

## 2023 South Dakota Legislature

**House Bill 1091****AMENDMENT 1091A  
FOR THE INTRODUCED BILL**

1 **An Act to amend provisions of the insurance statutes regarding producer**  
2 **recommendations and responsibilities.**

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 **Section 1. That § 58-33A-13 be AMENDED:**

5 **58-33A-13.** Terms used in §§ 58-33A-14 to 58-33A-27, inclusive, mean:

- 6 (1) "Annuity," an annuity that is an insurance product under state law that is  
7 individually solicited, whether the product is classified as an individual or group  
8 annuity;
- 9 (2) "Cash compensation," any discount, concession, fee, service fee, commission, sales  
10 charge, loan, override, or cash benefit received by a producer in connection with  
11 the recommendation or sale of an annuity from an insurer, intermediary, or directly  
12 from the consumer;
- 13 (3) "Consumer profile information," information that is reasonably appropriate to  
14 determine whether a recommendation addresses the consumer's financial  
15 situation, insurance needs, and financial objectives, including, at a minimum, the  
16 following:
- 17 (a) Age;
- 18 (b) Annual income;
- 19 (c) Financial situation and needs, including debts and other obligations;
- 20 (d) Financial experience;
- 21 (e) Insurance needs;
- 22 (f) Financial objectives;
- 23 (g) Intended use of the annuity;
- 24 (h) Financial objectives;
- 25 (i) Existing assets or financial products, including investment, annuity and  
26 insurance holdings;

- 1 (j) Liquidity needs;
- 2 (k) Liquid net worth;
- 3 (l) Risk tolerance, including but not limited to, willingness to accept non-
- 4 guaranteed elements in the annuity;
- 5 (m) Financial resources used to fund the annuity; and
- 6 (n) Tax status;
- 7 (4) "FINRA," the Financial Industry Regulatory Authority or a succeeding agency;
- 8 (5) "Intermediary," an entity contracted directly with an insurer or with another entity
- 9 contracted with an insurer to facilitate the sale of the insurer's annuities by
- 10 producers;
- 11 (6) "Material conflict of interest," a financial interest of the producer in the sale of an
- 12 annuity that a reasonable person would expect to influence the impartiality of a
- 13 recommendation. Material conflict of interest does not include cash compensation
- 14 or non-cash compensation;
- 15 (7) "Non-cash compensation," any form of compensation that is not cash compensation
- 16 including health insurance, office rent, office support, and retirement benefits;
- 17 (8) "Non-guaranteed elements," the premiums, credited interest rates including any
- 18 bonus, benefits, values, dividends, non-interest based credits, charges, or
- 19 elements of formulas used to determine any of these, that are subject to company
- 20 discretion and are not guaranteed at issue. An element is considered non-
- 21 guaranteed if any of the underlying non-guaranteed elements are used in its
- 22 calculation;
- 23 (9) "Producer," a person or entity required to be licensed under the laws of this state
- 24 to sell, solicit or negotiate insurance, including annuities. This term also includes
- 25 an insurer where no producer is involved;
- 26 (10) "Recommendation," advice provided by a producer to an individual consumer that
- 27 was intended to result or results in a purchase, replacement, or exchange of an
- 28 annuity in accordance with that advice. This term does not include general
- 29 communication to the public, generalized customer services assistance or
- 30 administrative support, general educational information and tools, prospectuses,
- 31 or other product and sales material. The term does not include presentation of
- 32 illustrations or showing multiple products to ~~advise~~ educate and explain to the
- 33 consumer the options available, ~~provided that a written recommendation is~~
- 34 subsequently provided by the producer;

- 1 (11) "Replacement," a transaction in which a new annuity is to be purchased, and it is  
2 known or should be known to the proposing producer, or to the proposing insurer  
3 whether or not a producer is involved, that by reason of the transaction, an existing  
4 annuity or other insurance policy has been or is to be any of the following:
- 5 (a) Lapsed, forfeited, surrendered, partially surrendered, assigned to the  
6 replacing insurer, or otherwise terminated;
  - 7 (b) Converted to reduced paid-up insurance, continued as extended term  
8 insurance, or otherwise reduced in value by the use of nonforfeiture benefits  
9 or other policy values;
  - 10 (c) Amended so as to effect either a reduction in benefits or in the term for  
11 which coverage would otherwise remain in force or for which benefits would  
12 be paid;
  - 13 (d) Reissued with any reduction in cash value; or
  - 14 (e) Used in a financed purchase; and
- 15 (12) "SEC," the United States Securities and Exchange Commission.

