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Via E-Mail and Overnight Mail

The Honorable Maria T. Vullo
Superintendent
New York State Department of Financial Services
One State Street
New York, NY 10004
Via email to: maria.vullo@dfs.ny.gov
Via email to: james.regalbuto@dfs.ny.gov

Re: Proposed First Amendment to Insurance Regulation 187
Suitability in Life Insurance and Annuity Transactions

Dear Superintendent Vullo:

On behalf of the Committee of Annuity Insurers (the "Committee") and its 32-member insurance companies that represent over 80% of the annuity business in the United States, we are writing in response to the Proposed First Amendment ("Proposal") to 11 NYCRR 224 (Insurance Regulation 187) ("Regulation 187"), proposed to be renamed "Suitability in Life Insurance and Annuity Transactions," published by the New York State Department of Financial Services (the "Department") on December 27, 2017. The Committee appreciates the opportunity to provide comments on the Proposal. Our comments below begin with an overview of the Committee and general principles we urge the Department to follow in moving forward with the Proposal, before providing comments on specific provisions of the Proposal.

OVERVIEW OF THE COMMITTEE

The Committee is a coalition of life insurance companies formed in 1981 to participate in the development of federal and state policy with respect to regulatory and tax issues affecting the annuity industry. The Committee's members offer annuities through affiliated and unaffiliated distribution channels, including broker/dealers. A list of the Committee's member companies is attached as Appendix A. For more than 35 years, the Committee has been involved in shaping and commenting upon many elements of the regulatory framework applicable to annuity products. In particular, as relevant to the Proposal, the Committee over many years has been actively involved in standard of conduct and suitability-related initiatives of the U.S. Department of Labor ("DOL"), the Financial Industry Regulatory Authority, Inc. ("FINRA") and the U.S. Securities and Exchange Commission ("SEC").

GENERAL PRINCIPLES FOR MOVING FORWARD WITH THE PROPOSAL

In view of the general level of regulatory and legislative activity related to the standard of care owed by financial intermediaries, the effort the National Association of Insurance Commissioners ("NAIC") has begun provides the best opportunity for the state insurance regulatory community to work in a coordinated fashion with other regulatory authorities. The Committee recommends that the Department work more closely with the NAIC, to develop a common approach that works for all affected, in terms of both substance and timing. The Department's determination to move forward with its own amendments to Regulation 187,

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separate from the NAIC's undertaking, distracts focus from the collective effort and has immediate and counter-productive impacts on the insurance marketplace. While the Committee recognizes that a variety of factors influence a regulator's decision to move forward separately from the NAIC, we encourage the Department to act in concert with the NAIC on any proposed revisions to current standard of conduct requirements.

Turning to general principles for rulemaking in this area, the Committee has supported and continues to support a "best interest" standard for financial intermediaries when providing advice or recommendations to their customers regarding the purchase or replacement of annuities. To that end, the Committee urges the Department to move forward consistent with the following principles, which are critical to the ultimate success of the Proposal:

- The Proposal should operate in full harmony to the greatest extent possible with regulatory changes under consideration by the NAIC, as well as other regulators whose regulations apply to certain annuity transactions. These include regulatory requirements imposed by (i) the DOL under its fiduciary rule set ("DOL Fiduciary Rule")[1] with respect to fiduciaries providing investment advice about annuities to retirement plans and investors, (ii) FINRA with respect to broker/dealers recommending variable annuity transactions to customers,[2] and (iii) the SEC with respect to insurance products regulated as securities and the standards applicable to registered broker/dealers and investment advisers recommending or advising on such products. As you know, the NAIC has exposed a draft of a proposed amendment to the NAIC Suitability in Annuity Transactions Model Regulation ("NAIC Proposal"),[3] the SEC is actively engaged in an initiative focused on a uniform standard of care for broker/dealers and investment advisers,[4] and the DOL has deferred full implementation of the DOL Fiduciary Rule pending in part on the SEC's action on a uniform standard of care.[5]

- The Proposal should articulate a clear and workable best interest standard that clarifies – and does not confuse – the obligations of all annuity market participants, including insurers, producers, annuity customers and regulators.

