

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL: SB 1476

INTRODUCER: Senator Richter

SUBJECT: Annuities

DATE: February 3, 2012 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------------------|
| 1. | Knudson | Burgess | BI | Pre-meeting |
| 2. | | | BC | |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

I. Summary:

Senate Bill 1476 substantially revises the Florida consumer protection laws related to sales of annuities by incorporating the 2010 National Association of Insurance Commissioners model regulation on annuity protections. The bill expands the scope of the consumer protection laws to include all consumers purchasing annuities. Under current law, the consumer protections only apply to senior consumers 65 years of age and older. However, the bill also deletes some consumer protections that are currently available to senior consumers. The bill’s provisions can be summarized as follows:

Suitability of Annuities – The bill requires an insurer or insurance agent recommending the purchase or exchange of an annuity that results in an insurance transaction to have reasonable grounds for believing the recommendation is suitable for the consumer, based on the consumer’s suitability information. Additional duties are placed on insurers or insurance agents when a transaction involves the exchange or replacement of an annuity.

Documentation of Sales Transaction – An agent or agent’s representative must make a record of any recommendation made to a consumer.

Prohibitions on Agents – The bill prohibits agents from dissuading or attempting to dissuade a consumer from truthfully responding to the insurer’s request for suitability information, filing a complaint, or cooperating with the investigation of a complaint.

Agent Training – Agents are prohibited from selling annuity products unless they have sufficient knowledge of annuities and complete a one-time 4-hour annuity training course approved by the Department of Financial Services (DFS).

Provisions Related to Senior Consumers Repealed by the Bill – The bill repeals the following provisions related to annuity sales to senior consumers:

- Requirement to document suitability information on a form promulgated by the DFS that is signed by both the agent and consumer.
- Prior to entering into a contract to replace or exchange an annuity, the agent must provide a written disclosure to the consumer detailing the differences between each existing annuity contract and the annuity contract being recommended in order to determine the suitability of the recommendation and its benefit to the consumer.
- Prohibition against surrender charges or deferred sales charges in annuity contracts issued to a senior consumer exceeding 10 percent of the amount withdrawn. The charge must be reduced so that no surrender or deferred sales charge exists after the end of the 10th policy year or 10 years after the premium is paid, whichever is later.
- Requirement that unconditional refunds to senior consumers related to fixed or variable annuities must be available for 21 days and to be equal to the surrender value of the annuity contract.

The bill has an effective date of July 1, 2012.

This bill substantially amends the following sections of the Florida Statutes: 627.4554 and 626.99

II. Present Situation:

Annuities: Fixed vs. Variable¹

An annuity is a contract between a customer and an insurer for which the customer makes a lump sum payment or series of payments to an insurer that in return agrees to make periodic payments back to the annuitant at a future date, either for the annuitant's life or a specified period. There are two basic annuity types. A fixed annuity guarantees fixed payments at a fixed interest rate to the annuitant, while a variable annuity provides a rate of return that is not guaranteed and is based on the success of the investment option that underlies the annuity. In a variable annuity, the premium dollars are placed into a variety of investments called subaccounts. The performance of the investments in the subaccounts determines the performance of the annuity. Variable annuities will often offer a wide range of subaccount investment options with varying degrees of risk. Fixed annuities are considered insurance products that may be sold by a licensed life insurance and annuity agent. Variable annuities are considered investment products and under the jurisdiction of both securities regulators and state insurance departments. Agents selling this type of annuity must hold a variable annuity license from the state insurance regulator, a securities license and an active securities registration with a broker/dealer. Variable annuity sales are subject to the suitability standards contained in the Financial Industry Regulatory Authority (FINRA) under FINRA Rule 2821.

¹ The Present Situation is based in part on *Florida Department of Financial Services 2008 White Paper on Annuities*, Roxanne Rehm (March 5, 2008).

Both fixed and variable annuities can be obtained in either immediate or deferred form. In an immediate annuity the annuity company is typically given a lump sum payment in exchange for immediate and regular periodic payments, which may be for as long as the contract owner lives. For a deferred annuity, premiums are usually either paid in a lump sum or by a series of payments, and the annuity is subject to an *accumulation phase*, when those payments experience tax-deferred growth, followed by the *annuitization* or *payout phase*, when the annuity provides a regular stream of periodic payments to the consumer.

