The State of New Hampshire
Insurance Department
21 South Fruit Street, Suite 14
Concord, NH 03301
(603) 271-2261 Fax (603) 271-1406
TDD Access: Relay NH 1-800-735-2964

John Elias
Commissioner

Alexander K. Feldvebel
Deputy Commissioner

WAIVER APPLICATION DECISION PERTAINING TO NEW YORK LIFE INSURANCE COMPANY'S MAY 29, 2018 REQUEST FOR A WAIVER FROM INS 306.05(f)(8) FOR PARTICIPATING ANNUITY PRODUCTS

On May 29, 2018, New York Life Insurance Company submitted a waiver application, pursuant to Ins 306.08, seeking a waiver of Ins 306.05(f)(8) as it pertains to illustrations associated with New York Life Insurance Company's Mutual Income annuities. The New Hampshire Insurance Department ("Department") has considered New York Life Insurance Company's waiver application and proposal. In doing so, the Department has outlined its analysis below and grants the waiver request subject to the following conditions:

Factual Background:

The Department recently updated and adopted its regulatory rules pertaining to annuity disclosures within Ins 306. Ins 306, which became effective on April 28, 2018, tracks Model Rule #245 (Annuity Disclosure Model Regulation) of the National Association of Insurance Commissioners ("NAIC"). During the Ins 306 rulemaking process, the Department received a request from New York Life Insurance Company ("NY Life") to either modify the rule or postpone the filing of Ins 306. NY Life's request to delay the proceedings was based upon amendments being considered at the NAIC for Model Rule #245 in relation to two of NY Life's innovative annuity products, Future Mutual Income annuity and Lifetime Mutual Income annuity. The Department delayed the rulemaking process in hopes that the NAIC would be able to finalize amendments to Model Rule #245 within six months to address regulations relevant to these particular annuity products. However, that did not occur. As a result, the Department proceeded with the rulemaking process for Ins 306, which, like current Model Rule #245, does not provide specific regulations for illustrations pertaining to participating annuities like those offered by NY Life.

Waiver Application and Proposed Alternative:

NY Life seeks a waiver from Ins 306.05(f)(8)(Standards for Annuity Illustrations) for its Future Mutual Income annuity and Lifetime Mutual Income annuity products because these are new products that were not contemplated by regulators when Model Rule #245 was previously adopted. These products, also known as "participating annuities," provide a base level of guaranteed income with the opportunity for more income through annual dividends. The dividend scale of these products is based on an investment cohort method.

As Ins 306.05(f)(8) is currently written with regard to nonguaranteed income, illustrations of these annuities "shall be no more favorable than current non-guaranteed elements and shall not include any assumed future improvement of such elements." As a result, to fully comply with Ins 306.05(f)(8), the dividend formula and all illustrations relating thereto would have to assume no future change in today's low interest rates. As such, this would lead to overly conservative illustrations for consumers compared to non-participating products.

The Department approved NY Life's participating annuity products in 2015 when Ins 306 was not in effect and they have been sold to NH consumers since then. In March 2018, the NAIC's Working Group for Model Rule #245 accepted illustration amendments to this Model from NY Life that would more appropriately address these products. However, at this time, these amendments have not been formally adopted by the entire NAIC. Final approval and adoption by the NAIC is anticipated this fall after the NAIC's Summer Meeting. As a result, until October 1, 2018, NY Life has requested that the Department permit NY Life to follow regulatory guidance that NY Life has followed by the Insurance Departments of Maine and Rhode Island. This regulatory guidance, by bulletin, is substantially consistent with the amendments to Model Rule #245 that the NAIC's Working Group approved in March 2018. After October 1, 2018, NY Life anticipates that the NAIC will have formally adopted all changes to Model Rule #245 at which time NY Life would comply with the changes adopted by the NAIC.

