Regulation 187
New York’s Best Interest Standard
History of Reg. 187 (11 NYCRR Part 224)

- Originally adopted in 2012? as a suitability standard for annuities only.
- NYS DFS proposed amendments on December 27, 2017. NAIFA-NYS submitted comments to DFS on February 26, 2018.
- NYS DFS published revisions to the amendments on May, 2018. NAIFA-NYS submitted additional comments to the revisions on June 15, 2018.
- NYS DFS published and adopted the final version of Reg. 187 on August 1, 2018.
Scope of the regulation

- Governs all life insurance and Annuity product sales in New York EXCEPT:
  - Generalized offer by insurer by mail, at the worksite or other method, without producer involvement.
  - Policies used to fund an ERISA plan.
  - IRS qualified employer plans [i.e. 401(a), 401(K), 430(B), 408(K), 408(P)]
  - Government or church plan defined in IRC Sec. 414, 457.
  - Nonqualified deferred comp. arrangement by employer
  - Settlement or assumption of liabilities associated with personal injury litigation.
  - Terminating employee pension plans
  - Corporate or bank-owned policies or Credit life insurance sold on a group basis.
  - Life settlement contracts
Purpose

- To clarify the duties and obligations of producers when making recommendations to consumers with respect to policies delivered or issued for delivery in this state.

- To help ensure that a transaction is in the best interest of the consumer.

- To appropriately address the insurance needs and financial objectives of the consumer at the time of the transaction (suitability).

(11 NYCRR Section 224.0[c])
Applicability

The regulation’s provisions apply to:

“ANY TRANSACTION OR RECOMMENDATION WITH RESPECT TO A PROPOSED OR IN-FORCE POLICY”

11 NYCRR 224.1
What is a “Transaction”

• Consists of both a “sales transaction” or an “in-force transaction”

  • A “sales transaction” means “the purchase or issuance of a policy…any replacement…conversion, or any modification or election of a contractual provision with respect to an in-force policy that generates new sales compensation.” (224.3[j])

  • “In-force transaction’ means any modification or election of a contractual provision with respect to an in-force policy that does not generate new sales compensation.” (224.3[j])

  • IMPORTANT: “New sales compensation does not include compensation provided to a producer when, after the initial premium or deposit under a policy, the consumer pays further premiums or deposits pursuant to the policy.” (224.3[j])
Recommendation

• Recommendation “means one or more statements or acts by a producer, or by an insurer where no producer is involved, to a consumer that:

  • Reasonably may be interpreted by a consumer to be advice and that results in a consumer entering into or refraining from entering into a transaction in accordance with that advice; or

  • 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.”

(224.3[e])
Recommendation does NOT include:

- General factual information to consumers
  - Such as: advertisements, marketing materials, general educational information regarding insurance or other financial products and general administrative services to the consumer.

- “Use of an interactive tool that solely provides a prospective consumer with the means to estimate insurance, future income, or other financial needs or compare different types of products or refer the consumer to a producer, provided that the interactive tool is not used by a producer... to satisfy any requirement imposed by this part.”
Best Interest of the Consumer

- “In recommending a sales transaction to a consumer, the producer… shall act in the best interest of the consumer.”
  
  (224.4[a])
“Acting in the best interest of the Consumer”

- This term consists of three basic parts: (224.4 [b, 1,2,3])

1. The producer’s recommendation to the consumer is based on an evaluation of the relevant suitability information of the consumer and 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 then prevailing. Only the interests of the consumer shall be considered in the recommendation.

**NOTE:** The producer’s receipt of compensation or other incentives permitted by the insurance law and the insurance regulations is permitted by this requirement provided that the amount of compensation or the receipt of an incentive does not influence the recommendation.
“Acting in the best interest of the Consumer”

2. The sales transaction is suitable; and (suitability factors defined in 224.3g)
“Acting in the best interest of the Consumer”

3. There is a reasonable basis to believe

(i) the consumer has been reasonably informed of the various features of the policy and potential consequences of the sales transaction, both favorable and 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 consumer sells, modifies, surrenders, lapses or annuitizes the policy, death benefit, mortality and expense fees, cost of insurance charges, investment advisory fees, policy exclusions or restrictions, potential charges for features of riders, limitations on interest returns, guaranteed interest rates, insurance investment components, market risk, any differences in features among fee-based and commission-based versions of the policy, 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;
“Acting in the best interest of the Consumer”

(ii) the consumer would benefit from certain features of the policy, such as tax deferred growth of any cash values, annuitization, or death or living benefit;

(iii) the particular policy, as a whole, the underlying subaccounts to which funds are allocated at the time of the sales transaction, and riders and similar product enhancements, if any, are suitable for the particular consumer based on the consumer’s suitability information; and

(iv) in the case of a replacement of a policy, the replacement is suitable...
When “best interest” doesn’t apply

A producer has no obligation to a consumer under the best interest standard when:

- No recommendation is made;
- A recommendation was made and was later found to be based on materially inaccurate material information provided by the consumer;
- A consumer refuses to provide relevant suitability information and the transaction is not recommended; or
- A consumer decides to enter into a sales transaction that is not based on a recommendation of the producer. (224.4[e])
Other producer requirements:

