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Supreme Court of the State of New York
Appellate Division – Third Department

In the Matter of the Application of

No. 530047

INDEPENDENT INSURANCE AGENTS AND BROKERS OF NEW YORK, INC. and TESTA BROTHERS, LTD.,

Petitioners-Appellants,

v.

The NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES and MARIA T. VULLO, in her official capacity as Superintendent of the New York State Department of Financial Services,

Respondents-Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules.

(Caption continues inside front cover.)

BRIEF FOR RESPONDENTS

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(*Caption continues from front cover.*)

PROFESSIONAL INSURANCE AGENTS OF NEW YORK STATE, INC. and GARY SLAVIN,

Petitioners.

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PRELIMINARY STATEMENT

Consumer protection is central to the mission of the Department of Financial Services ("DFS"). The Legislature has instructed DFS to take appropriate action to protect consumers by, among other things, "encouraging high standards of honesty, transparency, fair business practices and public responsibility" in the insurance industry. Fin. Servs. Law § 201(b)(5); *see also, e.g.*, *id.* § 102(e) (empowering DFS to take action to promote "the continued, effective state regulation of the insurance industry"); *id.* § 301(c) (enumerating certain consumer-protection powers of DFS); *id.* § 302(a) (authorizing DFS to promulgate regulations to effectuate any of its statutory powers). Indeed, the Legislature has vested plenary power in DFS over the supervision of the insurance business and other industries in New York State.

Petitioners—an industry trade association and one of its members—challenge one such regulation concerning the sale of life insurance and annuity products. These products have proliferated in recent years, with increasing potential for consumer confusion and an associated need for trustworthy advice. Moreover, compensation to producers—the individuals licensed by DFS to sell insurance products—

has become increasingly complex, creating financial incentives for producers to sell products regardless of whether they meet the specific needs of a particular consumer.

The provision at issue here, the first amendment to DFS Regulation 187 (the "Amendment"), was enacted to ensure transparent and fair business practices, protect consumers, eliminate fraud and unethical conduct by producers, and promote producer competence and trustworthiness. The Amendment applies to producers' "recommendations" to their customers regarding specific insurance transactions, and requires producers to act in the "best interests" of the consumer, as defined in the Amendment, when they make such recommendations.

The Amendment thus advances DFS's legislative mandate in several important ways. For example, the Amendment promotes producer competence by requiring that producers collect relevant information about consumers in order to determine whether a particular transaction would further the consumer's needs and objectives, and by requiring producers to be knowledgeable about the transaction that they recommend. The Amendment promotes honesty and fair dealing by

requiring that producers' recommendations to consumers be based on an evaluation of the relevant suitability information,[1] rather than on producers' potential compensation to be earned from the transaction. And the Amendment promotes transparency by requiring that producers disclose certain categories of information to consumers, such as the various features and limitations of the recommended product and the reasons for believing that the product will further the consumer's needs and objectives. In sum, the Amendment falls squarely within the authority the Legislature has vested in DFS.

Supreme Court (Zwack, J.) properly dismissed petitioners' article 78 petition challenging the Amendment. First, the Amendment constitutes a lawful exercise of DFS's rulemaking authority by advancing the purposes of the applicable statutes. Second, the Amendment has a rational basis and is neither arbitrary nor capricious. In response to documented industry trends, it imposes reasonable standards on the sale of important long-term financial planning tools, in order to protect consumers from conflicted advice, and does not impair existing

[1] The concept of suitability information is explained in greater detail below and is defined at 11 N.Y.C.R.R. § 224.3(g).

relationships between producers and insurers. Third, the Amendment is not unconstitutionally vague. To the contrary, it defines key terms and provides appropriate notice of prohibited and required conduct. Fourth, DFS fully complied with the State Administrative Procedure Act in promulgating the Amendment, which it did only after conducting numerous meetings with stakeholders and substantially revising earlier drafts in responses to public comments.

For all these reasons, the Amendment is a proper exercise of agency authority. This Court should affirm Supreme Court's judgment.

QUESTIONS PRESENTED

1. Whether the Amendment is a lawful exercise of DFS's rulemaking authority.

2. Whether the Amendment has a rational basis and is neither arbitrary nor capricious.

3. Whether the Amendment is unconstitutionally vague.

4. Whether DFS complied with the State Administrative Procedure Act in promulgating the Amendment.

STATEMENT OF THE CASE

A. DFS's Statutory Authority Over the Insurance Industry in New York

"[I]nsurance is a business to which the government has long had a special relation." *Health Ins. Assn. of Am. v. Harnett*, 44 N.Y.2d 302, 308 (1978) (internal quotation marks omitted). Indeed, the insurance industry is pervasively regulated, and the Legislature has granted DFS comprehensive authority to oversee its operation in New York.

Under the federal McCarran-Ferguson Act, the regulation of "[t]he business of insurance, and every person engaged therein," is reserved to the States. 15 U.S.C. § 1012(a). Thus, like its predecessor agency the New York Insurance Department and the insurance departments of other States, DFS exercises plenary authority over the insurance industry as it operates in New York. The supervisory authority delegated to DFS by the Legislature extends to every aspect of the creation, operation, and dissolution of insurance businesses in the State. (*See* Record on Appeal ["R."] 670 ¶ 6.)

The Legislature created DFS in 2011 when it enacted the Financial Services Law, which consolidated the Banking and the Insurance Departments under the auspices of the new agency, DFS. *See* Fin. Servs.

Law § 102. To effectuate its mandate, the Legislature expressly directed DFS to "take such actions as the superintendent believes necessary" to, among other things:

- ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services;
- encourage high standards of honesty, transparency, fair business practices and public responsibility;
- eliminate financial fraud, other criminal abuse and unethical conduct in the industry; and
- educate and protect users of financial products and services and ensure that users are provided with timely and understandable information to make responsible decisions about financial products and services.

Fin. Servs. Law § 201(b); *see also id.* § 202(a) (setting forth powers of superintendent); *id.* § 301 (same).

In addition to that broad grant of authority, the Legislature vested DFS with authority over particular aspects of the insurance market, such as the power to regulate insurance agents and brokers—referred to as "producers." Ins. Law § 2101(k). This includes the power to establish producers' "professional standards of conduct." Ins. Law § 2104(a)(2). For example, DFS is responsible for producer licensure, *see id.* §§ 2103, 2104, 2110, and is permitted to refuse to renew, to suspend, or to revoke the license of any producer if that producer uses "fraudulent, coercive or

dishonest practices," demonstrates "untrustworthiness" or "incompetence," or "intentionally misrepresent[s] the terms of an actual or proposed insurance contract." Ins. Law §§ 2110(a)(4)(A), 2110(a)(4)(B), 2110(a)(4)(C), 2110(a)(6).

Multiple statutory provisions enable DFS to set specific standards defining misleading conduct by producers and others. For example, article 24 of the Insurance Law, governing unfair or deceptive acts or practices in the business of insurance, prohibits both "defined violations"—violations of enumerated statutory provisions—and "determined violations"—those practices determined by DFS to be unfair or deceptive. Ins. Law §§ 2402(b), (c).

DFS is also empowered to interpret substantive provisions of the Financial Services and Insurance Laws, *see* Fin. Servs. Law § 302(a)(2); Ins. Law § 301(c), including those that prohibit producers from misrepresenting the terms of a life insurance policy or annuity contract (Ins. Law §§ 2123[a][1], [2]) and those setting forth mandatory disclosures to be made when selling insurance policies and annuities (*id.* § 3209). Further, DFS is responsible for approving all life insurance policies and annuity contracts, and all riders and endorsements to and

applications for such products, including disclosures provided therein (collectively referred to as "policy forms"), as well as producer compensation plans. *See* Ins. Law §§ 3201(b)(1), 4228(f)(1).

In short, DFS has "broad power to interpret, clarify, and implement the legislative policy," *Matter of Medical Socy. of State of N.Y. v. Serio*, 100 N.Y.2d 854, 853-64 (2003) (internal quotation marks omitted), provided only that such efforts are "not inconsistent with" its statutory authority, Fin. Servs. Law § 302(a). Where "the Superintendent has properly crafted a rule within the scope of his authority, that rule has the force of law and represents the policy choice of this State." *State Farm Mut. Auto. Ins. Co. v. Malella*, 4 N.Y.3d 313, 321 (2005).

B. DFS's Investigative Oversight of and Guidance to the Insurance Industry

As part of its statutory mandate to protect consumers, DFS maintains a specific bureau to receive, investigate, and, to the extent possible, resolve consumer complaints. (R. 672 ¶ 12.) DFS fields these complaints in addition to uncovering violations through routine examinations of domestic insurance carriers and more targeted investigations. *See generally* Ins. Law §§ 308, 309. (R. 672 ¶ 12.) DFS

thus regularly receives and compiles complaints from multiple sources, and analyzes them for trends and issues in the industry. (R. 672 ¶ 12.)

DFS also draws on its expertise to provide guidance to industry actors. Formal guidance can take the form of guidance letters or circular letters. *See* N.Y. Dep't of Fin. Servs., *Industry Guidance*, https://www.dfs.ny.gov/industry_guidance/home (last visited July 29, 2020). (*See* R. 672 ¶ 13.) Additionally, DFS regularly provides informal guidance through its responses to questions posed by industry groups and specific licensed entities, including insurers, agents, and brokers. (*See* R. 672 ¶ 13.)

C. Life Insurance and Annuity Products

Life insurance and annuity products—the subject of the Amendment—are among the most complex fields regulated by DFS. (R. 673 ¶ 16.) There are currently 166 insurers authorized to issue life insurance and annuity products in New York, which insure against a variety of risks and address different personal financial objectives. (R. 673 ¶ 16.)

