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VIA ELECTRONIC MAIL
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Mr. Peter Dumar
Chief Attorney, Life Bureau
New York State Department of Financial Services
One Commerce Plaza
Albany, NY 12257

Re: Proposed Amendment of 11 NYCRR Part 50 (Insurance Regulation 47)

Dear Mr. Dumar:

On behalf of the Committee of Annuity Insurers (the "CAI" or "Committee"), we are submitting this letter in response to the proposal by the New York State Department of Financial Services (the "DFS" or "Department") to amend 11 NYCRR Part 50 (Insurance Regulation 47) (the "Proposed Amendment").

**Introduction and Overview**

The CAI's members include virtually all of the leading issuers of variable annuities in New York and across the United States. Additionally, all of the life insurers that currently issue registered index-linked annuities ("RILAs") in the US are CAI members.[1] Therefore, the Committee has a strong interest in commenting on the Proposed Amendment, and hopes that the Department will seriously consider the Committee's comments as set forth below.

The Proposed Amendment includes several new or modified provisions applicable to variable annuities. As the Department is aware, variable annuities have been a widely accepted retirement savings product for over 50 years. Indeed, over the past decade there has been a growing recognition by federal and state regulators across the country that, due to the precipitous decline of defined benefit retirement plans, efforts should be made to make the lifetime income guarantees that only life insurers can provide more widely available to retirement savers. The CAI is concerned that certain of the provisions in the Proposed Amendment would deprive New York residents of the guaranteed lifetime withdrawal benefits that have become a hallmark of variable annuities. Moreover, because

[1] The Committee of Annuity Insurers is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's current 30 member companies represent approximately 80% of the annuity business in the United States. The Committee was formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of insurance, securities, banking, and tax policies regarding annuities. For over three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities at both the federal and state levels, working with and advocating before the SEC, FINRA, IRS, Treasury Department, and Department of Labor, as well as the NAIC and relevant Congressional committees. A list of the Committee's member companies is available on the Committee's website at www.annuity-insurers.org/about-the-committee/.

variable annuities compete with mutual funds and other commingled fund investments, it is important that insurers have the ability to offer a wide array of investment options in their variable annuities. The Committee hopes that the Department will reconsider certain of the product design provisions applicable to variable annuities as discussed in more detail below.

The CAI commends the Department for its significant efforts to modernize Regulation 47 to make RILAs more widely available to New York consumers. However, the Committee believes that certain of the prescriptive provisions in the Proposed Amendment will unnecessarily restrict issuers from issuing RILAs that would provide New York residents with attractive investment options and will impede RILA product innovation to the detriment of New York residents. In this regard, the Committee would note that New York residents currently have access to a wide variety of structured notes offered by banks. RILAs bear some strong similarities to structured notes, the terms of which also link performance to market indexes or benchmarks and provide various forms of downside protections and upside limits. The CAI respectively submits that some of the restrictions on RILA design in the Proposed Amendment would unduly limit the RILA market in New York. In doing so, New York residents would be deprived of the choices that residents in other states have, and RILA designs would be restricted in ways not applicable to other similar investment products, such as structured notes, that do not offer the benefits uniquely available in life insurance products. The Committee therefore hopes that the Department will reassess the provisions noted below.

**Provisions Applicable to Variable Annuities**

***Withdrawal Rates for Guaranteed Lifetime Withdrawal Benefits (GLWBs)***

The Proposed Amendment includes several new variable annuity provisions that have raised concerns among Committee members. . The most critical of those is the impact the Proposed Amendment would have on variable annuity products offering guaranteed lifetime withdrawal benefits ("GLWB") because most or all existing designs in the market do not meet these new requirements. We urge the Department to remove these provisions from the Proposed Amendment to allow for further discussion toward an approach that addresses the Department's concerns without causing significant disruption in the market and the potential for New Yorkers to lose access to these meaningful and valued benefits.

Under the Proposed Amendment, life insurers will be required to provide a withdrawal rate increase for each five-year age band, without regard to length of deferral and any potential market and/or guaranteed growth in the benefit base to which the withdrawal rate would be applied to calculate the maximum allowable withdrawal amount. Retirees that defer for a longer amount of time before commencing withdrawals have the potential for a significantly higher annual withdrawal amount for the same withdrawal rate. Additionally, the Committee is concerned that the proposed language does not make a distinction between withdrawal rates on single vs. joint life contracts.

Further, section 50-2.9(h)(3), which prohibits a reduction in withdrawal rates due to reduction or depletion of the contract's accumulated value, fails to recognize the consumer value of variable annuities with guaranteed living benefit riders. Some allow consumers to take more of their money in earlier years when retirement spending needs for active and healthy retirees may be higher than in later years. Riders that decrease the withdrawal rates after depletion of the accumulated value offer higher withdrawal rates than non-decreasing riders before accumulated value depletion. The benefit to the consumer with the higher initial withdrawal rates is an expected lower payout for a longer period from the insurance company, as compared to the non-decreasing riders where the payout is expected to occur for a shorter amount of time, as it will take longer to reach accumulated value depletion. No two retirement programs are the same. Some retirees will spend more money earlier in retirement rather than later, and the decreasing riders provide these retirees with a higher withdrawal rate earlier in retirement. Some retirees will not need as much income after accumulated value depletion if they have other sources of income such as Social Security or other investments that will supplement the guaranteed lifetime withdrawal. Decreasing and non-decreasing GMWB riders ultimately provide similar value to consumers, but the ability to offer both allows retirees to choose how they want to receive their benefit based on their expected spending pattern in retirement.

The CAI respectfully submits that the issues that DFS seeks to address in Section 50.2-9(h) are complex and have not received adequate vetting and consideration of the unintended consequences the provision would have. Additionally, promulgation of this provision would force all existing GMWB products from the market while the industry seeks approval of alternative designs. The industry and the Department should engage in more in-depth conversations prior to rulemaking on this issue. However, we believe that it is critical that the Department's rulemaking on RILAs move forward expeditiously to end the moratorium on approval of such products and make them available to New York consumers. We therefore respectfully request that the DFS remove this section from the proposed rulemaking and engage in a separate rulemaking so as to not slow the implementation of the RILA rulemaking.

***Prohibition of Variable Annuity Underlying Funds with Buffer and Floor Strategies***

Relatively late in the process of developing the Proposed Amendment, the Department added Section 50.2-9(i), which provides: "No separate account contract shall include investment funds that purport to provide benefits, features, or investment strategies that are, in the opinion of the superintendent, similar to non-guaranteed index benefits with buffer and floor features as discussed in this section." This provision does not regulate RILAs, but rather regulates the funds that can be offered in a variable annuity through a separate account.

CAI members are not aware of any other circumstances where the Department has prohibited the inclusion of a class of funds in a variable annuity product. Indeed, in CAI members' experience, although the investment objectives of funds are reviewed as part of any Separate Account Plan of Operations filing, they are not aware of the Department rejecting a particular fund. Section 4240 of the New York Insurance Law provides only that a life insurer shall invest for a separate account in "good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." (*See* NYIL Section 4240(a)(2)(C). *See also* DFS Guidelines for the Preparation of Plans of Operations for Separate Accounts (April 2014), ¶¶ 2 and 4).) Committee members do not see how a fund with a strategy designed to limit losses would fail to meet this prudent person standard.

