

Rulemaking Hearing Rules
of
The Tennessee Department of Commerce and Insurance
Insurance Division

Chapter 0780-01-86
Suitability in Annuity Transactions

New Rules

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0780-01-86-.01 Purpose.

- (1) The purpose of this Chapter is to set forth standards and procedures for recommendations to consumers that result in a transaction involving annuity products so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.
- (2) Nothing herein shall be construed to create or imply a private cause of action for a violation of this Chapter.

Authority: T.C.A. §§ 56-2-301, 56-2-305, 56-3-508, 56-6-112(a), 56-6-112(d), 56-6-124(a), 56-8-104, 56-8-113, and 56-8-101 *et seq.*

0780-01-86-.02 Scope.

This Chapter shall apply to any recommendation to purchase or exchange an annuity made to a consumer by an insurance producer, or an insurer where no producer is involved, that results in the purchase or exchange recommended.

Authority: T.C.A. §§ 56-2-301, 56-2-305, 56-3-508, 56-6-112(a), 56-6-112(d), 56-6-124(a), 56-8-104, 56-8-113, and 56-8-101 *et seq.*

0780-01-86-.03 Authority.

This Chapter is issued under the authority of T.C.A. §§ 56-2-301, 56-2-305, 56-3-508, 56-6-112(a), 56-6-112(d), 56-6-124(a), 56-8-104, 56-8-113, and 56-8-101 *et seq.*

Authority: T.C.A. §§ 56-2-301, 56-2-305, 56-3-508, 56-6-112(a), 56-6-112(d), 56-6-124(a), 56-8-104, 56-8-113, and 56-8-101 *et seq.*

0780-01-86-.04 Exemptions.

Unless otherwise specifically included, this Chapter shall not apply to recommendations involving:

- (1) Direct response solicitations where there is no recommendation based on information collected from the consumer pursuant to this Chapter; or
- (2) Contracts used to fund:
 - (a) An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);
 - (b) A plan described by Sections 401(a), 401(k), 403(b), 408(k) or 408(p) of the Internal Revenue Code (IRC), as amended, if established or maintained by an employer;
 - (c) 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;
 - (d) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor;
 - (e) Settlements of or assumptions of liabilities associated with personal injury litigation or any dispute or claim resolution process; or
 - (f) Formal prepaid funeral contracts.

Authority: T.C.A. §§ 56-2-301, 56-2-305, 56-3-508, 56-6-112(a), 56-6-112(d), 56-6-124(a), 56-8-104, 56-8-113, and 56-8-101 *et seq.*

0780-01-86-.05 Definitions.

- (1) "Annuity" means a fixed annuity or variable annuity that is individually solicited, whether the product is classified as an individual or group annuity;
- (2) "Commissioner" means the Commissioner of the Tennessee Department of Commerce and Insurance;
- (3) "Department" means the Tennessee Department of Commerce and Insurance;
- (4) "Insurer" means a company required to be licensed under the laws of this state to provide insurance products, including annuities;
- (5) "Insurance producer" means a person required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities;
- (6) "Person" means any natural or artificial person including, but not limited to, an individual, partnership, association, trust or corporation;

- (7) "Recommendation" means advice provided by an insurance producer, or an insurer where no producer is involved, to an individual consumer that results in a purchase or exchange of an annuity in accordance with that advice.

Authority: T.C.A. §§ 56-2-301, 56-2-305, 56-3-508, 56-6-112(a), 56-6-112(d), 56-6-124(a), 56-8-104, 56-8-113, and 56-8-101 *et seq.*

0780-01-86-.06 Duties of Insurers and Insurance Producers.

- (1) In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the insurance producer, or the insurer where no producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to his or her investments and other insurance products and as to his or her financial situation and needs.
- (2) Prior to the execution of a purchase or exchange of an annuity resulting from a recommendation, an insurance producer, or an insurer where no producer is involved, shall make reasonable efforts to obtain information concerning:
- (a) The consumer's financial status;
 - (b) The consumer's tax status;
 - (c) The consumer's investment objectives; and
 - (d) Such other information used or considered to be reasonable by the insurance producer, or the insurer where no producer is involved, in making recommendations to the consumer.
- (3) (a) Except as provided under Subparagraph (b) of this Paragraph, neither an insurance producer, nor an insurer where no producer is involved, shall have any obligation to a consumer under Paragraph (1) of this Rule related to any recommendation if a consumer:
- 1. Refuses to provide relevant information requested by the insurer or insurance producer;
 - 2. Decides to enter into an insurance transaction that is not based on a recommendation of the insurer or insurance producer; or
 - 3. Fails to provide complete or accurate information.
- (a) An insurer or insurance producer's recommendation subject to Paragraph (1) of this Rule must be reasonable under all the circumstances actually known to the insurer or insurance producer at the time of the recommendation.
- (4) (a) An insurer either shall assure that a system to supervise recommendations that is reasonably designed to achieve compliance with this Chapter is established and maintained by complying with Subparagraphs (c) to (e) of this Paragraph, or shall establish and maintain such a system, including, but not limited to:
- 1. Maintaining written procedures; and