16 **Section 2. That § 58-33A-16 be AMENDED:**

17 **58-33A-16.** A producer, when making a recommendation of an annuity, shall act  
18 in the best interest of the consumer under the circumstances known at the time the  
19 recommendation is made, without placing the producer's or the insurer's financial interest  
20 ahead of the consumer's interest. For purposes of this section, a producer has acted in  
21 the best interest of the consumer by satisfying the obligations regarding care in §§ 58-  
22 33A-16.1 to 58-33A-16.3, inclusive, disclosure in §§ 58-33A-16.4 to 58-33A-16.6,  
23 inclusive, conflict of interest in § 58-33A-16.7, and documentation in § 58-33A-19.2. Any  
24 requirement applicable to a producer under §§ 58-33A-13 to 58-33A-27, inclusive, must  
25 apply to every producer who has exercised material control or influence in the making of  
26 a recommendation and has received direct compensation as a result of the  
27 recommendation or sale, regardless of whether the producer has had any direct contact  
28 with the consumer. Activities such as providing or delivering marketing or educational  
29 materials, product wholesaling or other back-office product support, and general  
30 supervision of a producer do not, in and of themselves, constitute material control or  
31 influence.

32 The following acts, when considered in isolation, do not constitute material control  
33 or influence:

- 34 (1) Receipt of override commissions;

- 1        (2) Transmittal of documents, including application to insurers; and  
2        (3) Providing illustrations and quotes.

3        **Section 3. That § 58-33A-16.1 be AMENDED:**

4                **58-33A-16.1.** Producers must, in making a recommendation:

- 5        (1) Exercise reasonable diligence, care, and skill to:
- 6                (a) Know the consumer's financial situation, insurance needs, and financial  
7                objectives;
- 8                (b) Understand the available recommendation options after making a  
9                reasonable inquiry into options available to the producer;
- 10              (c) Have a reasonable basis to believe the recommended option effectively  
11              addresses the consumer's financial situation, insurance needs, and financial  
12              objectives over the life of the product as evaluated in light of the consumer  
13              profile information; and
- 14              (d) Communicate the basis or bases of the recommendation;
- 15        (2) Make reasonable efforts to obtain consumer profile information from the consumer  
16              prior to the recommendation of an annuity;
- 17        (3) Consider the types of products the producer is authorized and licensed to  
18              recommend or sell that address the consumer's financial situation, insurance  
19              needs, and financial objectives. This does not require analysis or consideration of  
20              any products outside the authority and license of the producer or other possible  
21              alternative products or strategies available in the market at the time of the  
22              recommendation. A producer is not considered to be authorized for a product if the  
23              producers have no access to that product. ~~Producers~~ The producer must be held to  
24              standards applicable to producers with similar authority and licensure; and
- 25        (4) Have a reasonable basis to believe the consumer would benefit from certain  
26              features of the annuity, such as annuitization, death or living benefit, or other  
27              insurance-related features.

28              Factors generally relevant in making a determination whether an annuity  
29              effectively addresses the consumer's financial situation, insurance needs, and financial  
30              objectives include the consumer profile information, characteristics of the insurer, product  
31              costs, rates, benefits, and features. The level of importance of each factor in this section  
32              may vary depending on the facts and circumstances of a particular case, but each factor  
33              may not be considered in isolation.

1 **Section 4. That § 58-33A-16.7 be AMENDED:**

2 **58-33A-16.7.** A producer shall identify and avoid or reasonably manage and  
3 disclose material conflicts of interest, including material conflicts of interest related to an  
4 ownership interest. The following factors, when considered in isolation, are not material  
5 conflicts of interest:

- 6 (1) The producer has a minority ownership in an insurer or licensed business entity;  
7 (2) The producer has a majority ownership in a licensed business entity, if the  
8 ownership is conspicuously disclosed to the consumer; or  
9 (3) An immediate family member is employed by a licensed business entity.