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New York's Regulation 187: What Insurers Need to Know Come August 1, 2019

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New York's first amendment to Regulation 187 went into effect August 1, 2019. [Regulation 187](#) regulates recommendations made by a producer in the sale of a policy or certain in-force transactions. In particular, the Regulation is concerned with direct producer involvement and requires a producer to act in the best interest of the consumer when making a recommendation. There were several revisions proposed in the first amendment that were ultimately adopted into the Regulation. Life insurers also face basic obligations under the amended regulation.

Overall, the requirements and responsibilities of producers and insurers remain largely unchanged from the [initial draft of the first amendment](#). The final Regulation slightly alters the exemptions for direct solicitation and corporate or bank-owned policies, clarifies the definition of "recommendation," and provides specific examples of the factors to be weighed when considering whether a consumer's best interest has been served.

Exemptions

The [proposed first amendment](#) specified a number of exemptions that were set forth in Section 11 NYCRR 224.2. The final Regulation modified the exemptions in Sections 224.2(a) and (c).

Direct solicitation

The proposed first amendment had exempted transactions involving a "purchase of a policy where the application [had been] solicited and received in response to a generalized offer by the insurer by mail or under other methods without producer involvement." A slightly modified version of this exemption was adopted into the final Regulation, which creates an exemption for the "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."

By adding this clarifying language, the Regulation makes clear that direct solicitation inquiries are exempt from the best interest standard regardless of whether the person helping the consumer is a licensed producer. Nonetheless, [some commenters](#) continue to raise concern about this exemption, arguing that the direct solicitation exemption in practice would, in fact, harm consumers by encouraging insurers to switch all their products into a direct sales mechanism, leaving a consumer without any meaningful options: "Since life insurance products are not easily sold, many consumers may simply opt for the easier method of obtaining a policy through a direct sale, without ever knowing what product available was suitable for them or was offered in their 'best interest.'"

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Corporate or bank-owned policies

The updated proposed first amendment also exempted any corporate or bank-owned policies authorized by Insurance Law Section 3205(d) if *all* benefits under the policy were payable to the corporate or bank policy owner. In the final Regulation, the exemption now only requires that “substantially all” benefits under the policy be paid to the corporate or bank policy owner, expanding the reach of this exemption.

Definitions

The final Regulation also further clarifies and defines certain keywords used throughout the Regulation. Specifically, the terms “recommendation,” “sales transaction,” and “in-force transaction” have been further defined.

Recommendation

The proposed first amendment defined “recommendation” as one or more statements that either (1) “reasonably may be interpreted by a consumer to be advice that results in a consumer entering into or refraining from entering into a transaction”; 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,” including general factual information provided to them.

The final Regulation expands on the second definition, adding that “[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.” While the term “interactive tool” is undefined, this addition may motivate producers to couch their recommendations in the form of evaluations or comparisons using “interactive tools” to try to avoid application of the Regulation.

Sales and in-force transactions

The final adoption of the Regulation also added to the definitions of both “sales” and “in-force transactions” that “[n]ew 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.” This definition excludes trail commissions. The expansion of these two definitions also affords stronger protection to insurers and producers if additional compensation may be paid pursuant to the same policy when no recommendation is made or the consumer merely exercises a policy option that results in the payment of additional compensation.

Duties of Insurers and Producers

Moreover, the proposed first amendment had imposed a number of duties for insurers and producers to act in the best interest of a consumer. The final Regulation now identifies additional factors that may also be considered in determining whether the proposed transaction is in a consumer’s best interest:

- (c) In making a recommendation, a producer, or an insurer where no producer is involved, may weigh multiple factors that are relevant to the best interests of the consumer including, but not limited to, *the benefits provided by the policy, the price of the policy, the financial strength of the insurer, and other factors that differentiate products or insurers.*

Several commenters requested clarification on whether acting in the best interest of a consumer meant that the recommendation be the least-expensive product available to the consumer. The New York State Department of Financial Services (NYDFS) [clarified this duty](#), stating that one singular product alone is not necessarily in the best interest of a consumer, meaning the least-expensive product does not necessarily equate to acting in the best interest of a consumer, though the price of the policy would likely be one factor in making such a determination.