In general, New York life insurers sell two related but distinct classes of products: life insurance and annuities. (R. 673 ¶ 17.) In essence,

life insurance products insure against the risk of the insured's death, while annuities do the opposite—they insure against the financial risk of the insured "outliving" her resources. (R. 673 ¶ 17.) Life insurance products are primarily divided into two categories: term life insurance and permanent life insurance. (R. 674 ¶ 18.) Term life insurance promises the payment of a stated death benefit if the insured dies within a specified period of time. (R. 674 ¶ 19.) Permanent life insurance, by contrast, does not expire and combines a death benefit with a savings portion, which grows based on a set rate or market performance and can be paid out to the insured as a dividend over time. (R. 674-75 ¶¶ 20-23.)

Annuity products are also primarily divided into two categories: immediate annuities and deferred annuities. (R. 675 ¶ 24.) Immediate annuities are the simplest form of longevity insurance: a consumer pays a lump sum and immediately begins to receive a stream of income on an annual or monthly basis for the remainder of that consumer's life. (R. 675 ¶ 25.) On the other hand, a consumer purchasing a deferred annuity pays a lump sum of money in exchange for payment at a later date. (R. 675 ¶ 26.) In the intervening time, that money is credited with interest

according to a defined formula or is invested in mutual fund–like sub-accounts. (R. 675 ¶ 26.)

In addition to these basic categories, both life insurance and annuity products are offered in many variations and sub-categories, with assorted terms, features, and structures. (R. 674-75 ¶¶ 18-26.) As these products have become increasingly complex, they have increasingly been marketed as investment products and long-term savings tools, rather than as traditional insurance policies. (*See* R. 678 ¶ 37.) As consumer choice has proliferated, consumers have become ever more reliant on the assistance of licensed producers in evaluating and recommending an appropriate product tailored to the specific consumer's particular circumstances. (R. 680 ¶ 43.)

D. Insurance Agents and Brokers

While some insurers—particularly those selling smaller or more simplified policies—sell directly to consumers by phone, mail, or over the internet (R. 677 ¶ 35), most insurers sell their products through insurance agents and brokers (each and collectively, "producers"). (R. 676 ¶ 27.) An "agent" is an agent of the insurer, while a "broker" generally acts on behalf of insureds or prospective insureds as they seek

appropriate insurance products. (R. 676 ¶ 29.) Both types of producers, however, interact with and provide recommendations to consumers (R. 676 ¶ 30) and must be licensed by DFS in order to operate in New York, *see* Ins. Law § 2102. It is not uncommon for producers to hold both an agent's license and a broker's license from DFS and to operate under both licenses at the same time. (R. 676 ¶ 31.)

E. Regulation 187

1. The Original Regulation 187

DFS initially promulgated Insurance Regulation 187 on an emergency basis in 2010, and issued a final regulation in 2013. (R. 690 ¶ 69.) While the original Regulation 187 applied only to annuities and not to life insurance policies (*See* R. 690 ¶ 69), it was in many ways similar to the Amendment. Like the Amendment, it imposed disclosure requirements on sales of annuities and required that producers engage in a multi-factored "suitability" analysis prior to recommending a particular annuity to a consumer. (R. 690 ¶ 69.) Specifically, the original Regulation 187 applied to "any recommendation to purchase or replace an annuity contract made to a consumer by an insurance producer" (*See* R. 139 § 224.1), and required producers and insurers to ensure that any

"recommendation" was "suitable for the consumer," that the consumer was "reasonably informed of various features of the annuity contract," and that the consumer would "benefit from certain features of the annuity contract." (*See* R. 142-46 § 224.4.) Despite its similarity to the Amendment in terms of structure, purpose, and terminology, the original Regulation 187 was never challenged by the insurance industry, nor did the Legislature take any action to overrule or curtail it in any way. (*See* R. 691 ¶ 69 n.6.)

2. Impetus for the Amendment

DFS began developing an amendment to Regulation 187 in 2017, motivated primarily by two considerations. (R. 677-78 ¶¶ 36-37.) First, DFS was concerned that the purchase of life insurance and annuity products, which plays an increasingly significant role in retirement planning, "increasingly involves more complex financial transactions"—which, in turn, has made the role of insurer and producer recommendations "increasingly important and has resulted in a greater need for consumers to rely on professional advice and assistance" in understanding available products. (R. 2037; *see also* R. 2068-69.) The increased marketing of both life insurance and annuities as investment

products, and not just as insurance, magnified this concern. (R. 678 ¶ 37.) Second, the producers' compensation structure for the sale of life insurance and annuities created incentives for producers to act other than in their customers' best interests. (R. 681-85 ¶¶ 45-54; R. 2037.)

a. Increasing Product Complexity

The nature and scope of life insurance and annuities have been evolving rapidly as new products have proliferated on the market. (R. 679 ¶ 38; R. 2037.) Over the last decade in particular, insurers have begun to offer many additional features and "riders" (policy add-ons), including those that combine traditional life insurance with other forms of insurance, such as long-term care insurance. (R. 679 ¶ 38.) Between 2011 and 2017 alone, life insurers submitted 44,624 different policy forms to DFS for approval. (R. 679 ¶ 38.)

These innovations have expanded consumer choice along multiple axes. For example, a consumer shopping for life insurance must choose, among other options:

- whether the policy should be term or permanent;
  - if term, the length of the term and whether the policy should guarantee fixed premiums over the term or offer the opportunity to have premiums returned at the end;

- if permanent, whether whole life (offering consistent payments and guaranteed cash-value accumulation) or universal life (offering flexibility in premium payments, death benefits, and savings);
  - if whole life, whether lifetime pay, single premium whole life, or limited pay whole life;
  - if universal life, whether traditional, indexed, variable, or guaranteed universal life;
  - whether to opt for a participating policy (which receives dividends from the insurer's surplus earnings) or a non-participating policy.

And so on. (*See* R. 679-80 ¶¶ 39-41.)

Annuities are equally complex. Even purchasers of immediate annuities—traditionally viewed as the most basic option—must still decide whether to select benefit commutation (the right to exchange one type of payment for another), inflation protection, or other optional features. (R. 680. ¶ 42.) Purchasers of deferred annuities must also choose among various sub-categories, such as buffer variable annuities, which allow the holder to limit downside market losses in exchange for a cap on future earnings, and deferred-income annuities, whereby the holder pays a lump sum in exchange for the promise of a lifetime income stream that will begin at some point in the future. (R. 680 ¶ 42.) In

addition, purchasers must decide which underlying mutual fund–like sub-accounts to invest in, based on their risk tolerance and investment objectives. (*See* R. 675 ¶ 26.)

When there were only a handful of different products on the market, it was easier for consumers to evaluate and choose from the available menu of options. However, in a world of highly differentiated, technically complex products, consumers must place greater trust in producers to help them navigate the marketplace and settle on a product that is tailored to their own individual circumstances, such as age, annual income, net worth, financial sophistication, investment objectives, and risk tolerance. *See* 11 N.Y.C.R.R. § 224.3(g).

b. Producer Compensation Practices

With greater reliance on producers comes greater potential for manipulation by those producers, particularly where, as here, producers' financial incentives do not always align with consumers' best interests.

A significant portion, if not all, of a producer's income is typically earned from commissions on sales of insurance policies or annuities, subject to statutory limits. *See* Ins. Law § 4228. (*See* R. 681 ¶ 46; R. 682

¶ 48.) This commission-based compensation structure creates incentives that can conflict with consumers' best interests.

First, the sale of a life insurance policy or annuity contract provides significant compensation for producers, but only if a consumer actually purchases a product—thereby putting pressure on producers to make sales quickly. (*See* R. 682 ¶ 48.)

Second, there is a directly proportional relationship between the premium amount that the customer pays and the compensation that the producer receives. That means that a producer will generally be paid more for selling a policy with a higher premium amount, irrespective of the customer's wants, needs, or ability to pay. (R. 682 ¶ 50.)

Third, the amount of compensation that producers receive from intermediaries between producers and insurers frequently varies based on a producer's volume of sales of an intermediary's products in a given time period. (R. 682-83 ¶ 51.) This creates an incentive to maximize sales of a given product, even if it is not well suited to a customer's needs. (R. 682-83 ¶ 51.)

Fourth, the overwhelming majority of commission-based compensation is paid in the first four years of the policy and, in the case

of life insurance, paid using nearly all of the customer's first-year premium payment. (R. 682 ¶ 49.) As such, producers are more richly compensated in the short term—for the sale of inherently long-term planning tools—regardless of whether the product reflects the needs of the customer or the customer's ability to pay beyond the first several years of the policy. (R. 682 ¶ 49.)

Fifth, financial incentives can interfere with the objectivity of producers' recommendations to customers regarding in-force transactions. (R. 683 ¶ 52.) An in-force transaction is a transaction relating to an existing policy, such as taking a loan against the policy or paying an additional premium so as to increase future benefits. (R. 683 ¶ 52.) Some compensation structures contain back-end incentives for producers, which encourage producers to sell policies that remain in force for a long time. (R. 683 ¶ 52.) While this incentive generally aligns the interests of the consumer and the producer, DFS has seen instances of manipulation, for example, by a producer taking aggressive action to prevent a policy from lapsing or being replaced, where lapse or replacement would otherwise have been in the consumer's best interests. (R. 683-84 ¶ 52.)

Sixth, high turnover rates in the producer sales force—the four-year retention rate for the life insurance salesforce in New York is under 20%—make it likely that the producer who sold the policy will not be around to provide ongoing service down the road. (R. 684 ¶ 54.) This creates the incentive for a new producer who takes over an account to make recommendations in order to generate new commissions. (R. 684-85 ¶ 54.)

