

**NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
PROPOSED
11 NYCRR 48
(INSURANCE REGULATION 210)**

LIFE INSURANCE AND ANNUITY NON-GUARANTEED ELEMENTS

I, Maria T. Vullo, Superintendent of Financial Services, pursuant to the authority granted by Sections 202 and 302 of the Financial Services Law, and Sections 301, 1106, 1113, 3201, 3203, 3209, 3219, 3220, 3223, 4216, 4221, 4223, 4224, 4231, 4232, 4238, 4239, 4240, 4511, 4513, 4518 and Article 24 of the Insurance Law, do hereby promulgate a new Part 48 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 210) to take effect 180 days after publication in the State Register, to read as follows:

(ALL MATERIAL IS NEW)

Section 48.0 Purpose, scope, and unfair trade practice.

(a) The purpose of this Part is to establish standards for the determination and any readjustment of non-guaranteed elements that may vary at the insurer's discretion for life insurance policies and annuity contracts delivered or issued for delivery in this State, to ensure that policy forms do not contain provisions that may mislead policy owners as to the crediting of non-guaranteed amounts or the deduction of non-guaranteed charges, and to ensure that the issuance of any policy forms would not be prejudicial to the interest of owners or members or contain provisions that are unjust, unfair or inequitable.

(b)(1) This Part shall apply to any determination or readjustment of non-guaranteed elements occurring on or after the effective date of this Part, including any readjustment of non-guaranteed elements occurring on or after the effective date of this Part for life insurance policies or annuity contracts issued prior to October 12, 2017.

(2) This Part shall apply to all individual life insurance policies, individual annuity contracts, and applicable group certificates, except as otherwise provided in this Part.

(3) This Part shall not apply to any corporate or bank owned individual life insurance policy or group life insurance certificate authorized by Insurance Law section 3205(a)(1)(B) or (d) where all benefits under the policy are payable to the corporate or bank policy owner.

(c) A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this State, and shall be deemed to be a trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law, in violation of section 2403.

Section 48.1 Definitions.

For purposes of this Part:

(a) *Adverse change in the current scale of non-guaranteed elements* means any change in the current scale of non-guaranteed elements that increases or may increase a charge or reduces or may reduce a benefit to the policy owner, other than a change in a credited interest rate or an index account parameter based entirely on changes in the insurer's expected investment income or hedging costs.

(b) *Anticipated experience factor* means an assumption as to a future experience factor as determined by the insurer.

(c) *Applicable group certificate* means any group life insurance or group annuity certificate where:

(1) the group life insurance certificate:

(i) may develop nonforfeiture values that are affected by non-guaranteed elements; or

(ii) the certificate holder is required to contribute to the cost of the certificate, the certificate allows for changes in the rate of the certificate holder's contributions, and there is a guaranteed maximum contribution scale that exceeds five years; or

(2) the group annuity certificate is:

(i) funding individual retirement accounts or individual retirement annuities, as defined in the Internal Revenue Code at 26 U.S.C. section 408,

(ii) funding annuities in accordance with the Internal Revenue Code at 26 U.S.C. section 403(b), or

(iii) providing a plan of retirement annuities under which the payments are derived substantially from funds contributed by the person covered.

(d) *Board-approved criteria* means written criteria adopted by the board of directors of an insurer, or a committee of directors thereof, that are the basis for determining non-guaranteed charges or benefits.

(e) *Class of policies* means all policies with similar expectations as to anticipated experience factors that are grouped together for the purpose of determining non-guaranteed elements.

(f) *Current scale of non-guaranteed elements* means the non-guaranteed elements that apply to a policy in the current and future years unless changed by the insurer.

(g) *Exempt policy provision* means a dividend provision, a provision providing for readjustments described in Insurance Law section 4231(g)(1)(C), or any other policy provision that gives the insurer discretion and that in the superintendent's opinion is not designed to allocate to the policy a portion of the anticipated financial experience of an insurer on the policy, such as minimum transaction amounts, maximum number of transactions, or limits on premiums or deposits. *Exempt policy provision* also means any separate account expense charge providing solely for the actual expense incurred, without profit to the insurer.