- The Proposal should be crafted in a manner that makes maximum possible use of existing operational, compliance and transaction review structures for annuity transactions so as to minimize the operational disruption, costs and resources required to respond to regulatory changes, given the reality that additional costs to deliver products and services to consumers ultimately get passed onto consumers.

- The effective date for changes to Regulation 187 should be coordinated with the effective date for changes under consideration by other regulators applicable to annuity transactions so that insurers can implement necessary and appropriate changes on a holistic, rather than piecemeal basis, again in the interests of minimizing ultimate costs and confusion for consumers.[6]

Adopting the Proposal in a manner that fails to take into account the general principles above and the other comments below, will have harmful effects on insurers, investors and the

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[1] See DOL releases, 81 F. Reg. 20946 (April 8, 2016), et seq.
[2] See FINRA Rules 2330 and 2111.
[3] See http://www.naic.org/documents/cmte_a_aswg_exposure_draft_revisions_275.pdf?386.
[4] See SEC Chair Jay Clayton, Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker/Dealers, June 1, 2017, posted at https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31.
[5] See DOL release, 82 F. Reg. 16902 (April 7, 2017).
[6] In this regard, we note that it appears that the SEC is attempting to time its proposed review of broker/dealer and investment adviser standards of conduct to be coordinated with the July 1, 2019 effective date for full implementation of the DOL Fiduciary Rule.

economy as a whole. For example, a lack of harmonization with other regulatory regimes, resulting in conflicting changes or more burdensome and costly requirements, could significantly disadvantage annuity products compared to other financial or investment products, particularly for New York consumers, and therefore result in annuity products being less available to consumers than other financial or investment products and on fewer distribution platforms.

The importance of easy accessibility to annuity products for the investing public cannot be over-emphasized. Other than Social Security and employer-sponsored defined benefit plans (which are costly to employers and no longer widely offered), annuities are the only financial products that can provide consumers lifetime income benefits that guarantee they will not outlive their retirement income. Annuity products can also protect against other significant risks to which individuals' retirement assets are exposed, including inflation risk, investment risk, interest rate risk and liquidity risk, thereby allowing retail investors to acquire, in a single product, insurance against a number of different risks to their financial well-being in retirement.

COMMENTS ON PROVISIONS OF THE PROPOSAL

In light of the general principles outlined above, the Committee offers the following comments, questions and requests for clarification pertaining to the Proposal as it relates to annuity products. (While Committee member companies issue life insurance products, the Committee's mandate is limited to annuity products and, accordingly, the comments discussed below are focused on the impact of the Proposal on annuity recommendations. The Committee notes, though, that the Proposal's applicability to life insurance plainly fails to recognize and distinguish the differences inherent in a recommendation for a life insurance policy versus an annuity contract.) The comments below focus on provisions of the Proposal relating to:

A. The scope of the Proposal and key definitions;

B. The best interest standard, the suitability standard and other components of the Proposal's best interest requirement;

C. Disclosure requirements and restrictions imposed by the Proposal; and

D. Effective date considerations.

A. SCOPE OF THE PROPOSAL AND KEY DEFINITIONS

1. Regulation 187 Should Not Be Expanded to Cover Transactions in Addition to Recommendations

Proposal. Section 224.1 of the Proposal would expand the applicability of Regulation 187 to apply to transactions as well as recommendations made to a consumer.

Comments. The Department should reconsider this proposed change for the following reasons.

- This change would create unnecessary ambiguity and confusion because it suggests that the Proposal would apply to any transaction regardless of whether the transaction was recommended by a producer or insurer. In this regard, the change also departs from the approaches followed by the DOL, SEC and FINRA, under which best interest or suitability standards are imposed only on recommendations by fiduciaries or financial intermediaries, as applicable.

