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VIA ELECTRONIC MAIL
William.Carmello@dfs.ny.gov.

Mr. William B. Carmello
Chief Life Actuary
New York State Department of Financial Services
One Commerce Plaza, 19th Floor
Albany, New York 12257

Re: Life Insurance and Annuity Non-Guaranteed Elements
Re-Proposed Regulation 210
I.D. No. DFS-48-16-00006-RP

Dear Mr. Carmello:

We are writing on behalf of our client, the Committee of Annuity Insurers (the "Committee"). The Committee is a coalition of 29 of the largest and most prominent issuers of annuity contracts whose member companies represent more than 80% of the annuity business in the United States. Many member companies, either directly or through affiliates, do business in New York and some are domiciled in New York.[1]

We appreciate the New York Department of Financial Service's ("Department") consideration of the Committee's significant concerns about the applicability of Regulation 210 to annuities, as expressed in our comment letter of January 17, 2017. While the Committee recognizes that a number of those concerns were addressed, and applauds the changes that were made in response to our comments and those submitted by others, we are disappointed that our recommendation to exclude annuities was rejected. As a result, we believe that certain provisions of re-proposed Regulation 210 would still have serious negative consequences for the annuity market and annuity purchasers in New York. We are therefore advocating that a number of further changes be made to improve its application to annuities.[2]

While there are a number of specific items that are still of significant concern to annuity issuers, at this stage of the proceedings the Committee will focus its comments on three crucial points:

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[1] A list of the Committee's member companies is attached as Appendix A.

[2] As proposed, Regulation 210 would apply to all types of annuity contracts, including traditional fixed annuities, excess interest annuities, multi-year guarantee annuities, modified guaranteed annuities (with market value adjustments), fixed indexed annuities (including equity indexed annuities), and variable annuities; it would apply to both immediate and deferred annuities (including longevity annuities); and it would apply to various types of optional benefits (including both guaranteed living benefits and death benefits). These comments generally apply to all of the above, unless otherwise stated or the context otherwise requires.

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(1) the definition of "*adverse change in the current scale of non-guaranteed elements*" in section 48.1(a) should be revised and clarified;

(2) the phrase "group annuity certificate" in subsection (2) within the definition of "*applicable group certificate"* in section 48.1(c) should be clarified; and

(3) the 60 day notice requirement in section 48.3(b) should be revised and shortened, because 60 days is unworkable for important non-guaranteed elements in annuities.

We are suggesting revised language for your consideration on these three points. The Committee believes that these changes, while maintaining the regulation's goal of protecting New York insurance consumers, will allow insurers to better serve the protection and retirement security needs of New Yorkers.

In addition, at least with respect to annuities, Regulation 210 should apply only on a prospective basis, that is, only to annuities sold after the effective date of the regulation. Any retroactive application, to annuities sold before the effective date, would be problematic. For example, the requirement for profit margins to be fixed at issue would be new. For past sales, in many cases documentation of the original pricing assumptions may not exist, so it would be unreasonably burdensome for companies to confirm, in accordance with re-proposed Regulation 210, that profit margins at all durations will not have increased above the anticipated profit margin at original pricing.

I. The Exclusion From the Definition of *Adverse Change* in Section 48.1(a) Should Be Broadened

The definition of *"adverse change in the current scale of non-guaranteed elements"* in section 48.1(a) is key to the scope and impact of significant provisions of Regulation 210.[3] That definition includes an exclusion (or carve-out) for "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."[4] This exclusion is in turn a crucial component of the definition. While an exclusion of this nature is certainly appropriate, in its current form it is too narrow in several respects.

