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FEBRUARY 26, 2018

Honorable James V. Regalbuto, Deputy Superintendent for Life Insurance
New York Department of Financial Services
One State Street
New York, New York 10004-1511

james.regalbuto@dfs.ny.gov

Re: Comments of the National Association of Insurance and
Financial Advisors-New York State, Inc. (NAIFA-NYS) on
Proposed Amendments to Regulation 11 NYCRR Part 224
(Regulation 187) – *Suitability in Life Insurance and Annuity
Transactions*

Dear Deputy Superintendent Regalbuto:

Thank you for the opportunity to comment on the Department of Financial Services (DFS)
proposed amendments to Regulation 187, 11 NYCRR Part 24.

NAIFA-NYS represents thousands of life insurance agents and brokers, financial advisors and their associates, and others in the financial services community throughout New York State. The members of NAIFA-NYS, in turn, represent, through trust-based relationships, tens of thousands of New Yorkers who have wisely and appropriately entrusted their financial security needs to these licensed and regulated professionals. As members of NAIFA-NYS, our members have dedicated themselves to the Association's 98-year tradition of upholding the highest ethics of their profession and have taken pride in assisting New York's life insurance and financial product clients in making important decisions to protect their family's financial future. Our members, with and through the licensed insurance and financial products companies operating in New York, provide needed advice on asset management, growth of personal net worth, employee benefits, retirement planning, college funding, business succession, and legacy planning, among other vital services.

The business of our members is largely based upon, and succeeds only through, the trust that they build with their clients. Providing recommendations and performing services to clients that are always in the clients' best interest comes second nature to our members. In fact, the NAIFA Code of Ethics, to which our members subscribe, embodies some of the very principles contained in the proposed regulatory amendments. For example, NAIFA-NYS members commit, among other things:

- To help maintain my client's confidences and protect their right to privacy.

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- To work diligently to satisfy the needs of my clients.
- To present accurately and honestly, all facts essential to my client's financial decisions.
- To render timely and proper service to my clients and ultimately their beneficiaries.
- To continually enhance professionalism by developing my skills and increasing my knowledge through education.
- To obey the letter and spirit of all laws and regulations which govern my profession.
- To conduct all business dealings in a manner which would reflect favorably on NAIFA and my profession.

Source: National Association of Insurance and Financial Advisors Code of Ethics

These principles, and many others geared towards maximizing the protection of clients, are put into practice every day as our members work to assure their clients' financial futures or provide security to their clients' families if a tragedy may visit them.

This profession's commitment to operate in the clients' best interest renders the Department's proposed regulation as a bit of a conundrum for the members of NAIFA-NYS: they are enthusiastically supportive of any effort to improve the client/agent-advisor relationship, but are also deeply wary of specific, government-prescribed mandates that may do harm to the marketplace and, by extension, to the clients who are served by the market.

Generally, our members are concerned that extending the requirement of suitability from annuity sales to all life insurance products and codifying a best interest standard for both life insurance and annuity products will potentially derail the market for lower-priced insurance products by making the production burden outweigh any financial benefit. Further, this regulatory effort will place a chilling effect upon the willingness of agents and advisors to perform routine policy services for clients, such as providing advice or assistance on certain in-force policy matters. Many producers will likely avoid providing these services if they believe there is the risk of violating a poorly defined regulatory obligation. The result will be the disruption in the provision of producer services in a life insurance marketplace that previously served the New York insurance consumer well. We believe that the resulting disruptions in the market, as manifested by decreased availability of critical life insurance products to New York's citizens, far outweigh any benefit that the DFS believes will come from these regulations.

We also draw the Department's attention to recent comments made by the Chairman of the SEC. While discussing the SEC's new fiduciary rule, Chairman Jay Clayton also addressed the issue of "regulatory coordination" between federal and state regulators over certain insurance transactions. The Chairman stated that it is one of his goals to bring "regulatory harmony" to transactions which are governed by "state insurance commissioners and securities regulators, the Financial Industry Regulatory Authority, Inc., the SEC, the DOL and potentially other agencies." (See *Investment News*, "SEC Chairman Outlines Goals for a New Fiduciary Standard" by Mark Schoeff, February 23, 2018) While we understand the importance of this regulation, we strongly

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suggest that the DFS halt the promulgation process to provide time to meet with all of the other agencies listed by the Chairman in order to better coordinate all of the currently pending regulatory efforts. Without such coordination, we fear that the life insurance industry in New York will be severely hampered by the impending “regulatory arms race” that is under way. We are unable to see how such a result could benefit the life insurance consumer.

