Assessment of Public Comments for Proposed New Part 48 to 11 NYCRR (Insurance Regulation 210)

The Department of Financial Services ("Department") received significant comments on proposed rule 11 NYCRR 48 from 11 parties, including life insurers and trade associations, summarized as follows.

Some commenters recommended that annuities be excluded from the scope of the regulation because it could be disruptive to the annuity marketplace and they do not believe that there has been a demonstrated problem with the readjustment of non-guaranteed elements in annuities. The Department acknowledges that the problems uncovered over the years have primarily, but not exclusively, involved life insurance and has substantially revised the proposed rules for annuities to limit reporting on annuities to an annual reporting to the Department of adverse changes in non-guaranteed elements that took place during the prior year, as well as the 60-day notice to policyholders of adverse changes in non-guaranteed elements. The Department believes that this reporting is necessary to protect annuitants' interests.

One commenter recommended that participating policies be excluded from the scope of the regulation rather than just the dividend provisions, whereas another commenter recommended that all aspects of participating policies should be subject to the regulation, including dividend provisions. The Department continues to believe that dividend provisions should not be subject to the regulation since the regulation is intended to address non-guaranteed elements that are based on expectations of future performance rather than results from past performance. However, there is no reason to exempt a participating policy in its entirety when it has one or more non-guaranteed elements determined based on expectations of future performance, e.g., the cost of insurance charges in a participating universal life insurance policy.

One commenter recommended that variable policies be excluded from the scope of the regulation, but the Department has the same concerns about variable products as it does about fixed products, i.e., that consumers be treated fairly when insurers change the non-guaranteed elements, e.g., cost of insurance charges.

One commenter recommended that only group business subject to individual rules should be subject to the regulation. The Department narrowed the scope of the regulation with respect to group business but some groups not subject to individual rules are still subject to the regulation if the Department continues to have concerns about fair treatment of the participants. For example, the regulation would still be applicable to certain group annuities subject to ERISA that are not subject to individual standards in which case the insurer would be required to report annually on adverse changes to non-guaranteed elements.

Some commenters recommended clarification as to whether the regulation applied to in-force policies or just policies sold after the effective date. One commenter recommended that the regulation should apply to only policies sold after the effective date. Some commenters recommended applying the regulation to previously applied changes in non-guaranteed elements. The Department believes it is important that the regulation is applied to any changes to non-guaranteed elements made after the effective date of the regulation even for policies issued prior to the effective date, but changes made prior to the effective date should be subject to whatever standards existed at the time of the change. Clarification to this effect has been made.

Some commenters recommended clarification of the application of the regulation to indexed products. The Department made revisions to the regulation to make those clarifications.

Some commenters recommended narrowing the definition of board-approved criteria to remove items such as marketing objectives, which typically do not need board approval. The Department made the recommended revision.

Some commenters expressed concern that the definition of class of policies might lead to confusion in applying the regulation. No revision was made to the definition. The Department acknowledges that a policy might be in one class with respect to one assumption, for example, the mortality assumption, and a different class with respect to another assumption, for example, the expense assumption, since there would generally be more policyholders with similar expectations as to expense costs in comparison with the number of policyholders with similar expectations as to mortality.

One commenter recommended changing the definition of experience factor to indicate that the list of factors is not exhaustive. No revision was made because the Department does not want to include factors that are not listed in the applicable laws.

Some commenters expressed concern that the definition of pricing cell could result in too many required calculations. No revision was made to the definition. The Department believes the regulation's definition of pricing cell in conjunction with the regulation's definition of class of policies should ensure fair treatment of policyholders within a given pricing cell.

Some commenters recommended expanding the definition of qualified actuary. The Department revised the definition to include an associate of the Society of Actuaries.

One commenter recommended that the regulation have no rules applicable to setting initial non-guaranteed elements but instead focus exclusively on revisions of non-guaranteed elements. The Department believes it is important for the initial scale of non-guaranteed elements be reasonable and equitable.

One commenter recommended deleting the requirement that assignment of policies into classes be consistent with advertising material provided to the policy owner. The Department sees no reason for there to be an inconsistency.

Some commenters questioned the requirement that policies with dissimilar guarantees be placed in separate classes for determining non-guaranteed elements. The Department believes significant differences in guarantees warrants separate classes.

One commenter recommended clarifying that companies are not required to make changes. However, 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 might mean one or more non-guaranteed elements would change. The regulation does permit thresholds for making changes but those thresholds must be applied fairly for both increases and decreases in non-guaranteed elements. Accordingly, this revision was not made.

One commenter questioned the need for different experience factors for different types of policies in the redetermination of non-guaranteed elements per section 48.2(b). The differences are due to different assumptions applicable to different types of policies in the Insurance Law. The commenter also questioned why morbidity was not listed as a factor: the reason is that relevant laws do not include morbidity in the listed assumptions.

One commenter requested with respect to section 48.2(b) that insurers be able to look back only to the most recent prior change in non-guaranteed elements when making a new change, rather than looking back to the non-guaranteed elements in effect at the time the policy was issued. This revision was made.

Several commenters made recommendations about the role of profit margins in readjusting non-guaranteed elements. One commenter recommended deleting reference to profit margin. The Department believes in order to ensure that changes to non-guaranteed elements are based solely on changes in expected future experience, the profit margin must be fixed. Otherwise, if an insurer may change the profit margin, the various sections of the law requiring reasonable assumptions and equitable treatment of policyholders could be easily violated and bait and switch pricing could occur. Two commenters suggested that, instead of requiring that the profit margin at a given policy year be fixed, the regulation should require only that the present value of profits from the time of a change in non-guaranteed elements be fixed. The Department's concern about this approach is if profit margins are increased at certain durations and reduced at other durations, some policyholders could be harmed.