First, an insurer's decision to change credited interest rates, index account parameters, or other non-guaranteed elements is rarely based solely or entirely on a single factor. Such decisions typically take into account not just expected investment income or hedging costs, but also a variety of factors, such as market conditions, competitive considerations, anticipated expenses, regulatory matters, taxes, policy owner behavior (both experienced and anticipated), and other factors. It is both necessary and appropriate to consider such factors in making decisions about interest crediting rates and index account parameters. Indeed, insurers would be amiss and irresponsible if they did not consider all relevant factors. We understand the Department's concern with adverse changes that are intended to increase profit margins, but taking macroeconomic and other such factors that are beyond the insurer's control into account, and reacting appropriately to them, is not the same as attempting to increase profits. Changing non-guaranteed elements in order to increase profit margins is within an insurer's control, but the various factors noted above are not.

[3] For example, the definition is key to the operation of section 48.3(b), which requires 60 days notice to policy owners of certain adverse changes in the current scale of non-guaranteed elements.

[4] The Committee recognizes and appreciates that the Department expanded this exclusion from the original to cover index products.

In addition, the exclusion should include changes in other elements that may change over the life of a policy due to factors outside of the insurer's control, such as changes in loan interest rates and settlement options.

Therefore, the Committee recommends revising the exclusion from the definition of *adverse change in the current scale of non-guaranteed elements* in section 48.1(a) to include factors outside of the insurer's direct control and discretion (see suggested language below).

Second, the Committee recommends clarifying that the reference to expected investment income refers to the investments for the product at issue and not to the insurer's overall general account investments. We suggest doing so by adding the parenthetical phrase "(with respect to the investments supporting those policies)" to the exclusion, as shown in the language below.

The following are suggested revisions to section 48.1(a) that would implement these recommendations (new language shown in red):

> "(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 or loan interest rate or settlement option where such change is based entirely on factors outside of the insurer's direct control or discretion, such as changes in the insurer's expected investment income (with respect to the investments supporting those policies) or hedging costs, policy owner experience (including policy owner actions such as payment or non-payment of premiums, the exercising of rights under the policy or riders, and lapse rates), and premium or other taxes."

This proposed expansion of the exclusion would not include a change that is intended or designed to increase an insurer's profit margin, since such a change would be within the insurer's control and discretion.

II. The Term "Group Annuity Certificate" in Subsection 48.1(c)(2) Should Be Clarified and Revised

Committee members are confused by the definition of group annuity certificate in section 48.1(c)(2), as it is not clear what it includes and what it does not. On its face, the definition appears to be based on certificates that are subject to section 4223 of the New York insurance law (standard nonforfeiture law for annuities), but with changes in the language that lead to the confusion. In particular, in subsection (iii) of re-proposed section 48.1(c)(2), the phrase "a plan of retirement income annuities" is not explained or defined.

The Committee has two specific recommendations regarding section 48.1(c) to address these issues:

1. Clarify the Definition of *Applicable Group Certificate*.

Rather than develop a new definition, the Committee recommends that the definition of *applicable group certificate* in section 48.1(c) be clarified by adding a reference to, and relying on, NY Insurance Law Section 4223(b)(2). This can be accomplished by revising the introductory language as follows (new language in red):

> "(c) *Applicable group certificate* means any group life insurance or group annuity certificate that is subject to the individual standards of New York Insurance Law Section 4223(b)(2) where: . . . ."[5]

[5] The Committee's concerns and recommendation regarding §48.1(c) are directed only at group annuity certificates, and should not be read as suggesting our agreement that Regulation 210 should apply to group

We understand that the Department is concerned that owners of group annuity certificates that are subject to individual rules should have the protections of Regulation 210 (the Committee agrees). The proposed change recommended above is consistent with and furthers that objective, while providing clarification and certainty to insurers for their compliance.

2. Not All Section 403(b) Annuities Should Be Included In The Definition of Applicable Group Certificate

Not all section 403(b) annuities are sold as individual products. In many cases, they are truly group products that are managed by an employer under applicable federal tax law requirements for section 403(b) plans. In particular, in many cases section 403(b) certificate owners cannot do anything with the information that would be provided in the disclosure document (required by section 48.3) since the determination of what products are available to them is generally solely with the employer. Regulation 210 should apply only to those section 403(b) certificates that are funded by the employee, and that are not subject to ERISA and not effectively under the control of an employer or other such party. Regulation 210 should apply only to those types of §403(b) annuities that function more as individual products.