Retail mutual funds with investment objectives that seek to provide partial protection from loss through buffer or floor strategies in exchange for some upside limitation, known as defined outcome funds, are already widely available to investors nationwide, including in New York. Additionally, several life insurance companies already offer variable annuities in other states that include defined outcome funds as investment options. We urge the Department to not deny New Yorkers the opportunity to invest in such vehicle within a variable annuity contract.

While the Committee understands why the Department denied approval of these funds while it developed standards to facilitate the issuance of RILAs in New York, we do not understand why the Department is preventing these funds from being offered in variable annuity contracts now that the standards have been developed and are being implemented. We do not believe that this provision advances the Department's regulatory objectives concerning RILAs, which motivated the development of the Proposed Amendment. Unlike a RILA contract where crediting terms are contractual obligations of the life insurance company, the investment risk of an underlying fund with buffer or floor features is borne by the contract owner. Offering such funds within a variable annuity has no relevance to a life insurance company's actuarial or financial health, and consumers are well informed of the features and risks of such funds through prospectus disclosure. The CAI urges the Department to remove this provision from the Proposed Amendment.

We should also note that this prohibition would have anti-competitive effects. As the Department is aware, RILAs are securities that must be registered with the SEC. Unlike for variable annuities where the SEC has had a dedicated registration form for over 35 years, the SEC does not have a registration form or disclosure framework tailored to RILAs. This has meant that life insurers wishing to issue RILAs essentially must incur the costs and establish disclosure and accounting protocols very similar to those required for an initial public offering of debt or equity securities. Not all life insurers are able or

willing to incur those costs or undertake that effort in order to offer a RILA. Even for those life insurers that do offer RILAs, there are selling firms and distribution channels that may be limited to selling variable annuities. Moreover, it seems illogical that variable annuity issuers would be prohibited from offering, and variable annuity investors would be deprived of the opportunity to invest in, investment options such as defined outcome funds with investment objectives designed to provide various forms of downside protection along with potential upside limitations. This is especially so since such funds are widely available to New York residents and retail investors across the country as SEC-registered investment companies.

***Limitation on Variable Annuity Surrender Charges and Surrender Charge Period***

Regulation 47 currently provides that a variable annuity surrender charge "may not exceed a reasonable charge for unamortized acquisition expenses," but does not state a numerical limit on the percentage charge or duration of the surrender charge period. The Proposed Amendment would limit surrender charges to no greater than 8%, declining in accordance with a prescribed schedule over an eight-year period. As the Department is aware, there are approved products in New York that exceed both this surrender charge percentage and surrender period. The Committee agrees with the comments made by the Life Insurance Council of New York ("LICONY") on this issue, conceding to a limitation on surrender charges of no greater than 8%, but urging the Department to allow issuers to extend the surrender period to as long as nine years and allowing flexibility in the annual reduction in the charge to ensure that issuers can recover their acquisition expenses.

**Provisions Applicable to RILAs**

As the Department is aware, RILAs represent a growing portion of the annuity market as consumers seek to grow and preserve assets for retirement and other long-term savings objectives. As noted above, the Committee is very appreciative of the Department's efforts to make RILAs available to New York residents. Several Committee members have already submitted RILA policy forms for review and approval since the Proposed Amendment was published in the New York State Register.

While CAI members look forward to offering their RILA products in New York, there are several aspects of the Proposed Amendment that raise concerns as discussed in more detail below. In addition, based on the extensive experience that Committee members issuing RILAs outside New York have had with the SEC and FINRA filing process for RILA prospectuses and marketing materials, and therefore the prospectus and other disclosures developed for RILAs that have been subject to SEC and FINRA review and comment, the Committee is offering suggestions for improving and clarifying the RILA disclosure document that the Department has proposed.

***Limitations on RILA Design***

The CAI appreciates that the Department has sought and accepted input from several of its members and LICONY as it developed the Proposed Amendment. During the course of that process, industry participants have raised several significant concerns with limitations on the design of RILA products included in the Proposed Amendment, including:

- The limitation on the indexes to which a strategy may be linked to "independent, external, publicly available" indexes and the prohibition on the use of a proprietary index or an ETF. (Section 50-2.9(f).)
- The limitation on buffer designs to between 10% and 30% and limitation on floor designs to 15% to 25%. (Section 50-2.9(d)(2)(ii).) In particular, floors of 10% are common in existing RILA products offered in other states. Not permitting 10% floors will effectively preclude floor designs in New York, and thereby deprive consumers who want the protection from market volatility and possible severe market downturns that buffer designs do not provide.

- The prescription of minimum caps and step credits based on level of buffer or floor protection. (Section 50-2.9(d)(5) and (d)(7).) In particular, the Committee is concerned that the provision requiring netting of any rider or other fees from the prescribed cap rates will inhibit the offering of RILAs with attractive guaranteed living benefit or death benefit options that would be available for an additional fee.
- The establishment of a minimum participation rate of 100%. (Section 50-2.9(d)(6).) This may preclude companies from offering designs that include more than one index parameter in the determination of their values, and generally from offering alternatives to cap designs.
- The provision permitting only "temporary" suspension of renewal index options, under only limited circumstances (Section 50-2.9(d)(8)). As is the case with variable annuity contracts, issuers need flexibility to manage the availability of investment options in these long-tail products over many years and evolving circumstances. The Committee is concerned that both the "temporary" qualifier and the enumerated limited circumstances impose restrictions that do not anticipate a variety of real world situations that can meaningfully impact the availability and continued viability of index options.

The CAI shares the concerns already raised by LICONY and several of its members that these provisions are overly prescriptive, and that a more principles-based approach would allow the Department to regulate the marketing of RILAs in New York without impeding product innovation. Not only do these detailed prescriptions not reflect the breadth of RILAs currently offered in other states, they also will impede innovative product design in the future. We join with LICONY in their objections to these prescriptive requirements.

***RILA Interim Value Calculations***

The Proposed Amendment Provides that the interim value of an investment in an index linked strategy "on any date other than the maturity date of the index crediting period shall at least equal either: (i) the current fair market value of the maturity date guarantees of the segment; or (ii) any other method of calculation that, in the opinion of the superintendent, provides reasonable equity to terminating and continuing contract holders and to the insurer." (Section 50-2.9(d)(3).)

In earlier drafts of the Proposed Amendment, the Department included language that explicitly allowed for a pro-rata method to be used to determine RILA interim values. The Proposed Amendment replaced that safe harbor with the language that gives the Superintendent broad discretion regarding when and whether to permit pro-rata interim value methods.

In the interest of regulatory flexibility that will allow for future product innovation, the CAI commends the Department on the inclusion of the language that grants the Superintendent discretion to allow other methods of interim value calculation. However, the CAI believes that such discretion should not be in lieu of, but should be in addition to, a safe harbor for the use of pro-rata interim value calculations. The Committee therefore requests that the Proposed Amendment be modified to provide for such a safe harbor.

