To be argued by:
SARAH L. ROSENBLUTH
Time requested:
10 MINUTES

APL 2021-00108

Court of Appeals of the State of New York

In the Matter of the Application of

INDEPENDENT INSURANCE AGENTS AND BROKERS OF NEW YORK, INC., et al.,

Petitioners-Respondents,

PROFESSIONAL INSURANCE AGENTS OF NEW YORK STATE, INC., et al.,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, et al.,

Respondents-Appellants,

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

BRIEF FOR APPELLANTS

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
SARAH L. ROSENBLUTH
Assistant Solicitor General
Of Counsel

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants
The Capitol
Albany, New York 12224
(518) 776-2025
sarah.rosenbluth@ag.ny.gov

Dated: February 3, 2022

Supreme Court, Albany County, Index No. 907005-18; Third Dept. No. 530047

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ... iii

PRELIMINARY STATEMENT ... 1

JURISDICTIONAL STATEMENT ... 4

QUESTION PRESENTED ... 5

STATEMENT OF THE CASE ... 5

- A. DFS's Statutory Authority Over the Insurance Industry in New York ... 5
- B. DFS's Investigative Oversight of and Guidance to the Insurance Industry ... 8
- C. Life Insurance and Annuity Products ... 10
- D. Insurance Agents and Brokers ... 12
- E. Regulation 187 ... 13
  - 1. The Original Regulation 187 ... 13
  - 2. Impetus for the Amendment ... 14
    - a. Increasing Product Complexity ... 15
    - b. Producer Compensation Practices ... 18
  - 3. Terms of the Amendment ... 21
  - 4. Promulgation of the Amendment ... 28
  - 5. Relationship Between Regulation 187 and National Standards ... 31

F. This Proceeding and the Decisions Below 33

ARGUMENT 35

THE AMENDMENT IS NOT UNCONSTITUTIONALLY VAGUE 35

A. The Amendment is sufficiently definite. 37

1. The term "recommendation" is sufficiently definite 38

2. The term "suitability information" is sufficiently definite 47

B. The Amendment sets forth clear standards for enforcement. 51

CONCLUSION 56

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases **Page(s)**

41 Kew Gardens Rd. Assoc. v. Tyburski,
70 N.Y.2d 325 (1987) 48

Chamber of Commerce of U.S. of Am. v. U.S. Dept. of Labor,
885 F.3d 360 (5th Cir. 2018) 30, 42n

CMSG Rest. Group, LLC v. State of New York,
145 A.D.3d 136 (1st Dep't 2016), *lv. denied*, 29 N.Y.3d 929 (2017), *cert. denied*, 138 S. Ct. 381 (2017) 54

Copeland v. Vance,
893 F.3d 101 (2d Cir. 2018) 37

Gonzales v. Carhart,
550 U.S. 124 (2007) 39

Health Ins. Assn. of Am. v. Harnett,
44 N.Y.2d 302 (1978) 5

Holder v. Humanitarian Law Project,
561 U.S. 1 (2010) 45

Matter of Gilmartin v. Tax Appeals Trib.,
31 A.D.3d 1008 (3d Dep't 2006) 48n

Matter of Kaur v. New York State Urban Dev. Corp.,
15 N.Y.3d 235 (2010) 37

Matter of Koelbl v. Whalen,
63 A.D.2d 408 (3d Dep't), *appeal dismissed*,
45 N.Y.2d 838 (1978), *lv. denied*, 46 N.Y.2d 706 (1978) 49n

Matter of Medical Socy. of State of N.Y. v. Serio,
100 N.Y.2d 854 (2003) 8

Cases **Page(s)**

Matter of New York State Land Tit. Assn., Inc. v. New York State Dept. of Fin. Servs.,
178 A.D.3d 611 (1st Dep't 2019) 43

Matter of Old Republic Life Ins. Co. v. Wikler,
9 N.Y.2d 524 (1961) 42n

Matter of Travis S.,
96 N.Y.2d 818 (2001) 48n

Montgomery v. Daniels,
38 N.Y.2d 41 (1975) 48

Natl. Assn. for Fixed Annuities v. Perez,
217 F. Supp. 3d 1 (D.D.C. 2016) 42

Osborne v. Ohio,
495 U.S. 103 (1990) 46

People v. Bakolas,
59 N.Y.2d 51, 54 [1983] 39n

People v. Illardo,
48 N.Y.2d 408 (1979) 48

People v. Marquan M.,
24 N.Y.3d 1 (2014) 44

People v. Nelson,
69 N.Y.2d 302 (1987) 39n

People v. New York Trap Rock Corp.,
57 N.Y.2d 371 (1982) 41

People v. Shack,
86 N.Y.2d 529 (1995) 39n, 46

People v. Smith,
44 N.Y.2d 613 (1978) 52

Cases **Page(s)**

People v. Stephens,
28 N.Y.3d 307 (2016) 36n, 41

People v. Stuart,
100 N.Y.2d 412 (2003) .... *passim*

People v. Tichenor,
89 N.Y.2d 769 (1997) 39n, 42n

Posters 'N' Things, Ltd. v. United States,
511 U.S. 513 (1994) 52

Screws v. United States,
325 U.S. 91 (1945) 40

State Farm Mut. Auto. Ins. Co. v. Malella,
4 N.Y.3d 313 (2005) 8

State of Minnesota ex rel. Swanson v. Am. Family Prepaid Legal Corp.,
No. A11-1848, 2012 WL 2505843 (Minn. Ct. App. July 2, 2012) 40

Town of Delaware v. Leifer,
34 N.Y.3d 234 (2019) 51

Ulster Home Care v. Vacco,
96 N.Y.2d 505 (2001) 51

United States v. Ciambrone,
602 F. Supp. 563 (S.D.N.Y. 1984) 49n

United States v. Farhane,
634 F.3d 127 (2d Cir. 2011) 44

United States v. Williams,
553 U.S. 285 (2008) 37, 38

Vil. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 36

New York State Statutes **Page(s)**

Civil Procedure Law and Rules
article 78 33
§ 5601(b)(1) 4

Financial Services Law
§ 102 5
§ 201(b) 6
§ 201(b)(5) 1
§ 302(a) 8
§ 302(a)(2) 7

Insurance Law
article 24 7
§ 301(c) 7
§ 308 9
§ 309 9
§ 2101(k) 6
§ 2102 12
§ 3201(b)(1) 8
§ 4228 18
§ 4228(f)(1) 8

New York State Rules and Regulations

11 N.Y.C.R.R.
§ 224.1 .... 13, 22
§ 224.1(a) 13
§ 224.1(b) 13
§ 224.1(g) 14
§ 224.2(a) 22n
§ 224.3(e) 27, 39
§ 224.3(e)(1) 40, 43, 45, 46
§ 224.3(g) 25, 48
§ 224.3(h) 47n
§ 224.4(b)(1) 24, 53
§ 224.4(d) 22, 47

