State of Wisconsin
2021 - 2022 LEGISLATURE

LRB-4097/1
EKL&TJD:cdc

# 2021 SENATE BILL 644

October 20, 2021 - Introduced by Senators STAFSHOLT, FEYEN and BALLWEG, cosponsored by Representatives PETERSEN, MAGNAFICI, DITTRICH, DOYLE, ALLEN and PETRYK. Referred to Committee on Insurance, Licensing and Forestry.

AN ACT ***to renumber and amend*** 628.347 (1) (e); ***to amend*** 628.347 (title), 628.347 (1) (b), 628.347 (3) (a) 4., 628.347 (3) (a) 5., 628.347 (3) (c), 628.347 (3m) (a) and 628.347 (4m) (b) 3. f.; ***to repeal and recreate*** 628.347 (2) and 628.347 (4); and ***to create*** 628.347 (1) (ac), 628.347 (1) (ae), 628.347 (1) (ag) 13. and 14., 628.347 (1) (ak), 628.347 (1) (ar), 628.347 (1) (aw), 628.347 (1) (ax), 628.347 (2b), 628.347 (2c), 628.347 (2d), 628.347 (2e), 628.347 (3) (a) 7., 8. and 9., 628.347 (3) (am), 628.347 (4m) (b) 10., 628.347 (4m) (b) 11. and 628.347 (9) and (10) of the statutes; **relating to:** best interest in annuity transactions.

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## ***Analysis by the Legislative Reference Bureau***

Under current law, before an insurance agent, or insurer if no agent is involved, can advise a prospective buyer to buy an annuity product, the agent or insurer must have reasonable grounds to believe that the recommendation is not unsuitable for the buyer. This bill modifies the existing suitability requirement based on a model regulation of the National Association of Insurance Commissioners.

Under the bill, rather than using the suitability framework provided under current law, an insurance agent must act in the best interest of the consumer under the circumstances known at the time the recommendation is made, without placing the financial interest of the agent or insurer ahead of the consumer's interest. The bill provides that an agent acts in the consumer's best interest if the agent satisfies obligations regarding care, disclosure, conflict of interest, and documentation.

Under the bill's care obligation, the agent must exercise reasonable diligence, care, and skill in making a recommendation, which includes knowing the consumer's financial situation, insurance needs, and financial objectives, understanding the available options, having a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs, and financial objectives, and communicating the basis of the recommendation to the consumer. The bill requires the agent to have a reasonable basis to believe the consumer will benefit from the annuity's features, make reasonable efforts to obtain the consumer's profile information, and consider the types of products the agent is authorized and licensed to recommend or sell that address the consumer's financial situation, insurance needs, and financial objectives.

Under the bill's disclosure obligation, the agent must, prior to the recommendation or sale, prominently disclose to the consumer a description of the agent's relationship with the consumer and role in the transaction, a statement on whether the agent is licensed and authorized to sell annuities and other products, a statement describing the insurers for which the agent is authorized to sell products, a description of the cash and noncash compensation to be received by the agent, and notice of the consumer's right to request additional information regarding cash compensation. The bill also requires that the agent disclose, upon request of the consumer or designee, a reasonable estimate of the amount of cash compensation to be received and whether the compensation is a one-time or multiple occurrence amount. Additionally, the bill requires that the agent, prior to or at the time of the recommendation or sale, have a reasonable basis to believe that the consumer has been informed of various features of the annuity.

Under the bill's conflict of interest obligation, the agent must identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts related to an ownership interest.

Under the bill's documentation obligation, the agent must, at the time of making a recommendation or sale, make a written record of any recommendation and the basis for it, obtain a signed statement from the consumer regarding the failure to provide profile information, and obtain a signed statement from the consumer that acknowledges an annuity transaction is not recommended if the consumer decides to enter into a transaction that is not based on the agent's recommendation.

