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 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 consumers with respect to [annuity contracts] policies 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 consumer at the time of the 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].

(c) This Part further clarifies 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 and appropriately addresses the insurance needs and financial objectives of the consumer at the time of the transaction.

§ 224.1 Applicability.

This Part shall apply to any transaction or recommendation [to purchase or replace an annuity contract made to a 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 or in-force policy.

§ 224.2 Exemptions.

Unless otherwise specifically included, this Part shall not apply to transactions involving:

(a) a direct response solicitation where there is no recommendation made; or

(b) a [contract] policy used to fund:

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

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

§ 224.3 Definitions.

For purposes of this Part:

(a) *Consumer* means the owner or prospective purchaser of [an annuity contract] a policy.

(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, to a consumer that:

(1) reasonably may be interpreted by a consumer to be advice and 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

(2) 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.

[(e)] (g) *Suitability information* means information that is reasonably appropriate to determine the suitability of a recommendation, including the following:

(1) age;

(2) annual income;

(3) financial situation and needs, including the financial resources used for the funding of the [annuity] policy;

(4) financial experience;

(5) financial objectives;

(6) intended use of the [annuity] policy, including any riders attached thereto;

(7) financial time horizon, including the duration of existing liabilities and obligations;

(8) existing assets, including investment and [life] insurance holdings;

(9) liquidity needs;

(10) liquid net worth;

(11) risk tolerance; [and]

(12) tolerance of non-guaranteed elements in the policy, including variability in premium, cash value, death benefit, or fees; and

(13) tax status.

(h) *Suitable* means in furtherance of a consumer's needs and objectives under the circumstances then prevailing, based upon the suitability information provided by the consumer and all available products, services, and transactions.

(i) *Transaction* means any purchase, 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 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 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 recommendations to the consumer are based on an evaluation of the suitability information of the consumer that reflects the care, skill, prudence, and diligence that a prudent person familiar with such matters would use under the circumstances without regard to the financial or other 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 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 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 consumer would benefit from certain features of the [annuity contact] policy, such as tax-deferred growth, annuitization 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, are suitable [(and in the case of a replacement, the transaction as a whole is suitable)] for the particular consumer based on the consumer's suitability information; 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 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 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 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; and

[(iii)] *(c)* the 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 consumer's suitability information.

[(c) Except as provided under subdivision (d) of this section] (d) In addition to the requirements of subdivisions (a) and (b) of this section, an insurer shall not issue [an annuity contract] or modify a policy recommended to a consumer unless there is a reasonable basis to believe that the [annuity contract] policy is suitable based on the consumer's suitability information.

[(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 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 consumer;

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

(iv) a 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 [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:

(1) disclose to the consumer all relevant suitability considerations and product information, whether favorable or unfavorable, that provide the basis for any recommendations;

[(1)] (2) document any recommendation subject to [subdivision] subdivisions (a) and (b) of this section;

[(2)] (3) document the consumer's refusal to provide suitability information, if any; and

[(3)] (4) document that [an annuity purchase or replacement] a transaction is not recommended if a 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 consumer to enter into a transaction unless the producer has a reasonable basis to believe that the consumer has the financial ability to meet the financial commitment under the policy.

[(f)] (h) An insurer shall establish a supervision program system that is reasonably designed to achieve the insurer's and [insurance] producers' compliance with this Part. An insurer may contract with a third party to establish and maintain a system of supervision with respect to [insurance] producers.

[(g)] (i) 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.

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

[(i)] (k) [An insurance] Neither a producer nor an insurer shall [not] dissuade, or attempt to dissuade, a 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.

(l) A producer shall not state or imply to the consumer that a recommendation to enter into a transaction 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.

(m) 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.

(n) Nothing in this Part shall be construed to prohibit the payment to a producer of any type or amount of compensation otherwise permitted under the Insurance Law.

§ 224.5 Insurer responsibility.

(a) The insurer shall take appropriate corrective action for any 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 designed to 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.

(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

(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 shall provide the information in accordance with Part 51 of this Title (Insurance Regulation 60), 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.

§ 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.

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].