2. Conducting periodic reviews of its records that are reasonably designed to assist in detecting and preventing violations of this Chapter.
- (b) A general agent and independent agency either shall adopt a system established by an insurer to supervise recommendations of its insurance producers that is reasonably designed to achieve compliance with this Chapter, or shall establish and maintain such a system, including, but not limited to:
1. Maintaining written procedures; and
 2. Conducting periodic reviews of records that are reasonably designed to assist in detecting and preventing violations of this Chapter.
- (c) An insurer may contract with a third party, including a general agent or independent agency, to establish and maintain a system of supervision as required by Subparagraph (a) of this Paragraph with respect to insurance producers under contract with or employed by the third party.
- (d) An insurer shall make reasonable inquiry to assure that the third party contracting under Subparagraph (c) of this Paragraph is performing the functions required under Subparagraph (a) of this Paragraph and shall take such action as is reasonable under the circumstances to enforce the contractual obligation to perform the functions. An insurer may comply with its obligation to make reasonable inquiry by doing all of the following:
1. The insurer annually obtains a certification from a third party senior manager who has responsibility for the delegated functions that the manager has a reasonable basis to represent, and does represent, that the third party is performing the required functions; and
 2. The insurer, based on reasonable selection criteria, periodically selects third parties contracting under Subparagraph (c) of this Paragraph for a review to determine whether the third parties are performing the required functions. The insurer shall perform those procedures to conduct the review that are reasonable under the circumstances.
- (e) An insurer that contracts with a third party pursuant to Subparagraph (c) of this Paragraph and that complies with the requirements to supervise in Subparagraph (d) of this Paragraph shall have fulfilled its responsibilities under Subparagraph (a) of this Paragraph.
- (e) An insurer, general agent or independent agency is not required by Subparagraphs (a) or (b) of this Paragraph to:
1. Review, or provide for review of, all insurance producer solicited transactions; or
 2. Include in its system of supervision an insurance producer's recommendations to consumers of products other than the annuities offered by the insurer, general agent or independent agency.
- (f) A general agent or independent agency contracting with an insurer pursuant to Subparagraph (c) of this Paragraph shall promptly, when requested by the insurer pursuant to Subparagraph (d) of this Paragraph, give a certification as described

in Subparagraph (d) of this Paragraph or give a clear statement that it is unable to meet the certification criteria.

- (g) No person may provide a certification under Subparagraph (d)1. of this Paragraph unless:
 - 1. The person is a senior manager with responsibility for the delegated functions; and
 - 2. The person has a reasonable basis for making the certification.
- (5) Compliance with the National Association of Securities Dealers Conduct Rules, now known as the Financial Industry Regulatory Authority (FINRA), pertaining to suitability shall satisfy the requirements under this Rule for the recommendation of variable annuities. However, nothing in this Paragraph shall limit the commissioner's ability to enforce the provisions of this Chapter.

Authority: T.C.A. §§ 56-2-301, 56-2-305, 56-3-508, 56-6-112(a), 56-6-112(d), 56-6-124(a), 56-8-104, 56-8-113, and 56-8-101 *et seq.*

0780-01-86-.07 Penalties and Mitigation of Responsibility.