One commenter recommended that the insurer be permitted to use the most recent profit objective where the insurer did not know the original profit margins. However, in those cases, the insurer should be able to back into the profit margins based on the original non-guaranteed elements and the original experience assumptions. Accordingly, the Department did not make the change. Two commenters recommended permitting the

Department to allow an increase in profit margins if there was a concern about the financial condition of the insurer. This revision was made.

Several commenters requested that the Department delete the requirement that reinsurance and other third party agreements be ignored when revising non-guaranteed elements. The Department believes that basing changes to non-guaranteed elements on actions by a third party is not acceptable if the actions, such as premium increases, are not consistent with the experience, e.g., mortality, anticipated by the direct insurer.

Two commenters expressed concerns when an insurer is acquired by another insurer about the requirement that the acquiring insurer's procedures for changing non-guaranteed elements should not be less favorable than the original insurer's procedures. The Department believes using a less favorable procedure would be unfair to policyholders and annuitants. Language was added, however, to allow an exception where necessary due to the financial condition of the original insurer, if approved by the Superintendent.

Two commenters recommended deleting the requirement that the insurer must review the anticipated experience factors for existing business whenever the non-guaranteed elements for new business are changed. The Department decided the requirement that the anticipated experience factors for existing business be reviewed at least every five years would be sufficient. Accordingly, the revision was made.

One commenter recommended deleting section 48.2(g), which permits certain simplifications and thresholds for making revisions to non-guaranteed elements within the board-approved criteria as unnecessary and giving the implication that anything other than what is in the regulation would not be permitted. No revision was made because the Department believes items such as thresholds for making changes should be approved by the board.

Two commenters recommended eliminating the rule requiring a limit on passing high unit costs on to policyholders due to low sales volume. The Department believes passing on the impact of low sales volume is unfair and inconsistent with the requirements in the law that the changes be based on expectations of future experience rather than the impact of past experience.

One commenter recommended that changes to cost of insurance rates in universal life insurance policies should be based solely on changes in anticipated mortality experience. The Department believes that the Insurance Law permits changes in any non-guaranteed element to be based on changes in any of the assumptions listed in the law. Accordingly, no change was made.

One commenter recommended that insurers should not be required to disclose current non-guaranteed elements to policyholders. The Department believes that it is important that policyholders and annuitants know the non-guaranteed elements that are expected to apply to their policies. This will allow them to track the actual credits and charges over time and compare them to what was originally expected.

Several commenters stated that the policy form requirements in the proposed regulation would be overly burdensome. The Department considered the comments and those requirements were removed.

One commenter recommended that the notice to policyholders of changes in non-guaranteed elements should only apply to adverse changes and should not apply to adverse changes in interest crediting rates. The Department made the revision so that the disclosure only applies to adverse changes with the exception of interest crediting rates. For interest crediting rates, adverse changes do not need to be disclosed in advance if the change is based solely on changes in expected investment income or hedging costs.

One commenter recommended that the regulation be revised to require Department approval of changes in non-guaranteed elements. Some commenters commented that the advance filing of changes in non-guaranteed elements is tantamount to rate regulation. Another commenter recommended that there be no advance filing with the Department of adverse changes. The Department believes prior approval is not necessary to ensure fair treatment of policyholders but advance notice of adverse changes is important because it helps avoid situations where improper changes in non-guaranteed elements results in fines and the need for the insurer to make restitution to harmed policyholders.

Some commenters requested that the Department not require the actuarial memorandum regarding pricing to be filed with the policy form filing, but instead be available upon request of the Department. The requested revision was made. Some commenters expressed concern about the need to ensure confidentiality due to the proprietary nature of the information that may be contained in the actuarial memorandum. In accordance with Public Officers Law Section 89, an insurer may request confidentiality of records at the time that it submits the records to the Department.

One commenter questioned the need for an actuarial memorandum for annuities. The Department believes a disciplined process for making changes to non-guaranteed elements for annuities is important to ensure fair treatment of contract holders. Some commenters commented that the information required for the actuarial memorandum is too detailed. The Department believes the level of detail required by the regulation is necessary and appropriate for the Superintendent to evaluate the information.

One commenter recommended deleting the requirement that the actuarial memorandum describe the investment strategy. The Department believes this is important information to have to ensure that policyholders are treated fairly.

Several commenters recommended shortening the time for notification to the Department of adverse changes in non-guaranteed elements from 120 days. Most of the concern seemed to center around changes in interest crediting rates. As indicated above, the advance notice requirement was removed for annuities and, for life insurance, only changes in interest crediting rate that are not related to expected investment income would need to be reported in advance. As for other adverse changes, the 120 day period was chosen so that any concerns the Department might have could be resolved prior to the time of advance notification to policyholders, which is 60 days.

One commenter expressed concern about the 15 day advance notice for changes in non-guaranteed elements on new policies. The Department has removed that requirement.

One commenter expressed concern about the requirement to provide the board criteria and other information within 30 days of adoption of the criteria. This requirement was removed. The Department will request the board criteria on an as-needed basis.

One commenter requested a delay in the effective date of the regulation from 120 days to one year after publication. Given the various changes made to the regulation in response to comments received, the Department believes a change to 180 days after publication should be sufficient.