New York State Rules and Regulations **Page(s)**

11 N.Y.C.R.R
§ 224.4(f) ... 53
§ 224.4(f)(1) ... 48n
§ 224.5(b)(1) ... 24n, 53
§ 224.6(b)(1)(ii) ... 53

Other State Statutes, Rules, and Regulations

Ala. Admin. Code
r. 482-1-137 ... 33
r. 482-1-137-0.5(i) ... 51

Ariz. Rev. Stat. Ann.
§ 20-1243 ... 33
§ 20-1243(4) ... 51

Ark. Code R.
§ 1 ... 33
§ 5(D) ... 51

Conn. Agencies Regs.
§ 38a-432a-1 ... 33
§ 38a-432a-4(12) ... 51

Del. Admin. Code
§ 1214 ... 33
§ 1214-3.0 ... 51

Idaho Code
§ 41-1940 ... 33
§ 41-1940(2)(d) ... 51

Iowa Admin. Code
r. 191-15.72(507B) ... 33
r. 191-15.74(507B) ... 51

Other State Statutes, Rules, and Regulations **Page(s)**

Ky. Admin. Regs.
12:120 33
12:120(3)(2) 51

Me. Code R.
ch. 917, § 5(3) 33, 51

Mich. Comp. Laws Ann.
§ 500.4151 33
§ 500.4151(c) 51

Miss. Admin. Code
pt 2., R. § 18.01 33
pt. 2, R. § 18.05(L) 51

Mont. Code Ann.
§ 33-20-801 33
§ 33-20-804(3) 51

Neb. Rev. Stat.
§ 44-8101 33
§ 44-8105(3) 51

N.D. Cent. Code
§ 26.1-34.2-01 33
§ 26.1-34.2-02(4) 51

Ohio Admin Code
3901-6-13 33
3901-6-13(E)(3) 51

Pa. Stat. and Cons. Stat.
§ 627-1 .... 33, 51

R.I. Code R.
§ 25-1.1 33
§ 25-1.5(D) 51

Other State Statutes, Rules, and Regulations **Page(s)**

Tex. Ins. Code Ann.
§ 1115.001 33
§ 1115.002(2-b) 51

Va. Admin. Code
§ 5-45-10 33
§ 5-45-20 51

Federal Statutes

15 U.S.C.
§ 1012(a) 5

Miscellaneous Authorities

Natl. Assoc. of Ins. Commrs., *Annuity Suitability & Best Interest Standard* (June 4, 2021), https://content.naic.org/cipr_topics/topic_annuity_suitability_best_interest_standard.htm 32n

Natl. Assoc. of Ins. Commrs., *Suitability in Annuity Transactions Model Regulation*, *available at* https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf (last visited Feb. 1, 2022) 50

N.Y. Dept. of Fin. Servs., *Circular Letters*, https://www.dfs.ny.gov/industry_guidance/circular_letters (last visited Feb. 1, 2022) 9

N.Y. Dept. of Fin. Servs., *Industry FAQs*, https://www.dfs.ny.gov/apps_and_licensing/industry_faqs (last visited Feb. 1, 2022) 9

N.Y. Dept. of Fin. Servs., *Industry Guidance* https://www.dfs.ny.gov/industry_guidance/home (last visited Feb. 1, 2022) 9n

Miscellaneous Authorities **Page(s)**

N.Y. Dept. 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 9n, 25, 54

PRELIMINARY STATEMENT

Consumer protection is central to the mandate of the Department of Financial Services ("DFS"). As part of this mandate, the Legislature has instructed the agency to take appropriate action to protect consumers by, among other things, "encourag[ing] high standards of honesty, transparency, fair business practices and public responsibility" in the insurance industry. Fin. Servs. Law § 201(b)(5). To allow DFS to carry out its statutory duties, the Legislature has vested plenary power in DFS over the supervision of the insurance business in New York State.

Petitioners—an industry trade association and one of its members—challenge a DFS regulation that requires insurance agents and brokers (collectively known as "producers") to serve consumers' best interests when selling life insurance and annuity policies. These products have proliferated in recent years, with increasing potential for consumer confusion and an associated need for trustworthy advice. Moreover, compensation to producers has become increasingly complex and structured in ways that incentivize the sale of products regardless of whether the products meet the specific needs of a particular consumer.

The provision at issue here, the first amendment to DFS Regulation 187 (the "Amendment"), was promulgated to ensure transparent and fair business practices in the sale of life insurance and annuities, and to protect consumers of these products. The Amendment applies to producers' "recommendations" to their customers regarding the sale of these products, and requires producers to act in the "best interest" of the consumer when they make such recommendations. This entails considering the consumer's particular "suitability information," *i.e.*, demographic and financial information. In other words, the Amendment requires producers to recommend to consumers only those life insurance and annuity policies that serve consumers', not producers', best interests, and prohibits producers from prioritizing their own financial incentives ahead of consumers' interests.

After Supreme Court dismissed the petition in its entirety, the Appellate Division, Third Department, reversed and declared the Amendment void for vagueness. But the court did not identify *any* particular provision of the Amendment that it found imprecise or otherwise unintelligible. Instead, it held that the definition of "recommendation" is too "broad" (A. 7), thereby conflating the vagueness

doctrine with the overbreadth doctrine. And it held that the components of the definition of "suitability information" "rely upon subjective terms that lack long-recognized and accepted meanings"—without citing any particular term claimed to be subjective. (A. 8.)

This Court should reverse. As an economic regulation that does not implicate any liberty interest, the Amendment is subject to a relaxed vagueness test, which it readily passes. The Amendment uses definite and intelligible language to convey its requirements and prohibitions, and sets forth clear standards for enforcement. It therefore comports with the Due Process Clause and is not void for vagueness.

The Third Department mistakenly held otherwise with respect to two key terms of the Amendment. *First*, contrary to the Third Department's conclusion, the definition of "recommendation"—the making of which triggers the Amendment's protections—contains a sufficiently definite, objective standard: it applies only to those statements or acts that may be reasonably perceived as constituting advice and that result in the consumer acting on that advice. *Second*, while the Third Department concluded that the definition of "suitability information" provides insufficient guidance to producers, that definition

is virtually the same as the one that has been in place since the original promulgation of Regulation 187 in 2010, and uses common terms that are also used by the National Association of Insurance Commissioners in its model rule regarding annuity transactions, and by at least 19 other States nationwide.

This Court should reverse and reinstate Supreme Court's judgment.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to C.P.L.R. 5601(b)(1). The order of the Appellate Division finally determined the action by declaring the Amendment unconstitutional on due-process grounds. This Court set the appeal down for briefing and argument in the normal course after conducting a jurisdictional inquiry.

The constitutional issue is preserved. The issue was raised in the petition and briefed in Supreme Court by both parties (Appendix ["A."] 55-59, 65, 114-120, 175-181), and ruled on by both Supreme Court and the Appellate Division (A. 7-8, 272-273).

QUESTION PRESENTED

Whether the Amendment comports with the Due Process Clause of the state and federal Constitutions because it is sufficiently definite and contains clear standards for enforcement.

STATEMENT OF THE CASE

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

As this Court has recognized, "insurance 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). The insurance industry is pervasively regulated, and the Legislature has granted DFS comprehensive authority to oversee its operation in New York.[1]

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 like the insurance departments of other

[1] 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.

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* A. 202 ¶ 6.)

