

ACT 108

S.B. NO. 1278

A Bill for an Act Relating to Insurance.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to protect consumers, particularly seniors, from abusive financial services practices by adopting model regulations of the National Association of Insurance Commissioners in compliance with the senior investor protections contained in Section 989A of the federal Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. In 2007, the legislature passed Act 257, Session Laws of Hawaii 2007, which established standards and procedures for insurers and insurance producers to make recommendations to consumers regarding the purchase or exchange of annuities. Part I of this Act adopts the updated version of the National Association of Insurance Commissioners Suitability in Annuity Transactions Model Regulation dated March 28, 2010. Part II of this Act adopts the National Association of Insurance Commissioners Model Regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities to protect seniors against producers who misrepresent their level of expertise and credentials in the marketing and sales of life insurance and annuity products.

PART I

SECTION 2. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to part VII of article 10D to be appropriately designated and to read as follows:

“§431:10D-A Insurance producer training. (a) An insurance producer shall 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 and materials to comply with this subsection.

(b) Any insurance producer who is authorized to sell life or accident and health or sickness insurance and who engages in the sale of annuity products shall complete by January 31, 2012, a one-time training course on annuity products that is approved by the commissioner and is conducted by an approved continuing education course provider. An insurance producer who obtains a life insurance line of authority after January 31, 2012, shall not engage in the sale of annuities until the insurance provider has completed training that meets the following requirements:

- (1) The minimum length of the training shall be sufficient to qualify for at least four continuing education credits;
- (2) The training shall include information on the following topics:
 - (A) The types and various classifications of annuities available on the market;
 - (B) Identification of the parties to an annuity;
 - (C) How fixed, variable, and indexed annuity contract provisions affect consumers;
 - (D) The application of income taxation to qualified and non-qualified annuities;
 - (E) The primary uses of annuities; and

- (F) Appropriate sales practices, replacement, and disclosure requirements; and
- (3) The training shall not include any marketing information for products of any particular insurer or training on sales techniques.
- (c) An insurer shall verify that an insurance producer has completed the annuity training course required by this section before allowing the producer to sell an annuity product for the insurer. An insurer may satisfy its responsibility under this subsection by obtaining certificates of completion from the training course provider, or by obtaining reports from the commissioner, from training course providers, or from a reasonably reliable commercial database vendor that has a reporting arrangement with approved insurance continuing education providers.”

SECTION 3. Section 431:10D-621, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§431:10D-621]]~~ **Scope.** (a) This part applies to any recommendation to purchase ~~[or], exchange, or replace~~ an annuity made to a consumer by an insurance producer, or an insurer where no producer is involved, that results in the purchase ~~[or], exchange, or replacement~~ recommended.

(b) This part does not apply to ~~[recommendations]~~ transactions involving:

- (1) Direct-response solicitations where there is no recommendation based on information collected from the consumer pursuant to this part; or
- (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 sections 401(a), 401(k), 403(b), 408(k), or 408(p) of the Internal Revenue Code of 1986, as amended, if established or maintained by an employer;
 - (C) A ~~[government]~~ governmental plan or church plan defined in section 414 of the Internal Revenue Code of 1986, as amended, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization ~~[under]~~ subject to section 457 of the Internal Revenue Code of 1986, as amended;
 - (D) A non-qualified 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 any dispute or claim resolution process; or
 - (F) Formal prepaid funeral contracts.

~~[[c)]]~~ Nothing in this ~~[[part]]~~ shall be construed to affect in any manner any provision of chapter 485A.”

SECTION 4. Section 431:10D-622, Hawaii Revised Statutes, is amended as follows:

1. By adding two new definitions to be appropriately inserted and to read:

““Replacement” means a transaction for the purchase of a new policy or contract that the proposing producer, or the proposing insurer if there is no

producer, knows or has reason to know will cause an existing policy or contract to be:

- (1) Terminated, lapsed, forfeited, or surrendered, partially surrendered, or assigned to the replacing insurer;
- (2) 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;
- (3) Amended to effect a reduction in either benefits or the term for which coverage would otherwise remain in force or for which benefits would be paid;
- (4) Reissued with any reduction in cash value; or
- (5) Used in a finance purchase.