(h) *Experience factor* means a value or set of values consisting of investment income, mortality, morbidity, persistency, or expense that represents the insurer's financial experience on a policy. Profit margin is not an experience factor.

(i) *Indeterminate premium policy* means a life insurance policy as described in Insurance Law section 4231(g)(1)(D).

(j) *Index account parameter* means a feature impacting the net credited rate for an index account such as participation rate, cap, or spread.

(k) *Insurer* means an authorized life insurance company or authorized fraternal benefit society.

(l) *Non-guaranteed element* means any element within a policy provision other than an exempt policy provision that may be changed at the insurer's discretion without the consent or request of the policy owner and that affects the policy charges or benefits. *Non-guaranteed element* includes indeterminate premium policy rates, expense and benefit charge rates, interest crediting rates, cost of insurance rates, and index account parameter, but shall not include elements that are not within the insurer's discretion, such as the pass-through of variable fund returns.

(m) *Policy* means any individual life insurance policy, individual annuity contract, or applicable group certificate.

(n) *Pricing cell* means a collection of policies for which the same anticipated experience factors are used to determine the same current scale of non-guaranteed elements.

(o) *Qualified actuary* means an individual who:

(1) is a member in good standing of the American Academy of Actuaries;

(2) meets the American Academy of Actuaries qualification standards for statements of actuarial opinion required by this Part;

(3) is an associate or fellow by examination of either the Society of Actuaries or the Institute of Actuaries or is designated in writing by the superintendent as a qualified actuary after written application to the superintendent providing evidence of the actuary's actuarial knowledge and experience of non-guaranteed elements, and stating that the actuary is familiar with the New York Insurance Law and regulations promulgated thereunder and the current standards of practice of the American Academy of Actuaries involving non-guaranteed charges or benefits;

(4) has not been found by a commissioner or superintendent of insurance of any state, following appropriate notice and hearing, within the past five years, to:

(i) have violated any provision of, or any obligation imposed by, any law in the course of his or her dealings as a qualified actuary; or

(ii) have demonstrated his or her incompetence, lack of cooperation, or untrustworthiness to act as a qualified actuary;

(5) has not resigned or been removed as a qualified actuary within the past five years as a result of acts or omissions indicated in any adverse report on examination or as a result of a failure to adhere to generally acceptable actuarial standards; and

(6) has not been convicted of any crime involving fraudulent or dishonest practices within the past five years.

Section 48.2 Non-guaranteed elements.

(a)(1) An insurer shall establish board-approved criteria for determining non-guaranteed charges or benefits.

(2) An insurer, in the assignment of policies into classes of policies, for the purpose of determining non-guaranteed elements:

(i) shall not unfairly discriminate among policies with similar expectations as to anticipated experience factors;

(ii) shall assign policies into classes based on sound actuarial principles;

(iii) shall assign policies with material differences in expected costs into different classes;

(iv) shall have sufficient refinement of classes to place reasonable limits on anti-selection;

(v) shall distinguish between policies when the cost of guarantees are not similar. For example, policies with a low guaranteed interest rate shall not be combined with policies with a high guaranteed interest rate;

(vi) may distinguish based on the date of policy issue with different issue periods;

(vii) shall not result in a change to a less favorable underwriting risk class applied to existing coverage than the underwriting risk class assigned to existing coverage prior to the change; and

(viii) shall be consistent with the language of the policy and the solicitation, advertising or other material provided by the insurer to the policy owner.

(b) Readjustments to non-guaranteed elements on existing policies shall be subject to the following:

(1) At the time of revision of a scale for an indeterminate premium policy, the difference from the point of revision between the revised scale and the scale in effect at the later of the date of issue or the date of last revision, shall be reasonably based on the difference from the point in time of revision and application of the anticipated experience factors underlying the two scales with respect to expenses, mortality, policy claims, taxes, investment income and lapses.

(2) At the time of revision of a scale of non-guaranteed elements for a policy subject to Insurance Law section 4232(b), the difference from the point in time of revision and application of the revised scale and the scale in effect at the later of the date of issue or the date of last revision, shall be reasonably based on the difference from the point of revision of the anticipated experience factors underlying the two scales with respect to expenses, mortality, investment income and persistency.

