

Life Bureau Guidance Note

Guidance Date: [DRAFT 10-7-19]

Frequently Asked Questions Regarding First Amendment to Insurance Regulation 187

The New York State Department of Financial Services (the “Department”) promulgated the First Amendment to Insurance Regulation 187 (11 NYCRR 224), Suitability and Best Interest in Life Insurance and Annuity Transactions (“Regulation 187”), which has an effective date of August 1, 2019 for annuity transactions and February 1, 2020 for life insurance transactions.

To assist insurers and producers in complying with Regulation 187 and to correct misinformation about Regulation 187 by certain external entities, the Department has compiled the following list of frequently asked questions.

Regulation 187 takes a principles-based approach, setting standards that must be met but also affording significant flexibility in how producers and insurers meet those standards. Regulation 187 does not impose any particular systems, forms, or procedures for meeting the requirements of the regulation. The responses provided in this Q&A are limited to the scenarios presented. The addition, deletion, or modification of facts may change the Department’s responses. These responses do not represent a pre-determination of a producer’s or insurer’s overall compliance with the regulation. Compliance with Regulation 187 will be examined in the context of all relevant facts and circumstances. Except as specifically noted, these responses should not be construed as the Department requiring or favoring any particular approach to compliance.

See also: [Frequently Asked Questions Regarding Section 224.4\(f\) of Regulation 187](#)

Question: Generally, how will the Department approach its review of a transaction for compliance with the best interest standard in section 224.4(b)?

Answer: The Department views the best interest standard more as a process than a singular outcome so the Department expects to focus on the producer’s process and analysis from the initial gathering of suitability information and initial consideration of the products available for sale by the producer to the subset of those products that would be suitable¹ for the particular consumer and finally the recommendation to the consumer of one or more products that best meet the needs and objective of the consumer under the consumer’s personal and financial circumstances. A producer should expect the Department to request information/documentation about the steps taken and analysis performed during that process.

Citation: 11 NYCRR 224.0, 224.4(b), 224.5(b),

¹ Suitable means in furtherance of a consumer’s needs and objectives under the circumstances then prevailing, based upon the suitability information provided by the consumer and all products, services, and transactions available to the producer. 11 NYCRR 224.3(h).

Question: Are producers required to document why certain products or transactions were not recommended or just document and disclose why a particular product or transaction was recommended?

Answer: Generally, a producer does not need to document why other products or transactions were not recommended unless it is relevant to understanding the basis of the recommendation that was made. For example, if a producer recommends that a consumer purchase an immediate annuity to further the consumer's goal of immediate lifetime income, the Department would not be looking for documentation of why the producer did not recommend other products that do not provide for immediate lifetime income. However, if a producer recommends to a consumer that they replace a deferred annuity with an immediate annuity, the producer should document why the producer recommended that the consumer purchase the immediate annuity instead of exercising the annuitization option under the existing deferred annuity, particularly if the annuitization option under the existing deferred annuity would have resulted in higher income to the consumer. Similarly, if a producer is choosing between two immediate annuities to recommend to the consumer, the producer should document why one was chosen over the other, particularly if the annuity not recommended would have provided higher income to the consumer.

Citation: 11 NYCRR 224.4

Questions: Are producers required to consider in their suitability analysis products that they are not licensed to sell?

Answer: No, section 224.3(h) of Regulation 187 provides: "Suitable means in furtherance of a consumer's needs and objectives under the circumstances then prevailing, based upon the suitability information provided by the consumer and all products, services, and transactions *available to the producer.*" [emphasis added]. If a producer is not licensed to sell a product then that product is not "available to the producer" for purposes the producer's suitability analysis.

Citation: 11 NYCRR 224.3(h)

Question: Will the Department's review for compliance with the best interest requirement be based on hindsight and subsequent performance of an annuity contract or life insurance policy?

Answer: No, section 224.5(b)(1) of Regulation 187 provides, in relevant part, that "the producer's or insurer's recommendation to the consumer is based on an evaluation of the relevant suitability information of the consumer and reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use *under the circumstances then prevailing*" [emphasis added]. For compliance with section 224.5(b), the Department will be looking at the circumstances at the time the recommendation was made.

Citation: 11 NYCRR 224.5(b)(1)

Question: In the case of replacements, could the Regulation 60 Disclosure Statement be used to satisfy some of the disclosure or documentation requirements under Regulation 187 or would separate disclosure or documentation be required for Regulation 187?

