

Preparing for New York Regulation 210's Effective Date

December 29, 2017

The Preamble to New York's Regulation 210 (the "Regulation") contains a March 19, 2018 effective date. However, the Regulation's scope paragraph supports an interpretation that the Regulation's requirements apply only when an insurer makes a "determination or readjustment of a non-guaranteed element [an "NGE action"] occurring on or after the effective date ... , including any readjustment of non-guaranteed elements occurring on or after the effective date" for any policy issued prior to the effective date. The Regulation defines the term policy as "any individual life insurance policy, individual annuity contract, or applicable group contract." Thus, an insurer may not need to come into compliance with the Regulation's requirements unless and until it takes an NGE action. For example, a central requirement of the Regulation is that an insurer obtain an actuarial memorandum signed and dated by a qualified actuary (i) prior to the issuance of any policy under a new policy form, (ii) prior to the issuance of any policy form for which NGEs have been changed only for new issues, or (iii) prior to any change in an NGE (subject to certain limited exceptions) on an existing policy. Logically, an actuarial memorandum is unnecessary until one of these events occurs. Likewise, certain of the Regulation's requirements are triggered only by an "adverse" change in a policy's current NGE scale (i.e., a change "that increases or may increase a charge or reduces or may reduce a benefit"). Other provisions of the Regulation present a spectrum of possible required compliance deadlines. At one end is Section 48.3(a), which requires insurers to provide a policy owner with the current NGE scale *no later than the policy's date of issue*. Although not tied to an NGE action in the Regulation, the Department has explained in its assessments of public comments that "policyholders and annuitants should know the non-guaranteed elements that are expected to apply to their policies so that actual credits and charges may be tracked over time and can be compared to what was originally expected." Thus, an insurer would be well advised to provide this disclosure for all policies issued on and after March 19, 2018. Other provisions present a closer call, as their requirements appear to be dependent on the existence of an NGE action:

- Section 48.2(a)(1), which requires that an insurer's board of directors (or a committee thereof) adopt written criteria that are the basis for determining NGEs.

- Section 48(a)(2), which requires that insurers assign policies into classes for purposes of determining NGEs.
- Section 48.2(b), which requires that insurers identify the anticipated experience factors underlying a policy's NGE scale as of the date of the NGE action as well as the date of issue (or the last NGE revision, if later) so that any NGE changes are reasonably based on the differences between such factors.

Insurers should remain cognizant that because the Regulation so broadly defines NGEs, an insurer may engage in an NGE action more quickly than it realizes. For example, a variable annuity writer that sets withdrawal benefit percentages or withdrawal rider charges as frequently as monthly will likely have taken an NGE action as soon as the insurer makes its first monthly adjustment. And in any event, the actuarial related work required by Section 48.2 could require substantial lead time before an NGE action may be effected. Insurers subject to Regulation 210 may wish to consider these points (along with the host of other thorny interpretive issues) as they perform their initial Regulation 210 compliance work.

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