

Enrolled
Senate Bill 536

Sponsored by Senator SOLLMAN (Presession filed.)

CHAPTER

AN ACT

Relating to annuities; creating new provisions; amending ORS 731.156; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2023 Act is added to and made a part of ORS 743.255 to 743.273.

SECTION 2. (1) As used in this section:

(a)(A) “Annuity” means:

(i) An agreement to make periodic payments, whether fixed or variable, in an amount:

(I) That is individually solicited, whether the agreement is classified as an individual annuity or a group annuity; and

(II) In which the obligation to make all or some of the periodic payments, or the amount of any periodic payment, depends upon the continuance of human life; and

(ii) Any additional benefits that safeguard the agreement from lapse or that provide a special surrender value or special benefit or annuity if the annuitant becomes totally and permanently disabled.

(B) “Annuity” does not include:

(i) A charitable remainder annuity trust or a charitable remainder unitrust as defined in section 664(d) of the Internal Revenue Code; or

(ii) Payments made in accordance with settlement provisions of a life insurance policy.

(b) “Cash compensation” means a discount, concession, fee, service fee, commission, sales charge, loan, override or cash benefit that a producer receives from an insurer, from an intermediary or directly from a purchaser as compensation for the producer’s recommendation or sale of an annuity.

(c) “Comparable to the requirements of this section” means:

(A) For broker-dealers and registered representatives of broker-dealers, regulations that the United States Securities and Exchange Commission and the Financial Industry Regulatory Authority promulgate as best interest obligations and use to supervise annuity recommendations and sales, including but not limited to Regulation Best Interest, 17 C.F.R. 240.151-1, as in effect on the operative date specified in section 5 of this 2023 Act.

(B) For investment advisers registered under federal or state securities laws, and for investment adviser representatives, the fiduciary duties and all other requirements to which investment advisers and investment adviser representatives are subject under ORS chapter 59 and the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 to 80b-21, including but not limited to Form ADV, 17 C.F.R. parts 275 and 279, and related interpretations.

(C) For fiduciaries and plan fiduciaries, the duties, obligations, prohibitions and other requirements to which fiduciaries and plan fiduciaries are subject under the Internal Revenue Code and the Employee Retirement Income Security Act, 29 U.S.C. 1001 et seq., both as in effect on the operative date specified in section 5 of this 2023 Act.

(d) “Consumer profile information” means information that is reasonably appropriate to determine whether a recommendation or sale of an annuity addresses a consumer’s financial situation, insurance needs and financial objectives, including at a minimum:

- (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 for an annuity;
- (H) Financial time horizon;
- (I) Existing assets, including investment, annuity and other insurance holdings;
- (J) Liquidity needs;
- (K) Liquid net worth;
- (L) Risk tolerance, including but not limited to the consumer’s willingness to accept non-guaranteed elements in the annuity;
- (M) Financial resources for funding an annuity; and
- (N) Tax status.

(e) “Financial professional” means a producer that is regulated and is acting as:

(A) A broker-dealer that is registered under federal or state securities laws, or a registered representative of a broker-dealer;

(B) An investment adviser registered under federal or state securities laws or an investment adviser representative affiliated with the registered investment adviser; or

(C) A fiduciary, as described in 29 U.S.C. 1002(21) or as defined in 26 U.S.C. 4975(e)(3), both as in effect on the operative date specified in section 5 of this 2023 Act.

(f) “Intermediary” means a person that for compensation contracts directly with an insurer, or with another person that contracts with the insurer, for the purpose of facilitating a producer’s sale of the insurer’s annuities.

(g)(A) “Material conflict of interest” means a producer’s financial interest in the sale of an annuity that a reasonable person would expect to influence the impartiality of the producer’s recommendation of an annuity.

(B) “Material conflict of interest” does not include cash compensation or non-cash compensation.

(h) “Non-cash compensation” means a form of compensation that is not cash compensation, such as health insurance, office rent, office support or retirement benefits.

(i) “Non-guaranteed elements” means a provision in an annuity contract that an insurer may determine at the insurer’s discretion and that the insurer does not guarantee, such as:

(A) A premium, credited interest rate or bonus, benefit, value, dividend, credit that is not based on interest or other charge;

(B) A formula that an insurer uses to calculate an item described in subparagraph (A) of this paragraph; or

(C) Any provision in the annuity contract the calculation of which depends on another provision that is not guaranteed.

