

**STATE OF VERMONT
DEPARTMENT OF BANKING, INSURANCE, SECURITIES
AND HEALTH CARE ADMINISTRATION**

In Re: New York Life
Insurance and Annuity Corporation
NAIC # 91596

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DOCKET NO. 05-028-I

ORDER ADOPTING REPORT OF EXAMINATION

NOW COMES John P. Crowley, Commissioner of the Vermont Department of Banking, Insurance, Securities and Health Care Administration, and hereby issues the following Order adopting the Market Conduct Examination Report in the above referenced docket number, subject to the exceptions and qualifications discussed below.

FINDINGS OF FACT

1. Pursuant to the authority granted by Vermont law, including, but not limited to, that contained in 8 V.S.A. §§ 10-13, 18, 3564-3574 and 4726, the Commissioner of the Department of Banking, Insurance, Securities and Health Care Administration (the "Department") is charged with administering and enforcing the insurance laws and regulations of the State of Vermont and is authorized to conduct examinations of insurers and licensees to determine whether they are in compliance with said laws and regulations.

2. New York Life Insurance and Annuity Corporation (the "Company") is authorized to transact business in Vermont under Foreign Insurance Company License No. 9280 P.

3. A final target¹ market conduct examination report was issued by examiners Jennifer Greenway, Robbie Kriplean and James Montgomery entitled MARKET CONDUCT EXAMINATION REPORT OF NEW YORK LIFE INSURANCE AND ANNUITY CORPORATION NEW YORK, NEW YORK AS OF DECEMBER 31, 2002 BY VERMONT DEPARTMENT OF BANKING, INSURANCE, SECURITIES & HEALTH CARE ADMINISTRATION (the "Report").

4. In accordance with the requirements of 8 V.S.A. § 3574(b), the Report was transmitted to the Company and the Company was afforded a reasonable period of time to submit a formal written response to the findings of Report. The Company submitted a formal response (the "Response") addressing the issues raised the Report. Upon review of the Response, the Department has undertaken additional investigation and sought additional information from the Company.

5. Pursuant to 8 V.S.A. § 3574(c), the undersigned Commissioner has fully considered the Report, the Response and additional information provided.

CONCLUSIONS OF LAW

6. To the extent comments made by the Company are not discussed below, such comments are expressly rejected. The examiners' Report, including their recommendations, are adopted unless noted otherwise below.

7. In the (V) **CLAIMS PROCEDURES AND PROCESSING – (A) Claims Practices and Procedures – Not In Compliance with 8 V.S.A. § 3665** section of the Report (pages 7-

¹ The market conduct examination focused on marketing and sales, consumer complaints, claims procedures and processing, and replacement procedures from January 1, 2000 to December 31, 2002. (Report at page 3.)

8), the examiners discuss the Company's failure to comply with 8 V.S.A. § 3665. 8 V.S.A. § 3665(c)(2) requires life insurers to pay interest on benefits from the date of the insured's death at 6% or the rate paid on proceeds left on deposit, whichever is higher. In turn, 8 V.S.A. § 3665(d) requires all insurers to pay claims within thirty days of a properly executed proof of loss. Under 8 V.S.A. § 3665(d), if an insurer does not pay a claim within 30 days, it shall pay interest on the proceeds at the judgment rate.² In contrast, the Company has not calculated interest at 6% for timely paid claims, nor has the Company paid the 12% rate in late paid claims. The examiners recommend that the Company revise its claim procedures to conform with Vermont law and recalculate and pay improperly withheld interest from 1993 until the present. (Recommendation Nos. 1 and 2, Report at page 18.)

In its Response, the Company notes that it has been paying interest consistent with 8 V.S.A. § 3665 since November 2003, when the Company discovered the discrepancy. The Company argues that 8 V.S.A. § 3665 only requires the application of the judgment rate if the matter has gone through litigation and that logically the 6%³ interest rate applies to late paid claims which have not been litigated. Further, the Company urges the application of the "rule of lenity" pursuant to *State of Vermont v. Greg L. Goodhue*, 175 Vt. 457, 833 A.2d 861, 868 (Vt. 2003) and related case law.

The undersigned rejects the Company's arguments regarding the interpretation of 8 V.S.A. § 3665. Life insurance proceeds earn interest from the date of death at six percent (8 V.S.A. § 3665(c)(2)) and if an insurer fails to pay those benefits within 30

² The judgment rate in Vermont is 12% interest per annum. 9 V.S.A. § 41a.

³ Or the rate paid on proceeds left on deposit if higher.

days of properly executed claim forms,⁴ interest then begins to accrue at 12% (8 V.S.A. § 3665(d)). The statute both clarifies when interest begins to run for life insurance claims (whether late paid or otherwise) and also provides additional incentive for all lines of insurance to timely pay claims by imposing a greater interest rate if claims are not paid timely. Further, the undersigned finds the cases cited by the Company are inapplicable to an administrative proceeding such as this. However, it must be noted that it appears the Company addressed the discrepancy in a timely manner upon discovery and has corrected its procedures for claims received after November 2003.