While these incentives do not mean that producers will inevitably privilege their own interests over those of their customers, DFS has observed such marketplace conduct with some regularity, including producers (i) selling unaffordable policies to low-wealth consumers; (ii) selling policies with terms contrary to the consumer's stated preferences as recorded by the producer, or incompatible with the purpose for which the consumer is buying the policy; and (iii) encouraging customers to cancel their existing contracts and purchase new products that provide inferior benefits, apparently in an effort to generate new commissions. (*See* R. 686-88 ¶¶ 58-64.)

Further, recent data suggest that producers may be making unsuitable recommendations to their customers, perhaps under the

influence of the incentives mentioned above. The most recent multi-year study of individual life insurance policies marketed in the U.S. found that, by the end of the fifth policy year, nearly a third of purchased policies had lapsed, and nearly *half* of all policies had lapsed by the end of the tenth year. (R. 685 ¶ 55.) Such high rates of lapse indicate a systemic problem of unsuitable life insurance recommendations and sales. (R. 685-86 ¶ 57.)

3. Terms of the Amendment

DFS's experience in administering the original version of Regulation 187—which required only that producer recommendations be "suitable" for consumers (R. 142 § 224.4[a])—demonstrated the need for a more stringent standard of care for life insurance and annuity sales. (R. 2037.) DFS believed that "rules [were] needed to prevent insurers and producers from recommending transactions that, while arguably 'suitable' because they minimally further[ed] the needs and objectives of consumers, [were] not otherwise in the best interest of that consumer because they [were] designed to maximize compensation to the sellers." (R. 2037.) Accordingly, the resulting Amendment was intended to provide guidelines for trustworthy and competent producer practices, and to

prevent self-dealing by producers at consumers' expense. (*See* R. 2037-38.)

The Amendment applies to "any transaction or recommendation[2] with respect to a proposed or in-force policy," 11 N.Y.C.R.R. § 224.1, with "policy" defined as "a life insurance policy, an annuity contract, a certificate issued by a fraternal benefit society, or a certificate issued under a group life insurance policy or group annuity contract." *Id.* § 224.3(d). The Amendment does not apply, however, when insurance is purchased "in response to a generalized offer by the insurer" without

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[2] A "recommendation" is defined as "one or more statements or acts by a producer, or by an insurer where no producer is involved, to a consumer that: (1) reasonably may be interpreted by a consumer to be advice and that results in a consumer entering into or refraining from entering into a transaction in accordance with that advice; 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." 11 N.Y.C.R.R. § 224.3(e).

Excluded from the definition of "recommendation" is "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. 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." *Id.* § 224.3(e)(2).

"producer involvement"—such as an offer made by mail or at a worksite—and "where there is no recommendation made." *Id.* § 224.2(a).

The Amendment imposes a "best interest" standard on producers making recommendations to consumers, both for new sales transactions and transactions regarding in-force policies. *Id.* § 224.4(a). For new sales transactions, this standard has three components:

i. recommendations must be based on an evaluation of the consumer's relevant "suitability" information—including factors such as age, income, and liquidity needs, *id.* § 224.3(g)—and reflect the "care, skill, prudence, and diligence" of a prudent person acting in a like capacity and familiar with such matters under the "circumstances then prevailing," *id.* § 224.4(b)(1);

ii. the transaction must be "suitable," *id.* § 224.4(b)(2), *i.e.*, "in furtherance of a consumer's needs and objectives under the circumstances then prevailing, based upon the suitability information[3] provided by the consumer and all products, services, and transactions available to the producer," *id.* § 224.3(h); and

iii. the producer must have a reasonable basis to believe that the consumer will benefit from the recommended policy's features, *id.* § 224.4(b)(3).

Additionally, while a producer is permitted to receive compensation in exchange for selling a policy, the compensation may not influence the

[3] "Suitability information" is defined at 11 N.Y.C.R.R. § 224.3(g).

recommendation; "[o]nly the interests of the consumer shall be considered in making the recommendation." *Id.* § 224.4(b)(1).

For in-force transactions, the best-interest standard has two components: (i) the recommendation must reflect the care, skill, prudence, and diligence of a prudent producer and may be based only on the consumer's interests; and (ii) the producer must have a reasonable basis to believe that the consumer has been reasonably informed of the relevant policy features and potential consequences of the in-force transaction, both favorable and unfavorable. *Id.* § 224.5(b).

Finally, in order to protect both consumers and producers, the Amendment requires producers to document and disclose to consumers their sales recommendations and the reasons therefor. *Id.* §§ 224.4(f)(1)-(4). It also requires insurers to train and supervise producers. *Id.* § 224.6(a), (b). (*See also* R. 694-700 ¶ 83 [outlining all changes made by Amendment to Reg. 187].)

4. Promulgation of the Amendment

The Amendment was the product of an extensive interactive process with numerous stakeholders. DFS first proposed the Amendment in December 2017 and simultaneously published a regulatory impact

statement, a regulatory flexibility analysis, and a statement in lieu of a job impact statement. (R. 1207-10.) In response to its initial proposal, DFS received over 35 sets of comments from individuals and entities, including insurers, producers, trade associations, and consumer groups, and had over 15 meetings with interested parties—including petitioners—between January and May of 2018. (R. 693 ¶¶ 76-78; R. 1218-1694.)

In May 2018, DFS published a revised proposal and an assessment of public comments, in which it summarized the revisions made in response to the comments and gave the reasons for its revisions or decisions not to revise. (R. 1696-1700, 1724-48.) Thereafter, DFS received another set of comments and again met with interested parties. (R. 693-94 ¶¶ 80-81; R. 1750-2016.) DFS then issued a revised regulatory impact statement (R. 2035-49), a revised regulatory flexibility analysis (R. 2017-20), a revised statement in lieu of a job impact statement (R. 2021), as well as another assessment of public comments (R. 2050-79).

In the regulatory impact statement ("RIS"), DFS noted that a distinct but similar regulation promulgated by the federal Department of Labor ("DOL")—which would have expanded the definition of

"investment advice" under the federal Employee Retirement Income Security Act ("ERISA") and imposed enhanced standards of conduct on financial advisors—had recently been vacated by the United States Court of Appeals for the Fifth Circuit on the ground that the rule exceeded the DOL's authority under ERISA. *See Chamber of Commerce of U.S. of Am. v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018). (*See* R. 2038.) But the ruling did not address states' authority to act under state law and, indeed, the court recognized that the increasing complexity of financial markets was an "argument[ ] for . . . state regulators to act within their authority." *Chamber of Commerce*, 885 F.3d at 379. Thus, notwithstanding the fate of the federal rule, DFS explained in its RIS that it remained convinced "that the best interest standard is an important consumer protection and is necessary for the protection of NY consumers as to the life insurance and annuity products within its own purview." (R. 2038.)

DFS also explained that it had taken great care to minimize compliance costs associated with the Amendment, and had made certain revisions to address potentially costly implementation challenges that stakeholders identified during the consultation process. (R. 2041-42.)

Because the Amendment takes a flexible approach to compliance based on broad principles and is designed to permit producers to leverage existing practices,[4] administrative costs were expected to be minimal for most producers, and to be outweighed by the substantial benefits to consumers. (R. 2042-47.)

On July 17, 2018, the final Amendment to Regulation 187 was filed, and was published in the State Register on August 1, 2018. (R. 2017-22.)

F. This Proceeding and the Decision Below

Petitioners commenced this article 78 proceeding in Supreme Court, Albany County. (R. 78-137.) The petition alleged that DFS exceeded its authority in promulgating the Amendment because the Amendment conflicts with the statutory scheme, constitutes improper policymaking, violates the State Administrative Procedure Act ("SAPA"), is arbitrary and capricious, and lacks a rational basis. (R. 131-32.) The

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[4] For example, although the Amendment requires producers to make recommendations based on relevant suitability information, it does not mandate the creation or use of any particular forms. (R. 2043.) Further, although the Amendment requires producers to document the reason for recommending a given transaction, it does not prescribe any format or approach for compliance. (R. 2043.) Additionally, the Amendment's supervision requirements are substantially similar to those of various national organizations, which already guide the behavior of many producers. (R. 2044.)

petition further alleged that the Amendment is unconstitutionally vague and improperly extends the agent/broker relationship, and sought an order annulling the Amendment. (R. 133.) A different organization also representing insurance producers (the National Association of Insurance and Financial Advisors, New York State) filed an article 78 petition in New York County raising substantially similar allegations. (R. 398-417.) The two petitions were consolidated in Albany County. (R. 58-62.)

Respondents answered and moved to dismiss the petitions. (R. 625-26, 632-38, 654-67, 1167-68.) By order entered August 7, 2019, Supreme Court (Zwack, J.) granted respondents' motions and dismissed the petitions in their entirety. (R. 10-53.) The court held that the Amendment—which "reflects a rational and reasonable movement towards consumer protection"—is a "proper exercise of the powers granted to the DFS Superintendent, that it is not an attempt by DFS to improperly legislate, and that [it] is neither arbitrary [n]or capricious." (R. 37, 44.) The court further found that DFS "amply" complied with SAPA in promulgating the Amendment, which "is not [unconstitutionally] ambiguous; in fact, it is clear and quite self-explanatory." (R. 38, 49.)

Petitioners Independent Insurance Agents and Brokers of New York, Inc. and Testa Brothers, Ltd. filed a notice of appeal. (R. 5-7.) Petitioners Professional Insurance Agents of New York State, Inc.; Gary Slavin; the National Association of Insurance and Financial Advisors, New York State; and Donald Damick did not appeal.

ARGUMENT

On appeal, petitioners argue that DFS exceeded its rulemaking authority in passing the Amendment; the Amendment lacks a rational basis; is unconstitutionally vague; and was promulgated in violation of SAPA. There is no merit to these challenges, as established below.

POINT I

THE AMENDMENT IS A LAWFUL EXERCISE OF DFS'S RULEMAKING AUTHORITY

Contrary to petitioners' argument (Br. at 14-28), the Amendment is a valid exercise of DFS's comprehensive authority to regulate New York's insurance industry, including the conduct of its producers.