Answer: To the extent that the Disclosure Statement under Insurance Regulation 60 (11 NYCRR 51) contains all necessary information required by Regulation 187, it could be used to also satisfy Regulation 187.

Question: When does an “In-Force Transaction” become a “Sales Transaction” for the purposes of Regulation 187?

Answer: If a producer recommends a modification or election of a contractual provision with respect to an in-force policy, it falls within the definition of “in-force transaction” if it does not generate new sales compensation. If it does generate new sales compensation, then it falls within the definition of “sales transaction”. Note: The regulation provides that new sales compensation does not include compensation provided to a producer when, after the initial premium or deposit under a policy, the consumer pays further premiums or deposits pursuant to the policy.

Citation: 11 NYCRR 224.3(j) and (k)

Question: For “In-Force Transactions”, is a producer required to collect suitability information or document the basis of the recommendation?

Answer: When making a recommendation for an in-force transaction,² there is no requirement under Regulation 187 to collect suitability information again or document the basis of a recommendation (although documentation remains a best practice). However, the producer must still act in the best interest of the consumer and have a reasonable basis to believe the consumer has been informed of the relevant features of the policy and potential consequences of the transaction.

Citation: 11 NYCRR 224.4(f), 224.5; 11 NYCRR 243

Question: In whose best interest is a producer required to act where the owner and insured are different? Should consideration be paid to the needs of potential beneficiaries?

Answer: Regulation 187 requires producers to act in the best interest of the “consumer”. The term “consumer” is defined in section 224.3(a) as “the owner or prospective purchaser of a policy”. This follows well established law and precedent that the owner retains all rights and privileges of an annuity contract or life insurance policy. As a result, where the owner and insured are different, the producer is required to act in the best interest of the owner.

² In-force transaction means any modification or election of a contractual provision with respect to an in-force policy that does not generate new sales compensation. New sales compensation does not include compensation provided to a producer when, after the initial premium or deposit under a policy, the consumer pays further premiums or deposits pursuant to the policy. 11 NYCRR 224.3(k).

Consideration of the needs of any potential beneficiaries should occur as part of the analysis of suitability criteria for the owner to the extent that the needs of the potential beneficiaries are relevant to furthering the needs or goals of the owner.

Citation: 11 NYCRR 224.3(a)

Question: Can a producer comply with Regulation 187 by demonstrating compliance with FINRA rules, the SEC’s Regulation Best Interest, the NAIC model suitability regulation, the CFP® standards of conduct, or as a result of acting as a fiduciary?

Answer: No. Any recommendations made with respect to annuity contracts and life insurance policies that are subject to the New York Insurance Law after the effective date of the regulation must fully comply with Regulation 187. An important benefit of Regulation 187 is that it establishes a uniform standard of care across all annuity and life insurance transactions, which provides consistent consumer protection and a consistent and cost-effective regulatory framework to ensure fair treatment regardless of product choice or market. This benefit would be lost if different producers were complying with different regulations or standards as a substitute for complying with the uniform standards in Regulation 187. Regulation 187 contains important provisions, requirements and definitions that differ from these other regulations or standards, which have a different scope or focus and derive from different law. However, the same documentation or disclosures could meet multiple standards simultaneously, so long as they are independently in compliance with Regulation 187.

Question: Can a producer still use illustrations in a life insurance or annuity sale and be compliant with Regulation 187’s requirements?

Answer: Yes. Compliant illustrations for annuity and life insurance products are an important part of educating consumers on how products operate and provide important and required product disclosures. Comparisons of product illustrations and information provided by a product illustration may be considered as part of producer’s best interest analysis. However, a recommendation cannot be solely based on illustrated or projected values, particularly when the product contains non-guaranteed elements. The recommendation must be based on a comprehensive analysis of the consumer’s needs and objectives and how the product features and benefits will meet those needs and objectives.

Question: How can a producer conduct a best interest analysis when the products being contemplated include non-guaranteed elements such as dividends, interest credited by the insurer or sub-accounts invested in securities?

Answer: Many annuity and life insurance products include non-guaranteed elements that can change as a result of insurer, market or economic factors. The uncertainty of non-guaranteed elements is not inconsistent with a careful and prudent recommendation. Regulation 187 explicitly requires producers to consider the consumer’s willingness to accept non-guaranteed elements in a policy, including potential variability in premium, cash values, death benefit, fees, etc. The producer’s recommendation to a consumer under Regulation 187 should carefully consider the risks and potential benefits of non-guaranteed elements (versus fully guaranteed

products) as occurs with other types of risk that are considered in the process of making recommendations.