- This change, along with other changes, would extend Regulation 187 to any transactions involving the exercise of contractual rights by contract owners under in-force policies – regardless of when that exercise occurred. Since the availability of these contractual rights would have been considered at the time the purchase recommendation was made, there is no need to subject a transaction resulting from the later exercise of those rights to a suitability or best interest standard at the time of exercise.

- This change calls into question the existing exemption from Regulation 187 for direct response solicitation activities where no recommendation is made – surely, a consequence not intended to be made by the Proposal.

In sum, Regulation 187 should be triggered only when a recommendation is made; expanding Section 224.1 to allow transactions to trigger the regulation is not only confusing but also inconsistent with the principle of harmonization.

2. The Definition of Transaction Should Be Limited to Purchases and Replacements

Proposal. Section 224.3(i) of the Proposal would add a new definition of "transaction" to mean any purchase, replacement, modification or election of a contractual provision with respect to a proposed or in-force policy. The effect of this definition, in connection with other provisions, would be to subject not only purchases and replacements, but also modifications and elections of contractual provisions to Regulation 187.

Comments. The proposed new definition raises several significant concerns particularly with regard to the inclusion of a "modification" and "exercise of contractual right" in the definition.

- The proposed definition, as noted above, would effectively expand the transactions "in scope," from purchases and replacements to include "modifications" and "elections of contractual provisions" for in-force policies. In this respect, the Proposal would significantly depart from existing suitability rules for annuities, which have focused on purchase and replacement transactions only.

- The Department has not provided any explanation of what would be considered a "modification" or an "election of a contractual provision" in the case of an annuity contract. Without knowing what those terms are intended to cover, insurers and producers could not readily determine what additional event or transaction in connection with an annuity contract would become subject to the new best interest requirement imposed by Section 224.4(a) and defined in Section 224.4(b) of the Proposal (together, the "Best Interest Requirement").

- The proposed definition of "transaction," when taken together with the revised definition of "recommendation," would have the effect of subjecting "hold" or "no-action" recommendations (i.e., recommendations to refrain from entering into a transaction) to the proposed Best Interest Requirement. The Committee believes that it will not be operationally feasible to satisfy the Proposal's Best Interest Requirement in the case of a hold or no-action recommendation by a producer. Since "no-action" recommendations historically have been "non-events" for insurance regulatory purposes that do not trigger any documentation or supervisory requirements, subjecting a "no-action" recommendation to Regulation 187 would require producers and insurers to comply with all of the requirements of the Best Interest Requirement, including the collection of suitability information from consumers and informing consumers of the potential consequences of not taking any action – in a context in which there ordinarily would be no compensation benefit to the producer. This standard could have the perverse effect of encouraging producers to say "no comment" when consumers ask servicing questions out of a concern that any further response could trigger the Best Interest Requirement and related documentation and disclosure requirements.

- The interplay of the new "transaction" definition and revised "recommendation" definition could lead to the view that a producer and an insurer have an ongoing duty to monitor a consumer's annuity contract under Regulation 187. Such a duty would be wholly inconsistent with other regulatory regimes applicable to annuity recommendations. For example, the DOL has acknowledged that investment advice fiduciaries do not have an ongoing duty to monitor an investment, unless they agree to do so.[7]

In light of all of these concerns, the Committee urges the Department to remove "modification or election of a contractual provision" from the definition of transaction.

3. The Definition of Recommendation Should Exclude Servicing and Educational Information and Be Otherwise Clarified

Proposal. Section 224.3(e) of the Proposal would revise the definition of "recommendation" to mean one or more acts or statements that (1) reasonably may be interpreted by a consumer to be advice and that result in 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.

Comments. The following changes should be made to the definition of "recommendation" in the interest of clarifying and rationalizing the definition:

- To avoid confusion and ambiguity regarding what acts or statements would be considered to be "advice" for purposes of the first clause (clause (1)), the term "advice" should be modified to be limited to "advice tailored to the consumer's circumstances."

- With regard to the second clause that would be added to the definition, the Department should add the phrase "in accordance with that advice" at the end of the clause to be consistent with the first clause.

