211 CMR 96.00: SUITABILITY IN ANNUITY TRANSACTIONS

Section

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96.01: Purpose

(1) 211 CMR 96.00 requires producers, as defined in 211 CMR 96.00, to act in the best interest of the consumer when making a recommendation of an annuity and requires insurers to establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.

(2) Nothing herein shall be construed to create or imply a private cause of action for a violation of 211 CMR 96.00 or to subject a producer to civil liability under the best interest standard of care outlined in 211 CMR 96.05 or under standards governing the conduct of a fiduciary or a fiduciary relationship.

96.02: Scope

211 CMR 96.00 shall apply to any sale or recommendation of an annuity made on or after June1, 2023.

96.03: Exemptions

Unless otherwise specifically included, 211 CMR 96.00 shall not apply to recommendations or transactions involving:

(1) Direct response solicitations where there is no recommendation based on information collected from the consumer pursuant to 211 CMR 96.00.

(2) Contracts used to fund:

(a) An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);

(b) A plan described by the Internal Revenue Code (IRC), as amended, §§ 401(a), 401(k), 403(b), 408(k) or 408(p), if established or maintained by an employer;

(c) A government or church plan defined in IRC § 414, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under IRC § 457;

(d) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor;

(3) Settlements of or assumptions of liabilities associated with personal injury litigation or any dispute or claim resolution process; or

(4) Formal prepaid funeral contracts.

96.04: Definitions

Annuity means an annuity that is an insurance product that is individually solicited, whether the product is classified as an individual or group annuity.

(Mass. Register #1484, 12/09/2022)

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Cash Compensation means any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.

Commissioner means the Commissioner of Insurance appointed pursuant to M.G.L. c. 26, § 6.

Consumer Profile Information means information that is reasonably appropriate to determine whether a recommendation addresses the consumer's financial situation, insurance needs and financial objectives, including, at a minimum, the following:

(a) Age;
(b) Annual income;
(c) Financial situation and needs, including debts and other obligations;
(d) Financial experience;
(e) Insurance needs;
(f) Financial objectives;
(g) Intended use of the annuity;
(h) Financial time horizon;
(i) Existing assets or financial products, including investment, annuity and insurance holdings;
(j) Liquidity needs;
(k) Liquid net worth;
(l) Risk tolerance, including but not limited to willingness to accept non-guaranteed elements in the annuity;
(m) Financial resources used to fund the annuity; and
(n) Tax status

Continuing Education Credit or CE Credit means a continuing education credit as required by M.G.L. c 175, §177E and 211 CMR 50.00: *Continuing Education for Insurance Producers*.

Continuing Education Provider or CE Provider means an individual or entity that is approved to offer continuing education courses pursuant to M.G.L. c 175, § 177E and 211 CMR 50.00: *Continuing Education for Insurance Producers*.

FINRA means the Financial Industry Regulatory Authority or a succeeding agency.

Insurer means a company required to be licensed under the laws of Massachusetts to provide insurance products, including annuities.

Intermediary means an entity contracted directly with an insurer or with another entity contracted with an insurer to facilitate the sale of the insurer's annuities by producers.

Material Conflict of Interest means a financial interest of the producer in the sale of an annuity that a reasonable person would expect to influence the impartiality of a recommendation. Material conflict of interest does not include cash compensation or non-cash compensation.

Non-cash Compensation means any form of compensation that is not cash compensation including, but not limited to, health insurance, office rent, office support and retirement benefits.

Non-guaranteed Elements means the premiums, credited interest rates (including any bonus), benefits, values, dividends, non-interest based credits, charges or elements of formulas used to determine any of these, that are subject to company discretion and are not guaranteed at issue. An element is considered non-guaranteed if any of the underlying non-guaranteed elements are used in its calculation.

Person means any individual, corporation, association, partnership, limited liability company, limited liability partnership or other legal entity.

Producer means a person or entity required to be licensed under the laws of Massachusetts to sell, solicit or negotiate insurance, including annuities. "Producer" includes an insurer where no producer is involved.

