

**Insurance Department Explanatory Comments and Intent--Ins 305
December 1, 2008**

Ins 305.01(b)

Reference to RSA 417:19 added as requested by the Office of Legislative Services, Division of Administrative Rules to reflect the existing consumer private right of action provided in RSA 417:19.

Ins 305.04 (a)

The intent of the NAIC model regulation is to regulate all annuities, including indexed annuities. The Department has specifically referenced indexed annuities to clarify that indexed annuities are a type of fixed annuity regulated under Ins 305.05. This change comports with the intent of the model regulation and does not limit the Department's authority to regulate indexed annuities as an annuity product under any other statute or regulation.

Ins 305.05(b)(2)

Paragraph 2 from the Department's initial proposal has been removed based on comments received.

Ins 305.05(c)(1)

The NAIC Model language in section (c)(1) reads: "...neither an insurance producer, nor an insurer where no producer is involved, shall have any obligation to a consumer under Subsection (a) related to any recommendation if a consumer..." The Department believes this language is awkward and confusing because in fact, even if the consumer refuses to provide information or acts against the producer's recommendations, the producer still has an obligation to the consumer to both have reasonable grounds for believing that the recommendation given is suitable and to make a recommendation that is reasonable under all the circumstances actually known at the time the recommendation is made. The Department has revised the model language to more accurately reflect that the producer is not relieved of these obligations. Instead, if the producer or insurer has complied with the obligations set forth in the rule, the producer or insurer is in compliance with the rule, despite the fact that the consumer acts against the producer's recommendations or refuses to provide information requested.

The Department also has eliminated under subsection (c)(1) a third provision from the NAIC model section: "(c) *Fails to provide complete or accurate information.*" The rule already provides that a producer or insurer is not in violation of the rule if the producer or insurer makes a recommendation in reliance on inaccurate or incomplete information. Ins 303.05(a) states that the insurer or producer is responsible for making a recommendation "*on the basis of the facts disclosed by the consumer...*" Therefore, the elimination of subparagraph (c) of the model regulation does not change the intent of the model regulation or result in a producer or insurer being found in violation of the regulation if a recommendation is made in reasonable reliance on information provided by the consumer. Under Ins 305.05(a), if a consumer fails to provide complete or accurate information, and the producer relies on this information and has reasonable grounds for believing that the recommendation (based on the incomplete or inaccurate information) is suitable, the producer is in compliance with the obligations set forth in the rule. The Department eliminated model provision (c) because it was redundant and because of concerns that this provision would be misinterpreted to mean that the producer or insurer has no obligation under subsection (a) if the consumer either intentionally or in advertently provides incomplete or inaccurate information.

**Insurance Department Explanatory Comments and Intent--Ins 305
December 1, 2008**

Ins 305.05(c)(2)

The Department has made changes to the awkward model language in Ins 305.05(c)(2). This change to the model language does not change the intent of the model regulation. The NAIC language reads: *"An insurer or insurance producer's recommendation subject to Paragraph (1) shall be reasonable under all the circumstances actually known to the insurer or insurance producer at the time of the recommendation."* The intent of the model language is to impose upon the producer or insurer an obligation to make a recommendation that is reasonable under all circumstances actually known to the insurer or producer, even if the consumer refuses to provide information or acts against the producer or insurer's recommendations. If the recommendation is not reasonable under all circumstances known, then the producer or insurer is in violation of the obligations set forth in paragraph (a). The Department has clarified subparagraph (c)(2) as well as the phrasing in subparagraph (c)(1) to more clearly and accurately reflect these important producer and insurer responsibilities.

Ins 305.05(d)(1) and Ins 305.05(d)(4)

The Department has substituted the word "ensure" for the word "assure" to more accurately reflect that the insurer must "make certain" and not simply "reassure" that a system is in place to supervise recommendations and that a third party is properly performing delegated functions.

Ins 305.05(e)

The NAIC model language reads: *"Compliance with the National Association of Securities Dealers Conduct Rules pertaining to suitability shall satisfy the requirements under this section for the recommendation of variable annuities."* The Department has clarified the language in paragraph (e) by adding the language from the NAIC drafting note to the rule. The drafting note reads: *"This subsection is intended to grant a safe harbor when the NASD has reviewed a transaction and found that it complies with the NASD Conduct Rules pertaining to suitability."* The Department believes the drafting note makes clear that the intent of the rule is to provide a safe harbor *"when the NASD has reviewed a transaction and found it complies with the NASD Conduct Rules pertaining to suitability."* (emphasis added)

Ins 305.06(a)(1)

The language of the Department's proposed regulation requires that the insurer must take reasonable and appropriate corrective action if a consumer is harmed by the actions of the insurer or the insurer's producer acting within his or her apparent authority. Pursuant to RSA 402-J:14,IV the insurer is bound by the acts of its producers. The Department would not require that the consumer seek restitution from the producer by way arbitration (if any) through FINRA. Only the insurer can unwind an annuity sold in violation of Ins 305. FINRA does not regulate the insurer but only the producer and FINRA could not order the insurer to provide restitution to the consumer.

Ins 305.06(b)

NAIC model provides for either a discretionary reduction or elimination of any penalty if no schedule of penalties has been adopted by the commissioner, or a mandatory reduction or elimination of any penalty if a schedule has been adopted. Because the commissioner has not adopted such a schedule, the Department adopts the model

**Insurance Department Explanatory Comments and Intent--Ins 305
December 1, 2008**

language that provides for reduction or elimination of any penalty at the discretion of the commissioner.