NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES
PROPOSED
FIRST AMENDMENT TO 11 NYCRR 224 (INSURANCE REGULATION 187)

SUITABILITY IN LIFE INSURANCE AND ANNUITY TRANSACTIONS

I, Maria T. Vullo, Superintendent of Financial Services, pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law and Sections 301, 308, 309, 2103, 2104, 2110, 2123, 2208, 3209, 4224, 4226, 4525, and Article 24 of the Insurance Law, do hereby promulgate the following First Amendment to Part 224 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 187), to take effect [90 days] twenty-four months after publication in the State Register, to read as follows:

(New Matter Underscored; Matter In Brackets Deleted)

The title of Part 224 is amended to read: SUITABILITY IN LIFE INSURANCE AND ANNUITY TRANSACTIONS

§ 224.0 Purpose.

(a) The purpose of this Part is to require insurers to set forth] Insurance Law article 24 permits the superintendent to regulate trade practices in the business of insurance to prevent acts or practices that are unfair or deceptive. The Insurance Law, including sections 2103, 2104, 2110, 2123 and 2208, establishes standards of conduct for insurance producers, including that producers must act in a competent and trustworthy manner. The Insurance Law, including section 4226, also establishes standards of conduct for insurers, including fraternal benefit societies.

(b) This Part clarifies the duties and obligations of insurers, including fraternal benefit societies, by requiring them to establish standards and procedures for recommendations to retail consumers with respect to [annuity contracts] policies, or certificates issued thereunder, delivered or issued for delivery in this state so that any transaction with respect to those policies [is in the best interest of the consumer and] appropriately addresses the insurance needs and financial objectives of [consumers] the retail consumer at the time of the recommendation [transaction are appropriately addressed. These standards and procedures are substantially similar to the National Association of Insurance Commissioners’ Suitability in Annuity Transactions Model Regulation (“NAIC Model”) for annuities, and the Financial Industry Regulatory Authority’s current National Association of Securities Dealers (“NASD”) Rule 2310 for securities. To date, more than 30 states have implemented the NAIC MODEL, while NASD Rule 2310 has applied nationwide for nearly 20 years. Accordingly, this Part intends to bring these national standards for annuity contract sales to New York]. This Part also clarifies the nature and extent of supervisory controls that an insurer must maintain to achieve compliance with this Part.

(c) The requirement under this Part that a transaction should be suitable, as defined herein, is intended to be substantially similar to the national standard for suitability established by the Financial Industry Regulatory Authority’s current Rule 2111 (Suitability) and current Rule 2330 (Members’ Responsibilities Deferred Variable Annuities), as applicable. In addition, the requirement under this Part to act in the best interest of the retail consumer is not intended to create a different standard of care for any recommendation to which 29 CFR 2510.3-21 and related prohibited transactions exemptions applies.
(c) (d) This Part further clarifies the duties and obligations of producers when making recommendations to retail consumers with respect to policies, or certificates issued thereunder, delivered or issued for delivery in this state to help ensure that a transaction is in the best interest of the retail consumer and appropriately addresses the insurance needs and financial objectives of the retail consumer at the time of the transaction.

§224.1 Applicability.

This Part shall apply to any transaction where a producer receives compensation as the result of a recommendation, or an insurer makes a recommendation, to purchase or replace an annuity contract made to a retail consumer by an insurance producer or an insurer, where no insurance producer is involved, that results in the purchase or replacement recommended with respect to a proposed policy.

This Part shall only apply to policies, or certificates issued thereunder, delivered or issued for delivery in this state.

§ 224.2 Exemptions.

Unless otherwise specifically included, this Part shall not apply to transactions where no recommendation is made, or to transactions involving:

(a) a direct response or group insurance solicitation, including, for example, a general solicitation inviting retail consumers to inquire or apply for a policy, where there is no recommendation made; or

(b) a [contract] policy that is a part of or is used to fund and/or assume the benefit obligations of:

(1) an employee pension or welfare benefit plan that is covered by the Employee Retirement Income Security Act (ERISA) (or the liabilities thereunder);

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

(3) a government or church plan defined in Internal Revenue Code section 414, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under Internal Revenue Code section 457;

(4) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor; or

(5) any account or annuity described in Internal Revenue Code section 4975(e)(1)(B) through (F); or

(6) a settlement or assumption of liabilities associated with personal injury litigation or any dispute or claim resolution process;

(c) a policy issued to a group policy holder who, either on its own or through an intermediary, has negotiated and agreed to the terms of the policy on behalf of certificate holders;

