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February 26, 2018

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Submitted Electronically–james.regalbuto@dfs.ny.gov

Re: Comments on the Proposed Amendment to 11 NYCRR 224 (Insurance Regulation 187) Establishing a New "Best Interest" Standard for Life Insurance and Annuity Transactions

Superintendent Regalbuto:

The U.S. Chamber of Commerce ("the Chamber")[1] appreciates the opportunity to comment on the proposed First Amendment to 11 NYCRR 224 (Insurance Regulation 187) that would establish a new "best interest" standard for life insurance and annuity transactions in New York ("the Proposal"). This comment period is vital to ensure that the New York Department of Financial Services ("DFS") has fully considered the Proposal's impact on what is currently a well-functioning marketplace. Our members, their employees and their families are the consumers that DFS seeks to protect, and we share the goal of ensuring that their life insurance and annuity needs are met by agents and insurance carriers who act on their behalf

We are very concerned that DFS is proposing to implement an entirely new legal standard of care for all life insurance and annuity transactions that would harm consumer protection, deprive consumers of choice and create confusion in the marketplace. The Chamber is also troubled that DFS is considering a proposal that is

[1] The Chamber is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions.

closely copied from the controversial U.S. Department of Labor ("DOL") fiduciary regulation (the "DOL Rule"). The DOL Rule is in the process of being reviewed and revised because of the harm it has caused retirement investors. Furthermore, the Fifth Circuit Court of Appeals can issue a decision at any time in the litigation[2] challenging the DOL Rule. This lawsuit questions if the DOL had the power to issue the rule. Finally, we are concerned that the Proposal would set up a regulatory conflict between multiple agencies with overlapping jurisdictions—in addition to DOL, the Securities and Exchange Commission ("SEC") will soon propose new standards of conduct that will be applicable to many annuity recommendations in New York. Such conflicts would create a hodgepodge system of rules that will create consumer confusion and damage oversight. These standards should be closely coordinated if they are to help, rather than harm, consumers.

Our experience with the DOL Rule and the harm it has caused our members, combined with our concern that DFS has not properly considered the ramifications of this change, compel us to offer the following comments.

A Rushed Regulatory Process Harms Consumers—DFS Should Conduct a Thorough Analysis and Coordinate with SEC, DOL and NAIC

Accompanying the Proposal, DFS provided a Regulatory Impact Statement ("RIS") that offers two rationales for the sweeping changes proposed.

First, noting that the DOL Rule now applies to some annuity transactions in New York but not others, DFS "finds no acceptable justification for applying different standards of conduct based solely on the source of funds."[3] The proposed solution to solve this lack of uniformity is to amend the state standard of care by adopting the DOL Rule best interest language "because of the urgency to achieve uniformity of a best interest standard of care for all transactions in New York State."[4]

Second, recognizing that New York just adopted a revised suitability standard for annuity recommendations less than five years ago, DFS states that "Since 2013 [when the last standard was adopted], the purchase of annuities and life insurance has

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[2] Chamber of Commerce of the United States of America v. Acosta, Case No. 17-10238 (5th Cir.)

[3] Regulatory Impact Statement for the Proposed First Amendment to 11 NYCRR 224 (Insurance Regulation 187); December 27, 2017; Section 3, page 3.

[4] RIS, Section 8, page 6.

become a more complex financial transaction, resulting in a greater need for consumers to rely on professional advice, to seek assistance in understanding available life insurance and related products, and in making purchase decisions."[5]

Unfortunately, neither of these rationales are correct or accurate, and neither justifies the Proposal.

1) The Proposal Would Actually Prevent Uniformity

Acting quickly will not cause uniformity, it will prevent it. Acting quickly to lock in the current DOL Rule standard ultimately will make it harder to achieve uniformity. As discussed above, the SEC is developing updated standards for registered investment advisors and broker dealers. These standards will apply to the sale of annuities that are securities, such as variable annuities. The SEC proposal is under active consideration, and could be published by the end of the year. Acting quickly, before coordinating with the SEC (or even seeing the SEC proposal), would ensure a lack of uniformity.

Even as the SEC develops its new standard, DOL is currently reviewing the DOL Rule and will likely issue a revised proposal in the fall. As DOL recently wrote, "The [review] will help identify any potential alternative exemptions or conditions that could reduce costs and increase benefits to all affected parties…The Department also anticipates that it will propose in the near future a new streamlined class exemption."[6] In other words, the DOL Rule standard that DFS is copying in order to "achieve uniformity" is a moving target, and is likely to change. Acting quickly, before coordinating with DOL, would make uniformity much less likely.

We also note that the National Association of Insurance Commissioners ("NAIC") is considering amendments to its Model Rule for annuity recommendations. The Model Rule would not apply to life insurance, resulting in a material difference between New York and most other states (assuming the Model Rule amendments are finalized and adopted by states). The comment period closed in January, and the NAIC likely will make a decision on how to proceed in the next several months. While this would not create a direct conflict in the standard applicable in New York, it could result in New York having a very different standard than is the national norm.

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[5] Ibid, Section 3, page 3.

[6] Final Regulation Extending the Transition Period, 82 Fed. Reg. 56,548, November 29, 2017.

Given the fact that two federal regulators are in the process of developing new standards that will apply to some New York annuity transactions, adopting the Proposal cannot achieve uniformity—adopting it in the near future would only guarantee that as many as three different standards apply in New York to the same transaction.