(j) “Producer” means a person that is licensed under ORS 744.052 to 744.089 or an insurer, if the insurer solicits, negotiates or sells an annuity without involving a producer.

(k)(A) “Recommendation” means a producer’s advice to a consumer that the producer intends as an inducement to sell, exchange or replace an annuity or that results in a sale, exchange or replacement of an annuity in accordance with the producer’s advice.

(B) “Recommendation” does not include a general communication to the public, generalized customer service, administrative support, general educational information and tools, prospectuses or other product material or sales material.

(L) “Replacement” means a purchase of a new annuity that an insurer or producer knows or should know will cause an existing annuity or other insurance policy to:

(A) Lapse, become forfeit, be surrendered or partially surrendered, become assigned or partially assigned to the replacing insurer or otherwise terminate;

(B) Convert to paid-up insurance, continue as extended term insurance or otherwise reduce in value using nonforfeiture benefits or other policy values;

(C) Reduce through amendment the annuity’s or other insurance policy’s benefits or the term during which coverage remains effective or in which an insurer pays benefits;

(D) Be reissued with a reduction in cash value; or

(E) Be used in a financed purchase.

(2)(a) Except as provided in paragraph (b) of this subsection, this section applies to any sale or recommendation of an annuity.

(b) This section does not apply to a transaction that involves:

(A) A direct-response solicitation, if a producer does not make a recommendation based on consumer profile information; or

(B) A contract that funds:

(i) An employee pension or welfare benefit plan that is covered under the Employee Retirement and Income Security Act, 29 U.S.C. 1001 et seq., as in effect on the operative date specified in section 5 of this 2023 Act;

(ii) A plan that an employer establishes or maintains in accordance with sections 401(a), 401(k), 403(b) or 408(k) or (p) of the Internal Revenue Code;

(iii) A governmental plan or church plan, as defined in section 414(d) and (e) of the Internal Revenue Code;

(iv) A deferred compensation plan that a state or local government or tax exempt organization establishes or maintains in accordance with section 457 of the Internal Revenue Code;

(v) A nonqualified deferred compensation arrangement that an employer or sponsor establishes or maintains;

(vi) A settlement or assumption of liability associated with personal injury litigation or a dispute or claim resolution process; or

(vii) A formal prepaid funeral contract.

(3)(a) A producer, in making a recommendation of an annuity, shall act in the consumer’s best interest, under the circumstances the producer knows at the time the producer makes the recommendation, without placing the producer’s or insurer’s financial interests ahead of the consumer’s interests.

(b) A producer satisfies the producer’s best interest obligations if the producer satisfies the care obligation set forth in subsection (4) of this section, the disclosure obligation set forth in subsection (5) of this section, the conflict of interest obligation set forth in subsection (6) of this section and the documentation obligation set forth in subsection (7) of this section.

(4)(a) A producer satisfies the care obligation if the producer, in making a recommendation, exercises reasonable skill, diligence and care to:

(A) Know the consumer’s financial situation, insurance needs and financial objectives;

(B) Understand the options the producer may recommend to the consumer after making a reasonable inquiry into available options;

(C) Have a reasonable basis for believing that:

(i) The producer’s recommended option effectively addresses the consumer’s financial situation, insurance needs and financial objectives when considered in light of consumer profile information; and

(ii) The consumer will benefit from certain features of the annuity, such as annuitization, death or living benefits or other insurance-related features; and

(D) Communicate to the consumer the basis for the producer's recommendation.