Therefore, we submit these comments to suggest how the DFS may adapt the proposal to better accomplish its desired goals while minimizing, to the extent possible, the regulation’s unintended consequences, and to recommend to the DFS that they make the regulation drafting process more open, inclusive and transparent. To be sure, we appreciate the willingness of the DFS to discuss its proposed regulatory amendments that are so important to our members and their clients and to consider the recommendations our members will make in their collective effort to make the regulation better.

THE MODERN LIFE INSURANCE TRANSACTION FOR PRODUCER AND CLIENT

Over time, as financial products made available by New York’s life insurers and their producers have become more complex, the sheer number of state statutes, regulations and advisories governing the purchase of those products has increased dramatically. Additionally, as the products have increasingly taken on the traits of investment products the amount of regulation of these products by both state and federal agencies has increased dramatically. Life insurance producers are responsible, both for themselves and their carriers, for ensuring compliance with the dizzying array of federal and state regulatory provisions, while at the same time rendering professional and timely advice to New York’s insurance consumers.

Part of the concern over government’s increasing footprint in the agent-insurer-client relationship, beyond just some of the excesses and duplications of its own efforts, is that the relationship is already governed by significant underwriting and production requirements that are imposed by insurers. Many of those underwriting and production requirements are also heavily reflective of and burdened by regulation. The heft of paperwork required by the underwriting process, as dictated by regulation, provides an effective safety net for all client-facing agents and company actions, but also adds a seemingly endless regulatory documentation obligation that producers must process in order to offer clients the right product that will meet their needs.

The life insurance consumer as a result must often sift through and attempt to process a veritable mountain of paperwork to access the right life insurance product. NAIFA-NYS members report that the amount of legal disclosures, illustrative information, warnings, acknowledgements, comparisons, applications and underwriting forms currently required to be presented to the client by applicable laws and underwriting requirements, taken all together simply overwhelm the client in many cases. We are concerned that if the additional increase in the level of information and disclosures required by the proposed regulations are not more specifically tailored to the exact product sought and circumstances of the transaction, the resulting effect will be one of diminishing utility and, actually, increasing frustration to the consumer. We believe that it is critically important, therefore, to structure the regulation in a manner that does not add to this consumer overload; rather we hope that it will provide the proper guidance to producers that will enable them to continue to provide important advice and insurance products to their clients.

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In a timely development, the LIMRA Secure Data Institute just reported that annuity sales were down in 2017 because of increasing confusion within the regulatory space over such products. The director of annuity research for LIMRA, Todd Geising, is quoted as saying that “he expects sales to be flat or up marginally in 2018, amid persistent market uncertainty surrounding the DOL fiduciary rule, a potential fiduciary rule from the Securities and Exchange Commission this year, and a **swelling number of states** pushing for their own fiduciary regulations.” (Emphasis included). Source “DOL Fiduciary rule continues to take toll on annuity sales,” Investment News (online edition), Feb. 21, 2018.

We offer the following specific comments, suggestions and proposed changes in the language of the proposed regulatory amendments:

REGULATION APPLICATION

At the outset, it is strongly recommended that the regulation apply only to new life insurance product and annuity product sales, including replacement sales. Applying a regulation of this breadth and potential impact upon existing policies, for which the economic basis of such has been long-established, will materially, and adversely impact insurance companies and insurance agents/producers. Although NAIFA-NYS agrees with the intentions behind the regulation, we are compelled to make such a recommendation because of its effect - essentially changing the conditions of a pre-existing financial transaction.