The bill also provides that an insurer may not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity will effectively address the consumer's financial situation, insurance needs, and financial objectives based on the consumer's profile information. The bill also requires that insurers establish and maintain reasonable procedures to assess whether agents have provided consumers with the information required to be provided under the bill, to identify and address suspicious refusals by consumers to provide profile information, and to identify and eliminate contests, quotas, bonuses, and noncash compensation that are based on the sales of specific annuities within a limited time period.

The bill provides that recommendations and sales of annuities made in compliance with comparable standards, such as those under federal and state securities laws, satisfy the bill's requirements if the insurer satisfies certain conditions. Under current law, this standard is limited to requirements of the Financial Industry Regulatory Authority pertaining to suitability and supervision of annuity transactions.

Under the bill, insurance agents are required to, within six months of the bill's effective date, take a four credit training course approved by the commissioner of insurance or an additional one credit course provided by an education provider that is approved by the commissioner.

These provisions do not create or imply a private cause of action for a violation of the requirements or subject an insurance intermediary or insurer to civil liability under the best interest standard of care or fiduciary standards. The provisions also do not require an insurance intermediary to obtain any additional licensure.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

**SECTION 1.** 628.347 (title) of the statutes is amended to read:

**628.347** (title) **~~Suitability~~ <u>Best interest</u> in annuity transactions.**

**SECTION 2.** 628.347 (1) (ac) of the statutes is created to read:

628.347 **(1)** (ac) "Cash compensation" means any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received in connection with the recommendation or sale of an annuity by an insurance intermediary from an insurer or other insurance intermediary or directly from the consumer.

**SECTION 3.** 628.347 (1) (ae) of the statutes is created to read:

628.347 **(1)** (ae) "Comparable standards" means:

1. With respect to broker-dealers and registered representatives of broker-dealers, the applicable rules of the federal securities and exchange commission and FINRA pertaining to best interest obligations and supervision of

annuity recommendations and sales, including Regulation Best Interest and any amendments or successor regulations thereto.

2. With respect to investment advisers registered under federal or state securities law and investment adviser representatives, the fiduciary duties and other requirements imposed on the investment adviser or investment adviser representative by contract or under the Investment Advisers Act of 1940 or applicable state securities law, including the federal form ADV and applicable interpretations.

3. With respect to plan fiduciaries and fiduciaries described in par. (ak) 3., the duties, obligations, prohibitions, and other requirements attendant to such status under the Employee Retirement Income Security Act of 1974 or the Internal Revenue Code.

**SECTION 4.** 628.347 (1) (ag) 13. and 14. of the statutes are created to read:

628.347 **(1)** (ag) 13. Insurance needs.

14. Financial resources used to fund the annuity.

**SECTION 5.** 628.347 (1) (ak) of the statutes is created to read:

628.347 **(1)** (ak) "Financial professional" means an insurance intermediary who is regulated and acting as any of the following:

1. A broker-dealer registered under federal or state securities law or a registered representative of such a broker-dealer.

2. An investment adviser registered under federal or state securities law or an investment adviser representative associated with such an investment adviser.

3. A plan fiduciary, as defined in 29 USC 1002 (21), or a fiduciary, as defined in section 4975 (e) (3) of the Internal Revenue Code.

**SECTION 6.** 628.347 (1) (ar) of the statutes is created to read:

628.347 **(1)** (ar) "Material conflict of interest" means a financial interest of an insurance intermediary in the sale of an annuity that a reasonable person would expect to influence the impartiality of a recommendation, but does not include cash compensation or noncash compensation.

**SECTION 7.** 628.347 (1) (aw) of the statutes is created to read:

628.347 **(1)** (aw) "Noncash compensation" means any form of compensation that is not cash compensation, including health insurance, office rent, office support, and retirement benefits.

