

## [California Seeking Suitability Requirements Again](#)

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The [California Department of Insurance](#) (“CDI”) published, on March 11, 2011, proposed regulations containing suitability requirements to govern the sale of annuities (see Insurance Commissioner Jones' [press release](#)). This represents an attempt by the CDI to accomplish by regulation what it failed to accomplish several times by statute in the past decade.

The [proposed regulations](#) are based on the [NAIC Suitability in Annuity Transactions Model Regulations](#), as revised by the NAIC in 2010, but include some revisions.

It is important to note that for many years the CDI has held the position that the prior versions of the NAIC Suitability Model did not go far enough in protecting consumers. The CDI supported unsuccessful legislation in California at least three times in the mid-2000s that sought to impose suitability requirements that were more onerous than the then current NAIC Suitability Model.

Thus, while most states have adopted laws that follow the NAIC Suitability Model, California currently lacks laws that provide specific suitability requirements that pertain to the sale of annuities.

Given the lack of express suitability requirements, the CDI has sought to regulate suitability in connection with the sale of annuities using other tools such as:

1. general legal concepts of principal-agent responsibility;
2. requirements relating to replacements; and,
3. [California Insurance Code Section 785\(a\)](#)'s imposition of a duty of good faith and fair dealing in connection with the sale on an insurance product to a senior.

The regulations proposed by the CDI include a provision that would make them applicable only to sales of annuities to purchasers aged 65 and older. This is in contrast to the NAIC Suitability Model which applies to all sales of annuities.

Another important distinction between the CDI's proposed regulations and the NAIC Suitability Model is that the CDI proposal does not include the “FINRA Safe Harbor” provisions which were some of the primary revisions made by the NAIC to the Suitability Model last year. A public hearing will be held on the CDI's proposed regulations on April 25, 2011.

It is interesting to note that the [The National Conference of Insurance Legislators recently endorsed the NAIC Suitability Model](#). Also, the Senate Insurance Committee of the California Legislature introduced legislation, [SB 715](#), on February 18, 2011, that seeks to codify the NAIC Suitability Model. SB 715's draft language is the same as the NAIC Suitability Model that was revised by the NAIC last year.

It is not clear at this point in time why the CDI has proposed the NAIC Suitability Model in the form of regulations when the Model is pending as a proposed statute. One thought is that the CDI is hedging its bets. One problem that the CDI may have is that it is unclear whether there is

sufficient statutory authority for the CDI to promulgate the NAIC Suitability Model as a regulation.

For more information, please contact [Randall Doctor](#).