Assessment of Public Comments for the Fourth Amendment to 11 NYCRR 50 (Insurance Regulation 47)

The proposed Fourth Amendment to 11 NYCRR 50 ("Amendment") was published in the State Register on March 16, 2022. The Department of Financial Services ("DFS") received comments from insurer trade groups and individual insurers. DFS granted extensions of the 60-day public comment period and met with commenters upon request.

Prior to proposing the Amendment, DFS had extensive discussions with interested parties, including insurer trade groups, individual insurers, and consumer advocates. Since the comments in response to the March 16, 2022 proposal largely repeated suggestions made to DFS during its discussions with interested parties and were carefully considered during the drafting of the Amendment, no substantive changes are being made to the Amendment as a result of these comments. Minor non-substantive changes are being made as discussed below.

In light of the extended comment period and in response to comments, DFS changed the September 1, 2022 and September 1, 2023 compliance dates in sections 50-1.0 and 50-2.2 to January 1, 2023 and January 1, 2024, respectively.

DFS made changes to clarify section 50-2.9(d)(8), which permits insurers to temporarily suspend all index options if certain economic conditions prevent insurers from meeting the minimum cap requirements in the Amendment. These changes were suggested by one commenter who was concerned that the language could be interpreted as preventing insurers from offering renewal index options that differ from the index options offered at issue of the contract, which was not the intention of the provision.

DFS made changes to section 50-2.9(h)(2) to clarify the safe harbor for calculation of the slope of increases for age based guaranteed minimum withdrawal benefits. Calculations that do

not fall within the safe harbor are approved on a case-by-case basis. Some commenters pointed out that the language could be interpreted as not including certain approaches to the calculation. Since it was not DFS's intention to exclude these approaches, DFS edited the provision to avoid doubt.

One commenter provided a redlined markup of the disclosure set forth in Appendix 28 showing a series of non-substantive line edits aimed at improving clarity or adding technical detail to existing language. DFS implemented some of the suggestions where the edits enhanced clarity or readability of existing language. DFS did not implement other suggestions that were technical in nature because DFS felt that the negative impact on readability outweighed the benefit of adding technical detail that did not otherwise change the meaning of the disclosure. In collaboration with consumer advocates, DFS took great care to make the disclosure readable for average consumers. If the suggested edits were adopted in whole it would result in a lower Flesch-Kincaid Reading Ease Score, a widely used readability formula that assesses how easy text is to read. The suggested edits would also result in a higher Flesch Kincaid Grade Level Score, a widely used readability formula that assesses the approximate reading grade level of text. In other words, if the suggested edits were adopted in whole, the disclosure would be more difficult to read and would require a higher level of education to understand. The edits that DFS did make do not alter the purpose, meaning, or effect of the disclosure.

One commenter requested that the reference to "Shield Annuities" be removed from the beginning of the disclosure -- "NON-GUARANTEED INDEX ANNUITIES (AKA STRUCTURED ANNUITIES, REGISTERED INDEX ANNUITIES, NON-GUARANTEED INDEX ANNUITY ANNUITIES, BUFFER ANNUITIES, SHIELD ANNUITIES, AND FLOOR ANNUITIES)". The basis of the commenter's request was that the insurer has trademarked

“Shield Annuities” for its non-guaranteed index annuity. Rather than removing the reference, DFS added a registered trademark symbol. Nominative fair use of a registered trademark is permissible to refer to the trademark owner’s goods and services associated with the mark. Since insurers use different terminology to refer to non-guaranteed index annuity products, the non-commercial use of the mark in the Amendment merely alerts the public to the terminology currently being used in the marketplace to refer to this type of product. Deleting this language could result in an unlevel playing field among insurers and could mislead consumers into believing that the disclosure is not applicable to this insurer’s product.

Commenters suggested various edits related to product design, discussed below, to broaden the scope of permissible designs for non-guaranteed index annuities, a new innovative type of annuity. However, DFS did not make these edits. The Amendment, while authorizing these innovative annuities, also limits the more complex versions of the products. The nonforfeiture standards in the Amendment are intended to promote transparency and avoid misleading designs. In discussions with consumer advocates during the drafting of the Amendment, the advocates raised significant concerns about the complexity of design of these products. The consumer advocates felt that the complexity of design often adds little or no value to consumers while making it very difficult, if not impossible, for consumers to understand how the product works and the financial risk to which consumers are exposed. DFS shares these concerns. DFS is also concerned that some features of the more complex product designs, which limit the consumer’s earnings under the contract, can result in the consumer’s potential investment loss being significantly greater than the potential investment gain. DFS considered prohibiting this type of product altogether. Instead, DFS decided to allow the more transparent, straight forward designs with

robust disclosure. DFS will monitor the market and may consider adjusting the scope of authorized designs or disclosure in future amendments to Part 50.

