



NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

January 31, 2019

VIA E-MAIL

Commissioner Doug Ommen
Chair, Life Insurance and Annuities (A) Committee
c/o Jolie H. Matthews
Senior Health and Life Policy Counsel
National Association of Insurance Commissioners
444 North Capitol Street, NW
Hall of the States, Suite 700
Washington, DC 20001-1509

RE: Draft Proposed Revisions to the Suitability in Annuity Transactions Model Regulation (#275)

Dear Chairman Ommen:

The New York State Department of Financial Services (the “Department” or “New York”) appreciates the opportunity to comment on the November 28, 2018 draft amendments to the *Suitability in Annuity Transactions Model Regulation* (the “Draft Model Regulation”). The Department oversees nearly 170 life insurance companies doing business in New York with assets exceeding \$3 trillion. In 2017, those insurers wrote approximately \$30 billion of annuity and life insurance premium in New York, making New York the second largest insurance market in the United States for such products.

Standard of Care:

New York strongly believes that state insurance regulators, who exclusively regulate the majority of annuity sales, should be leading the national discussion on the standard of care for annuity transactions. While cooperation and coordination with our federal counterparts with whom we share concurrent jurisdiction on the remainder of sales is essential, the National Association of Insurance Commissioners (“NAIC”) should be advocating for a strong, consumer-focused standard of care that requires producers and insurers to only recommend transactions that are in the best interest of consumers and where financial compensation or other incentives do not in any way influence the advice consumers receive. New York proposes that the Draft Model Regulation should clearly define what it means to act in the best interest of the consumer, as New York’s Insurance Regulation 187 does, as follows:

In recommending a sales transaction to a consumer, the producer, or the insurer where no producer is involved, shall act in the best interest of the consumer.

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

(1) the producer's or insurer'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 making the recommendation. 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 the compensation or the receipt of an incentive does not influence the recommendation...

11 NYCRR 224.4 (a) and (b)(1).

In contrast with New York's Regulation 187 quoted above, where a standard of care does not require a producer or insurer to act without regard to its own financial interests, such a standard should not be referred to as a best interest standard. The U.S. Securities and Exchange Commission's ("SEC") Regulation Best Interest (17 C.F.R. 240) does not define what it means to act in the best interest of the consumer and simply requires a provider to place the interests of the consumer "ahead of" the interest of the provider¹ and permits firms to simply "identify and at a minimum disclose" conflicts of interest.² This language inappropriately permits producers and insurers to consider their own financial interest in making a recommendation. As the Draft Model Regulation matches the SEC's language, New York believes that the NAIC model should instead include the language of New York's Regulation 187, quoted above. However, New York also agrees that the current NAIC Draft Model Regulation correctly does not use the term best interest, because it does not set forth a best interest standard.

Life Insurance:

New York continues to strongly urge that life insurance products should be brought within the scope of the NAIC Draft Model Regulation. The Annuity Suitability Working Group improperly determined that the issue of life insurance suitability was out of scope of the Draft Model Regulation, despite the fact that the first charge of the working group is to "review and revise, as necessary, the *Suitability in Annuity Transactions Model Regulation (#275)*." We believe the decision to limit the scope of discussion was incorrect and inconsistent with the NAIC's processes and bylaws.

As a matter of policy, the Draft Model Regulation should include life insurance. Currently, there exists no model standard applicable to life insurance recommendations. It is also indisputable that insurers are developing and marketing life insurance products to meet retirement needs (e.g., to provide

¹ 17 C.F.R. 240.151-1(a)(1)

² 17 C.F.R. 240.151-1(a)(2)(iii)(A)

supplemental retirement income or as IRA and annuity alternatives) and that producers are soliciting and making recommendations to consumers to purchase life insurance products for these purposes. Life insurance products share the same distribution, the same compensation structures and the same sales incentives as annuity products. Moreover, in many cases life insurance products, particularly those marketed for cash value accumulation and to supplement retirement income, are more complex than many annuity products, increasing consumers' reliance on outside advice and the recommendations of producers. Every consumer of a life insurance policy or annuity contract should receive recommendations that are in their interests and not those that are motivated by a producer's interests. The A-Committee should not continue to leave consumers exposed to conflicted advice and should pursue a unified annuity and life insurance standard of care.