(b) A producer, in satisfying the care obligation, shall:

(A) Make reasonable efforts to obtain consumer profile information before making a recommendation;

(B) Consider products that the producer may sell in accordance with the producer's license if the products address the consumer's financial situation, insurance needs and financial objectives, except that the consideration does not require the producer to analyze or consider products that are outside the scope of the producer's license, to analyze or consider other products or strategies that are available in the insurance market at the time the producer makes the recommendation, or to meet any other obligation that a producer with a similar license does not have to meet;

(C) Make a recommendation to address a consumer's financial situation, insurance needs and financial objectives on the basis of consumer profile information, the characteristics of the insurer and product costs, rates, benefits and features, and vary the importance of consumer profile information, the characteristics of the insurer and product costs, rates, benefits and features to account for the facts and circumstances of a particular case, except that the producer may not consider in isolation any factor set forth in this subparagraph; and

(D) Consider the whole transaction if the transaction will exchange or replace an existing annuity, which requires that the producer consider whether:

(i) The consumer will incur a surrender charge, be required to begin a new surrender period, lose existing death, living or other contractual benefits or incur increased fees, investment advisory fees or charges for riders or similar product enhancements;

(ii) The replacement product will substantially benefit the consumer over the life of the replacement product, in comparison to the existing annuity; and

(iii) The prospective producer had a previous annuity exchange or replacement, particularly within the preceding 60 months.

(c) The care obligation set forth in paragraph (a) of this subsection:

(A) Applies to a particular annuity as a whole, to the underlying subaccounts to which funds are allocated at the time the annuity is purchased or exchanged and to any riders or similar product enhancements; and

(B) Does not:

(i) Create a fiduciary obligation for the producer or a fiduciary relationship between the producer and a consumer;

(ii) Require a producer to necessarily recommend an annuity with the lowest one-time or multiple occurrence compensation structure;

(iii) Require a producer to obtain any license other than a producer license with appropriate authority to solicit, negotiate or sell insurance in this state and does not require the producer to have or obtain a license to sell securities in this state if the producer does not give advice or provide services that are subject to federal or state securities laws or does not engage in any other activity that requires another professional license; or

(iv) Require of a producer an ongoing obligation to monitor compliance with the requirements set forth in paragraph (a) of this subsection, unless a separate fiduciary, consulting, investment advising or financial planning agreement with the consumer provides otherwise.

(5)(a) Before making a recommendation of or selling an annuity to a consumer, a producer shall prominently disclose on a separate form and in a manner substantially similar to the manner the Director of the Department of Consumer and Business Services specifies by rule:

(A) The producer's role in the transaction and the producer's relationship with the consumer;

(B) Whether the producer has a license and authority to sell fixed annuities, fixed indexed annuities, variable annuities, life insurance, mutual funds, stocks, bonds or certificates of deposit;

(C) Whether the producer may recommend or sell insurance products under contract or otherwise from one insurer, from two or more insurers or from two or more insurers while remaining under a primary contract with one insurer;

(D) The sources and types of the cash compensation and non-cash compensation the producer will receive for making a recommendation of or selling an annuity, including whether the compensation is a commission that is part of a premium or other remuneration the producer receives from the insurer, an intermediary or another producer or whether the compensation is a fee that results from a contract for advice or consulting services;

(E) The consumer's right to request additional information about the cash compensation the producer disclosed under subparagraph (D) of this paragraph; and

(F) A reasonable estimate, at the request of the consumer or a designated representative of the consumer, of the cash compensation that the producer will receive from recommending or selling the annuity, whether the producer will receive the cash compensation once or on more than one occasion and, if the compensation occurs on more than one occasion, the amount of each payment, all of which the producer may disclose as a range or a percentage.

(b) Before making a recommendation or completing a sale of an annuity to a customer, a producer must have a reasonable basis for believing that the consumer was informed of the annuity's features, such as the potential tax penalties that could result from the consumer's sale, exchange, surrender or annuitization of the annuity, the potential surrender period and surrender charges, any annual fees, mortality and expense fees, investment advisory fees, features of and potential charges for riders or other options, limitations on interest returns, potential charges for non-guaranteed elements of the annuity, the annuity's insurance and investment components and market risk.

(6) A producer shall identify and avoid, or reasonably manage and disclose, any material conflict of interest, including a material conflict of interest that is related to an ownership interest.

(7) A producer, at the time the producer recommends or sells an annuity to a consumer, shall:

(a) Record in writing the substance of and basis for the producer's recommendation; and

(b) Obtain from the consumer in the following circumstances a signed statement on separate forms and in a manner substantially similar to the forms and manner the director prescribes by rule:

(A) If a consumer refuses to provide consumer profile information, the consumer's statement must acknowledge that the consumer refused to provide consumer profile information and that the consumer understands the ramifications of not providing consumer profile information or providing incomplete consumer profile information.