The revision recommended above, by referencing the individual standards in §4223(b)(2), helps to focus the definition of *Applicable Group Certificate* on products subject to individual standards. In addition, with specific reference to section 403(b) annuities, the Committee recommends that subsection (ii) of 48.1(c)(2) be revised to read as follows (new language in red):

> "(ii) funding annuities in accordance with the Internal Revenue Code at 26 U.S.C. section 403(b) (other than annuities 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. ("ERISA"), including all employee benefit plans as defined in ERISA whether or not subject to the substantive provisions thereof), or … "

The last section of the new language suggested above is in accordance with the opinion issued by the New York Office of General Counsel on June 5, 2006 representing the position of the New York State Insurance Department, **Re: Treatment of Government Plans Under N.Y. Ins. Law §4223** (Opinion No. 06-06-01)**,** where it was made clear that the statutory reference in §4223 to employee benefit plans "within the meaning of" ERISA includes all employee benefit plans as defined in ERISA whether or not subject to the substantive provisions thereof.[6]

III. The 60 Day Notice Requirement in Section 48.3(b) Should Be Revised and Shortened.

Another significant problem with re-proposed Regulation 210 is the requirement in section 48.3(b) to provide policy owners with a notice (a disclosure document) at least 60 days in advance of any adverse change in the current scale of non-guaranteed elements.

A. The Time Period in Section 48.3(b) Should Be Shortened

For a number of reasons, the Committee believes it imperative that the 60 day advance notice period be significantly shortened.

First, the further in advance that annuity issuers must make decisions about time and market sensitive non-guaranteed elements, the more conservative those decisions almost certainly will be. An advance notice requirement effectively imposing this conservatism on insurers would be contrary to the best interests of New York annuity purchasers and their retirement security, as

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life insurance. To the contrary, we support other commentators who argue that group life insurance should be excluded from Regulation 210.

[6] This same change should be made in subsection (2)(iii) of section 48.1(c), by adding the same parenthetical exclusion at the end of that subsection.

their annuities would then have lower benefits and/or higher costs than annuities purchased in other states.

Second, as you know, insurers utilize significant risk management techniques in order to set the non-guaranteed elements in their annuity products – particularly the credited interest rate and index account parameters. Insurers often must be able to do so quickly in a competitive marketplace taking various factors such as expected investment income, hedging costs, market environment, market trends, competitive pressures, and expected inflows and outflows from the product line (*i.e.*, policy owner behavior) into account without risking or endangering their solvency. Non-guaranteed elements ("NGEs"), and the ability to adjust them as and when needed, are a very essential component of insurers' risk management because, although annuities have a number of NGEs (credited interest, annuity purchase rates, and perhaps certain fees and charges), they generally provide insurers with only one principal source of revenue – the interest rate margin or spread on fixed and fixed index annuities.[7]

Third, the practical impact of the 60 day notice requirement in section 48.3(b) of re-proposed Regulation 210 is to require insurers to set any change in credited interest rates or index account parameters (and other NGEs) *more than* two months in advance (since once a decision is made, it will take time to prepare and mail the notices), and require months to effect any changes (at least for in-force annuities). This would severely limit the ability of insurers to respond flexibly to market changes, or other changes beyond their control, resulting in negative consequences for both New York consumers and insurers.

For example, if an underlying mutual fund offered in a variable annuity implements redemption fees (or otherwise significantly increases fees or expenses, or changes its investment objective or investment policies), the insurer might conclude that the fund is no longer appropriate for its annuity policy owners. However, the current requirement in re-proposed section 48.3(b) means, as a practical matter, that it would take more than two months for the insurer to actually implement appropriate changes to protect its policy owners (such as 'shutting off' the affected subaccount(s) from new/additional policy owner investments).

Fourth, there even may be changes where insurers cannot give 60 days advance notice. For example, variable product underlying funds may make (and have made) such changes (or others) and given insurers ***less than*** 60 days notice. Such situations will make it impossible for insurers to react to such fund changes and give their policy owners a two month notice.