The Legislature has directed DFS to take such actions as the superintendent believes necessary to effectuate its mandate, including actions to:

- 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 granting DFS broad authority over financial products and services, the Legislature gave DFS specific authority over particular aspects of the insurance market, including 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." *Id.* § 2104(a)(2). For example, DFS is responsible for producer licensure, *see id.* §§ 2103, 2104, 2110, and is authorized to suspend, revoke, or refuse to renew the license of any producer if that producer uses "fraudulent, coercive or dishonest practices," *id.* § 2110(a)(4)(A), demonstrates "incompetence" or "untrustworthiness," *id.* § 2110(a)(4)(B), (C), or "intentionally misrepresent[s] the terms of an actual or proposed insurance contract," *id.* § 2110(a)(6).

DFS is further authorized 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. *Id.* §§ 2402(b), (c).

DFS is also authorized 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, *see id.* § 2123, and those setting forth mandatory disclosures to be made

when selling insurance policies and annuities, *see 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, 863-64 (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

DFS regularly receives and compiles information from multiple sources about producer conduct, and analyzes them for trends and issues in the industry. (A. 204 ¶ 12.) It obtains such information through routine

examinations of domestic insurance carriers and also through more targeted investigations. *See generally* Ins. Law §§ 308, 309. (A. 204 ¶ 12.) And DFS also receives information through consumer complaints that it receives about the insurance industry, and from the resulting investigations. (A. 204 ¶ 12.)

Based on this information and its general expertise, DFS routinely publishes on its website a variety of guidance materials, such as circular letters and responses to frequently asked questions.[2] (A. 204 ¶ 13.) *See generally* N.Y. Dept. of Fin. Servs., *Industry Guidance* https://www.dfs.ny.gov/industry_guidance/home (last visited Feb. 1, 2022).[3] Those guidance materials are directed to the industry at large and address common questions that DFS has received. In addition, DFS regularly provides informal, unpublished guidance by answering specific

---

[2] DFS published a response to a set of frequently asked questions about the Amendment on February 12, 2020. *See* N.Y. Dept. 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.

[3] *See also, e.g.*, N.Y. Dept. of Fin. Servs., *Circular Letters*, https://www.dfs.ny.gov/industry_guidance/circular_letters (last visited Feb. 1, 2022); N.Y. Dept. of Fin. Servs., *Industry FAQs*, https://www.dfs.ny.gov/apps_and_licensing/industry_faqs (last visited Feb. 1, 2022).

questions posed by industry groups or by specific licensed entities, such as insurance agents and brokers. (A. 204-205 ¶¶ 13-14.)

C. Life Insurance and Annuity Products

Life insurance and annuity products—the subject of the Amendment—address a range of personal financial objectives and insure against a variety of risks, and are among the most complex fields regulated by DFS. (A. 205 ¶ 16.)

In general, New York life insurers sell two related but distinct classes of products: life insurance and annuities. (A. 205 ¶ 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, by providing regular income. (A. 205 ¶ 17.)

Life-insurance products are primarily divided into two categories: term life insurance and permanent life insurance. (A. 206 ¶ 18.) Term life insurance promises the payment of a stated death benefit if the insured dies within a specified period of time. (A. 206 ¶ 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. (A. 206-207 ¶¶ 20-23.)

Annuity products are also primarily divided into two categories: immediate annuities and deferred annuities. (A. 207 ¶ 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. (A. 207 ¶ 25.) By contrast, a consumer purchasing a deferred annuity pays a lump sum of money in exchange for payment at a later date. (A. 207 ¶ 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. (A. 207 ¶ 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. (*See* A. 206-207 ¶¶ 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. (A. 210 ¶ 37.) As consumer choice has proliferated, consumers have become ever more reliant on the

assistance of licensed agents and brokers in evaluating and recommending an appropriate product tailored to the specific consumer's circumstances. (A. 212 ¶ 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 (A. 209 ¶ 35), most insurers sell their products through insurance agents and brokers (collectively referred to as "producers") (A. 208 ¶ 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. (A. 208 ¶ 29.) Both types of producers, however, interact with and provide recommendations to consumers (A. 208 ¶ 30) and must be licensed by DFS in order to operate in New York, *see* Ins. Law § 2102. It is not uncommon for a producer to hold both an agent's license and a broker's license from DFS and to operate under both licenses at the same time. (A. 208 ¶ 31.)

E. Regulation 187

1. The Original Regulation 187

The first New York regulation of producers' duties to consumers was promulgated by one of the predecessor agencies to DFS, the former Insurance Department, on an emergency basis in 2010, and as a final regulation by DFS in 2013. (A. 222 ¶ 69.) While the original Regulation 187 applied only to annuities and not to life-insurance policies (*see* A. 222 ¶ 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. (A. 222 ¶ 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 or an insurer" (A. 378 § 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" (A. 381-382 §§ 224.4[a], [b].) It also required insurers to ensure that all

producers recommending the insurer's products were "adequately trained to make the recommendation." (A. 384 § 224.4[g].)

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* A. 223 ¶ 69 n.6.)

2. Impetus for the Amendment

DFS began developing an amendment to Regulation 187 in 2017, motivated primarily by two features of the market for insurance products, one relating to consumers and the other to producers. (A. 209-210 ¶¶ 36-37.) *First*, DFS observed that the purchase of life insurance and annuity products increasingly involves more complex financial transactions. (A. 303.) Moreover, the products are increasingly marketed as investment products, and play an increasingly significant role in retirement planning. (A. 210 ¶ 37; A. 303.) The increasingly complex nature of these transactions, and the increasingly salient role they play for consumers, have in turn made the role of insurer and producer recommendations "increasingly important and [have] resulted in a greater need for consumers to rely on professional advice and assistance"

in understanding available products. (A. 303; *see also* A. 365-366.) *Second*, producers' compensation structure for the sale of life insurance and annuities creates substantial incentives for producers to act other than in their customers' best interests. (A. 213-217 ¶¶ 45-54.) This concern has become more acute as consumers have become increasingly reliant on producers to navigate the insurance marketplace. (*See* A. 303.)

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. (A. 211 ¶ 38.) 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. (A. 211 ¶ 38.) Between 2011 and 2017 alone, life insurers submitted 44,624 different policy forms to DFS for approval. (A. 211 ¶ 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 (premiums paid over the life of the policy), single premium whole life (one single payment upfront), or limited pay whole life (premiums paid for a set number of years);
        - if universal life, whether traditional, indexed, variable, or guaranteed universal life;
        - whether to opt for a participating policy (which receives dividends from the life insurance company's surplus earnings) or a non-participating one.

And so on. (*See* A. 211-212 ¶¶ 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, like a lump sum, for another, like a series of future

payments), inflation protection, or other optional features. (A. 212 ¶ 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. (A. 212 ¶ 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* A. 207 ¶ 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.

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* A. 213 ¶ 46; A. 214 ¶ 48.) As DFS has observed, 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* A. 214 ¶ 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. (A. 214 ¶ 50.)

Third, the amount of compensation that producers receive from intermediaries between producers and insurers (such as general agents or broker-dealers) frequently varies based on a producer's volume of sales of an intermediary's products in a given time period. (A. 214-215 ¶ 51.) This creates an incentive to maximize sales of a given product, even if it is not well suited to a customer's needs. (A. 214-215 ¶ 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, the compensation is paid using nearly all of the customer's first-year premium payment. (A. 214 ¶ 49.) As a result, producers are more richly compensated in the short term—for the sale of inherently long-term planning tools—regardless of whether the product suits the needs of the customer or the customer's ability to pay beyond the first several years of the policy. (A. 214 ¶ 49.)

