

AN ACT

ENTITLED, An Act to establish certain suitability requirements for annuities.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

Terms used in this Act mean:

- (1) "Annuity," a fixed annuity or variable annuity that is individually solicited, whether the product is classified as an individual or group annuity;
- (2) "Insurer," a company required to be licensed under the laws of this state to provide insurance products, including annuities;
- (3) "Insurance producer," a person required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities;
- (4) "Recommendation," 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.

Section 2. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

This Act applies to any recommendation to purchase or exchange an annuity made to a consumer by an insurance producer, or an insurer if no producer is involved, that results in the purchase or exchange recommended. Nothing in this Act creates or implies a private cause of action for a violation of this Act.

Section 3. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

Unless otherwise specifically included, this Act does not apply to any recommendation

involving:

- (1) A direct response solicitation if there is no recommendation based on information collected from the consumer pursuant to this Act; or
- (2) Any contract 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 of January 1, 2008, if established or maintained by an employer;
 - (c) A government or church plan defined in section 414 of the IRC as of January 1, 2008, 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 as of January 1, 2008;
 - (d) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor;
 - (e) A settlement of or assumption of liabilities associated with personal injury litigation or any dispute or claim resolution process; or
 - (f) A formal prepaid funeral contract.

The director may, by rules promulgated pursuant to chapter 1-26, adopt revisions of the Internal Revenue Code which are in substantial compliance with the intent of subsections (b) and (c) of this section.

Section 4. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

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 if 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 the consumer's investments and other insurance products and as to the consumer's financial situation and needs.

Section 5. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

Prior to the execution of a purchase or exchange of an annuity resulting from a recommendation, an insurance producer, or an insurer if no producer is involved, shall make reasonable efforts to obtain information concerning:

- (1) The consumer's financial status;
- (2) The consumer's tax status;
- (3) The consumer's investment objectives; and
- (4) Such other information used or considered to be reasonable by the insurance producer, or the insurer if no producer is involved, in making any recommendation to the consumer.

Section 6. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

Except as provided pursuant to section 7 of this Act, no insurance producer, nor any insurer if no producer is involved, has any obligation to a consumer under section 4 of this Act 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.

Section 7. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

An insurer or insurance producer's recommendation subject to section 4 of this Act shall be reasonable under all the circumstances actually known to the insurer or insurance producer at the time of the recommendation.

Section 8. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

An insurer either shall assure that a system to supervise recommendations that is reasonably designed to achieve compliance with this Act is established and maintained by complying with section 10 of this Act, 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 Act.

Section 9. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

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 Act, 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 Act.

Section 10. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

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 section 8 of this Act 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 contracting under this section is performing the functions required under section 8 of this Act 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 this section 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.

Any insurer that contracts with a third party pursuant to this section and that complies with the requirements to supervise in this section has fulfilled its responsibilities under section 8 of this Act.

Section 11. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

No insurer, general agent, or independent agency is required by section 8 or section 9 of this Act 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.

A general agent or independent agency contracting with an insurer pursuant to section 10 of this Act shall promptly, if requested by the insurer, give a certification as described in section 10 of this Act or give a clear statement that it is unable to meet the certification criteria.

Section 12. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

No person may provide a certification under subdivision (1) of section 10 of this Act 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.

Section 13. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

If the director finds that the Conduct Rules of the National Association of Securities Dealers meet or exceed the requirements of sections 4 to 12, inclusive, of this Act, then any recommendations made for variable annuities that comply with the Conduct Rules of the National Association of Securities Dealers meet the requirements of sections 4 to 12, inclusive.

Section 14. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

The director may order:

- (1) 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 Act;
- (2) An insurance producer to take reasonably appropriate corrective action for any consumer harmed by the insurance producer's violation of this Act; and
- (3) 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 Act.

Any violation of sections 4, 5, or 7 of this Act subjects the insurer, insurance producer, or general agency or independent agency to suspension, revocation, refusal to renew a license, or to a monetary penalty as provided for under this title. However, the penalty may be reduced or eliminated, according to a schedule adopted by the director, if corrective action for the consumer is taken promptly after a violation is discovered.

Section 15. That chapter 58-33A be amended by adding thereto a NEW SECTION to read as follows:

Each insurer, general agent, independent agency and insurance producer shall maintain or be able to make available to the director 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 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.

Any record required to be maintained by this Act may be maintained in paper, photographic, microprocess, magnetic, mechanical or electronic media or by any process that accurately reproduces the actual document.

An Act to establish certain suitability requirements for annuities.

I certify that the attached Act
originated in the

SENATE as Bill No. 37

Secretary of the Senate

President of the Senate

Attest:

Secretary of the Senate

Speaker of the House

Attest:

Chief Clerk

Senate Bill No. 37

File No. _____

Chapter No. _____

Received at this Executive Office
this ____ day of _____ ,

20__ at _____ M.

By _____
for the Governor

The attached Act is hereby
approved this _____ day of
_____, A.D., 20__

Governor

STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed _____, 20__
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State