

DFS Enforcement Action Highlights Risks of Pension Risk Transfers in New York

On April 13, the New York State Department of Financial Services (“DFS”) announced a Consent Order with Athene Annuity and Life Company (“AAIA”) and Athene Holding Limited (“AHL”) (together “Athene”) for engaging in an insurance business in New York without a New York license, in violation of Insurance Law §§ 1101 and 1102. Athene agreed to pay a \$45 million penalty for entering into 14 large-scale pension risk transfer transactions that involved thousands of New York policyholders. In negotiating these transactions, Athene allegedly engaged in thousands of communications with New York-based plan sponsors.

A pension risk transfer is an ordinary, yet complex, transaction through which an employer shifts the risk of its pension plan to a life insurance company generally by transferring a portion of its pension assets to the insurance company, which issues a group annuity contract (“GAC”) to guarantee payments to the pension participants or sponsor. These transactions can be quite large; two of the transactions at issue in the Athene matter were each worth more than \$1 billion.

Athene’s difficulty arose from the fact that while the GACs were issued and physically delivered in New Jersey (at least for the two largest transactions in question), the employers were both headquartered in New York, involved thousands of New York policyholders, and the transactions involved thousands of communications by email, phone and in person with plan sponsors in New York. As part of the resolution, Athene will transfer all New York business, including issuance and servicing, to its NY-licensed state subsidiary, Athene Annuity & Life Insurance Co. of New York (“AANY”). All external-facing AANY pension risk transfer team members must also obtain a New York insurance agent’s license.

The DFS investigation into Athene began in January 2019. In September 2019, prompted by a market-wide sweep that uncovered that multiple unauthorized life insurers and their representatives were operating in the pension risk transfer market, DFS issued an admonitory circular letter. The circular reminded all life insurers and insurance producers that soliciting, negotiating, and selling GACs by unauthorized insurers is prohibited by New Insurance Law.

Compliance Considerations

Life insurers, insurance producers, and agents should be particularly vigilant about engaging in risk transfer transactions with any connection to New York, as DFS has taken particular interest in this issue. Any of the following could potentially expose a company to liability and penalties:

- Solicitation, negotiation, sales or improperly servicing GACs, including terminal funding (retirement funding financed by a sum of money the employer sets aside at the time of retirement) or close-out contracts in New York or to New York policyholders via:
 - In-person meetings in New York;
 - Telephone calls, mails or emails to New York plan sponsors or participants;
 - Providing access to web portals in New York for plan participants; or
 - Any other manner from an office or any other location in New York.
- Aiding or calling attention by any advertisement or public announcement to any unauthorized life insurer in New York.

There are, however, a few limited “back office” activities that are permissible in New York, including gathering information about the insurance industry and assembling policies on non-New York risks. Accordingly, to avoid any missteps, compliance groups should ensure that any pension risk transfer transactions that either involve New York policyholders or companies with any presence in New York receive an appropriate level of scrutiny and make a proactive decision whether to seek appropriate licenses from DFS. The insurer should:

- Screen the New York participants;
- Make sure that a NY-licensed entity issues NY-compliant GACs and certificates;
- Ensure that a NY-licensed entity services the plan at the same-level of servicing provided to any non-NY participants;
- Require that any external facing team members who conduct business in New York obtain a New York insurance agent’s license; and
- Ensure that no non-NY insurance agent solicits, negotiates, sells or services a pension risk transfer with any New York contacts.

Walden Macht & Haran LLP (WMH) can assist in crafting targeted and cost-effective solutions to satisfy legal obligations and safeguard against future wrongdoing. WMH has substantial experience understanding and addressing the unique challenges entities face when their internal compliance practices are subject to a DFS enforcement action. We identify key deficiencies, root causes, and recommend workable solutions to build effective and sustainable compliance programs.

About Walden Macht & Haran LLP

WMH is a New York-based boutique law firm with deep experience in resolving complex compliance challenges. Our partners have held numerous senior positions in the public and the private sphere and have the breadth and depth of experience to advise in connection with the most pressing matters and to handle the most sensitive engagements. The partnership includes seven former federal prosecutors, many of whom held senior supervisory positions in the Department of Justice, a former counsel for national security at the Federal Bureau of Investigation, a former general counsel of a NYSE listed multinational, a former chief compliance officer of a publicly traded company, and multiple former state prosecutors. We are known for our experience, integrity, and outstanding track record in both state and federal court and in connection with banking monitorships.