American Bankers Association
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Submitted Electronically to jmatthews@naic.org

The Honorable Doug Ommen
Commissioner, Iowa Insurance Division
Chairman, NAIC Life Insurance and
Annuities (A) Committee
Two Ruan Center
601 Locus, 4th Floor
Des Moines, IA 50309

The Honorable Stephen C. Taylor
Commissioner, D.C. Department of Insurance,
Securities and Banking
Vice Chairman, NAIC Life Insurance and
Annuities (A) Committee
1050 First Street, NE, Suite 801
Washington D.C., 20002

Re: Suitability in Annuity Transactions Model Regulation
Exposure Draft dated November 19, 2018

Dear Commissioner Ommen and Commissioner Taylor:

The American Bankers Association ("ABA") writes to the National Association of Insurance Commissioners ("NAIC") to thank them for the opportunity to provide comments. ABA asks the NAIC Life Insurance and Annuities Committee (EX) Working Group to insert a safe harbor for banks and their affiliates in the insurance distribution business from the Suitability in Annuity Transactions Model Regulation ("Model Law") to avoid duplicative and contradictory regulatory regimes.

Background

Banks in the business of insurance distribution have a unique regulatory regime in which they have to comply with significant federal regulations by multiple regulatory bodies as well as the regulatory regime of each state where they do business. Bank agency regulatory oversight is different than non-bank and independent agency regulation in that bank agencies are subject to comply with standards and regulations that are not applicable to non-bank and independent agencies. Banks and their affiliates are subject to federal regulation by the federal banking agencies (OCC, Federal Reserve, FDIC). Adding another layer of regulations to an already contradictory and complex regime is unnecessary, duplicative and will ultimately result with banks exiting the business and limiting consumer choice. While we understand that the model law is intended to aim for consistency, it is only reasonable to presume that not every state will be harmonized and ultimately banks will end up facing the issue of different states adopting different laws in addition to complying with the federal regime.

Federal Regulatory Requirements

This model law is really leaning toward a securities sale standard. This type of standard has evolved materially and become increasingly complex, burdensome and unwieldy. Banks in the insurance distribution business have that kind of standard for annuities with features that make them investment contracts (securities), but have not had it for purely insurance-based products. Regulation of annuity sales by banks selling such products is not needed and would create an additional and unnecessary regulatory and compliance burden. It would also violate section 104 of the Gramm-Leach-Bliley Act (15 U.S.C. section 6701) governing federal preemption of state laws that significantly interfere with banks' ability to market, solicit, and sell insurance products.

Variable annuities sold within the bank insurance setting are considered securities and are regulated by the Financial Industry Regulatory Authority ("FINRA") and the Securities and Exchange Commission ("SEC"). Any individual selling a variable annuity must hold the appropriate securities license, and as such, falls within the regulatory control of FINRA. The sale of a variable annuity is subject to FINRA Rule 2111, governing suitability of the sale of securities. In evaluating whether the sale of a variable annuity is appropriate for a particular customer, Rule 2111 looks to ensure the individual selling the product must have a reasonable basis to believe that the recommended sale is suitable for the customer based on the information obtained through reasonable diligence to understand the customer's investment profile. Generally, the investment profile will include the customer's age, other investments, financial situation and needs, investment objectives, investment experience, time horizon, liquidity needs and risk tolerance. These factors and information will assist in determining whether the annuity transaction is suitable for the customer.

FINRA comments have underscored the need for the customer to understand the nature of the annuity product. FINRA has recommended that the customer understand the terms, fees and expenses of the product, understand surrender charges, liquidity risks, tax consequences and have an understanding of how the salesperson is being compensated. By complying with the FINRA suitability requirements found in Rule 2111, a Bank is adhering to the highest standard governing the sale of annuities. As such, the new NAIC proposed rule is not necessary because the suitability in sales of such products is already sufficiently regulated.

