



February 26, 2018

New York State Department of Financial Services
Attn: Mr. James V. Regalbuto
Deputy Superintendent for Life Insurance, Life Bureau
One State Street
New York, NY 10004-1511
james.regalbuto@dfs.ny.gov

RE: Public Comment on Proposed Amendments to Insurance Regulation 187 (Suitability in Life Insurance and Annuity Transactions), I.D. No. DFS-52-17-00020-P

Dear Deputy Superintendent Regalbuto and NYDFS Staff:

The Financial Planning Coalition (Coalition)¹ – comprised of Certified Financial Planner Board of Standards (CFP Board),² the Financial Planning Association® (FPA®),³ and the National Association of Personal Financial Advisors (NAPFA)⁴ – appreciates the opportunity to comment on the New York State Department of Financial Services' (NYDFS) proposed amendments to Insurance Regulation 187, announced in the December 27, 2017 press release.⁵

I. Introduction of the Coalition and Summary of Recommendations

The Coalition brings together the national organizations leading the development and advancement of the financial planning profession. The Coalition seeks to educate policymakers about the financial planning profession, to advocate for policy measures that affect financial planners, ensure financial planning services are delivered in the best interests of the public, to enable the public to identify trustworthy financial advisers. The Coalition has supported a fiduciary standard of care for personalized investment advice – across all business models – for nearly a decade.

¹ The Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession.

² CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for approximately 80,000 CERTIFIED FINANCIAL PLANNER™ professionals throughout the country. CFP® professionals voluntarily agree to comply with CFP Board's rigorous standards including education, examination, experience and ethics, and subject themselves to disciplinary oversight of CFP Board.

³ FPA® is the largest membership organization for CFP® professionals and those who support the financial planning process in the U.S. with over 23,000 members nationwide. With a national network of 88 chapters and state councils, FPA® represents tens of thousands of financial planners, educators and allied professionals involved in all facets of providing financial planning services. FPA® works in alliance with academic leaders, legislative and regulatory bodies, financial services firms and consumer interest organizations to represent its members.

⁴ NAPFA is the nation's leading organization of fee-only comprehensive financial planning advisors with more than 3,000 members nationwide. NAPFA members are highly trained professionals who adhere to high professional standards. Each NAPFA advisor annually must sign and renew a Fiduciary Oath and subscribe to NAPFA's Code of Ethics.

⁵ NYDFS, "Governor Cuomo Announces New Consumer Protections for Life Insurance Sales" (Dec. 27, 2017), available at <http://www.dfs.ny.gov/about/press/pr1712271.htm>.

The Coalition supports the NYDFS in its decision to adopt a best interest standard for life insurance and annuity transactions and recommendations in retirement and non-retirement accounts that closely mirrors the DOL Rule⁶ and Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. However, some of the proposed language, as currently drafted, may not achieve the NYDFS' stated goal of consumer protection in curbing conflicted insurance transactions and advice.

The Coalition further supports the NYDFS' proposal to add consumer protections that would prohibit a producer from stating that a recommendation is part of financial or investment planning unless the producer has a specific or professional designation in that area. However, the Coalition believes the proposed language should be strengthened to ensure that consumers seeking financial planning advice can identify competent and ethical financial planners.

As such, the Coalition respectfully recommends that the NYDFS revisit two provisions of the proposed regulation in order to 1) establish a clear, strong fiduciary mandate; and 2) strengthen the certification and designation requirements vis-à-vis financial planning and financial advice.

II. The Coalition Recommends a Clear and Strong Fiduciary Standard

Any amendments to Insurance Regulation 187 must capture the crucial distinction between a fiduciary standard and a suitability standard. A suitability standard can be satisfied by the recommendation of any of the potentially large number of insurance products that would appropriately address the insurance needs and financial objectives of the consumer. The producer operating under a suitability standard would, for example, be free to recommend an annuity that pays the highest compensation or the one that is most profitable for the firm, as long as it meets the test of being generally "suitable" for the consumer. In contrast, a true fiduciary standard would require the producer to recommend an insurance product, without regard to the producer's compensation, from among those he or she has available to recommend, whose particular mix of features and cost best matches the needs and objectives of the consumer. It is possible that more than one insurance product would meet this fiduciary standard, but not all those that are generally suitable would be equally beneficial to the best interests of the consumer.

The Coalition recommends that Section 224.4(a)-(b)(2) eliminate any reference to suitability information and simply state that the best interest standard is met when the recommendation is made without any regard to the financial or other interests of the producer, insurer, or any other third party. The suggested language would read:

In recommending a transaction to a consumer, the producer, or the insurer where no producer is involved, shall act in the best interest of the consumer. The producer, or insurer where no producer is involved, acts in the best interest of the consumer ***when the producer's or insurer's recommendations to the***

⁶ See Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20945 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, and 2550), *available at* <https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>; See also Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128, 82 Fed. Reg. 16902 (Apr. 7, 2017) (to be codified at 29 C.F.R. pt. 2510), *available at* <https://www.federalregister.gov/documents/2017/04/07/2017-06914/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice-best>.

consumer are made pursuant to a fiduciary standard and without regard to the financial or other interests of the producer, insurer, or any other party.