Annuities are often used for retirement planning because they provide a guaranteed source of income for future years. Immediate annuities are often used by senior citizens as a means to supplement their retirement income, or as a method of planning for Medicaid nursing care. The main advantage of deferred annuities is that the principal invested grows on a tax-deferred basis. However, unlike some other investments that are subject to the capital gains tax (maximum 15 percent), a deferred annuity is subject to the ordinary income tax rates of up to 35 percent. Both deferred and immediate annuities are long-term contracts that typically restrict investor's ability to access money placed in the annuity. Deferred annuities may be unsuitable investments for many senior citizens because of this fact.

Equity Indexed Annuities

Equity indexed annuities are defined and regulated as fixed annuity products, but act more as a hybrid of a fixed and variable annuity. Equity indexed annuities provide a "minimum guaranteed" interest rate in combination with an index-linked component. This is different than a traditional fixed annuity which provides a specific guaranteed rate of interest.

Equity indexed annuities are one of the fastest growing segments of the insurance industry today and many insurance agents are aggressively marketing them to seniors in Florida. The products are touted as a vehicle for investors to realize gains similar to those in the stock market without the corresponding risk. However, such annuities rarely provide returns that are the equivalent of a stock market index. Additionally, even with a guaranteed minimum interest rate, investors may still lose money purchasing an equity indexed annuity if the rate is less than the premium or initial payment. Investors who need to cancel an annuity to access funds prior to the maturity of the contract may lose principal through surrender charges.

Equity indexed annuities are complex and can contain many detrimental features such as hidden penalties, fees, and large multi-year surrender charges. These annuities are not considered securities and not required to register with the federal Securities and Exchange Commission, as is the case with variable annuities. As a result, the law does not require equity indexed annuities to be accompanied with a prospectus that discloses possible investment risks. Additionally, unlike variable annuity products that may only be sold by agents with securities and insurance licenses, agents that have only an insurance license may sell equity indexed annuities.

Equity based annuities have several unique factors that may affect potential return. The unique factors used to calculate the interest an investor may receive often include:

- **Interest Rate Caps** – A maximum rate of interest that an investor will receive, even if the underlying stock market index performs well. For example, if an equity indexed annuity has

a cap of 6 percent the investor is limited to a 6 percent return even if the underlying investment index earns a much higher percentage.

- **Participation Rates** – Determines how much of the increase or return of the underlying stock market index will be used to calculate the annuity’s return on investment. For example, if the participation rate is 70 percent, and the index increases 20 percent, the return credited to the equity indexed annuity would be only 14 percent.
- **Index Crediting Methods** – Permit investors to choose the method by which interest will be credited to equity indexed annuities. For instance, the annual ratchet method usually credits an amount of interest based on the increase (if any) in value of the underlying index from the beginning to the end of the year. The point-to-point method credits an amount of interest based on any increase in the value of the underlying index from the beginning to the end of a specific period of time, sometimes based on the contract date.

Equity indexed annuities often have various fees and charges. These include:

- **Surrender Charges** – These vary dramatically among annuities and can be as high as 25 percent and be valid for up to 20 years.
- **Administrative Fees or Margins** – The fees in some equity indexed annuities amount to the difference between the percentage gain in the index and the actual amount credited to the investor. These fees or “margins” are not always disclosed clearly in marketing materials or contracts.
- **Market Value Adjustments** – Typically function to alter or reduce the cash value of an annuity dependent on changes in the interest rate since the contract’s issue. Such adjustments may result in a loss of previously credited bonuses or interest credits.
- **Asset Fees** – Charged by the company, based upon a percentage of the value of the annuity, sometimes subject to change annually.

It is important to note that whether an annuity is fixed, variable or equity indexed, the industry does not require that the annuity contract be provided to the consumer prior to or at the time of purchase. Thus, the consumer must rely on the representations of the agent. Florida requires that contracts contain a free look provision that allows consumers to read and review their contracts and request cancellation within 10 days after receiving the contract.

Common Types of Annuity and Life Insurance Fraud

When unsuitable annuities are sold to consumers, the transaction commonly involves inappropriate conduct by the agent such as misrepresentations and material omissions designed to hide the fact that the product is not suitable to meet the consumer’s needs. Forgeries are also commonplace. Annuity or life insurance transactions involving misrepresentations or material omissions are administratively prosecutable under the Unfair Insurance Trade Practices Act in ch. 626, F.S.

Two common unfair insurance trade practices are “twisting” and “churning.” Twisting involves knowingly making misleading representations, or incomplete or fraudulent comparisons, or fraudulent material omissions regarding insurance policies or insurers in an attempt to induce a customer to take an action regarding their current insurance policy or take out an insurance

policy with another insurer.² Churning is similar to twisting, but instead involves the surrender or withdrawal from a product to fund another product issued by the same company.³ Agents that engage in these practices do so to obtain additional agent commissions.