EXEMPTION FOR FEDERALLY REGULATED TRANSACTIONS

One of the first steps that the DFS should take to alleviate consumer and producer confusion and uncertainty is to provide a safe harbor to transactions that are currently governed by federal statutory and regulatory provisions. While we recognize that the DFS has concurrent jurisdiction with the Securities and Exchange Commission and the federal Department of Labor over certain transactions, NAIFA-NYS members are concerned that compliance with both the applicable federal rules and this New York regulation will impose very difficult, duplicative and conflicting burdens upon both producer and client. This burden is unnecessary given the common goals of both state and federal regulations in this area. It is recommended that the proposed amendments should provide that transactions that are also governed by the Financial Industry Regulatory Authority’s (FINRA) current rule for suitability (NASD Rule 2310) are also compliant with the New York regulation. The same exemption should exist for those transactions governed by the impartial conduct provisions of the federal Department of Labor rule with respect to qualified products. The DFS could reserve the right to enforce its standard for any violation of these provisions.

BEST INTEREST RULE FOR CERTAIN LIFE INSURANCE TRANSACTIONS

The application of all the regulation’s best interest and suitability provisions to the more basic life insurance products is not necessary to protect consumers who are looking for simple protection against mortality at the lowest possible cost. Compliance with the regulation’s provisions for the sale of these products will necessarily increase their cost and may result in

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insurers and producers choosing not to offer such products in New York if they are made uneconomical to sell as a result of this regulation. The sale of such policies are already governed by New York's extensive regulatory system which is a national leader in consumer protection. We urge the DFS to conduct an economic analysis designed to assess the regulatory costs on such products, like term insurance, and whether such costs will tip the scales for insurers between offering and not offering them for sale in this State.

NEED TO CLARIFY KEY DEFINITIONS

The scope of the proposed regulatory changes is unduly broad, as evidenced by the following provision,

“[T]his part shall apply to any *transaction* or *recommendation* (emphasis added) with respect to a proposed or in-force policy.” (224.1)

The regulation's definitions of *transaction* and *recommendation* are written to include far too many situations that do not require the application of the full range of the regulation's protections. Our members have described instances where they believe that the application of the regulation would not only result in an unnecessary burden on the sale of a policy but could also result in producers choosing to refer client contacts to the insurer's consumer affairs department instead of providing the sought-after advice to the client directly.

Definition of Transaction

Transaction is defined as

“any (emphasis added) purchase, replacement, modification or election of a contractual provision with respect to a proposed or in-force policy.” (224.3[i])

The application of this regulation to in-force policies could become counter-productive to both the producer and the consumer. Generally, in-force transactions such as a modification or election of a contractual provision do involve some form of interaction with the producer. However, NAIFA-NYS members have indicated that these transactions generally involve assistance from the producer, but do not necessarily constitute additional advice or recommendation. While we recognize that some modifications or elections may require additional advice or recommendation from the producer, most do not. The problem with the definition is that it does not differentiate between such routine situations and those that involve significant policy changes.

- Policy loans, for example, generally do not require advice or recommendation from the producer, especially since that the policy loan option would have been explained to the client at the policy purchase.
- Changes in beneficiaries also do not require advice or recommendation from the producer.

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- Other matters concerning in-force policies do not involve compensation for the producer.

Given the subjectivity in the definition of *recommendation*, our members are concerned that they would have to work through the suitability factors and the best interest provisions to assist a client with these routine policy servicing matters. This result is far too burdensome, and we believe it will cause producers to simply refer clients with such questions to the insurers' consumer affairs department instead of taking the responsibility to helping the client themselves. This would not be beneficial to the client nor to the producer-client relationship. To guard against this unintended result, we recommend that the reference to in-force policies be eliminated entirely. Should the DFS not agree with this recommendation we urge that the definition be amended for in-force policies to apply only to those modifications or elections that would materially alter the consumer's rights or benefits, and that result in additional compensation to the producer. Further, the definition should clearly state that a *transaction* does not include the provision of assistance to the consumer to effectuate a modification or election.

We are also concerned that the application of the proposed regulatory amendments to in-force policies presents a possible improper retroactive application of the new provisions. While we do not believe that the DFS intends to apply this regulation's provisions to the sale or replacement of policies that are in-force on the day the regulation takes effect, we would like the definition of *transaction* to specifically state that its provisions only apply to modifications or elections of policies that were in-force prior to the regulation's effective date.

Definition of Recommendation

"Recommendation (emphasis added) means one or more statements or acts by a producer...to a consumer that: (1) reasonably may be interpreted by a consumer to be advice and that results in a consumer entering into or refraining from entering into a transaction in accordance with that advice; or (2) is intended by the producer...to result in a consumer entering into or refraining from entering into a transaction." (224.3[e])

We are concerned that the first part of the definition establishes a subjective standard viewed solely from the perspective of the consumer. There are numerous ways that such a subjective definition could lead to an unfair result for a producer.