Analysis:

Pursuant to Ins 306.08,[1] the Commissioner shall waive any requirement of Ins 306, under certain circumstances, if such waiver does not contradict the objective or intent of the rule. As noted by NY Life, Ins 306, which tracks current Model Rule #245, does not contemplate participating annuity products. In 2014, Maine and Rhode Island addressed this issue by bulletin so that these participating annuity products could continue to be sold to consumers with appropriate consumer protections in place relating to the products' dividend scales and their illustrations. Specifically, the following regulatory standards have applied to NY Life's disclosure requirements for participating annuity products in Maine and Rhode Island since 2014:

> **Company expectations must be both subjectively and objectively reasonable. To be subjectively reasonable, they must be the same assumptions on which the company itself relies. The program must be designed so that the company will apportion**

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[1] Ins 306.08 Waiver or Suspension of Rules.

(a) The commissioner, upon the commissioner's own initiative or upon request by an insurer, shall waive any requirement of Ins 306 if such waiver does not contradict the objective or intent of the rule and:

(1) Applying the rule provision would cause confusion or would be misleading to consumers;

(2) The rule provision is in whole or in part inapplicable to the given circumstances;

(3) There are specific circumstances unique to the situation such that strict compliance with the rule would be onerous without promoting the objective or intent of the rule provision; or

(4) Any other similar extenuating circumstances exist such that application of an alternative standard or procedure better promotes the objective or intent of the rule provision.

(b) No requirement prescribed by statute shall be waived unless expressly authorized by law.

(c) Any person or entity seeking a waiver shall make a request in writing.

(d) A request for a waiver shall specify the basis for the waiver and proposed alternative, if any.

dividends fairly and equitably, whether performance meets, exceeds, or falls short of expectations. The company may not arbitrarily change the assumptions it uses in its illustrations—if it bases expected future investment performance on a long-term horizon at times when observed past performance is better in the long term than the short term, it may not switch to a shorter time horizon when short-term performance improves.

To be objectively reasonable, assumptions about future investment performance must be consistent with assumptions that are reflected in the marketplace within the normal range of analyst forecasts and investor behavior. If the dividend scale is based on a portfolio rate method, the portfolio rate underlying the illustrated dividend scale shall not be assumed to increase. For a participating income annuity product where the dividend scale is based on an investment cohort method, the illustrated dividend scale should assume that reinvestment rates grade to long-term interest rates. For the purposes of this grading, the assumed long-term U.S. Treasury rates should not exceed the rates listed in the table below, based on the tenor (time to maturity/reinvestment) of the investments underlying the cohort of policies. Grading to the long-term U.S. Treasury rates should take place over (a) no less than 20 years from issue if U.S. Treasury rates as of the illustration date are below the long-term rates, or (b) no more than 20 years from issue if the U.S. Treasury rates as of the illustration date are above the long-term rates.

Tenor	**Maximum Assumed Long-term U.S. Treasury Rate**
3 Month (or less)	**3.00%**
5 Year	**4.50%**
10 Year	**5.00%**
20 Years (or more)	**5.50%**

The rates in the table above are stated on a bond equivalent yield basis. For points on the U.S. Treasury yield curve not listed above, the maximum long-term rates should be determined using linear interpolation. This rate table will be reviewed periodically and may be adjusted to reflect changes in market conditions.

Notably, the standards and table set forth in bold above were approved by the NAIC's Working Group in March 2018. Additional standards pertaining to future interest rate assumptions and disclosures as to maximum rate assumptions were also approved by the Working Group at that time. According to NAIC Working Group members, all of the changes to Model Rule #245 that the NAIC Working Group adopted in March 2018 are expected to be formally adopted by the entire NAIC in the near future.

In light of the foregoing, a waiver of Ins 306.05(f)(8) as it pertains to participating annuities, is appropriate because such a waiver would not contradict the goal of Ins 306 to ensure that purchasers of annuity contracts understand basic features of annuity contracts and the intent of Ins 306.05(f)(8) to provide consumers with accurate annuity performance illustrations as to non-guaranteed income. In addition, applying the alternative standard set forth above, which is more specific to participating annuities, better promotes the intent of the rule consistent with Ins 306.08 (4).

Conclusion:

As discussed above, the standard set forth in bold above shall apply to participating annuity products, like NY Life's mutual annuity products, until such time as the NAIC has formally adopted all changes to Model Rule #245 and the Department has amended Ins 306 to reflect those changes.

Date: 6/26/18

John Elias, New Hampshire Insurance Commissioner