The pro-rata interim value methodology is a popular approach that is simple, easily understood by consumers, and highly transparent. Moreover, a safe harbor for the pro rata calculation is appropriate because it meets the requirements that the Department is establishing for interim value calculations. This standard, embodied in the language guiding the Superintendent's exercise of discretionary authority under the Proposed Amendment, requires "reasonable equity to terminating and continuing contract holders and to the insurer." A pro-rata interim value meets this standard because it provides reasonable equity to terminating contract holders, has absolutely no impact on continuing contract holders, and provides reasonable equity to the insurer, all without the potential for significant losses or windfalls. Accordingly, we urge that the Proposed Amendment provide safe harbors for both the fair market value approach and the pro-rata approach, in addition to granting the Superintendent broad discretion to approve other methodologies.

***Required Disclosure Statement***

The Proposed Amendment would require that a prescribed disclosure statement, set forth in Appendix 28, be delivered to a prospective purchaser of a RILA no later than at the time of application. (Section 50-2.9(e).) The CAI is concerned that certain elements of the proposed disclosure statement may be confusing or misleading to prospective purchasers. Additionally, there are statements in the draft disclosure document that are inaccurate and should be corrected. The mark-up of the proposed disclosure statement that is attached to this letter is intended to supplement the discussion that follows to assist the Department in resolving these issues.

First, the CAI believes that consumers would best be served with a disclosure document that addresses only those features offered in the RILA contract that they are considering for purchase. For example, if an insurance company offers RILA contracts with buffers but not floors (which will be likely in New York if a floor cannot be set below 15%), providing a disclosure document with detailed discussion of how a floor works is likely to confuse the consumer. Similarly, if the RILA contract does not offer step-credits, that discussion could be confusing rather than illuminating. Accordingly, we urge the Department to allow the disclosure statement to be treated in a modular fashion, allowing an insurer to include only those disclosures relevant to the product being sold.

Second, there are certain inaccuracies in the draft disclosure statement that warrant revision. In the chart set forth in Q&A #1, the first row is labeled "Direct Investment in Securities." That label, and the responses for each product, are confusing and inaccurate. A non-guaranteed Index Annuity is a security under the federal securities laws, just as a variable annuity is. Additionally, a variable annuity is not a "direct investment in securities" in the sense intended by the Department, because the contract owner invests in a separate account, and it is the separate account that makes a direct investment in the underlying mutual fund shares. We believe that the Department's intention is to illuminate the degree to which performance under the contract directly tracks the performance of an underlying investment and we recommend the revised language in the attached mark-up, which addresses this more clearly.

Additionally, Q&A #2 is confusing and inaccurate. As frequently stated in securities disclosure, "you cannot invest directly in a market index." See https://www.investor.gov/introduction-investing/investing-basics/investment-products/mutual-funds-and-exchange-traded-4. The disclosure should distinguish between an index and an index fund, and should also be clear that it is the companies included in an index that pay dividends, not the index itself.

We are also concerned that Q&A #8 is inaccurate. Although we commend the Department for noting that the examples are "without fees," RILAs are generally spread products, without fees, while variable annuities can have significant separate account and underlying fund fees and expenses. By assuming no fees, the disclosure materially overstates variable annuity performance and therefore the difference between that performance and RILA performance.

The attached mark-up of the proposed disclosure statement also includes other suggestions to clarify and improve the disclosure.

**Conclusion**

The Committee of Annuity Insurers appreciates this opportunity to comment on the Proposed Amendment. The CAI and its members stand ready to provide the Department with any information that may further its consideration of the concerns we have expressed. We are prepared to meet with you and your colleagues for further discussion of these matters at your convenience, and we would welcome a constructive dialog.

Sincerely,

**FOR THE COMMITTEE OF ANNUITY INSURERS**

Eversheds Sutherland (US) LLP

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The Committee of Annuity Insurers was formed in 1981 to participate in the development of federal policies with respect to annuities. The member companies of the Committee represent approximately 80% of the annuity business in the United States.

Committee of Annuity Insurers Comments

**A new Appendix 28 is added to Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York to read as follows:**

NON-GUARANTEED INDEX ANNUITIES (AKA STRUCTURED ANNUITIES, REGISTERED INDEX-LINKED ANNUITIES, BUFFER ANNUITIES, SHIELD ANNUITIES, AND FLOOR ANNUITIES)

The following questions aim to help you understand how non-guaranteed index annuities work. They also highlight some of the risks with this type of annuity. You can use these questions when you talk with an insurance producer about whether this type of annuity is right for you. This is general information. Since there may be variations in how insurance companies design their annuities, you should ask the insurance producer to explain the details of the annuities you are considering buying and how the questions below relate to those annuities.

You should know that if you invest in a non-guaranteed index annuity:

- While it offers the potential for gain, ~~You~~ you could lose money.
- In exchange for some loss protection, you may sacrifice potential gain.
- In some instances, the potential loss may be much greater than the potential gain.
- There may be limits on future gains that could delay or prevent you from earning back prior losses.

1. **How does a non-guaranteed index annuity differ from a fixed annuity or a variable annuity?**
   - The chart below shows some differences. Sometimes an annuity may offer a combination of fixed, fixed index, non-guaranteed index, or variable investment options within the same contract.

| | Fixed Annuity | Fixed Index Annuity | Non-guaranteed Index Annuity | Variable Annuity |
|---|---|---|---|---|
| Gain or Loss Based Directly on Value of ~~Investment in~~ Securities | No (Fixed interest rate) | No (Positive market index performance only, subject to upside limitations) | No (Market index performance, subject to partial downside protections and upside limitations) | Yes (Performance of underlying mutual funds) |
| Potential for Gain~~/~~ or Loss | ~~Positive~~Gain only | ~~Positive~~Gain only | ~~Positive or Negative~~Gain or loss | ~~Positive or Negative~~Gain or loss |
| Potential Loss of Principal | No | No | Yes | Yes |

**Commented [CAI1]:** We believe that this is confusing. A non-guaranteed index annuity is a security under Federal law, and this implies otherwise. We think that what is intended is to be clear that while the performance of a variable annuity is determined by the performance of a specific security (i.e., the underlying mutual fund), the performance of a non-guaranteed index annuity is not based directly on the performance of a security or the index.

| | | | | |
|---|---|---|---|---|
| Limit on Gains | Yes<br>Interest you earn is declared by the insurance company each year. | Yes<br>Interest you earn may be limited by a cap. | Yes<br>Interest you earn may be limited by a cap. | No |
| Protection against Loss | Yes | Yes | Partial Protection (Buffer or Floor) | No |

2. **Do I benefit from the dividends paid by companies included in ~~on~~ the index with a non-guaranteed index annuity?**
   - No, since ~~you are not invested in the~~most non-guaranteed index annuities are linked to versions of an index that do not include the dividends paid by the companies in the index in calculating their value, the index performance used to calculate your returns will not include~~you will not receive~~ any dividends that you would receive if you ~~credited by the index to investors who~~ invested directly in the companies in the index (or through an index fund offered in a variable annuity~~, for example~~). ~~Non-guaranteed index annuities often use a version of the index that does not include these dividends. So,~~ Therefore, the amount the insurance company credits to your account may be based on lower ~~gains~~ index value than if you invested in an index fund~~occurred in the version of the index that includes dividends~~. For example, over the ten-year period ending December 31, 2020, the returns onthe S&P 500 Index without dividends were lower by an average of 2% each year compared to the same index ~~with~~ that included dividend payments. The returns on indexes other than the S&P 500 are also lower without dividends.