(d) any corporate or bank owned individual life insurance policy or group life insurance certificate authorized by Insurance Law section 3205(a)(1)(B) or (d);

(e) any variable policy that (1) is exempt from registration under the U.S. Securities Act of 1933, (2) includes one or more separate accounts that are exempt from registration as an investment company under the U.S. Investment Company Act of 1940, and (3) is only available to an accredited investor, as defined in 17 CFR
section 230.501(a) or to a qualified purchaser, as defined in 15 USC section 80-a2(a)(51):

(f) voluntary life insurance policies issued in conformance with the retail consumer’s stipulated, fixed premium payment amount when sold in either the employer worksite or financial institution marketplace;

(g) term life insurance policies:

(h) any life insurance policy with a face amount of $35,000 or less; or

(i) credit life insurance up to the amount of the underlying debt.

(j) a recommendation that relates only to a rider or feature of a policy that accelerates benefits for long term care or provides another long term care benefit;

§ 224.3 Definitions.

For purposes of this Part:

(a) **Retail consumer** means a natural person or trust, or the legal representative of such natural person or trust who owns [the owner] or is the prospective purchaser of [an annuity contract] a policy, and (1) is the recipient of a recommendation under this Part, and (2) would be acting on such recommendation primarily for personal, family or household purposes.

(b) **Insurer** means a life insurance company as defined in Insurance Law section 107(a)(28)[,] or a fraternal benefit society as defined in Insurance Law section 4501(a).

(c) **Insurance producer or producer** means an insurance agent or insurance broker.

(d) **Policy** means a life insurance policy, annuity contract or a certificate issued by a fraternal benefit society or under a group life insurance policy or group annuity contract.

(e) **Recommendation** means [advice provided by an insurance] one or more statements or acts by a producer, or by an insurer where no [insurance] producer is involved, which is individually tailored to the retail consumer and which, based on its content, context and presentation, would reasonably be interpreted by a retail consumer to be advice which results in the purchase or replacement of a policy for which the producer receives compensation [ ... to a consumer that (1) reasonably may be interpreted by a consumer to be advice that results in [a purchase or replacement of an annuity contract] a consumer entering into or refraining from entering into a transaction in accordance with that advice; or].

(1) Recommendation does not include general communications to the public, such as advertisements, marketing materials, general education information and tools regarding insurance or other financial products and general customer service assistance or administrative support.

(2) Recommendation also does not include:
(A) communications that a reasonable person would not view as an investment recommendation;
(B) information and materials on financial, investment and retirement matters that do not address specific investment and/or insurance products; and
(C) discretionary actions taken by a producer under prior, express authorization of the retail consumer.

(3) An objective presentation of the features of a policy, which is neither based on nor directed toward addressing a retail consumer’s particular financial circumstances, is not a recommendation.

[is intended by the producer, or an insurer where no producer is involved, to result in a consumer entering into or refraining from entering into a transaction.]
([d]) (f) Replace or Replacement means a transaction subject to Part 51 of this Title (Insurance Regulation 60) and involving [an annuity contract] a policy.

(g) Suitability information means the relevant information that is reasonably appropriate to determine the suitability of a recommendation, which may include, depending on the type of policy and circumstances presented, all or some of [including] the following:

1. For life insurance policies that do not include a savings component (such as term life insurance):
   1. Age;
   2. Annual income;
   3. Insurance protection and [5] financial objectives, including the desired duration of the policy; and
   4. Intended use of the [annuity] policy, including any riders attached thereto;

2. For non-variable life insurance policies that include a savings component (such as whole life, universal life and indexed universal life):
   1. The information contained in paragraph (1) of this subdivision for policies that do not include a savings component;
   2. Financial situation and needs, including the financial resources used for the funding of the annuity policy; and
   3. Tolerance of potential changes in non-guaranteed elements in the policy, including variability in premium, cash or account value, death benefit or fees.

3. For variable life insurance policies and any annuity contracts:
   1. The information contained in paragraphs (1) and (2) of this subdivision for life insurance policies that do not include a savings component, and non-variable life insurance policies that include a savings component;
   2. Financial experience;
   3. Financial time horizon, including the duration of existing liabilities and obligations;
   4. Existing assets, including investment and life insurance holdings;
   5. Liquidity needs;
   6. Liquid net worth;
   7. Risk tolerance; and
   8. Tax status.

(h) Suitable means in furtherance of a retail consumer's needs and objectives under the circumstances then prevailing, based upon the life insurance or annuity suitability information provided by the retail consumer at the time of the recommendation, as applicable, and [all available products, services, and transactions] taking into account only the types of policies that the producer is authorized by the insurer to sell and, in the case of an insurer, only the types of policies sold by such insurer.

