

CHAPTER 26.1-34.2

ANNUITY TRANSACTION PRACTICES

26.1-34.2-01. Exemptions. Unless otherwise specifically included, this chapter does not apply to recommendations involving:

1. Direct response solicitations if there is no recommendation based on information collected from the consumer pursuant to this chapter; and
2. Contracts used to fund:
 - a. An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act;
 - b. A plan described by section 401(a), 401(k), 403(b), 408(k), or 408(p) of the Internal Revenue Code, as amended, if established or maintained by an employer;
 - c. A government or church plan defined in section 414 of the Internal Revenue Code, 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 Internal Revenue Code;
 - 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 a dispute or claim resolution process; or
 - f. Formal prepaid funeral contracts.

26.1-34.2-02. 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. "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 results in a purchase or exchange of an annuity in accordance with that advice.

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.

2. Before the execution of a purchase 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 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.
 - 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 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.

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

- 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 a consumer harmed by the insurance producer's violation of this chapter.
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.

26.1-34.2-05. Recordkeeping.

1. Insurers, general agents, independent agencies, and insurance producers shall maintain or be able to make available to the commissioner a record of the information collected from the consumer and other information used in making the recommendations that were the basis for insurance transactions for ten years after the insurance transaction is completed by the insurer. An insurer is permitted, but is not 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.