Under the separation-of-powers doctrine, the Legislature must make the "critical policy decisions, while the executive branch's responsibility is to implement those policies." *Bourquin v. Cuomo*, 85

N.Y.2d 781, 788 (1995). The Legislature, however, need not give an administrative agency "rigid marching orders." *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 260 (2018). Rather, it may provide a "general but comprehensive grant of regulatory authority" that gives the agency the "flexibility [to] determin[e] the best methods for pursuing objectives articulated by the legislature." *Id.* "[I]t is only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, that the doctrine of separation is violated." *Bourquin*, 85 N.Y. 2d at 785 (internal quotation marks omitted).

In assessing whether an agency improperly encroached on the Legislature by engaging in legislative policymaking, courts consider four "coalescing circumstances." *Boreali v. Axelrod*, 71 N.Y.2d 1, 11 (1987). These four "*Boreali* factors" look to whether the agency (i) resolved a problem by making its own "value judgments entailing difficult and complex choices between broad policy goals," rather than by simply balancing costs and benefits under existing standards; (ii) wrote on a "clean slate," rather than filling in the details of a broad policy set by the Legislature; (iii) took upon itself to regulate matters on which the Legislature already tried, and failed, to set policy; and (iv) acted outside

its area of expertise. *Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.*, 27 N.Y.3d 174, 179-80 (2016).

Here, all four considerations support the conclusion that the Amendment constitutes permissible, interstitial rulemaking.

A. The Amendment Advances the Legislative Goals of Consumer Protection, Ensuring Transparent and Fair Business Practices, and Eliminating Fraud and Unethical Conduct by Producers.

The first *Boreali* factor asks whether an agency has gone out on a limb by crafting a new policy goal that represents a "new value judgment" not "tied to a specific goal dictated by the legislature," *Matter of LeadingAge*, 32 N.Y.3d at 262-63 (internal quotation marks omitted), or whether, instead, the agency has merely chosen a means for advancing a legislatively dictated end, *Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601, 612 (2018). The Amendment falls squarely into the latter category.

Financial Services Law § 201(a) declares the "intent of the legislature that the superintendent shall supervise the business of, and the persons providing, financial products and services, including any

persons subject to the provisions of the insurance law." Subsection 201(b) instructs that "[t]he superintendent shall take such as actions as the superintendent believes necessary" to "ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services," to "encourage high standards of honesty, transparency, fair business practices and public responsibility," to "eliminate financial fraud, other criminal abuse and unethical conduct in the industry," and to "educate and protect users of financial products and services." Fin. Servs. Law § 201(b).

The legislative concern with industry participants' ethical standards of conduct—to be enforced and elaborated on by DFS—is evident throughout the Insurance Law as well. *See, e.g.*, Ins. Law § 2104(a) (discussing DFS's power to license brokers and declaring statutory purpose to "protect the public by requiring and maintaining professional standards of conduct"); *id.* § 2103(h) (empowering DFS to refuse to license any agent who "is not trustworthy"); *id.* § 2123 (prohibiting producers from making misrepresentations or false statements); *id.* §§ 2403-04 (forbidding deceptive acts or practices in insurance industry and granting DFS broad powers to investigate and

levy penalties for violations); *id.* §§ 2110(a)(4)(A)-(C) (permitting DFS to suspend or revoke producers' licenses if they engage in dishonest practices or demonstrate "incompetence" or "untrustworthiness").

The considerations that motivated DFS in promulgating the Amendment are "directly tied" to these legislative mandates. *Matter of LeadingAge*, 32 N.Y.3d at 263. At least three legislative policies are relevant. First, in accordance with its mandate to "educate and protect users of financial products . . . and ensure that users are provided with timely and understandable information to make responsible decisions," Fin. Servs. Law § 201(b)(7), DFS observed that the Amendment had become necessary due to the increased prevalence of complex financial transactions in the insurance market, which created "a greater need for consumers to rely on professional advice and assistance in understanding available life insurance and annuity products, making purchasing decisions, and ensuring a financial outcome in their best interest." (R. 2037.)

Second, in accordance with its mandate to "encourage high standards of honesty, transparency, fair business practices and public responsibility," Fin. Servs. Law § 201(b)(5), DFS formulated the

Amendment to "clarify the conduct that is expected of producers and insurers . . . [in] selecting which suitable product or products to recommend to the consumer." (R. 2037.)

Third, in accordance with its mandate to "eliminate financial fraud . . . and unethical conduct in the industry," Fin. Servs. Law § 201(b)(6), and to ensure that producers do not act in an "incompeten[t]" or "untrustworth[y]" manner, Ins. Law §§ 2110(a)(4)(B), (C), DFS noted that it had seen "instances of conflicted advice in New York" and accordingly drafted the Amendment so that it "operates proactively to prevent consumer harm." (R. 2039.)

In its close adherence to legislative policy, the Amendment resembles other exercises of regulatory authority that have been upheld by the courts. For example, in *Garcia*, 31 N.Y.3d at 604-05, the Court of Appeals upheld a New York City regulation requiring that children who attend certain city-regulated programs be vaccinated against the flu. In particular, the Court found that the first *Boreali* factor was satisfied where the legislature had empowered the agency to take action to prevent the spread of communicable disease; thus, "[i]n adopting the flu vaccine rules, the Board determined, in accordance with the legislature's

mandates, which vaccines should be required for children attending certain day care programs, as a matter of public health." *Id.* at 612. So, too, here, DFS has determined that the above legislative policies are best effectuated by the standards embodied in the Amendment.

Petitioners ignore this legislative backdrop, instead invoking a supposed "deep division" over issues of "consumer autonomy"—without elaboration—in support of their contention that DFS impermissibly waded into a new policy debate in promulgating the Amendment. (Br. at 19.) Petitioners' argument rests on the conclusory claim that the Amendment represents an improper value judgment simply because it imposes a best-interest standard. (Br. at 20.) But it does not follow from petitioners' substantive disagreement with the standard, or from their own belief that there are "enormous costs" associated with the standard (Br. at 20), that the agency impermissibly crossed the line into legislative policymaking. To the contrary, in exercising its statutory rulemaking authority, DFS appropriately weighed the costs of the Amendment against the benefits to consumers and industry, and determined that the latter outweighed the former. (R. 2042-47.) "[C]ost-benefit analysis is the essence of reasonable regulation." *Matter of New York Statewide*

Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene, 23 N.Y.3d 681, 697 (2014); *see also Matter of LeadingAge*, 32 N.Y.3d at 265 (finding first *Boreali* factor satisfied where regulation "indicate[d] a balancing of costs and benefits directly tied to" legislative policy goal). DFS appropriately balanced costs and benefits in furtherance of statutorily enumerated goals.

Petitioners in fact concede that DFS has "ample authority" to regulate the sale of products that are not in consumers' best interests (Br. at 19),[5] but quibble only with the means that DFS has chosen to do so. But the Court of Appeals has cautioned against "second-guess[ing] agency regulations that properly fall within the agency's purview." *Garcia*, 31 N.Y.3d at 616. Petitioners' preference for a different approach to achieving the Legislature's goals does not show that the Amendment is an unconstitutional usurpation of the legislative branch.

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[5] *See also* Br. at 44 ("The fact is that DFS already has authority to investigate and remedy the very problems it conjures up.")

B. The Amendment Fills in the Details of the Existing Statutory Policy Framework and Does Not Write on a Clean Slate.

The second *Boreali* factor is satisfied because DFS "did not promulgate regulations on a blank slate without any legislative guidance." *Matter of Medical Socy.*, 100 N.Y.2d at 865. Rather, it regulated in the statutory context discussed above, which specifies policy goals for DFS—including protecting consumers, ensuring transparent and fair business practices, and eliminating fraud and unethical conduct in the insurance industry—and gives DFS extensive discretionary authority to achieve them. In promulgating the Amendment, DFS drew on this authority to fill in the details of the Legislature's broad objectives.

Moreover, DFS "was not writing on a clean slate in the sense that it has always regulated the [insurance] industry as to almost every detail of operation," *Greater N.Y. Taxi Assn. v. New York City Taxi & Limousine Commn.*, 25 N.Y.3d 600, 611 (2015), including the very aspects of producer operation that are the subject matter of the Amendment. The Amendment merely supplements the original Regulation 187—on the books since 2010—and strengthens its original "suitability" standard to one of best interest. Petitioners attack the best-interest standard as

lacking legislative authority (*e.g.*, Br. at 2) even as they admit that DFS was authorized to promulgate "preexisting suitability rules" (Br. at 19). This is effectively a concession that the regulation itself is valid interstitial rulemaking; petitioners disagree only with the precise standard of care that the Amendment adopts.

