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Mr. Philip Reyna, CLU, ChFC
Manager

via email: Philip.reyna@tdi.texas.gov

Life and Health Lines Office - Life, Annuity, and Credit Program
Regulatory Policy Division
Texas Department of Insurance
333 Guadalupe St.
Austin, Texas 78701

Re: Informal Draft Rules-Life and Annuity

Dear Mr. Reyna:

These are preliminary comments submitted on behalf of my client, the Texas Association of Life & Health Insurers (TALHI). TALHI has over 100 member insurers who will be impacted by these rules.

As indicated in the stakeholder meeting yesterday, TALHI is still receiving input from numerous technical and actuarial employees of member companies of TALHI. Because of the length of these informal draft rules and normal vacation schedules in July, there is a need for additional time in order to provide meaningful comments. We appreciate the willingness of staff to extend the comment period to August 17, 2018.

The following is a summary of some of the oral comments submitted at yesterday's stakeholder meeting along with some additional comments for your consideration:

Comments on Document B

- 1. New Chapter 4, Subchapter A§4.1. Applicability & Scope.** Based on your comments at the meeting yesterday, it is our understanding that proposed Sections 4.1-4.35 is intended to apply to all life and annuity policies, including both individual and group products. The actual wording on applicability and scope should be carefully analyzed. The wording in the informal draft states it will apply to "all life and annuity policies, including individual and group products." There have been some questions as to whether the word "product" should either be defined or whether it may be better to refer to policies consistent

with language in other portions of the administrative code such as individual and group term, whole life, non-variable universal life or flexible premium life, endowment products. These appear to be the basic types of life products that are intended to be subject to this subchapter and would be consistent with the distinctions included in the Interstate Compact published standards by product type.

There should also be some exceptions added under applicability and scope. It would appear that many of the provisions in this proposed Subchapter A would not fit some types of life policies such as credit life. Some of the provisions also may not fit some types of annuity policies, such as fixed or variable annuities sold as qualifying under Sections 403(b) and 457 of the Internal Revenue Code. Additional comments are expected in this area and we would urge Department staff to refine the applicable and scope to include only those products in this Subchapter A that are not addressed in specific new Subchapters. The proposed applicability may also not describe certain types of policies that are not subject to the nonforfeiture requirements in Chapter 1105. These include pure endowment, certain term policies, and certain policies that do not provide guaranteed nonforfeiture or endowment benefits. Please see, Tex. Ins. Code §1105.003. The statutory requirements for group life products are set forth in Chapter 1131. Some of the required or prohibited provisions may be different. Despite this, the rules appear to blend and require certain provisions that may not be applicable in all instances to group life policies.

There another important legal point that should also be considered. It appears the informal draft rules attempt to apply certain statutory standards to all life and annuity policies, including group when some of the statutory standards in Chapter 1101 only apply to life policies. There are other required standards in Chapter 1131 for group life. There are few specific statutory standards for annuities. Tex. Ins. Code §1131.101(b) provides that the “standard provisions required for individual life insurance policies do not apply to group life insurance policies.” This does not appear to have been adequately considered. However, the rules would take requirements in Chapter 1101 of the Insurance Code and apply them to group life and annuities that may be contrary to the statute cited above and also contrary to long-standing rules of statutory construction. The Texas Supreme Court has said that “where the Legislature employs a term in one section of a statute and excludes it in another, the term should not be implied where it is excluded”. *Laidlaw Waste Systems Dallas, Inc. v. City of Wilmer*, 904 S.W.2d 656 (Tex. 1995); *Brown v. De La Cruz*, 156 S.W. 3rd 560 (Tex. 2004); *Meritor Automotive, Inc. v. Ruan Leasing*, 44 S.W.3rd 86 (Tex. 2001). TALHI will urge its members to review this and urges department staff to further consider this on each of the sections below.

2. **§4.4. Table of Contents.** Based on comments by department staff, this would be a new section encouraged by the Commissioner. The proposed rule requires an

index or table of contents on any policy that exceeds three (3) pages. This may effectively require an index on all policies including small face amount or pre-need policies. It is requested that more information on the source of the 3,000 words or 3 pages be provided. This may require some smaller companies writing only small face amount or term policies to file all new forms just to meet this requirement.

