

**Sixty-second Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 4, 2011**

HOUSE BILL NO. 1160
(Representative Keiser)

AN ACT to create and enact two new sections to chapter 26.1-34.2 of the North Dakota Century Code, relating to annuity transaction practices; and to amend and reenact sections 26.1-34.2-02, 26.1-34.2-03, and 26.1-34.2-04 of the North Dakota Century Code, relating to annuity transaction practices; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 26.1-34.2 of the North Dakota Century Code is created and enacted as follows:

Scope.

This chapter applies to any recommendation to purchase, exchange, or replace an annuity made to a consumer by an insurance producer, or an insurer when no producer is involved, that results in the purchase, exchange, or replacement recommended.

SECTION 2. AMENDMENT. Section 26.1-34.2-02 of the North Dakota Century Code is amended and reenacted as follows:

26.1-34.2-02. Definitions.

1. "Annuity" means ~~a fixed annuity or variable~~ an annuity that is an insurance product under state law which 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 when no producer is involved, to an individual consumer ~~that~~ which results in a purchase, replacement, or exchange of an annuity in accordance with that advice.
5. "Replacement" means a transaction in which a new policy or contract is to be purchased, and it is known or should be known to the proposing producer, or to the proposing insurer if there is no producer, that by reason of the transaction, an existing policy or contract has been or is to be:
 - a. Lapsed, forfeited, surrendered or partially surrendered, assigned to the replacing insurer, or otherwise terminated;
 - b. 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;
 - c. Amended so as to effect either a reduction in benefits or in the term for which coverage would otherwise remain in force or for which benefits would be paid;
 - d. Reissued with any reduction in cash value; or
 - e. Used in a financed purchase.

6. "Suitability information" means information that is reasonably appropriate to determine the suitability of a recommendation, including the following:
- a. Age;
 - b. Annual income;
 - c. Financial situation and needs, including the financial resources used for the funding of the annuity;
 - d. Financial experience;
 - e. Financial objectives;
 - f. Intended use of the annuity;
 - g. Financial time horizon;
 - h. Existing assets, including investment and life insurance holdings;
 - i. Liquidity needs;
 - j. Liquid net worth;
 - k. Risk tolerance; and
 - l. Tax status.

SECTION 3. AMENDMENT. Section 26.1-34.2-03 of the North Dakota Century Code is amended and reenacted as follows:

26.1-34.2-03. 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 when no producer is involved, must 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 the consumer's investments and other insurance products and as to the consumer's financial situation and needs, including the consumer's suitability information, and that there is a reasonable basis to believe all of the following:
- a. The consumer has been reasonably 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; potential charges for and features of riders; limitations on interest returns; insurance and investment components; and market risk;
 - b. The consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization, or death or living benefit;
 - c. The particular annuity as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or exchange of the annuity, and riders and similar product enhancements, if any, are suitable, and in the case of an exchange or replacement, the transaction as a whole is suitable, for the particular consumer based on the consumer's suitability information; and
 - d. In the case of an exchange or replacement of an annuity, the exchange or replacement is suitable, including taking into consideration whether:

- (1) 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;
 - (2) The consumer would benefit from product enhancements and improvements; and
 - (3) The consumer has had another annuity exchange or replacement and, in particular, an exchange or replacement within the preceding thirty-six months.
2. Before the execution of a purchase, replacement, or exchange of an annuity resulting from a recommendation, an insurance producer, or an insurer when no producer is involved, shall make reasonable efforts to obtain the consumer's suitability information concerning:
 - a. The consumer's financial status;
 - b. The consumer's tax status;
 - c. The consumer's investment objectives; and
 - d. Other information used or considered to be reasonable by the insurance producer, or the insurer when no producer is involved, in making recommendations to the consumer.
- ~~3. a. Except as provided under subdivision b, neither an insurance producer nor an insurer when no producer is involved has an obligation to a consumer under subsection 1 related to a 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.~~
 - b. ~~An insurer or insurance producer's recommendation subject to subdivision a 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 shall ensure that a system to supervise recommendations that is reasonably designed to achieve compliance with this chapter is established and maintained by complying with subdivisions c through e, or shall establish and maintain such a system, including:~~
 - ~~(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 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:~~
 - ~~(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.~~