The Coalition additionally suggests that NYDFS:

- Define the term “fiduciary” in a way that is consistent with the DOL Rule;
- Include suitability considerations only as a secondary parameter of the producer or insurer’s evaluation of recommendations and transactions; and
- Separately outline the objective prudent person standard and make clear that covered insurers will be examined and held liable under this standard.

With regard to disclosures of conflicts, the Coalition recommends that the NYDFS strengthen its disclosure requirements outlined in Section 224.4(b)(3)(i). Enforceable disclosure requirements should include guidance on communicating to consumers that an insurance agent’s employment obligations potentially or actually conflict with clients’ best interests. Additionally, insurance companies should disclose to consumers a full compensation breakdown and provide a free look period.

However, a strong fiduciary standard cannot be based on a disclosure-only regime. The Coalition believes that disclosures alone are insufficient to remedy investor confusion and harm stemming from conflicted advice, which the NYDFS’ proposed amendments seek to remedy. The Coalition opposes a disclosure-only regime and urges consideration of a system based on either conflict avoidance or disclosures **coupled with** proper mitigation.

III. The Coalition Recommends Rigorous Designations Granted by Accredited Certification-Granting Bodies

By proposing Section 224.4(l), the NYDFS has addressed a significant regulatory gap that allows financial service providers, including insurance producers to hold themselves out to consumers as “financial planners” without requiring any demonstrated competencies in financial planning and without mandating even minimal standards of conduct.⁷

In fact, industry research shows that over 100,000 financial service providers, spurred by economic incentives, incorrectly self-identify as members of a financial planning practice, but do not actually offer financial planning services. As a result, consumers who want and expect financial planning advice are being harmed because they are receiving narrowly focused advice, single product solutions or advice that is not in their best interest. Furthermore, consumers are confused by the titles financial service providers use and they are not able to identify persons qualified to provide financial planning services.

This issue can be especially problematic in the insurance arena. For a consumer who seeks an insurance solution, an insurance only recommendation may be perfectly appropriate. But for a consumer who seeks and expects financial planning, an insurance solution should be recommended only if it is in the client’s best interest and evaluated in the context of other potential investments and solutions.

The Coalition applauds NYDFS’ attempt to help consumers identify competent and ethical

⁷ Financial Planning Coalition, “Consumers are Confused and Harmed: The Case for Regulation of Financial Planners,” available at <http://financialplanningcoalition.com/wp-content/uploads/2014/06/Financial-Planning-Coalition-Regulatory-Standards-White-Paper-Final.pdf>.

financial planners. However, as currently drafted, Section 224.4(l) would allow, and potentially encourage financial service professionals to offer financial planning services with dubious certifications and/or designations.⁸

As such, the Coalition suggests that the NYDFS clarify which certifications or professional designations are allowed. The Coalition proposes to limit designations to only those that are granted by **accredited** certifying bodies and, at a minimum, include rigorous ethical and professional standards, thorough education and examination requirements to first obtain the designation, and ongoing continuous education requirements to maintain the certification.

For example, CFP Board, which offers the CFP® certification, is accredited by the National Commission for Certifying Agencies (NCCA). The NCCA standards require demonstration of a valid and reliable process for development, implementation, maintenance, and governance of certification programs. The CFP® certification is one of only six financial services designations accredited by NCCA. The CFP® certification requires substantial educational and professional experience, a rigorous exam designed to test for competencies in financial planning, continuing education which meets CFP Board's requirements, and high professional and ethical standards enforced through a disciplinary process with publicly available sanctions, including documented revocation of the CFP® certification.

Notably, CFP® professionals operate across a variety of business models and are obligated to provide financial planning services under a fiduciary standard of conduct.

The Coalition also recommends retaining the term "related services" in Section 224.4(l). This is a catch-all provision and may be helpful in expanding the umbrella of covered behavior and activities of insurers. Including a broader range of activities that will trigger the certification requirement will benefit consumer protection.

IV. Contact Information for Further Discussion

The Coalition appreciates the opportunity to comment on the NYDFS proposed regulatory amendments. If you have any questions regarding this comment letter or the Coalition, please contact Maureen Thompson, Vice President of Public Policy, CFP Board, at (202) 379-2281 or mthompson@cfpboard.org.

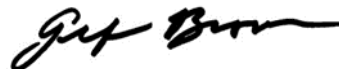
Sincerely,



Kevin R. Keller, CAE
Chief Executive Officer
CFP Board



Lauren Schadle, CAE
Executive Director/CEO
FPA®



Geoffrey Brown, CAE
Chief Executive Officer
NAPFA

⁸ Jason Zweig and Mary Pilon, "Is Your Advisor Pumping Up His Credentials?" The Wall Street Journal (Oct. 16, 2012), available at <https://www.wsj.com/articles/SB10001424052748703927504575540582361440848>.