Suitability of Annuity and Life Insurance Products

In Florida, the suitability—the appropriateness of a particular product relative to the consumer’s age, investment objectives, and current and future financial needs—is a primary concern with regard to transactions involving senior consumers. The Department of Financial Services indicates that consumer complaints regarding annuities have historically involved the suitability of the product itself, deceptive sales practices by agents, or both. In 2004, the Florida Legislature enacted the Annuity Transactions Model Regulation of the National Association of Insurance Commissioners in s. 627.4554, F.S.

Section 627.4554, F.S., provides standards and procedures that must be followed when recommending the purchase of an annuity product to senior consumers (age 65 and older). The section sets forth duties on insurers and insurance agents when recommending the purchase of an annuity by a senior. The agent or insurer must make reasonable efforts to obtain information about the senior’s financial status, tax status, and investment objectives prior to completing the sale of an annuity. Additionally, the agent or insurer must have objectively reasonable grounds for recommending the annuity on the basis of the facts disclosed by the senior consumer as to his or her investments, other insurance products, financial situation, and needs.⁴ If an agent recommends replacing or exchanging an existing annuity for a new annuity, the agent must provide a written summary detailing the differences between the existing annuity and the new annuity product.⁵ The disclosure must provide the benefits, terms, and limitations of each annuity, the fees and charges of each annuity, and the basis for the agent’s recommendation, including all relevant information the agent considered in making the recommendation.⁶ Insurers and insurance agents are required to develop written procedures designed to ensure compliance with the statutory disclosure requirements.

If a senior consumer is harmed due to the failure of an insurer or insurance agent to comply with the provisions, the insurer or insurance agent may be ordered to take corrective action.⁷ The Office of Insurance Regulation has authority to order the rescission of the annuity contract and order the refund of all premiums paid or the accumulation value of the annuity, whichever is greater. The Department of Financial Services may order an insurance agent to provide monetary restitution of all monies misappropriated, converted, or unlawfully withheld as well as restitution of penalties and fees incurred by a senior consumer. The DFS may also require insurance agencies to take reasonably appropriate corrective action for a senior consumer harmed by an agent’s noncompliance.

² Section 626.9541(1)(l), F.S.

³ Section 626.9541(1)(aa), F.S.

⁴ Section 627.4554(4), F.S.

⁵ Section 627.4554(4)(d), F.S.

⁶ The written disclosure must be made on a form developed by the DFS.

⁷ Section 627.4554(5), F.S.

Florida law also allows consumers to obtain an unconditional refund within 14 days of entering into a fixed or variable annuity contract.⁸ Senior consumers may obtain such refunds within 21 days. An annuity contract issued to a senior consumer also is prohibited from containing a surrender or deferred sales charge for a withdrawal of money that exceeds 10 percent of the amount withdrawn.⁹ Such charges must be reduced so that no surrender or deferred sales charge exists after the end of the 10th policy year or 10 years after the premium is paid, whichever is later.

Unfair Insurance Trade Practices Act

The “Unfair Insurance Trade Practices Act” under s. 626.9541, F.S., specifies and prohibits practices which constitute unfair methods of competition or unfair or deceptive acts. Insurers, insurance agents, and any other person involved in the business of insurance can be fined for violating the act, up to \$5,000 for each non-willful violation up to an aggregate \$20,000 fine, and up to \$40,000 for each willful violation up to an aggregate \$200,000 fine. Willful violations of these provisions are also subject to criminal prosecution as a second degree misdemeanor (s. 624.15, F.S.).

Further, the unfair trade practice laws authorize the OIR or the DFS to issue cease and desist orders against insurers and agents that violate those provisions (s. 626.9581, F.S.). Violation of a cease and desist order is subject to a penalty not to exceed \$50,000 (s. 626.9601, F.S.). An insurance agent that violates this section is also subject to suspension or revocation of his or her license and an administrative penalty of up to \$500 or, for willful violations, up to \$3,500, under the authority of the DFS (s. 626.681, F.S.).

Certain violations are subject to increased penalties. The act contains increased penalties for “twisting” and “churning” Such violations are first degree misdemeanors. Each non-willful violation is subject to a \$5,000 fine up to an aggregate \$50,000 fine, while each willful violation is subject to a \$75,000 fine up to an aggregate \$250,000 fine. Willfully submitting fraudulent signatures on an application or policy-related document is a third degree felony, and is subject to an administrative fine not greater than \$5,000 for each nonwillful violation up to an aggregate fine of \$50,000, while each willful violation is subject to an administrative fine not greater than \$75,000 up to an aggregate fine of \$250,000.

