Life and Health

NAIC Suitability Model Regulation

BY ANN FURMAN

State insurance regulators made a course correction in their protracted consideration of the *Suitability in Annuity Transactions Model Regulation*. Prior to the NAIC fall meeting in late September, a sub-group of the Suitability Working Group had prepared and recommended a new revised draft suitability model regulation (dated September 4, 2009), which is modeled after FINRA Rule 2821, the suitability rule governing the sale of deferred variable annuities. The September 4 draft is annotated with parallel FINRA rule citations.

Since 2008, the Suitability Working Group had been considering another version of the model regulation. At its September 21, 2009 meeting, however, the working group voted to discontinue work on that version and move forward instead with the September 4 exposure draft. Among other things, the September 4 exposure draft:

- Holds an insurer, as well as a producer, responsible for the suitability of each sale;
- Requires an insurer to have a system for review, but not to review every sale; and
- Requires an insurer to adopt reasonable procedures for training, periodic review, inspection and the like.

Stronger enforcement might achieve the same goal

Meanwhile, industry trade groups and interested parties have voiced concern about revising a suitability model that the NAIC adopted in 2006 and some 46 states have either adopted or have followed with similar or related suitability standards. Some suggest that stronger enforcement of the current model would achieve the same goal as a new suitability model and that modeling the NAIC suitability regulation after FINRA Rule 2821 is ill-fitting. Rule 2821 applies to distributors, not to manufacturers of insurance products, and some securities concepts do not lend themselves to direct application to insurers. For example, in adopting securities concepts, the September 4 exposure draft does not address the sale of fixed annuities that do not have an investment component.

Several trade groups collaborated to craft a model bulletin to accompany the existing suitability model. The Suitability Working Group determined not to pursue the model bulletin.

In a comment letter dated October 15, 2009, five industry trade groups encouraged further consideration of the Model Bulletin as a complement to any final suitability model regulation.

Intellectual Property & Technology

Privacy Breaches and Class Action Lawsuits Against Financial Services Companies

BY DIANE DUHAIME & DAN CRISP

Plaintiffs have filed class action lawsuits against financial services companies on the grounds that the company failed to comply with the terms of its own privacy policy. One such class action case was filed in May, 2007 against TD AMERITRADE, Inc. (TD AMERITRADE). A TD AMERITRADE customer had received penny stock spam at two e-mail addresses linked to his TD AMERITRADE brokerage account, one of which was set up to test for a privacy breach of this account. In September, 2007, TD AMERITRADE announced that someone had hacked into a TD AMERITRADE database and stole the personally identifiable information of over 6 million current and former customers. The breach was linked only to the sending of penny stock spam to customers, not to any actual identity theft.

The parties initially agreed upon a proposed settlement of the class action lawsuit. The proposed terms included: (1) nearly $1.9 million in legal fees to the plaintiffs' attorneys; (2) one year of anti-spam software to the victims; and (3) TD AMERITRADE to take certain security measures, including hiring an individual to test TD AMERITRADE's security systems and retaining a security expert to test for evidence of identity theft. While preliminarily approving the proposed settlement, the court subsequently rejected it because, among other things, it viewed the terms as benefitting the plaintiffs' attorneys and TD AMERITRADE more than the class members.