- In light of the comments discussed above regarding "no-action" recommendations, the Department should strike the phrase "or refraining from entering" in the second clause.

- The Department should add a proviso to the definition that would exclude information intended to be general information or educational in nature from the definition of recommendation. Such an exclusion would be consistent with the approach taken by the DOL in connection with the DOL Fiduciary Rule.[8]

- The definition should explicitly exclude acts or statements made in the course of servicing an in-force annuity contract.

- The Department should add text clarifying that the Proposal is not intended, and should not be interpreted, to impose a different standard of care for any recommendation to

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[7] The best interest contract exemption ("BIC Exemption"), one of a number of prohibited transaction exemptions issued as part of the DOL's Fiduciary Rule set, treats ongoing monitoring as a disclosure matter, simply requiring a financial institution relying on the exemption to disclose to retirement investors "whether or not the Adviser and Financial Institution will monitor the Retirement Investor's investments and alert the Retirement Investor to any recommended change to those investments and, if so monitoring, the frequency with which the monitoring will occur and the reasons for which the Retirement Investor will be alerted." See Section II(e)(7) of the BIC Exemption.

[8] See 29 CFR Section 2510.3-21(b)(2), which excludes general information and investment education from the definition of "recommendation" for purposes of the definition of an investment advice fiduciary adopted by the DOL as part of the DOL Fiduciary Rule.

which the DOL Fiduciary Rule and its related prohibited transaction exemptions ("PTEs") apply.

4. The Proposal Should Not Apply to Producers Without Direct Consumer Contact

Proposal. Section 224.4(m) of the Proposal would apply the requirements applicable to producers to "every producer in the transaction" regardless of whether they had direct contact with the consumer.

Comments. The Committee has serious concerns with this provision because it raises the following interpretive, operational and harmonization issues:

- It is unclear from the text who would be considered to be a "producer in the transaction." More particularly, is this phrase intended to be limited to a situation in which producers, working together as a team, make a recommendation? Or alternatively, could it possibly apply to others with only a tangential relationship to the producer making the recommendation to the consumer? For example, could this provision apply to insurance company personnel who may prepare illustrations for use by the producer who has direct contact with the consumer? Imposing the Best Interest Requirement on such personnel – including that they collect and evaluate all of the consumer's suitability information – simply because they are preparing an illustration at the request of the producer is not only unduly burdensome for the personnel but also for the consumer given the inevitable delays resulting from duplicating the activities.

- There is also a question about whether this provision would capture a producer acting in a wholesaler role, who might receive compensation based on a transaction (or salary and bonuses) resulting from a recommendation made by another producer. If so, the provision would be wholly inconsistent with other regulatory regimes, including other state insurance regulatory regimes, which impose suitability (or best interest) standards only on the person making the recommendation to the consumer or investor.

- The provision also would present serious operational and consumer privacy challenges, because it would appear to require all of the producers "in the transaction" to coordinate and share the consumer's suitability information and other documentation supporting the recommendation made. A producer considered to be "in the transaction," by virtue of providing wholesaling services or illustrations, for example, may very well be unaffiliated with the producer making the recommendation to the consumer. As such, the producer providing some assistance may not have access to the same system used by the producer making the recommendation to capture consumer information. The sharing of the consumer's information by one producer with another that would then be required may run afoul of privacy rules and create additional risks for all concerned in maintaining the privacy of such information.

Given the totality of these concerns, this provision should be eliminated.

5. The Proposal Should Not Apply to Institutional Purchasers

Proposal. Section 224.2(b) of Regulation 187 provides exemptions for policies used in five specified situations, four of which refer to employment-related arrangements and one of which relates to a settlement arrangement. The Proposal would make a minor, editorial change to the text of this provision, but no other changes to the situations that would qualify for exemptions.