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Recommendation means advice provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice. Recommendation does not include general communication to the public, generalized customer services assistance or administrative support, general educational information and tools, prospectuses, or other product and sales materials.

Replacement means a transaction in which a new annuity is to be purchased, and it is known or should be known to the proposing producer, or to the proposing insurer whether or not a producer is involved, that by reason of the transaction, an existing annuity or other insurance policy has been or is to be any of the following:

(a) Lapsed, forfeited, surrendered, partially surrendered, assigned to the replacing insurer or otherwise terminated;

(b) Converted to reduced paid-up insurance, continued as extended term insurance, or otherwise reduced in value by the use of nonforfeiture benefits or other policy values;

(c) Amended so as to effect either a reduction in benefits or in the term for which coverage would otherwise remain in force or for which benefits would be paid;

(d) Reissued with any reduction in cash value; or

(e) Used in a financed purchase.

SEC means the United States Securities and Exchange Commission.

96.05: Duties of Producers and Insurers

(1) Best Interest Obligation. A producer, when making a recommendation of an annuity, shall act in the best interest of the consumer under the circumstances known at the time the recommendation is made, without placing the producer's or the insurer's financial interest ahead of the consumer's interest. A producer has acted in the best interest of the consumer if they have satisfied the following obligations regarding care, disclosure, conflict of interest and documentation:

(a) Care Obligation.

1. The producer, in making a recommendation shall exercise reasonable diligence, care and skill to:

a. Know the consumer's financial situation, insurance needs and financial objectives;

b. Understand the available recommendation options after making a reasonable inquiry into options available to the producer;

c. Have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives over the life of the product, as evaluated in light of the consumer profile information; and

d. Communicate the basis or bases of the recommendation.

2. The requirements set forth in 211 CMR 96.05(1)(a)1. include making reasonable efforts to obtain consumer profile information from the consumer prior to the recommendation of an annuity.

3. The requirements set forth in 211 CMR 96.05(1)(a)1. require a producer to consider the types of products the producer is authorized and licensed to recommend or sell that address the consumer's financial situation, insurance needs and financial objectives. This does not require analysis or consideration of any products outside the authority and license of the producer or other possible alternative products or strategies available in the market at the time of the recommendation. Producers shall be held to standards applicable to producers with similar authority and licensure.

4. The requirements set forth in 211 CMR 96.05(1) do not create a fiduciary obligation or relationship and only create a regulatory obligation as established by 211 CMR 96.00.

5. The consumer profile information, characteristics of the insurer, and product costs, rates, benefits and features are those factors generally relevant in making a determination whether an annuity effectively addresses the consumer's financial situation, insurance needs and financial objectives, but the level of importance of each factor under the care obligation set forth in 211 CMR 96.05(1)(a) may vary depending on the facts and circumstances of a particular case. However, each factor may not be considered in isolation.

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6. The requirements set forth in 211 CMR 96.05(1)(a) include having a reasonable basis to believe the consumer would benefit from certain features of an annuity, such as the annuitization, death or living benefit or other insurance-related features

7. The requirements set forth in 211 CMR 96.05(1)(a) apply to the particular annuity as a whole and the underlying subaccounts to which funds are allocated at the time of purchase or exchange of an annuity, and riders and similar product enhancements, if any.

8. The requirements set forth in 211 CMR 96.05(1)(a) do not mean the annuity with the lowest one-time or multiple occurrence compensation structure will necessarily be recommended.

9. The requirements set forth in 211 CMR 96.05(1)(a) do not mean the producer has ongoing monitoring obligations under the care obligation set forth in 211 CMR 96.05(1)(a)1., although such an obligation may be separately owed under the terms of a fiduciary, consulting, investment advising or financial planning agreement between the producer and the consumer.