In-Force Transactions:

New York believes that producers and insurers licensed and supervised by state insurance regulators should be subject to the enhanced standard of care for all advice provided to consumers. While some have maintained that the existing NAIC Draft Model Regulation covers recommendations with respect to in-force annuity contracts, this is not the case. Under Section 6, Duties of Insurers and Producers, the Draft Model Regulation states:

A producer, or an insurer where no producer is involved, when making a recommendation of an annuity, shall act in the interests of the consumer at the time the recommendation is made...

Section 6.A(1). The definition of "Recommendation" under the Draft Model Regulation is:

"Recommendation" means advice provided by a producer, or an insurer where no producer is involved, to an individual consumer that results 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 material.

Section 5.M. Further, "Replacement" is defined as:

"Replacement" means a transaction in which a new policy or contract is to be purchased, and it is known or should be known to the proposing producer...

Section 6.N.

The collective result of these definitions is that the NAIC Draft Model Regulation does not cover a wide array of recommendations made by producers or insurers with respect to in-force annuity contracts. For example, a producer recommending that a consumer "do nothing" and maintain her existing annuity contract would not be subject to any standard of care. A

producer or insurer recommending the exercise of a feature or rider, such as annuitization or withdrawal benefits, would not be subject to any standard of care under the Draft Model Regulation. These recommendations may have a material financial impact to a producer given the structure of many compensation arrangements (e.g., fee-based compensation or trail commissions), the inclusion of product persistency in producer compensation plans, or other explicit or implicit conflicts of interest. Moreover, a producer recommending that a consumer surrender her existing annuity contract in order to purchase a non-insurance product (such as a mutual fund or certificate of deposit) would also not be covered.

Producers and insurers rightly worry about having to perform and supervise all of the pre-sale suitability analysis, documentation and disclosure requirements and the impact this would have on the provision of advice to consumers with respect to in-force policies. To ensure that consumers do not receive conflicted recommendations while still enabling producers to adequately service existing annuity contract holders, New York proposes three important additions to the Draft Model Regulation. First, New York proposes an amendment to Section 5.M as follows:

“Recommendation” means advice provided by a producer, or an insurer where no producer is involved, to an individual consumer that results in a purchase, an exchange or a replacement, of an annuity in accordance with that advice; or a modification or election of a contractual provision with respect to an in-force annuity that generates cash or non-cash compensation. 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 material.

Second, New York proposes a new Section 5.H, as follows:

“In-Force Recommendation” means advice provided by a producer, or an insurer where no producer is involved, to a consumer that results in any modification or election of a contractual provision with respect to an in-force annuity that does not generate cash or non-cash compensation or that is intended to result in a consumer refraining from entering into a transaction.

Third, New York proposes a new Section 6.B³, as follows:

- (1) A producer, or an insurer where no producer is involved, when making an in-force recommendation with respect to an annuity, shall act in the interests of the consumer at the time the recommendation is made.*
- (2) A producer of insurer complies with paragraph (1) by:
 - (a) Acting with reasonable diligence, care skill and prudence; and**

³ This addition assumes the other subsections of Section 6 have been relettered to reflect the inclusion of a new Section 6.B

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(b) Making suitable recommendations in accordance with subsections C and E.

New York looks forward to continuing to discuss improvements to the NAIC Draft Model Regulation that strengthen protections for consumers across the United States, as New York has already done in finalizing its Regulation 187, which contains a strong best interests standard for both annuity contracts and life insurance products.

Sincerely,



Maria T. Vullo
Superintendent

cc: James Regalbuto
Deputy Superintendent