- (1) Any violation of this Chapter subjects an insurer to any applicable sanctions, including but not limited to those found in T.C.A. §§ 56-1-416, 56-2-305, and 56-8-101 *et seq.*
- (2) Any violation of this Chapter subjects an insurance producer to any applicable sanctions, including but not limited to those found in T.C.A. §§ 56-6-112 and 56-8-101 *et seq.*
- (3) The Commissioner may, in accordance with T.C.A. § 56-1-411, order:
 - (a) An insurer to take reasonably appropriate corrective action for any consumer harmed by the insurer's, or by its insurance producer's, violation of this Chapter;
 - (b) An insurance producer to take reasonably appropriate corrective action for any consumer harmed by the insurance producer's violation of this Chapter; and
 - (c) A general agency or independent agency that employs or contracts with an insurance producer to sell, or solicit the sale, of annuities to consumers, to take reasonably appropriate corrective action for any consumer harmed by the insurance producer's violation of this Chapter.
- (4) Any applicable penalty under the pertinent insurance statutes for a violation of Rule 0780-01-86-.06(1), (2), or (3)(b) may be reduced or eliminated, if corrective action for the consumer was taken promptly after a violation was discovered.

Authority: T.C.A. §§ 56-1-408, 56-1-409, 56-1-411, 56-1-416, 56-2-301, 56-2-305, 56-3-508, 56-6-112(a), 56-6-112(d), 56-6-124(a), 56-8-104, 56-8-109, 56-8-113, and 56-8-101 *et seq.*

0780-01-86-.08 Recordkeeping.

- (1) Insurers, general agents, independent agencies and insurance producers shall maintain or be able to make available to the commissioner records of the information collected from the consumer and other information used in making the recommendations that were the basis for insurance transactions for five (5) 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.
- (2) Records required to be maintained by this Chapter may be maintained in paper, photographic, microprocess, magnetic, mechanical or electronic media or by any process that accurately reproduces the actual document.

Authority: T.C.A. §§ 56-1-408, 56-1-411, 56-2-301, 56-2-305, 56-3-508, 56-6-112(a), 56-6-112(d), 56-6-124(a), 56-8-104, 56-8-107, 56-8-113, and 56-8-101 *et seq.*

0780-01-86-.09 Effective Date

The effective date of this Chapter or any amendments thereto shall be as set forth below; but this Chapter will not be enforced for an additional ninety (90) days after the effective date.

Authority: T.C.A. §§ 56-2-301, 56-3-508, 56-6-112(a), 56-6-112(d), 56-6-124(a), 56-8-104, 56-8-113, and 56-8-101 *et seq.*

The rulemaking hearing rules set out herein was properly filed in the Department of State on the 22nd day of April, 2008, and will become effective on the 6th day of July, 2008. (FS 04-14-08; DBID 2869)

Economic Impact Statement:

1. Types of small businesses directly affected:

The type or types of small businesses that might be impacted by these proposed rules may include insurance companies or producers offering annuity products to consumers.

2. Projected reporting, recordkeeping, and other administrative costs:

Insurers, general agents, independent agencies and insurance producers shall maintain or be able to make available to the commissioner records of the information collected from the consumer and other information used in making the recommendations that were the basis for insurance transactions for five (5) 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.

3. Probable effect on small businesses:

The adverse impact that will be borne by small businesses after the enactment of these rules is the same adverse impact that will be borne by all persons or entities having to comply with these regulations. The small business will have to ensure compliance with these regulations so that the public has full and complete disclosure about the annuity products being offered. The consumer is also afforded more protections by these rules by requiring that the insurer or insurance producer take more steps to meet the needs and financial objectives of the consumers at the time of purchase.

4. Less burdensome, intrusive, or costly alternative methods:

Alternative means to accomplishing the intent, which is to ensure the consumer's needs and financial objectives have been considered at the time of the annuity purchase do not exist and do not achieve consistency with other states' regulation of suitability pursuant to the NAIC model. The Insurance Division must ensure that every person or entity selling such products does so in a manner consistent with these regulations.

5. Comparison with federal and state counterparts:

As this is a National Association of Insurance Commissioner's Model Rule, a search has been conducted to see which states have adopted either the model regulations or similar legislation or regulations. The following states have adopted this model or similar regulations: Alabama, Arizona (pending), Arkansas (limited to seniors), Colorado, Connecticut, Delaware, Florida (limited to seniors), Georgia, Idaho (limited to seniors), Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts (effective November 5, 2006), Nevada, Oklahoma (limited to seniors), Rhode Island (limited to seniors), South Carolina (pending 2006), Utah (pending rule change to update the model) and Wisconsin.

6. Effect of possible exemption of small businesses:

The Department must ensure that all annuity sales comply with these regulations. By exempting small businesses from this rule, it would raise the risk that consumers were not being adequately protected from the harm associated with unsuitable annuities.