III. Effect of Proposed Changes:

Section 1. Amends s. 627.4554, F.S., which under current law contains standards and procedures for making annuity recommendations to senior consumers. The bill incorporates the 2010 National Association of Insurance Commissioners model regulation on annuity protections, which expands the scope of the section to include all annuity transactions and generally places additional duties on insurers. However, the bill also deletes some consumer protections that are currently available to senior consumers. The major provisions of the bill are as follows:

⁸ Section 626.99(4)(b), F.S.

⁹ Section 627.4554(9), F.S.

Duties of Insurers and Agents

Suitability of Annuities – The bill requires an insurer or insurance agent recommending the purchase or exchange of an annuity that results in an insurance transaction to have reasonable grounds for believing the recommendation is suitable for the consumer, based on the consumer’s suitability information. The insurer or agent must also have a reasonable basis to believe that:

- The consumer has been reasonably informed of:
 - The annuity’s features such as the potential surrender period and surrender charge;
 - Potential tax penalties if the consumer sells, exchanges, surrenders, or annuitizes the annuity;
 - Mortality and expense fees;
 - Investment advisory fees;
 - Riders, their features, and potential charges;
 - Limits on interest returns;
 - Insurance and investment components; and
 - Market risk.
- The consumer would benefit from certain features of the annuity such as tax-deferred growth, annuitization, or the death or living benefit.
- The annuity and any associated subaccounts, riders, and product enhancements are suitable. If the annuity is being exchanged or replaced, the annuity must be suitable for the particular consumer based on his or her suitability information.

Suitability of the Exchange or Replacement of an Annuity – Additional duties are placed on insurers or insurance agents when a transaction involves the exchange or replacement of an annuity. The bill provides criteria for determining whether the new annuity is suitable for a particular consumer. The insurer or agent must consider whether the consumer:

- Will incur a surrender charge; be subject to commencement of a new surrender period; lose existing benefits (death, living, or other contractual benefits), or be subject to increased fees (including investment advisory fees or charges for riders or other similar product enhancements).
- Will benefit from product enhancements and improvements; and
- Has had another annuity exchange or replacement, in particular within the past 36 months.

Requirement to Obtain Suitability Information – The bill retains the requirement in current law that the insurer or its agent must make reasonable efforts to obtain a consumer’s suitability information. An insurer may not issue an annuity unless there is a reasonable basis to believe the annuity is suitable based on the consumer’s suitability information. However, the insurer or its agent are not obliged to have a reasonable basis for believing the annuity is suitable if no recommendation has been made, the recommendation was based on materially inaccurate information, the consumer refuses to provide relevant suitability information and the annuity transaction is not recommended, or the consumer decides to enter into an annuity transaction not based on a recommendation of an insurer or its agent.

Documentation of Sales Transaction – An agent or agent’s representative must make a record of any recommendation made to a consumer. If the consumer refuses to provide suitability

information, the agent or representative must obtain a signed statement from the consumer documenting his or her refusal to provide suitability information. If the consumer enters into an annuity transaction that is not based on the recommendation of the insurer or insurance agent, the agent or representative must obtain a signed statement from the consumer acknowledging that the annuity transaction is not recommended.

Compliance Measures – As under current law, insurers must establish a supervision system designed to ensure insurer and agent compliance with the requirements of the statute. The measures include maintaining procedures to inform agents of their legal requirements when selling annuities, providing training and training materials that explain the insurer’s annuity products, maintaining procedures for reviewing each recommendation before issuing an annuity, procedures for detecting recommendations that are not suitable, and an annual report to senior managers. Insurers may contract with outside entities to perform these duties, but if an insurer does so, must supervise contractual performance.

Prohibitions on Agents – The bill prohibits agents from dissuading or attempting to dissuade a consumer from truthfully responding to the insurer’s request for suitability information, filing a complaint, or cooperating with the investigation of a complaint.

Agent Training – Agents are prohibited from selling annuity products unless they have sufficient knowledge of the product to recommend the annuity and the agent complies with the insurer’s standards for product training. All agents selling annuity products must also complete a one-time 4-hour annuity training course approved by the DFS. Each insurer must verify that the insurer’s agent has completed the annuity training course. Agents with a life insurance line of authority as of July 1, 2012, have 6 months from that date to complete the course; agents who obtain the line of authority after that date may not sell annuity products prior to taking the course.