Comments. Given the overall import and intent of the Proposal, Section 224.2(b) should be revised to clarify that Regulation 187 does not apply to a situation in which a policy is purchased by an institutional or sophisticated purchaser, such as a corporation, trust or other investor recognized as an institutional investor, qualified purchaser or similar type investor under laws

and regulations applicable to investors. These purchasers are sophisticated, often relying on advisers and consultants, and are not in need of the consumer protections provided by Regulation 187.

B. BEST INTEREST REQUIREMENT, BEST INTEREST STANDARD AND SUITABILITY STANDARD

1. The Best Interest Requirement Should Be Harmonized and Rationalized

Proposal. Sections 224.4(a) and 224.4(b) together outline the Best Interest Requirement in the Proposal. Section 224.4(a) of the Proposal would require a producer (or an insurer where no producer is involved) to act in the best interest of the consumer when recommending a transaction. Section 224.4(b) would describe "best interest" as comprised of three "elements" or "standards," with an additional standard applicable to recommendations involving replacements or exchanges.

- The first standard, outlined in Section 224.4(b)(1) of the Proposal (the "Best Interest Standard"), requires that the producer's (or insurer's) recommendations to the consumer be 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.

- The second standard, outlined in Section 224.4(b)(2) of the Proposal (the "Suitability Standard"), requires that the recommended transaction be "suitable."

- The third standard, outlined in Section 224.4(b)(3) of the Proposal (the "Disclosure Standard"), would modify the existing requirement that there be a reasonable basis to believe that the consumer has been reasonably informed of certain features of the annuity, to require that the consumer also has been informed of the potential consequences of the transaction, whether favorable or unfavorable, and the manner in which the producer is compensated for the sale and servicing of the policy.

- In the case of a replacement, the fourth standard, outlined in Section 224.4(b)(4) (the "Replacement Standard"), would require that the replacement be suitable taking into consideration, among other things, whether the consumer will incur increased premiums or fees, decreased coverage duration, decreased death benefit or income amount or adverse change in health rating, and that the consumer would benefit from things such as a decreased premium or fees, increased coverage duration, or increased death benefit or income amount.

Comments on Best Interest Standard. As noted above, the Committee supports a "best interest" standard for recommendations of annuity transactions. But the proposed Best Interest Standard differs from the best interest standard adopted or proposed by other regulators. While the Best Interest Standard in the Proposal is similar to the best interest standard articulated by the DOL in its BIC Exemption and PTE 84-24, it differs from the standard in those PTEs in several critical respects:

- The Best Interest Standard would require that a recommendation be made "without regard to the financial or other interests of the producer, insurer or other party." However, the best interest standard in the BIC Exemption modifies the "without regard to" condition in the case of financial institutions and advisers relying on the alternative safe harbor in the BIC Exemption for recommendations of proprietary products and products involving "third party payments," such as commissions from insurers. The disadvantages of different descriptions cannot be overstated. Given the challenges of operationalizing a process for use in all 50 states and other U.S. jurisdictions subject to

multiple regulators, any differences in terms, conditions and guardrails for a best interest standard will complicate procedures as insurers struggle to assess whether those differences are meaningful. In addition, as insurers develop disclosures to satisfy the differing best interest standards, the differences will confuse consumers regarding what they should expect from their producers and insurers.

- Other regulators that have adopted or proposed a best interest standard have stated that a best interest standard does not require a recommendation of the "best available" or "cheapest" options. The Department should provide similar clarifications to ensure a harmonized implementation of the Best Interest Standard across jurisdictions and regulatory regimes and to clarify the boundaries of the Best Interest Standard.

- The Department should clarify that the Best Interest Standard is solely the responsibility of the producer, and not the responsibility of the insurer, when a producer is involved.

Comments on Suitability Standard. The Suitability Standard effectively would require that a recommendation meet a separate test of "suitability" in addition to "best interest." The purpose and benefit of a separate "suitability" test is unclear and seems superfluous. Again, from an operational perspective, it is unclear what producers and insurers would be required to do to evidence compliance with the Suitability Standard subsumed in the Best Interest Requirement that would be different from what they would be required to do to satisfy the Best Interest Standard also subsumed in that requirement. If the Department proceeds with a Best Interest Standard, the separate suitability test should be removed from Section 224.4(b).