Fifth, financial incentives can interfere with the objectivity of producers' recommendations to customers regarding in-force transactions. (A. 215-216 ¶ 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. (A. 215

¶ 52.) Some compensation structures contain back-end incentives for producers, which encourage producers to sell policies that remain in force for a long time. (A. 215 ¶ 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. (A. 215-216 ¶ 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. (A. 216 ¶ 54.) This creates the incentive for a new producer who takes over an account to make recommendations in order to generate new commissions. (A. 216-217 ¶ 54.)

While these incentives do not inevitably induce producers to 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* A. 218-220 ¶¶ 58-64.)

DFS also considered recent studies that 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. (A. 217 ¶ 55.) Such high rates of lapse indicate a systemic problem of unsuitable life-insurance recommendations and sales. (A. 217-218 ¶ 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 (A. 222 ¶ 69)—demonstrated the need for a more

stringent standard of care for life insurance and annuity sales (A. 303). DFS concluded that "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." (A. 303.) 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* A. 303-304.) The Amendment made four key changes in this regard.

First, the Amendment expands the scope of Regulation 187. Unlike the original version, which applied only to new annuity transactions, the Amendment applies to both annuity and life-insurance transactions, and covers both new purchases and in-force transactions.[4] *See* 11 N.Y.C.R.R. §§ 224.1, 224.4(d).

---

[4] The Amendment does not apply, however, when insurance is purchased "in response to a generalized offer by the insurer" without "producer involvement"—such as an offer made by mail or at a worksite—and "where there is no recommendation made." 11 N.Y.C.R.R. § 224.2(a).

Second, the Amendment imposes a new standard of care on producers (or on insurers where no producer is involved) that applies when they make recommendations to consumers. Instead of simply being required to recommend "suitable" products, producers must also "act in the best interest of the consumer." *Id.* §§ 224.4(a), 224.5(a). The "best interest" standard does not assume the existence of a single "best" product for a given consumer, nor does it penalize producers who do not recommend the "right" needle out of a haystack of options, as petitioners in this case suggested below. Instead, the rule emphasizes producers' procedural duties in recommending insurance products. As DFS explained in the course of promulgating the Amendment, the term "best interest" refers to "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." (A. 358.)

Most fundamentally, the "best interest" standard prohibits producers from prioritizing their own financial incentives ahead of consumers' interests,[5] even if the product recommended is minimally

---

[5] Producers' receipt of otherwise allowable compensation is still permitted, "provided that the amount of the compensation or the receipt of an

(footnote continues on next page)

suitable for the consumer. 11 N.Y.C.R.R. §§ 224.4(b)(1), 224.5(b)(1). An example may make this point clear. Suppose that a consumer is shopping for a product suited to her goal of guaranteed growth with no risk of losing the principal. Suppose also that a producer has two annuities that he could recommend to the consumer: Annuity A offers a 3% guaranteed interest rate for the life of the contract while Annuity B offers only a 1% guaranteed interest rate. While both annuities would further the consumer's goal of guaranteed growth, Annuity A—with the higher interest rate—would better meet that goal. Now suppose, too, that Annuity B pays the producer a higher commission than does Annuity A. The consumer will lose out on a better interest rate if the producer decides to recommend Annuity B over Annuity A in order to capture the higher commission for himself. The "best interest" standard therefore requires the producer to refrain from considering his own financial interest when deciding whether to recommend Annuity A or Annuity B.

To serve the best interest of consumers, the standard additionally requires producers to (i) collect and evaluate certain "suitability

---

incentive does not influence the recommendation." 11 N.Y.C.R.R. §§ 224.4(b)(1), 224.5(b)(1); *see also id.* § 224.4(*l*).

information" from the consumer (discussed further below), (ii) confirm that the sales transaction is indeed suitable for the consumer and (iii) ensure that there is a reasonable basis to believe that the consumer will benefit from the recommended policy's features. *Id.* § 224.4(b). Compliance is measured against 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" as of the time the recommendation is made, without regard for the subsequent performance of the annuity contract or the life-insurance policy. *Id.* § 224.4(b); N.Y. Dept. 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). A producer who carries out these steps complies with the duty to act in the consumer's best interest.

The "suitability information" that must be collected from a consumer before making a recommendation is generally the same as the suitability information that was required to be collected under the original version of Regulation 187 (A. 379-380), and includes data such as age, income, financial situation, time horizon, and risk tolerance. 11

N.Y.C.R.R. § 224.3(g). The precise scope of "suitability information" depends on the type of policy. For policies solely providing term life insurance with no cash value, the term "suitability information" is defined as:

> information that is reasonably appropriate to determine the suitability of a recommendation commensurate with the materiality of the transaction to a consumer's financial situation at the time of the recommendation and the complexity of the transaction recommended, including some or all of the following, as relevant to the consumer: (i) age; (ii) annual income; (iii) financial situation and needs, including the financial resources used for the funding of the policy; (iv) financial objectives; (v) intended use of the policy, including any riders attached thereto; (vi) financial time horizon, including the duration of existing liabilities and obligations; (vii) existing assets, including investment and insurance holdings: (viii) willingness to accept non-guaranteed elements in the policy, including variability in premium, death benefit, or fees; and (ix) any other information provided by the consumer which in the reasonable judgment of the producer, or the insurer where no producer is involved, is relevant to the suitability of the transaction.

Id. § 224.3(g)(1). For all other types of policies, "suitability information" may include some or all of the above, as relevant, and in addition may include financial experience, liquidity needs, liquid net worth, risk tolerance, and tax status. *Id.* § 224.3(g)(2).

The Amendment's requirement that producers collect such suitability information and use it to act in the best interests of consumers

attaches only to the act of making "recommendations." *See id.* §§ 224.4(a), (b). A "recommendation" is defined to mean a statement that is either subjectively intended by a producer to result in a consumer entering into or refraining from entering into a transaction, or one that can objectively be interpreted to constitute sales advice and results in the consumer acting on that advice. Specifically, 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.

Id. § 224.3(e).

The definition also makes clear that the following acts or statements do not constitute "recommendations": (i) "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" and (ii) the "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." *Id.* § 224.3(e)(2).

Third, in order to protect both consumers and producers, the Amendment's third main change to the original Regulation 187 requires producers to provide consumers documentation of sales recommendations and the reasons therefor. *Id.* § 224.4(f).

Finally, the Amendment imposes more specific supervision requirements on insurers. *Id.* § 224.6. In addition to ensuring that producers are trained on making recommendations, *id.* § 224.6(e), as was mandated by the original Regulation 187, insurers must, among other things, develop systems for the collection of suitability information, the documentation and disclosure of the bases for recommendations, and the review of any complaints, *id.* § 224.6(b). Insurers are also required to implement procedures for auditing producers' recommendations, so as to monitor producers' compliance with the Amendment. *Id.*

4. Promulgation of the Amendment

The Amendment was the product of extensive interactions with numerous stakeholders. DFS first proposed the Amendment in December 2017 and simultaneously published a regulatory impact statement, a

regulatory flexibility analysis, a rural area flexibility analysis, and a job impact statement. (A. 278-281.) 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. (A. 225 ¶¶ 76-78.)

