

State of South Dakota

EIGHTY-THIRD SESSION
LEGISLATIVE ASSEMBLY, 2008

400P0191

SENATE BILL NO. 37

Introduced by: The Committee on Commerce at the request of the Department of Revenue
and Regulation

1 FOR AN ACT ENTITLED, An Act to establish certain suitability requirements for annuities.

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

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

5 Terms used in this Act mean:

6 (1) "Annuity," a fixed annuity or variable annuity that is individually solicited, whether
7 the product is classified as an individual or group annuity;

8 (2) "Insurer," a company required to be licensed under the laws of this state to provide
9 insurance products, including annuities;

10 (3) "Insurance producer," a person required to be licensed under the laws of this state to
11 sell, solicit or negotiate insurance, including annuities;

12 (4) "Recommendation," advice provided by an insurance producer, or an insurer where
13 no producer is involved, to an individual consumer that results in a purchase or
14 exchange of an annuity in accordance with that advice.

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



1 as follows:

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

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

8 Unless otherwise specifically included, this Act does not apply to any recommendation
9 involving:

- 10 (1) A direct response solicitation if there is no recommendation based on information
11 collected from the consumer pursuant to this Act; or
- 12 (2) Any contract used to fund:
 - 13 (a) An employee pension or welfare benefit plan that is covered by the Employee
14 Retirement and Income Security Act (ERISA);
 - 15 (b) A plan described by sections 401(a), 401(k), 403(b), 408(k), or 408(p) of the
16 Internal Revenue Code (IRC), as of January 1, 2008, if established or
17 maintained by an employer;
 - 18 (c) A government or church plan defined in section 414 of the IRC as of
19 January 1, 2008, a government or church welfare benefit plan, or a deferred
20 compensation plan of a state or local government or tax exempt organization
21 under section 457 of the IRC as of January 1, 2008;
 - 22 (d) A nonqualified deferred compensation arrangement established or maintained
23 by an employer or plan sponsor;
 - 24 (e) A settlement of or assumption of liabilities associated with personal injury

1 litigation or any dispute or claim resolution process; or

2 (f) A formal prepaid funeral contract.

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

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

8 In recommending to a consumer the purchase of an annuity or the exchange of an annuity
9 that results in another insurance transaction or series of insurance transactions, the insurance
10 producer, or the insurer if no producer is involved, shall have reasonable grounds for believing
11 that the recommendation is suitable for the consumer on the basis of the facts disclosed by the
12 consumer as to the consumer's investments and other insurance products and as to the
13 consumer's financial situation and needs.

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

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

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

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

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

- 6 (1) Refuses to provide relevant information requested by the insurer or insurance
7 producer;
- 8 (2) Decides to enter into an insurance transaction that is not based on a recommendation
9 of the insurer or insurance producer; or
- 10 (3) Fails to provide complete or accurate information.

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

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

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

18 An insurer either shall assure that a system to supervise recommendations that is reasonably
19 designed to achieve compliance with this Act is established and maintained by complying with
20 section 10 of this Act, or shall establish and maintain such a system, including:

- 21 (1) Maintaining written procedures; and
- 22 (2) Conducting periodic reviews of its records that are reasonably designed to assist in
23 detecting and preventing violations of this Act.

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

1 as follows:

2 A general agent and independent agency either shall adopt a system established by an insurer
3 to supervise recommendations of its insurance producers that is reasonably designed to achieve
4 compliance with this Act, or shall establish and maintain such a system, including:

- 5 (1) Maintaining written procedures; and
- 6 (2) Conducting periodic reviews of records that are reasonably designed to assist in
7 detecting and preventing violations of this Act.

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

10 An insurer may contract with a third party, including a general agent or independent agency,
11 to establish and maintain a system of supervision as required by section 8 of this Act with
12 respect to insurance producers under contract with or employed by the third party.

13 An insurer shall make reasonable inquiry to assure that the third party contracting under this
14 section is performing the functions required under section 8 of this Act and shall take such
15 action as is reasonable under the circumstances to enforce the contractual obligation to perform
16 the functions. An insurer may comply with its obligation to make reasonable inquiry by doing
17 all of the following:

- 18 (1) The insurer annually obtains a certification from a third party senior manager who
19 has responsibility for the delegated functions that the manager has a reasonable basis
20 to represent, and does represent, that the third party is performing the required
21 functions; and
- 22 (2) The insurer, based on reasonable selection criteria, periodically selects third parties
23 contracting under this section for a review to determine whether the third parties are
24 performing the required functions. The insurer shall perform those procedures to

1 conduct the review that are reasonable under the circumstances.

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

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

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

- 9 (1) Review, or provide for review of, all insurance producer solicited transactions; or
10 (2) Include in its system of supervision an insurance producer's recommendations to
11 consumers of products other than the annuities offered by the insurer, general agent,
12 or independent agency.

13 A general agent or independent agency contracting with an insurer pursuant to section 10
14 of this Act shall promptly, if requested by the insurer, give a certification as described in section
15 10 of this Act or give a clear statement that it is unable to meet the certification criteria.

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

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

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

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

23 If the director finds that the Conduct Rules of the National Association of Securities Dealers
24 meet or exceed the requirements of sections 4 to 12, inclusive, of this Act, then any

1 recommendations made for variable annuities that comply with the Conduct Rules of the
2 National Association of Securities Dealers meet the requirements of sections 4 to 12, inclusive.

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

5 The director may order:

- 6 (1) An insurer to take reasonably appropriate corrective action for any consumer harmed
7 by the insurer's, or by its insurance producer's, violation of this Act;
- 8 (2) An insurance producer to take reasonably appropriate corrective action for any
9 consumer harmed by the insurance producer's violation of this Act; and
- 10 (3) A general agency or independent agency that employs or contracts with an insurance
11 producer to sell, or solicit the sale, of annuities to consumers, to take reasonably
12 appropriate corrective action for any consumer harmed by the insurance producer's
13 violation of this Act.

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

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

21 Each insurer, general agent, independent agency and insurance producer shall maintain or
22 be able to make available to the director records of the information collected from the consumer
23 and other information used in making the recommendations that were the basis for insurance
24 transactions for five years after the insurance transaction is completed by the insurer. An insurer

1 is permitted, but is not required, to maintain documentation on behalf of an insurance producer.
2 Any record required to be maintained by this Act may be maintained in paper, photographic,
3 microprocess, magnetic, mechanical or electronic media or by any process that accurately
4 reproduces the actual document.