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## **TITLE 760 DEPARTMENT OF INSURANCE**

### **Proposed Rule** LSA Document #05-134

#### **DIGEST**

Adds 760 IAC 1-72 to set standards for determining whether a purchase or exchange of an annuity is suitable for a senior consumer and to otherwise implement IC 27-4-9. Effective 30 days after filing with the Secretary of State.

#### **IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses**

##### **Estimated Number of Small Businesses Subject to This Rule:**

The Department of Insurance is directed by IC 27-4-9-4 to adopt rules to establish a method for making determinations as to whether a purchase or an exchange of an annuity is unsuitable for a senior consumer. The Department expects small businesses licensed as insurance producers selling annuities will be affected by this rule. There are 3,457 resident insurance agencies authorized to sell life products. It is unknown how many of these agencies fall into the definition of small business. It is believed that most insurance agencies are small businesses.

##### **Estimated Average Annual Administrative Costs that Small Businesses will Incur:**

The proposed rule requires the producers to maintain written procedures to determine when sales or exchanges of annuities are unsuitable for a senior consumer and for the producer to periodically audit their activities. The audit is not required to be performed by an independent auditor nor is it required to be annual. Annuity sales to seniors will not be an agent's entire book of business. The annual record keeping and auditing expense should be an average of \$1,000 or less.

##### **Estimated Total Annual Economic Impact on Small Businesses:**

The Department is directed by statute to promulgate a rule to set standards for the sale of or exchange of annuities for senior consumers. The proposed rule will provide savings to consumers and also to producers and insurance companies by avoiding inappropriate sales. In the event that a senior makes an inappropriate decision on the purchase or exchange of an annuity insurers and producers face complaints from family members and/or the Department of Insurance that many times result if the insurer or producer providing restitution to the consumer. The provisions of this rule should avoid these instances and thus have a positive economic benefit.

##### **Regulatory Flexibility Analysis of Alternative Methods:**

The National Association of Insurance Commissioners has developed a model law on this issue that has been adopted by nine (9) states and expected to be implemented in more jurisdictions. The Department reviewed the model law and consulted with the insurance industry. It was determined that adopting the provision of the model law would be cost efficient for the insurance industry. If Indiana were to develop standards different than those adopted in other states, then compliance costs would be increased for those doing business in Indiana if they had to develop Indiana compliance tools. Under the proposed rule Indiana's standards will be consistent with other states. This will increase cost sharing between insurance companies and insurance producers. Insurance companies that have already created the guidelines will provide them to their producers thus relieving the producers, who are generally small businesses, from the cost of compliance. As a significant portion of the insurance agencies are small businesses, it would not be effective to exempt small business from these requirements or to have different standards for small businesses. In addition, the statute directs standards to be implemented for all insurance companies and producers.

## **760 IAC 1-72**

SECTION 1. 760 IAC 1-72 IS ADDED TO READ AS FOLLOWS:

### **Rule 72. Senior Protections in Annuity Transactions**

#### **760 IAC 1-72-1 Purpose and scope**

**Authority:** IC 27-4-9-4

**Affected:** IC 27-1-15.6-12; IC 27-4-1-4; IC 27-4-9

**Sec. 1. (a) The purpose of this rule is to set forth standards and procedures for recommendations to senior consumers that result in a transaction involving annuity products so that the insurance needs and financial objectives of senior consumers at the time of the transaction are appropriately addressed.**

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

**(c) Nothing herein shall be construed to create or imply a private cause of action for a violation of this regulation.**  
*(Department of Insurance; 760 IAC 1-72-1)*

#### **760 IAC 1-72-2 Exemptions**

**Authority:** IC 27-4-9-4

**Affected:** IC 27-1-15.6-12; IC 27-4-1-4; IC 27-4-9

**Sec. 2. Unless otherwise specifically included, this regulation shall not apply to recommendations involving the following:**

**(1) Direct response solicitations where there is no recommendation based on information collected from the senior consumer under this regulation.**

**(2) Contracts used to fund any of the following:**

**(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 Section 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.**

**(D) A government or church welfare benefit plan.**

**(E) A deferred compensation plan of a state or local government or tax exempt organization under Section 457 of the IRC.**

**(F) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor.**

**(G) Settlements of or assumptions of liabilities associated with personal injury litigation or any dispute or claim resolution process.**

**(H) Formal prepaid funeral contracts.**

*(Department of Insurance; 760 IAC 1-72-2)*

#### **760 IAC 1-72-3 Definitions**

**Authority:** IC 27-4-9-4

**Affected:** IC 27-1-15.6-12; IC 27-4-1-4; IC 27-4-9

**Sec. 3. The following definitions apply throughout this rule:**

**(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) “Insurance producer” means a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance, including annuities.**

**(3) “Insurer” means a company required to be licensed under the laws of this state to provide insurance products, including annuities.**

**(4) “Recommendation” means advice provided by an insurance producer, or an insurer where no producer is involved, to an individual senior consumer that results in a purchase or exchange of an annuity in accordance with that advice.**

**(5) “Senior consumer” means a person at least sixty-five (65) years of age. In the event of a joint purchase by more than one (1) party, the purchaser will be considered to be a senior consumer if any of the parties is at least sixty-five (65) years of age.**

*(Department of Insurance; 760 IAC 1-72-3)*

#### **760 IAC 1-72-4 Duties of insurers and of insurance producers**

**Authority:** IC 27-4-9-4

**Affected:** IC 27-1-15.6-12; IC 27-4-1-4; IC 27-4-9

**Sec. 4. (a) In recommending to a senior 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 senior consumer on the basis of the facts disclosed by the senior consumer as to his or her:

- (1) investments and other insurance products; and
- (2) financial situation and needs.

