
SUBSTITUTE SENATE BILL 5210

State of Washington

68th Legislature

2023 Regular Session

By Senate Business, Financial Services, Gaming & Trade (originally sponsored by Senators Stanford, Gildon, and Hasegawa)

READ FIRST TIME 01/20/23.

1 AN ACT Relating to the best interest standard for annuities in
2 Washington; amending RCW 48.23.015; adding a new section to chapter
3 48.23 RCW; and providing an effective date.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 48.23
6 RCW to read as follows:

7 The purpose of this act is to require producers, as defined in
8 RCW 48.23.015, to act in the best interest of the consumer when
9 making a recommendation of an annuity and to require insurers to
10 establish and maintain a system to supervise recommendations so that
11 the insurance needs and financial objectives of consumers at the time
12 of the transaction are effectively addressed.

13 **Sec. 2.** RCW 48.23.015 and 2009 c 18 s 2 are each amended to read
14 as follows:

15 (1) This section applies to any sale or recommendation of an
16 annuity.

17 (2) For the purposes of this section:

18 (a) "Annuity" means a fixed annuity or variable annuity that is
19 individually solicited, whether the product is classified as an
20 individual or group annuity.

1 (b) "Cash compensation" means any discount, concession, fee,
2 service fee, commission, sales charge, loan, override, or cash
3 benefit received by a producer in connection with the recommendation
4 or sale of an annuity from an insurer, intermediary, or directly from
5 the consumer.

6 (c) "Consumer profile information" means information that is
7 reasonably appropriate to determine whether a recommendation
8 addresses the consumer's financial situation, insurance needs, and
9 financial objectives including, at a minimum, the following:

- 10 (i) Age;
11 (ii) Annual income;
12 (iii) Financial situation and needs, including debts and other
13 obligations;
14 (iv) Financial experience;
15 (v) Insurance needs;
16 (vi) Financial objectives;
17 (vii) Intended use of the annuity;
18 (viii) Financial time horizon;
19 (ix) Existing assets or financial products, including investment,
20 annuity, and insurance holdings;
21 (x) Liquidity needs;
22 (xi) Liquid net worth;
23 (xii) Risk tolerance including, but not limited to, willingness
24 to accept nonguaranteed elements in the annuity;
25 (xiii) Financial resources used to fund the annuity; and
26 (xiv) Tax status.

27 (d) "FINRA" means the financial industry regulatory authority or
28 a successor agency.

29 (e) "Insurer" means a company required to be authorized under the
30 laws of this state to provide insurance products, including
31 annuities.

32 (f) "Intermediary" means an entity contracted directly with an
33 insurer or with another entity contracted with an insurer to
34 facilitate the sale of the insurer's annuities by producers.

35 (g) "Material conflict of interest" means a financial interest of
36 the producer in the sale of an annuity that a reasonable person would
37 expect to influence the impartiality of a recommendation. "Material
38 conflict of interest" does not include cash compensation or noncash
39 compensation.

1 (h) "Noncash compensation" means any form of compensation that is
2 not cash compensation including, but not limited to, health
3 insurance, office rent, office support, and retirement benefits.

4 (i) "Nonguaranteed elements" means the premiums, credited
5 interest rates including any bonuses, benefits, values, dividends,
6 noninterest based credits, charges, or elements of formulas used to
7 determine any of these, that are subject to company discretion and
8 are not guaranteed at issue. An element is considered nonguaranteed
9 if any of the underlying nonguaranteed elements are used in its
10 calculation.

11 (j) "Producer" has the same meaning as "insurance producer" in
12 RCW 48.17.010 and also includes an insurer where no producer is
13 involved.

14 (k) "Recommendation" means advice provided by ((an insurance)) a
15 producer((, or an insurer when no producer is involved,)) to an
16 individual consumer that ((results)) was intended to or does result
17 in a purchase ((or)), an exchange, or a replacement of an annuity in
18 accordance with that advice.