- For example, would it be reasonable for a consumer to believe that the mere assistance provided by a producer to enable that consumer to modify or make a policy election, even if no express recommendation is made by that producer, is, in fact, a recommendation?
- If a producer is asked to review a client's insurance policy and informs the client that the policy "looks good", may this response be "reasonably" believed to be a "recommendation" that the client not obtain any other insurance?

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- Given the fact that the definition includes “statements” or “acts” by a producer, could a consumer reasonably believe that the failure to respond by the producer to a comment or question be, in fact, a “recommendation”?

It is recommended, therefore, that the first provision of the definition be stricken. Our members believe that the second paragraph provides a sufficient standard to enforce the provisions of the regulation.

NAIFA-NYS also recommends that the definition of a *recommendation* contain an exception for informal or social conversations or contacts that are intended to be general and informational and not intended to immediately result in a transaction. Many of our members tell us that the producer-client relationship is often one that lasts over many years and can involve social interactions at a variety of recreational, charitable, religious or other kind of public event. These social interactions assist our members in building the trust and respect that must exist for many clients to rely on the eventual formal recommendation of the producer. For example, a client, who has placed an investment sensitive product with a producer, asks that producer at a social event “which direction do you think the market is going in the next few months?” or “what is your opinion on policy loans?” Requiring a producer to work through the requirements of the regulation and then documenting his or her response to such a general question would be an onerous burden and could fundamentally alter the trust, respect and comfort in the producer-client relationship.

Definition of Suitable

The definition of *suitable* also needs clarification.

“*Suitable* (emphasis added) 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.” (224.3[h]).

The term *all available products, services and transactions* (emphasis added) is unnecessarily vague, overly broad and should be described in more detail. DFS officials have indicated that this is intended to mean only those products, services, and transactions that the producer is authorized to offer, and does not include the universe of all available products, services and transactions in the market. It is recommended that the definition be amended to accurately reflect the representations of DFS staff to provide more particular guidance to producers. Further, independent producers are often authorized to write for many insurers through a number of brokerages or general agents. As a result, those producers may have hundreds of policies available to offer. We urge that the regulation provide guidance to these producers who would be unable to examine all such available policies for each client.

Further, when defining *suitability information* in Section 224.3(g) the words “reasonably appropriate to determine suitability” do not adequately describe which of the suitability factors listed apply to life insurance and which apply to annuities. Without more specific guidance in this definition, consumers could be subject to needless and burdensome requests for information.

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The suitability factors listed should clearly be linked to the specific type of product to be recommended.

BEST INTEREST OF THE CONSUMER STANDARD

The best interest of the consumer standard, as proposed, presents several practical problems for producers attempting to implement its provisions.

Section 224.4(b) (1), which is the primary requirement of the best interest standard, reads as follows:

- (b) The producer...acts in the best interest of the consumer when:
 - (1) the producer'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.

The requirement under the *best interest* standard that the recommendation be made “without regard to the financial or other interests of the producer, insurer, or any other party” needs clarification. The word *regard* does not provide sufficient direction to producers. For example, if the producer can offer two products that both meet the *best interest* standard but one carries a higher level of compensation to that producer than the other, would the producer violate this rule if he or she offered the product that carries the greater compensation? NAIFA-NYS would like to see a clarification that prohibits the producer from considering compensation or other interests of the producer or insurer as the sole or predominant reason for the recommendation. We believe that this change will provide a more workable standard for the producer without sacrificing the intended consumer benefit.

In Section 224.4(b) (3) (i) the list of features should include language that requires informing the consumer of their favorable or unfavorable consequences “to the extent that those consequences are reasonably ascertainable by the producer at the time of the recommendation.”

Section 224.4(c) should be amended to replace the term “reasonable efforts” to “a reasonable number of requests” to clarify a producer’s obligation to obtain suitability information.