Comments on Disclosure Standard. The Disclosure Standard would effectively require additional disclosure of "potential consequences," as well as the producer's compensation arrangements. The Committee questions what additional information would be required to be provided by the proposed open-ended requirement to disclose "potential consequences." Regulation 187 currently provides a comprehensive list of policy features that need to be disclosed. That list has been expanded with the addition of the requirement to disclose lapse consequences and policy exclusions or restrictions. It is not readily apparent that there are any other "potential consequences" to be disclosed to consumers. In addition, differences in disclosure requirements among regulations applicable to annuity transactions will exacerbate the operational challenges of developing a disclosure to satisfy all requirements. Given these concerns, the Department should confirm that disclosure of the features and consequences listed in the Disclosure Standard will be deemed to sufficiently address the requirement to disclose potential consequences to consumers.

The Disclosure Standard also would require disclosure of the manner in which the producer is compensated for the sale and servicing of the policy. This requirement is duplicative and redundant of the existing disclosure requirements imposed by Regulation 194. Given this duplication, the producer compensation disclosure requirement should be removed from the Disclosure Standard.

Comments on Replacement Standard. With regard to the Replacement Standard, the proposed change would appear to require a showing of financial benefit only for the consumer in question to support the recommendation, without regard to other factors that could be important to consumers. The Committee is deeply concerned about a standard for replacements that would be limited solely to a financial benefit analysis. Such an analysis misses the point that, in many cases, annuities provide "peace of mind" to consumers through the potential availability of living benefits, or the availability to invest in different investment options that cannot be measured quantitatively as a "financial benefit."

2. The Suitability Standard Should Not Apply to Non-Recommended Transactions

Proposal. Section 224.4(e)(2) of the Proposal would alter the insurer's responsibility for situations where no recommendation is made, or was made on the basis of materially inaccurate information provided by the consumer, or where the consumer refused to provide suitability information or enters into a transaction that was not recommended (collectively, "non-recommended transactions"). Under Section 224.4(d)(2) of Regulation 187 as currently in effect, an insurer is held only to a standard of reasonableness, based on the circumstances actually known to the insurer at the time. The Proposal would impose a suitability standard on an insurer in these circumstances, by requiring that the transaction must nonetheless be "suitable," based on information actually known to the insurer.

Comments. The Department should eliminate this proposed change to the standard for non-recommended transactions. No other regulator imposing a suitability or best interest standard on transactions currently applies a suitability standard to non-recommended transactions. Imposing a requirement on insurers to comply with a suitability standard for non-recommended transactions would be inconsistent with the approaches taken in other jurisdictions and by other regulatory regimes applicable to annuity transactions.

If, contrary to the Committee's comments, the Department retains the suitability standard in Section 224.4(e)(2) (and also in Section 224.4(d)), Section 224.0(b) should be revised to eliminate a potential conflict between Section 224.4 and Section 224.0 by clarifying that the reference in Section 224.0(b) to the obligations of insurers to have standards and procedures so that "any transaction with respect to those policies is in the best interest of the consumer" should not be read to alter the suitability standard for insurers identified in Section 224.4(d) and 224.4(e)(2). Finally, as discussed above, Regulation 187 should not apply to a contract owner's exercise of contractual rights under an in-force policy.

3. A Consumer's Financial Ability to Meet Financial Commitments Is Irrelevant to Annuity Contracts

Proposal. Section 224.4(g) of the Proposal would require a producer, when making a recommendation, to have a reasonable basis to believe that the consumer has the financial ability to meet the financial commitment under the policy.

Comments. The Committee questions the purpose and relevancy of this requirement in the case of annuities, and urges the Department either to remove this provision or to provide greater clarification regarding its purpose and relevancy. For example, it is unclear whether this requirement is intended to apply to a policy that is being purchased on the basis of periodic payments that must be made in order to maintain the policy. If that is the case, the Department should make clear that this requirement does not apply to an annuity contract that does not require additional premium payments.