Fifth, if policy owners are going to take any action in response to a notice of an adverse change, they are likely to do so shortly after receiving the notice, not weeks later. A long notice period could actually be counter-productive, since policy owners may very well be complacent when given so much time, putting aside the notice for later consideration and then simply forgetting about it.

Finally, changes in annuity NGEs do not have the same potential importance and consequences to policy owners as changes in life insurance NGEs (where, for example, policy owners on fixed incomes may need to make lifestyle adjustments in order to pay higher premiums to avoid lapse). A 60 day notice for changes in annuity NGEs should not be required, and as noted above will actually have negative consequences for annuity purchasers in New York.

Therefore, the Committee recommends that the notice period in section 48.3(b) be shortened and requests that a 15 day notice requirement be provided for annuities. This is particularly

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[7] The equivalent for variable annuities would be the mortality and expense risk charge and possibly an asset-based administrative charge; these are more likely to be guaranteed rather than non-guaranteed elements, and if they are NGEs then any changes are limited and circumscribed by the terms of the contract, the Memorandum of Variable Material filed with and approved by the Department, and for SEC registered variable annuities, by the disclosure, anti-fraud, and other applicable provisions of the federal securities laws.

important for changes in credited interest rates and index account parameters, where an insurer's ability to react relatively quickly to rapidly changing conditions is critical. These non-guaranteed elements are typically not set anywhere near 60 days in advance. Indeed, market changes that impact annuity non-guaranteed elements may very well change more than once over the course of a two month period. Notice of 15 days for annuities would be more reasonable and consistent with annuity issuer's typical rate setting procedures and would still provide policy owners with sufficient time to decide whether to keep, surrender or replace the policy or change their investment option(s).

B. The Prior Notice Requirement in Section 48.3(b) Should Not Apply to Policy Owners Who are Not Currently Affected

There should not be a requirement to provide prior notice to policy owners who would not, based upon the policy choices they have made, be currently affected by the change in a non-guaranteed element. For example, many fixed annuities offer multiple investment option "buckets," with different current interest rates or index account parameters; a change in the rate or parameter for a particular investment bucket would not have any immediate impact on a policy owner who does not have any cash value in that particular bucket. Similarly, a change that is applicable to a particular variable annuity subaccount would not affect policy owners who are not invested in that subaccount. In addition, if an insurer changes a non-guaranteed element in a particular rider, there should be no requirement to provide advance notice of that change to policy owners who have not elected the rider (and who may not even be eligible to elect the rider).

In some cases, for a particular product there could be many thousands of policy owners, but only a handful who are invested in the particular option or who would otherwise be currently affected; requiring notice to all of those thousands of policy owners would be an unnecessary expense, divert the insurer's attention and resources away from more important consumer protection matters, and serve no important purpose. Indeed, that kind of notice of irrelevant information could lead the recipients to become complacent about insurance company notices and disregard future notices that could actually be important to them. However, the notice (the disclosure document) should be provided to such policy owners if and when they do invest their annuity funds in the affected investment option or are otherwise affected by the change in the non-guaranteed element.

Accordingly, the Committee recommends that section 48.3(b) be revised to add the following proviso (new language in red):

"Section 48.3 Disclosure to policy owner.

(a) . . .

(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 15 days prior to any adverse change in the current scale of non-guaranteed elements applicable to the policy owner; *provided,* that such disclosure document need not be provided to policy owners who are not currently affected by the change (*e.g.,* policy owners who have no policy funds in the investment option to which the change applies, or who have not elected the rider to which the change applies, or who have guarantees in place that make the change inapplicable to them); *provided further,* that such disclosure document must be provided to such policy owners at (or before) the time when they would be currently affected by such change (*e.g.,* when they choose to invest their policy funds in the affected investment option). Using the same terminology that is used in the policy, the disclosure shall contain: . . . "