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. (A. 296-300, 316-340.) Thereafter, DFS received another set of comments and again met with interested parties. (A. 225-226 ¶¶ 80-81.) DFS then issued a revised regulatory impact statement (A. 301-315), a revised regulatory flexibility analysis (A. 342-344), a revised rural area flexibility analysis (A. 344-345), a revised job impact statement (A. 345), as well as another assessment of public comments (A. 347-376).

In the revised 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. Dept. of Labor*, 885 F.3d 360 (5th Cir. 2018). (*See* A. 304.) But the Fifth Circuit's 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." (A. 304.)

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. (A. 307-308.)

Because the Amendment takes a flexible approach to compliance based on broad principles and is designed to permit insurers and producers to leverage existing practices,[6] administrative costs were expected to be minimal for most producers, and to be outweighed by the substantial benefits to consumers. (A. 308-313.)

On July 17, 2018, the final Amendment to Regulation 187 was filed, and was published in the State Register on August 1, 2018. (A. 341-346.)

5. Relationship Between Regulation 187 and National Standards

The original version of Regulation 187 was based on the Suitability in Annuity Transactions Model Regulation (Model Regulation 275) promulgated by the National Association of Insurance Commissioners ("NAIC"). (A. 279.) While that regulation required producers to recommend only those annuity transactions that were suitable for the

---

[6] 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. (A. 309.) 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. (A. 309.) Additionally, the Amendment's supervision requirements are substantially similar to those of various national organizations, which already guide the behavior of many producers. (A. 310.)

consumer, it stopped short of imposing a "best interest" standard of care. (*See* A. 365.) The limits of this suitability standard prompted DFS to promulgate the Amendment, for the reasons discussed above. (*See* Statement of the Case, Part E.2, *supra*.) (A. 305-306, 365-366.) While DFS was in the process of finalizing the Amendment in 2018, it shared its proposal with NAIC, recommending that NAIC consider DFS's proposed Amendment when revising its Model Regulation 275. (A. 349.)

NAIC approved revisions to Model Regulation 275 in February 2020. *See* Natl. Assn. of Ins. Commrs., *Annuity Suitability & Best Interest Standard* (June 4, 2021), https://content.naic.org/cipr_topics/topic_annuity_suitability_best_interest_standard.htm.[7] The revised model rule relies on the New York DFS Amendment as a prototype, and, like the Amendment, requires that producers and insurers recommend only those annuity transactions that are in the best interest of the consumer.[8] *See id.* At least 19 States (in addition to New York), led by both

---

[7] The current text of the model rule is available at https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf (last visited Feb. 1, 2022).

[8] Unlike the Amendment, Model Regulation 275 does not extend to life-insurance transactions.

Democrats and Republicans, have now adopted the revised Model Regulation 275 in some form.[9]

F. This Proceeding and the Decisions Below

Petitioners commenced this article 78 proceeding in Supreme Court, Albany County in November 2018. (A. 10-69.) The petition alleged, among other things, that the Amendment is unconstitutionally vague, and sought an order annulling the Amendment. (A. 65-67.) 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. The two petitions were consolidated in Albany County.

Respondents answered and moved to dismiss the petitions. Supreme Court (Zwack, J.) granted respondents' motions and dismissed

---

[9] *See* Ala. Admin. Code r. 482-1-137; Ariz. Rev. Stat. Ann. § 20-1243 *et seq.*; 054-01.82 Ark. Code R. § 1 *et seq.*; Conn. Agencies Regs. § 38a-432a-1 *et seq.*; 18 Del. Admin. Code § 1214; Idaho Code § 41-1940 *et seq.*; Iowa Admin. Code r. 191-15.72(507B) *et seq.*; 806 Ky. Admin. Regs. 12:120; 02-031 Me. Code R. ch. 917; Mich. Comp. Laws Ann. § 500.4151 *et seq.*; 19 Miss. Admin. Code pt. 2, R. § 18.01 *et seq.*; Mont. Code Ann. § 33-20-801 *et seq.*; Neb. Rev. Stat. § 44-8101 *et seq.*; N.D. Cent. Code § 26.1-34.2-01 *et seq.*; Ohio Admin. Code 3901-6-13; 40 Pa. Stat. and Cons. Stat. § 627-1 *et seq.*; 230-20 R.I. Code R. § 25-1.1 *et seq.*; Tex. Ins. Code Ann. § 1115.001 *et seq.*; 14 Va. Admin. Code § 5-45-10 *et seq.*

the petitions in their entirety. (A. 234-277.) As relevant here, the court held that the Amendment was not unconstitutionally vague but rather "clear and quite self-explanatory." (A. 273.)

The Third Department unanimously reversed and declared the Amendment unconstitutional. The court held two aspects of the Amendment to be void for vagueness: (i) the definition of "recommendation" and (ii) the definition of "suitability information." Without quoting or analyzing the text of the former definition, the court held that it is "so broad that it is difficult to discern what statements producers could potentially make that would not be reasonably interpreted by the consumer to constitute advice regarding a potential sales transaction." (A. 7.) And with respect to the latter definition, the court held that the guidelines regarding suitability information improperly "rely upon subjective terms that lack long-recognized and accepted meanings," though the court did not identify any particular terms as subjective or otherwise unintelligible. (A. 8.) Nonetheless, the court concluded that "ambiguities in the language employed, coupled with [the Amendment's] lack of clear standards for how these provisions will ultimately be enforced" bestow upon DFS "virtually unfettered

discretion" in enforcing the Amendment, thereby rendering it unconstitutionally vague in violation of petitioners' due-process rights. (A. 8 [internal quotation marks omitted].) The court entered a declaratory judgment in favor of petitioners. (A. 9.)

ARGUMENT

THE AMENDMENT IS NOT UNCONSTITUTIONALLY VAGUE

Facial vagueness challenges, such as petitioners' here, are "generally disfavored." *People v. Stuart*, 100 N.Y.2d 412, 422 (2003). Accordingly, in pursuing such a challenge, the challenger must carry the "heavy burden" of showing that the regulation is "impermissibly vague in *all* of its applications." *Id.* at 421 (internal quotation marks omitted). Petitioners made no such showing and the Third Department erred in holding otherwise.

The void-for-vagueness doctrine embraces the principle that all citizens should have fair notice of the conduct that has been deemed illegal. Accordingly, a vague regulation violates the constitutional guarantee of due process where (i) its terms are so imprecise that they

fail to provide notice of prohibited conduct and (ii) the regulation permits arbitrary enforcement.[10] *People v. Stephens*, 28 N.Y.3d 307, 312 (2016).

However, "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Vil. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Thus, economic regulation, such as the Amendment, "is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Id.* (footnote omitted). Moreover, "the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id.* And there is no liberty interest at stake. *See id.* at 499.

Petitioners fail to establish that the Amendment is vague under the requirements of the ordinary test for vagueness, let alone the less strict test applicable to economic regulations. The Amendment's key terms,

---

[10] Neither the petitioners nor the Third Department specified whether they were relying on the state or federal Constitution, but the same test applies under both. *Stephens*, 28 N.Y.3d at 312.

including "recommendation" and "suitability information," all have plain-English definitions, further illuminated by standard use in the industry. Because the meaning of those terms is clear, enforcement of the Amendment does not turn on DFS's "unguided and subjective judgment." *Copeland v. Vance*, 893 F.3d 101, 120 (2d Cir. 2018). The Amendment is thus sufficiently definite and provides clear standards for enforcement, and the order of the Third Department should be reversed.