(i) Transaction means any purchase, or replacement, [modification or election of a contractual provision] with respect to a proposed [or-in-force] policy.

§ 224.4 Duties of insurers and [insurance] producers.

(a) In recommending a transaction to a retail consumer [the purchase or replacement of an annuity contract],
the [insurance] producer, or the insurer where no [insurance] producer is involved, [shall have reasonable
grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed
by the consumer as to the consumer’s investments and other insurance policies or contracts and as to the
consumer’s financial situation and needs, including the consumer’s suitability information, and that] shall act in
the best interest of the retail consumer. Acting in the best interest of the retail consumer does not mean that a
recommendation should always be made for the least expensive policy, or the policy with the highest guaranteed
interest rate.

(b) The producer, or insurer where no producer is involved, acts in the best interest of the retail consumer
when:

(1) the producer’s or insurer’s recommendations to the retail consumer related to a transaction are based
on an evaluation of the relevant life insurance or annuity suitability information of the retail consumer that reflects
the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such
matters would use under the circumstances where the interests of the retail consumer are placed above the
interests of the person making the recommendation [without regard to the financial interests of the producer,
insurer, or any other party].

(2) the transaction is suitable; and

(3) there is a reasonable basis to believe [all of the following]:

[(1)] (i) the retail consumer has been reasonably informed of various features of the [annuity contract]
policy and potential consequences of the transaction, whether favorable or unfavorable, such as the potential
surrender period and surrender charge, any secondary guarantee period, equity-index features, availability of
cash value, potential tax implications if the retail consumer sells, modifies, surrenders, lapses or annuitizes the
[annuity contract] policy, death benefit, mortality and expense fees, cost of insurance charges, investment
advisory fees, policy exclusions or restrictions, potential charges for and features of riders, limitations on interest
returns, guaranteed interest rates, insurance and investment components, [and] market risk, and the manner in
which the producer is compensated for the sale and servicing of the policy in accordance with Part 30 of this
Title (Insurance Regulation 194) and Insurance Law section 2119:

[(2)] (ii) the retail consumer would benefit from certain features of the [annuity contact] policy, such as
tax-deferred growth, annuitization, availability of cash value or death or living benefit;

[(3)] (iii) the particular [annuity contract] policy as a whole, the underlying subaccounts to which funds
are allocated at the time of [purchase or replacement of the annuity contract] the transaction, and riders and
similar product enhancements, if any, being recommended are suitable [(and in the case of a replacement, the
transaction as a whole is suitable)] for the particular retail consumer based on the retail consumer’s relevant life
insurance or annuity suitability information, taking into account the non-guaranteed elements in the policy,
including variability in premium, cash value, death benefit or fees; and

[(4)] (iv) in the case of a replacement of [an annuity contract] a policy, the replacement is suitable
including taking into consideration whether:

[(i)] (a) the retail consumer will incur a surrender charge, increased premium or fees, decreased
coverage duration, decreased death benefit or income amount, adverse change in health rating, be subject to the
commencement of a new surrender period, lose existing benefits (such as death, living or other contractual
benefits), be subject to tax implications if the retail consumer surrenders or borrows from the [annuity contract]
policy, or be subject to increased fees, investment advisory fees, premium loads or charges for riders and similar
product enhancements;

[(ii)] (b) the retail consumer would benefit from [annuity contract] policy enhancements and improvements, such as a decreased premium or fees, increased coverage duration, increased death benefit or income amount, additional guarantees or additional investment options, improved policy performance, or better alignment with the retail consumer’s goals and ability to fund the policy; and

[(iii)] (c) the retail consumer has had another [annuity] policy replacement, in particular, a replacement within the preceding 36 months.

[(b)] (c) Prior to the recommendation of a [purchase or replacement of an annuity contract] transaction, [an insurance] a producer, or an insurer where no [insurance] producer is involved, shall make reasonable efforts to obtain the retail consumer’s relevant suitability information related to either the life insurance or annuity transaction, as provided in paragraph (d) of this section.

[(c) Except as provided under subdivision (d) of this section] (d) In addition to the requirements of subdivisions (a) and (b) of this section applicable to insurers where no producer is involved, and except as provided under subdivision (e) of this section, an insurer shall not issue [an annuity contract] or modify a policy recommended to a retail consumer unless there is a reasonable basis to believe that the [annuity contract] policy is suitable based on the retail consumer’s relevant life insurance or annuity suitability information. Nothing in this provision requires the insurer to consider or have knowledge of other insurers’ policies that the producer could have recommended.