In the language suggested above, the parenthetical "(or before)" would give insurers the flexibility to either provide the disclosure document to all policy owners (including unaffected

ones) at the time of the change, or to provide more targeted disclosure to policy owners when they are affected by the change.[8]

C. Annuity Purchase Rates Should be Excluded From the Definition of Non-Guaranteed Element in Section 48.1(l).

Annuity contracts typically include a table of guaranteed annuity purchase rates, at which the owner has the right to annuitize the contract. However, many contracts also provide that the owner can annuitize at the company's current annuity rates in effect when the owner annuitizes, if those current rates are better (more favorable for the owner) than the guaranteed rates. In practice, those current rates are not disclosed or provided to contract owners generally, but only upon request by a particular owner. Changes in the current annuity purchase rates have no current effect on policy owners during the accumulation phase of an annuity contract; they only affect owners if and when they annuitize. It makes no sense to send a notice to all contract owners of changes in those current annuity purchase rates. Therefore, in these circumstances current annuity purchase rates should be excluded from the definition of non-guaranteed elements in section 48.1(l). The Committee suggests the following language (new language in red):

"(l) *Non-guaranteed element* means . . . but shall not include (i) elements that are not within the insurer's discretion, such as the pass-through of variable fund returns; and (ii) current annuity purchase rates, when the policy owner has the ability to annuitize at the greater (better) of guaranteed minimum annuity purchase rates or the company's current annuity purchase rates in effect at the time of annuitization."

IV. Additional Comments

There are other important recommendations, suggestions, or clarifications that the Committee believes should be addressed in the final regulation. We list these additional items very briefly here, and note the Committee's support for other commenters who may address these items more fully.

Section 48.1

- The definitions of *class of policies* (§48.1(e)) and *pricing cell* (§48.1(n)) and the unfair discrimination provision (§48.2(a)(2)(i)) should refer to policies on the same policy form (and with similar expectations as to anticipated experience factors). In addition, in general the term "pricing cell" needs clarification (perhaps with an example).

- For certain group annuity contracts (*e.g.,* unallocated group annuity contracts used to fund deferred compensation plans), no individual certificates are issued. Please confirm that such contracts are not within the term "group annuity certificate" in §48.1(c)(2).

- In the definition of *exempt policy provision* (§48.1(g)), the following were deleted from the original proposal: (1) changes to the variable funds offered in a policy; (2) the right to defer payment when required by law; (3) the discretion to pay minimal annuity benefits in a single sum; and (4) the discretion to maintain the tax qualified status of a policy. Since these are not designed to allocate financial experience to the policy owner, please "re-include" these as enumerated exempt policy provisions or otherwise confirm that they are exempt policy provisions.

Section 48.2

- The inability to increase profit margins at any policy duration (section 48.2(b)(5)) is unworkable. Insurers do not always measure profit duration by duration; instead, it can be measured over the anticipated life of an expected cohort of sales or by policy form number. Any workable methodology would of necessity have disparate impacts on different pricing cells. Otherwise, insurers would be forced to adjust NGEs differently by

[8] Additional revisions to §48.3(b) are recommended below.

pricing cell in order to reduce profitable cells to their original profit margin (good for some policyholders) or increase profit margins in under-performing cells (not so good for others).

- With respect to re-insurance and other third party agreements, the phrase "in the absence of the costs" at the end of §48.2(d) is confusing; we recommend changing it to "in the absence of the reinsurance agreement(s) or third party agreement(s)."

- The provision regarding an acquired block of business (§48.2(e)), while improved from the original, is still problematic. It should be deleted, or revised to apply for only a limited period after an acquisition (allowing the purchaser to develop experience with the new block, which if appropriate and subject to the other provisions of Regulation 210, might justify a change in a NGE). The Committee recommends that it apply "only until the purchaser has acquired sufficient experience with the acquired business to make changes consistent with its business practices, or for 3 years after the acquisition, whichever is less." In addition, if not deleted, this provision should only apply to acquisitions made after the effective date of Regulation 210.