(3) At the time of revision of a scale of non-guaranteed elements for a policy subject to Insurance Law section 4232(a), the difference from the point in time of revision and application of the revised scale and the scale in effect at the later of the date of issue or the date of last revision, shall be reasonably based on the difference from the point of revision of the anticipated experience factors underlying the two scales with respect to expenses, mortality and investment income.

(4) At the time of revision of a scale of non-guaranteed elements for a policy not subject to paragraphs (1), (2), or (3) of this subdivision, the difference from the point in time of revision and application of the revised scale and the scale in effect at the later of the date of issue or the date of last revision, shall be reasonably based on the difference from the point of revision of the anticipated experience factors underlying the two scales.

(5) At the time of revision of a scale of non-guaranteed elements for a policy, an insurer shall not increase the profit margins at any policy duration above the profit margin projected at that duration at the date of issue of the policy, unless approved by the superintendent upon a finding that the increase is necessary due to the financial condition of the insurer.

(6) A readjustment to non-guaranteed elements on existing policies shall be based on expectations as to future experience and shall not recoup past losses. Experience factors from the later of the date of issue or the date of last revision and up until the time of new revision shall be assumed to equal the anticipated experience factors as of the later of the date of issue or the date of last revision.

(c) Any readjustment in non-guaranteed charges and benefits on in-force policies resulting from a change in board-approved criteria shall meet the requirements of subdivision (b) of this section.

(d) An insurer shall not consider cost of reinsurance agreements or other third party agreements, when changing non-guaranteed elements, if it would cause an adverse impact on non-guaranteed elements of any existing policy, unless the costs are consistent with the insurer's own anticipated experience assumptions and the insurer would have made the changes to the non-guaranteed elements in the absence of the costs.

(e) An insurer's procedures for readjustment of non-guaranteed elements on an assumed or acquired class of business shall not be less favorable to policy owners than the procedures used by the original insurer when the policies in the class were issued, unless approved by the superintendent upon a finding that the increase is necessary due to the financial condition of the original insurer.

(f) The board-approved criteria shall:

(1) require that anticipated experience factors be consistent with experience that is credible and relevant, if any;

(2) require the examination, as needed, of anticipated experience factors at specified times and under specified conditions but no less frequently than required by law to determine if the factors are reasonable; and

(3) include a statement of the maximum period, not to exceed five years, between reviews of anticipated experience factors and non-guaranteed elements for reasonableness.

(g) In addition to the criteria required under subdivision (f) of this section, board-approved criteria also may include:

(1) an amount of in-force policies, either by number issued or premium volume, below which no changes in an anticipated experience factor will be made because of a lack of statistical credibility;

(2) a minimum change in anticipated experience factors that will result in readjustment to non-guaranteed elements, provided that the minimum change: shall be reasonable in relation to the value provided to the policy owner and the cost of implementing a change in non-guaranteed elements; and the minimum change in anticipated experience factors that cause a readjustment in non-guaranteed elements favorable to policy owners shall be no greater than the minimum change in anticipated experience factors that causes a change in non-guaranteed elements adverse to policy owners; and

(3) averaging, smoothing, interpolating and rounding that are reasonable in relation to the values and benefits provided and that do not have a bias toward reducing policy benefits or values.

(h) Board-approved criteria shall place reasonable limits on the policy owner's exposure to higher unit expense costs from discontinued sales or a volume of sales significantly less than anticipated.

Section 48.3 Disclosure to policy owner.

(a) An insurer shall provide to a policy owner (other than an owner of a group annuity certificate used to fund an employee benefit plan within the meaning of the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. section 1001 et seq.) the current scale of non-guaranteed elements no later than the date of issue, either in the policy, application, illustration of the policy as sold, or a special disclosure document, in a manner that will allow an easy comparison to the corresponding guarantees. For the purpose of Part 53 of this Title (Insurance Regulation 74), the special disclosure document by itself shall not constitute an illustration.