- At the time of a recommendation a producer shall:
  - Disclose to the consumer “in a reasonable summary format” all relevant suitability considerations and product information, both favorable and unfavorable, that provide the basis for any recommendation;
  - Document the basis for the recommendation and the facts an analysis to support that recommendation;
  - Document, if relevant, the consumer’s refusal to provide suitability information;
  - Document that a sales transaction is not recommended if a consumer decides to enter into a sales transaction that is not based on the insurance producer’s recommendation.
  - A producer shall not make a recommendation about which that producer has inadequate knowledge. (224.4[f])
Producer prohibitions

• A producer shall not dissuade nor attempt to dissuade a consumer from:

  • Truthfully responding to an insurer’s request for confirmation of suitability information;
  • Filing a complaint with the Superintendent;
  • Cooperating with the investigation of a complaint (224.4[h])
Producer prohibitions: Titles

- A producer shall not use a title or designation of ‘financial planner,’ ‘financial advisor’ or similar title unless the producer is properly licensed or certified and actually provides security or other non-insurance financial services. Although a producer may state or imply that a sales recommendation is component of a financial plan, a producer shall not state or imply to the consumer that a recommendation to enter into a sales transaction is comprehensive financial planning, comprehensive financial advice, investment management or related services unless the producer has a specific certification or professional designation in that area. (224.4[j])
Producers Involved in the Recommendation

- The requirements under this regulation are applicable to a producer who:
  - Materially participated in the making of the recommendation and;
  - Received compensation as a result of the sales transaction, REGARDLESS of whether the producer has had any direct contact with the consumer.
  
- EXCEPT: Product wholesaling or product support based on generic client information, OR product support based on generic client information, OR the provision of education or marketing material DOES NOT CONSTITUTE PARTICPATING IN THE MAKING OF A RECOMMENDATION. (224.4[k])
Producer Compensation

- The regulation will not be construed to prohibit the payment of any type of compensation, whether cash or non-cash, including pension and welfare benefits, and any other form of compensation otherwise permitted under the Insurance Law. (224.4[l])
Producers with captive or affiliation agreements

- These producers may limit the range of policies recommended from the insurer when that producer prominently discloses, in writing, prior to the recommendation, *in a form acceptable to the superintendent*;

  - The nature of the agreement and circumstances under which the producer will limit the recommendations
  - For example, “without limitation”
Producers with captive or affiliation agreements

Examples of circumstances include where a producer primarily recommends policies of a particular insurer and secondarily recommends polices from one or more other insurers when:

- The primary insurer does not offer a policy that meets the consumer’s needs or objectives,
- The type of policy in consumer’s best interest is not available from the primary insurer,
- Primary insurer’s underwriting criteria is not favorable to the consumer,
- Offer made by the primary insurer is not acceptable to the consumer. (224.4[m])
Producers with captive or affiliation agreements

- **WARNING:**

- The disclosure pursuant to this section is insufficient if it merely states that the producer may limit recommendations without specific disclosure without specific disclosure of the extent to which recommendations are, in fact, limited. (224.4[m])
A Producers Duty on In-force Transactions

A Producer:

- Must act in the best interest of the consumer when recommending the in-force transaction.
- Must not allow compensation to influence the recommendation.
- Must inform the consumer of favorable and unfavorable consequences.
- Must not use an unauthorized title or designation.
- Or any compensated producers participating must follow these rules.
- Must have adequate knowledge about the transaction.
Ensure that the best interest standard has been implemented. (224.4[a] and [b])

Ensure that the sales transaction is suitable.

Implement an audit system to achieve compliance with 224.4 (a-k) using “risk-based” approach.

Must develop standards and procedures for:
- the collection of consumer suitability information for sales transactions,
- the documentation and disclosure of the basis for any recommendation,
- the review of complaints received by the insurer regarding recommendations,
- the auditing and review of recommendations to monitor compliance w/224.4 (a),(b)
In the event of a sales transaction resulting from the exercise of a contractual right in a policy the insurer may comply by relying on a written certification of compliance with 224.4 (b)(1)(i & ii) provided by the producer.

Insurer may maintain variations in compensation or other incentives that comply with the Insurance Law as long as they taken as a whole are not designed to avoid best interest recommendations by producers.

Difference in compensation and incentives based solely on amount of premium paid among polices does not violate the regulation. (224.6[b][2] and [d])
Insurer Responsibility and Supervision

- Insurers:
  - are responsible for ensuring that every producer recommending any transaction with respect to the insurer’s policies is adequately trained.
  - must establish and maintain procedures designed to prevent financial exploitation and abuse of an adult’s funds, property or resources.
  - shall, when a producer is authorized to offer fee-based or commission-based compensation versions of a produce, provide to the consumer, on a form acceptable to the Superintendent, showing the differences between the products, including differences in compensation structure. (224.6[e-f,h])
  - must ensure all rules governing replacements have been followed.
Miscellaneous

- All records required to be kept under this regulation must be kept in accordance with 11 NYCRR Part 243, Regulation 152.
- Violations of this part shall be an unfair method of competition or an unfair or deceptive act and practice and shall be deemed a trade practice constituting a determined violation under Insurance Law Section 2402.
- The regulation is effective for annuity transactions on August 1, 2019 and for life insurance policies six months thereafter.
Questions?