Bank sales of insurance, including annuities, are already subject to state and federal laws, which require sufficient disclosure to consumers. Specifically, under federal banking agency requirements, any depository institution or person engaged in insurance sales activities at an office of the institution or on behalf of the institution must make certain disclosures to consumers before the completion of a sale of an insurance product.[1]

Federal banking agency regulations implementing the above requirement indicate that in connection with the initial purchase of an insurance product or annuity, a bank must make a disclosure of the fact that the insurance product or annuity is not a deposit of the bank, not insured by the FDIC or federal government agency, not guaranteed by the bank and, if applicable, that there is an investment risk and may go down in value. The specific regulatory requirements applicable to all sales of insurance products and annuities by banks are as follows:

- In connection with the initial purchase of an insurance product or annuity by a consumer from a covered person [bank or federal savings association], a covered person must disclose to the consumer, except to the extent the disclosure would not be accurate, that:
    - the insurance product or annuity is not a deposit or other obligation of, or guaranteed by, the bank, Federal savings association, or an affiliate of the bank or Federal savings association;
    - the insurance product or annuity is not insured by the FDIC or any other agency of the United States, the bank, Federal savings association, or (if applicable) an affiliate of the bank or Federal savings association; and

[1] 12 U.S.C. Section 1831x.

    - in the case of an insurance product or annuity that involves an investment risk, there is investment risk associated with the product, including the possible loss of value.
- Credit disclosure. In the case of an application for credit in connection with an insurance product or annuity is solicited, offered, or sold, a covered person must disclose that the bank or Federal savings association may not condition an extension of credit on either:

    - the consumer's purchase of an insurance product or annuity from the bank, Federal savings association, or any of their affiliates; or

    - the consumer's agreement not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.[2]

Additionally, banks may not engage in any practice that leads a consumer to believe that an extension of credit is conditional upon either the purchase of an insurance product or annuity, an agreement by the consumer not to obtain, or a prohibition on the consumer from obtaining an insurance product or annuity from an unaffiliated entity.[3] Furthermore, banks may not engage in any practice or use any advertisement that could mislead a person with respect to the fact that:

- an insurance product or annuity is not backed by the government, the bank or any agency;

- in the case of an insurance product or annuity that involves investment risk, there is an investment risk, including the fact that the principal may be lost and the product may decline in value;

- the approval of an extension of credit may not be conditioned on the purchase of an insurance product or annuity; or,

- the consumer is free to purchase the insurance product or annuity from another source.[4]

While these laws reflect the Comptroller of the Currency ("OCC") requirements, the Federal Reserve Board and the FDIC have similar regulations.[5] More generally, banks are also subject to unfair and deceptive acts and practices restrictions ("UDAAP") in any activity in which they are engaged, including sales of insurance products and annuities. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), all covered persons or service providers are legally required to refrain from committing unfair, deceptive, or abusive acts or practices.[6] The Dodd-Frank Act prohibits conduct that constitutes an unfair act or practice. An act or practice is unfair when:

- it causes or is likely to cause substantial injury to consumers;

- the injury is not reasonably avoidable by consumers; and

- the injury is not outweighed by countervailing benefits to consumers or to competition.[7]

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[2] 12 CFR 14(a), (b).
[3] 12 CFR 14.30(a).
[4] 12 CFR 14.30(b).
[5] 12 CFR Part 14, i.e., 12 CFR Part 208.81, et. seq. and 12 CFR Part 343.
[6] 12 U.S.C. Section 5531.
[7] 12 U.S.C. Section 5531(c).

The Consumer Financial Protection Bureau ("CFPB") similarly prohibits conduct that constitutes a deceptive act or practice. The CFPB indicates (based on its authority under the Dodd-Frank Act and the standards of the FTC Act) that an act or practice is deceptive when:

- the act or practice misleads or is likely to mislead the consumer;
- the consumer's interpretation is reasonable under the circumstances; and
- the misleading act or practice is material.

The Dodd-Frank Act also expressly prohibits conduct that constitutes an abusive act or practice which is defined as a practice that:

- materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- takes unreasonable advantage of a consumer's lack of understanding of the material risks, costs, or conditions of the product or service, a consumer's inability to protect his or her interests in selecting or using a consumer financial product or service or a consumer's reasonable reliance on a covered person to act in his or her interests.[8]

Encouraging a consumer to purchase any annuity product based on misleading information would likely be considered a deceptive or abusive practice under the above-listed UDAAP standards. Providing insufficient or misleading information regarding an annuity product specifically implicates the prohibitions against abusive practices in the Dodd-Frank Act. Banks subject to such UDAAP standards are already required and incentivized to provide full disclosure to consumers regarding products in order to avoid UDAAP violations. The CFPB has aggressively used its UDAAP enforcement abilities against banks and other financial institutions. Many states have similar UDAAP, and unfair trade practices laws to which banks are also subject. Thus, implementing a state best interest standard for banks and affiliate agencies already complying with UDAAP would create another duplicative and unnecessary layer of regulation.

