

NY DFS's Regulation 187 – Consumers' Best Interests

On February 1, 2020, the New York Department of Financial Services' Regulation 187 will go into effect for life insurance products. Although Regulation 187 went into effect with regard to annuity products on August 1, 2019, its effect on life insurers and their producers is anticipated to be more extensive.

Regulation 187 "requires insurers to establish standards and procedures to supervise recommendations ... with respect to life insurance policies and annuity contracts ... 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 the consumer."

The "Best Interest" Requirement

Regulation 187 requires producers to make life insurance or annuity product recommendations based upon their "clients' best interests." Permissible factors in deciding the clients' best interests include the price of the policy, the benefits provided by the policy, the financial strength of the insurer, and other factors that differentiate products or insurers. Regulation 187 also identifies specific information a producer must gather to formulate a best interests recommendation, such as age, financial objectives, time horizon, liquidity needs, risk tolerance, and any other information reasonably viewed as relevant to the suitability of the insurance transaction.

Scope

Insurers must ensure compliance with Regulation 187 for all "life insurance policies and annuity contracts issued in New York State," which means that both non-resident and resident producers are subject to the best interests standard. But a best interests rule may not stop there. The Life Insurance and Annuities Committee of the National Association of Insurance Commissioners have approved a model rule with Regulation 187-like standards, the model rule awaits full NAIC approval. Nevada and New Jersey are also considering best interests rules.

Efforts to stop Regulation 187 have been unsuccessful. In July 2019, a New York State Supreme Court struck down a challenge from industry plaintiffs, including the National Association of Insurance and Financial Advisers and the Independent Insurance Agents and Brokers of New York. In its ruling, the court found that the NY DFS properly exercised its powers to promulgate the rule, which was neither "arbitrary" nor "capricious."

What Insurers Need to Know

Insurers will play a central role in ensuring compliance with Regulation 187. The regulation requires insurers to develop, maintain, and manage mechanisms to ensure producers truly recommend products based on consumer's best interests. For example, Regulation 187 expressly forbids a producer from recommending a product in which he or she lacks adequate knowledge. In turn, this requires an insurer to educate and train producers on products it is attempting to sell, although Regulation 187 does allow an insurer to use a third-party to establish and maintain the sort of supervision required.

The Regulation places some limits on the duty of the insurers to supervise producers. Section 224.6 of the NY DFS's regulations has also been altered to limit an insurer's supervisory obligations by (i) allowing an insurer's suitability determination to be based solely on its own products; (ii) clarifying that an insurer need not offer a warranty that a producer is acting in a consumer's best interests (an insurer need only ensure the producer is adequately trained); and (iii) removing from the scope of Regulation 187 an insurer's obligation to confirm or determine the suitability of certain transactions that derive from the exercise of contractual rights in a policy (e.g.,



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whether a consumer should take out a loan against a policy's cash value, or additional annuity deposits).

Enforcement

Importantly, Regulation 187 does not expressly authorize direct legal actions by consumers. Although a prior version of the regulation made reference to a private right of action, the final version explains that the standards imposed by the regulation are to be “enforced by the Superintendent.”