Nevertheless, petitioners claim—without quoting any statutory language—that administrative promulgation of a best-interest standard is "preclude[d]" because no statutory provision "contemplate[s]" such a standard. (Br. at 22.) That conclusion does not follow: while neither the Financial Services Law nor the Insurance Law themselves prescribe a best-interest standard, that silence does not bar DFS from adopting one. As the Court of Appeals has said, "an agency is permitted to adopt regulations that go beyond the text of its enabling legislation, so long as those regulations are consistent with the statutory language and underlying purpose." *Matter of Acevedo v. New York State Dept. of Motor Vehs.*, 29 N.Y.3d 202, 221 (2017). Here, the Insurance Law contemplates that, among other things, DFS will "maintain[ ] professional standards of conduct" of producers within the State. Ins. Law § 2104(a)(2). That "general but comprehensive authority" to ensure ethical producer

conduct is more than sufficient to support the Amendment, even though the Legislature did not "specifically instruct" DFS to enact the best-interest standard "as the particular means to achieve that goal." *Matter of LeadingAge*, 32 N.Y.3d at 264.[6]

This Court rejected a similar argument in *Matter of Sullivan Financial Group, Inc. v. Wrynn*, 94 A.D.3d 90 (3d Dep't 2012). There, the Court considered a challenge to a DFS rule requiring insurance producers to disclose elements of their compensation. *Id.* at 93 (citing 11 N.Y.C.R.R. § 303.3[a]). The Court held that the rule was a valid "implementation of the legislative policy underlying Insurance Law article 21," which "vests [DFS] with authority over the licensing and discipline of insurance producers." *Id.* at 94-95. The Court rejected the petitioners' argument that the rule was promulgated without legislative guidance insofar as no statute contemplated the precise disclosure required by the rule, reasoning that "the statute's silence on the issue does not imply that the Legislature intended to prohibit [DFS] from

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[6] Moreover, contrary to petitioners' argument (Br. at 22), nothing in DFS's enabling legislation makes its regulatory authority in a given area contingent on the existence of a related federal rule.

issuing regulations requiring such disclosure in response to an escalating fraud problem." *Id.* at 96. Moreover, "the absence of a specific statutory delegation of authority . . . does not bar the challenged regulations." *Id.* (quoting *Matter of Medical Socy.*, 100 N.Y.2d at 866) (alteration in original). Here, too, the absence of a specific statutory delegation to adopt a particular standard of producer conduct does not bar the Amendment in light of DFS's otherwise comprehensive authority to regulate producers.

Further, the principle of *expressio unius est exclusio alterius* (Br. at 23) does not have any application here. That canon of statutory construction "is merely an aid to be utilized in ascertaining the meaning of a statute when its language is ambiguous." *Price v. Price*, 69 N.Y.2d 8, 16 n.3 (1986) (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240, at 414). But petitioners do not ask this Court to interpret an ambiguous statute. Rather, they attempt to weave together standards of conduct located in disparate sections of the Insurance Law that address specific factual circumstances (*see* Br. at 23 [citing Ins. Law §§ 1405(c), 2110(a)(15), 7813(*l*)]), to support an inference that the Legislature intended to deprive DFS of authority to regulate producer

conduct more broadly. Any such inference is undercut, however, by the express delegation of authority to "protect[ ] the public by requiring and maintaining professional standards of conduct" on the part of producers. *Matter of Sullivan Fin. Group*, 94 A.D.3d at 95 (quoting Ins. Law § 2104[a][2]). Accordingly, DFS did not write on a blank slate when it promulgated the Amendment, but rather followed clear legislative guidance.

C. The Legislature Has Not Tried to Act on the Subject Matter of the Amendment.

The third *Boreali* factor, "whether the legislature has unsuccessfully tried to reach agreement on the issue," *Greater N.Y. Taxi Assn.*, 25 N.Y.3d at 611, also weighs in favor of upholding the Amendment. This factor asks whether the proponent of a policy goal that was debated publicly but ultimately not enacted by the Legislature has resorted to accomplish administratively that which it could not achieve legislatively. *See Garcia*, 31 N.Y.3d at 615 (noting that third factor weighs against agency only in the event of "'repeated failures by the legislature to reach an agreement' on the subject matter 'in the face of

substantial public debate and vigorous lobbying by a variety of interested factions'" [quoting *Boreali*, 71 N.Y.2d at 13]).

Here, the Legislature has not considered *any* bill on the same subject as the Amendment, let alone engaged in the sort of sustained debate that would be necessary for this factor to weigh in petitioners' favor. While petitioners point (Br. at 25-26) to a bill called the Investment Transparency Act—which was proposed unsuccessfully in the Assembly in the 2015 and 2017 sessions, and unsuccessfully in the Senate in the 2019 session—that bill dealt only with disclosures in the provision of "investment advice," and made no mention of the sale of life insurance or annuity products by insurance producers. *See, e.g.*, 2019 N.Y. Senate Bill S2872A. And it was a disclosure-only bill: it did not obligate the professionals under its purview to act in the best interests of their customers. *See id.* In fact, it affirmatively mandated that professionals disclose that they are *not* required to act in their customers' best interests. *See id.* Thus, it did not regulate the substance of insurance producers' recommendations to consumers, as does the Amendment. *See Matter of LeadingAge*, 32 N.Y.3d at 265-66 (third *Boreali* factor weighed

in favor of agency where bills referred to by petitioners "did not relate specifically" to subject of challenged regulation).

In any event, the "proposed bills never cleared their respective committees, a situation hardly indicative of the 'vigorous debate' referred to in the third *Boreali* factor." *Roman Catholic Diocese of Albany v. Vullo*, 2020 N.Y. Slip. Op. 03707, slip op. at 10 (3d Dep't July 2, 2020); *cf. Matter of New York State Land Tit. Assn., Inc. v. New York State Dept. of Fin. Servs.*, 169 A.D.3d 18, 34 (1st Dep't 2019) (even express rejection by Senate of legislation concerning same subject matter as challenged regulation did not weigh against agency).

Meanwhile, Regulation 187 has been in effect in one form or another since 2010, and the Legislature has not taken any action to repeal or otherwise weaken it. (R. 690-91 ¶ 69 & n.6.) "Where an agency has promulgated regulations in a particular area for an extended time without any interference from the legislative body, [the Court] can infer, to some degree, that the legislature approves of the agency's interpretation or action." *Greater New York Taxi Assn.*, 25 N.Y.3d at 612. Because the Legislature has taken no action against Regulation 187, and

because "[t]he bills that petitioners identify deal[ ] with other matters," *id.*, the third *Boreali* factor, like the first two, favors DFS.

D. The Amendment Draws on DFS's Special Expertise Regarding the Insurance Market.

DFS's core competency is the regulation of insurance producers. DFS drew on this competency in promulgating the Amendment, thus satisfying the fourth *Boreali* factor.

Together with its predecessor (the Insurance Department), DFS has overseen the regulation of insurance in New York for 160 years. *See* N.Y. Dep't of Fin. Servs., *Our History*, https://dfs.ny.gov/our_history (last visited July 29, 2020) (discussing formation of Insurance Department in 1860). As New York courts have long recognized, DFS possesses "special competence and expertise with respect to the insurance industry." *Matter of Sullivan Fin. Group*, 94 A.D.3d at 94 (quoting *Matter of New York Pub. Interest Research Group v. New York State Dept. of Ins.*, 66 N.Y.2d 444, 448 [1985]). Relying on this competence and expertise, DFS began formulating the Amendment when it observed several specific and highly technical trends in the insurance industry, including (i) a growing complexity in life insurance and annuity products that were increasingly

being marketed to consumers as investments, rather than as insurance (R. 679-81 ¶¶ 38-44; R. 2037); (ii) a compensation structure for producers' sale of life insurance products that was creating incentives for producers to act in their own interests, rather than those of consumers (R. 681-85 ¶¶ 45-54; R. 2038-39); and (iii) a high lapse rate in certain life insurance policies, as demonstrated by independent research, suggesting that many consumers could not afford the polices they had been sold (R. 685-86 ¶¶ 55-57). These trends were discussed in the regulatory impact statements issued by DFS (R. 1208-09, 1712-23, 2035-49) and in DFS's detailed assessments of extensive public comments received, which resulted in substantial revisions (*see* R. 1724-48, 2050-79).

Additionally, DFS was concerned about the significant number of consumer complaints it had received about producer practices (R. 686 ¶ 58-59; R. 2040), and about practices uncovered during investigations into specific instances of insurer and producer misconduct (R. 686-88 ¶¶ 60-64; R. 2037). This experience, combined with its broader understanding of insurance markets and practices, led DFS to conclude that the prior regulatory framework was inadequate, and that the Amendment was necessary to provide additional protection for

consumers. (R. 689-93 ¶¶ 66-74.) *See Agencies for Children's Therapy Servs., Inc. v New York State Dept. of Health*, 136 A.D.3d 122, 132 (3d Dep't 2015), *lv. denied*, 27 N.Y.3d 907 (2016) (fourth *Boreali* factor met where challenged regulation "clearly reflect[ed] that it [was] the product of the [agency's] independent research . . . , its industry and program management expertise, and multiple revisions based on stakeholders' concerns").

Petitioners make the puzzling claim that, because DFS does not regulate ERISA plans, securities brokers, or investment advisors, it lacks the "depth of knowledge" that unnamed "other agencies" have (Br. at 27)—in other words, because it does not regulate parties that are *not* subject to the Amendment, it lacks expertise concerning parties and practices that are. As Supreme Court found, petitioners' argument in this regard is "wholly without merit." (R. 43.)

POINT II

THE AMENDMENT HAS A RATIONAL BASIS AND IS NEITHER ARBITRARY NOR CAPRICIOUS

"It is well-settled that a State regulation should be upheld if it has a rational basis and is not unreasonable, arbitrary, capricious or contrary

to the statute under which it was promulgated." *Kuppersmith v. Dowling*, 93 N.Y.2d 90, 96 (1999). "If a regulation is to be nullified, the challenger must establish that it is so lacking in reason for its promulgation that it is essentially arbitrary." *Id.* (internal quotation marks omitted). Petitioners fail to meet this "heavy burden." *Matter of Acevedo*, 29 N.Y.3d at 227.

A. The Amendment Has a Rational Basis and Reflects an Appropriate Cost-Benefit Analysis.

"[I]t is not the role of the courts to second-guess [DFS's] expert judgment regarding the efficacy of the [Amendment] in protecting consumers." *Matter of Sullivan Fin. Group*, 94 A.D.3d at 97. Rather, insofar as the Amendment is a "reasonable exercise of [DFS's] broad power to implement the Insurance Law, and is 'neither irrational nor unreasonable, neither arbitrary nor capricious, the [Amendment] must be upheld.'" *Id.* (quoting *Matter of Medical Socy.*, 100 N.Y.2d at 867); *see also Matter of Brodsky v. Zagata*, 222 A.D.2d 48, 51 (3d Dep't), *lv. denied*, 89 N.Y.2d 803 (1996)(administrative regulation must be upheld "if there is *any* evidence in the record before the agency" to support it [emphasis in original]).