The NAIC was directly involved in the consumer grievance process in connection with the bank sale of insurance disclosure rules and prohibitions and submitted a comment on behalf of the State insurance authorities that generally supported the Banking Agencies' proposed rules related to consumer protections in financial institution sales of insurance. The NAIC advised the Agencies to clarify in the final rules the role of the States in regulating insurance sales and also requested more detailed guidance in the Consumer Grievance Appendix to the final rules. Finally, the NAIC expressed its view that the lending area of a depository institution should be separated from the area in which insurance is sold.

The Agencies modified certain provisions of the proposed rules in light of the comments received, most notably:

- Section 47(f) of the FDIA requires that the Agencies jointly establish a consumer complaint mechanism for addressing consumer complaints alleging violations of these rules. Each agency has procedures in place to handle consumer complaints they receive directly. The Agencies will apply those procedures to complaints involving these rules. The Appendix to each agency's final rule contains the name and address of each agency's consumer complaint office. Any consumer who believes that a depository institution or any other person selling, soliciting, advertising, or

[8] 12 U.S.C. Section 5531(d).

offering insurance products or annuities to the consumer at an office of the institution or on behalf of the institution has violated the requirements of these rules may contact the consumer complaint office listed in the Appendix.[9]

- Each agency who has already entered into, or is developing, agreements with State insurance commissioners regarding the sharing of consumer complaints. It is expected that these agreements will facilitate prompt resolution of consumer complaints and ensure that incoming complaints are directed to the appropriate agency. Consumer complaints alleging violations of these rules that raise issues under State and local law will be shared with State regulators pursuant to those agreements.[10]

The banking agencies' modified and worked directly with NAIC to establish regulations to protect the consumer and therefore, banks and affiliates complying with these regulations should not be subject to an additional proposed standard by the NAIC.

There is a significant difference between people who are licensed in security and annuity sales and people who are licensed in insurance product sales. Practically speaking, at a minimum, there will have to be increased education and training on what it takes to meet the new standard and to stay in compliance. These differences include multiple different licenses and a rigorous education standard.[11] If this new standard is to apply, the sales person will have to have the same education requirements as a person selling securities.[12] The education for a life insurance-only agent is different from a securities standard and is governed by the particular state insurance department. For an insurance agent to apply such a best interest standard, it is going to require the agent to do a "needs" analysis, which will require the agent to have an investment tool for an advisor as opposed to a state insurance license. This is going to create increased litigation and liability if you want to stay in this product set and will come at additional costs and a significant increased compliance burden to meet these education requirements. Furthermore, the requirements will not be quantified globally since each bank will be different based on the product mix currently offered.

Education requirements are already required from bank insurance affiliates due to federal requirements by the parent company; therefore, it would be duplicative to place additional state education requirements on the affiliate or subsidiary that is already required by the parent or holding company. Annuities and life insurance are very different- while some producers sell life insurance as an investment product, life insurance is primarily sold on a needs base sale. Compared to other products, annuities are not always a big revenue generator for a bank agency so it is very likely that the increased compliance, litigation and liability of the model law will ultimately lead to banks leaving the business and no longer offering these products.

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[9] Appendix - Consumer Grievance Process

[10] Supplementary Information to Final Rule, Consumer Protections for Depository Institution Sales of Insurance, December 4, 2000.

[11] FINRA Rule 1210 Each person engaged in the investment banking or securities business of a member shall be registered with FINRA as a representative or principal in each category of registration appropriate to his or her functions and responsibilities as specified in Rule 1220, unless exempt from registration pursuant to Rule 1230. Such person shall not be qualified to function in any registered capacity other than that for which the person is registered, unless otherwise stated in the rules.

[12] FINRA Rule 1240 The imposition of this new standard will come at additional costs and a significant increased compliance burden in order to meet these education requirements. The requirements may not be quantified globally as every bank will be different based on the product mix currently offered. Educational requirements are already required from bank insurance affiliates due to federal and existing state requirements; therefore, it would be onerous to place additional state education requirements on the affiliate or subsidiary that is already required to meet educational requirements under federal and state laws. These additional requirements may result in increased liability and litigation for banks that want to stay in this product set.

