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New York's Department of Financial Services Releases Long-Awaited Guidance on Rule 187: What Producers Need to Know

The New York Department of Financial Service's (NYDFS) new Best Interest regulation for life insurance and annuity transactions (Rule 187) requires producers to make significant changes in how they develop, document, and disclose information about the life insurance and annuity policies they recommend to their clients. Given the magnitude of these changes, AALU and many other groups have been calling on NYDFS to issue guidance clarifying the requirements of Rule 187. Unfortunately, despite these requests, NYDFS did not issue any guidance until early September. However, now that we finally have some new information, producers need to know what NYDFS expects as the Rule's application to life insurance transactions begins February 1, 2020.

What Issues Does the New Guidance Address?

Most of the new guidance is directed to one specific (but very important) section of Rule 187 that describes a producer's documentation and disclosure requirements. In addition to this producer disclosure guidance, NYDFS issued separate guidance for insurers addressing a specific disclosure applicable to insurers who permit a dually-licensed producer to recommend either a fee-based or a commission-based version of the policy.

To understand the producer disclosure guidance, it is helpful to review a small part of the language in Rule 187:

“A producer, or an insurer where no producer is involved, shall at the time of a recommendation:

(1) disclose to the consumer in a reasonable summary format all relevant suitability considerations and product information, both favorable and unfavorable, that provide the basis for any recommendations;

(2) document the basis for any recommendation made, subject to subdivisions (a) and (b) of this section and the facts and analysis to support that recommendation”

What are the Important Questions the Producer Disclosure Guidance Answers?

The guidance largely focuses on practical questions related to when and how disclosure is required. As these obligations fall on producers, it is important to understand these issues. Below are the key takeaways we’ve summarized from the Q&As:

Q: Can the disclosure of the suitability considerations and favorable and unfavorable factors that are the basis of the recommendation be delivered to the consumer at the end of the process along with the policy itself?

A: No—the recommendation occurs at the beginning of the process, when the proposed policy is recommended, and disclosure must be provided before the consumer applies for the policy. NYDFS explains that one of the benefits of pre-application disclosure is to “...reduce instances of recommendations that are based on misunderstandings or miscommunications between producers and consumers... [by] afford[ing] the consumer an opportunity to identify and correct any misunderstandings or miscommunications about the consumer’s goals, needs, or personal/financial circumstances.”

Q: If the recommendation changes during the process, can the disclosure be provided only for the final recommendation? (For example, due to underwriting issues that cause the producer to alter the initial recommendation)

A: No—each time a producer recommends a policy, the consumer must receive the disclosure explaining the basis for the recommendation. In this example, the disclosure would have to be provided for the initial recommendation and for the modified final recommendation before the consumer acts on each of the recommendations.

Q: Can the disclosure be sent via email?

A: Yes—NYDFS does not impose specific format or delivery method requirements. However, the disclosure must be in a “reasonable summary format” and the producer must be able to document to NYDFS what was disclosed to the participant and when (such as by retaining the email sent to the consumer).

Q: Does the disclosure have to be in writing?

A: Technically no, the disclosure can be made orally under Rule 187. However, the producer has to be able to “produce reasonable and reliable documentation of compliance” to NYDFS. For example, NYDFS would accept an audio recording of the oral disclosure, or a subsequent written communication between the consumer and the producer confirming the oral disclosure and the date it was made. The Q&A implies that simply making a note that an oral

disclosure was made during a telephone call likely will not satisfy the documentation requirement, as this will not demonstrate the content of the disclosure.

Q: Insurers have a duty under Rule 187 to supervise and train producers in complying with the Rule when selling their products. Can an insurer require the producer to complete a customer profile with factual details that are the basis for the recommendation? Can the insurer require the producer to certify that the producer made a compliant recommendation to the consumer? Can the insurer require the producer to memorialize in writing that the proper disclosure was made to the consumer?

A: The answer is yes, but NYDFS went on to make three important clarifying points.

1. Rule 187 does not specifically require any particular forms or processes, but leaves insurers with some discretion in designing compliant supervision and training processes. NYDFS, therefore, does not require any of these particular ways to supervise producers, but it also does not object to any of them.
2. These methods alone may not be enough, however, to meet the insurers' supervisory responsibilities for producers. NYDFS explains that, for example, "...an insurer who solely utilizes a producer attestation form but has no procedures in place to ever audit transactions to verify any of the attestations has not met its supervisory responsibilities."
3. NYDFS also specifically noted that insurers may contract with third parties to conduct training and supervision, including auditing. This appears to make it clear that these and other services commonly provided by various types of intermediaries may continue under Rule 187.

What Special Disclosure Rules Apply to a Dually-Registered Producer Who May Recommend Either a Fee-Based or a Commission-Based Version of an Insurer's Product?

Rule 187 places a specific obligation on insurers who have authorized a producer to recommend both a fee-based and a commission-based version of the product to disclose to the consumer ("in a form acceptable to the superintendent") a comparison of the differences in the product.

In reviewing filings describing these disclosures, NYDFS learned that some insurers had different commission-based agreements for the same product with different distributors—as a result, the comparison related to one producer addressing the fee vs. commission product would be different from the comparison related to another producer because the commission arrangement applicable to each producer was different. Among other issues, NYDFS was concerned that this could result in otherwise similar consumers being offered the same product on different terms without clear disclosure. Accordingly, NYDFS clarified the disclosure requirement to offer two choices to insurers. Either the insurer can:

1. Provide to the consumer one comparison disclosure that addresses the fee-based version and all versions of the commission-based product (whether available through that producer or not), or
2. Provide to the consumer a comparison addressing only the fee-based and commission-based products available through that producer, but the comparison must include a “prominently displayed” notice reading: “[Insert Name of Insurer] offers through other distributors other versions of this product not shown in this comparison that may have different costs and/or benefit levels such as [Insert areas of difference such as annual fee, surrender charge, bonus level, etc.]. A full comparison of these differences can be viewed at [website location] or can be obtained by calling [phone number].” The insurer’s website then must provide the disclosure described in the first choice above.

Conclusion:

While this guidance is helpful in addressing some pragmatic questions, AALU continues to believe that additional guidance will be helpful for producers, and we will continue to engage with NYDFS to assist our members in complying with these broad new rules. Producers selling life insurance and annuity products in New York need to pay close attention to these developments, and to work with their insurers and intermediaries to focus on compliance. Please contact David Hollingsworth (hollingsworth@aalu.org; 202-742-4589) with any questions or concerns.