We urge DFS to closely coordinate with both DOL and the SEC and refrain from finalizing the Proposal until all three regulators have discussed what a final rule should provide. There is no urgency, and DFS should not pretend that there is under the guise of achieving uniformity.

2) No Evidence Supporting "More Complex" Annuity and Life Insurance Marketplace Since 2013

Despite the assertion in the RIS, there is no evidence provided to justify any claim that the annuity or life insurance marketplace has grown more complex since 2013. If there were such evidence, DFS should be able to provide it—after all, DFS should approve every insurance policy form offered for sale in New York, and closely monitor and regulate the insurance and annuity marketplace. We respectfully submit that there has been no change, much less a material change justifying an entirely new regulatory regime for annuity and life insurance transactions.

In order to comply with its responsibilities as a regulator, DFS should provide a detailed analysis identifying the faults in the current marketplace and how the Proposal would fix them. Without such an analysis, DFS has not offered a credible Regulatory Impact Study, and runs a very serious risk of unintentionally creating significant new problems for consumers by replacing the existing, well-functioning consumer protection system with a new one based on a DOL Rule that has already harmed consumers nationally, and that DOL itself is attempting to revise as a result.

To assist in the development of this analysis, we have attached a report the Chamber provided to DOL detailing the loss of investor access to advice and to investment products, including annuities, resulting from the DOL Rule.

Life Insurance Recommendations Should Not Be Governed by a Standard Developed for Retirement Investment Advice

We are also concerned that DFS is proposing to apply a standard of care developed specifically for investment advice to retirement investors to all life insurance transactions. Life insurance is a broad category of quite different types of insurance products that serve a fundamentally different purpose than investment advice for retirement savings. Even though some kinds of life insurance may have an investment component, the suitability factors required by the Proposal would be largely inapplicable to these transactions.

To ensure compliance with the Proposal, producers or carriers would have to conduct a full-blown financial "needs analysis" including all 13 factors in Sec. 224.3(g) to document their "best interest" recommendation, even though many of these factors have nothing to do with recommending, for example, a death benefit-only insurance policy. This would significantly increase the cost and complexity of purchasing life insurance for consumers, while offering no additional benefit.

DOL's "Without Regard" Language Should be Removed

One of the many problems with the DOL Rule is that it equates the method of compensation with the quality of the recommendation. For example, most traditional forms of insurance compensation are prohibited under the DOL Rule, but then permitted only if additional conditions are met. While the Proposal partially addresses this problem in Sec. 224.4(n) by stating that compensation otherwise permitted under New York insurance law is not prohibited, the Proposal still retains DOL Rule language undermining this intent. Sec. 224.4(b)(1) states that the recommendation must be made "without regard to the financial or other interests" of the producer.

This language opens the door to allege that a producer who could make different compensation amounts depending on the recommendation is violating the best interest standard even though the different compensation is not prohibited, *per se*. This tension between compensation methodologies and best interest should not exist because DFS closely regulates permissible compensation already. Including the "without regard" language just casts doubt on traditional forms of insurance product compensation and increases liability risks for producers and carriers within improving consumer protection.

We urge DFS to remove the "without regard" language if it adopts a final rule.

Proposal Creates Risk due to Ambiguities about Credentialing

Even as the Proposal requires producers to consider 13 specific suitability factors in Sec. 224.3(g), new language in Sec. 224(l) exposes these producers to unnecessary risk for doing so. Sec. 224(l) reads that that a producer "shall not state or imply" that the recommendation for a life insurance or annuity "is part of financial planning, financial advice, investment management or related services unless the producer has a specific certification or professional designation in that area."

However, the 13 factors that must be taken into account inherently require producers to consider issues that are directly related to financial planning or advice. These include the consumer's financial situation and needs, financial experience, financial objectives, and liquidity needs. By not defining what a "special certification or professional designation in that area" means, the regulation puts insurance license-only producers at risk for providing the required recommendation or answering questions from their clients.

We urge DFS to remove this provision entirely as it is unnecessary. DFS has long regulated the scope of activity permissible under a state insurance license, and this approach serves only to make it harder to serve the needs of consumers.

Implementation Would Take at Least 18-24 Months

It would take at least 18-24 months to implement a change of this magnitude, not the 90 days provided for in the Proposal. Insurance companies often issue more than 100,000 policies a year, which means any suitability process would require automation that will take significant time to develop. Moreover, developing a standardized "needs analysis" will be time consuming, given the lack of existing industry guidance for a suitability standard for life insurance products. Carriers and producers must also develop and undergo training on the new requirements, internal policies and procedures must be developed to ensure documentation of compliance efforts, and client-facing materials would have to be amended.

Our experience related to the DOL Rule shows that these efforts cannot be done in any less than 18-24 months. The confusion, dislocation and cost of rushing implementation will be borne by the consumers.

Conclusion

Further, the DFS has not met its burden of demonstrating why the Proposal is necessary, or preferable to other alternatives. We urge DFS to coordinate with DOL, SEC, and the NAIC, and not to move forward unilaterally. The Chamber is concerned that the DFS proposal in its current form would create confusion for consumers and the marketplace. This may adversely impact consumer choice and affordability.

We appreciate the opportunity to comment, and ask for you sincere consideration of our concerns. We would be happy to discuss any questions or concerns you may have.

Sincerely,

Tom Quaadman