3. **Can I lose money with a non-guaranteed index annuity?**
   - Yes, the return may be positive, negative or zero. As a result, investment in this product may result in a loss of principal. In some instances, the potential loss may be significantly greater than the potential gain. See Question 8 below for examples. Fees in the contract can further reduce what you earn.
   - The non-guaranteed index annuity generally offers greater potential for gain but less loss protection than a fixed annuity or fixed index annuity. Fixed annuities and fixed index annuities guarantee a minimum interest rate. They also have a guarantee of principal, although they may be subject to surrender charges and limited market value adjustments if you surrender your contract. If you are concerned about losing principal and are willing to sacrifice some potential for gain, ask the insurance producer about the fixed and fixed index annuities the producer offers.

4. **How does a "buffer" work?**
   - With a buffer, the insurance company will not reduce your account value if the loss in the index is within a stated percentage. However, the insurance company will reduce your account value for additional loss in the index beyond that ~~initial~~ stated percentage.
   - For example, if the annuity has a buffer against loss of 10%, that means the insurance company will not reduce your account value if the loss in the index value is between 0%

**Commented [CAI2]:** This Q&A creates the impression that an investor can invest in an index, and that indexes pay dividends. Securities disclosure frequently notes that you cannot invest in an index, although you can invest in a fund based on the index. We believe that these suggestions make the intended disclosure more clear and understandable.

and 10% over the period specified in your contract (the index period). However, if the index loses more than 10% of its value, the insurance company will reduce your account value. If the index loses 30% of its value, for example, the insurance company will reduce your account value by 20%. Put another way, with a 10% buffer, the most you could lose for the index period is 90% if the index loses 100% of its value over the index period.

- You may give up potential gain in order to have this loss protection. See Questions 7 and 8 below.

5. **How does a "floor" work?**
   - With a floor, the insurance company will reduce your account value for any loss in the index up to a stated percentage. The insurance company will not further reduce your account value for additional loss in the index beyond that ~~initial~~ stated percentage.
   - For example, if the annuity has a floor against loss of 20%, that means the insurance company will reduce your account for loss in the index value between 0% and 20% over the index period. Loss beyond 20% will not be subtracted from your account value. Put another way, with a 20% floor, the most you could lose for the index period is 20%.
   - You may give up potential gain in order to have this loss protection. See Questions 7 and 8 below.

6. **What is a "step credit"?**
   - For annuities that don't use a step credit, the amount the insurance company adds to your account depends on ~~how much~~the gain the value of the index ~~returns~~during the index period. The greater the gain, the greater the percentage credited to your account, up to any stated cap. However, a step credit works differently. With a step credit, the insurance company will credit your account the same preset percentage regardless of how much the index gains.
   - For example, if the step rate is 6%, then the insurance company will credit you 6% if there is any gain in the index value during the index period. If the index returns 1%, you still get 6%. However, if the index returns 15%, you also still get 6%.
   - Some insurance companies will also credit the step credit if the index return is zero.
   - If the index loses value, your account value will be reduced, subject to any buffer or floor you have on your annuity.

7. **Are there limits on my potential gain with a non-guaranteed index annuity?**
   - Yes, insurance companies often limit the amount of money you can earn with a non-guaranteed index annuity.
   - A "cap" is a common type of limitation. Caps limit the amount of gain that is credited to your account. For example, if the insurance company sets a cap of 10%, then 10% is the most the insurance company will credit to your account for the index period, regardless of how well the index performs. A step credit may also limit your potential gain.
   - At the same time, the amount of loss protection from a buffer or floor is also limited. The cap levels will often differ based upon the level of buffer or floor protection.
   - In some instances, the potential loss may be much greater than the potential gain. For example, if there is a cap on gain of 10% and a buffer against loss of 10%, that means that the most you could earn is 10% and the most you could lose is 90%, if the index loses 100% of its value over the index period.

**Commented [CAI3]:** The term "index period" is used throughout without any explanation of what that is, so we suggest this revision to clarify.

- Example 1: Consider an annuity with a 10% cap and a 10% buffer.

| Change in Index Value ~~Movement~~ During the Index Period | Impact on your Account Value |
|---|---|
| Index Gains 40% | 10% Gain |
| Index Loses 40% | 30% Loss |

- Example 2: Consider an annuity with a 10% cap and a 15% floor.

| Change in Index Value ~~Movement~~ during the Index Period | Impact on your Account Value |
|---|---|
| Index Gains 40% | 10% Gain |
| Index Loses 40% | 15% Loss |

8. **Could the limits on potential future gains delay or prevent me from recouping prior losses?**
   - Yes, in some instances the potential loss may be much greater than the potential gain during any specified period. This can make it difficult to earn back early losses with later gains.

For example, consider the table below that shows a series of losses and gains, without fees, over a four-year period with an initial $100,000 contribution to the annuity. A variable annuity charge explicit fees, while most non-guaranteed index annuities do not include explicit fees.

Commented [CAI4]: This would be more accurate if some estimate of variable annuity separate account fees and underlying fund fees and expenses were included. As it is, the chart overstates VA performance. At the very least, we recommend adding the sentence that follows.

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| **Year** | **Index ~~Movement~~ Performance** | **Variable Annuity invested in index fund** | **Buffer Annuity 7% Cap 10% Buffer** | **Floor Annuity 7% Cap 15% Floor** | **Floor Annuity 7% Cap 25% Floor** |
|---|---|---|---|---|---|
| 1 | 20% Loss | $80,000 | $90,000 | $85,000 | $80,000 |
| 2 | 25% Gain | $100,000 | $96,300 | $90,950 | $85,600 |
| 3 | 20% Loss | $80,000 | $86,670 | $77,308 | $68,480 |
| 4 | 25% Gain | $100,000 | $92,737 | $82,719 | $73,274 |
| Overall | | 0% Break Even | $7,263 Loss | $17,281 Loss | $26,726 Loss |

- If you want to have exposure to ~~invest directly~~ in the stock market or other investments included in an index and are willing to go without the limited loss protection in order to have greater potential gain, ask the insurance producer about the variable annuities the producer offers.

9. **Will the same caps and index options always be available after the initial index period?**
   - Not always. The insurance company can change the caps when it renews the index options

at the end of each index period. Caps could be higher or lower.

- The insurance company may temporarily suspend renewal index options (both the indexes offered and the length of the options). This can happen if market conditions make it difficult for the company to offer the options. Surrender charges may apply if you surrender the contract.

10. **What if I want to take money out before the end of the index period?**
    - You may not be able to move your money out of an index option to another investment within the annuity before the end of the index period.
    - You can take all or some of your money out of the annuity contract, but you may receive less than your initial investment in the index option. This may be true even if the index movement has been positive since your start date. The amount you receive may be less than the amount you would receive if you had waited until the end of the index period. Surrender charges and other adjustments to your account value may also apply.