Nonetheless, the Company shall perform an audit and issue a report to the Department. The audit shall be of all life insurance claims received by the Company from January 1, 1999 to the date the Company began complying with 8 V.S.A. § 3665, arising out of policies issued in Vermont. For each claim, the Company shall report the date of death, the date the proof of loss was received, the amount of insurance at the time of death, the amount paid to the beneficiary, the date payment was made to the beneficiary,⁵ the amount that should have been paid if interest had been calculated in accordance with 8 V.S.A. § 3665, the policy number, and the claim number. The audit shall be provided to the Department no later than December 15, 2005 and shall be transmitted both in hardcopy and electronically in the form of an Excel spreadsheet. Upon approval, the Company shall refund all underpaid interest owing which exceeds

⁴ The Company's attention is further directed to 27 V.S.A. § 1210 which imposes certain obligations on life and annuity companies even when a final executed proof of loss has not been received.

⁵ The date of payment shall refer to either the date that the check was issued or, in the event of an electronic transfer, the date the transfer was made.

\$25 at the time the benefits were paid.⁶ Upon successful remediation, it is not anticipated any administrative penalty would be warranted.

8. In the **(VII) REPLACEMENTS** section of the Report (pages 11 – 12), the examiners discuss various violations of the replacement regulations⁷ discovered in sampled files. The examiners recommend assigning a specific staff member the responsibility to review each replacement file and ensure compliance with applicable regulations.

(Recommendation No. 3, Report at page 23.)

In its Response (page 2), the Company notes that it has always been the Company's policy to comply with the replacement regulations. The Company details the extensive procedures in place to help ensure that policies will be sold in compliance with the replacement regulations, including having the Administrative Manager review all replacement applications, educating its agents and regularly reminding agents and staff of the requirements of the replacement regulations. Further, the Company notes that it has implemented a new business tracking sheet with reminds the staff that processes the application of replacement regulations requirements.

Upon consideration, the undersigned adopts this portion of the Report and the examiners recommendation. According to the information provided in the Response, it appears that Company has implemented the examiners recommendations into its processes. In light of the apparent isolated nature of the violations discovered, it does not appear that any penalty is warranted at this time.

⁶ Refunds shall also accrue interest from the date the benefits were paid until the refunds are paid. Pursuant to 9 V.S.A. § 41a, interest shall be calculated on the refunds exceeding \$25.00 at 12% simple interest per annum.

⁷ For policies and contracts issued before March 1, 2002, files were examined for compliance with Regulation 88-2; for contacts issued after March 1, 2002, files were examined for compliance with Regulation I-2001-3.

9. In the **(IX) UNDERWRITING – HIV CONSENT FORMS** section of the Report (page 14), the examiners note that they discovered two violations of 8 V.S.A. § 4724(20)(B), out of a total sample of fifty files. The examiners recommend the Company exercise additional care in the future to ensure that proper HIV information and consent forms are used in all cases. (Recommendation No. 5, Report at page 24.)

In its Response (page 3), the Company indicates it will review the importance of using the correct VT specific HIV information forms with its agents and processing staff.

Upon consideration, the undersigned adopts this portion of the Report and the examiners' recommendation. It appears the Company is taking proactive steps to address the problem and no further action is necessary beyond that which the Company has indicated will occur. Because the violations discovered appear to be isolated and few in number, the undersigned concludes no administrative penalty is warranted.

10. In the **(X) LIFE INSURANCE ILLUSTRATIONS** section of the Report (page 15), the examiners note that Regulation 99-1 § 10 provides: "If an adverse change in non-guaranteed elements that could affect the policy has been made by the insurer since the last annual report, the annual report shall contain a notice of that fact and the nature of the change *prominently* displayed" (emphasis added). The examiners note that some of the Company's reports contain such notices, but not prominently. For example, in one notice, an increase in the monthly contract charge was included in an inconspicuous footnote. The Company did not agree with the examiners' characterization, but nonetheless volunteered to make the information more prominent by increasing the font size.

The Company did not specifically refer to this portion of the examination in its Response.

Upon consideration, the undersigned finds this a clear violation of the Regulation. Although no additional remedial efforts are necessary beyond what the Company has voluntarily undertaken, the undersigned finds this appropriate for a \$1,000 penalty for the violation discovered by the examiners. Although the examiners only note one specific violating form, such form was presumably provided to numerous customers. Further, this is precisely the type of policyholder communication prohibited by the Regulation.

11. In the **(XII) SALES AND MARKETING – (A) INCOMPLETE/INCORRECT APPLICATIONS** section of the Report (page 17), the examiners discuss a problem with a specific form used by both the Company and New York Life Insurance Company. The form provides for a box at the top to be checked to indicate the issuing company. The examiners note that in four files, the application had the wrong company name or did not have any company name selected in that section. The examiners make no specific recommendation, but do note that the Company indicated it will reaffirm with the Administrative Manager the necessity of completing the form correctly.