19 ~~((2) Insurers and insurance producers must comply with the~~
20 ~~following requirements in recommending and executing a purchase or~~
21 ~~exchange of an annuity:~~

22 ~~(a) In recommending the purchase of an annuity or the exchange of~~
23 ~~an annuity that results in another insurance transaction or series of~~
24 ~~insurance transactions to a consumer, the insurance producer, or the~~
25 ~~insurer when no producer is involved, must have reasonable grounds~~
26 ~~for believing that the recommendation is suitable for the consumer on~~
27 ~~the basis of the facts disclosed by the consumer about their~~
28 ~~investments and other insurance products and as to their financial~~
29 ~~situation and needs.~~

30 ~~(b) Prior to the execution of a purchase or exchange of an~~
31 ~~annuity resulting from a recommendation, an insurance producer, or an~~
32 ~~insurer when no producer is involved, shall make reasonable efforts~~
33 ~~to obtain information concerning:~~

- 34 ~~(i) The consumer's financial status;~~
35 ~~(ii) The consumer's tax status;~~
36 ~~(iii) The consumer's investment objectives; and~~
37 ~~(iv) Other information used or considered to be reasonable by the~~
38 ~~insurance producer, or the insurer when no producer is involved, in~~
39 ~~making recommendations to the consumer.~~

1 ~~(3) An insurer or insurance producer's recommendation))~~
2 "Recommendation" does not include general communication to the
3 public, generalized customer services assistance or administrative
4 support, general educational information and tools, prospectuses, or
5 other product and sales material.

6 (1) "Replacement" means a transaction in which a new annuity is
7 to be purchased, and it is known or should be known to the proposing
8 producer or proposing insurer, whether or not a producer is involved,
9 that by reason of the transaction, an existing annuity or other
10 insurance policy has been or is to be any of the following:

11 (i) Lapsed, forfeited, surrendered or partially surrendered,
12 assigned to the replacing insurer, or otherwise terminated;

13 (ii) Converted to reduced paid-up insurance, continued as
14 extended term insurance, or otherwise reduced in value by the use of
15 nonforfeiture benefits or other policy values;

16 (iii) Amended so as to effect either a reduction in benefits or
17 in the term for which coverage would otherwise remain in force or for
18 which benefits would be paid;

19 (iv) Reissued with any reduction in cash value; or

20 (v) Used in a financed purchase.

21 (m) "SEC" means the United States securities and exchange
22 commission.

23 (3) Best interest obligations. A producer, when making a
24 recommendation of an annuity, shall act in the best interest of the
25 consumer under the circumstances known at the time the recommendation
26 is made, without placing the producer's or the insurer's financial
27 interest ahead of the consumer's interest. A producer has acted in
28 the best interest of the consumer if they have satisfied the
29 obligations in this subsection regarding care, disclosure, conflict
30 of interest, and documentation.

31 (a) Care obligation.

32 (i) The producer, in making a recommendation shall exercise
33 reasonable diligence, care, and skill to:

34 (A) Know the consumer's financial situation, insurance needs, and
35 financial objectives;

36 (B) Understand the available recommendation options after making
37 a reasonable inquiry into options available to the producer;

38 (C) Have a reasonable basis to believe the recommended option
39 effectively addresses the consumer's financial situation, insurance

1 needs, and financial objectives over the life of the product, as
2 evaluated in light of the consumer profile information; and

3 (D) Communicate the basis or bases of the recommendation.

4 (ii) The requirements under (a)(i) of this subsection include
5 making reasonable efforts to obtain consumer profile information from
6 the consumer prior to the recommendation of an annuity.

7 (iii) The requirements under (a)(i) of this subsection require a
8 producer to consider the types of products the producer is authorized
9 and licensed to recommend or sell that address the consumer's
10 financial situation, insurance needs, and financial objectives. This
11 does not require analysis or consideration of any products outside
12 the authority and license of the producer or other possible
13 alternative products or strategies available in the market at the
14 time of the recommendation. Producers shall be held to standards
15 applicable to producers with similar authority and licensure.

16 (iv) The requirements under this subsection do not create a
17 fiduciary obligation or relationship and only create a regulatory
18 obligation as established in this section.

19 (v) The consumer profile information, characteristics of the
20 insurer, and product costs, rates, benefits, and features are those
21 factors generally relevant in making a determination whether an
22 annuity effectively addresses the consumer's financial situation,
23 insurance needs, and financial objectives, but the level of
24 importance of each factor under the care obligation of this section
25 may vary depending on the facts and circumstances of a particular
26 case. However, each factor may not be considered in isolation.