EVERSHEDS SUTHERLAND

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May 13, 2022

VIA ELECTRONIC MAIL
peter.dumar@dfs.ny.gov

Mr. Peter Dumar
Chief Attorney, Life Bureau
New York State Department of Financial Services
One Commerce Plaza
Albany, NY 12257

Re: Proposed Amendment of 11 NYCRR Part 50 (Insurance Regulation 47)

Dear Mr. Dumar:

On behalf of the Committee of Annuity Insurers (the "CAI" or "Committee"), we are submitting this letter in response to the proposal by the New York State Department of Financial Services (the "DFS" or "Department") to amend 11 NYCRR Part 50 (Insurance Regulation 47) (the "Proposed Amendment").

**Introduction and Overview**

The CAI's members include virtually all of the leading issuers of variable annuities in New York and across the United States. Additionally, all of the life insurers that currently issue registered index-linked annuities ("RILAs") in the US are CAI members.[1] Therefore, the Committee has a strong interest in commenting on the Proposed Amendment, and hopes that the Department will seriously consider the Committee's comments as set forth below.

The Proposed Amendment includes several new or modified provisions applicable to variable annuities. As the Department is aware, variable annuities have been a widely accepted retirement savings product for over 50 years. Indeed, over the past decade there has been a growing recognition by federal and state regulators across the country that, due to the precipitous decline of defined benefit retirement plans, efforts should be made to make the lifetime income guarantees that only life insurers can provide more widely available to retirement savers. The CAI is concerned that certain of the provisions in the Proposed Amendment would deprive New York residents of the guaranteed lifetime withdrawal benefits that have become a hallmark of variable annuities. Moreover, because

[1] The Committee of Annuity Insurers is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's current 30 member companies represent approximately 80% of the annuity business in the United States. The Committee was formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of insurance, securities, banking, and tax policies regarding annuities. For over three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities at both the federal and state levels, working with and advocating before the SEC, FINRA, IRS, Treasury Department, and Department of Labor, as well as the NAIC and relevant Congressional committees. A list of the Committee's member companies is available on the Committee's website at www.annuity-insurers.org/about-the-committee/.

variable annuities compete with mutual funds and other commingled fund investments, it is important that insurers have the ability to offer a wide array of investment options in their variable annuities. The Committee hopes that the Department will reconsider certain of the product design provisions applicable to variable annuities as discussed in more detail below.

The CAI commends the Department for its significant efforts to modernize Regulation 47 to make RILAs more widely available to New York consumers. However, the Committee believes that certain of the prescriptive provisions in the Proposed Amendment will unnecessarily restrict issuers from issuing RILAs that would provide New York residents with attractive investment options and will impede RILA product innovation to the detriment of New York residents. In this regard, the Committee would note that New York residents currently have access to a wide variety of structured notes offered by banks. RILAs bear some strong similarities to structured notes, the terms of which also link performance to market indexes or benchmarks and provide various forms of downside protections and upside limits. The CAI respectively submits that some of the restrictions on RILA design in the Proposed Amendment would unduly limit the RILA market in New York. In doing so, New York residents would be deprived of the choices that residents in other states have, and RILA designs would be restricted in ways not applicable to other similar investment products, such as structured notes, that do not offer the benefits uniquely available in life insurance products. The Committee therefore hopes that the Department will reassess the provisions noted below.

**Provisions Applicable to Variable Annuities**

***Withdrawal Rates for Guaranteed Lifetime Withdrawal Benefits (GLWBs)***

The Proposed Amendment includes several new variable annuity provisions that have raised concerns among Committee members. . The most critical of those is the impact the Proposed Amendment would have on variable annuity products offering guaranteed lifetime withdrawal benefits ("GLWB") because most or all existing designs in the market do not meet these new requirements. We urge the Department to remove these provisions from the Proposed Amendment to allow for further discussion toward an approach that addresses the Department's concerns without causing significant disruption in the market and the potential for New Yorkers to lose access to these meaningful and valued benefits.

Under the Proposed Amendment, life insurers will be required to provide a withdrawal rate increase for each five-year age band, without regard to length of deferral and any potential market and/or guaranteed growth in the benefit base to which the withdrawal rate would be applied to calculate the maximum allowable withdrawal amount. Retirees that defer for a longer amount of time before commencing withdrawals have the potential for a significantly higher annual withdrawal amount for the same withdrawal rate. Additionally, the Committee is concerned that the proposed language does not make a distinction between withdrawal rates on single vs. joint life contracts.

Further, section 50-2.9(h)(3), which prohibits a reduction in withdrawal rates due to reduction or depletion of the contract's accumulated value, fails to recognize the consumer value of variable annuities with guaranteed living benefit riders. Some allow consumers to take more of their money in earlier years when retirement spending needs for active and healthy retirees may be higher than in later years. Riders that decrease the withdrawal rates after depletion of the accumulated value offer higher withdrawal rates than non-decreasing riders before accumulated value depletion. The benefit to the consumer with the higher initial withdrawal rates is an expected lower payout for a longer period from the insurance company, as compared to the non-decreasing riders where the payout is expected to occur for a shorter amount of time, as it will take longer to reach accumulated value depletion. No two retirement programs are the same. Some retirees will spend more money earlier in retirement rather than later, and the decreasing riders provide these retirees with a higher withdrawal rate earlier in retirement. Some retirees will not need as much income after accumulated value depletion if they have other sources of income such as Social Security or other investments that will supplement the guaranteed lifetime withdrawal. Decreasing and non-decreasing GMWB riders ultimately provide similar value to consumers, but the ability to offer both allows retirees to choose how they want to receive their benefit based on their expected spending pattern in retirement.

The CAI respectfully submits that the issues that DFS seeks to address in Section 50.2-9(h) are complex and have not received adequate vetting and consideration of the unintended consequences the provision would have. Additionally, promulgation of this provision would force all existing GMWB products from the market while the industry seeks approval of alternative designs. The industry and the Department should engage in more in-depth conversations prior to rulemaking on this issue. However, we believe that it is critical that the Department's rulemaking on RILAs move forward expeditiously to end the moratorium on approval of such products and make them available to New York consumers. We therefore respectfully request that the DFS remove this section from the proposed rulemaking and engage in a separate rulemaking so as to not slow the implementation of the RILA rulemaking.

***Prohibition of Variable Annuity Underlying Funds with Buffer and Floor Strategies***

Relatively late in the process of developing the Proposed Amendment, the Department added Section 50.2-9(i), which provides: "No separate account contract shall include investment funds that purport to provide benefits, features, or investment strategies that are, in the opinion of the superintendent, similar to non-guaranteed index benefits with buffer and floor features as discussed in this section." This provision does not regulate RILAs, but rather regulates the funds that can be offered in a variable annuity through a separate account.

CAI members are not aware of any other circumstances where the Department has prohibited the inclusion of a class of funds in a variable annuity product. Indeed, in CAI members' experience, although the investment objectives of funds are reviewed as part of any Separate Account Plan of Operations filing, they are not aware of the Department rejecting a particular fund. Section 4240 of the New York Insurance Law provides only that a life insurer shall invest for a separate account in "good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." (*See* NYIL Section 4240(a)(2)(C). *See also* DFS Guidelines for the Preparation of Plans of Operations for Separate Accounts (April 2014), ¶¶ 2 and 4).) Committee members do not see how a fund with a strategy designed to limit losses would fail to meet this prudent person standard.

