SUBMITTED ELECTRONICALLY: James.Regalbuto@dfs.ny.gov

February 26, 2018

James V. Regalbuto
Deputy Superintendent for Life Insurance
One State Street
New York, NY 10004

RE: Proposed First Amendment to 11 NYCRR 224 (Insurance Regulation 187)
Suitability in Life Insurance and Annuity Transactions

Dear Mr. Regalbuto:

On behalf of the membership of NAFA, the National Association for Fixed Annuities,[1] I am pleased to have the opportunity to provide these comments regarding the New York State Department of Financial Service's proposed First Amendment to 11 NYCRR 224, Insurance Regulation 187: Suitability in Life Insurance and Annuity Transactions (the Proposed Amendment).

NAFA's membership represents all channels of the independent annuity distribution system – a system that is unique within the financial and retirement services industry to annuity transactions – which includes insurance carriers, insurance marketing organizations, and independent insurance producers. As such, NAFA is distinctly positioned to provide commentary on proposed changes to state-based suitability rules for annuity transactions. We have long been a champion of such rules; moreover, we are pleased to report that the suitability regime is working.

Prior to the NAIC's adoption of the current 2010 version of the suitability model rule,[2] fixed indexed annuity complaints were approximately one complaint per $150 million of premium; in 2017 that rate was one per $550 million – down by nearly three-quarters.[3] Measured against total premium, the percentage of fixed indexed annuity owners prior to 2010 who did *not* make a

[1] NAFA, the National Association for Fixed Annuities, is the premier trade association exclusively dedicated to fixed annuities. Our mission is to promote the awareness and understanding of fixed annuities. We educate annuity salespeople, regulators, legislators, journalists, and industry personnel about the value of fixed annuities and their benefits to consumers. NAFA's membership represents every aspect of the fixed annuity marketplace covering 85% of fixed annuities sold by independent agents, advisors and brokers. NAFA was founded in 1998. For more information, visit www.nafa.com.

[2] NAIC Suitability in Annuity Transactions Model Regulation (#275), available at http://www.naic.org/store/free/MDL-275.pdf.

[3] *Index Compendium*, Vol. 21, No. 4, April 2017, *available at* https://nafa.com/wp/wp-content/uploads/2018/01/IC0417.pdf.

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complaint was 99.7%; today, since industry adopted the more robust suitability culture in 2010, that figure is 99.92%.[4] And, according to data released by the NAIC for 2016, there were 148 complaints related to fixed indexed annuities;[5] for 2017, the NAIC reports that number at just 97 – a 34% year-over-year decrease.[6]

NAFA supported the NAIC's work in developing the 2010 revisions to the suitability model rule, and we have consistently advocated for its adoption at the state level.[7] In fact, NAFA has devoted considerable time and resources to promote and help establish the standards and practices set forth in this model regulation. Our initiative was undertaken in an effort to increase consumer protection and satisfaction by providing better education, instruction, and oversight to the annuity industry; NAFA members, in turn, have put into place sales practices, training, and supervisory protocols to implement the model's enhanced suitability standards. And, today NAFA is participating closely with the NAIC as it considers revising the model rule to include enhanced suitability requirements as well as a new best interest standard of conduct to govern annuity transactions.[8]

In addition to these yet-to-be-finalized new standards coming from the NAIC, the annuity industry still does not know the final contours of the federal fiduciary duty rule. Despite the implementation of the new impartial conduct standards last June, the Department of Labor continues its review of the rule pursuant to the White House memorandum issued on February 3, 2017. Also, it is widely expected that the SEC will propose its own uniform fiduciary standard sometime later this year. Clearly there is a great deal of uncertainty surrounding a new best interest or fiduciary standard of conduct for insurance and annuity sales, and we are concerned that adopting this Proposed Amendment to New York's annuity suitability rule will just exacerbate that uncertainty by creating duplicative and perhaps conflicting regulations.

Recognizing that insurance companies operate on a regional or national platform and that independent insurance producers are licensed in multiple states, NAFA believes that the insurance marketplace is more efficient and better serves American consumers when the state-based regulatory regime is harmonized across state lines. NAFA strongly encourages state insurance regulators to adopt insurance rules and regulations that conform, to the extent possible, with the standards and protocols embodied in the NAIC's model regulations, including the