Further, while the updated proposed first amendment prohibited a producer from using the title or designation “financial planner,” “financial advisor,” or similar title unless the producer was properly licensed or certified, the final adoption now clarifies that “a producer may state or imply that a sales recommendation is a component of a financial plan.” This clarification takes into account that in practice, many producers offer policies with overall comprehensive financial planning.

Challenges to the Regulation

Several industry players filed suit challenging the Regulation. The suits argued that the best interest standard and other requirements imposed by it are vague and confusing. The actions were consolidated on March 15, 2019, and were pending in the Supreme Court of the State of New York, County of Albany court. However, the court recently dismissed the consolidated action.

Training

Regulation 187 imposes new training and supervisory obligations on insurers. The Regulation requires insurers to adequately train their insurance agents on an insured’s policies when making a recommendation. “An insurer shall be responsible for ensuring that every producer recommending any transaction with respect to the insurer’s policies is adequately trained to make the recommendation in accordance with the provisions of this Part, but an insurer shall not be required to warrant that a producer is acting in the consumer’s best interest.”

For many insurers, this training requirement might not impose an additional material obligation. However, to the extent that an insurer does not already provide this training – i.e., the insurer requires the producer to self-educate on the insurer’s products – the Regulation may now require affirmative action on the part of the insurer to provide this training. While the Regulation does not specify *how* the training must be provided, common forms of training might include seminars, tests, instruction, company courses, and product design materials, with much discretion left to the insurer on how to satisfy the Regulation’s requirements.

Supervision

Additionally, the Regulation imposes supervisory obligations on insurers. For example, an insurer is prohibited from effectuating a sales transaction unless there is a “reasonable basis” to believe that the sales transaction is suitable based on the suitability information provided by the consumer. The language of the Regulation is vague since it does not define “reasonable basis,” leaving the insurer to speculate on the precise obligation imposed on it. One might reasonably anticipate increased litigation premised on this term, such as the two consolidated New York lawsuits filed against NYDFS alleging that the requirements imposed by the Regulation are generally vague and confusing. Absent applicable exemptions, carriers will want to have a system in place to ensure compliance with the supervision aspect of the Regulation.

Further, the Regulation requires insurers to establish, maintain, and audit a system of supervision that is reasonably designed to achieve the insurers' and producers' compliance with the Regulation, including standards and procedures for the collection of a consumer's suitability information, documentation and disclosure of the basis for any recommendation for sales transactions, review of complaints received by the insurer about recommendations inconsistent with the best interest of the consumer, and the auditing and/or contemporaneous review of recommendations to monitor producers' compliance with the Regulation. Critically, the Regulation refers to "establish, maintain, and audit." This means that the insurer must establish a system that is reasonably designed to achieve the requirements, maintain the system, and also have a procedure in place to audit that system. The Regulation does not identify the exact method in which this must be achieved, leaving discretion but also ambiguity on how best to implement such a system.

Avoiding Financial Exploitation and Abuse

Finally, the insurer is required to establish and maintain procedures designed to prevent "financial exploitation and abuse," defined as "improper use of an adult's funds, property or resources by another individual, including fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets." This requirement may require the insurer, for example, to investigate a producer's background, track ongoing sales to identify potential patterns of abuse, or other independent inquiries that would achieve prevention.

Marketing Materials

Insurers may also want to reexamine their existing marketing materials to determine whether they could be categorized as making a "recommendation" under the Regulation.

Marketing materials, for example, may direct, instruct, or advise a consumer or existing policyholder that he or she should purchase or modify a policy. While the Regulation expressly excludes marketing materials from the definition of "recommendation," the exclusion is grounded in the presumption that the marketing material is purely factual in nature without any advice or recommendation: "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." Marketing materials may need to be reexamined to ensure they contain information that is purely factual in nature and cannot be perceived or interpreted as a recommendation.

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