A. The Amendment is sufficiently definite.

"Due process requires that a statute be sufficiently definite so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms." *Matter of Kaur v. New York State Urban Dev. Corp.*, 15 N.Y.3d 235, 256 (2010) (internal quotation marks omitted). A regulation is not rendered indefinite, however, by the bare possibility that it might be difficult to determine whether a given requirement has been satisfied in a particular case; rather, it is the "indeterminacy of precisely what that [requirement] is" that gives rise to a constitutional problem. *United States v. Williams*, 553 U.S. 285, 306 (2008). Only when a regulation rests on "wholly subjective judgments without statutory

definitions, narrowing context, or settled legal meanings" will it be so indefinite as to violate the Constitution. *Id.*

Contrary to the Third Department's conclusion, the Amendment's key terms "recommendation" and "suitability information" are not indefinite but rather are defined in plain, intelligible language, as discussed below.

1. The term "recommendation" is sufficiently definite.

The Appellate Division held that the Amendment was vague in part because, in that court's view, the regulatory definition of "recommendation" fails to give producers sufficient notice of what statements to consumers are covered. (A. 7-8.) That conclusion is incorrect.

The Amendment provides that a communication is a "recommendation" if one of two conditions is met: either (i) the producer subjectively intends to induce the consumer to engage in a transaction, or (ii) the communication would objectively be perceived by a reasonable person as made with that intent, and results in the consumer taking

action in accordance with the communication. 11 N.Y.C.R.R. § 224.3(e). Neither is vague.

As an initial matter, the Third Department did not find the subjective definition of "recommendation" to be insufficiently definite, and rightly so: a producer cannot claim to lack notice of whether his statement constitutes a recommendation under that part of the definition when the linchpin of a recommendation is the producer's own subjective intent to induce a consumer to enter into a particular transaction. Thus, because a producer cannot unwittingly "recommend" a product under the subjective definition, the provision "cannot be described as a trap for those who act in good faith." *Gonzales v. Carhart*, 550 U.S. 124, 149-50 (2007) (internal quotation marks omitted); *see also, e.g.*, *Stuart*, 100 N.Y.2d at 426-27 (rejecting vagueness challenge, reasoning that inclusion of specific-intent element in statute ruled out prospect of violating law "by accident, inadvertence or chance encounter").[11] The inverse is also

---

[11] *See also People v. Tichenor*, 89 N.Y.2d 769, 776 (1997) (rejecting vagueness challenge where specific-intent requirement "narrow[ed] the definition, so that no inadvertent act may be punished") (quoting *People v. Bakolas*, 59 N.Y.2d 51, 54 [1983]); *People v. Shack*, 86 N.Y.2d 529, 539 (1995) (rejecting vagueness challenge where specific-intent requirement "removed the possibility that a defendant could be unaware of his criminal conduct"); *People*

(footnote continues on next page)

true: if a producer does intend to make a sale, he "cannot be said to suffer from lack of warning or knowledge" that his conduct is regulated by the Amendment. *Screws v. United States*, 325 U.S. 91, 102 (1945); *see State of Minnesota ex rel. Swanson v. Am. Family Prepaid Legal Corp.*, No. A11-1848, 2012 WL 2505843, at *7 (Minn. Ct. App. July 2, 2012) (rejecting vagueness challenge brought by producers who clearly violated statute by failing to conduct any meaningful inquiry into suitability of recommended annuities). Accordingly, the subjective definition of "recommendation" is sufficiently definite.

Further, contrary to the Third Department's conclusion, the objective prong of the definition of "recommendation" is also sufficiently definite. Under that prong, one or more statements or acts by a producer (or by an insurer where no producer is involved) is a recommendation if it "reasonably may be interpreted by a consumer to be advice and . . . results in a consumer entering into or refraining from entering into a transaction in accordance with that advice." 11 N.Y.C.R.R. § 224.3(e)(1).

---

v. Nelson, 69 N.Y.2d 302, 307-08 (1987) (rejecting vagueness challenge to statute that prohibited "certain intentional course of conduct").

As this Court has held, objective standards of reasonableness render regulations sufficiently definite and defeat vagueness challenges. For example, in *Stephens*, 28 N.Y.3d at 314-15, the Court found the inclusion of the term "reasonable person" to be the critical factor distinguishing the City of Syracuse's constitutionally permissible noise ordinance from Poughkeepsie's vague one that the Court had previously declared unconstitutional. *See People v. New York Trap Rock Corp.*, 57 N.Y.2d 371 (1982). Whereas the Poughkeepsie ordinance prohibited "any sound which annoys a person"—a subjective standard that could result in liability based solely on the "animosity of a cantankerous neighbor"—Syracuse's ordinance properly defined "unnecessary noise" based on "an objective standard—specifically, 'a reasonable person of normal sensibilities.'" *Id.* at 313-14. The Court explained that the term "unreasonable noise" was "not incapable of definition" but instead sufficiently put the public on notice that "noise of a type or volume that a reasonable person, under the circumstances, would not tolerate" was prohibited. *Id.* at 314 (quoting *Bakolas*, 59 N.Y.2d at 53).[12]

---

[12] *See also Stuart*, 100 N.Y.2d at 427-28 (holding that statute that prohibited conduct "likely to cause reasonable fear of material harm" contained

(footnote continues on next page)

Indeed, as a United States District Court observed in rejecting a vagueness challenge to a federal rule regarding the sale of annuities that regulated the receipt of more than "reasonable compensation," the term "reasonable" is "ubiquitous in the law."[13] *Natl. Assn. for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1, 41 (D.D.C. 2016). That ubiquity makes it "unsurprising that the case law is replete with decisions rejecting vagueness challenges, like that raised here, to the words 'reasonable,' 'reasonably,' and 'unreasonably.'" *Id.* at 42 (collecting cases). The First Department, in rejecting a vagueness challenge to a DFS regulation prohibiting unreasonable inducements to title insurers, has similarly observed that "reasonableness is one of the most commonly applied legal standards, and indicates an objective test which does not give license to

---

objective standard, defeating vagueness challenge); *Tichenor*, 89 N.Y.2d at 776 (holding that statute's objective standard supported conclusion that statute was sufficiently definite); *Matter of Old Republic Life Ins. Co. v. Wikler*, 9 N.Y.2d 524, 532 (1961) ("The standards laid down in these statutes, that the premium rates approved be not 'unreasonable in relation to the benefits provided', are fully as specific and clear as other statutory standards which this court has upheld.").

[13] The federal rule at issue was the federal Department of Labor's fiduciary rule that was subsequently vacated by the United States Court of Appeals for the Fifth Circuit. *See Chamber of Commerce*, 885 F.3d at 360. However, the Fifth Circuit vacated the rule only because it conflicted with the statutory text of ERISA; the court did not consider any vagueness challenge to the rule.

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) (internal citation omitted).

Here, the objective prong of the definition of "recommendation" pegs the term's scope not to whatever the most credulous consumer might interpret as advice, but only to the understanding of a reasonable person. *See* 11 N.Y.C.R.R. § 224.3(e)(1). That definition sets clear boundaries, ensures that producers are not subject to the whims of eccentric or unpredictable customers, and is squarely in line with this Court's precedent. And producers' mandatory training on the making of recommendations, *see id.* § 224.6(e), provides an opportunity for further clarification of that definition in light of standard industry practices.

