

New York Adopts Non-Guaranteed Elements Rule for Life Insurance and Annuity Products

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On September 19, the New York Department of Financial Services promulgated the final version of new [Regulation 210](#) “Life Insurance and Annuity Non-Guaranteed Elements” (the “Rule”). The Rule takes effect on March 19, 2018.

As discussed in our recent [Expect Focus article](#) on the Rule’s previous draft, which the Department exposed for comment on May 24, the Rule will impose comprehensive requirements on insurers offering individual and group life insurance and annuity products in New York containing non-guaranteed elements (NGEs), including requirements for board-approved determination policies, substantive requirements for NGE determinations, and mandated disclosures and notices to the Department and policy owners of NGE changes. We also noted in our article that the Department received comments on the May 24 draft and informally advised us that the final Rule would incorporate only “non-substantive” changes. Ultimately, only the following clarifying changes were added to the final Rule:

- Section 48.1(h)’s definition of “Experience factors” was clarified to reflect that experience factors are to be determined by reference to the insurer’s financial experience on “a class of policies,” as contrasted with a reference to “a policy” in the prior version.
- A sentence was added to Section 48.1(l)’s “Non-guaranteed element” definition to clarify that the NGE definition does not include current annuity rates.
- The earlier version of the Rule made reference to “profit margin” without defining those words. The final Rule defines profit margin in new Section 48.1(o) as “expected revenues less costs.”

- The actuarial memorandum required for new policy forms by Section 48.4(b) somewhat relaxes the content requirements by requiring only “sufficient detail of the pricing assumptions,” as contrasted with a “a tabulation by pricing cell,” for the specific points to be addressed in the actuarial memorandum.

As with the May 24 draft Rule, the final Rule was accompanied by an **Assessment of the Public Comments**, which provides insights into the Department’s positions on 37 unique comments submitted to the Department on the May 24 draft Rule. Particularly noteworthy were the Department’s remarks in rejecting comments that had suggested the following modifications:

- One commenter recommended that the Rule should clarify that insurers are not required to make NGE changes as this requirement would exceed the Department’s statutory authority. The Department noted that “certain sections of the law require non-guaranteed elements to be based on reasonable assumptions. If an assumption is no longer reasonable it needs to be changed, which may mean that one or more non-guaranteed elements would change.” The Department also noted the Rule establishes thresholds for making NGE changes, which must be applied fairly to both increases and decreases in non-guaranteed elements.
- Three commenters recommended that instead of requiring the profit margin at a given policy year be fixed, the Rule should require only that the present value of profits be fixed from the time of an NGE change. The Department responded by stating that its concern with this approach is that if profit margins are increased at certain durations and reduced at others, some policyholders could be harmed.
- One commenter suggested that the Rule’s requirement for a new actuarial memorandum when NGEs are changed for new issues should not apply to changes in interest crediting rates. The Department did not change the Rule because it believes that changing interest crediting rates for only new issues might imply the creation of a new pricing class.
- One commenter recommended exempting fixed accounts from variable annuities from the Rule. The Department believes the Rule’s protections are needed for such accounts.
- One commenter recommended clarifying when the five-year period begins for reviewing experience factors for policies already in force on the Rule’s effective date. The Department stated in the Assessment that it added clarifying language; however, the Department informally advised us that it later decided not to add such language.
- One commenter recommended a later effective date, referencing the need to revise board criteria. The Department responded by stating that “insurers should establish proper board criteria and procedures for setting and revising non-guaranteed elements as soon as practicable to ensure that consumers are treated fairly” and also noted that the effective date provides “sufficient time to comply.”

Compliance with the Rule will require most, if not all, insurers subject to the Rule to implement operational and other NGE-related changes. And whether the Rule's March 19, 2018 effective date provides a given insurer sufficient time to comply will likely depend on how closely that insurer's existing NGE procedures and approach match up with what the Rule will require. Insurers subject to the Rule should consider the need for an expeditious analytical comparison of current practice against the Rule's requirements to identify and prioritize any necessary changes in their NGE procedures and approach. Likewise, insurers planning or evaluating the need for NGE changes in the coming year, whether subject to the Rule or not, would be well served to consider how differences between their NGE procedures and approach and those required by the Rule might impact potential litigation or regulatory exposure arising out of a decision to change (or not change) NGEs.

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