(B) If a consumer enters into an annuity transaction that is not based on a producer's recommendation, the consumer's statement must acknowledge that the annuity transaction is not recommended.

(8) The best interest obligation set forth in subsection (3) of this section applies to any producer who exercises material control or influence over a recommendation or sale of an annuity and who receives direct compensation as a result of the recommendation or sale, even if the producer did not have direct contact with the consumer. Providing or delivering marketing or educational materials, product wholesaling or back office support for, or general supervision of, a producer does not, alone, constitute material control or influence.

(9)(a) Except as provided in paragraph (b) of this subsection, a producer does not have an obligation under subsection (3) of this section to a consumer if:

(A) The producer does not make a recommendation of an annuity;

(B) The producer made a recommendation based on materially inaccurate information from the consumer;

(C) The consumer refused to provide consumer profile information and the producer did not recommend the annuity that was the subject of the consumer's transaction; or

(D) The consumer enters into a transaction for an annuity that the producer did not recommend.

(b) An insurer's issuance of an annuity must be reasonable under all of the circumstances of which the insurer has actual knowledge at the time the insurer issues the annuity.

(10)(a) Except as provided in subsection (9) of this section, an insurer may not issue an annuity on the basis of a recommendation to a consumer unless, after considering the consumer profile information, the insurer has a reasonable basis for believing that the annuity would effectively address the consumer's financial situation, insurance needs and financial objectives.

(b) An insurer shall establish and maintain a supervision system that is reasonably designed to ensure that the insurer and the insurer's producers comply with this section. The system, at a minimum, must:

(A) Have reasonable procedures for educating producers about the requirements of this section and incorporate the education into relevant training materials for producers;

(B) Have standards for training producers on the insurer's products that require the producers to comply with the requirements of subsection (13) of this section;

(C) Provide product-specific training and training materials that explain all material features of the insurer's annuity products to producers;

(D) Establish procedures for reviewing each of a producer's recommendations before the insurer issues an annuity to ensure that a reasonable basis exists for determining that the annuity would effectively address each consumer's financial situation, insurance needs and financial objectives, which review may consist of screening recommendations, electronically or otherwise, identifying recommendations that require further review and reviewing only the recommendations that meet the criteria for additional review;

(E) Have a method for detecting recommendations that do not comply with the provisions of this section, which may include confirming consumer profile information, conducting systematic customer surveys and interviews, issuing confirmation letters to purchasers, taking statements or attestations from producers and otherwise conducting internal monitoring, and may consist of taking appropriate samples or confirming consumer profile information after issuing and delivering an annuity;

(F) Assess before or at the time the insurer issues or delivers an annuity whether a producer has provided the information the producer must provide to a consumer under this section;

(G) Have reasonable procedures for identifying and addressing suspicious refusals to provide consumer profile information;

(H) Have reasonable procedures for identifying and eliminating any sales contests, sales quotas, bonuses and non-cash compensation that are based on sales of specific annuities within a limited period of time, except that the procedures need not prohibit non-cash compensation that consists of health insurance, office rent, office support, retirement benefits or other employee benefits if the benefits are not based on the sales volume of a specific annuity within a limited period of time; and

(I) Require annual written reports to the insurer's senior management, including the senior manager with responsibility for auditing functions, that details the insurer's process of reviewing and testing the effectiveness of the system and taking or recommending corrective action to address flaws.

(c) An insurer may contract with another person to perform a function required under this subsection, but the insurer remains responsible for taking appropriate corrective action

and is liable under subsection (17) of this section for any sanctions and penalties for failing to comply with the requirements of this section even if the insurer contracted with another person to meet the requirement and even if the insurer complies with the requirements of paragraph (d) of this subsection.

(d) If an insurer contracts with another person under this subsection, the insurer must supervise the contractor's performance by:

(A) Monitoring the performance and conducting audits if appropriate; and

(B) Obtaining each year from a senior manager with responsibility for the function the contractor performs a certification that the manager has a reasonable basis for believing and does believe that the function is being performed properly.