[(d)] (e)(1) Except as provided under paragraph (2) of this subdivision, neither [an insurance] a producer[,] nor an insurer[,] shall have any obligation to a retail consumer under subdivision (a), (b) or [(c)] (d) of this section related to any [annuity] transaction if:

(i) no recommendation is made;

(ii) a recommendation was made and was later found to have been prepared based on materially inaccurate material information provided by [the] a retail consumer;

(iii) a retail consumer refuses to provide relevant suitability information and the [annuity purchase or replacement] transaction is not recommended; or

(iv) a retail consumer decides to enter into a transaction that is not based on a recommendation of the insurer or the producer.

(v) a retail consumer decides to enter into [an annuity purchase or replacement] a transaction that is not based on a recommendation of the insurer or the [insurance] producer.

(2) [An insurer’s issuance of an annuity contract] An insurer shall not enter into a transaction subject to paragraph (1) of this subdivision [shall be reasonable] unless the transaction is [suitable] reasonable [under all the circumstances] based on all the information actually known to the insurer at the time [the annuity contract is issued] of the transaction.

[(e) An insurance] (f) A producer, or an insurer[,] where no [insurance] producer is involved, shall at the time of [purchase or replacement] a recommendation, in a manner commensurate with the nature of the interaction with the retail consumer, the size and scale of the recommended transaction, and the risks involved:
(1) provide reasonable disclosure to the retail consumer all the relevant suitability considerations and product information, whether favorable or unfavorable, that provides the basis for any the recommendation[s], which disclosure may be satisfied through the provision of a prospectus in the case of a policy registered with the Securities Exchange Commission;

[(1)] (2) create reasonable documentation of any recommendation subject to subdivisions (a) and (b) of this section;

[(2)] (3) create reasonable documentation of the retail consumer’s refusal to provide suitability information, if any; and

[(3)] (4) create reasonable documentation that an annuity purchase or replacement a transaction is not recommended if a retail consumer decides to enter into an annuity purchase or replacement a transaction that is not based on the insurance producer’s or insurer’s recommendation.

(g) A producer shall not make a recommendation to a retail consumer to enter into a transaction unless the producer has a reasonable basis to believe that the retail consumer has the financial ability to meet the financial commitment under the policy.

[(f)] (h) For recommendations that are not exempt under section 224.2 of this Part, an insurer shall establish a supervision system that is reasonably designed to achieve the insurer’s and insurance producers’ compliance with this Part.

(1) An insurer may contract with a third party to establish and maintain a system of supervision with respect to insurance producers or, with respect to producers who are not employees of the insurer, may implement other supervisory procedures so as to provide the insurer with reasonable assurance that the producer has complied with the requirements of this Part.

(2) An insurer shall be responsible for ensuring that every insurance producer recommending any transaction with respect to the insurer’s annuity contracts policies is adequately trained to make the recommendation.

(3) An insurer’s obligation to establish a supervision system is subject to the following limitations:

(A) An insurer is not required to vet every recommendation prior to issuance of the policy, and instead may apply underwriting criteria or a system to identify selected transactions for additional review, and may perform additional review only of those recommendations identified by reasonable selection criteria.

(B) An insurer is not required to consider or have knowledge of other insurer’s policies that a producer could have recommended to a retail consumer nor include in its supervision system a producer’s recommendations of products or transactions other than products or transactions offered by the insurer that the producer is authorized to recommend.

[(h)] (i) [No insurance] A producer shall not make a recommendation to a retail consumer to purchase an annuity contract enter into a transaction about which the insurance producer has inadequate knowledge.

[(i)] (j) [An insurance] Neither a producer nor an insurer shall not dissuade, or attempt to dissuade, a retail consumer from:

(1) truthfully responding to an insurer’s request for confirmation of suitability information;
(2) filing a complaint with the superintendent; or

(3) cooperating with the investigation of a complaint.

(k) A producer shall not state or imply to the retail consumer that a recommendation to enter into a transaction is part of a fee-based financial plan, an investment management program or other investment advisory service unless the producer is authorized to provide such services under applicable law. A producer shall also be governed by the provisions of Part 225 of this Title (Regulation 199). [financial planning, financial advice, investment management or related services unless the producer has a specific certification or professional designation in that area.]

(l) [Any requirement applicable to a producer pursuant to this Part shall apply to every producer in the transaction, regardless of whether the producer has had any direct contact with the consumer] Regardless of whether the producer has had any direct contact with the retail consumer, a producer who provides a recommendation to another producer about a proposed transaction, and would be directly compensated as the result of the transaction, shall not engage in conduct that would be violative of this Part.