27 (vi) The requirements under (a)(i) of this subsection include
28 having a reasonable basis to believe the consumer would benefit from
29 certain features of the annuity, such as annuitization, death or
30 living benefit, or other insurance-related features.

31 (vii) The requirements under (a)(i) of this subsection apply to
32 the particular annuity as a whole and the underlying subaccounts to
33 which funds are allocated at the time of purchase or exchange of an
34 annuity, and riders and similar producer enhancements, if any.

35 (viii) The requirements under (a)(i) of this subsection do not
36 mean the annuity with the lowest one-time or multiple occurrence
37 compensation structure shall necessarily be recommended.

38 (ix) The requirements under (a)(i) of this subsection do not mean
39 the producer has ongoing monitoring obligations under the care
40 obligation under this section, although such an obligation may be

1 separately owed under the terms of a fiduciary, consulting,
2 investment advising, or financial planning agreement between the
3 consumer and the producer.

4 (x) In the case of an exchange or replacement of an annuity, the
5 producer shall consider the whole transaction, which includes taking
6 into consideration whether:

7 (A) The consumer will incur a surrender charge, be subject to the
8 commencement of a new surrender period, lose existing benefits, such
9 as death, living, or other contractual benefits, or be subject to
10 increased fees, investment advisory fees, or charges for riders and
11 similar product enhancements;

12 (B) The replacing product would substantially benefit the
13 consumer in comparison to the replaced product over the life of the
14 product; and

15 (C) The consumer has had another annuity exchange or replacement
16 and, in particular, an exchange or replacement within the preceding
17 60 months.

18 (xi) Nothing in this section should be construed to require a
19 producer to obtain any license other than a producer license with the
20 appropriate line of authority to sell, solicit, or negotiate
21 insurance in this state, including but not limited to any securities
22 license, in order to fulfill the duties and obligations contained in
23 this section; provided the producer does not give advice or provide
24 services that are otherwise subject to securities laws or engage in
25 any other activity requiring other professional licenses.

26 (b) Disclosure obligation.

27 (i) Prior to the recommendation or sale of an annuity, the
28 producer shall prominently disclose to the consumer on a form
29 substantially similar to appendix A, as published on the
30 commissioner's website:

31 (A) A description of the scope and terms of the relationship with
32 the consumer and the role of the producer in the transaction;

33 (B) An affirmative statement on whether the producer is licensed
34 and authorized to sell the following products:

35 (I) Fixed annuities;

36 (II) Fixed indexed annuities;

37 (III) Variable annuities;

38 (IV) Life insurance;

39 (V) Mutual funds;

40 (VI) Stocks and bonds; and

1 (VII) Certificates of deposit;

2 (C) An affirmative statement describing the insurers the producer
3 is authorized, contracted, appointed, or otherwise able to sell
4 insurance products for, using the following descriptions:

5 (I) From one insurer;

6 (II) From two or more insurers; or

7 (III) From two or more insurers although primarily contracted
8 with one insurer;

9 (D) A description of the sources and types of cash compensation
10 and noncash compensation to be received by the producer, including
11 whether the producer is to be compensated for the sale of a
12 recommended annuity by commission as part of premium or other
13 remuneration received from the insurer, intermediary, or other
14 producer or by fee as a result of a contract for advice or consulting
15 services; and

16 (E) A notice of the consumer's right to request additional
17 information regarding cash compensation described in this subsection
18 (3)(b);

19 (ii) Upon request of the consumer or the consumer's designated
20 representative, the producer shall disclose:

21 (A) A reasonable estimate of the amount of cash compensation to
22 be received by the producer, which may be stated as a range of
23 amounts or percentages; and

24 (B) Whether the cash compensation is a one-time or multiple
25 occurrence amount, and if a multiple occurrence amount, the frequency
26 and amount of the occurrence, which may be stated as a range of
27 amounts or percentages; and

28 (iii) Prior to or at the time of the recommendation or sale of an
29 annuity, the producer shall have a reasonable basis to believe the
30 consumer has been informed of various features of the annuity, such
31 as the potential surrender period and surrender charge, potential tax
32 penalty if the consumer sells, exchanges, surrenders, or annuitizes
33 the annuity, mortality and expense fees, investment advisory fees,
34 any annual fees, potential charges for and features of riders or
35 other options of the annuity, limitations on interest returns,
36 potential changes in nonguaranteed elements of the annuity, insurance
37 and investment components, and market risk.