(b) Before 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 the following:

- (1) The senior consumer's:

- (A) financial status;
- (B) tax status; and
- (C) investment objectives.

- (2) 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 senior consumer.

(c) Except as provided in subsection (b), neither an insurance producer, nor an insurer where no producer is involved, shall have any obligation to a senior consumer related to any recommendation if a consumer does any of the following:

- (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.
- (3) Fails to provide complete or accurate information.

(d) An insurer or insurance producer's recommendation shall be reasonable under all the circumstances actually known to the insurer or insurance producer at the time of the recommendation.

(e) An insurer shall:

- (1) assure that a system to supervise recommendations that is reasonably designed to achieve compliance with this rule is established and maintained by complying with the standards set forth in subsection (g); or
- (2) establish and maintain such a system, including, but not limited to:
  - (A) maintaining written procedures; and
  - (B) conducting periodic reviews of its records that are reasonably designed to assist in detecting and preventing violations of this regulation.

(f) A general agent and independent agency shall:

- (1) adopt a system established by an insurer to supervise recommendations of its insurance producers that is reasonably designed to achieve compliance with this rule; or
- (2) establish and maintain such a system, including, but not limited to:
  - (A) maintaining written procedures; and
  - (B) conducting periodic reviews of records that are reasonably designed to assist in detecting and preventing violations of this regulation.

(g) 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 subsection (e) with respect to insurance producers under contract with or employed by the third party. An insurer shall make reasonable inquiry to assure that the third party is performing the functions required by this section 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.
- (2) The insurer, based on reasonable selection criteria, periodically selects third parties 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.

(h) An insurer that:

(1) contracts with a third party under subsection (g); and  
(2) complies with the requirements to supervise therein;  
shall have fulfilled its responsibilities under subsection (e).

(i) An insurer, general agent, or independent agency is not required 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 senior consumers of products other than the annuities offered by the insurer, general agent, or independent agency.

(j) A general agent or independent agency contracting with an insurer under subsection (g) shall promptly, when requested by the insurer give a:

- (1) certification; or
- (2) clear statement;

that it is unable to meet the certification criteria.

(k) No person may provide a certification under subsection (g) unless the person:

- (1) is a senior manager with responsibility for the delegated functions; and
- (2) has a reasonable basis for making the certification.

(l) 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. However, nothing in this subsection shall limit the insurance commissioner's ability to enforce the provisions of this rule. (*Department of Insurance; 760 IAC 1-72-4*)

#### **760 IAC 1-72-5 Mitigation of responsibility**

Authority: IC 27-4-9-4

Affected: IC 27-1-15.6-12; IC 27-4-1-4; IC 27-4-9

Sec. 5. (a) The commissioner may order the following:

- (1) An insurer to take reasonably appropriate corrective action for any senior consumer harmed by the insurer's, or by its insurance producer's, violation of this regulation.
- (2) An insurance producer to take reasonably appropriate corrective action for any senior consumer harmed by the insurance producer's violation of this regulation.
- (3) A general agency or independent agency that employs or contracts with an insurance producer to sell, or solicit the sale, of annuities to senior consumers to take reasonably appropriate corrective action for any senior consumer harmed by the insurance producer's violation of this regulation.

(b) Any applicable penalty for a violation of this rule may be reduced or eliminated, with the approval of the commissioner of the department of insurance, if corrective action for the senior consumer was taken promptly after a violation was discovered. (*Department of Insurance; 760 IAC 1-72-5*)

#### **760 IAC 1-72-6 Record keeping**

Authority: IC 27-4-9-4

Affected: IC 27-1-15.6-12; IC 27-4-1-4; IC 27-4-9

Sec. 6. (a) Insurers, managing general agents, independent agencies, and insurance producers shall:

- (1) maintain; or
- (2) be able to make available to the commissioner;

records of the information collected from the senior 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.

(b) Records required to be maintained by this rule may be maintained:

- (1) in:
  - (A) paper;
  - (B) photographic;

- (C) microprocess;
- (D) magnetic;
- (E) mechanical; or
- (F) electronic;

media; or

(2) by any process that accurately reproduces the actual document.

(Department of Insurance; 760 IAC 1-72-6)

### ***Notice of Public Hearing***

*Under IC 4-22-2-24, notice is hereby given that on December 1, 2005 at 10:00 a.m., at the Department of Insurance, 311 West Washington Street, Suite 300, Indianapolis, Indiana the Department of Insurance will hold a public hearing on a proposed new rule to set standards for determining whether a purchase or exchange of an annuity is suitable for a senior consumer and to otherwise implement IC 27-4-9.*

*The Department is directed by statute to establish a method for making determinations as to whether the purchase or exchange of an annuity is unsuitable for a senior consumer. The proposed rule affects small employers that are insurance producers that sell annuity product. The proposed rule requires written procedures be developed and periodically audited. Typically, the insurance companies will provide the procedures leaving only the costs of audits to the small employer.*

*Copies of these rules are available on the Department of Insurance's Web site at [www.state.in.us/idoi](http://www.state.in.us/idoi).*

*Copies of these rules are now on file at the Department of Insurance, 311 West Washington Street, Suite 300 and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.*

Jim Atterholt  
Commissioner  
Department of Insurance