(e) An insurer need not include in a system described in paragraph (b) of this subsection:

(A) A producer's recommendation to consumers of a product that the insurer does not offer; or

(B) A consideration of or comparison to options available to a producer other than annuities the insurer offers or a consideration of or comparison to compensation available to the producer through options other than annuities the insurer offers.

(11) An insurer or a producer may not dissuade or attempt to dissuade a person from truthfully responding to an insurer's request to confirm consumer profile information, from filing a complaint or from cooperating with an investigation of a complaint.

(12)(a) An insurer or financial professional that makes a recommendation of or sells an annuity in compliance with standards, business rules, controls and procedures that are comparable to the requirements of this section complies with the requirements of this section if the insurer exercises the supervision described in paragraph (b) of this subsection, even if the standard, business rule, control or procedure does not apply directly to the recommendation or the annuity.

(b) For supervision of a financial professional under standards, business rules, controls and procedures that are comparable to the requirements of this section to qualify as complying with the requirements of this section, the insurer shall:

(A) Use information the insurer collects in the normal course of the insurer's business to monitor the financial professional's relevant conduct or to monitor any person that is responsible for supervising the financial professional's conduct, such as the financial professional's broker-dealer or an investment adviser registered under federal or state securities laws; and

(B) Provide to a person that is responsible for supervising the financial professional's conduct as described in subparagraph (A) of this paragraph reports and information that are reasonably appropriate for assisting the person to properly supervise the financial professional.

(c) This subsection does not affect an insurer's obligation to comply with subsection (10)(a) of this section, except that the insurer may base an analysis of whether an annuity would effectively address a consumer's financial situation, insurance needs and financial objectives on information the insurer receives from a financial professional or a person that supervises the conduct of the financial professional.

(d) This subsection does not affect the director's powers to investigate and enforce the provisions of this section.

(13)(a) A producer may not solicit the sale of an annuity unless the producer has knowledge that is adequate to make a recommendation of the annuity and has complied with the insurer's standards for product training. A producer may rely for compliance with this subsection on product-specific training standards and materials the insurer provides.

(b) A producer that makes a recommendation of or sells an annuity shall complete, at a minimum, a four-hour training course with a continuing education provider that has registered with the Department of Consumer and Business Services.

(c) A producer with authority to transact life insurance in this state who intends to make recommendations of or sell annuities shall complete the course described in paragraph (b) of this section within 180 days following the operative date specified in section 5 of this 2023 Act. A producer that obtains authority to transact life insurance in this state after the operative date specified in section 5 of this 2023 Act may not make a recommendation of or sell an annuity until after completing the course.

(d) A producer that has completed a course described in paragraph (b) of this subsection before the operative date specified in section 5 of this 2023 Act shall within 180 days after the operative date specified in section 5 of this 2023 Act complete either:

(A) A new training course that complies with rules the director adopts under this section; or

(B) A supplemental one-hour training course on appropriate standards of conduct, sales practices, disclosure requirements and what to be aware of when replacing an existing annuity.

(e) A producer may complete a training course described in paragraph (b) of this subsection in a classroom or by self-study in accordance with rules the director adopts under this section.

(f) A producer that completes in another state a training course or components of a training course that is substantially similar to the requirements specified in this subsection complies with the applicable requirements of this subsection.

(14)(a) A training course described in subsection (13)(b) of this section must be of sufficient length to qualify for four continuing education credits, but may be longer, and must cover:

(A) Types and classifications of annuities;

(B) How to identify parties to an annuity;

(C) How contract provisions for specific annuities affect purchasers;

(D) Income taxation of qualified and nonqualified annuities;

(E) Primary uses for annuities; and

(F) Appropriate standards of conduct, sales practices, disclosure requirements and what to be aware of when replacing an existing annuity.

(b) A person that provides a training course described in subsection (13)(b) of this section:

(A) Shall register with the department as a continuing education provider and comply with rules the director adopts for continuing education providers;

(B) Shall cover in a training course the person intends as compliant with the requirements of this subsection all of the topics described in paragraph (a) of this subsection;

(C) May cover in a training course topics in addition to the topics described in paragraph (a) of this subsection;

(D) Shall comply with reporting requirements and issue certificates of completion in accordance with rules the director adopts under this section; and

(E) May not present during a training course described in paragraph (a) of this subsection marketing information or training that concerns sales techniques or that is specific to a particular insurer's products.