10. In the case of an exchange or replacement of an annuity, the producer shall consider the whole transaction, which includes taking into consideration wheth

a. The consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits, such as death, living or other contractual benefits, or be subject to increased fees, investment advisory fees or charges for riders and similar product enhancements;

b. The replacement product would substantially benefit the consumer in comparison to the replaced product over the life of the product; and

c. The consumer has had another annuity exchange or replacement and, in particular, an exchange or replacement within the preceding 60 months.

11. Nothing in 211 CMR 96.00 should be construed to require a producer to obtain any license other than a producer license with the appropriate line of authority to sell, solicit or negotiate insurance in Massachusetts including, but not limited to, any securities license, in order to fulfill the duties and obligations set forth in 211 CMR 96.00; provided the producer does not give advice or provide services that are otherwise subject to securities laws or engages in any other activity requiring other professional licenses.

(b) Disclosure Obligation.

1. Prior to the recommendation of sale of an annuity, the producer shall prominently disclose to the consumer on a form designated by the Commissioner and posted on the Division's website at www.mass.gov/doi:

a. A description of the scope and terms of the relationship with the consumer and the role of the producer in the transaction;

b. An affirmative statement on whether the producer is licensed and authorized to sell the following products:

A. Fixed Annuities;
B. Fixed indexed annuities;
C. Variable annuities;
D. Life insurance;
E. Mutual funds;
F. Stocks and bonds; and
G. Certificates of deposit.

c. An affirmative statement describing the insurers the producer is authorized, contracted (or appointed), or otherwise able to sell insurance products for, using the following descriptions:

A. One insurer;
B. From two or more insurers; or
C. From two or more insurers although primarily contracted with one insurer.

d. A description of the sources and types of cash compensation and non-cash compensation to be received by the producer, including whether the producer is to be compensated for the sale of a recommended annuity by commission as part of premium or other remuneration received from the insurer, intermediary or other producer or by fee as a result of a contract for advice or consulting services; and

e. A notice of the consumer's right to request additional information regarding cash compensation described in 211 CMR 96.05(1)(b)2.

2. Upon request of the consumer or the consumer's designated representative, the producer shall disclose:

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i. A reasonable estimate of the amount of cash compensation to be received by the producer, which may be stated as a range of amounts or percentages; and

ii. Whether the cash compensation is a one-time or multiple occurrence amount, and if a multiple occurrence amount, the frequency and amount of the occurrence, which may be stated as a range of amounts or percentages; and

3. Prior to or at the time of the recommendation or sale of an annuity, the Producer shall have a reasonable basis to believe the consumer has been informed of various features of the annuity, such as the potential surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity, mortality and expense fees, investment advisory fees, any annual fees, potential charges for and features of riders or other options of the annuity, limitations on interest returns, potential changes in non-guaranteed elements of the annuity, insurance and investment components and market risk.

(c) Conflict of Interest Obligation. A producer shall identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts of interest related to an ownership interest.

(d) Documentation Obligation. A producer shall at the time of recommendation or sale:

1. Make a written record of any recommendation and the basis for the recommendation subject to 211 CMR 96.00;

2. Obtain a consumer signed statement on a form designated by the Commissioner and posted on the Division's website at www.mass.gov/doi documenting:

a. A customer's refusal to provide the consumer profile information, if any; and

b. A customer's understanding of the ramifications of not providing his or her consumer profile information or providing insufficient consumer profile information; and

3. Obtain a consumer signed statement on a form designated by the Commissioner and posted on the Division's website at www.mass.gov/doi acknowledging the annuity transaction is not recommended if a customer decides to enter into an annuity transaction that is not based on the producer's recommendation.

(e) Application of the Best Interest Obligation. Any requirement applicable to a producer under 211 CMR 96.05(1) shall apply to every producer who has exercised material control or influence in the making of a recommendation and has received direct compensation as a result of the recommendation or sale, regardless of whether the producer has had any direct contact with the consumer. Activities such as providing or delivering marketing or educational materials, product wholesaling or other back office product support, and general supervision of a producer do not, in and of themselves, constitute material control or influence.