(m) Nothing in this Part shall be construed to prohibit the payment to a producer of any type or amount of cash or non-cash compensation otherwise permitted under the Insurance Law, including but not limited to health and welfare benefits.

(n) The fact that a producer, only or primarily, offers or recommends proprietary products or a limited range of products shall not be considered inconsistent with the provisions of this Part. Furthermore, nothing herein shall impose an obligation on an insurer or producer to consider or recommend products of other insurers. A producer who only or primarily offers or recommends proprietary or a limited range of products shall disclose such fact to the retail consumer.

(o) Nothing herein shall impose on an insurer or producer any continuing obligations to the retail consumer under this Regulation after a recommended transaction is completed.

(p) The best interest standard described in this section is independent of, and should not be construed to result in, fiduciary status as defined under the Employee Retirement Income Security Act of 1974 (ERISA), the Investment Advisers Act of 1940, or common law, nor should it cause a person to be required to register as an investment adviser under federal or state law.

§ 224.5 Insurer responsibility.

(a) The insurer shall take appropriate corrective action for any retail consumer harmed by a violation of this Part by the insurer, the [insurance] producer, or any third party that the insurer contracts with pursuant to subdivision [(f)] (h) of section 224.4 of this Part. In determining any penalty or other disciplinary action against the insurer, the superintendent may consider as mitigation any appropriate corrective action taken by the insurer, or whether the violation was part of a pattern or practice on the part of the insurer.

(b) An insurer shall establish and maintain procedures reasonably designed to detect and prevent financial exploitation and abuse. For purposes of this subdivision, “financial exploitation and abuse” means improper use of an adult’s funds, property or resources by another individual, including fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets. Notwithstanding the foregoing, no insurer shall be obligated to take any action that would be inconsistent with applicable securities and/or privacy laws and regulations, to the extent applicable to any transaction.

(c)(1) An insurer shall provide:

(i) to a consumer, all relevant policy information with respect to evaluating any transaction or proposed transaction, including a comparison, in a form acceptable to the superintendent, of all available policies of the same product type offered by the insurer; and

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(ii) to a producer, in the case of a proposed replacement, all relevant policy information with respect to any transaction that is necessary for the evaluation of suitability by the producer or the replacing insurer.

(2) The insurer An insurer whose policy is being replaced shall provide to the producer or replacing insurer the information required in accordance with Part 51 of this Title (Insurance Regulation 60), including the relevant policy information that is necessary for the evaluation of suitability by the producer or the replacing insurer relating to a transaction involving a replacement [regardless of whether there exists any specific section for the inclusion of the information within the disclosure statement set forth in Appendices 10A and 10B of Part 51].

(d) Notwithstanding any other provision of this Part, a producer, or insurer where no producer is involved, acts in the best interest of the retail consumer when, with respect to the proposed transaction, it presents a complete, fair and objective summary of a policy's features, which is neither based on nor directed toward addressing any retail consumer's particular individual financial circumstances and is free from material misrepresentation.

§ 224.6 Recordkeeping.

All records required or maintained under this Part, whether by [an insurance] a producer, an insurer, or other person shall be maintained in accordance with Part 243 of this Title (Insurance Regulation 152).

§ 224.7 Violations: Mitigation

[A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state and shall be deemed to be a trade practice constituting a determined violation, as defined in Insurance Law section 2402(c) [of the Insurance Law], except where such act or practice shall be a defined violation, as defined in Insurance Law section 2402(b) [of the Insurance Law], and in either such case shall be a violation of Insurance Law section 2403 [of the Insurance Law].]

(a) An insurer is responsible for compliance with its obligations under this Part when a recommendation results in the purchase of its policies. If a violation occurs, either because of the action or inaction of the insurer in meeting its obligations under Section 224.4(h), or the action or inaction of an insurance producer in meeting the producer’s obligations under this Part, the Superintendent may order:

(1) an insurer to take reasonably appropriate corrective action for any retail consumer harmed by the insurer’s violation of its obligations under this regulation;

(2) an insurance producer to take reasonably appropriate corrective action for any retail consumer harmed by the insurance producer's violation of this regulation; and

(3) appropriate penalties and sanctions.

(b) A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state and shall be deemed to be a trade practice constituting a determined violation, as defined in Insurance Law section 2402(c), except where such act or practice shall be a defined violation, as defined in Insurance Law section 2402(b), and in either such case shall be a violation of Insurance Law section 2403.