(b) An insurer shall provide a disclosure document to a policy owner (other than an owner of a group annuity certificate used to fund an employee benefit plan within the meaning of the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. section 1001 et seq.) at least 60 days prior to any adverse change in the current scale of non-guaranteed elements. Using the same terminology that is used in the policy, the disclosure shall contain:

(1) the non-guaranteed elements that have changed;

(2) the new current scale of non-guaranteed elements;

(3) the prior current scale of non-guaranteed elements since the last disclosure;

(4) the guaranteed scale; and

(5) a prominent description of any adverse change in the current scale of non-guaranteed elements identifying the nature of the change and that the change is adverse or the conditions under which the change would be adverse.

Section 48.4 Filing and records requirements.

(a) An insurer shall obtain an actuarial memorandum signed and dated by a qualified actuary:

(1) prior to the issuance of any policy of a new policy form;

(2) prior to the issuance of any policy of a policy form for which the non-guaranteed elements have been changed for only new issues; and

(3) prior to any change to the non-guaranteed elements of an existing policy other than a change in a credited interest rate or an index account parameter based entirely on changes in the insurer's expected investment income or hedging costs.

(b) The actuarial memorandum shall contain the following as applicable:

(1) a tabulation by pricing cell and duration of the current scale of non-guaranteed elements and the anticipated experience factors on which they are based. The tabulation shall include:

(i) premium;

(ii) gross investment returns;

(iii) investment expenses;

(iv) investment defaults;

(v) credited rates and index account parameters;

(vi) policyholder behavior assumptions including option elections and persistency;

(vii) benefits paid;

(viii) mortality rates;

(ix) morbidity rates;

(x) insurance expenses, including the allocation of tax, sale, maintenance, service and overhead expenses;

(xi) profit margins;

(xii) policy expense charges; and

(xiii) policy benefit charges;

(2) a description of 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;

(3) a description of the processes and methods used in the determination of non-guaranteed elements for a pricing cell from the anticipated experience factors;

(4) any formula used to determine index account parameters and a description of the index formula;

(5) the investment strategy, which shall include:

(i) a description of the method used for the allocation of investment income, specifying how trading gains and losses due to interest rate changes are allocated; and

(ii) a description of the methods used to assess deductions from gross earned rates for default, investment expenses and risk items; and

(6) a statement signed and dated by a qualified actuary that the anticipated experience factors in the actuarial memorandum are reasonable assumptions and are the basis for determining the scale of non-guaranteed elements, and that the actuary is familiar with the current requirements in this State for non-guaranteed elements.

(c) An insurer shall have procedures in place to require a qualified actuary acting on the insurer's behalf to notify the insurer of any action specified in sections 48.1(o)(4), (5), and (6) of this Part. The insurer shall notify the superintendent of the action taken against the actuary as soon as practicable.

(d) An insurer shall file any adverse change in the current scale of non-guaranteed elements applicable to existing life insurance policies or applicable group life insurance certificates with the superintendent at least 120 days prior to implementation. The filing shall include:

(1) the actuarial memorandum required by subdivision (a) of this section;

(2) a tabulation of all proposed changes in the current scale of non-guaranteed elements by pricing cell giving the current scale of non-guaranteed elements, the proposed current scale of non-guaranteed elements, and the changes in the non-guaranteed elements;

(3) a tabulation of all changes in the anticipated experience factors and profit margins by pricing cell giving the prior anticipated experience factors and profit margins, the current anticipated experience factors and profit margins, and the changes in the anticipated experience factors and profit margins;

(4) a narrative description of experience or other rationale that explain the changes in anticipated experience factors; and

(5) for pricing cells, a narrative description of any changes in the methods or procedures for determining non-guaranteed elements from the anticipated experience factors.

(e) By May 1 of each year, the insurer shall file with the superintendent a listing of any adverse change in the current scale of non-guaranteed elements of any existing policy that occurred in the prior calendar year. The filing shall include a statement signed and dated by a qualified actuary that all changes were in compliance with this Part.

(f) An insurer shall provide all records required by this Part to the Superintendent upon request.

(g) The insurer shall maintain in its records, for six years after the termination of the last policy subject to the board-approved criteria, the written documentation of the determination of non-guaranteed elements required by this Part. The insurer shall maintain the written documentation in accordance with section 243.3 of this Title (Insurance Regulation 152).