[4] *Id*.
[5] *Annuity Perspectives*, Vol. 7, No. 4, October 2017, Jack Marrion, *available at* https://nafa.com/wp/wp-content/uploads/2018/01/IC0417.pdf.
[6] NAIC Report: Closed Confirmed Consumer Complaints by Coverage Type, as of December 29, 2017, *available at* https://nafa.com/wp/wp-content/uploads/2018/01/cis_aggregate_complaints_by_coverage_types-0120201816.pdf.
[7] To date, 45 states plus the District of Columbia have adopted, in whole or in part, the 2010 Suitability model rule. See https://nafa.com/wp/wp-content/uploads/2018/01/NAFA_Suitability_Update_012218.pdf.
[8] NAFA comment letter submitted to the NAIC Annuity Suitability Working Group on January 22, 2018, *available at* https://nafa.com/wp/wp-content/uploads/2018/01/2018_0122_NAFA-Comment-Proposed-Revisions-to-the-NAIC-Suitability-in-Annuity-Transactions-Model-Regulation-275.pdf

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standards for annuity transactions. Accordingly, **NAFA believes that the best course of action for the Department in amending its annuity suitability rule would be to delay adoption of the Proposed Amendment and coordinate its efforts with the work being done by the NAIC in revising the suitability model regulation.**

However, we are eager to provide constructive input to the Department of Financial Services regarding some specifics of the proposed Amendment, which we discuss in greater detail below.

EXPANDED SCOPE AND APPLICABILITY OF THE AMENDMENT

1. The Amendment would expand the scope of NY Insurance Regulation 187 beyond a sales *recommendation* to purchase or replace an annuity contract[9] (the current rule) to now be applicable to "any transaction" (§224.1), which, in turn, is newly defined to include not only any purchase or replacement but would also include any "modification or election of a contractual provision" with respect to an annuity contract. NAFA is concerned that this language is too broad and could sweep in post-sale or post-issuance activity, including, for example, interest crediting allocations or an election of a death benefit, which is sometimes done at the consumer's direction without consultation with the producer. It would be inappropriate to impose suitability or best interest standards in circumstances where the consumer makes the election and where there is no producer or insurer recommendation.

   We believe that the applicability of the Proposed Amendment should be limited to the recommendation to purchase or replace an annuity and that there should be no ongoing obligation after the issuance of the annuity contract.

2. Additionally, NAFA is troubled that the revised definition of "Recommendation" includes "one or more statements or acts…that reasonably may be interpreted by a consumer to be advice…" (§224.3(e)(1)). NAFA is concerned that this definition is overly subjective and among other interpretations might include educational and/or marketing material. Indeed, this language is so broad and is entirely subjective from the viewpoint of the consumer that literally any activity or communication could be swept under this definition. Such a broad definition will lead to a chilling effect and decrease the amount of education and information related to retirement available to New York residents. We note that even the Department of Labor has provided a carve-out for educational and marketing materials in its fiduciary duty rule.

[9] NAFA recognizes that the Amendment would also expand the scope of 11 NYCRR 224 (Insurance Regulation 187) to include, *inter alia*, life insurance policies, but, because our Association's mission is focused on fixed annuities, our primary concerns address the Amendment's implications on annuity transactions and the annuity marketplace. Nevertheless, we would like to note that the differences between life insurance and annuities are such that it may not be appropriate to use an annuity suitability regulation as the vehicle to regulate suitability of life insurance sales.

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EXPANDED SUITABILITY ANALYSIS AND DUTIES

1. NAFA is concerned that the expanded suitability analysis under the amended definition of "Suitability Information" – which would now include consideration of the consumer's "tolerance of non-guaranteed elements in the [annuity contract]" (§224.3(g)(12)) – is vague and confusing; the Amendment provides no guidance as to how a producer or insurer would discern whether the consumer had the requisite "tolerance" for such features. Moreover, is this a subjective analysis to be made by the producer at the time of the recommendation as to whether he or she believes the consumer has a suitable level of tolerance, or might the consumer retrospectively determine that, in hindsight, he or she really could not tolerate such non-guaranteed elements? NAFA believes that the duty of the producer (or insurer where no producer is involved) to reasonably inform the consumer about the various features of the annuity contract – including any non-guaranteed contract elements – is sufficient and would provide the necessary platform for a discussion relating to consumer's tolerance for any such features.

2. The new definition of "Suitable" contemplates an assessment based, in part, on whether the transaction or recommendation is suitable in comparison to "all available products, services, and transactions." (§224.3(h)). NAFA is concerned that this broad mandate could be interpreted to require insurance-only agents to evaluate products that they are not, without additional licensure, permitted to evaluate, such as securities. This presents a similar problem for insurers, as insurers would be required to assess whether the annuity transaction is suitable based upon a consideration of "all available products, services, and transactions," which, again, could be construed to require insurers to evaluate other companies' product offerings.

   We would recommend amending this subsection to clarify that producers would only be responsible to consider those products that the producer is authorized to sell and that an insurer is responsible to evaluate the suitability of the annuity transaction based upon a consideration of the insurer's own annuity products only.

