



Life Insurance Consumer Advocacy Center

August 1, 2023

The Honorable Chris Holden, Chair
Assembly Appropriations Committee
1021 O Street, Suite 8220
Sacramento, CA 95814

RE: SB 263 (Dodd) - As Amended June 21, 2023 - OPPOSE UNLESS AMENDED

Dear Chair Holden:

Our five organizations representing insurance consumers oppose SB 263 (Dodd), as most recently amended on June 21, 2023, unless it is substantially amended to actually enhance, and not diminish, consumer protections. If the bill is to accomplish its stated goals, it needs amendments to restore critical consumer protections that have been deleted from the bill at the hands of the insurance industry, including provisions relating to a true consumer “best interest” standard and requirements that agents disclose conflicts of interest relating to cash and non-cash compensation. Without these changes, the bill will mislead consumers because it claims to adopt a consumer’s “best interest” standard and claims to require disclosure of agent conflicts of interests, but in reality it does neither.

When SB 263 was introduced and first amended in March, it was a strong consumer protection bill – the kind that California can be proud of. However, amendments pushed by the insurance industry have weakened the bill to something very close to (though even weaker than) National Association of Insurance Commissioners (NAIC) Suitability in Annuity Transactions Model Regulation 275-1. This occurred despite the major shortcomings of the NAIC Model, which was adopted in 2020 at NAIC over the objections of consumer organizations, California Department of Insurance (CDI) representatives and at least one insurance agent organization. Consumer stakeholders were excluded from discussion of the April 17, 2023, and May 2, 2023, amendments to SB 263. The resulting bill does a grave disservice to consumers by making it appear that consumers are protected (and allowing agents to say that consumers are protected), when in fact that is not the case. The Fact Sheet submitted with this letter outlines several important protections of the original SB 263 that need to be restored. Our coalition intends to oppose SB 263 unless it is amended to address the problems raised in the Fact Sheet, including especially these key flaws in the current version of the bill:

1) THE CONSUMER’S BEST INTEREST TAKES A BACK SEAT TO THAT OF THE AGENT AND INSURANCE COMPANY - The amendments have gutted the true “consumer’s best interest” standard that was in the March 7, 2023, bill, which required agents to consider only the interests of the consumer in making a recommendation. But under the bill as

of May 2, 2023, *agents are not required to consider only the interests of the consumer and may weigh their own interests against those of the consumer* – with predictable results given the sorry history of sales abuses in the annuities market especially.

2) THE REQUIREMENT THAT AGENTS DISCLOSE CONFLICTS OF INTEREST IS PHONY BECAUSE “MATERIAL CONFLICT OF INTEREST” IS DEFINED TO EXCLUDE “CASH AND NONCASH COMPENSATION.” Nearly all conflicts of interest between an insurance agent and a consumer arise from cash or noncash compensation an agent can earn if the consumer accepts the agent’s recommendation, yet the bill would make Orwell proud by defining those conflicts *not to be conflicts*. Thus, an agent would have to disclose stock ownership in an insurance company being recommended but would not have to disclose the commission of \$20,000 or more that the agent could earn if the consumer accepts the recommendation.

3) THE DISCLOSURES THE BILL DOES REQUIRE NEED NOT BE PROVIDED UNTIL THE ANNUITY IS ISSUED AND DELIVERED TO THE CONSUMER – FAR TOO LATE TO BE USEFUL. After the hearing in the Senate Insurance Committee, and with no notice to consumer stakeholders, the bill was amended on May 2, 2023, to allow agents to wait until the “sale” of an annuity (i.e., delivery) to provide even those disclosures that the bill’s proponents believe are needed. This is too late because the decision to buy the annuity is in most cases effectively made at the time the consumer submits an application based on a recommendation from the agent.

4) “SAFE HARBOR” PROVISION CREATES A MASSIVE LOOPHOLE - The amendments have introduced a gaping loophole (euphemistically called a “Safe Harbor”) whereby producers can argue that the obligations of SB 263 do not apply to them because they are following a “comparable standard” (such as the SEC’s Regulation Best Interest) *even if that standard does not apply to that producer or product and there is no regulator supervising the producer’s compliance with that standard*. This loophole threatens to nullify SB 263 entirely.