Retail mutual funds with investment objectives that seek to provide partial protection from loss through buffer or floor strategies in exchange for some upside limitation, known as defined outcome funds, are already widely available to investors nationwide, including in New York. Additionally, several life insurance companies already offer variable annuities in other states that include defined outcome funds as investment options. We urge the Department to not deny New Yorkers the opportunity to invest in such vehicle within a variable annuity contract.

While the Committee understands why the Department denied approval of these funds while it developed standards to facilitate the issuance of RILAs in New York, we do not understand why the Department is preventing these funds from being offered in variable annuity contracts now that the standards have been developed and are being implemented. We do not believe that this provision advances the Department's regulatory objectives concerning RILAs, which motivated the development of the Proposed Amendment. Unlike a RILA contract where crediting terms are contractual obligations of the life insurance company, the investment risk of an underlying fund with buffer or floor features is borne by the contract owner. Offering such funds within a variable annuity has no relevance to a life insurance company's actuarial or financial health, and consumers are well informed of the features and risks of such funds through prospectus disclosure. The CAI urges the Department to remove this provision from the Proposed Amendment.

We should also note that this prohibition would have anti-competitive effects. As the Department is aware, RILAs are securities that must be registered with the SEC. Unlike for variable annuities where the SEC has had a dedicated registration form for over 35 years, the SEC does not have a registration form or disclosure framework tailored to RILAs. This has meant that life insurers wishing to issue RILAs essentially must incur the costs and establish disclosure and accounting protocols very similar to those required for an initial public offering of debt or equity securities. Not all life insurers are able or

willing to incur those costs or undertake that effort in order to offer a RILA. Even for those life insurers that do offer RILAs, there are selling firms and distribution channels that may be limited to selling variable annuities. Moreover, it seems illogical that variable annuity issuers would be prohibited from offering, and variable annuity investors would be deprived of the opportunity to invest in, investment options such as defined outcome funds with investment objectives designed to provide various forms of downside protection along with potential upside limitations. This is especially so since such funds are widely available to New York residents and retail investors across the country as SEC-registered investment companies.

***Limitation on Variable Annuity Surrender Charges and Surrender Charge Period***

Regulation 47 currently provides that a variable annuity surrender charge "may not exceed a reasonable charge for unamortized acquisition expenses," but does not state a numerical limit on the percentage charge or duration of the surrender charge period. The Proposed Amendment would limit surrender charges to no greater than 8%, declining in accordance with a prescribed schedule over an eight-year period. As the Department is aware, there are approved products in New York that exceed both this surrender charge percentage and surrender period. The Committee agrees with the comments made by the Life Insurance Council of New York ("LICONY") on this issue, conceding to a limitation on surrender charges of no greater than 8%, but urging the Department to allow issuers to extend the surrender period to as long as nine years and allowing flexibility in the annual reduction in the charge to ensure that issuers can recover their acquisition expenses.

**Provisions Applicable to RILAs**

As the Department is aware, RILAs represent a growing portion of the annuity market as consumers seek to grow and preserve assets for retirement and other long-term savings objectives. As noted above, the Committee is very appreciative of the Department's efforts to make RILAs available to New York residents. Several Committee members have already submitted RILA policy forms for review and approval since the Proposed Amendment was published in the New York State Register.

While CAI members look forward to offering their RILA products in New York, there are several aspects of the Proposed Amendment that raise concerns as discussed in more detail below. In addition, based on the extensive experience that Committee members issuing RILAs outside New York have had with the SEC and FINRA filing process for RILA prospectuses and marketing materials, and therefore the prospectus and other disclosures developed for RILAs that have been subject to SEC and FINRA review and comment, the Committee is offering suggestions for improving and clarifying the RILA disclosure document that the Department has proposed.

***Limitations on RILA Design***

The CAI appreciates that the Department has sought and accepted input from several of its members and LICONY as it developed the Proposed Amendment. During the course of that process, industry participants have raised several significant concerns with limitations on the design of RILA products included in the Proposed Amendment, including:

- The limitation on the indexes to which a strategy may be linked to "independent, external, publicly available" indexes and the prohibition on the use of a proprietary index or an ETF. (Section 50-2.9(f).)
- The limitation on buffer designs to between 10% and 30% and limitation on floor designs to 15% to 25%. (Section 50-2.9(d)(2)(ii).) In particular, floors of 10% are common in existing RILA products offered in other states. Not permitting 10% floors will effectively preclude floor designs in New York, and thereby deprive consumers who want the protection from market volatility and possible severe market downturns that buffer designs do not provide.

- The prescription of minimum caps and step credits based on level of buffer or floor protection. (Section 50-2.9(d)(5) and (d)(7).) In particular, the Committee is concerned that the provision requiring netting of any rider or other fees from the prescribed cap rates will inhibit the offering of RILAs with attractive guaranteed living benefit or death benefit options that would be available for an additional fee.
- The establishment of a minimum participation rate of 100%. (Section 50-2.9(d)(6).) This may preclude companies from offering designs that include more than one index parameter in the determination of their values, and generally from offering alternatives to cap designs.
- The provision permitting only "temporary" suspension of renewal index options, under only limited circumstances (Section 50-2.9(d)(8)). As is the case with variable annuity contracts, issuers need flexibility to manage the availability of investment options in these long-tail products over many years and evolving circumstances. The Committee is concerned that both the "temporary" qualifier and the enumerated limited circumstances impose restrictions that do not anticipate a variety of real world situations that can meaningfully impact the availability and continued viability of index options.

The CAI shares the concerns already raised by LICONY and several of its members that these provisions are overly prescriptive, and that a more principles-based approach would allow the Department to regulate the marketing of RILAs in New York without impeding product innovation. Not only do these detailed prescriptions not reflect the breadth of RILAs currently offered in other states, they also will impede innovative product design in the future. We join with LICONY in their objections to these prescriptive requirements.

***RILA Interim Value Calculations***

The Proposed Amendment Provides that the interim value of an investment in an index linked strategy "on any date other than the maturity date of the index crediting period shall at least equal either: (i) the current fair market value of the maturity date guarantees of the segment; or (ii) any other method of calculation that, in the opinion of the superintendent, provides reasonable equity to terminating and continuing contract holders and to the insurer." (Section 50-2.9(d)(3).)

In earlier drafts of the Proposed Amendment, the Department included language that explicitly allowed for a pro-rata method to be used to determine RILA interim values. The Proposed Amendment replaced that safe harbor with the language that gives the Superintendent broad discretion regarding when and whether to permit pro-rata interim value methods.

In the interest of regulatory flexibility that will allow for future product innovation, the CAI commends the Department on the inclusion of the language that grants the Superintendent discretion to allow other methods of interim value calculation. However, the CAI believes that such discretion should not be in lieu of, but should be in addition to, a safe harbor for the use of pro-rata interim value calculations. The Committee therefore requests that the Proposed Amendment be modified to provide for such a safe harbor.