(2) Transactions Not Based on a Recommendation.

(a) Except as provided under 211 CMR 96.05(2)(b), a producer shall have no obligation to a consumer under 211 CMR 96.05(1) related to any annuity transaction if:

1. No recommendation is made;

2. A recommendation was made and was later found to have been prepared based on materially inaccurate information provided by the consumer;

3. A consumer refuses to provide relevant consumer profile information and the annuity transaction is not recommended; or

4. A consumer decides to enter into an annuity transaction that is not based on a recommendation of the producer.

(b) An insurer's issuance of an annuity subject to 211 CMR 96.05(2)(a) shall be reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.

(3) Supervision System.

(a) Except as permitted under 211 CMR 96.05(2), an insurer may not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity would effectively address the particular consumer's financial situation, insurance needs and financial objectives based on the consumer's consumer profile information.

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(b) An insurer shall establish and maintain a supervision system that is designed to achieve compliance with 211 CMR 96.00 including, but not limited to, the following:

1. The insurer shall establish and maintain procedures to inform its producers of the requirements of 211 CMR 96.00 and shall incorporate the requirements of 211 CMR 96.00 into relevant producer training manuals;

2. The insurer shall establish and maintain standards for producer product training and shall establish and maintain procedures to require its producers to comply with the requirements of 211 CMR 96.06;

3. The insurer shall provide product-specific training and training materials which explain all material features of its annuity products to its producers;

4. The insurer shall establish and maintain procedures for the review of each recommendation prior to issuance of an annuity. The review procedures shall be designed to ensure there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer's financial situation, insurance needs and financial objectives. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including, but not limited to, physical review. Such review procedures may be designed to require additional review only of those transactions identified for additional review;

5. The insurer shall establish and maintain procedures to detect recommendations that are not in compliance with 211 CMR 96.05(1), (2), (4) and (5). In addition to investigating consumer complaints, these may include, but are not limited to, confirmation of the consumer's consumer profile information, systematic customer surveys, producer and consumer interviews, confirmation letters, producer statements or attestations and programs of internal monitoring. Insurers may comply with this requirement by applying sampling procedures, or by confirming the consumer profile information or other required information under 211 CMR 96.00 after issuance or delivery of the annuity;

6. The insurer shall establish and maintain procedures to assess, prior to or upon issuance or delivery of an annuity, whether a producer has provided to the consumer the information required to be provided under this section;

7. The insurer shall establish and maintain procedures to identify and address suspicious consumer refusals to provide consumer profile information;

8. The insurer shall establish and maintain procedures to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time. This is not intended to prohibit the receipt of health insurance, office rent, office support, retirement benefits or other employee benefits by employees as long as those benefits are not based upon the volume of sales of a specific annuity within a limited period of time; and

9. The insurer shall annually provide a written report to senior management, including to the senior manager responsible for audit functions, which details a review, with appropriate testing, designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any.

(c) 1. Insurers may contract for compliance with 211 CMR 96.05(3)(b). An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to 211 CMR 96.07, regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with 211 CMR 96.05(3)(c)(2).

2. An insurer's supervision system under 211 CMR 96.05(3)(b) shall include supervision of contractual performance. This includes, but is not limited to, the following:

a. Monitoring and, as appropriate, conducting audits to assure that the contracted function is properly performed; and

b. Annually obtaining a certification from a senior manager who has responsibility for the contracted function that the function is properly performed.

(d) An insurer is not required to include in its system of supervision:

1. A producer's recommendations to consumers of products other than the annuities offered by the insurer; or

2. Consideration of or comparison to options available to the producer or compensation relating to those options other than annuities or other products offered by the insurer.

96.05: continued

(4) Prohibited Practices. Neither a producer nor an insurer shall dissuade, or attempt to dissuade, a consumer from:

(a) Truthfully responding to an insurer's request for confirmation of the consumer profile information;

(b) Filing a complaint; or

(c) Cooperating with the investigation of a complaint.

