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

The Department of Financial Services ("Department") received comments on revised proposed rule 11 NYCRR 48 from four parties, summarized as follows:

One commenter requested the effective date of the regulation to be extended from 180 days to 240 days after publication in the State Register, noting the need to revise board criteria. The Department believes 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 that 180 days after publication will provide sufficient time to comply.

Two commenters recommended excluding annuities from the scope of the regulation. One commenter suggested that if annuities are included they should be included only during the surrender charge period. The Department believes that annual reporting of adverse changes in non-guaranteed elements, and a 60-day notice to policyholders of adverse changes in non-guaranteed elements, are necessary to protect annuitants' interests. Two commenters recommended that the regulation only apply to annuities issued after the effective date of the regulation. The Department believes that the regulation should apply to existing business to ensure that consumers who already bought annuities are treated fairly and without undue discrimination.

Two commenters recommended amending the definition of adverse change in order to exclude more types of changes, such as lapse rates or other forms of policyholder behavior. Currently the regulation only excludes changes in crediting rates or indexed account parameters based entirely on changes to expected investment income or hedging costs. The Department believes that changes to non-guaranteed elements based on factors other than changes in the general level of interest rates or hedging costs should be subject to review by the Department to ensure that the changes are justified, whereas changes due to, for example, changes in interest rates should be straightforward and need not be reviewed.

One commenter recommended adding wording to permit smoothing and rounding in the resetting of credited interest rates or index account parameters, without such change being considered adverse. The Department believes that unbiased smoothing and rounding would not be treated as an adverse change per section 48.2(g)(3) of the regulation and thus no change is necessary.

Two commenters recommended that the regulation exempt certain types of group business, such as business not subject to individual rules. The Department believes that the recommended exemption is overly broad and would result in exempting groups of contracts, which could lead to unfair treatment of participants.

One commenter recommended that the definition of applicable group certificate should be revised by replacing "derived substantially from funds contributed by the person covered" with "derived wholly from funds contributed by the person covered" to replicate language used in other contexts, such as the group mail order exception in Insurance Law §1101(b)(2)(B). The Department intentionally used the term "substantially" rather than "wholly" in this context to prevent insurers from circumventing the regulation through the use of nominal contributions in order to claim that the contributions were not "wholly" contributed by the person covered.

One commenter contended that applying the regulation to group certificates that were issued to New York residents from outside New York would be administratively burdensome. The Department has consistently held that the Insurance Law and regulations apply to certificates issued in the individual insurance market in this state regardless of the situs of delivery of the group policy or contract. The Department believes that the extension of New York protections to New York certificate holders in this context substantially outweighs the commenter's contention regarding potential administrative burdens.

Two commenters recommended clarifying the definition of class of policies. The Department believes that the definition is appropriate because 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 generally there would be more policyholders with similar expectations as to expense costs compared with the number of policyholders with similar expectations as to mortality.

One commenter recommended that dividend provisions should not be exempt from the regulation because they can be based on considerations of future financial performance. The Department believes that dividend provisions should not be subject to the regulation since the regulation is intended to address non-guaranteed elements that are required to be based on expectations of future performance, whereas as dividends are legally based on accumulated surplus from past financial performance.

One commenter recommended expanding the list of exempt policy provisions in the definition of exempt policy in section 48.1(g). The Department believes that expanding the list is not necessary because the definition already provides sufficient examples.

One commenter recommended exempting fixed accounts in variable annuities from the regulation. The Department believes that the protections provided by the regulation are needed for such accounts.

Two commenters recommended clarifying changes to the definition of experience factor. The Department believes that the definition does not need to be changed because the definition is based on applicable sections of the Insurance Law.

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 included in the applicable laws.

Two commenters suggested clarifying that current annuitization rates in annuity contracts are not considered non-guaranteed elements. The Department made the suggested change.

Three commenters recommended clarifying changes to the definition of pricing cell because the definition could result in too many required calculations. No revision was made to the definition. The Department believes that the regulation's definition of pricing cell, in conjunction with the regulation's definition of class of policies, supports the fair treatment of policyholders within a given pricing cell.

One commenter recommended that profit margin be defined. The Department added the definition.