“Suitability information” means information about the consumer that is reasonably related to the determination of the appropriateness of a recommendation, including the following:

- (1) Age;
- (2) Annual income;
- (3) Financial situation and needs, including the financial resources used for funding the annuity at issue;
- (4) Financial experience;
- (5) Financial objectives;
- (6) Intended use of the annuity;
- (7) Financial time horizon;
- (8) Existing assets, including investment and life insurance holdings;
- (9) Liquidity needs;
- (10) Liquid net worth;
- (11) Risk tolerance; and
- (12) Tax status.”

2. By amending the definitions of “annuity” and “recommendation” to read as follows:

““Annuity” means ~~[a fixed or variable]~~ an annuity that is an insurance product under state law that is individually solicited, whether the product is classified as an individual or group annuity.

“Recommendation” means 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, or replacement of an annuity in accordance with that advice.”

SECTION 5. Section 431:10D-623, Hawaii Revised Statutes, is amended to read as follows:

“[§431:10D-623] Duties of insurers and insurance producers. (a) 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 where no producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer ~~[on the basis of]~~ based on the facts, including the consumer’s suitability information, disclosed by the consumer about the consumer’s investments, other insurance products, financial situation, and needs~~[-]~~ and that:

- (1) The consumer has been reasonably informed of the various features of the annuity, including 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 rid-

ers; limitations on interest returns; insurance and investment components; and market risk;

- (2) The consumer would benefit from certain features of the annuity, including tax-deferred growth, annuitization, or death or living benefit;
- (3) The particular annuity as a whole, the underlying subaccounts to which funds are allocated at the time of the 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; and
- (4) In the case of an exchange or replacement of an annuity, the exchange or replacement is suitable for the particular consumer taking into consideration whether:
 - (A) 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;
 - (B) The consumer would benefit from product enhancements and improvements; and
 - (C) The consumer has had another annuity exchange or replacement, particularly an exchange or replacement within the preceding thirty-six months.

(b) Prior to the execution of a purchase [or], exchange, or replacement of an annuity resulting from a recommendation, an insurance producer, or an insurer where no producer is involved, shall make reasonable efforts to obtain the consumer's suitability 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 where no producer is involved, in making recommendations to the consumer].

(c) Except as permitted under subsection (d), an insurer shall not issue an annuity that has been recommended to a consumer unless the insurer has a reasonable basis to believe the annuity is suitable for the particular consumer based on the consumer's suitability information.

(e) (d) (1) Except as provided under paragraph (2), neither an insurance producer[;] nor an insurer [where no producer is involved;] shall have any obligation to a consumer related to any [recommendation] annuity transaction if [a consumer]:

- (A) No recommendation is made;
- (B) A recommendation was made based on materially inaccurate information provided by the consumer;
- (A) Refuses] (C) A consumer refuses to provide relevant suitability information [requested by the insurer or insurance producer;] and the annuity transaction is not recommended; or
- (B) Decides] (D) A consumer decides to enter into an [insurance] annuity transaction that is not based on a recommendation of the insurer or the insurance producer[; or
- (C) Fails to provide complete or accurate information.]; and

(2) An [insurer or insurance producer's recommendation] insurer's issuance of an annuity subject to paragraph (1) shall be reasonable under all the circumstances actually known to the insurer [or insur-

ance producer] at the time [of the recommendation.] the annuity is issued.

(e) An insurance producer or a representative of the insurer, where no insurance producer is involved, shall at the time of sale:

- (1) Make a record of any recommendation subject to this section;
- (2) Obtain a signed statement from the consumer documenting the customer's refusal to provide suitability information, if applicable; and
- (3) Obtain a signed statement from the consumer acknowledging that an annuity transaction is not recommended if a consumer decides to enter into an annuity transaction that is not based on the insurance producer's or insurer's recommendation.