38 (c) Conflict of interest obligation. A producer shall identify
39 and avoid or reasonably manage and disclose material conflicts of

1 interest, including material conflicts of interest related to an
2 ownership interest.

3 (d) Documentation obligation. A producer shall at the time of
4 recommendation or sale:

5 (i) Make a written record of any recommendation and the basis for
6 the recommendation subject to this section;

7 (ii) Obtain a consumer signed statement on a form substantially
8 similar to appendix B as published on the commissioner's website
9 documenting:

10 (A) A customer's refusal to provide the consumer profile
11 information, if any; and

12 (B) A customer's understanding of the ramifications of not
13 providing his or her consumer profile information or providing
14 insufficient consumer profile information; and

15 (iii) Obtain a consumer signed statement on a form substantially
16 similar to appendix C as published on the commissioner's website
17 acknowledging the annuity transaction is not recommended if a
18 customer decides to enter into an annuity transaction that is not
19 based on the producer's recommendation.

20 (e) Application of the best interest obligation. Any requirement
21 applicable to a producer under this subsection shall apply to every
22 producer who has exercised material control or influence in the
23 making of a recommendation and has received direct compensation as a
24 result of the recommendation or sale, regardless of whether the
25 producer has had any direct contact with the consumer. Activities
26 such as providing or delivering marketing or educational materials,
27 product wholesaling, or other back office product support, and
28 general supervision of a producer do not, in and of themselves,
29 constitute material control or influence.

30 (4) Transactions not based on a recommendation.

31 (a) Except as provided under (b) of this subsection, a producer
32 shall have no obligation to a consumer under subsection (3)(a) of
33 this section related to any annuity transaction if:

34 (i) No recommendation is made;

35 (ii) A recommendation was made and was later found to have been
36 prepared based on materially inaccurate information provided by the
37 consumer;

38 (iii) A consumer refuses to provide relevant consumer profile
39 information and the annuity transaction is not recommended; or

1 (iv) A consumer decides to enter into an annuity transaction that
2 is not based on a recommendation of the producer.

3 (b) An insurer's issuance of an annuity subject to (a) of this
4 subsection must be reasonable under all the circumstances actually
5 known to the insurer ((or insurance producer)) at the time ((of the
6 recommendation. Neither an insurance producer nor an insurer when no
7 producer is involved, has any obligation to a consumer under
8 subsection (2) of this section related to any recommendation if a
9 consumer:

10 ~~(a) Refuses to provide relevant information requested by the~~
11 ~~insurer or insurance producer;~~

12 ~~(b) Decides to enter into an insurance transaction that is not~~
13 ~~based on a recommendation of the insurer or insurance producer; or~~

14 ~~(c) Fails to provide complete or accurate information.~~

15 ~~(4)) the annuity is issued.~~

16 (5) Supervision system.

17 (a) Except as permitted under subsection (4) of this section, an
18 insurer may not issue an annuity recommended to a consumer unless
19 there is a reasonable basis to believe the annuity would effectively
20 address the particular consumer's financial situation, insurance
21 needs, and financial objectives based on the consumer's consumer
22 profile information.

23 (b) An insurer must ((assure that a system to supervise
24 recommendations,)) establish and maintain a supervision system that
25 is reasonably designed to achieve the insurer's and the producer's
26 compliance with this section((, is established and maintained. The
27 system must include, but is not limited to, written procedures and
28 conducting periodic review of its records that are reasonably
29 designed to assist in detecting and preventing violations of this
30 section)).

31 ~~((a))~~ (c) An insurer may contract with a third party, including
32 ~~((insurance))~~ producers, a general agent, or independent agency, to
33 establish and maintain a system of supervision as required in this
34 subsection with respect to ((insurance)) producers under contract
35 with or employed by the third party. An insurer must make reasonable
36 inquiry to assure that the third party is performing the functions
37 required in this subsection and must take action as is reasonable
38 under the circumstances to enforce the contractual obligation to
39 perform the functions. An insurer may comply with its obligation to
40 make reasonable inquiry by doing all of the following:

1 (i) Annually obtaining a certification from a third party senior
2 manager with responsibility for the delegated functions that the
3 manager has a reasonable basis to represent, and does represent, that
4 the third party is performing the required functions; and

5 (ii) Based on reasonable selection criteria, periodically
6 selecting third parties contracting under this subsection for a
7 review to determine whether the third parties are performing the
8 required functions. The insurer shall perform those procedures to
9 conduct the review that are reasonable under the circumstances.