3. **§4.5 Premium and Other Policy Charges.** This appears to add a new disclosure on the face page to include not only the minimum and maximum charge but the timing of charges. This is very ambiguously worded and may not be necessary for all life and annuity products subject to Subchapter A. Subsection (2) adds a new requirement for a disclosure on the face page of “the charge” will reduce interest credit and policy values, if applicable. Again this is ambiguously worded and not clear on what will be required for compliance.
4. **§4.6 Policy Values.** This should be amended to insert words to reflect that this requirement is only necessary if applicable to a particular type of policy. Some policies do not accumulate cash values.
5. **§4.7. Payment of Premiums.** As mentioned in the meeting yesterday, this proposed change would eliminate long-standing policy language that provides that premium is payable at the home office. This has been discussed in several contexts including but not limited to the impact on AG rules on child support lien look-ups, venue for civil or criminal proceedings, and other. The wording in proposed 4.7 should be reviewed.
6. **§4.8. Required Statutory Provisions.** As mentioned in the meeting yesterday, not all of the statutes cited would fit all types of annuities, life or group products. These should only apply if applicable. All of the required statutory provisions refer to a section in Chapter 1101 that is applicable to life insurance. See the earlier comments on why this may be directly contrary to other statutes in the Insurance Code specifically regulating group life and annuity products. As stated in earlier comments this may be contrary to some specific statutes and rules of statutory construction recognized by the Texas Supreme Court.
7. **§4.9. Underpayment and Overpayment.** The language in this proposed new section appears to change the requirements in existing statutory law. Under Tex. Ins. Code §1101.008, a policy must provide that if the age of an insured is understated, the “amount payable” under the policy is the amount that the premium paid would have purchased if the insured’s age had been correctly stated. There is nothing in this statute that requires overpayment of premium or includes a requirement for the payment of interest for either an overpayment or underpayment due to a misstatement of age. This appears to be an attempt at setting public policy through a rule, which may exceed the rulemaking authority granted under Tex. Ins. Code §1701.060.

8. §4.11. Payment of Benefits. TALHI objects to this proposed new language. As stated yesterday, this language could materially impact all annuities because it appears to create a new private cause of action under the prompt pay provisions in Chapter 542, Subch. B of the Insurance Code. This is new language that is not based on any NAIC or Interstate Compact. Based on comments from department staff at yesterday's stakeholder meeting, it appears to be a staff solution to particular complaint or situation by an annuity company that ceased making regularly scheduled annuity payments. The reasons and facts behind this were not clear.

At the meeting, staff requested additional alternatives for this situation. It is submitted that this matter should have been referred to enforcement staff, which has demonstrated a clear ability to use its powers of enforcement in situations such as this and there are sufficient provisions in the Insurance Code to for the department to take action if a particular insurer has violated the law with its conduct. There is no need to expand or adopt this proposed section.

It is also respectfully submitted, that this section appears to be an attempt to "interpret" when and what is a "claim" under Ch. 542, Subch. B. The Department has been given authority to promulgate rules for unfair claim settlement practices under Ch. 542, Subch. A, but has been given no authority to promulgate rules under Subchapter B. Thus, there is no legal authority for the department to adopt this rule.

Even if staff persists that there is legal authority for this rule, Chapter 542, Subch. B has been the subject of considerable recent legislative debate because of abuses by some plaintiff lawyers for hail or residential property claims. The proposed amendment in this section could have similar detrimental effects in the annuity market and subject annuity companies to 18% interest and attorney's fees for each and every "systematic withdrawal" or "death benefit".

This proposed rule incorrectly concludes that a systematic withdrawal or death benefit is a "claim". Under an annuity, the claim may have been made earlier that starts provisions for a systematic withdrawal or payment. Inclusion of "death benefit" is also misleading and deceptive because the beneficiary may not have established their right to proceeds, if any, under an annuity. **TALHI strongly recommends this proposed section be deleted.**

- 9. §4.12. Conversion or Exchange Provision.** This appears to amend current rule Section 3.118 by adding the word "Exchange" to the title. An exchange and conversion may not always be the same. It is not clear why "exchange" is added or what problem is sought to be solved by adding this to the title. If there is a problem with exchanges, this should be spelled out in better detail. Tex. Ins. Code §1101.054 permits and exchange or conversion of a life policy as of a date not earlier than the effective date of the original policy or contract. This section

applies to life policies and does not appear to apply to annuities. TALHI recommends this section be reviewed and amended or clarified as to what is intended.