The Amendment was carefully crafted in response to DFS's investigations, examinations, and observations since 2013, which demonstrated the inadequacy of the existing "suitability" standard as well as "the need for a best interest standard of care for life insurance and annuity sales." (R. 2037) DFS identified consumer-protection issues arising from (i) the increasing complexity and variety of financial transactions and (ii) the compensation structure for producers' sale of insurance products. (R. 678 ¶ 37.) In the agency's judgment, these changing market dynamics resulted in "a greater need for consumers to rely on professional advice and assistance in understanding available life insurance and annuity products, making purchasing decisions, and ensuring a financial outcome in their best interest." (R. 2037.) DFS also considered additional factors, such as the industry-wide lapse rate of life insurance products and consumer complaints regarding producer conduct favoring their own commissions over the insurance needs of consumers. (R. 685-88 ¶¶ 55-64.) These factors provide a rational basis for DFS's judgment that imposing a best-interest requirement on producers with regard to their recommendations of particular products would provide "a consistent standard of care across life insurance and

annuity product lines and protect[ ] consumers from conflicted recommendations." (R. 2039.) That judgment "warrant[s] substantial deference." *Matter of Acevedo*, 29 N.Y.3d at 227.

In asserting that DFS "did not even feign an attempt" to assess the Amendment's costs (Br. at 43) and failed to provide "even a modicum of analysis" as to its benefits (Br. at 45), petitioners overlook the exhaustive administrative record (R. 1203-2080). Petitioners' contentions regarding DFS's consideration of costs repackage their SAPA arguments and are addressed in Point IV, below.

As for the argument that DFS did not provide "quantification or specifics" about the Amendment's benefits (Br. at 43; *see also* Amicus Br. at 14), "nothing in law require[s]" that DFS "conduct an empirical survey identifying the precise benefits that would be obtained under [the Amendment] prior to taking action." *Sullivan Fin. Group, Inc. v. Wrynn*, 30 Misc. 3d 366, 378 (Sup. Ct. Albany Cty. 2010), *aff'd*, 94 A.D.3d 90 (3d Dep't 2012). Further, while petitioners argue that DFS "fail[ed] to explain how existing suitability and other compliance requirements are insufficient" (Br. at 44), DFS's revised regulatory impact statement did just that: it explained why "rules are needed to prevent insurers and

producers from recommending transactions that, while arguably 'suitable' because they minimally further the needs and objectives of consumers, are not otherwise in the best interest of that consumer because they are designed to maximize compensation to the sellers." (R. 2037.) Finally, even assuming that the underlying issues that the Amendment seeks to address are "not novel," as petitioners contend (Br. at 44-45), that does nothing to detract from the reasonableness of DFS's intervention.

New York State Association of Counties v. Axelrod, 78 N.Y.2d 158 (1991), and *Matter of New York State Land Title Association*, 169 A.D.3d at 18, on which petitioners rely (Br. at 42, 45-46), are readily distinguishable. Both cases involved an agency's unsubstantiated selection of a given numerical value for a rate or cap. In *New York State Association of Counties*, 78 N.Y. 2d at 163, 167-68, the Department of Health adopted an across-the-board reduction in Medicaid reimbursement rates to nursing homes that ostensibly reflected a concomitant increase in the accuracy of data that facilities reported, but without any evidence that all facilities had in fact experienced such an increase, even on average. And in *Matter of New York State Land Title*

Association, 169 A.D.3d at 32, the First Department found that DFS lacked empirical support for concluding that a given cap on fees to be charged by title insurers would "allow[ ] insurers to be adequately compensated for the additional costs of conducting [ancillary] searches [made in connection with residential real property closings] while turning a reasonable profit."

Unlike the regulations at issue in those cases, the Amendment here does not impose a specific cap on producer compensation, but rather imposes a rational, flexible standard. While petitioners rely on the two cases cited above for the proposition that "empirical documentation, assessment and evaluation" is "demanded of rational rulemaking" (Br. at 45), the Court of Appeals has clarified that, "[a]lthough documented studies often provide support for an agency's rule making, such studies are not the *sine qua non* of a rational determination." *Matter of Consolation Nursing Home v. Commissioner of N.Y. State Dept. of Health*, 85 N.Y.2d 326, 332 (1995). Rather, an agency "may apply broader judgmental considerations based upon [its] expertise and experience." *Id.* DFS did just that here. In short, the Amendment represents a sound

balancing of benefits and costs squarely within DFS's authority and expertise, which should not be disturbed by the Court.

B. The Amendment Neither Conflicts With the Governing Statutory Framework Nor Imposes Conflicting Obligations on Insurance Producers.

Although petitioners claim that the Amendment is "irreconcilable" with "existing New York insurance statutes" (Br. at 46), they do not cite any particular provision with which the Amendment supposedly conflicts. Nor can they. As discussed above, the Amendment represents a valid exercise of DFS's extensive authority to fill in statutory interstices and regulate producer conduct. (*See* Argument Points I.A, I.B, *supra*.)

Petitioners' theory of conflict is apparently based on the notion that the Amendment requires producers to act "exclusively in the interest of a consumer," while the Insurance Law recognizes that they operate "on an arm's length basis" and accordingly obligates (or at least permits) them to prioritize the interest of "the insurance company they work for." (Br. at 46.) As an initial matter, nothing in the Insurance Law characterizes the duties of producers as those associated with "arm's

length" transactions.[7] Nor do the interests of consumers necessarily diverge from those of insurers. Indeed, petitioners offer no reason to believe that insurers are not best served when their agents sell quality products that are appropriately tailored to customers' individual needs. There is therefore no conflict between the Amendment and the governing statutory framework, much less an "irreconcilable" one. (Br. at 46.)

By the same token, the Amendment does not impose any obligations on insurance agents that conflict with their preexisting duties to their principals. The Amendment does not, as petitioners contend (Br. at 47-49), establish the consumer as a competing "master" for an agent to serve alongside the insurer, or otherwise create a "special" or fiduciary relationship between producers and consumers. A fiduciary relationship is one that imposes on the fiduciary a continuing obligation to "deal fairly, honestly and with undivided loyalty" with the principal. *Elacqua v. Physicians' Reciprocal Insurers*, 52 A.D.3d 886, 889 (3d Dep't 2008)

[7] The only mentions of arm's-length transactions in the Insurance Law address scenarios beyond the scope of the Amendment. *See* Ins. Law § 7813(n)(2)(A) (discussing duties of life settlement brokers); *id.* § 7814(a)(6)(A) (same). There are no mentions of arm's-length transactions in the Financial Services Law.

(internal quotation marks omitted). Such a relationship will not be inferred from a single transaction; only "ongoing conduct between parties" gives rise to a fiduciary relation. *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 122 (1st Dep't 1998). In the insurance context in particular, the Court of Appeals has declined to recognize a special relationship between insurance agent and consumer that would impose on the agent a "continuing duty to advise, guide or direct a client to obtain additional coverage." *Murphy v. Kuhn*, 90 N.Y.2d 266, 273 (1997).

The Amendment does not impose such a continuing duty on producers or otherwise transform them into fiduciaries of their customers. Rather, it regulates only discrete interactions between producers, as insurance salespeople, and consumers. A producer's obligation to the consumer under the Amendment is a defined and limited one: it attaches solely to "recommendations" by the producer as to whether or not to buy a particular policy or engage in a particular transaction. 11 N.Y.C.R.R. §§ 224.4, 224.5. The obligation ends with the making of the recommendation. And because a producer only recommends products, and does not herself make a final decision on behalf of a consumer, the producer has no control over the consumer and

therefore lacks an "essential element[ ] of a fiduciary relation." *Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15, 21 (2008) (identifying "de facto control and dominance" as key elements of fiduciary relationship [internal quotation marks omitted]).[8] Moreover, the Amendment specifically restricts the scope of potentially suitable products that may be recommended to the consumer to those "available to the producer." 11 N.Y.C.R.R. § 224.3(h). This means that an agent who, for example, represents only one insurer is not required to sell any product other than those consistent with her existing contractual obligations to that insurer. (*See* R. 1731.)

While the Amendment stops short of imposing a fiduciary duty on producers, the governing statutes do not bar DFS from imposing an obligation toward consumers that, even if not fiduciary, exceeds the

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[8] Petitioners' argument that the Amendment impermissibly imposes a fiduciary standard while "ignor[ing] the[ ] lessons" (Br. at 49) of the vacatur of the federal DOL rule is similarly mistaken. The "principal question" in the federal case was "whether the [DOL's] new definition of an investment advice fiduciary comports with ERISA Titles I and II." *Chamber of Commerce*, 885 F.3d at 368. But state law, not ERISA, controls here. In fact, the Fifth Circuit recognized that state authorities—such as DFS—are better positioned than the DOL to regulate in response to increasing complexity in financial markets, *id.* at 379, something that DFS also observed in the process of promulgating the Amendment (R. 2078).

minimum duties prescribed by the common law. (*See* Br. at 49-50.) As this Court observed in rejecting a similar challenge to DFS's rule requiring disclosure of producer compensation, "[w]hile . . . absent a special relationship, an insurance producer has no [common-law] duty to disclose incentive arrangements with insurance companies . . . , there is nothing in the case law forbidding [DFS] from requiring disclosure." *Matter of Sullivan Fin. Group*, 94 A.D.3d at 96; *see also Sullivan Fin. Group,* 30 Misc. 3d at 382 ("[T]he need for Regulation 194 arises precisely because producers do not owe a [common-law] legal duty to an insured to recommend the best or most appropriate coverage.").[9]

Finally, the Amendment does not create an "impossible dilemma" for producers (Br. at 47) for the additional reason that an agent's purported duty to promote the principal's product (Br. at 48) does not license the agent to pursue ends that the principal itself may not pursue.

