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NY Department of Financial Services Proposes its Own Fiduciary Rule in Response to U.S. DOL Delay

In February, President Trump signed an Executive Order directing the U.S. Department of Labor (DOL) to review the fiduciary rule for brokers that President Obama's Labor Department adopted. The federal rule would expand the definition of "investment advice" in the retirement context and require brokers to provide advice that is in the consumer's best interest. While the federal fiduciary rule is under review, the U.S. DOL delayed some of the rule's requirements until July 1, 2019. In response, Governor Cuomo announced that the New York Department of Financial Services (DFS or Department) proposed a rule requiring brokers to put their customers' best interests first in life insurance and annuity transactions.

The DFS proposed the amendments to the Suitability in Life Insurance and Annuity Transactions regulation, Title 11 NYCRR Part 224, or the fiduciary rule, on Wednesday, Dec. 27, joining a handful of other states who have taken similar action in response to the U.S. DOL delay. The Governor's press release notes the proposed regulation is subject to a 60-day public comment period; however the State Register, which formally publishes regulatory actions, sets forth a 45-day public comment period. The Department's proposed regulation goes beyond the federal fiduciary rule by expanding the financial services transactions covered to include not only the sale of annuity products but also all life insurance transactions.

The federal fiduciary rule expands the definition of "investment advice" in the retirement context to apply to certain annuity and life insurance sales and requires financial advisors to advise clients based on the clients' best interest rather than their personal compensation structures. Likewise, the Department's proposed rule expands New York's current regulation to establish a "best interest" standard for *all* life insurance and annuity product transactions in the context of retirement planning *and* generally when recommendations are made to consumers. Brokers would be required to provide advice that is in the clients' best interests at the time of the transaction or recommendation without influence by the profitability of the sale for the broker.

The proposed regulation would also require insurers to establish and maintain procedures designed to prevent "financial exploitation and abuse." Financial exploitation and abuse is defined as the improper use of an adult's funds, property, or resources by another individual and includes fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or the denial of access to assets. This requirement is consistent with the Department's policy objective of establishing formal protections for populations they deem vulnerable and susceptible to financial abuse.

Lastly, the proposed rule requires insurers to provide consumers with comparisons of other available products in a form that is acceptable to the Superintendent. It is unclear if the form will be provided by the Department, if there will be a prior-approval process put in place, or a procedure that reflects a file and use protocol. Furthermore, the proposed regulation incorporates the transparency and disclosure requirements of Title 11 NYCRR Part 51, or Regulation 60, as part of New York's proposed fiduciary rule.

After the comment period expires, the Department will review comments and may propose a revised regulation for additional comment or file a notice of adoption.

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