~~[(d)] (f) An insurer shall [either ensure that a system to supervise recommendations] establish and maintain a supervision system that is reasonably designed to achieve the insurer's and its insurance producers' compliance with this part [is established and maintained by complying with subsections (f), (g), and (h), or establish and maintain such a system, which shall include but not be limited to:~~

- ~~(1) Maintaining written procedures; and~~
- ~~(2) Conducting a periodic review of the insurer's records that is reasonably designed to assist in detecting and preventing violations of this part.~~

~~(e) A managing 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 part, or establish and maintain such a system, which shall include but not be limited to:~~

- ~~(1) Maintaining written procedures; and~~
- ~~(2) Conducting a periodic review of records that is reasonably designed to assist in detecting and preventing violations of this part.~~

~~(f) An insurer may contract with a third party, including a managing general agent or independent agency, to comply with the requirement of subsection (d) to establish and maintain a system of supervision of insurance producers under contract with or employed by the third party.~~

~~(g) An insurer shall make reasonable inquiry to ensure that the third party contracting under subsection (f) is performing the functions required under subsection (d) 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:~~

- ~~(1) Annually obtaining 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; provided that no person may provide a certification unless:

 - ~~(A) The person is a senior manager with responsibility for the delegated functions; and~~
 - ~~(B) The person has a reasonable basis for making the certification; and~~~~
- ~~(2) Based on reasonable selection criteria, periodically reviewing the performance of selected third parties contracting under subsection (f) 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 contracts with a third party pursuant to subsection (f) and that complies with the requirements to supervise in subsection (g) shall have fulfilled its responsibilities under subsection (d-), including:~~

- (1) Reasonable procedures to inform the insurer's insurance producers of the requirements of this part, including incorporating the requirements of this part into relevant insurance producer training manuals;
- (2) Standards for insurance producer product training, including reasonable procedures to require its insurance producers to comply with section 431:10D-A;
- (3) Product-specific training and training materials that explain all material features of its annuity products to its insurance producers;
- (4) Procedures for review of each recommendation prior to the issuance of an annuity to ensure that there is a reasonable basis to determine the suitability of a recommendation that may include additional review of selected transactions through electronic, physical, or other means; provided that the insurer may specify criteria for selection of transactions for additional review;
- (5) Reasonable procedures to detect recommendations that are not suitable, including confirmation of consumer suitability information, systematic consumer surveys, interviews, confirmation letters, and programs of internal monitoring; provided that nothing in this paragraph shall prevent an insurer applying sampling procedures or confirming suitability information after issuance or delivery of the annuity;
- (6) Annual review and testing of the supervision system which shall be documented in a report to the insurer's senior management, including the senior manager responsible for audit functions, to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any;
- (7) Procedures for monitoring contracts and, as appropriate, conducting audits to assure that any contracted functions are properly performed; and
- (8) Annual certification based on reasonable facts from a senior manager who has responsibility for contracted functions that the contracted functions are properly performed.

(g) An insurer may contract for performance of any functions, including maintenance of procedures, required by subsection (f)(1) to (6); provided that an insurer shall be responsible for taking any appropriate corrective action and may be subject to sanctions and penalties pursuant to section 431:10D-624 regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with subsection (f).

~~[(4)] (h) An insurer[, managing general agent, or independent agency] is not required [by subsections (d) and (e) to:~~

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

~~[(j) A managing general agent or independent agency who contracts with an insurer under subsection (f) shall promptly, when requested by the insurer under subsection (g), give a certification as described in subsection (g) or give a clear statement that it is unable to satisfy the certification criteria.]~~

(i) An insurance producer shall not dissuade, or attempt to dissuade, a consumer from:

- (1) Truthfully responding to an insurer's request for confirmation of suitability information;
- (2) Filing a complaint; or
- (3) Cooperating with the investigation of a complaint.

~~[(k)]~~ (j) [Compliance with the National Association of Securities Dealers Conduct Rules] Sales made in compliance with requirements of the Financial Industry Regulatory Authority or its successor agency pertaining to suitability and supervision of annuity transactions shall satisfy the requirements [under] of this section [for recommending variable annuities.]; provided that an insurer that issues an annuity subject to this part shall:

- (1) Monitor the sales by entities registered as broker-dealers with the Financial Industry Regulatory Authority of annuities issued by the insurer using information collected in the normal course of an insurer's business; and
- (2) Provide the entity subject to paragraph (1) with any information and reports that are reasonably necessary to assist the entity in maintaining the supervision system required by the Financial Industry Regulatory Authority.