(5) Safe Harbor.

(a) Recommendations and sales of annuities made in compliance with comparable standards shall satisfy the requirements of 211 CMR 96.00. 211 CMR 96.05(5) applies to all recommendations and sales of annuities made by financial professionals in compliance with business rules, controls and procedures that satisfy a comparable standard even if such standard would not otherwise apply to the product or recommendation at issue. However, nothing in this subsection shall limit the Commissioner's ability to investigate and enforce the provisions of this regulation.

(b) Nothing in 211 CMR 96.05(5)(a) shall limit the insurer's obligation to comply with 211 CMR 96.05(3)(a), although the insurer may base its analysis on information received from either the financial professional or the entity supervising the financial professional.

(c) For 211 CMR 96.05(5)(a) to apply, an insurer shall:

1. Monitor the relevant conduct of the financial professional seeking to rely on 211 CMR 96.05(5)(a) or the entity responsible for supervising the financial professional, such as the financial professional's broker-dealer or investment adviser registered under federal or Massachusetts securities law using information collected in the normal course of an insurer's business; and

2. Provide to the entity responsible for supervising the financial professional seeking to rely on 211 CMR 96.05(5)(a), such as the financial professional's broker-dealer or investment adviser registered under federal or Massachusetts securities law, information and reports that are reasonably appropriate to assist such entity to maintain its supervision system.

(d) For purposes of 211 CMR 96.05(5), "financial professional" means a producer that is regulated and acting as:

1. A broker-dealer registered under federal or Massachusetts securities laws or a registered representative of a broker-dealer;

2. An investment adviser registered under federal or Massachusetts securities laws or an investment adviser representative associated with the federal or Massachusetts registered investment adviser; or

3. A plan fiduciary under Section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA) or fiduciary under Section 4975(e)(3) of the Internal revenue Code (IRC) or any amendments or successor statutes thereto.

(e) For purposes of 211 CMR 96.05(5), "comparable standard" means;

1. With respect to broker-dealers and registered representatives of broker-dealers, applicable SEC and FINRA rules pertaining to best interest obligations and supervision of annuity recommendations and sales including, but not limited to, Regulation Best Interest and any amendments or successor regulations thereto;

2. With respect to investment advisers registered under federal or Massachusetts securities laws or investment adviser representatives, the fiduciary duties and all other requirements imposed on such investment advisers or investment adviser representatives by contract or under the Investment Advisers Act of 1940 or Massachusetts securities laws including, but not limited to, the Form ADV and interpretations; and

3. With respect to plan fiduciaries or fiduciaries, means the duties, obligations, prohibitions and all other requirements attendant to such status under ERISA or the IRC and any amendments or successor statutes thereto.

96.06: Producer Training

(1) A producer shall not solicit the sale of an annuity product unless the producer has adequate knowledge of the product to recommend the annuity and the producer is in compliance with the insurer's standards for product training. A producer may rely on insurer-provided product-specific training standards and materials to comply with 211 CMR 96.06.

96.06: continued

(2) (a) A producer who engages in the sale of annuity products shall complete a one-time training course for four CE credits, approved by the Commissioner and provided by a continuing education provider.
(b) Producers who obtain a new life insurance line of authority may not engage in the sale of annuities until the annuity training course required under 211 CMR 96.06 has been completed.

(3) The minimum length of the training required under 211 CMR 96.06(2) shall be sufficient to qualify for at least four CE credits but may be longer.

(4) The training required under 211 CMR 96.06(2) shall include information on the following topics:
(a) The types of annuities and various classifications of annuities;
(b) Identification of the parties to an annuity;
(c) How product specific annuity contract provisions affect consumers;
(d) The application of income taxation of qualified and non-qualified annuities;
(e) The primary uses of annuities; and
(f) Appropriate standards of conduct, sales practices, replacement and disclosure requirements.

(5) Training courses intended to comply with this subsection shall cover all topics listed in 211 CMR 96.06(4) and shall not present any marketing information or provide training on sales techniques or provide specific information about a particular insurer's products. Additional topics may be offered in conjunction with and in addition to the required topics.