Citation: 11 NYCRR 224.2(g)(1)(viii), 224.2(g)(2)(xii)

Question: Can a producer simply provide one or more quotes to the consumer and avoid the requirements of Regulation 187?

Answer: No. Consumers would reasonably interpret the act of presenting one or more quotes for particular products as constituting a recommendation to purchase the products.

Section 224.3(e) provides:

“Recommendation means one or more statements or acts by a producer, or by an insurer where no producer is involved, 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, or an insurer where no producer is involved, to result in a consumer entering into or refraining from entering into a transaction. A recommendation does not include general factual information to consumers, such as advertisements, marketing materials, general education information regarding insurance or other financial products and general administrative services to the consumer. A recommendation also does not include use of an interactive tool that solely provides a prospective consumer with the means to estimate insurance, future income, or other financial needs or compare different types of products or refer the consumer to a producer, provided that the interactive tool is not used by a producer, or an insurer where no producer is involved, to satisfy any requirement imposed by this Part.”

Citation: 11 NYCRR 224.3(e)

Question: Regulation 187 contains different suitability criteria for term life insurance products with no cash value than for permanent life insurance. Which suitability criteria should a producer consider when replacing term life insurance with permanent life insurance and vice versa?

Answer: When replacing term life insurance with permanent life insurance or vice versa, the producer should consider all suitability criteria that is relevant to the transaction.

While Regulation 187 contains separate lists of suitability criteria for term products with no cash value and other products, both lists provide that these lists should be considered “as relevant to the consumer.” Both lists also include among the factors “any other information provided by the consumer which in the reasonable judgment of the producer, or insurer where no producer is involved, is relevant to the suitability of the transaction.” This structure was intended to allow the list of suitability criteria to vary based on a consumer’s situation at the time of the recommendation and the complexity of the transaction.

Citation: 11 NYCRR 224.3(g)

Question: Can a producer provide service to a consumer where he or she insists on acting counter to the producer’s recommendation?

Answer: Yes. When a consumer wishes to enter into or refrain from entering into a sales transaction contrary to the recommendation of the producer, the producer may still provide administrative assistance to facilitate that transaction. However, the producer must document the basis of the recommendation made as required by Regulation 187 and document that the product or transaction chosen is not based on the producer’s recommendation. An insurer’s effectuation of such a transaction must still be suitable based on all information actually known to the insurer at the time of the sales transaction.

Citation: 11 NYCRR 224.4(e), 224.4(f)(4)

Question: Are general agents, sales managers, wholesalers and other support staff subject to Regulation 187?

Answer: Any requirement applicable to a producer under Regulation 187 applies to every producer that materially participates in the making of a recommendation and who receives compensation as a result of the transaction, regardless of whether or not an individual has any contact with the consumer. This would include sales managers, general agents and product or investment specialists that help to specifically tailor the recommendations for the consumer.

Product wholesaling, product support (i.e., the provision of non-client specific product training and information) and the provision of generic educational, administrative or marketing information does not meet the definition of a recommendation and would not subject the requirements of Regulation 187. However, when the providers of this type of information begin to tailor that information based on a particular consumer, they fall within the definition of recommendation and will then be subject to the requirements of Regulation 187.

Citation: 11 NYCRR 224.4(k), 224.5(d)

Question: Does Regulation 187 apply retroactively?

Answer: No. Regulation 187 does not apply retroactively to recommendations made prior to the effective date of the regulation. Regulation 187 only applies to new recommendations made after the effective date of the regulation. This would include new recommendations with respect to in-force life insurance policies or annuity contracts.

Citation: 11 NYCRR 224.3(k), 224.9

Question: When analyzing suitability, should a producer take into consideration that the policy will be used in connection with a trust? In whose best interest is a producer required to act where a trust is purchasing the policy or contract?

Answer: The definition of suitability information in section 224.3(g) of Regulation 187 includes “intended use of the policy, including any riders attached thereto”. If the fact that the policy will be used in connection with a trust is relevant to the transaction being recommended, then it would need to be considered.