10 ~~((b))~~ (d) An insurer, or the contracted third party if a
11 general agent or independent agency, is not required to:

12 (i) Review, or provide for review of, all ~~((insurance))~~ producer
13 solicited transactions; or

14 (ii) Include in its system of supervision ~~((an insurance))~~ a
15 producer's recommendations to consumers of products other than the
16 annuities offered by the insurer, general agent, or independent
17 agency.

18 ~~((e))~~ (e) A general agent or independent agency contracting
19 with an insurer to supervise compliance with this section shall
20 promptly, when requested by the insurer, give a certification of
21 compliance or give a clear statement that it is unable to meet the
22 certification criteria. A person may not provide a certification
23 unless the person:

24 (i) Is a senior manager with responsibility for the delegated
25 functions; and

26 (ii) Has a reasonable basis for making the certification.

27 ~~((5) Compliance with the financial industry regulatory authority
28 conduct rules pertaining to suitability satisfies the requirements
29 under this section for the recommendation of annuities registered
30 under the securities act of 1933 (15 U.S.C. Sec. 77(a) et seq. or as
31 hereafter amended). The insurance commissioner must notify the
32 appropriate committees of the house of representatives and senate if
33 there are changes regarding the registration of annuities under the
34 securities act of 1933 that affect the application of this
35 subsection. This))~~ (6) Safe harbor.

36 (a) Recommendations and sales of annuities made in compliance
37 with comparable standards shall satisfy the requirements under this
38 section. This subsection applies to recommendations and sales of
39 annuities made by financial professionals in compliance with business
40 rules, controls, and procedures that satisfy a comparable standard

1 even if such a standard would not otherwise apply to the product or
2 recommendation at issue. However, nothing in this subsection ((does
3 not)) shall limit the insurance commissioner's ability to investigate
4 and enforce the provisions of this section.

5 ((~~(6) The~~)) (b) Nothing in (a) of this subsection shall limit the
6 insurer's obligation to comply with subsection (5)(a) of this
7 section, although the insurer may base its analysis on information
8 received from either the financial professional or the entity
9 supervising the financial professional.

10 (c) For (a) of this subsection to apply, an insurer shall:

11 (i) Monitor the relevant conduct of the financial professional
12 seeking to rely on (a) of this subsection or the entity responsible
13 for supervising the financial professional, such as the financial
14 professional's broker-dealer or an investment adviser registered
15 under federal or state securities laws using information collected in
16 the normal course of an insurer's business; and

17 (ii) Provide to the entity responsible for supervising the
18 financial professional seeking to rely on (a) of this subsection,
19 such as the financial professional's broker-dealer or investment
20 adviser registered under federal or state securities laws,
21 information and reports that are reasonably appropriate to assist
22 such entity to maintain its supervision system.

23 (d) For purposes of this subsection, "financial professional"
24 means a producer that is regulated and acting as:

25 (i) A broker-dealer registered under federal or state securities
26 laws or a registered representative of a broker-dealer;

27 (ii) An investment adviser registered under federal or state
28 securities laws or an investment adviser representative associated
29 with the federal or state registered investment adviser; or

30 (iii) A plan fiduciary under section 3(21) of the employee
31 retirement income security act of 1974 (ERISA) or fiduciary under
32 section 4975(e)(3) of the internal revenue code (IRC) or any
33 amendments or successor statutes thereto.

34 (e) For purposes of this subsection, "comparable standards"
35 means:

36 (i) With respect to broker-dealers and registered representatives
37 of broker-dealers, applicable SEC and FINRA rules pertaining to best
38 interest obligations and supervision of annuity recommendations and
39 sales including, but not limited to, regulation best interest and any
40 amendments or successor regulations thereto;

1 (ii) With respect to investment advisers registered under federal
2 or state securities laws or investment adviser representatives, the
3 fiduciary duties and all other requirements imposed on such
4 investment advisers or investment adviser representatives by contract
5 or under the investment advisers act of 1940 or applicable state
6 securities law including, but not limited to, the Form ADV and
7 interpretations; and

8 (iii) With respect to plan fiduciaries or fiduciaries, the
9 duties, obligations, prohibitions, and all other requirements
10 attendant to such status under ERISA or the IRC and any amendments or
11 successor statutes thereto.

