

NY DFS Proposes New Regulation for Life and Annuity Non-Guaranteed Elements

November 18, 2016

On November 17, the New York Department of Financial Services (DFS) issued a [press release](#) announcing its proposal of new [Insurance Regulation 210 - Life Insurance and Annuity Non-Guaranteed Elements](#). Non-guaranteed elements (NGEs) are policy elements insurers can change at their discretion that affect policy charges and credits, including interest crediting rates, expense and benefit charges, cost of insurance rates, and participation rates and caps under fixed indexed annuities. The press release highlights that the regulation would require insurers to give DFS at least 120 days' advance notice of any adverse NGE change, with Superintendent Maria T. Vullo noting that "life insurers may only increase the cost of insurance on in-force policies when the experience justifies it and only in a way that is fair and equitable." The proposed regulation overlays insurers' determination processes and policies with a comprehensive regulatory multi-pronged approach involving standards for NGE changes, policy form and report requirements, and policy filing requirements, including expanded actuarial submissions. As summarized in the proposed regulation's scope and purpose section, the proposal:

- Establishes NGE determination standards for life policies and annuities delivered in New York;
- Ensures policy forms do not contain NGE provisions that may mislead policy owners;
- Ensures that issuance of policy forms would not be prejudicial to owners or contain provisions that are unjust, unfair or inequitable; and
- Deems any violation of the regulation to be an unfair method of competition or an unfair or deceptive act and practice under New York's unfair insurance trade practices law.

The substantive requirement of the proposed regulation include the following: **NGE Standards**

- Requires board (or board committee) approved written determination policies, including reasonableness standards; financial, equity, and marketing objectives; and good faith and fair dealing standards.
- Provides specific content standards for board approved NGE criteria, including that differences in the revised scale of NGE changes, as compared with the scale in effect at issue, “shall be reasonably based on the differences from the point of revision of the anticipated experience factors underlying the two scales with respect to expenses, mortality, investment income and persistency.”
- Provides specific determination process requirements, such as requiring the review of the anticipated experience factors and NGEs for existing policies whenever the NGEs on newly issued policies are changed.

Policy Form and Report Requirements

- By no later than policy issue, the insurer must provide the policy owner with the current NGE scale.
- The insurer must include certain NGE related provisions in its policy forms, including stating the experience factor used to determine any readjustment in each NGE.
- At least 60 days prior to any change in the current NGE scale, the insurer must deliver a disclosure document to the consumer that, among other things, identifies the new NGE scale and the prior NGE scale since the last disclosure, together with a description of any adverse change.

Filing and Records Requirements

- All policy form filings shall include:
 - The approval date of the board-approved NGE criteria.
 - An actuarial memorandum that, among other things, describes the experience or other information used to determine the anticipated experience factors, “including a description of the reasoning and analysis that led from the information to the anticipated experience factors,” and “ a description of the processes and methods used in the non-guaranteed elements for a pricing cell from the anticipated experience factors.”
- Insurers shall file NGE scale changes that may have an adverse effect on policy values at least 120 days prior to implementation, along with specific detailed actuarial information.

- Insurers shall also file:
 - Any change in the current NGE scale for new policies at least 15 days prior to implementation, along with specific detailed actuarial information and an explanation of the inapplicability of the changes to in-force policies.
 - The board approved NGE criteria, including information regarding the policies to which it applies.

The proposed regulation will be subject to a 45 day public comment period following formal publication in New York's State Register on November 30, 2017. Given the burdens of, and the drafting ambiguities in, the proposed regulation, we expect industry participants will be commenting on this proposal. We are available to discuss the potential practical implications of the proposed regulation and to assist with industry comment letters.

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