The pro-rata interim value methodology is a popular approach that is simple, easily understood by consumers, and highly transparent. Moreover, a safe harbor for the pro rata calculation is appropriate because it meets the requirements that the Department is establishing for interim value calculations. This standard, embodied in the language guiding the Superintendent's exercise of discretionary authority under the Proposed Amendment, requires "reasonable equity to terminating and continuing contract holders and to the insurer." A pro-rata interim value meets this standard because it provides reasonable equity to terminating contract holders, has absolutely no impact on continuing contract holders, and provides reasonable equity to the insurer, all without the potential for significant losses or windfalls. Accordingly, we urge that the Proposed Amendment provide safe harbors for both the fair market value approach and the pro-rata approach, in addition to granting the Superintendent broad discretion to approve other methodologies.

***Required Disclosure Statement***

The Proposed Amendment would require that a prescribed disclosure statement, set forth in Appendix 28, be delivered to a prospective purchaser of a RILA no later than at the time of application. (Section 50-2.9(e).) The CAI is concerned that certain elements of the proposed disclosure statement may be confusing or misleading to prospective purchasers. Additionally, there are statements in the draft disclosure document that are inaccurate and should be corrected. The mark-up of the proposed disclosure statement that is attached to this letter is intended to supplement the discussion that follows to assist the Department in resolving these issues.

First, the CAI believes that consumers would best be served with a disclosure document that addresses only those features offered in the RILA contract that they are considering for purchase. For example, if an insurance company offers RILA contracts with buffers but not floors (which will be likely in New York if a floor cannot be set below 15%), providing a disclosure document with detailed discussion of how a floor works is likely to confuse the consumer. Similarly, if the RILA contract does not offer step-credits, that discussion could be confusing rather than illuminating. Accordingly, we urge the Department to allow the disclosure statement to be treated in a modular fashion, allowing an insurer to include only those disclosures relevant to the product being sold.

Second, there are certain inaccuracies in the draft disclosure statement that warrant revision. In the chart set forth in Q&A #1, the first row is labeled "Direct Investment in Securities." That label, and the responses for each product, are confusing and inaccurate. A non-guaranteed Index Annuity is a security under the federal securities laws, just as a variable annuity is. Additionally, a variable annuity is not a "direct investment in securities" in the sense intended by the Department, because the contract owner invests in a separate account, and it is the separate account that makes a direct investment in the underlying mutual fund shares. We believe that the Department's intention is to illuminate the degree to which performance under the contract directly tracks the performance of an underlying investment and we recommend the revised language in the attached mark-up, which addresses this more clearly.

Additionally, Q&A #2 is confusing and inaccurate. As frequently stated in securities disclosure, "you cannot invest directly in a market index." See https://www.investor.gov/introduction-investing/investing-basics/investment-products/mutual-funds-and-exchange-traded-4. The disclosure should distinguish between an index and an index fund, and should also be clear that it is the companies included in an index that pay dividends, not the index itself.

We are also concerned that Q&A #8 is inaccurate. Although we commend the Department for noting that the examples are "without fees," RILAs are generally spread products, without fees, while variable annuities can have significant separate account and underlying fund fees and expenses. By assuming no fees, the disclosure materially overstates variable annuity performance and therefore the difference between that performance and RILA performance.

The attached mark-up of the proposed disclosure statement also includes other suggestions to clarify and improve the disclosure.

**Conclusion**

The Committee of Annuity Insurers appreciates this opportunity to comment on the Proposed Amendment. The CAI and its members stand ready to provide the Department with any information that may further its consideration of the concerns we have expressed. We are prepared to meet with you and your colleagues for further discussion of these matters at your convenience, and we would welcome a constructive dialog.

Sincerely,

**FOR THE COMMITTEE OF ANNUITY INSURERS**

Eversheds Sutherland (US) LLP

By:



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The Committee of Annuity Insurers was formed in 1981 to participate in the development of federal policies with respect to annuities. The member companies of the Committee represent approximately 80% of the annuity business in the United States.

Committee of Annuity Insurers Comments

**A new Appendix 28 is added to Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York to read as follows:**

NON-GUARANTEED INDEX ANNUITIES (AKA STRUCTURED ANNUITIES, REGISTERED INDEX-LINKED ANNUITIES, BUFFER ANNUITIES, SHIELD ANNUITIES, AND FLOOR ANNUITIES)

The following questions aim to help you understand how non-guaranteed index annuities work. They also highlight some of the risks with this type of annuity. You can use these questions when you talk with an insurance producer about whether this type of annuity is right for you. This is general information. Since there may be variations in how insurance companies design their annuities, you should ask the insurance producer to explain the details of the annuities you are considering buying and how the questions below relate to those annuities.

You should know that if you invest in a non-guaranteed index annuity:

- While it offers the potential for gain, ~~You~~ you could lose money.
- In exchange for some loss protection, you may sacrifice potential gain.
- In some instances, the potential loss may be much greater than the potential gain.
- There may be limits on future gains that could delay or prevent you from earning back prior losses.

1. **How does a non-guaranteed index annuity differ from a fixed annuity or a variable annuity?**
   - The chart below shows some differences. Sometimes an annuity may offer a combination of fixed, fixed index, non-guaranteed index, or variable investment options within the same contract.

| | Fixed Annuity | Fixed Index Annuity | Non-guaranteed Index Annuity | Variable Annuity |
|---|---|---|---|---|
| Gain or Loss Based Directly on Value of ~~Investment in~~ Securities | No (Fixed interest rate) | No (Positive market index performance only, subject to upside limitations) | No (Market index performance, subject to partial downside protections and upside limitations) | Yes (Performance of underlying mutual funds) |
| Potential for Gain~~/~~ or Loss | ~~Positive~~Gain only | ~~Positive~~Gain only | ~~Positive or Negative~~Gain or loss | ~~Positive or Negative~~Gain or loss |
| Potential Loss of Principal | No | No | Yes | Yes |

**Commented [CAI1]:** We believe that this is confusing. A non-guaranteed index annuity is a security under Federal law, and this implies otherwise. We think that what is intended is to be clear that while the performance of a variable annuity is determined by the performance of a specific security (i.e., the underlying mutual fund), the performance of a non-guaranteed index annuity is not based directly on the performance of a security or the index.

| | | | | |
|---|---|---|---|---|
| Limit on Gains | Yes<br>Interest you earn is declared by the insurance company each year. | Yes<br>Interest you earn may be limited by a cap. | Yes<br>Interest you earn may be limited by a cap. | No |
| Protection against Loss | Yes | Yes | Partial Protection (Buffer or Floor) | No |

2. **Do I benefit from the dividends paid by companies included in ~~on~~ the index with a non-guaranteed index annuity?**
   - No, since ~~you are not invested in the~~most non-guaranteed index annuities are linked to versions of an index that do not include the dividends paid by the companies in the index in calculating their value, the index performance used to calculate your returns will not include~~you will not receive~~ any dividends that you would receive if you ~~credited by the index to investors who~~ invested directly in the companies in the index (or through an index fund offered in a variable annuity~~, for example~~). ~~Non-guaranteed index annuities often use a version of the index that does not include these dividends. So,~~ Therefore, the amount the insurance company credits to your account may be based on lower ~~gains~~ index value than if you invested in an index fund~~occurred in the version of the index that includes dividends~~. For example, over the ten-year period ending December 31, 2020, the returns onthe S&P 500 Index without dividends were lower by an average of 2% each year compared to the same index ~~with~~ that included dividend payments. The returns on indexes other than the S&P 500 are also lower without dividends.

