Assessment of Public Comments for the Sixteenth Amendment to 11 NYCRR 83 (Insurance Regulation 172) and new 11 NYCRR 77 (Insurance Regulation 220)

The New York State Department of Financial Services ("DFS") received comment letters from a trade association representing the life insurance industry ("life trade"), a trade association representing asset managers ("asset management trade"), and five asset management businesses ("asset managers 1 - 5"). The comment letters from the life trade, the asset manager trade, and asset managers 1, 2, and 3 expressed unqualified support for the amendments to Insurance Regulation 172 and new Insurance Regulation 220 and provided no other comments. The comments from asset managers 4 and 5, relating to new Insurance Regulation 220, are discussed below.

Comment: With respect to proposed Section 77.2(a)(2) of Insurance Regulation 220, the asset managers objected to the regulation's favorable risk-based capital ("RBC") treatment of shares of qualifying exchange traded funds ("ETF"), applying only to ETFs that track a bond index. The asset managers requested that favorable RBC treatment be extended to actively managed fixed-income ETFs.

Response: Limiting the regulation's applicability to index-tracking fixed-income ETFs best ensures that the ETF portfolio's management follows a rules-based approach that approximates a more conservative "buy and hold" type strategy as opposed to active trading. Accordingly, DFS did not make any changes in response to this comment.

Comment: The asset managers requested that the requirement in Section 77.2(a)(2) of Insurance Regulation 220 that ETFs make available a detailed list of their holdings no less frequently than monthly be amended to require that ETFs make a detailed list of their holdings available daily because daily reporting provides greater transparency, which the asset managers claim will allow ETF investors to better predict the ETF's performance and investment risks.

Response: In setting the criteria for ETFs qualifying for favorable RBC treatment under the regulation, DFS concluded that requiring monthly portfolio reporting is sufficient because monthly disclosure is aligned

with the administrative and operational practices of index-tracking fixed-income ETFs, which adjust and true up their portfolios on a monthly basis. Note that the regulation only allows favorable RBC treatment for shares of qualifying ETFs that are registered pursuant to the Investment Company Act of 1940. As such, any ETF that satisfies the criteria set forth in the regulation will be subject to the applicable rules (including regarding disclosure) and oversight of the Securities and Exchange Commission.

In consideration of the above, DFS did not make any changes in response to this comment.

Comment: Asset manager 4 suggested that DFS lower the minimum US $1 billion in assets under management requirement in Section 77.2(a)(3) of Insurance Regulation 220 to US $300 million.

Response: DFS determined that the US $1 billion threshold is generally indicative of a mature and relatively liquid product that helps reduce the concentration risk inherent in smaller ETFs, the stability of which can be adversely affected by the activities of one or more large individual shareowners. Therefore, DFS did not make any changes in response to this comment.

Comment: Asset manager 5 suggested that the requirement in Section 77.2(a)(4) of Insurance Regulation 220 that the ETF be rated by a nationally recognized statistical rating organization ("NRSRO") be waived if at least 80% of the ETF's holdings are "U.S. government debt."

Response: A rating requirement for all ETFs qualifying for favorable RBC treatment under the regulation is warranted for consistency and an NRSRO rating provides a useful third-party review of the risks and quality of an ETF's portfolio, management, and structure. An exception for "U.S. government debt" is too vague because the exception is open to a wide variety of interpretations, *i.e.,* including U.S. government agency or U.S. government-sponsored entity obligations. DFS thus declined to make any changes in response to this comment.

As a final, general response to all comments, DFS will monitor ETF market developments as well as the impact of the regulation and will consider amendments to the regulation if warranted. To that end, the regulation's sunset date of January 1, 2027 ensures that the regulation will be revisited by DFS no later than that date.