**SECTION 8.** 628.347 (1) (ax) of the statutes is created to read:

628.347 **(1)** (ax) "Non-guaranteed elements" means the premiums, credited interest rates, benefits, values, dividends, noninterest based credits, and charges, along with the elements of formulas used to determine any of these items, that are subject to company discretion and are not guaranteed at issue. An element is a non-guaranteed element if any non-guaranteed elements are used in its calculation. For purposes of this subsection, credited interest rates include any bonus.

**SECTION 9.** 628.347 (1) (b) of the statutes is amended to read:

628.347 **(1)** (b) "Recommendation" means advice provided by an insurance intermediary, or an insurer if no intermediary is involved, to an individual consumer that results in, or was intended to result in, the purchase, exchange, or replacement of an annuity in accordance with that advice, except that "recommendation" does not include general communication to the public, generalized customer service assistance or administrative support, general educational information and tools, prospectuses, and other product and sales materials.

**SECTION 10.** 628.347 (1) (e) of the statutes is renumbered 628.347 (1) (ag), and 628.347 (1) (ag) (intro.), 3., 8. and 11., as renumbered, are amended to read:

628.347 **(1)** (ag) (intro.) "~~Suitability~~ Consumer profile information" means information that is reasonably appropriate to determine ~~the suitability of~~ whether a recommendation addresses the consumer's financial situation, insurance needs, and financial objectives, including all of the following:

3. Financial situation and needs, including ~~the financial resources used for the funding of the annuity~~ debts and other obligations.

8. Existing assets and financial products, including investment, annuity, and ~~life~~ insurance holdings.

11. Risk tolerance, including willingness to accept non-guaranteed elements in the annuity.

**SECTION 11.** 628.347 (2) of the statutes is repealed and recreated to read:

628.347 **(2)** BEST INTEREST OBLIGATIONS. (a) When making a recommendation of an annuity, an insurance intermediary shall act in the best interest of the consumer under the circumstances known at the time the recommendation is made, without placing the financial interest of the intermediary or insurer ahead of the consumer's interest. An insurance intermediary has acted in the best interest of the consumer if the intermediary has satisfied the care obligation under sub. (2b), the disclosure obligation under sub. (2c), the conflict of interest obligation under sub. (2d), and the documentation obligation under sub. (2e). The requirements under this subsection and subs. (2b) to (2e) create only a regulatory obligation and do not create a fiduciary obligation or relationship.

(b) Any requirement applicable to an insurance intermediary under this subsection shall apply to every insurance intermediary who exercises material control or influence in the making of a recommendation and has received direct compensation as a result of the recommendation or sale, regardless of whether the intermediary has any direct contact with the consumer. Activities such as providing or delivering marketing or educational materials, product wholesaling or other back office product support, and conducting general supervision of an insurance intermediary do not, in and of themselves, constitute material control or influence.

**SECTION 12.** 628.347 (2b) of the statutes is created to read:

628.347 **(2b)** CARE OBLIGATION. (a) In making a recommendation, an insurance intermediary shall exercise reasonable diligence, care, and skill to do all of the following:

1. Know the consumer's financial situation, insurance needs, and financial objectives.

2. Understand the available recommendation options after making a reasonable inquiry into the options available to the intermediary.

3. Have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs, and financial objectives over the life of the product, as evaluated in light of the consumer profile information.

4. Communicate the basis or bases of the recommendation to the consumer.

(b) The requirements imposed on an insurance intermediary under par. (a) include all of the following:

1. Having a reasonable basis to believe the consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization, a death or living benefit, or other insurance-related features.

2. Making reasonable efforts to obtain consumer profile information from the consumer prior to the recommendation.

3. Considering the types of products the intermediary is authorized and licensed to recommend or sell that address the consumer's financial situation, insurance needs, and financial objectives. Nothing in this subdivision requires analysis or consideration of products outside the authority and license of the intermediary or other possible alternative products or strategies available in the market at the time of the recommendation. Under this subdivision, an intermediary shall be held to standards applicable to intermediaries with similar authority and licensure.