10. **§4.14. Settlement at Maturity.** Even though this appears to be similar to current rule Section 3.121, this appears to be based on certain requirements required for a life policy under Chapter 1101. There are no similar provisions for annuities. The statutory provisions for group life products in chapter 1131 contain some but not all of the provisions referenced in this rule. TALHI would urge that staff carefully review and compare the differences in the statutory provisions. The rule appears to combine various statutes into a single rule. This is true in this proposed sections and other sections in this subchapter A.
11. **§4.15. Assignment Provisions.** This section materially changes existing rules by requiring that all policies must contain an assignment provision. This is not required by statute for life or annuity policies. It is not included in the required provisions in Chapter 1101 for life policies and not included in the required provisions in Chapter 1131 for group life policies. The Legislature has also not given the department rulemaking authority to determine or add required provisions under either Chapter 1101 or Chapter 1131. Tex. Ins. Code §1103.055 provides that an individual who is insured under a life policy may “in the manner and to the extent permitted by the policy” ...designate a beneficiary; and “to the extent not prohibited by the policy”, transfer or assign the policy.....”. This language appears to permit policy provisions that may restrict assignment. Assignment of benefits may not be prohibited under certain health insurance policies under Tex. Ins. Code §1204.053. This section prohibits policy provisions that restrict or prohibit assignments of benefits to a physicians or other health care providers. There is no similar provision applicable to life or annuity products. Even though many insurers have policy provisions that permit assignments, it should not be required and not required by rule.¹ TALHI submits this rule exceeds the authority granted the department and it should be reworded to be consistent with the current rule and applicable statutes.
12. **§4.22. Provisions relating to dividends, coupon benefits or other guaranteed returns.** Even though this appears to be based on language similar to Section 3.124, new terms have been added that could be confusing. The term “divisible surplus” is not defined and appears to be different than terms used for regulating dividends, including policyholder dividends, in Chapter 403 and other provisions in the Insurance Code. It is not clear what is intended by the reference to the Internal Revenue Code in subsection (3).
13. **§4.23. Bonus Benefits.** This section requires the policy to include the “effective date of the bonus”. This should be clarified on what is specifically required for a

¹ Please see earlier comments on why provisions in one statute should not be implied in other statutes or rules.

policy filing. Other questions include whether this can be applied to all group life and annuities without some express statutory authority.

14. **§4.26 Written Consent of Insured.** This proposed rule changes appears to conflict with the provisions in Chapter 1103 on insurable interest. The proposed rule restricts obtaining a policy on the life of another, other than familial interest, without written consent. Chapter 1103 clearly authorizes certain business, partnerships, or religious institutions to be designated as beneficiaries that insures the life of an individual. Written consent is not required. Subsection (b) in this section imposes obligations on third parties to obtain written consent from each individual, such as an employee, at the time of policy application. This is inconsistent with Chapter 1103 and not required in Chapter 1131 or other law. It appears the informal draft rule is attempting to legislate. TALHI respectfully contends the Legislature has not authorized the department to adopt rules to enact provisions such as Section 4.26.
15. **§4.31. Right to Examine.** This appears to be a new rule that is not based on any current statute or regulation. At the meeting, staff referred to this as an “industry” standard that appeared in either the Interstate Compact or other National standard. To the extent staff has relied on NAIC Model laws to enact this rule, TALHI would point out that this may violate the provisions Tex. Ins. Code §36.004(b) on compliance with NAIC Model Laws and Regulations. Under this statute, the Department must have specific statutory authority to adopt rules consistent with certain NAIC Model laws. There is no statute that authorizes staff to use NAIC Model Life or Annuity Policy provisions as a rule. This would also not be a technical or non-substantive rule. The right to examine imposes basically a 20 day free look on all life and annuity products. Currently, fixed annuity products have a 20 day free look under Tex. Ins. Code §1116.002(a). There is no similar provision for all life and group products. There is also no similar provision for annuities that are not a fixed annuity contract. Separate rules apply to variable or modified guaranteed annuity contracts. TALHI recommends that this informal rule be withdrawn, amended or modified to be consistent with current statutory provisions. TALHI also reiterates that the Department may not have authority to require provisions that are not included in statute or specifically authorized by statute. Finally, this provision points out that a 20 day free look should not be applicable to products such as credit life.
16. **§4.32. Waiver of Surrender Charges.** At the stakeholder meeting, it was discussed that this new provision may not be authorized by statute even though many insurers have waiver of premium or surrender charges. This rule seems to impose a mandatory requirement on all policies that may require legislative authorization.