12 (7) An insurer is responsible for compliance with this section.
13 If a violation occurs, either because of the action or inaction of
14 the insurer or its producer, the commissioner may order ((a)):

15 (a) An insurer(~~, an insurance producer, or both,~~) to take
16 reasonably appropriate corrective action for any consumer harmed by
17 (~~the insurer's or insurance producer's violation of this section.~~

18 ~~(a))~~ a failure to comply with this act by the insurer, an entity
19 contracted to perform the insurer's supervisory duties, or by the
20 producer;

21 (b) A general agency, independent agency, or the producer to take
22 reasonably appropriate corrective action for any consumer harmed by
23 the producer's violation of this section; and

24 (c) Appropriate penalties and sanctions.

25 (8) Any applicable penalty under this or other sections of Title
26 48 RCW may be reduced or eliminated by the commissioner if corrective
27 action for the consumer was taken promptly after a violation was
28 discovered or the violation was not part of a pattern or practice.

29 (~~(b))~~) This subsection does not limit the commissioner's ability to
30 enforce this section or other applicable sections of Title 48 RCW.

31 (~~(7))~~) (9) The authority to enforce compliance with this section
32 is vested exclusively with the commissioner.

33 (10) Insurers, general agents, independent agencies, and
34 (~~insurance~~) producers must maintain or be able to make available to
35 the commissioner records of the information collected from the
36 consumer, disclosures made to the consumer, including summaries of
37 oral disclosures, and other information used in making the
38 recommendations that were the basis for the insurance transaction for
39 five years after the insurance transaction is completed by the
40 insurer(~~, or for five years after the annuity begins paying~~

1 ~~benefits, whichever is longer~~). An insurer is permitted, but is not
2 required, to maintain documentation on behalf of ~~((an insurance))~~ a
3 producer. This section does not relieve ~~((an insurance))~~ a producer
4 of the obligation to maintain records of insurance transactions as
5 required by RCW 48.17.470.

6 ~~((+8))~~ (11) Records required to be maintained by this regulation
7 may be maintained in paper, photographic, microprocess, magnetic,
8 mechanical, or electronic media or by any process that accurately
9 reproduces the actual document.

10 (12) The commissioner may adopt rules to implement and administer
11 this section.

12 ~~((+9))~~ (13) Unless otherwise specifically included, this section
13 does not apply to recommendations involving:

14 (a) Direct response solicitations when there is no recommendation
15 based on information collected from the consumer under this section;

16 ~~((+))~~

17 (b) Contracts used to fund:

18 (i) An employee pension or welfare benefit plan that is covered
19 by the employment and income security act;

20 (ii) A plan described by sections 401(a), 401(k), 403(b), 408(k),
21 or 408(p) of the internal revenue code, as amended, if established or
22 maintained by an employer;

23 (iii) A government or church plan defined in section 414 of the
24 internal revenue code, a government or church welfare benefit plan or
25 a deferred compensation plan of a state or local government or tax
26 exempt organization under section 457 of the internal revenue code;
27 or

28 (iv) A nonqualified deferred compensation arrangement established
29 or maintained by an employer or plan sponsor;

30 ~~((+v))~~ (c) Settlements of or assumptions of liabilities
31 associated with personal injury litigation or any dispute or claim
32 resolution process; or

33 ~~((+vi))~~ (d) Formal prepaid funeral contracts.

34 ~~((+10))~~ (14) This section does not affect the application of
35 chapter 21.20 RCW.

36 (15) Nothing in this section shall be construed to create or
37 imply a private cause of action for a violation of this section or to
38 subject a producer to civil liability under the best interest
39 standard of care outlined in subsection (3) of this section or under

1 standards governing the conduct of a fiduciary or a fiduciary
2 relationship.

3 NEW SECTION. **Sec. 3.** This act takes effect January 1, 2024.

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