(be) If consumer profile information is obtained by an insurance intermediary, the insurance intermediary may not conceal the information from the insurer, and an insurance intermediary may not otherwise dissuade or attempt to dissuade the consumer from providing the information.

(c) The requirements under this subsection shall apply to the annuity as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or exchange of the annuity, and any riders and similar product enhancements.

(d) The factors generally relevant in determining under this subsection whether an annuity effectively addresses the consumer's financial situation, insurance needs, and financial objectives shall be the consumer profile information, characteristics of the insurer, and product costs, rates, benefits and features. The level of importance of each factor may vary depending on the facts and circumstances of a particular case, and no factor may be considered in isolation.

(e) Nothing in this subsection requires that an annuity with the lowest one-time or multiple occurrence compensation structure be recommended.

(f) Nothing in this subsection requires that the insurance intermediary have an ongoing monitoring obligation, although such obligation may be separately owed under the terms of a fiduciary, consulting, investment advising, or financial planning agreement between the consumer and intermediary.

(g) In the case of an exchange or replacement of an annuity, the insurance intermediary shall consider the whole transaction, which includes taking into consideration all of the following:

1. Whether the consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits, including death, living, or other contractual benefits, or be subject to increased fees, investment advisory fees, or charges for riders and similar product enhancements.

2. Whether the replacing product would substantially benefit the consumer in comparison to the replaced product over the life of the product.

3. Whether the consumer has had another annuity exchange or replacement, particularly within the preceding 60 months.

(h) 1. Subject to subd. 2., an insurance intermediary shall have no obligation to a consumer under this subsection if any of the following applies:

a. The intermediary made no recommendation.

b. The intermediary made a recommendation that is later found to have been prepared based on inaccurate material information provided by the consumer.

c. The consumer refuses to provide relevant consumer profile information and the annuity transaction is not recommended.

d. The consumer decides to enter into an annuity transaction that is not based on a recommendation made by the intermediary.

2. An insurer's issuance of an annuity under the circumstances specified in subd. 1. a. to d. shall be reasonable under all circumstances actually known to the insurer at the time the annuity is issued.

**SECTION 13.** 628.347 (2c) of the statutes is created to read:

628.347 **(2c)** DISCLOSURE OBLIGATION. (a) Prior to the recommendation or sale of an annuity, an insurance intermediary shall prominently disclose to the consumer, on a form substantially similar to Appendix A of the National Association of Insurance Commissioners Annuity Suitability Model Regulation that shall be posted on the office's Internet site, all of the following information:

1. A description of the scope and terms of the intermediary's relationship with the consumer and the role of the intermediary in the transaction.

2. An affirmative statement on whether the intermediary is licensed and authorized to sell fixed annuities, fixed indexed annuities, variable annuities, life insurance, mutual funds, stocks, bonds, and certificates of deposit.

3. An affirmative statement describing the insurers for which the intermediary is authorized, contracted, appointed, or otherwise able to sell insurance products, using whichever of the following descriptions is appropriate:

a. From one insurer.

b. From 2 or more insurers.

c. From 2 or more insurers although primarily contracted with one insurer.

4. A description of the sources and types of cash compensation and noncash compensation to be received by the intermediary, including whether the intermediary is to be compensated for the sale of a recommended annuity by commission as part of a premium or other remuneration received from the insurer

or another intermediary, or by fee as a result of a contract for advice or consulting services.

5. A notice of the consumer's right to request additional information regarding cash compensation.

(b) Upon request of the consumer or the consumer's designated representative, an insurance intermediary shall disclose all of the following:

1. A reasonable estimate of the amount of cash compensation to be received by the intermediary, which may be stated as a range of amounts or percentages.

2. Whether the cash compensation is a one-time or multiple occurrence amount and, if a multiple occurrence amount, the frequency and amount of the occurrence, which may be stated as a range of amounts or percentages.