Compliance and Penalties – Insurers are responsible for compliance with this section, both with regard to the insurer and its agents. The OIR may order an insurer to take reasonably appropriate corrective action for a consumer harmed the actions of the insurer or an insurer’s agent. Current law does not specify that insurers are responsible for their agent’s compliance; however, it does authorize the OIR to require the insurer to order rescission of the annuity policy and a full refund of premiums or accumulation value (whichever is greater).

The DFS is authorized to order insurance an insurance agent to take reasonably appropriate corrective action, including monetary restitution of penalties or fees incurred by the consumer. The DFS must order an insurance agent to pay restitution to a consumer who is deprived of money due to the agent’s misappropriation, conversion, or unlawful withholding of moneys belonging to a senior consumer. The DFS also may order a managing general agency or insurance agency to take corrective action.

Insurance code penalties must be reduced or eliminated by the OIR or the DFS if corrective action for the consumer is promptly taken after the discovery of a violation. Violations under this section do not give rise to a cause of action.

Other Provisions – The bill also contains the following provisions:

- The bill defines “suitability information” as information related to the consumer that is reasonably appropriate to determine the suitability of a recommendation made to the consumer.
- Annuity sales made in compliance with FINRA requirements pertaining to the suitability and supervision of annuity transactions must also comply with the requirements contained in this section. This requirement only applies when (1) the FINRA broker dealer sells an annuity and the suitability and supervision is similar to those applied to variable annuity sales; (2) the insurer monitors the FINRA member broker-dealer; and (3) the insurer provides information to the FINRA member broker-dealer in maintaining its supervision system.
- Insurers and agents must retain records of the annuity transaction for 5 years.
- The DFS has rulemaking authority to adopt rules to administer the section.

Provisions Related to Senior Consumers Repealed by the Bill – The bill repeals the following provisions related to annuity sales to senior consumers:

- Requirement to document suitability information on a form promulgated by the DFS that is signed by both the agent and consumer.
- Prior to entering into a contract to replace or exchange an annuity, the agent must provide a written disclosure to the consumer detailing the differences between each existing annuity contract and the annuity contract being recommended in order to determine the suitability of the recommendation and its benefit to the consumer. The information shall include, at a minimum:
 - A comparison of the benefits, terms, and limitations between the annuity contracts;
 - A comparison of any fees and charges between the annuity contracts;
 - A written basis for the recommended exchange, including the overall advantages and disadvantages to the consumer if the recommendation is followed; and
 - Such other information used or considered to be relevant by the insurance agent or the insurer in making recommendations to the consumer regarding the replacement or exchange of an annuity contract.
- Authorization for the OIR to require an insurer to enact rescission of the policy or contract and a full refund of the premiums paid or the accumulation value, whichever is greater, for any senior consumer harmed by a violation of this section by the insurer or the insurer’s insurance agent. The bill does authorize the OIR to require insurers to take “reasonably corrective action” but does not specify whether such action may include ordering rescission of the contract or refunds.
- An annuity contract issued to a senior consumer may not contain a surrender charge or deferred sales charge for a withdrawal of money from an annuity exceeding 10 percent of the amount withdrawn. The charge must be reduced so that no surrender or deferred sales charge exists after the end of the 10th policy year or 10 years after the premium is paid, whichever is later. The provision contains exceptions for purchases by accredited investors and contracts used to fund specified benefit plans, personal injury litigation settlements, or prepaid funeral contracts.

Section 2. Deletes from s. 626.99, F.S., requirements providing the means by which unconditional refunds to senior consumers related to fixed or variable annuities must be made. Current law requires the refund to be available for 21 days and to be equal to the surrender value of the annuity contract. The bill maintains current law, which requires the policy to authorize an unconditional refund of a fixed or variable annuity to any consumer within 14 days.

Section 3. The bill has an effective date of July 1, 2012.

Other Potential Implications:

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The consumer protections of s. 627.4554, F.S., will apply to all consumers purchasing annuities. However, certain consumer protections for senior consumers are deleted by the bill.

Agents selling annuities will be required to complete a 4-hour continuing education course in annuities, which will result in agents or their employers paying for such courses.

C. Government Sector Impact:

Representatives from the DFS assert that it will require an additional FTE (Insurance Analyst II) in the Division of Agent and Agency Services to assist in the administration of the bill's requirement that agents selling annuities take a 4-hour continuing education course on the subject.

VI. Technical Deficiencies:

Line 363 of the bill should provide the Office of Insurance Regulation and the Department of Financial Services with rulemaking authority to implement the requirements of the bill. The bill only provides such authority to the latter.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.