- ~~e. 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 subdivision a with respect to insurance producers under contract with or employed by the third party.~~
- ~~d. An insurer shall make reasonable inquiry to ensure that the third party contracting under subdivision c is performing the functions required under subdivision a and shall take 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 subdivision c 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 subdivision c and that complies with the requirements to supervise in subdivision d has fulfilled its responsibilities under subdivision a.~~
- ~~f. An insurer, general agent, or independent agency is not required by subdivision a or b 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.~~~~
- ~~g. A general agent or independent agency contracting with an insurer pursuant to subdivision c shall promptly, when requested by the insurer pursuant to subdivision d, give a certification as described in subdivision d or give a clear statement that it is unable to meet the certification criteria.~~
- ~~h. A person may not provide a certification under paragraph 1 of subdivision d 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 financial industry regulatory authority conduct rules pertaining to suitability satisfies the requirements under this section for the recommendation of annuities registered under the Securities Act of 1933 [15 U.S.C. 77a et seq.] or rules or regulations adopted under that act. However, nothing in this subsection limits the insurance commissioner's ability to enforce the provisions of this chapter.~~
- 6. ~~This chapter does not preempt, supersede, or limit any provision of any securities law of this state or any rule, order, or notice issued thereunder. Except as permitted under subsection 4, an insurer may not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity is suitable based on the consumer's suitability information.~~
- 4. a. Except as provided under subdivision b, neither an insurance producer, nor an insurer, has any obligation to a consumer under subsection 1 or 3 related to any annuity transaction if:

- (1) A recommendation was not made;
 - (2) A recommendation was made and was later found to have been prepared based on materially inaccurate information provided by the consumer;
 - (3) A consumer refuses to provide relevant suitability information and the annuity transaction is not recommended; or
 - (4) A consumer decides to enter an annuity transaction that is not based on a recommendation of the insurer or the insurance producer.
- b. An insurer's issuance of an annuity subject to subdivision a must be reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.
5. An insurance producer or, when no insurance producer is involved, the responsible insurer representative, at the time of sale shall:
- a. Make a record of any recommendation subject to subsection 1;
 - b. Obtain a customer signed statement documenting a customer's refusal to provide suitability information, if any; and
 - c. Obtain a customer signed statement acknowledging that an annuity transaction is not recommended if a customer decides to enter an annuity transaction that is not based on the insurance producer's or insurer's recommendation.
6. a. An insurer shall establish a supervision system that is reasonably designed to achieve the insurer's and the insurer's insurance producers' compliance with this chapter, including the following:
- (1) The insurer shall maintain reasonable procedures to inform the insurer's insurance producers of the requirements of this chapter and shall incorporate the requirements of this chapter into relevant insurance producer training manuals.
 - (2) The insurer shall establish standards for insurance producer product training and shall maintain reasonable procedures to require the insurer's insurance producers to comply with the requirements of section 4 of this Act.
 - (3) The insurer shall provide product-specific training and training materials that explain all material features of the insurer's annuity products to the insurer's insurance producers.
 - (4) The insurer shall maintain procedures for review of each recommendation before issuance of an annuity which are designed to ensure that there is a reasonable basis to determine that a recommendation is suitable. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means, including 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.
 - (5) The insurer shall maintain reasonable procedures to detect recommendations that are not suitable. This may include confirmation of consumer suitability information, systematic customer surveys, interviews, confirmation letters, and programs of internal monitoring. This paragraph does not prevent an insurer from complying with this paragraph by applying sampling procedures or by confirming suitability information after issuance or delivery of the annuity.