(c) Prior to or at the time of the recommendation or sale of an annuity, the insurance intermediary shall have a reasonable basis to believe the consumer has been informed of various features of the annuity, including the potential surrender period and surrender charges, potential tax penalty if the consumer sells, exchanges, surrenders, or annuitizes the annuity, mortality and expense fees, investment advisory fees, annual fees, potential charges for and features of riders and other options, limitations on interest returns, potential changes in non-guaranteed elements of the annuity, insurance and investment components, and market risk.

**SECTION 14.** 628.347 (2d) of the statutes is created to read:

628.347 **(2d)** CONFLICT OF INTEREST OBLIGATION. An insurance intermediary shall identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts related to an ownership interest.

**SECTION 15.** 628.347 (2e) of the statutes is created to read:

628.347 **(2e)** DOCUMENTATION OBLIGATION. An insurance intermediary shall, at the time of making a recommendation or sale of an annuity, do all of the following, as applicable:

(a) If an annuity is recommended, make a written record of any recommendation and the basis for the recommendation subject to this section.

(b) If a consumer refuses to provide consumer profile information, obtain a signed statement from the consumer, on a form substantially similar to Appendix B of the National Association of Insurance Commissioners Annuity Suitability Model Regulation that shall be posted on the office's Internet site, that documents all of the following:

1. A consumer's refusal to provide consumer profile information.

2. A consumer's understanding of the ramifications of not providing his or her consumer profile information or of providing insufficient consumer profile information.

(c) If an annuity is not recommended, obtain a signed statement from the consumer, on a form substantially similar to Appendix C of the National Association of Insurance Commissioners Annuity Suitability Model Regulation that shall be posted on the office's Internet site, that acknowledges an annuity transaction is not recommended if the consumer decides to enter into an annuity transaction that is not based on the intermediary's recommendation.

**SECTION 16.** 628.347 (3) (a) 4. of the statutes is amended to read:

628.347 **(3)** (a) 4. Maintain procedures for review of each recommendation before issuance of an annuity that are designed to ensure that there is a reasonable basis to determine that a recommendation ~~is suitable~~ would effectively address a consumer's financial situation, insurance needs, and financial objectives. An insurer's procedures may apply a screening system for the purpose of identifying selected transactions for additional review. An insurer's procedures may be accomplished electronically or through other means, including physical review. An electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria.

**SECTION 17.** 628.347 (3) (a) 5. of the statutes is amended to read:

628.347 **(3)** (a) 5. Maintain reasonable procedures to detect recommendations that ~~are not suitable~~ do not comply with subs. (2) to (2e), which may include confirmation of consumer ~~suitability~~ profile information, systematic customer surveys, interviews, confirmation letters, producer statements or attestations, and programs of internal monitoring. Nothing in this subdivision prevents an insurer from complying with this subdivision by applying sampling procedures or by confirming ~~suitability~~ consumer profile information after issuance or delivery of the annuity, or both.

**SECTION 18.** 628.347 (3) (a) 7., 8. and 9. of the statutes are created to read:

628.347 **(3)** (a) 7. Establish and maintain reasonable procedures to assess, prior to or upon issuance or delivery of an annuity, whether an insurance intermediary has provided to a consumer the information required to be provided under this section.

8. Establish and maintain reasonable procedures to identify and address suspicious refusals by consumers to provide consumer profile information.

9. Establish and maintain reasonable procedures to identify and eliminate any sales contests, sales quotas, bonuses, and noncash compensation that are based on the sales of specific annuities within a limited period of time. Nothing in this subdivision prohibits the receipt of health insurance, office rent, office support,

retirement benefits, or other employee benefits by employees so long as those benefits are not based upon the volume of sales of a specific annuity within a limited period of time.

**SECTION 19.** 628.347 (3) (am) of the statutes is created to read:

628.347 **(3)** (am) Except as permitted under sub. (2b) (h), an insurer may not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity will effectively address the particular consumer's financial situation, insurance needs, and financial objectives based on the consumer's consumer profile information.