(15) An insurer shall verify that a producer has completed a training course described in subsection (13)(b) of this section before permitting the producer to make a recommendation of or sell the insurer's annuities. For the verification, the insurer shall obtain from the producer a certificate of completion for the course or consult other reliable sources that document the producer's completion of the course.

(16) An insurer and any producer, contractor, general agent or independent agent affiliated with the insurer shall maintain, for not less than three years after the date of any recommendation or sale of an annuity, and shall make available to the director upon demand, records of all information collected from and disclosures, including oral disclosures, made

to a consumer or purchaser, and any other information that was used in or formed the basis for a recommendation of an annuity. An insurer may, but is not required to, maintain records on a producer's behalf. An insurer may maintain a record under this subsection on paper, as a photograph or in any electronic media that accurately reproduces the content of the record and can be easily retrieved and perceived.

(17)(a) The director may initiate an enforcement proceeding or action against an insurer for the insurer's failure to comply with or violation of this section or for a failure or violation committed by a producer or contractor affiliated with the insurer. The director may:

(A) Require the insurer, the producer, the contractor or a general or independent agency affiliated with the insurer to take reasonably appropriate corrective action to remedy harm to a person injured by the failure or violation; and

(B) Impose a civil penalty or other sanction.

(b) The director may reduce or waive a civil penalty the director imposes under this subsection if the director determines that the insurer took corrective action promptly and that the insurer's failure to comply or violation was not part of a pattern or practice.

(c) The director may adopt rules to carry out the provisions of this section.

(18) This section does not create or imply a private cause of action for a violation of the provisions of this section or subject a producer to civil liability under the best interest obligation described in subsection (4) of this section or under standards that govern the conduct of a fiduciary or of a fiduciary relationship.

SECTION 3. ORS 731.156 is amended to read:

731.156. "Variable life insurance" and "variable annuity" mean *[those]* forms of life insurance or annuity benefits, respectively, *[which]* **that** vary according to the investment experience of a separate account or accounts maintained by the insurer with respect to policies providing such benefits~~]~~ **or are securities under the Securities Act of 1933, 15 U.S.C. 77a et seq., as in effect on the operative date specified in section 5 of this 2023 Act, that vary according to the performance of a benchmark index, rate or fund if the principal or minimum rate of interest is not guaranteed and might be subject to a market value adjustment.** For convenience, reference to "variable life insurance" in the Insurance Code includes variable life insurance and variable annuities as defined in this section, except if the inclusion of variable annuities obviously is inapplicable or if the context requires, or the Insurance Code provides, otherwise.

SECTION 4. Section 2 of this 2023 Act and the amendments to ORS 731.156 by section 3 of this 2023 Act apply to annuities that an insurer or producer recommends, sells or issues on or after the operative date specified in section 5 of this 2023 Act.

SECTION 5. (1) Section 2 of this 2023 Act and the amendments to ORS 731.156 by section 3 of this 2023 Act become operative on January 1, 2024.

(2) The Director of the Department of Consumer and Business Services may adopt rules and take any other action before the operative date specified in subsection (1) of this section that is necessary to enable the director, on and after the operative date specified in subsection (1) of this section, to undertake and exercise all of the duties, functions and powers conferred on the director by section 2 of this 2023 Act and the amendments to ORS 731.156 by section 3 of this 2023 Act.

SECTION 6. This 2023 Act takes effect on the 91st day after the date on which the 2023 regular session of the Eighty-second Legislative Assembly adjourns sine die.

Passed by Senate April 11, 2023

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Lori L. Brocker, Secretary of Senate

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Rob Wagner, President of Senate

Passed by House May 22, 2023

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Dan Rayfield, Speaker of House

Received by Governor:

.....M,....., 2023

Approved:

.....M,....., 2023

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Tina Kotek, Governor

Filed in Office of Secretary of State:

.....M,....., 2023

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Secretary of State