Suggested changes related to product design, which DFS did not make, included revising the Amendment:

- To authorize participation rates lower than 100%. The Amendment permits caps, which limit a consumer's upside earning potential. A participation rate lower than 100% would further limit consumers' upside earning potential. This could make it more difficult, if not impossible, for consumers to earn back earlier losses under the contract. The use of combinations of caps and participation rates would make it very difficult for consumers to figure out how much their earning potential is limited. DFS believes that by focusing on caps as the limit on upside earning potential, the contracts will be more transparent and consumers will be in a better position to understand the product and to comparison shop.
- To authorize a pro-rata approach to calculating interim values. A blanket authorization of this approach would not be appropriate because there can be significant issues about the fairness of pro-rata calculations. DFS considered prohibiting this approach altogether. Instead, pro-rate calculations will be reviewed on a case-by-case basis with insurers having an opportunity to demonstrate the fairness of their particular proposed calculation.
- To authorize floors as low as 10%. DFS believes that allowing a floor of 10% would create a way for insurers to circumvent the guaranteed minimum interest requirements of Insurance Law section 4223 for indexed products. Further, a floor so low raises concerns about suitability and why a consumer so risk averse isn't being sold a fixed index product.
- So that the required minimum caps would not be determined "net of fees". DFS took fees into consideration when setting the minimum caps. To remove the "net of fees" language

would give insurers a mechanism for circumventing the minimum cap requirement and would allow insurers to unfairly restrict the upside earning potential to the detriment of consumers.

Some commenters suggested authorizing variable annuities that offer buffer or floor index funds rather than providing buffer or floor guarantees in the contract. DFS has significant concerns that this product design could be used to circumvent the consumer protections and disclosure requirements of this Amendment. DFS is also concerned about the fact that such products would offer only investment strategy goals without actual guarantees. There is a potential for consumers to be misled if variable annuities with these funds attempt to compete with buffer or floor index annuities. DFS did not make any changes in response to this comment and will continue to study and monitor this product design and may consider future amendments to Part 50.

One commenter suggested referencing additional indexes in section 50-2.9(f). However, the reference in this section just provides a few examples of published indexes. It is not meant to be a comprehensive list of all indexes. Therefore, DFS did not make any changes to the Amendment.

Commenters suggested that DFS revise the Amendment to allow insurers to craft their own versions of the disclosure because product offerings and product designs may vary by insurer. DFS did not make this revision. DFS drafted the disclosure in consultation with consumer advocates to give consumers a general overview of these types of products and the manner in which they work. The disclosure was not intended to be a description of any company's specific product. In response to this same comment during preproposal outreach, DFS added additional language indicating "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." Details outlining an insurer's particular product are already provided in the insurer's marketing and sales materials.

The Amendment replaces the current maximum surrender charge standard with a numerical schedule. Commenters were generally in favor of replacing the current standard with a more certain numerical schedule but suggested that the Amendment authorize higher and longer surrender charges.

While drafting the Amendment, DFS had extensive discussions with insurers about surrender charges. DFS initially considered setting the maximum surrender charge schedule at 7% for the first year, declining 1% per year thereafter (7%, 6%, 5%, 4%, 3%, 2%, 1%, 0%). After preproposal feedback from insurers and careful consideration, DFS decided to set higher maximum surrender charge percentages in the Amendment but kept the maximum duration at seven years (8%, 8%, 7%, 6%, 5%, 4%, 3%, 0%). The comments during the public comment period reiterated the earlier suggestions of allowing higher and longer surrender charges. DFS continues to believe that the schedule in the Amendment is the fair and appropriate maximum surrender charge and therefore did not make any changes to the Amendment.

In addition to the comments related to clarification of section 50-2.9(h)(2) discussed above, some commenters suggested removing from section 50-2.9(h)(3) the prohibition against reducing the withdrawal benefit percentage or amount of benefit when the account value of the annuity reaches zero. DFS finds this practice to be unfair and misleading. Prior to the account value reaching zero, consumers are withdrawing their own money. When the account value reaches zero, then the benefit is "in the money" and the insurer provides an insurance benefit. DFS recognizes that some consumers take more of their money in the early years of retirement.

However, a tiered withdrawal structure, triggered by account value depletion, shifts much of the risk of a decline in equity markets from the insurer to the consumer. A sharp decline in equity markets could deplete the account value well before expected and the consumer's income could be reduced earlier than planned. The Amendment does not prohibit tiered withdrawal structures that offer higher withdrawal benefits in earlier years, just those in which the benefit is reduced upon depletion of the account value. The Amendment does not, for example, prohibit tiered withdrawal structures that guarantee the higher initial withdrawal percentage for a specified number of years or to an attained age. Therefore, DFS did not make any changes in response to this comment.