3. **Can I lose money with a non-guaranteed index annuity?**
   - Yes, the return may be positive, negative or zero. As a result, investment in this product may result in a loss of principal. In some instances, the potential loss may be significantly greater than the potential gain. See Question 8 below for examples. Fees in the contract can further reduce what you earn.
   - The non-guaranteed index annuity generally offers greater potential for gain but less loss protection than a fixed annuity or fixed index annuity. Fixed annuities and fixed index annuities guarantee a minimum interest rate. They also have a guarantee of principal, although they may be subject to surrender charges and limited market value adjustments if you surrender your contract. If you are concerned about losing principal and are willing to sacrifice some potential for gain, ask the insurance producer about the fixed and fixed index annuities the producer offers.

4. **How does a "buffer" work?**
   - With a buffer, the insurance company will not reduce your account value if the loss in the index is within a stated percentage. However, the insurance company will reduce your account value for additional loss in the index beyond that ~~initial~~ stated percentage.
   - For example, if the annuity has a buffer against loss of 10%, that means the insurance company will not reduce your account value if the loss in the index value is between 0%

**Commented [CAI2]:** This Q&A creates the impression that an investor can invest in an index, and that indexes pay dividends. Securities disclosure frequently notes that you cannot invest in an index, although you can invest in a fund based on the index. We believe that these suggestions make the intended disclosure more clear and understandable.

and 10% over the period specified in your contract (the index period). However, if the index loses more than 10% of its value, the insurance company will reduce your account value. If the index loses 30% of its value, for example, the insurance company will reduce your account value by 20%. Put another way, with a 10% buffer, the most you could lose for the index period is 90% if the index loses 100% of its value over the index period.

- You may give up potential gain in order to have this loss protection. See Questions 7 and 8 below.

5. **How does a "floor" work?**
   - With a floor, the insurance company will reduce your account value for any loss in the index up to a stated percentage. The insurance company will not further reduce your account value for additional loss in the index beyond that ~~initial~~ stated percentage.
   - For example, if the annuity has a floor against loss of 20%, that means the insurance company will reduce your account for loss in the index value between 0% and 20% over the index period. Loss beyond 20% will not be subtracted from your account value. Put another way, with a 20% floor, the most you could lose for the index period is 20%.
   - You may give up potential gain in order to have this loss protection. See Questions 7 and 8 below.

6. **What is a "step credit"?**
   - For annuities that don't use a step credit, the amount the insurance company adds to your account depends on ~~how much~~the gain the value of the index ~~returns~~during the index period. The greater the gain, the greater the percentage credited to your account, up to any stated cap. However, a step credit works differently. With a step credit, the insurance company will credit your account the same preset percentage regardless of how much the index gains.
   - For example, if the step rate is 6%, then the insurance company will credit you 6% if there is any gain in the index value during the index period. If the index returns 1%, you still get 6%. However, if the index returns 15%, you also still get 6%.
   - Some insurance companies will also credit the step credit if the index return is zero.
   - If the index loses value, your account value will be reduced, subject to any buffer or floor you have on your annuity.

7. **Are there limits on my potential gain with a non-guaranteed index annuity?**
   - Yes, insurance companies often limit the amount of money you can earn with a non-guaranteed index annuity.
   - A "cap" is a common type of limitation. Caps limit the amount of gain that is credited to your account. For example, if the insurance company sets a cap of 10%, then 10% is the most the insurance company will credit to your account for the index period, regardless of how well the index performs. A step credit may also limit your potential gain.
   - At the same time, the amount of loss protection from a buffer or floor is also limited. The cap levels will often differ based upon the level of buffer or floor protection.
   - In some instances, the potential loss may be much greater than the potential gain. For example, if there is a cap on gain of 10% and a buffer against loss of 10%, that means that the most you could earn is 10% and the most you could lose is 90%, if the index loses 100% of its value over the index period.

**Commented [CAI3]:** The term "index period" is used throughout without any explanation of what that is, so we suggest this revision to clarify.

- Example 1: Consider an annuity with a 10% cap and a 10% buffer.

| Change in Index Value ~~Movement~~ During the Index Period | Impact on your Account Value |
|---|---|
| Index Gains 40% | 10% Gain |
| Index Loses 40% | 30% Loss |

- Example 2: Consider an annuity with a 10% cap and a 15% floor.

| Change in Index Value ~~Movement~~ during the Index Period | Impact on your Account Value |
|---|---|
| Index Gains 40% | 10% Gain |
| Index Loses 40% | 15% Loss |

8. **Could the limits on potential future gains delay or prevent me from recouping prior losses?**
   - Yes, in some instances the potential loss may be much greater than the potential gain during any specified period. This can make it difficult to earn back early losses with later gains.

For example, consider the table below that shows a series of losses and gains, without fees, over a four-year period with an initial $100,000 contribution to the annuity. A variable annuity charge explicit fees, while most non-guaranteed index annuities do not include explicit fees.

Commented [CAI4]: This would be more accurate if some estimate of variable annuity separate account fees and underlying fund fees and expenses were included. As it is, the chart overstates VA performance. At the very least, we recommend adding the sentence that follows.

- 

| **Year** | **Index ~~Movement~~ Performance** | **Variable Annuity invested in index fund** | **Buffer Annuity 7% Cap 10% Buffer** | **Floor Annuity 7% Cap 15% Floor** | **Floor Annuity 7% Cap 25% Floor** |
|---|---|---|---|---|---|
| 1 | 20% Loss | $80,000 | $90,000 | $85,000 | $80,000 |
| 2 | 25% Gain | $100,000 | $96,300 | $90,950 | $85,600 |
| 3 | 20% Loss | $80,000 | $86,670 | $77,308 | $68,480 |
| 4 | 25% Gain | $100,000 | $92,737 | $82,719 | $73,274 |
| Overall | | 0% Break Even | $7,263 Loss | $17,281 Loss | $26,726 Loss |

- If you want to have exposure to ~~invest directly~~ in the stock market or other investments included in an index and are willing to go without the limited loss protection in order to have greater potential gain, ask the insurance producer about the variable annuities the producer offers.

9. **Will the same caps and index options always be available after the initial index period?**
   - Not always. The insurance company can change the caps when it renews the index options

at the end of each index period. Caps could be higher or lower.

- The insurance company may temporarily suspend renewal index options (both the indexes offered and the length of the options). This can happen if market conditions make it difficult for the company to offer the options. Surrender charges may apply if you surrender the contract.

10. **What if I want to take money out before the end of the index period?**
    - You may not be able to move your money out of an index option to another investment within the annuity before the end of the index period.
    - You can take all or some of your money out of the annuity contract, but you may receive less than your initial investment in the index option. This may be true even if the index movement has been positive since your start date. The amount you receive may be less than the amount you would receive if you had waited until the end of the index period. Surrender charges and other adjustments to your account value may also apply.