17. **§4.33. Unilateral Amendments.** It is TALHI's understanding this new language was taken from standards developed by the Interstate Compact. The Compact itself has broad rulemaking authority on standards under Chapter 5001, Insurance Code. However, it appears the approach to the informal draft rules are to take some, but not all, of the standards to enact as part of the Texas Administrative Code. More careful study of this is encouraged for both the department and TALHI members.
18. **§4.34. Group Contracts Sold Individually and Nonforfeiture Values.** At the stakeholder meeting, it was stated that the provisions of this section are based on some long standing policy Department staff has used for review certain group life policy forms. This policy has never been articulated in either the administrative code or in the Texas Insurance Code. Thus, there may be questions on whether this would be directly contrary to Section 1131.101(b) because it attempts to impose requirements for individual life policies on group policies. This long-standing policy and the rule itself also may be contrary to current statutory provisions in Chapter 1105. The proposed informal draft rule requires a group policy to comply with the standard non-forfeiture law in chapter 1105. However, Section 1015.003(a)(2) exempts group insurance from this chapter. The department does not have the authority by rule to effectively repeal a statute. Similarly, the proposed rule also may require certain group annuities that are exempt from the non-forfeiture provisions in Chapter 1107 to be subject to the rule. See, Tex. Ins. Code §1107.002(2).
19. **Proposed Subchapter E. Life Generally.** TALHI had few specific comments at this time on this section but will supplement as additional comments are received. Overall, these sections appear to be based largely on existing rules. However, these rules are based on statutory provisions applicable to life rather than to group life and also do not appear to be relevant for credit life. TALHI urges the department to relook at the differences between the different statutes and required provisions for these products. There are several new provisions that appear to be based on the Interstate Compact that may require further review.
20. **§4.513. Required Report.** This rule would require annual reports for all types of life policies, including group. An annual report is currently mentioned in rules on life policies that have been illustrated. If a policy has not been illustrated, an annual report is not required. The rule should mention exceptions where an annual report is not required. Further, the policy provisions the proposed rule would require for reports appears to be overly broad and needs further review and consideration. The requirement for disclosure about a cash value not being sufficient is not required by any statute and a question should be raised on the statutory authority of the department to require this by rule.
21. **Subchapter C, Division 1. Market Value Adjustments.** It was stated at the stakeholder meeting that this proposed subchapter is based on existing review

checklists department staff has developed and also based on certain requirements that may appear in the Interstate Compact. None of these have been formally included in the Texas Administrative Code or Texas statutes. TALHI encourages use of formal rulemaking instead of checklists and will review this section carefully and submit additional comments.

22. **Subchapter C, Division 2.** Index-lined Crediting Provisions. See comments above.
23. **Subchapter J.** Life-Universal Life. See comments above. TALHI believes the disclosure requirements for non-guaranteed elements should be withdrawn. SB 3370 as amended in the Senate in 2017 addressed disclosures for non-guaranteed elements. TALHI has been working on possible legislation for 2019 and believes this is an issue best addressed by the legislature.
24. **Subchapter N.** Life Disclosures. TALHI questions the legislative authority to require disclosures that are not authorized by statute particularly for all life and group policies. This rule at least attempts to exclude certain life products. To the extent the rule requires disclosure of the NAIC Buyer's guide, please see comments on whether Section 36.004(c) would be applicable to requiring this. The rule would require the buyer's guide to be provided to all prospective purchasers before accepting a premium or deposit. The costs associated with this requirement have not been determined but could be significant. To the extent the rule requires disclosures to existing customers, this appears to effectively amend the requirements under the current illustration regulation in 28 TAC Ch. 21, Subchapter N and may in fact conflict with that regulation. The disclosure attempts to require disclosures based on cost of insurance changes which TALHI believes are best addressed through legislation that better defines terms including cost of insurance and other provisions. This has proven to be a very technical and complicated subject that these proposed rules do not adequately address. TALHI strongly recommends this proposed subchapter be withdrawn at this time.

TALHI has only had time to briefly review the changes in Documents C, D and E. Additional and supplemental comments on proposed changes will be submitted.

Please contact either Jennifer Cawley or myself if you have questions on these preliminary comments.

Sincerely,

/s/ Jay Thompson

Jay A. Thompson

Cc: Jennifer Cawley, Exec. Dir. TALHI