4. The Definition of "Suitable" Should Be Modified

Proposal. Section 224.3(h) of the Proposal would define the term "suitable" as being "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."

Comments. The phrase "all available products, services, and transactions" needs to be clarified. More particularly, it is unclear whether the reference to "all available products, services, and transactions" is to be determined with reference to the person making the recommendation or to the financial markets in general. The latter interpretation is simply not practicable and worse could require a producer to make an evaluation based on products, services and transactions

outside the scope of his or her permitted business activities. The Department should either eliminate the phrase entirely, or clarify that the determination of available products, services and transactions is to be made solely by reference to the individual person making the recommendation and not with regard to the business entity with which the person is associated or any insurer that has appointed the individual person.

5. The Definition of Suitability Information Should Not Be Changed

Proposed Changes to Suitability Information. Section 224.3(g) of the Proposal would revise the existing definition of "Suitability Information" to include as part of risk tolerance, "tolerance of non-guaranteed elements in the policy, including variability in premium, cash value, death benefit, or fees."

Comments. The specific references to potential changes in nonguaranteed elements in a policy should be deleted from the proposed changes to the definition of "Suitability Information." Calling out specifically a requirement to focus on risk tolerance related to potential changes in guaranteed elements dilutes the requirement to focus on the overall risk tolerance of the consumer. For example, risk tolerance requires an assessment of, among other things, the consumer's tolerance for investment risk and interest rate risk. Arguably, these types of risks are more important than tolerance for changes in the nonguaranteed elements of an annuity. The general reference to risk tolerance without further elaboration as a component of suitability information makes more sense.

Furthermore, the proposed revision to the definition of "Suitability Information" fails to recognize the differences between life insurance and annuity contracts, which are designed to address different needs and circumstances.

The Department also should not overlook the costs associated with the infrastructure "build out" required to change suitability information collection forms to request and process information specific to nonguaranteed elements, because these build out costs ultimately impact consumers. In particular, an infrastructure build out would likely encompass information technology changes to existing electronic systems used to capture suitability information and perform screening reviews. Whatever marginal (if any) gains to the recommendation review process are achieved by focusing on the tolerance for changes in nonguaranteed elements in an annuity would not be outweighed by the costs to build out the new systems.

Finally, the Committee believes that attention to the impact of nonguaranteed elements of a contract is better attended to as a matter of disclosure to the consumer of the features of the annuity, rather than expressly factored into the suitability information collection process. Indeed, the Department recently adopted Regulation 210 to require such disclosure.

C. DISCLOSURE REQUIREMENTS AND RESTRICTIONS

1. No Consumer Disclosure of Basis for Recommendation Should Be Required

Proposal. Section 224.4(f) of the Proposal would require a producer (or insurer) to provide disclosure of all relevant suitability considerations and product information to the consumer, whether favorable or unfavorable, that provide the basis for any recommendation.

Comments. The Department should eliminate this requirement for the following reasons:

- Requiring this disclosure would not be in harmony with FINRA rules and the DOL Fiduciary Rule disclosure requirements, because they do not require such a disclosure to investors, and thus is inconsistent with the principle of harmonization.

- From an operational and systems perspective, insurers and producers would be required to "build out" the infrastructure to document and deliver that disclosure and maintain evidence of such documentation and delivery, inevitably increasing overall costs that will ultimately be passed on to consumers.

- From a consumer perspective, it seems doubtful that the disclosure forms likely to be developed to document the bases for the recommendation would provide any meaningful information to consumers. These forms would either be far too simplistic (e.g., a "check the box" form on which a producer indicates the basis was "guaranteed income" or something similar), or too detailed and descriptive to be practical (e.g., a multi-page, individually tailored summary of the review process that highlights myriad factors that go into making an annuity recommendation for a particular consumer).