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[9] Petitioners also contend that the Amendment contravenes existing case law by "invit[ing] consumers to shift responsibility whenever a product does not perform as expected." (Br. at 50.) This argument overlooks DFS's recent guidance that its compliance reviews will *not* be "based on hindsight and subsequent performance of an annuity contract or life insurance policy," and that DFS will consider only "the circumstances at the time the recommendation was made." N.Y. Dep't of Fin. Servs., *Life Bureau Guidance Note*, (Feb. 12, 2020), *available at* https://www.dfs.ny.gov/apps_and_licensing/life_insurers/reg187_first_amendment_faq (answer to question #5).

See, e.g., *Central Trust Co. v. Sheahen*, 66 A.D.2d 1015, 1015-16 (4th Dep't 1978) (agent may not be appointed to perform illegal acts on behalf of principal). Under the Amendment, insurers may recommend only those products that serve the best interests of consumers. *See* 11 N.Y.C.R.R. §§ 224.4, 224.5. Producers, as their agents, are not conflicted simply because they are held to the same standard.

POINT III

THE AMENDMENT IS NOT UNCONSTITUTIONALLY VAGUE

The Amendment is not, as petitioners contend (Br. at 51-58), unconstitutionally vague. Far from it. "[I]n fact," as Supreme Court found, "it is clear and quite self-explanatory." (R. 49.)

A. The Definition of "Recommendation" Is Not Unconstitutionally Vague.

Petitioners first argue that the Amendment's definition of "recommendation" is void for vagueness insofar as it extends to statements or acts of a producer that "may be interpreted by a consumer" as advice, which petitioners insist is an "improperly subjective standard." (Br. at 53.) But petitioners ignore the definition's key limiting factor: a statement or act only qualifies as a recommendation if, among other

things, it "*reasonably* may be interpreted by a consumer to be advice." 11 N.Y.C.R.R. § 224.3(e)(1) (emphasis added). That oversight is critical, as the qualifier "reasonably" properly gives notice of the scope of regulated conduct and ensures that the Amendment will be interpreted according to objective, rather than subjective, standards. *See, e.g.*, *People v. Stephens*, 28 N.Y.3d 307, 311 (2016) (ordinance "defines 'unnecessary noise' with reference to an objective standard of reasonableness rather than a subjective standard, and thus it is not unconstitutionally vague on that ground" [internal quotation marks omitted]).

Petitioners' assertion that the Amendment gives DFS "unfettered discretion" to determine what constitutes a recommendation (Br. at 54) should be rejected for the same reason, as "reasonableness is one of the most commonly applied legal standards and indicates an objective test which does not give license to enforce the provision in an arbitrary or subjective manner." *Matter of New York State Land Tit. Assn., Inc. v. New York State Dept. of Fin. Servs.*, 178 A.D.3d 611, 612 (1st Dep't 2019) (citation omitted) (rejecting vagueness challenge to DFS regulation).

Petitioners also appear to argue that the definition of "recommendation" is overbroad. (*See* Br. at 54.) They acknowledge that

the definition contains a number of exclusions, (*see* Br. at 53 [citing 11 N.Y.C.R.R. § 224.3(e)(2)]), yet still inaccurately claim that the definition may be applied to "*every* action or document provided by the agent or broker to the customer" (Br. at 54 [emphasis added]). Petitioners provide no reason for disregarding the exclusions, which appropriately limit the scope of the Amendment. *Cf. People v. Shack*, 86 N.Y.2d 529, 537 (1995) (rejecting overbreadth challenge where statute contained limiting provision).

B. The Definition of "Best Interest of the Consumer" Is Not Unconstitutionally Vague.

Petitioners next posit that the definition of "best interest of the consumer" is unconstitutionally vague because it is unclear whether the "present financial interest of the owner" of a policy should be considered, as opposed to the "future beneficial interest of the owner's beneficiaries." (Br. at 55.) While petitioners argue that a "person of ordinary intelligence cannot possibly answer [this] question[ ] with any certainty" (Br. at 55), the Amendment itself supplies the answer: "consumer" is defined as the "owner or prospective purchaser of a policy." 11 N.Y.C.R.R. § 224.3(a). In considering the "best interest of the consumer," then, an insurer or

producer must consider the best interest of the owner or prospective purchaser of the policy.[10]

Petitioners also take issue with the definition of "suitability information," which encompasses a number of factors to be considered as part of the best-interest evaluation for the sale of new policies, *id.* § 224.4(b)(1), including the consumer's "financial situation and needs," "financial objectives," and "financial time horizon, including the duration of existing liabilities and obligations," 11 N.Y.C.R.R. §§ 224.3(g)(1)(iii), (iv), (vi). (*See* Br. at 55-56.) Contrary to petitioners' claim that these factors lack "common or ordinary meanings" (Br. at 56), the key terms of "needs," "duration," and "objectives" have "an accepted meaning long recognized in law and life," and are not "so vague and indefinite as to afford [regulated parties] insufficient notice" of what is required, "even though there may be an element of degree in the definition as to which

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[10] As recent DFS guidance elaborates, this definition of "consumer" comports with "precedent that the owner retains all rights and privileges of an annuity contract or life insurance policy. As a result, where the owner and insured are different, the producer is required to act in the best interest of the owner." However, potential beneficiaries' needs should also be considered "to the extent that [their] needs . . . are relevant to furthering the needs or goals of the owner." N.Y. Dep't of Fin. Servs., *Life Bureau Guidance Note*, (Feb. 12, 2020), *available at* https://www.dfs.ny.gov/apps_and_licensing/life_insurers/reg187_first_amendment_faq (answer to question #9).

estimates might differ." *Stephens*, 28 N.Y.3d at 312-13 (internal quotation marks omitted); *see, e.g.*, *Matter of Koelbl v. Whalen*, 63 A.D.2d 408, 411 (3d Dep't), *lv. denied*, 46 N.Y.2d 706 (1978) (regulatory term "needs" refers to "objective needs, reasonably-well identified by all competent observers").

The same is true of the term "best interest" itself, which appears throughout the law in diverse contexts. (*See* Br. at 56-57 [calling "best interest" a "nebulous" term].) *See, e.g.*, Fam. Ct. Act § 631 (custody of child to be determined "solely on the basis of the best interests of the child"); Gen. Oblig. Law § 5-1706(b) (transfer of structured settlement rights permitted only if "transfer is in the best interest of the payee"); Rural Elec. Coop. Law § 25(a) (rural electrical cooperative may indemnify director or officer of cooperative if she acted in "the best interests of the cooperative"; *cf. Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991) (citing "best interests" as example of "familiar" legal standard that properly constrains discretion despite its imprecision).

Nor is the term "best interest" vague simply because there may be no "surefire" way for producers to determine how much life insurance is in a consumer's best interest. (Br. at 57.) The Amendment does not

demand absolute precision. Rather, it requires only that producers use the "care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing" to recommend a suitable product that responds to individual consumers' needs, 11 N.Y.C.R.R. § 224.4(b).

Finally, petitioners raise a handful of additional arguments, none of which has merit. They argue that it is impossible to disclose to consumers "all unfavorable considerations" that informed a particular recommendation (Br. at 57) but again overlook a crucial limiting provision: only "relevant" considerations must be disclosed. 11 N.Y.C.R.R. § 224.4(f)(1). They raise the specter of insurers being subjected to antitrust liability for "control[ling] independent agent decisions" (Br. at 57), but do not explain how the modest requirement that insurers maintain systems for supervising producers, 11 N.Y.C.R.R. § 224.6(b), amounts to a Sherman Act violation. And they advance the novel theory that the Amendment compels speech in violation of the First Amendment to the United States Constitution (Br. at 58), but that claim is not properly before the Court, as it was not raised below. (*See* R. 78-135, 567-621.)

Accordingly, there is no merit to petitioners' claim that the Amendment is unconstitutionally vague.

POINT IV

DFS COMPLIED WITH THE STATE ADMINISTRATIVE PROCEDURE ACT IN PROMULGATING THE AMENDMENT

Contrary to the arguments of petitioners (Br. at 28-39) and the Chamber of Commerce of the United States of America as amicus curiae (the "Chamber") (Amicus Br. at 13-17), DFS complied with the State Administrative Procedure Act ("SAPA") in promulgating the Amendment, as it carefully weighed the costs associated with the Amendment, the Amendment's relationship to federal standards, and its impact on small businesses, among other things, and properly memorialized that analysis in a regulatory impact statement ("RIS") and a regulatory flexibility analysis ("RFA").

A. DFS Appropriately Provided Its Best Estimate of the Costs Associated With the Amendment.

An agency's rulemaking under SAPA must be upheld so long as it substantially complies with the statute's procedural requirements. *See* SAPA § 202(8); *Matter of Medical Socy.*, 100 N.Y. 2d at 869. SAPA requires agencies to issue a RIS when proposing a rule, which must

contain a "statement detailing the projected costs of the rule." SAPA § 202-a(3)(c). "[W]here an agency finds that it cannot fully provide a statement of such costs," it may instead provide "a statement setting forth its best estimate, which shall indicate the information and methodology upon which such best estimate is based and the reason or reasons why a complete cost statement cannot be provided." *Id.* § 202-a(3)(c)(iv).