Regulation 187 requires producers to act in the best interest of the “consumer”. The term “consumer” is defined in section 224.3(a) as “the owner or prospective purchaser of a policy”. This follows well established law and precedent that the owner retains all rights and privileges of an annuity contract or life insurance policy. In the case of a policy or contract purchased by a trust at the behest of the trustee, the trust retains all rights and privileges of the annuity contract or life insurance policy. As a result, the producer is required to act in the best interest of the owner-trust. Consideration of the needs or circumstances of trust beneficiaries should occur as part of the suitability analysis for the owner-trust to the extent that the needs or circumstances of the trust beneficiaries are relevant to furthering the goals of the owner-trust.

Citation: 11 NYCRR 224.3(g)

Question: Can a producer consider financial strength, in-force service, reputation and other factors as part of a best interest analysis?

Answer: Yes. The definition of suitability information in section 224.3 of Regulation 187 permits consideration of “any other information provided by the consumer which in the reasonable judgment of the producer, or insurer where no producer is involved, is relevant to the suitability of the transaction”. Producers may weigh multiple factors that are relevant to the best interests of the consumer including the benefits provided by the policy, the price of the policy, the financial strength of the insurer and any other relevant factors that might differentiate products or insurers. The Department recognizes that these factors could conflict with one another and expects producers to consider and disclose to the consumer these trade-offs as part of a comprehensive best interest analysis. The Department has seen abuses in the past where producers have attempted to rely on negligible differences in a single factor such as financial strength to justify recommendations of otherwise non-best interest transactions.

Citation: 11 NYCRR 224.4(c)

Question: The health status or likely/actual underwriting classification for a life insurance applicant is not listed as a suitability criterion. Can a producer consider it in a best interest analysis?

Answer: Yes. The definition of suitability information in section 224.3 of Regulation 187 permits consideration of “any other information provided by the consumer which in the reasonable judgment of the producer, or insurer where no producer is involved, is relevant to the suitability of the transaction.” Where health information is known by the applicant and the producer at the time of the producer’s analysis of the consumer’s suitability information, it is entirely appropriate to consider how that impacts the ability of the applicant to obtain the amounts and types of coverage desired, how this impacts the recommendation the producer would otherwise make based on the applicant’s suitability information, and from which company that consumer is likely to receive the best underwriting offer.

Producers should document and disclose to the consumer how any health or medical factors impacted the recommendation in the same manner as the producer would with other product and suitability factors.

Citation: 11 NYCRR 224.3

Question: Can an insurer’s life insurance underwriting standards play a role in satisfying the insurer’s suitability obligations under Regulation 187?

Answer: Yes. The Department expects that most insurers’ existing financial, medical and affordability underwriting criteria may already meet the requirement that insurers assess life insurance suitability. Insurers’ processes should ensure that any policy to be issued (along with the structure thereof or riders attached thereto) would meet the stated needs and objectives of the prospective policyowner under the circumstances prevailing at the time of application, consistent with the suitability information provided and medical condition of the proposed insured.

Citation: 11 NYCRR 224.6

Question: When can a producer use the term “Financial Planner” or “Financial Adviser/Advisor”?

Answer: Regulation 187 prohibits a producer from using the term “financial planner” or “financial adviser/advisor” unless that producer (1) has a specific licensure, designation or credential related to that title and (2) actually provides services beyond the sale of insurance such as comprehensive financial planning, investment management, etc. This standard would also be applicable to the names of any agencies or companies as well as any slogans, taglines or marketing done by firms.

The Department interprets this provision of Regulation 187 consistently with the SEC’s current interpretation of Regulation Best Interest³, that in most cases broker-dealers and their financial professionals cannot use the terms financial adviser/advisor and that such terms are limited to registered investment advisers.

Citation: 11 NYCRR 224.4(j), 224.5(c)

Question: Regulation 187 requires that an insurer’s compensation program, when taken as a whole, does not incentivize non-best interest recommendations. What types of practices are prohibited under this language?

Answer: Regulation 187 recognizes that producer’s receipt of compensation that is otherwise compliant with New York Insurance Law and regulations, including commissions, fees, welfare and retirement benefits, etc., do not create a per se violation of the best interest standard. Additionally, insurers are allowed to maintain within and across product lines variations in compensation and other incentives arising from the underlying economics of issuing a particular annuity contract or life insurance policy. Differences in compensation arising from the same compensation *rate* being applied to similar products with different premium levels also do not violate Regulation 187.