In short, this requirement would impose costs and burdens on insurers and producers to generate the disclosure and would negatively impact harmonization efforts, without offering any meaningful benefit to consumers.

2. Insurers Should Not Be Required to Provide Comparison Disclosures

Proposal. Section 224.5(c) of the Proposal would require an insurer to provide 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."

Comments. This provision on its face is overly broad. On its face, it appears to require a comparison with all available policies of the same product type, without clarifying what is meant by product type, or limiting the comparison to the products available to the producer involved at the time. Further, in light of the proposed definition of transaction, discussed above, this provision would appear to apply regardless of whether a recommendation is made to the consumer. Given these considerations, the Department should remove this provision.

3. The Restriction on Financial Advice Characterization Should Be Removed

Proposal. Section 224.4(l) of the Proposal states that a producer cannot state or imply that a recommendation 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.

Comments. The Committee is concerned that the limitation on a producer stating or implying that he or she is providing financial advice is too broad. Insurance producers do more than simply execute insurance transactions. By providing an insurance recommendation, an insurance producer would be viewed by many as providing financial advice. In addition, the Committee is concerned that this provision would prohibit producers from making statements about their services that they are permitted to do under applicable law. For example, there currently is no law or regulation that requires a person to have a specific certification or professional designation to characterize his or her statements as financial planning or financial advice. Moreover, this provision is strikingly at odds with what Regulation 187 requires a producer to do: to evaluate a consumer's suitability information, including the consumer's financial situation and needs. The Department should remove this provision from the Proposal.

D. Effective Date of the Proposal

The Proposal currently indicates that the effective date would be ninety (90) days after the publication of the final version in the State Register. The Committee strongly urges the Department to defer the effective date of the final version for at least 24 months after adoption.

The Proposal will require insurers and producers to create and implement large-scale changes in the way they do business with consumers and process insurance transactions. More particularly, the Proposal in its current form would require building out new forms, documentation, disclosures and business processes. In addition, there will be a need to educate and train all affected parties involved in annuity transactions on the changes resulting from the Proposal. In view of all of these considerations, we urge the Department to provide a lengthy implementation period. Doing so would be generally consistent with what other regulators, such as the DOL, and self-regulatory organizations, such as FINRA, have typically provided when adopting sweeping changes.

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The Committee appreciates the opportunity to comment on the Proposal. Please do not hesitate to contact Cliff Kirsch (212.389.5052 or cliffordkirsch@eversheds-sutherland.com); Susan Krawczyk (202.383.0197 or susankrawczyk@eversheds-sutherland.com); Eric Arnold (202.383.0741 or ericarnold@eversheds-sutherland.com); or Maureen Adolf, Senior Policy Adviser/Insurance (212.389.5028 or maureenadolf@eversheds-sutherland.com) with any questions or to discuss this comment letter. The Committee would be happy to provide any additional information to the Department or discuss any of the issues or concerns identified in this letter if that would be helpful.

Respectfully submitted,

Eversheds Sutherland (US) LLP

Eversheds Sutherland (US) LLP

FOR THE COMMITTEE OF ANNUITY INSURERS

Cc: James V. Regalbuto, Deputy Superintendent for Life Insurance

Appendix A

THE COMMITTEE OF ANNUITY INSURERS
MEMBER LIST

AIG
Allianz Life
Allstate Financial
Ameriprise Financial
Athene USA
AXA Equitable Life Insurance Company
Brighthouse Financial, Inc.
Fidelity Investments Life Insurance Company
Genworth Financial
Global Atlantic Life and Annuity Companies
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Lincoln Financial Group
Massachusetts Mutual Life Insurance Company
Metropolitan Life Insurance Company
National Life Group
Nationwide Life Insurance Companies
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Ohio National Financial Services
Pacific Life Insurance Company
Protective Life Insurance Company
Prudential Insurance Company of America
Sammons Financial Group
Symetra Financial Corporation
The Hartford Life Insurance Companies
The Transamerica companies
TIAA
USAA Life Insurance Company
Voya Financial, Inc.