

A Ticking Clock: New York's Pending Non-Guaranteed Elements Rule for Life Insurance and Annuity Products

September 26, 2017

The clock is ticking on the New York Department of Financial Services' issuance of new Regulation 210 "Life Insurance and Annuity Non-Guaranteed Elements" (the Rule). The Rule would 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. Notably, the Rule deems any violation of its provisions to be an unfair method of competition or unfair or deceptive insurance trade practice. The Rule's genesis dates back to between 2008 and 2010, when the Department published successive versions of then-proposed Regulation DA (Discretionary Amounts). Following critical industry comment on that proposed rule, the Department did not finalize it. In November 2016, the Department published a draft of the Rule that resurrected much of Regulation DA's conceptual basis as well as significant portions of its language. In the "Regulatory Impact Statement" for Regulation 210, the Department stated, "[t]his rule addresses a number of issues that have been highlighted by company announcements, media commentary, and complaints" regarding NGE determinations and readjustments. Focusing on policy lapses resulting from decreased credited rates and increased policy charges, the Department noted that "[t]he rule should assist consumers to better understand - at time of purchase, and upon any adverse [NGE] readjustment - how [products with NGEs] operate, and thereby reduce consumer dissatisfaction and the number of lapsed policies." The November 2016 draft of the Rule engendered substantial industry and other comments, with the Department publishing an updated draft on May 24, 2017, along with an "Assessment of Public Comments" on the November 2016 draft (the Assessment). Having received and reviewed all comments on the May 24 draft, the Department informally indicated that the final Rule will be published in the coming month and will incorporate only

"nonsubstantive" changes to the May 24 draft. The Rule is expected to take effect in March or April of 2018 (i.e., 180 days after publication of the final Rule in the state register). Accordingly, we expect the following requirements will apply to insurers writing life and annuity products in New York with NGEs:

- Each insurer must establish board-approved criteria for determining NGEs, with mandated and permissive content requirements for such criteria.
- Prior to the issuance of any new product form, a qualified actuary must prepare a detailed actuarial memorandum that includes comprehensive tabulations, by pricing cell and duration, of the insurer's current NGE scale and underlying anticipated experience factors. The memorandum must also include the reasoning and analysis that underpinned the insurer's anticipated experience factors as well as the insurer's processes and methods used in the NGE determinations.
- For product sales after the Rule's effective date, the insurer must provide to policy owners the current scale of NGE elements by no later than the date of issue.
- The insurer must satisfy certain requirements when setting and adjusting NGEs, including:
 - required practices for assigning products into classes for NGE determinations;
 - specific experience factors, by product type, the insurer may and may not use;
 - prohibitions against recouping past losses, including related prospective "profit margin" constraints; and
 - specific requirements for assumed and acquired business.
- For any post-issuance adverse changes to NGEs (including NGE changes applicable only to new policy issuances), the insurer must:
 - have a qualified actuary prepare an updated actuarial memorandum that includes a detailed tabulation, by pricing cell and duration, of all proposed NGE scale changes, and which identifies all changes in anticipated experience factors and profit margins. This memorandum must also include a description of the experience or other rationale underlying the new factors. And for life insurance policies only, the insurer must file this actuarial memorandum (along with the prior actuarial memorandum) with the Department no later than 120 days prior to implementation of the NGE change.
 - no later than 60 days prior to implementation, provide policy owners with a disclosure document containing, among other things, the proposed new and prior NGE scales along with narrative disclosure regarding the nature of the change and the fact that it is adverse (or the conditions under which the change would be adverse).

- By May 1 annually, the insurer must file with the superintendent a listing of any adverse NGE changes during the prior calendar year together with an actuarial certification of compliance with the Rule.

The Department's Assessment of the comments on the November 2016 version of the rule provides important insights into its positions on a number of the matters described above, such as policy class assignments, permitted experience factors, and prospective profit margins. Given the spate of class action litigation over NGE changes (and insurers' alleged failures to make NGE changes), any insurer with New York issued policies will want to study those positions closely, both when evaluating whether and how to implement future NGE changes as well as in defending any litigation or regulatory challenges to past NGE changes. In addition, for insurers issuing policies only outside New York, the Department's positions may afford useful guidance for NGE change structuring and litigation and might also serve as "the canary in the coal mine" for dealings with other state regulators. Copies of the May 24 version of the Rule and the Department's *Assessment of Public Comments* are available [here](#) and [here](#) or upon request.

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