Insurers must still review their overall compensation programs to ensure that they do not incentivize non-best interest recommendations. This means that compensation programs should

³ <https://www.sec.gov/rules/final/2019/34-86031.pdf> Pages 156-158

not clearly incentivize sales of particular products over others. Sales contests and other temporary incentives based on the sales of particular products would not be consistent with the requirements of Regulation 187.

Citation: 11 NYCRR 224.6(d)

Question: What are the requirements of a producer related to the producer’s “captive” or affiliated relationship with a particular insurer?

Answer: A producer may affiliate with a particular insurer where the producer is contractually charged with only or primarily offering that insurer’s products. Captive or affiliation agreements may require that a producer only sells products for a particular insurer (whether or not this provision is actively enforced by the insurer) or may include agreements where a producer is affiliated with a particular insurer and required to meet minimum production requirements to maintain affiliation, but where the producer is not otherwise limited in terms of what products the producer can sell.

Where a producer is captive or affiliated with a particular insurer, it is permissible for the producer to limit the range of products offered to consumers based on this affiliation, provided that the producer discloses to the consumer in writing prior to a recommendation (1) the nature of the agreement with the insurer and (2) the circumstances in which the producer will and will not limit recommendations to just the affiliated insurer. Insurers have prepared disclosure for their producers to use to satisfy this requirement.

Producers should note that it is not permissible to claim to be independent when maintaining an affiliation agreement with a particular insurer. Similarly, a producer cannot claim to be fully captive (and therefore able to limit recommendations) when routinely selling products from other insurers.

Additional information for insurers on the requirements for captive or affiliated producers can be found in [Procedural Guidance for Insurers Filing Disclosure Pursuant to Sections 224.4\(m\) and 224.6\(h\) of Regulation 187 or for adding Producer Attestations or Certifications to Application Policy Forms](#).

Citation: 11 NYCRR 224.4(m)

Question: Does the exemption in section 224.2(a) of Regulation 187 mean that an insurer’s direct to consumer sales are exempt from Regulation 187? Can an individual producer utilize this exemption?

Answer: Section 224.2(a) of Regulation 187 provides that the regulation shall not apply to transactions involving “purchase of a policy where the application is solicited and received in response to a generalized offer by the insurer by mail, at the worksite, or under other methods without producer involvement, other than customer service, administrative support, or enrollment services, and where there is no recommendation made;”.

This exemption only applies where the application is solicited and received in response to a *generalized offer* (i.e., not individually tailored). If the insurer seeks to tailor coverage to a

specific consumer, that would not fit within the exemption (other than a generalized menu of limited options available to everyone receiving the generalized offer).

This exemption also only applies where no recommendation is made. If at any time in the solicitation/sales process the insurer makes a recommendation, the exemption in 224.2(a) would not apply and the recommendation would be subject to Regulation 187. For example, if an insurer were to mail a generalized offer that solicits the consumer to call the insurer and when the consumer calls the insurer makes a recommendation to the consumer, that recommendation would be subject to Regulation 187.

A producer cannot claim an exemption under section 224.2(a). However, a producer could earn commissions for providing administrative enrollment services for generalized offers, such as in the context of worksite sales, without falling within the requirements of Regulation 187 provided no recommendations are made.

Citation: 11 NYCRR 224.2(a)

Question: A few insurers have indicated that they have experienced technical issues or other complications while making system changes to implement Regulation 187, which may result in delayed implementation for some of their products. The insurers asked whether they would need to suspend sales of those products if they are unable to implement the system changes to be fully compliant with the regulation by the effective dates.

Answer: Insurers would not need to suspend sales. An insurer who is making a good faith effort to comply with the regulation may contact the Department during a six-month grace period and would not be considered out of compliance with Regulation 187 while finalizing and testing system changes provided the following conditions are met:

- 1) The insurer collects the required suitability information for each sales transaction;
- 2) The insurer has taken steps to ensure that every producer recommending any transaction with respect to the insurer's policies is adequately trained as to how to make best interest recommendations in accordance with Regulation 187;
- 3) The insurer has reasonable procedures to ensure its producers collect suitability information and document and disclose the basis of any recommendation of a sales transaction with respect to its policies;
- 4) The insurer conducts a suitability review prior to the issuance of an insurance product or the effectuation of a sales transaction; and
- 5) The insurer has procedures designed to prevent financial exploitation and abuse.