5) SIGNIFICANT FISCAL IMPACT OF BILL - Last year many of our organizations worked on SB 927 (Archuleta), which was the first explicit effort to introduce a true “best interest” standard for consumer protection. The bill was modeled on best practices of other states, particularly New York’s Regulation 187 (unsuccessfully legally challenged by the insurance industry). SB 927 was essentially taken hostage by the insurance industry, which forced into the bill costly amendments regarding continuing education (“CE”), among other provisions. The intent was to kill the bill on the Suspense file at the Senate Appropriations Committee with a massive fiscal, and it worked. Now industry has CE amendments in SB 263, but this year’s version of CE language is even weaker in consumer protection than the language the insurance industry forced into SB 927 last year. Either way these provisions will still be very costly for CDI to implement, and the bill should follow the path of SB 927, go to the Suspense File, and stay there in perpetuity until a true stakeholder negotiation process takes place.

6) KEY PROVISIONS OF SB 263 ARE WEAKER THAN THE NAIC STANDARD AND WEAKEN EXISTING CALIFORNIA LAW - Item #4 above points out the massive loophole created by SB 263’s Safe Harbor provision. Even worse, recent amendments to SB 263

expand the Safe Harbor beyond what is provided in the NAIC Model, making SB 263 even less protective of consumers than the NAIC Model, potentially tying CDI's hands when it attempts to enforce California law pertaining to licensed insurance agents, and setting up a potential litigation trap for CDI. This problematic provision, which is *not* present in the NAIC Model, appears on page 24, lines 12-15 of the June 21, 2023, version of the bill, in provision (6) of subdivision (i) of Section 10509.914 of the Insurance Code, being added by SB 263. By exempting only Insurance Code Section 10509.915 from the Safe Harbor and not a much wider swath of the Insurance Code, the amendment creates an ambiguity that may be used against CDI in the future. For example, an agent might argue that the Safe Harbor exempts the agent from Section 10509.914(h), which prohibits acts such as attempting to dissuade a consumer from filing a complaint or cooperating with CDI's investigation of a complaint. Our organizations are not the only ones concerned about this possibility. SB 263 is also weaker than the NAIC Model because SB 263 does not require agents to disclose their estimated compensation if the consumer requests it. All provisions of SB 263 that weaken current California law or are weaker than the NAIC Model must be amended to at least meet those minimal standards. We would be happy to provide the committee with language doing that as part of our broader suggested amendments to the bill.

Other states, such as New York, have stepped up to protect consumers in this segment of the insurance marketplace. California must at least keep pace with the pro-consumer actions of New York. SB 263 does not do so. Indeed, it makes matters worse by leading consumers to believe they are protected when they are not. Regrettably, we must oppose SB 263 in its current form. The consumer protections we have described must be restored.

Finally, we ask that our groups be included in important negotiations over amendments. Members of our groups have worked on the issues at play in SB 263 for many years and are some of the foremost experts in this area. We remain fully available to assist in fixing the bill so that it meets California's long-held consumer protection standards.

CDI has said that SB 263 should be enacted to avoid dual federal/state regulation under Section 989j of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which creates an exemption from federal regulation for states that enact legislation by January 1, 2025, that is at least as protective of consumers as the NAIC Model. But enacting the current version of SB 263 will not meet that goal. To the contrary, enactment of the current version of SB 263 will trigger federal regulation because, as shown above, SB 263 *is less protective* of consumers than the NAIC Model. Fortunately, California has until January 1, 2025, to adopt stronger legislation. We urge that SB 263 be sent back to the drawing board such that consumers get a fair shake. The 5,000 complaints in the life insurance sector and almost 800 complaints in the annuity sector currently in CDI's possession over the past five years point to the need to take strong action to protect consumers. Let's get this right in a way that isn't written by the insurance industry. Thank you for your attention to this matter and we welcome any further dialogue with the committee regarding ways to truly protect consumers in this market space.

Sincerely,

/s/ Brian P. Brosnahan

Executive Director
Life Insurance Consumer Advocacy Center
/s/ Amy Bach

Executive Director
United Policyholders

/s/ Robert Herrell

Executive Director
Consumer Federation of California

/s/ Michael DeLong

Research and Advocacy Associate
Consumer Federation of America

/s/ Birny Birnbaum

Executive Director
Center for Economic Justice

CC: The Honorable Bill Dodd
Honorable Members, Assembly Insurance Committee
Claire Wendt, Principal Consultant, Assembly Insurance Committee
Michael Martinez, Chief Deputy Commissioner and Legislative Director, CDI
Josephine Figueroa, Chief Deputy Legislative Director, CDI