In its Response (page 3), the Company asserts that two of the four violations should not be included in the report because they involve NYLIC policies and further notes that three of the four files contained reference to the correct issuing company, even if the application was not filled out or filled out correctly.

Upon consideration, the undersigned adopts this portion of the Report, subject to the following revision. As requested by the Company, the reference to Policy 46624317 shall not be considered a part of the Report because it is a NYLIC policy. The reference

to Policy 46850092 shall be adopted because although the policy was issued by NYLIC, it was a Company policy conversion. The undersigned rejects the Company's argument that a violation should not be noted if there is a reference to the appropriate company in the policy file. The application is an integral and vital portion of the process and certain legal rights are determined by the application alone. Confusing the customer and potential beneficiaries about the actual issuing company should not be disregarded as a mere technicality. The undersigned finds this appropriate for a \$1500 administrative penalty (\$500 for the three listed violations). Although this is less than the statutory maximum, the Company appears to have taken a proactive approach to reaffirming its commitment to accurate applications.

12. In the **(XII) SALES AND MARKETING – (B) SUITABILITY – (i) SmartMatch** section of the Report (page 18), the examiners describe the Company's comprehensive suitability computer program called SmartMatch. The Company obtains information from the applicant by having the applicant fill out a form which specifies risk tolerance and investment objective. The application is then put through SmartMatch as part of the application processing. SmartMatch then analyzes the application and ensures that the applicant's investment objectives are consistent with the applicant's selection of investments for premium allocation. If they are inconsistent, the application is "pending" and potential inconsistencies are resolved.

The examiners note, however, that because of certain parameters of the SmartMatch system, an applicant that is determined to have a "moderate" risk tolerance can end up with up to 60% of his or her investments in "high" or "highest" risk investments. The examiners posit that a majority of investments in the high or highest

risk categories is inconsistent with a moderate tolerance level and recommend the SmartMatch system be modified to disallow such a high percentage of investments in the “high” and “highest” risk categories when the risk tolerance level has been identified as “moderate”.⁸ (Recommendation No. 8, Report at page 24.)

In its Response (pages 3-4), the Company asserts SmartMatch’s “current standard ensures that the relationship between risk tolerance and investment objective is consistent.” (Response at page 3.) The Company explains that although an applicant might have a “moderate” risk tolerance, he or she must also select an investment objective (capital preservation, income or long-term growth). Depending on the investment objective, SmartMatch allows differing allocations for high and highest risk investments. The Company explains that if an applicant selects a long term growth investment objective, SmartMatch will allow up to a 60% allocation of premium to higher risk investments because of the longer term nature of the goal. Further, the Company asserts that the relationship between risk tolerance and investment objective is “clearly displayed in the Investor Profile” (Response at page 4), including pie charts which illustrate acceptable allocation levels. Further, the Company notes that the risk classification of each investment choice is clearly specified. The Company asserts that “the suitability standard for individuals who have moderate risk tolerance and seek to achieve long-term growth by investing up to 60% of their investment in high or highest risk investment divisions is reasonable.” (Response at page 4.) Finally, the Company notes that SmartMatch is regularly reviewed to assure compliance with regulatory

⁸ The examiners specifically recommend that if a person has a “moderate” risk profile, the majority of their investments should not be in high or highest risk investments.

requirements and that the examiners' proposed revision will be considered at the next review.

Upon consideration, the undersigned adopts this portion of the Report, but rejects the examiners recommendation. From the information provided in the Report and the Response, it appears the SmartMatch program is a useful tool for analyzing suitability requirements and effectively assures that customers are consistently directed towards investment decisions that are suitable for their needs. The undersigned finds persuasive the Company's argument that under certain circumstances an investor with long term objectives and a moderate risk profile could be appropriately invested in up to 60% high risk investments. However, although the undersigned agrees that in certain circumstances a 60% high risk investment allocation for a moderate risk tolerance may be appropriate, such an allocation would only be acceptable in a limited set of circumstances and such allocation should be relatively uncommon.⁹ As such, although no change to the allocation models accepted by SmartMatch is specifically directed, the Company is on notice that such an allocation could result in a determination that a particular sale is, in fact, unsuitable and in violation of the Insurance Trade Practices Act.

13. In the **(XII) SALES AND MARKETING - (B) SUITABILITY - (ii) MainStay Variable Annuities** section of the Report (page 9), the examiners discuss the fact that although the Company has excellent suitability mechanisms for products sold directly by the Company, no monitoring system is in place to ensure that variable products sold by the Company through independent broker-dealers ("Dealers") are being sold in compliance with applicable suitability standards imposed by the insurance laws. The

⁹ Representatives of the Securities Division confirm that a 60% allocation in higher or highest risk investments for a customer with a moderate risk tolerance would be unusual.