In 2018, the New York Department of Financial Services finalized Regulation 187, the "Suitability and Best Interests for Life Insurance Annuities Transactions", requiring all life and annuities sold in or by New York to be in the best interest of the consumer and appropriately address the insurance needs and financial obligations of the consumer. This rule has been so ambiguous and burdensome that many producer groups have sued New York arguing that in addition to the lack of clarity in compliance, it is unconstitutionally vague and leaves the producer unreasonably vulnerable to litigation. As a result, many banks and insurance companies have immediately halted doing business in New York. If the NAIC and other states adopt a best interest standard, you can reasonably presume that many banks will eliminate the sales of these products ultimately affecting consumer choice.

In addition to the increased education requirements, there is a substantive difference between state enforcement disputes verses those of FINRA. The standard for suitability for the sale of annuities is governed by State law or regulation with the remedy for the violation of that standard likely to be in litigation. A lawsuit would be filed by the customer against the broker and/or the Bank to recover any damages. Depending on the circumstances, that lawsuit would be in either State or Federal Court. The damages may not be limited to compensatory type damages, but could also include claims for punitive damages if the conduct warranted. The time involved with litigation is usually lengthy and the costs of attorney's fees often result in an expensive process.

By contrast, disputes related to the violation of the FINRA suitability standard would be in arbitration proceedings. FINRA maintains a dispute resolution forum where such matters are arbitrated. The arbitration process is typically quicker than traditional litigation, and the awards are more limited to the investment losses. Awards of punitive damages are available, but are rare. Typically, the majority of FINRA arbitration matters are settled before a hearing. Similar to what you have seen in New York, if this model law results in increased vulnerability to litigation for producers, banks will avoid selling these products to avoid a lengthy and costly litigation process.

Recommendations

The American Bankers Association recommends that the NAIC clarify the intention on disclosure requirements in the model law. The proposed rule says that "prior to the recommendation of an annuity, the producer must "consider the types of products the producer, or insurer where no producer is involved, is authorized and licensed to recommend or sell that may align with the consumer's disclosed consumer profile information and address the consumer's financial situation, objectives and needs." The following disclosure is also required:

- "…disclose to the consumer any limitations the producer or the insurer has in regard to the following:
    - (a) The type of products that the producer is authorized and licensed to recommend or sell; and
    - (b) Whether only specific insurer company products or a limited range of annuity products may be offered; . . ."

A disclosure of the limitations on the types of products the producer is authorized to sell is required and this provision is not limited to types of annuities. There is a lack of clarity in the language of the proposed model as to whether banks would have to disclose all bank products or just all products that the producer is authorized and licensed to sell.

We ask the NAIC to clarify whether the intention of the model law is to have the producer consider other products in making the best interest determination and disclose any limits on the types of products that producer is able to offer or whether it is to require the disclosure of other products they are selling. While this can be read to mean a disclosure of a list of limitations on the types of products the insurance

producer working for the bank could sell it can also be read that a disclosure of all products offered i.e. a certificate of deposit, could also be required.

We recommend that NAIC clarify this ambiguity and confirm that the proposed rule's intention is to provide information about the insurance producer and what he or she is able to offer to a consumer in order to give the consumer more information to make the decision. Additional information about unrelated banking products would not seem helpful to a consumer interested in an insurance product or annuity. Also, listing other banking products that are not insurance products would likely result in consumer confusion as those products are governed by separate rules and likely cannot even be sold by an insurance producer in a bank insurance office.

Conclusion

As proven in the above comments, bank and affiliates in the business of selling annuities are already subject to sufficient and stringent federal regulation by the federal banking agencies that protect consumers' interested in obtaining these products. Subjecting banks and affiliates to a state best interest standard violates section 104 of the Gramm-Leach Bliley Act governing federal preemption of state insurance laws and will lead to contradictory, duplicative regulations, increased compliance and litigation resulting in the industry leaving the business and adversely affecting consumer choice. New York is a clear example of how a subjecting the bank and bank agency industry to a best interest standard leads to increased litigation and limitation of consumer options. The American Bankers Association asks that the NAIC to put in a safe harbor that exempts banks from this model law if they are complying with the regulations above to avoid any duplicative regulations, increased litigation and elimination of these products in the bank and affiliate industry.

Sincerely,

Sarah Ferman

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American Bankers Association