3. Subjecting "every producer" in the transaction – regardless of whether the producer has had any direct contact with the consumer or received any compensation as a result of the transaction – to the duties and requirements of the Amendment (§224.4(m)) is unnecessarily duplicative and is at odds with existing rules that logically apply such requirements only to the producer who makes the recommendation to the consumer. Additionally, this language is extremely vague which could lead to unintended liability of producers who were never intended to be subject to this regulation.

   Any duty or requirement of an amended suitability rule should apply only to producers who actually make a recommendation to the consumer.

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4. The Amendment should not expand suitability requirements for non-recommended transactions (§224.4(e)(2)). Currently, in situations where a consumer purchases an annuity where there was no recommendation to do so, or where a recommendation is made but is based upon materially inaccurate information provided by the consumer (a "non-recommended transaction"), Insurance Regulation 187 requires insurers to ensure that the issuance of the annuity contract is reasonable under the circumstances actually known to the insurer at the time the annuity contract is issued. The Proposed Amendment would require insurers to ensure a non-recommended transaction is suitable based on all the information actually known to the insurer at the time of the transaction.

   There are two problems here: first, requiring an insurer to conduct a suitability analysis on non-recommended purchases – particularly where the consumer either provided materially inaccurate suitability information or otherwise refused to provide the relevant suitability information – makes no sense and is without precedent under current market conduct standards. Second, because the Proposed Amendment would define a transaction to include any modification or election of a contractual provision, this suitability analysis and review would create an ongoing obligation for insurers throughout the life of the contract. In fact, it would not be enough to base such an analysis – ongoing as it may be – on the information known by the insurer at the time the annuity was issued. At each triggering point in the transaction, the insurer would have to assess whether there was any new or modified information to "actually" know about. In other words, not only would the review be ongoing, "all the information actually known to the insurer" would be potentially evolving or changing as well.

   An annuity product is a contract based upon certain conditions present at the time of issuance and is typically in place for a set duration of time; to allow consumers to rescind or otherwise modify a contract based on an after-issuance suitability analysis – potentially years down the road – harms the insurance carrier and jeopardizes the guarantees provided in the contract. NAFA would encourage the Department to revise this subsection of the Proposed Amendment back to its current standard.

THE NEW BEST INTEREST STANDARD

The new best interest duty under the Proposed Amendment requires any annuity recommendation be made "without regard to the financial or other interests of the producer, insurer, or any other party." (§224.4(b)(1)) However, later in the Amendment, its states that, "Nothing in this [Regulation] shall be construed to prohibit the payment to a producer of any type or amount of compensation otherwise permitted under the Insurance Law." (§224.4(n)) The latter subsection directly – and appropriately – recognizes the reality that insurance producers are paid for their professional services, but

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the best interest standard is so broad that virtually any payment in any amount could render the producer in violation of that standard. Arguably, other non-cash compensation and employment benefits provided to a producer could also fall under the requirement that annuity recommendations be made without regard to the financial or other interests of the producer.

NAFA believes that a duty of loyalty can be satisfied by language that requires an annuity recommendation place the interest of the consumer before that of the producer or insurer.

REQUIREMENT OF SPECIAL CERTIFICATION OR PROFESSIONAL DESIGNATION

The Proposed Amendment would prohibit producers from stating or implying to a consumer that the recommendation to enter into a transaction was "part of financial planning, financial advice, investment management or related services" unless the producer has a specific certification or professional designation that would allow him or her to do so. (§224.4(l))

Here again, NAFA is concerned that this language is overly-broad, as it is difficult to comprehend that a discussion regarding a retirement planning product such as a fixed annuity would not be "implied" to be part of a "financial plan" – or, for that matter, "a related service." Advice related to annuities is financial advice; it is advice that has to do with (is part of) finances and financial planning. Further, as we discussed above, producers who hold insurance licenses only are already prohibited from providing advice related to investments or investment management.

NAFA recommends that the Department amend the language to prohibit producers from stating or implying that they are authorized to offer investment advice unless they are qualified under law to do so.

EFFECTIVE DATE

Finally, NAFA requests that the Department consider extending the effective date of the Proposed Amendment, which currently is scheduled to take effect 90 days after the final proposed rule is published in the State Register. The Department has set forth an ambitious overhaul of its regulation governing annuity – and, as proposed, life insurance – transactions. We sincerely hope that the Department will makes changes to the Proposed Amendment, but, in any case, we can expect that annuity manufacturers, providers, and sellers will be faced with creating and implementing significant new business practices and protocols under a revised Insurance Regulation 187, and they need much longer than 90 days to do so in a meaningful way. NAFA respectfully requests the Department to provide, at a minimum, a one-year period after final publication for the final regulation to be implemented.

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Again, on behalf of NAFA's members, I want to thank you for opportunity to submit these comments. Please do not hesitate to contact me if you would require any additional information.

Sincerely,

Charles "Chip" Anderson
NAFA Executive Director

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