In estimating costs, the statute obligates agencies to estimate the direct "additional expenditures required" by a rule, *Matter of Industrial Liaison Comm. of Niagara Falls Area Chamber of Commerce v. Williams*, 72 N.Y.2d 137, 145 (1988), but it does "not require the consideration of speculative costs which might occur at unknown future dates," or other indirect costs, *Matter of Lake George Chamber of Commerce v. New York State Dept. of Health*, 205 A.D.2d 93, 95 (3d Dep't 1994); *cf. Seneca Nation of Indians v. State of New York*, 89 A.D.3d 1536, 1538 (4th Dep't 2011), *lv. denied*, 18 N.Y.3d 808 (2012) (agency was not required to address "speculative possibility" that rule would result in costly monopolistic behavior).

DFS carefully considered the Amendment's projected compliance costs and ultimately concluded that they would be "minimal," and likely to "decrease over time as better-trained and supervised producers come into compliance with the regulation and the number of improper or conflicted sales decrease." (R. 2043-44; *see also* R. 628-29 ¶ 7.) DFS's determination that the costs would be de minimis was based in large part on the Amendment's "principles-based approach to compliance" that would allow insurers and producers to leverage existing systems and curtail potential costs. (R. 2042-43.)

The RIS explained that:

> The amendment was specifically designed to allow producers to leverage existing practices and file management systems. . . . This amendment identifies certain suitability information that the producer should be asking their clients, if not already doing so. Although some producers and insurers have expressed an intention to create new forms or new file management systems, that is not required to comply with this amendment. . . .

(R. 2042-43.) DFS thus did not mandate specific forms or procedures, and determined that insurers and producers could comply largely by using their existing systems, with minimal additions as applicable. (R. 2042-45.) This flexible approach to compliance in turn precluded the provision

of a specific dollar figure of the costs associated with the rule "because the approach to compliance [is] subject to the discretion of each producer and insurer." (R. 628 ¶ 6.)

DFS reached this conclusion after numerous meetings with stakeholders and multiple rounds of revisions to address their concerns. For example, as noted in the RIS, DFS was persuaded by public comments arguing that proposed provisions pertaining to in-force transactions were unduly costly, and "significantly scaled back" those provisions as a result. (R. 2042; *see also* R. 2044.) DFS exhaustively assessed other public comments and responded to cost-related concerns, indicating its reasons for agreement or disagreement. (*See* R. 1744-45, 2073-77.) Thus, contrary to the Chamber's argument that DFS did not "attempt[ ] to analyze the Amendment's drawbacks" (Amicus Br. at 13), DFS's responses to public comments demonstrate that not only did the agency analyze potential drawbacks, but it took preemptive action to ameliorate them.

Petitioners' "[p]aramount" complaint is the RIS's "lack of any dollar figures," which they claim—without citation—that "SAPA does not allow." (Br. at 33.) But, as recognized in SAPA's legislative history,

quoted by petitioners themselves on the very next page of their brief, an agency is not required to "project an actual dollar figure." (Br. at 34 [quoting R. 895].) Rather, a "best estimate" of costs can take the form of a "description of the formula employed by the agency in projecting costs." (Br. at 34 [quoting R. 895].) As Supreme Court found, and as demonstrated above, DFS "amply" satisfied that requirement. (R. 38.) *Cf.* XXII N.Y. Reg. 21 (Aug. 2, 2000) (RIS upheld by Court of Appeals as SAPA-compliant in *Matter of Medical Society*, 100 N.Y.2d at 870, which estimated that "costs will be minimal compared to the overall savings to be enjoyed by New York's auto insurance consumers as a result of the lower fraud and abuse").[11] Petitioners' disagreement with DFS's estimate of costs does not mean that DFS "failed to meet its obligations under SAPA." (Br. at 34.)

Petitioners also take issue with the RIS's statement that the Amendment will impose minimal additional costs because insurers were

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[11] While this edition of the New York State Register contains only a summary of the relevant RIS, the complete RIS published on the Insurance Department's website reflects a substantially similar discussion of the costs associated with the rule. *See* N.Y. Ins. Dep't, *Consolidated Regulatory Impact Statement for 11 NYCRR 65 (Regulation 68) and the First Amendment to 11 NYCRR 64-2 (Regulation 35-C)*, https://web.archive.org/web/20000902225225/http:/ www.ins.state.ny.us/r6835cps.htm (last visited July 29, 2020).

already preparing to comply with the federal DOL rule. (Br. at 32.) Petitioners, however, do not dispute this proposition, complaining only that DFS erroneously claimed that the Amendment's costs have "magically evaporated" now that the federal rule has been struck down. (Br. at 32.) Petitioners miss the point: it is not that the costs went away, but that they had already been substantially incurred by the time that DFS proposed the Amendment (*see* Br. at 32), such that the marginal costs of complying with the Amendment were minimal. *Cf. Seneca Nation of Indians*, 89 A.D.3d at 1538 (expenses were not cognizable under SAPA where they were attributable to cost of complying with preexisting statute). For the same reason, the Chamber's argument that DFS failed to quantify costs associated with producers' collection of suitability information from their clients (Amicus Br. at 14-15) is meritless: Regulation 187, in its unamended form, already required the collection of most of this information (R. 140-41), and the Amendment requires only that additional information be collected "as relevant to the consumer." 11 N.Y.C.R.R. §§ 224.3(g)(1), (2). DFS therefore appropriately recognized that the Amendment imposed minimal new costs in this regard. (R. 2042-43.)

Finally, while petitioners attack the RIS's purported imprecision in estimating costs (Br. at 31), their own vagueness about costs is telling. Indeed, petitioners do not articulate *any* of the supposed "tangible costs" of the Amendment (Br. at 33), beyond providing an unexplained citation to 135 pages of the record. Included in those pages are the affidavits of two individual petitioners, Gary Slavin and Stephen Testa, who make dire predictions about the Amendment's effect on the New York insurance industry, ranging from increased litigation to entire businesses shutting down or leaving the State. (*See, e.g.*, R. 154-55, 161-62.) But those are precisely the sort of speculative costs that need not be accounted for in a RIS, and, indeed, are impossible to quantify. *See Matter of Lake George Chamber of Commerce*, 205 A.D.2d at 95. Moreover, to the extent that Slavin and Testa posit that the need to search the market to locate the singular product that is in a consumer's best interest will result in increased costs (*e.g.*, R. 153 ¶ 7; R. 160 ¶ 6), that conflates the notion of an ideal "best" product with one that generally furthers the consumer's—not the producer's—best interest. Only the latter is required. (*See* R. 2061 ["Best interest is an evaluation process resulting in a recommendation in the consumer's best interest rather than the one

singular product that is in the consumer's best interest."]; *cf.* R. 1733 ["The Department agrees that best interest does not necessarily mean the least expensive product available."].)

B. DFS Appropriately Addressed the Relationship Between the Amendment and Applicable Federal Standards.

SAPA § 202-a(3)(h) requires that an RIS identify "whether the rule exceeds any minimum standards of the federal government for the same or similar subject areas and, if so," provide "an explanation of why the rule exceeds such standards." Petitioners do not seriously dispute that the RIS here did so. (*See* R. 2038-39.) They assert instead that DFS failed to explain the rationale for promulgating the Amendment "once there was no federal counterpart." (Br. at 35.) The premise of this argument is that the existence of the federal DOL rule authorized DFS to take similar action, and that DFS's authority vanished once that rule was vacated. As detailed above, that is not so. (*See* Statement of the Case Part A, *supra* [discussing DFS's extensive statutory authority grounded in state law].) Indeed, even as it struck down the federal rule, the Fifth Circuit recognized the continued need for state regulators to act within their authority. *Chamber of Commerce*, 885 F.3d at 379. In any event, contrary

to petitioners' argument (Br. at 35), the RIS appropriately addressed the heightened need for state action in the absence of federal regulation. (*See* R. 2038-39.)

Petitioners' other arguments amount to broad complaints about the Amendment as it relates to federal law, untethered to any SAPA requirement. Petitioners' belief that a related United States Securities and Exchange Commission ("SEC") rule "expose[s] the overreach" of the Amendment (Br. at 36) has nothing to do with whether DFS adhered to § 202-a(3)(h) in promulgating it. Similarly, the fact that the State of New York filed a lawsuit (Br. at 36-37) in which it criticized the SEC's rule as too weak—a criticism that DFS also expressed in the RIS (R. 2039)—has no bearing on whether DFS complied with SAPA. Petitioners' arguments regarding § 202-a(3)(h) are therefore meritless.

C. DFS Appropriately Considered the Impact of the Amendment on Small Businesses.

SAPA § 202-b(1) requires agencies to "consider utilizing approaches that will accomplish the objectives of applicable statutes while minimizing any adverse economic impact of the rule on small businesses." DFS analyzed the Amendment's impact on small businesses,

including by meeting with interested parties, altering the Amendment in response to commenters' cost-related concerns, analyzing the administrative costs associated with the Amendment, and issuing a regulatory flexibility analysis ("RFA") and several revisions to it. (R. 2018-20.) DFS's revised RFA found that the Amendment "will not impose any reporting, recordkeeping or other compliance requirements on small businesses." (R. 2019.) DFS also expanded its RFA analysis in response to public comments, adding to the section on costs so as to clarify the Amendment's impact on small businesses. (R. 2078-79.) Thus, the record shows that DFS substantially complied with the procedural requirements of SAPA and took considerable action to ensure that stakeholders' views were reflected in the final product.

CONCLUSION

This Court should affirm the judgment of Supreme Court.

Dated: Albany, New York
August 3, 2020

Respectfully submitted,

LETITIA JAMES
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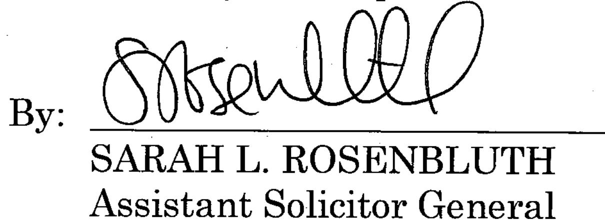
By: 

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

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