One commenter recommended that the regulation should not have rules applicable to the setting of initial non-guaranteed elements, but should instead focus exclusively on revisions of non-guaranteed elements. The Department believes that it is important for the initial scale of non-guaranteed elements to be reasonable and equitable.

One commenter suggested that the regulation require the initial scale of non-guaranteed elements to be self-supporting. The Department believes that the change is unnecessary because the Insurance Law contains self-support requirements and the regulation must be read consistently with those requirements.

One commenter recommended that section 48.2(b) of the regulation, regarding the method of calculating changes to non-guaranteed elements, should not apply to changes in interest crediting rates or index account parameters. The Department believes that the method of calculation should be applied to such changes and the related calculations should be straightforward.

One commenter recommended that the regulation should clarify that insurers are not required to make changes because such requirement would exceed the Department's statutory authority. 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 may mean that one or more non-guaranteed elements would change. The regulation establishes thresholds for making changes but those thresholds must be applied fairly to both increases and decreases in non-guaranteed elements. Accordingly, this revision was not made.

Three commenters recommended that instead of requiring the profit margin at a given policy year to be fixed, the regulation should require only the present value of profits from the time of a change in non-guaranteed elements to be fixed. The Department's concern about this approach is that if profit margins are increased at certain durations and reduced at other durations, some policyholders could be harmed.

One commenter recommended that the regulation permit the Superintendent to allow increases in profit margins for any reason, rather than due to the financial condition of the insurer. The Department does not anticipate any other legitimate reason for permitting such increases.

One commenter recommended deleting the requirement in section 48.2(b)(6) that experience from the time of the most recent change in non-guaranteed elements should be assumed to equal the anticipated experience factors. The Department believes that this requirement is necessary to ensure that the impact of past experience is not passed on to policies in force.

Three commenters recommended a clarification to section 48.2(d) regarding the impact of reinsurance. The Department believes that a clarification is not necessary because the language is clear and unambiguous.

One commenter recommended that the Department should delete the requirement that reinsurance and other third party agreements should 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.

Three commenters expressed concern 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 that using a less favorable procedure would be unfair to policyholders and annuitants, except where necessary due to the financial condition of the original insurer, if approved by the Superintendent.

One commenter recommended clarifying the requirement that the anticipated experience factors for existing business should be reviewed at least every five years to indicate when the five-year period begins for policies already in force at the time of adoption of the regulation. Clarifying language was added.

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

One commenter recommended that insurers should not be required to disclose current non-guaranteed elements to policyholders. The Department believes that policyholders and annuitants should know the non-guaranteed elements that are expected to apply to their policies so that actual credits and charges may be tracked over time and can be compared to what was originally expected.

One commenter recommended replacing the word “special” with “other” in section 48.3(a), thereby allowing the initial scale of non-guaranteed elements to be disclosed in any disclosure document. The Department believes that if the disclosure is not made in the policy, application or illustration, it should be made in a noticeable separate document and not in an obscure place in a larger document containing various types of information.

Two commenters recommended changing the advanced notification of adverse changes to policyholders from 60 days to 15 days. The Department believes that 15 days’ notice is insufficient and 60 days is more appropriate.

One commenter contended that the advanced notification of adverse changes to policyholders in section 48.3(b) should not be required if the change does not impact a given policyholder. The Department believes that the regulation does not require advanced notification in such case because there is no adverse change for that policyholder.

One commenter contended that the advanced notification of adverse changes to policyholders should not be required if the policyholder has an option to not accept the change by, for example, switching to another type of account option or surrendering a rider. The Department does not agree with the recommendation.

One commenter suggested that section 48.4(a)(2), which requires a new actuarial memorandum when non-guaranteed elements have been changed for only new issues, should not apply to changes in interest crediting rates. The change was not made because the Department believes that changing of interest crediting rates for only new issues might imply the creation of a new pricing class.

Three commenters remarked that the information required for the actuarial memorandum is too detailed. The Department believes that the level of detail required by the regulation is necessary and appropriate for the Superintendent to evaluate the information. However, section 48.4(b)(1) was revised to clarify that the Department needs sufficient detail of the pricing assumptions.

One commenter questioned the need to include in the annual notice of adverse changes in non-guaranteed elements any adverse changes that were previously filed with the Department. The Department believes that such changes should be included in the listing to ensure that the list is complete.