**SECTION 20.** 628.347 (3) (c) of the statutes is amended to read:

628.347 **(3)** (c) An insurer is not required to include in its system of supervision an insurance intermediary's recommendations to consumers of products other than the annuities offered by the insurer or include consideration of, or comparison to, options available to the intermediary or compensation relating to those options other than annuities or other products offered by the insurer.

**SECTION 21.** 628.347 (3m) (a) of the statutes is amended to read:

628.347 **(3m)** (a) Truthfully responding to an insurer's request for confirmation of ~~suitability~~ consumer profile information.

**SECTION 22.** 628.347 (4) of the statutes is repealed and recreated to read:

628.347 **(4)** COMPARABLE STANDARDS. (a) Recommendations and sales of annuities made in compliance with comparable standards shall satisfy the requirements of this section. This subsection applies to all recommendations and sales of annuities made by financial professionals in compliance with business rules, controls, and procedures that satisfy a comparable standard even if the standard does not otherwise apply to the annuity or recommendation.

(b) Nothing in this subsection limits the commissioner's ability to investigate and enforce the provisions of this section.

(c) Nothing in par. (a) limits an insurer's obligation to comply with sub. (3) (am), although the insurer may base its analysis on information received from either the financial professional or the entity responsible for supervising the financial professional, including the financial professional's broker-dealer or an investment adviser registered under federal or state securities law.

(d) In order for par. (a) to apply, an insurer shall do all of the following:

1. Monitor the relevant conduct of the financial professional or the entity responsible for supervising the financial professional, including the financial professional's broker-dealer or an investment adviser registered under federal or state securities law, using information collected in the normal course of an insurer's business.

2. Provide to the entity responsible for supervising the financial professional, including the financial professional's broker-dealer or investment adviser registered under federal or state securities law, the information and reports that are reasonably appropriate to assist the entity with maintaining its supervision system.

**SECTION 23.** 628.347 (4m) (b) 3. f. of the statutes is amended to read:

628.347 **(4m)** (b) 3. f. Appropriate standard of conduct, sales practices, and replacement and disclosure requirements.

**SECTION 24.** 628.347 (4m) (b) 10. of the statutes is created to read:

628.347 **(4m)** (b) 10. An intermediary who has completed an annuity training course approved by the commissioner prior to the effective date of this subdivision .... [LRB inserts date], shall, within 6 months of the effective date of this subdivision .... [LRB inserts date], complete any of the following:

a. A 4 credit training course approved by the commissioner.

b. An additional one-time one credit training course approved by the commissioner and provided by an education provider, who is approved by the commissioner, on appropriate sales practices and replacement and disclosure requirements under this section.

**SECTION 25.** 628.347 (4m) (b) 11. of the statutes is created to read:

628.347 **(4m)** (b) 11. Satisfaction of the components of the training requirements of a course or courses with components substantially similar to the requirements of this paragraph satisfies the training requirements of this paragraph.

**SECTION 26.** 628.347 (9) and (10) of the statutes are created to read:

628.347 **(9)** NO PRIVATE CAUSE OF ACTION. Nothing in this section may be construed to create or imply a private cause of action for a violation of this section or to subject an insurance intermediary or insurer to civil liability under the best interest standard of care under sub. (2) or under standards governing the conduct of a fiduciary or a fiduciary relationship.

**(10)** NO ADDITIONAL LICENSURE. Nothing in this section may be construed to require an insurance intermediary to obtain any license, including a securities license, other than an insurance intermediary license with the appropriate line of authority to sell, solicit, or negotiate insurance in this state in order to fulfill the duties and obligations contained in this section so long as the insurance intermediary does not give advice or provide services that are otherwise subject to securities laws or engage in any other activity requiring another professional license.

**SECTION 27. Effective date.**

(1) This act takes effect on the first day of the 6th month beginning after publication.

**(END)**