

New York Department of Financial Services Plays Pit Boss for Consumer Protection

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Worried that the cards may be stacked against certain consumers and producers, the New York Department of Financial Services (DFS) released a circular letter and filing guidance note on July 17 to remind insurers of their obligations pertaining to unfair and unlawful discrimination in the sale of life insurance and annuities. The DFS is concerned that low-income consumers, consumers of color, and consumers living upstate, as well as small insurance producers, are being disadvantaged if insurers offer different versions of products within the same sales channels. The DFS contends that “consumers with the same expectation of life and with identical needs, goals, or personal or financial circumstances” are “similarly situated consumers,” and that if similarly situated consumers received “different terms, conditions, benefits, fees, or premiums for the same policies or contracts in the individual market” unfair discrimination has occurred. As a result, the DFS states that it is a violation of New York Insurance Law sections 2606(a)(1) and 4224(a)(1) to:

- Have, at the request of a particular producer, a different version of a product or additional features that are offered solely to that producer’s clients.
- Have a producer-developed product that is offered exclusively through that producer.
- Have different versions of a product offered through different producers as a marketing strategy.
- Charge different premiums or fees for identical policies or contracts or to sell different versions of a product with different rights, benefits, or fees based solely upon the level of compensation paid to a producer.

The filing guidance explains that the DFS: [H]as not objected to different versions of a product being sold in the markets or through the channels [specified in the filing guidance]. ... [The DFS] does not object to the use of different policy forms in these markets or through these channels or deviation from the insurer’s regular individual underwriting rules for the same policy form, such as levels of

underwriting, pricing, and non-forfeiture values. The guidance cautions, however, that: [W]ithin each market or channel, there can be no unfair discrimination between individuals of the same class and of equal expectation of life, in the amount of interest being credited, the amount or payment or return of premium, or rates charges, or dividends or other benefits or in any of the terms and conditions of the policy or contract. And it explains that “similarly situated consumers with an equal expectation of life should receive the same version of the product regardless of which bank or financial institution sells it to them.” The filing guidance notes that the DFS may allow exceptions on a case-by-case basis, but to do so, the insurer must show that “one product or version is not always better than the other versions (suitability issue)” because the different versions address different consumer needs or goals. If the different versions are approved, all versions must be listed on the application. Insurers must:

- Adhere to the circular letter and the filing guidance for all new life insurance and annuity policy form filings made after July 17; and
- Review their product portfolios “and take steps, as needed, to comply with [New York] Insurance Law section 4224(a)(1) and the guidance in [the] circular letter.”

The circular letter states that the DFS expects to examine existing product portfolios for compliance with sections 2606(a)(1) and 4224(a)(1) during regular and targeted market conduct examinations beginning in 2025. While its goals are admirable, the DFS may have overplayed its hand. For example:

- Does the guidance unnecessarily conflate unfair discrimination with suitability by classifying consumers with the same life expectancy by their “needs, goals, or personal or financial circumstances”? These factors are considered as part of Regulation 187’s best interest obligations requiring the producer to believe that the insurance transaction is suitable. Given the robust nature of Regulation 187, it seems unnecessary to inject suitability factors into traditional unfair discrimination analysis.
- Will the guidance result in access to more products for consumers the DFS is intending to protect? An unintended consequence could be fewer and perhaps more expensive products. For instance, a financial institution may determine that its customers would benefit from a product with fewer riders or options and lower costs, while another financial institution may determine that its customers would benefit from a product with greater optionality and greater cost for such optionality. If an insurer must treat all consumers of such financial institutions as if they were “similarly situated,” the insurer will have to choose between offering a simplified product over a more versatile but potentially more expensive product. Either way, there ultimately may be fewer products in the market if every insurer is confined to offering a single product version for a given “recognized” market. And fewer products may result in less competition and higher pricing, potentially making products less affordable overall.

While the DFS went all-in on its consumer protection goal, it's currently anyone's bet what impact this latest guidance on unfair discrimination may have on product design, pricing, and affordability.

Authored By



[Ann Young Black](#)



[Edmund J. Zaharewicz](#)

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