Finally, the definition of "recommendation" cannot be deemed unconstitutionally vague on the ground that it is overly broad—which it is not. The Third Department's contrary conclusion erroneously conflated the vagueness doctrine with the overbreadth doctrine. The court's holding rested on the apparent belief that, while no particular term used to define "recommendation" is indefinite, the overall scope of the definition is too far-reaching. The problem, according to the court, is that

the definition is "so broad that it is difficult to discern what statements producers could potentially make that would not be reasonably interpreted by the consumer to constitute advice regarding a potential sales transaction," and thus the supposed overbreadth violates petitioners' due-process rights. (A. 7-8.)

But unlike the void-for-vagueness doctrine, the overbreadth doctrine is not rooted in due-process notions of fair notice. Instead, "vagueness and overbreadth are distinct concerns, the first implicating the Due Process Clause and the latter the First Amendment." *United States v. Farhane*, 634 F.3d 127, 136 (2d Cir. 2011). Recognizing that the vagueness doctrine does not necessarily "implicate First Amendment rights," this Court has "cautioned against" "improvidently import[ing] overbreadth analysis into a vagueness case." *Stuart*, 100 N.Y.2d at 422 n.8. A regulation is overbroad not if it is vague and indefinite but rather if "constitutionally-protected expression may be chilled by the provision because it facially prohibits a real and substantial amount of expression guarded by the First Amendment." *People v. Marquan M.*, 24 N.Y.3d 1, 8 (2014) (internal quotation marks omitted).

Petitioners have never claimed that the Amendment chills *any* constitutionally protected speech, let alone a substantial amount. Nor did the Third Department identify any such speech. But even if a chill had been established, it would not follow that the Amendment is unconstitutionally vague, since a "vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression." *Holder v. Humanitarian Law Project,* 561 U.S. 1, 20 (2010). In other words, the broad scope of a regulatory provision—even an overbroad scope—does not by itself mean that the provision is unclear; the application of the provision could be expansive but perfectly clear. The Third Department provided no reason why the scope of the definition of "recommendation," though potentially broad, is unclear or otherwise unintelligible.

The definition is not, in any event, overbroad. The definition excludes from the ambit of the Amendment all "general factual information," such as advertisements and marketing materials. 11 N.Y.C.R.R. § 224.3(e)(1). It also excludes producers' use of "interactive tool[s]" that estimate insurance needs or compare different products. *Id.* These exclusions mean that a significant portion of the sales interaction

between a producer and a consumer is not covered by the Amendment at all. *Cf., e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 112 n.9 (1990) (presence of statutory exclusions precluded overbreadth challenge); *accord Shack*, 86 N.Y.2d at 537.

There is also another limitation on the scope of the definition of "recommendation" that the Third Department did not consider. Under the objective definition, a statement or act only qualifies as a recommendation if it "reasonably may be interpreted by a consumer to be advice" *and* in fact "results in a consumer entering into or refraining from entering into a transaction in accordance with that advice." 11 N.Y.C.R.R. § 224.3(e)(1). The latter provision significantly narrows the range of scenarios in which producers may be regulated by the Amendment and ensures that they will not be penalized after the fact for perfunctory statements made during the sales process on which the consumer did not rely. Instead, a producer will face consequences in connection with a recommendation only if he makes a statement that (i) can objectively be interpreted to induce reliance, (ii) does in fact induce reliance, and (iii) is not in the best interest of the consumer.

2. The term "suitability information" is sufficiently definite.

As discussed above (Statement of the Case, Part E.3, *supra*), the Amendment requires producers to make reasonable efforts to collect "suitability information" from consumers before recommending new sales transactions. *See* 11 N.Y.C.R.R. § 224.4(d). "Suitability information" is defined as "information that is reasonably appropriate to determine the suitability of a recommendation commensurate with the materiality of the transaction to a consumer's financial situation at the time of the recommendation and the complexity of the transaction recommended."[14] *Id.* §§ 224.3(g)(1), (2). Depending on the type of policy, the type of transaction, and the consumer's needs, the particular pieces of suitability information that should be collected include such information as the consumer's age, annual income, financial situation and needs, financial objectives and experience, intended use of the policy, financial time

---

[14] The term "suitable" is separately defined as "in furtherance of a consumer's needs and objectives under the circumstances then prevailing, based upon the suitability information provided by the consumer and all products, services, and transactions available to the producer." 11 N.Y.C.R.R. § 224.3(h).

horizon, liquidity needs and liquid net worth, risk tolerance and tax status.[15] *Id.* § 224.3(g).

The Third Department held that the above guidelines impermissibly "rely upon subjective terms that lack long-recognized and accepted meanings." (A. 8.) However, the court identified no particular term that suffered from this flaw, and, contrary to its conclusion, the elements of "suitability information" are all commonplace terms that "have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept." *Montgomery v. Daniels*, 38 N.Y.2d 41, 58 (1975) (internal quotation marks omitted); *see also People v. Illardo*, 48 N.Y.2d 408, 414 (1979) ("[T]he quest for definiteness does not preclude the Legislature from using ordinary terms to express ideas that find adequate interpretation in everyday usage and understanding."). Indeed, many of the specific terms used in the definition have been upheld against similar vagueness challenges.[16]

---

[15] A summary of the relevant suitability considerations supporting a recommendation for a new purchase must also be disclosed to the consumer. 11 N.Y.C.R.R. § 224.4(f)(1).

[16] *See, e.g.*, *Matter of Travis S.*, 96 N.Y.2d 818, 820 (2001) (finding statutory term "age" to be sufficiently definite); *41 Kew Gardens Rd. Assoc. v. Tyburski*, 70 N.Y.2d 325, 336 (1987) (same for "income"); *Matter of Gilmartin*

(footnote continues on next page)

To be sure, some of the elements of "suitability information" require producers to solicit subjective information from consumers, such as the consumer's particular risk tolerance and financial objectives. But while some people may have idiosyncratic financial objectives or levels of risk tolerance and the like, that does not render the terms themselves impermissibly subjective, or make it impossible for a person of ordinary intelligence to understand them.

The ready comprehensibility of the definition of "suitability information" is confirmed by the fact that the definition in the Amendment is largely the same as that in the original version of Regulation 187, which has been on the books since 2010 without legal challenge. (*See* A. 379-380.) If the Third Department were correct that that the now 12-year-old suitability guidelines "provide insufficient guidance" to producers (A. 8), one would expect the well-organized insurance industry to have at least registered its confusion with DFS. However, since the original Regulation 187 was promulgated, DFS has

---

v. Tax Appeals Trib., 31 A.D.3d 1008, 1010 (3d Dep't 2006) (same for "income"); *Matter of Koelbl v. Whalen*, 63 A.D.2d 408, 411 (3d Dep't), *appeal dismissed*, 45 N.Y.2d 838 (1978), *lv. denied*, 46 N.Y.2d 706 (1978) (same for "needs"); *United States v. Ciambrone*, 602 F. Supp. 563, 568-69 (S.D.N.Y. 1984) (same for "financial resources").

received *no* complaints from regulated parties that it is "in any manner unclear." (A. 223 n.6.) Indeed, industry commenters on the proposed Amendment were "pleased to report that the suitability regime is working" (A. 282) and wrote to discuss the impact of the Amendment on "what is currently a well-functioning marketplace" (A. 289). The absence of any substantial confusion, in practice, with the decade-old suitability guidelines undercuts the Third Department's claim that the rules leave producers unsure of how to "conduct themselves in order to comply with the [A]mendment." (A. 8.)