(6) A provider of an annuity training course intended to comply with 211 CMR 96.06 shall register as a CE provider in this Commonwealth and comply with the rules and guidelines applicable to producer continuing education courses as set forth in M.G.L. c. 175, § 177E, and 211 CMR 50.00: *Continuing Education for Insurance Producers*.

(7) A producer who has completed an annuity training course approved by the Commissioner shall, by June 1, 2023 complete either:
(a) A new four-credit training course approved by the Commissioner; or
(b) An additional one time one credit course approved by the Commissioner and provided by a continuing education provider on appropriate sales practices, replacement and disclosure requirements under 211 CMR 96.00.

(8) Annuity training courses may be conducted and completed by classroom or self-study methods in accordance with M.G.L. c. 175, § 177E and 211 CMR 50.00: *Continuing Education for Insurance Producers*.

(9) Providers of annuity training shall comply with the reporting requirements and shall issue certificates of completion in accordance with M.G.L. c. 175, § 177E and 211 CMR 50.00: *Continuing Education for Insurance Producers*.

(10) The satisfaction of training requirements of another State that are substantially similar to the provisions of 211 CMR 96.06 shall be deemed to satisfy the training requirements of 211 CMR 96.06.

(11) The satisfaction of the components of the training requirements of any course or courses with components substantially similar to the provisions of 211 CMR 96.06 shall be deemed to satisfy the training requirements of 211 CMR 96.06.

(12) An insurer shall verify that a producer has completed the annuity training course required under 211 CMR 96.06 before allowing the producer to sell an annuity product for that insurer. An insurer may satisfy its responsibility under 211 CMR 96.06(12) by obtaining certificates of completion of the training course or obtaining reports provided by Commissioner-sponsored database systems or vendors or from a reasonably reliable commercial database vendor that has a reporting arrangement with approved continuing education providers.

96.07: Compliance Mitigation; Penalties

(1) In addition to any other penalties provided by the laws of Massachusetts, a producer or insurer that violates a requirement of 211 CMR 96.00 shall be deemed to be in violation of the provisions of M.G.L. c. 176D.

(2) If a violation occurs, the Commissioner may order:

(a) An insurer to take appropriate corrective action for any consumer harmed by a failure to comply with 211 CMR 96.00 by the insurer, an entity contracted to perform the insurer's supervisory duties or by the producer;

(b) A general agency, independent agency or the producer to take appropriate corrective action for any consumer harmed by the producer's violation of 211 CMR 96.00; and

(c) Any person that employs or contracts with a producer to sell, or solicit the sale, of annuities to consumers, to take appropriate corrective action for any consumer harmed by the producer's violation of 211 CMR 96.00.

(3) When determining the appropriate penalty under M.G.L. c. 176D for violations of 211 CMR 96.05(1), (2) or (3), the Commissioner may take into consideration whether corrective action was taken for the consumer promptly after such violation was discovered or the violation was not part of a pattern or practice.

(4) The authority to enforce compliance with this regulation is vested exclusively with the Commissioner.

96.08: Recordkeeping

(1) Producers and insurers shall maintain or be able to make available to the Commissioner records of the information collected from the consumer, disclosures made to the consumer, including summaries of oral disclosures, and other information used in making the recommendations that were the basis for insurance transactions for five years after the insurance transaction is completed by the insurer. An insurer is permitted, but shall not be required, to maintain documentation on behalf of a producer.

(2) Records required to be maintained by 211 CMR 96.00 may be maintained in paper, photographic, microprocess, magnetic, mechanical or electronic media or by any process that accurately reproduces the actual document.

96.09: Severability

If any provision of 211 CMR 96.00 is held to be invalid, in any way, by any court of law, the remainder of 211 CMR 96.00 shall not be affected.

REGULATORY AUTHORITY

211 CMR 96.00: M.G.L. c. 176D.