This subsection shall apply to sales of variable annuities and fixed annuities where suitability and supervision requirements are similar to those applied to variable annuity sales. Nothing in this subsection shall limit the insurance commissioner's ability to enforce this part."

SECTION 6. Section 431:10D-624, Hawaii Revised Statutes, is amended to read as follows:

~~“[§431:10D-624]— Mitigation of responsibility.]~~ Compliance mitigation; penalties. (a) [The] An insurer shall be responsible for compliance with this part. If a violation occurs because of the action or inaction of the insurer or its insurance producer, the commissioner 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 part;
 - (2) [A] A business entity, 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 part; 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 part.] Appropriate penalties and sanctions.
- (b) Any penalty applicable to an insurer, a managing general agent, independent agencies, or a producer under article 13 of chapter 431 [for] may be applicable to a violation [of section 431:10D-623(a), (b), and (c)] of this part; provided that penalties may be reduced or eliminated if corrective action for the consumer was taken promptly after a violation was discovered[-] or if the violation was not part of a pattern or practice."

PART II

SECTION 7. Chapter 431, Hawaii Revised Statutes, is amended by adding a new part to article 10D to be appropriately designated and to read as follows:

“PART . USE OF SENIOR-SPECIFIC DESIGNATIONS AND PROFESSIONAL DESIGNATIONS

§431:10D-B Purpose. The purpose of this part is to protect consumers from misleading and fraudulent marketing practices with respect to the use of senior-specific certifications and professional designations in the solicitation of, sale of, or purchase of, or advice given in connection with a life insurance or annuity product.

§431:10D-C Prohibited uses of senior-specific certifications and professional designations. (a) It is an unfair and deceptive act or practice in the business of insurance within the meaning of article 13 for an insurance producer to use a senior-specific certification or professional designation that indicates or implies in such a way as to mislead a purchaser or prospective purchaser that the insurance producer has a special certification or training in advising or servicing seniors in connection with the solicitation, sale, or purchase of a life insurance or annuity product or in providing advice as to the value of or the advisability of purchasing or selling a life insurance or annuity product either directly or indirectly through publications or writings or by issuing or promulgating analyses or reports related to a life insurance or annuity product.

(b) The prohibited use of senior-specific certifications or professional designations includes the following:

- (1) Use of a certification or professional designation by an insurance producer who has not actually earned or is otherwise ineligible to use the certification or designation;
- (2) Use of a non-existent, false, or self-conferred certification or professional designation;
- (3) Use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the insurance producer using the certification or designation does not have; and
- (4) Use of a certification or professional designation that was obtained from a certifying or designating organization that:
 - (A) Is primarily engaged in the business of instruction in sales or marketing;
 - (B) Does not have reasonable standards or procedures for assuring the competency of its certificants or designees;
 - (C) Does not have reasonable standards or procedures for monitoring and penalizing its certificants or designees for improper or unethical conduct; or
 - (D) Does not have reasonable continuing education requirements for its certificants or designees to maintain the certificate or designation.

(c) There is a rebuttable presumption that a certifying or designating organization is not disqualified for purposes of subsection (b) when the certification or designation issued from the organization does not primarily apply to sales or marketing and when the organization or the certification or designation in question has been accredited by:

- (1) The American National Standards Institute;
- (2) The National Commission for Certifying Agencies; or
- (3) Any organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes".

(d) In determining whether a combination of words or an acronym standing for a combination of words constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing seniors, factors to be considered shall include:

- (1) Use of one or more words such as “senior”, “retirement”, “elder”, or like words combined with one or more words such as “certified”, “registered”, “chartered”, “adviser”, “specialist”, “consultant”, “planner”, or like words, in the name of the certification or professional designation; and
- (2) The manner in which those words are combined.

(e) For purposes of this section, a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency is not a certification or professional designation unless it is used in a manner that would confuse or mislead a reasonable consumer when the job title:

- (1) Indicates seniority or standing within the organization; or
- (2) Specifies an individual’s area of specialization within the organization.”

PART III

SECTION 8. In codifying the new sections added by sections 2 and 7 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 9. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 10. This Act shall take effect on July 1, 2011; provided that sections 2 through 6 of this Act shall take effect on January 1, 2012.

(Approved June 14, 2011.)

Note

1. Edited pursuant to HRS §23G-16.5.