Section 48.3

- The parenthetical exceptions from the disclosure notice requirements in sections 48.3 (a) and (b) should be expanded to include individual annuity contracts used to fund ERISA employee benefit plans as well as group annuity certificates, by inserting the phrase "or individual annuity contract" after "group annuity certificate" in the parenthetical exception in both section 48.3(a) and 48.3(b).

- Also, the parenthetical exceptions from the disclosure notice requirements in sections 48.3 (a) and (b) should be revised to clarify the phrase "an employee benefit plan within the meaning of" ERISA, in accordance with the 2006 opinion issued by the New York Office of General Counsel interpreting that phrase in N.Y. Ins. Law §4223 (see discussion of Applicable Group Certificate in Part II above). Specifically, it should be made clear that the parenthetical exception includes all employee benefit plans as defined in ERISA whether or not subject to the substantive provisions thereof. This can be done (along with the recommendation in the immediately preceding bullet) by revising the parentheticals in sections 48.3(a) and (b) to read as follows (new language in red):

  > ". . . (other than an owner of a group annuity certificate or individual annuity contract 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. ("ERISA"), including all employee benefit plans as defined in ERISA whether or not subject to the substantive provisions thereof, *e.g.,* a governmental plan) … "

- There should be no advance notice requirement (§48.3(b)) when the policy owner has the option to make a retroactive change effective as of the date of the change in the NGE. For example, a company may change the participation rate or cap for a particular index option on a particular date, and give the policy owner a reasonable period (*e.g.,* 30 days) after the change, or after giving notice to the policy owner (whichever is later) to transfer out of that option, retroactive to the date of the change. Similarly, the insurer might increase the charge for a rider, but give policy owners a reasonable period after the increase to drop the rider, with a refund of all rider charges after the increase.

Section 48.4

- The actuarial memo requirement (§48.4) requires a tabulation, by pricing cell and duration, of various experience factors and profit margins. These requirements are granular in the extreme and certain information, such as profit margins, is generally based on averages and is not broken down or available by pricing cell and duration. The level of detail is excessive; a single policy form could have 80 pricing cells x 20-30

years projection x 13 required types of data in the regulation = approximately 20,000 – 30,000 data points. The Committee recommends that that the granularity of the tabulation should match the practice of the company in its rate setting procedures, and that the required documentation should not include data that are not allowed to be used as the basis for changes (see §§48.2(b)(1) through (3)). In addition, the Department should clarify that the tabular duration need not be more frequent than every five years.

- Interest crediting rates should be exempt from §48.4(a)(2) (the actuarial memorandum requirement for change in NGEs for new issues only).

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The Committee of Annuity Insurers appreciates the opportunity to comment on re-proposed Regulation 210, and we appreciate the Department's consideration of our comments. Please feel free to contact the undersigned at 202.383.0158 (steveroth@eversheds-sutherland.com) or Maureen Adolf at 212.389.5028 (maureenadolf@eversheds-sutherland.com) if you have any questions. We would be pleased to make ourselves available for a meeting to discuss the recommendations in this letter or any other matters that might assist the Department in finalizing Regulation 210.

Sincerely,

THE COMMITTEE OF ANNUITY INSURERS

Stephen E. Roth
Eversheds Sutherland (US) LLP

cc: Scott Fischer, Executive Deputy Superintendent
James Regalbuto, Deputy Superintendent for Life
Maureen Adolf, Eversheds Sutherland (US) LLP

APPENDIX A

THE COMMITTEE OF ANNUITY INSURERS

AIG
Allianz Life
Allstate Financial
Ameriprise Financial
Athene USA
AXA Equitable Life Insurance Company
Fidelity Investments Life Insurance Company
Genworth Financial
Global Atlantic Life and Annuity Companies
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Lincoln Financial Group
MassMutual Financial Group
Metropolitan Life Insurance Company
National Life Group
Nationwide Life Insurance Companies
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Ohio National Financial Services
Pacific Life Insurance Company
Protective Life Insurance Company
Prudential Insurance Company of America
Symetra Financial Corporation
The Transamerica companies
TIAA
USAA Life Insurance Company
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