NAIFA-NYS objects to Section 224.4(g). This provision is entirely too broad and places an undue burden upon the producer to form a “reasonable basis to believe that the consumer has the financial ability to meet the financial commitment under the policy.” This provision could force a producer to pry too deeply into a client’s financial position to reasonably determine if the client can afford the policy. Our members believe that such intrusiveness could undermine the trust relationship that exists with their clients who may become annoyed at requests for the kind of detailed financial information that a producer would be required to obtain in order to comply with this provision. Further, many life and annuity products have financial commitments that will last well into the future and that could increase over time. It would be impossible to determine, at the recommendation stage, whether a client could meet the financial commitment many years into the future. Given the extensive suitability information required by the

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regulation, the producer will be able to recommend a policy that is initially affordable to the client. Further, the requirements of the *best interest* standard will enable the consumer to determine whether that consumer will be able to afford the policy. For these reasons we recommend striking this provision of the regulation.

Section 224.4(l) prohibits a producer from stating or implying that a recommendation is part of “financial planning, financial advice, investment management, or related services” if that producer does not have a “specific certification or professional designation” in those areas. We recommend that the DFS provide more specificity as to what certifications and professional designations will suffice for compliance with this section. We are aware of such established certifications such as CFP (issued by the Certified Financial Planner Board of Standards, Inc.) and FINRA (Financial Industry Regulatory Authority), however, given the substantial number and diversity of producers in New York, the DFS should amend this provision to allow multiple sources and avenues of obtaining such certifications or professional designations with such qualifications as may be approved by the Superintendent. These avenues should include certifications issued by trade associations such as NAIFA-NYS, with the approval of the Superintendent.

Section 224.4(m) is unworkable in its current form. While it is understood that the DFS desires to have all producers involved in a transaction adhere to the standard of acting “in the best interest of the consumer” we cannot envision how a producer who is involved in some way in the transaction but has no contact with a consumer can technically comply with this provision. Further, we believe that this provision will hinder the training of new agents as the burden of compliance will push agencies to limit the number and types of client matters in which an agent-in-training will be allowed to participate. We request that the DFS rework this provision to provide detailed guidance on how to comply with this provision or strike this provision from the regulation.

EXEMPTION FOR DIRECT SALES

Section 224.2 provides Exemptions to this regulation. In particular, the regulation exempts:

- (a) A direct response solicitation where there is no recommendation made...

Direct response solicitations have evolved since such sales were authorized by the Department many years ago. Originally, direct solicitation sales were for small face amount life insurance policies that were written on a guaranteed basis through the U.S. mail. These direct response solicitations now write large face amount policies through a wide variety of products which involve underwriting by insurers. In many cases, the insurer will speak to the consumer directly to encourage the taking of increased face amounts. Within the past several days we have seen press reports of an increase in the direct sales platforms of several of New York’s life insurers. We have even noted that one life insurer will offer an annuity product through its direct sales platform. While we can only opine as to whether these developments have come in response to recent regulatory proposals, we nonetheless are greatly concerned that more and more life products will be offered to New York’s consumers in this manner and such transactions may indeed be beyond the scope of this regulation.

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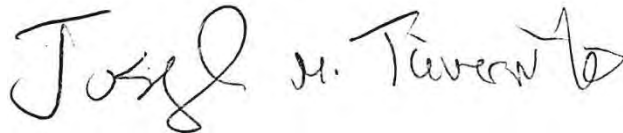
NAIFA-NYS believes that the application of the *best interest* standard to our members' recommendations, without requiring direct response solicitations to follow the same standard, creates an unlevel playing field to the disadvantage of our members and even some of the companies for which they write. While we recommend the elimination of this exemption, we believe the DFS should, at the very least, amend the exemption to make it clear that it only applies to small face amount policies, which do not involve any underwriting. Large face amount policies, policies that require some form of underwriting before issue and policies that are offered after verbal, electronic or other means of contact with consumers, must be required to adhere to this regulation.

Understanding that this issue is of concern to many in the carrier community, NAIFA-NYS would suggest and would welcome a meeting between carriers, agents and the DFS to further explore the direct response issue and options for addressing it.

CONCLUSION

We appreciate the Department's willingness to discuss this regulation and to review these comments and recommendations. We look forward to continuing the dialog on this very important topic.

Very Truly Yours,

A handwritten signature in black ink, reading "Joseph M. Tavernite". The signature is written in a cursive, flowing style with a large initial "J" and a stylized "T".

Joseph M. Tavernite, President
NAIFA-NYS