reasonably reliable commercial database vendor that has a reporting arrangement with approved insurance education providers.

[13.9.20.10 NMAC – N, 10/1/2022]

13.9.20.11 RECORD KEEPING:

A. An insurer, general agent, independent agency or insurance producer shall maintain and make available to OSI, upon request, records of the information collected from the consumer, disclosures made to the consumer, including summaries of oral disclosures, and other information used in making the recommendations that were the basis for each insurance transaction for five 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 producer.

B. Records required to be maintained by this rule may be maintained in any form that accurately reproduces the actual document.

[13.9.20.11 NMAC – N, 10/1/2022]

13.9.20.12 COMPLIANCE MITIGATION; PENALTIES; ENFORCEMENT:

A. 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 producer, the superintendent may order:

(1) an insurer to take reasonably appropriate corrective action for any consumer harmed by a failure to comply with this rule by the insurer, an entity contracted to perform the insurer's supervisory duties or by an insurance producer;

(2) a general agency, independent agency or an insurance producer to take reasonably appropriate corrective action for any consumer harmed by an insurance producer's violation of this rule; and

(3) appropriate penalties and sanctions.

B. Any applicable penalty under 59A-1-18 NMSA 1978 for a violation of this rule may be reduced or eliminated according to a schedule adopted by the superintendent 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.

APPENDIX A

CONSUMER DISCLOSURE

CONSUMER INFORMATION

First Name: _____ Last Name: _____

INSURANCE PRODUCER INFORMATION

First Name: _____ Last Name: _____

Business/Agency Name: _____ Website: _____

Business/Mailing Address: _____

Business Telephone Number: _____ Email Address: _____

National Producer Number ("NPN") _____ Domicile State: _____

What Types of Products Can I Sell You?

I am licensed to sell annuities to You in accordance with state law. If I recommend that You buy an annuity, it means I believe that it effectively meets Your financial situation, insurance needs and financial objectives. Other financial products, such as life insurance or stocks, bonds and mutual funds may also meet Your needs.

I offer the following products:

- ☐ Fixed or Fixed Indexed Annuities
- ☐ Variable Annuities
- ☐ Life Insurance

I need a separate license to provide advice about or to sell non-insurance financial products. Below, I have checked any non-insurance financial products that I am licensed and authorized to provide advice about or to sell.

- ☐ Mutual Funds
- ☐ Stocks/Bonds
- ☐ Certificates of Deposit

Whose Annuities Can I Sell to You?

I am authorized to sell:

- ☐ Annuities from only one insurer
- ☐ Annuities from two or more insurers
- ☐ Annuities from two or more insurers, although I primarily sell annuities from: _____

How I am Paid for My Work?

It is important for You to understand how I am paid for my work. Depending on the particular annuity You purchase, I may be paid a commission or a fee. Commissions are generally paid to Me by the insurer while fees are generally paid to Me by the Consumer (You). If You have questions about how I am paid, please ask Me.

Depending on the annuity You buy, I will or may be paid cash compensation as follows:

- ☐ Commission, which is usually paid by the insurer or other sources. If other sources, they come from: _____.
- ☐ Fees (such as a fixed amount, an hourly rate, or a percentage of Your payment), which are usually paid directly by the Consumer.
- ☐ Other: _____.

If you have questions about the above compensation I will be paid for this transaction, please ask me. I may also receive other indirect compensation resulting from this transaction (sometimes called “non-cash” compensation), such as health or retirement benefits, office rent and support, or other incentives from the insurer or other sources.

By signing below, You acknowledge that You have read and understand the information provided to You in this document.

Consumer Signature

Date

Insurance Producer Signature

Date

APPENDIX B

CONSUMER REFUSAL TO PROVIDE INFORMATION

Do Not Sign Unless You Have Read and Understand the Information in this Form

WHY ARE YOU BEING GIVEN THIS FORM?

You are buying a financial product: an annuity.

To recommend a product that effectively meets Your needs, objectives and situation, the agent, broker or insurer needs information about You, Your financial situation, insurance needs and financial objectives.

If You sign this form, it means You have not given the agent, broker or insurer some or all the information needed to decide if the annuity effectively meets Your needs, objectives and situation. You may lose protections under the New Mexico Insurance Code if You sign this form or provide inaccurate information.

Statement of Purchaser:

- I **REFUSE** to provide this information at this time.
- I have chosen to provide **LIMITED** information at this time.

Consumer Signature

Date

APPENDIX C

Consumer Decision to Purchase an Annuity NOT Based on a Recommendation

Do Not Sign This Form Unless You Have Read and Understand It.

WHY ARE YOU BEING GIVEN THIS FORM?

You are buying a financial product: an annuity.

To recommend a product that effectively meets Your needs, objectives and situation, the agent, broker or insurer has the responsibility to learn about You, your financial situation, insurance needs and financial objectives.

If You sign this form, it means You know that you are buying an annuity that was not recommended.

Statement of Purchaser:

I understand that I am buying an annuity, but the agent, broker or insurer did not recommend that I buy it. If I buy it **without a recommendation**, I understand I may lose protections under the New Mexico Insurance Code.

Consumer Signature

Date

Insurance Producer Signature

Date