- (6) Annually, the insurer shall provide a 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.
- b. (1) This subsection does not restrict an insurer from contracting for performance of a function, including maintenance of procedures, required under subdivision a. An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to section 26.1-34.2-04, regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with paragraph 2.
- (2) An insurer's supervision system under subdivision a must include supervision of contractual performance under this subsection. This includes 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.
- c. An insurer is not required to include in the insurer's system of supervision an insurance producer's recommendations to consumers of products other than the annuities offered by the insurer.
- 7. An insurance producer may not dissuade, or attempt to dissuade, a consumer from:
 - a. Responding truthfully to an insurer's request for confirmation of suitability information;
 - b. Filing a complaint; or
 - c. Cooperating with the investigation of a complaint.
- 8. a. Sales made in compliance with the financial industry regulatory authority requirements pertaining to suitability and supervision of annuity transactions must satisfy the requirements under this chapter. This subsection applies to financial industry regulatory authority broker-dealer sales of variable annuities and fixed annuities if the suitability and supervision is similar to those applied to variable annuity sales. However, this subsection does not limit the insurance commissioner's ability to enforce, including investigate, this chapter.
- b. For subdivision a to apply, an insurer shall:
 - (1) Monitor the financial industry regulatory authority member broker-dealer using information collected in the normal course of an insurer's business; and
 - (2) Provide to the financial industry regulatory authority member broker-dealer information and reports that are reasonably appropriate to assist the financial industry regulatory authority member broker-dealer to maintain its supervision system.

SECTION 4. A new section to chapter 26.1-34.2 of the North Dakota Century Code is created and enacted as follows:

Insurance producer training.

1. An insurance producer may 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 subsection.
2. a. (1) An insurance producer who engages in the sale of annuity products shall complete a one-time, four-hour training course.
(2) An insurance producer who holds a life insurance line of authority on the effective date of this Act and who desires to sell annuities shall complete the requirements of this subsection within twelve months after the effective date of this Act. An individual who obtains a life insurance line of authority on or after the effective date of this Act may not engage in the sale of annuities until the annuity training course required under this subsection has been completed.
- b. The training required under this subsection must include information on the following topics:
 - (1) The types of annuities and various classifications of annuities;
 - (2) Identification of the parties to an annuity;
 - (3) How fixed, variable, and indexed annuity contract provisions affect consumers;
 - (4) The application of income taxation of qualified and nonqualified annuities;
 - (5) The primary uses of annuities; and
 - (6) Appropriate sales practices, replacement, and disclosure requirements.
- c. Providers of courses intended to comply with this subsection shall cover all topics listed in the prescribed outline and may 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.
- d. Providers of annuity training shall issue certificates of completion.
- e. The satisfaction of the training requirements of another state which are substantially similar to the provisions of this subsection are deemed to satisfy the training requirements of this subsection in this state.
- f. An insurer shall verify that an insurance producer has completed the annuity training course required under this subsection before allowing the producer to sell an annuity product for that insurer. An insurer may satisfy the insurer's responsibility under this subsection by obtaining certificates of completion of the training course or obtaining reports from a reasonably reliable commercial database vendor that has a reporting arrangement with insurance education providers.

SECTION 5. AMENDMENT. Section 26.1-34.2-04 of the North Dakota Century Code is amended and reenacted as follows:

26.1-34.2-04. Mitigation of responsibility - Penalty.

1. The commissioner may order:

- ~~a. An insurer to take reasonably appropriate corrective action for a 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 a consumer harmed by the insurance producer's violation of this chapter; and~~
 - ~~e. 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 a consumer harmed by the insurance producer's violation of this chapter~~An insurer is responsible for compliance with this chapter. If a violation occurs, either because of the action or inaction of the insurer or the insurer's insurance producer, the commissioner may order:
 - a. An insurer to take reasonably appropriate corrective action for any consumer harmed by the insurer's or by the insurer's insurance producer's violation of this chapter;
 - b. A general agency, independent agency, or the insurance producer to take reasonably appropriate corrective action for any consumer harmed by the insurance producer's violation of this chapter; and
 - c. Appropriate penalties and sanctions.
2. Any applicable penalty under section 26.1-01-03.3 for a violation of subsection 1 or 2 or subdivision b of subsection 3 of section 26.1-34.2-03 may be reduced or eliminated, according to a schedule adopted by the commissioner, if corrective action for the consumer was taken promptly after a violation was discovered.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Sixty-second Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1160.

House Vote: Yeas 90 Nays 1 Absent 3

Senate Vote: Yeas 47 Nays 0 Absent 0

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 2011.

Approved at _____ M. on _____, 2011.

Governor

Filed in this office this _____ day of _____, 2011,

at _____ o'clock _____ M.

Secretary of State