Moreover, if the definition of "suitability information" were hopelessly vague, the National Association of Insurance Commissioners presumably would not have seen fit to incorporate the Amendment's definition of "suitability information" into its own model rule. But it did just that, including the Amendment's language nearly verbatim in Model Regulation 275's definition of the "consumer profile information" that must be collected before making a recommendation. *See* Natl. Assoc. of Ins. Commrs., *Suitability in Annuity Transactions Model Regulation*, *available at* https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf (last visited Feb. 1, 2022) (section 5[C]). And all 19 States that

adopted the model rule adopted that definition in some form, too.[17] The widespread adoption of the Amendment's language is further evidence that the words have a "common understanding" and are not indefinite. *Town of Delaware v. Leifer*, 34 N.Y.3d 234, 248 (2019); *accord Ulster Home Care v. Vacco*, 96 N.Y.2d 505, 510 (2001).

B. The Amendment sets forth clear standards for enforcement.

The second prong of the vagueness test requires courts to determine "whether the enactment provides officials with clear standards for enforcement." *Stuart*, 100 N.Y.2d at 420. Contrary to the Third Department's conclusion, nothing in the Amendment gives DFS "virtually unfettered discretion in determining whether a violation has occurred." (A. 8 [internal quotation marks omitted].) Rather, the Amendment contains "objective criteria" that "minimize the possibility of

---

[17] *See* Ala. Admin. Code r. 482-1-137-0.5(i); Ariz. Rev. Stat. Ann. § 20-1243(4); 054-01.82 Ark. Code R. § 5(D); Conn. Agencies Regs. § 38a-432a-4(12); 18 Del. Admin. Code § 1214-3.0 (third par.); Idaho Code § 41-1940(2)(d); Iowa Admin. Code r. 191-15.74(507B) (third par.); 806 Ky. Admin. Regs. 12:120(3)(2); 02-031 Me. Code R. ch. 917, § 5(3); Mich. Comp. Laws Ann. § 500.4151(c); 19 Miss. Admin. Code pt. 2, R. § 18.05(L); Mont. Code Ann. § 33-20-804(3); Neb. Rev. Stat. § 44-8105(3); N.D. Cent. Code § 26.1-34.2-02(4); Ohio Admin. Code 3901-6-13(E)(3); 40 Pa. Stat. and Cons. Stat. § 627-1 (twelfth par.); 230-20 R.I. Code R. § 25-1.5(D); Tex. Ins. Code Ann. § 1115.002(2-b); 14 Va. Admin. Code § 5-45-20 (sixth par.).

arbitrary enforcement and assist in defining the sphere of prohibited conduct." *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994).

The second prong of the vagueness test "is closely related to the first." *Stuart*, 100 N.Y.2d at 420. As this Court has explained, "[i]f a statute is so vague that a potential offender cannot tell what conduct is against the law, neither can a police officer." *Id.* at 420-21. (The same presumably goes for agency enforcement officials.) Conversely, however, "[t]he use of precise language will ensure that both requirements are met." *Id.* at 421. Accordingly, the second prong of the vagueness test is satisfied here for all the reasons set forth above. *Cf., e.g.*, *People v. Smith*, 44 N.Y.2d 613, 619-21 (1978) (objective and definite statutory standards precluded police from exercising unfettered discretion in making arrests).

The Third Department did not point to any regulatory language that it believed permitted arbitrary enforcement, but instead seemed to suggest that the absence of a mandate to keep documents in a "particular format or system" will make it impossible for producers to demonstrate their compliance with the Amendment in any enforcement action. (A. 8.) That is not the case. While stopping short of prescribing particular

templates, the Amendment does set forth documentation requirements, in an effort to "increase transparency in insurance transactions" but also to "protect the producer and insurer against frivolous complaints." (A. 306.) When recommending new purchases, producers must document the bases for their recommendations—on forms to be prescribed by the relevant insurer—including all relevant suitability considerations and the facts and analysis supporting the recommendation. 11 N.Y.C.R.R. §§ 224.4(f), 224.6(b)(1)(ii).

As discussed above (Statement of the Case, Part E.3, *supra*), the "best interest" requirement is generally satisfied when the producer follows the proper procedural steps and exercises 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." 11 N.Y.C.R.R. §§ 224.4(b)(1), 224.5(b)(1). Thus, proper documentation, showing the steps taken and facts analyzed in reaching a recommendation, will be important evidence of the producer's satisfaction of his ultimate duty to act in the consumer's best interest. DFS has explained as much in guidance posted on its website, answering

the question, "how will the Department approach its review of a transaction for compliance with the best interest standard?":

> The Department views the best interest standard more as a process than a singular outcome so the Department expects to focus on the producer's process and analysis from the initial gathering of suitability information and initial consideration of the products available for sale by the producer to the subset of those products that would be suitable for the particular consumer and finally the recommendation to the consumer from among the suitable products. A producer should expect the Department to request information/documentation about the steps taken and analysis performed during that process.

N.Y. Dept. 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 #1). This guidance is representative of the guidance materials that DFS routinely publishes, in the form of circular letters, answers to frequently asked questions, and responses to informal questions posed by industry groups and licensees. (*See* Statement of the Case, Part B, *supra*.) This "opportunity for businesses to obtain an official clarification" as to the scope of the Amendment "is sufficient to allay any concerns about unpredictable enforcement." *CMSG Rest. Group, LLC v. State of New York*, 145 A.D.3d 136, 149 (1st Dep't 2016), *lv. denied*, 29 N.Y.3d 929 (2017), *cert. denied*,

138 S. Ct. 381 (2017) (citing *Hoffman Estates*, 455 U.S. at 504) (rejecting vagueness challenge).

Thus, far from inviting arbitrary enforcement, the Amendment—together with readily available guidance—explains in advance how the Amendment will be enforced and provides producers with a roadmap for compliance. Because the Amendment provides clear standards for enforcement, and because its key terms, including "recommendation" and "suitability information," are sufficiently definite, regulated parties have fair notice of the nature of the conduct that will expose them to liability. Petitioners' vagueness challenge therefore fails.

CONCLUSION

The Court should reverse the order of the Third Department and reinstate the judgment of Supreme Court.

Dated: Albany, New York
February 3, 2022

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York
Attorney for Appellants

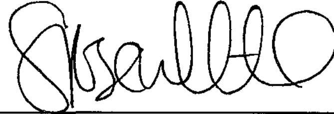
By:
SARAH L. ROSENBLUTH
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2025
sarah.rosenbluth@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
SARAH L. ROSENBLUTH
Assistant Solicitor General
Of Counsel

CERTIFICATE OF COMPLIANCE

I hereby certify that the body of the foregoing Brief for Appellants contains 10,585 words and thus complies with the word limit set by 22 N.Y.C.R.R. § 500.13(c)(1).



SARAH L. ROSENBLUTH