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INSURANCE DEPARTMENT  
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**NOTE: WITHDRAWN EFFECTIVE 08/02/2013**

**Supplement No. 1 to  
Circular Letter No. 27 (2008)  
December 9, 2009**

**TO: All Authorized Life Insurers and Fraternal Benefit Societies (collectively, "Licensees")**

**RE: Recognition in New York of Marriages Between Same-Sex Partners Legally Performed in Other Jurisdictions**

**STATUTORY REFERENCE: N.Y. Ins. Law §§ 2402, 2403, 3201 and 4224**

This Supplement replaces and supersedes Supplement No. 1 to Circular Letter No. 27 (2008) ("CL No. 27"), which was dated August 10, 2009 and was withdrawn effective October 19, 2009.

Subsequent to the Department's issuance of CL No. 27, which discussed the impact and application of Martinez v. Monroe Community College, 50 A.D.3d 189 (4th Dep't), lv. to appeal dismissed, 10 N.Y.3d 856 (2008), the Department received several inquiries concerning the application of CL No. 27 to annuity contracts that must comply with federal tax law in order to receive favored federal tax treatment. CL No. 27 provides that licensees under the New York Insurance Law must comply with Martinez by extending the same rights and benefits to same-sex spouses in marriages legally performed in jurisdictions outside New York as are afforded to opposite-sex spouses. The inquirers asked about the impact of CL No. 27 on the mandatory distribution rules set forth in federal Internal Revenue Code ("IRC") §§ 72(s) and 401(a)(9), which contain beneficial options available only to a surviving spouse of a deceased annuity holder.

Specifically, some inquirers asked about the applicability of CL No. 27 to annuity contracts that provide, pursuant to IRC § 72(s), that beneficiaries ordinarily must either begin an annuity within one year of the deceased annuity holder's death or else withdraw all funds within five years of that death. A surviving spouse, however, is not required to take these distributions, and may instead continue as owner of an annuity contract after the death of the annuity holder spouse. If a surviving spouse steps into the shoes of the deceased annuity holder, income tax on income earned within the annuity may be deferred until after the spouse's death. Accordingly, some annuity contracts provide a default option that assumes that the surviving spouse will prefer to continue as owner. A beneficiary who is not recognized as a spouse under federal law is not eligible for this exception.

Some inquirers also asked about the impact of CL No. 27 on the minimum distribution rules set forth in IRC § 401(a)(9), which allow a spouse to step into the shoes of the deceased account holder and use his or her own age to determine the date upon which distributions must begin, even if that age results in delayed distributions. A person who is not recognized as a spouse under federal law cannot delay distributions in that manner.

Section 3 of the federal Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7, enacted in 1996, is relevant to the inquiries. Section 3 of DOMA defines “marriage,” for federal purposes, as “a legal union between one man and one woman as husband and wife.” In addition, Section 3 of DOMA defines “spouse,” for federal purposes, as “a person of the opposite sex who is a husband or a wife.” Consequently, DOMA precludes recognition of marriages between same-sex partners under the IRC, which means that a same-sex spouse cannot delay distributions that are required under IRC § 72(s) or IRC § 401(a)(9). Rather, unless or until Section 3 of DOMA is struck or repealed,<sup>1</sup> for purposes of this federal benefit a same-sex spouse must follow the same distribution rules that apply to any natural person who is not the spouse of the deceased annuity holder. To the extent that an annuity contract or certificate accords to spouses other rights or benefits that are not affected by DOMA, same-sex spouses remain entitled to such rights or benefits to the same extent as any annuity holder’s spouse.

Because a surviving same-sex spouse is currently subject to the same distribution requirements of IRC §§ 72(s) and 401(a)(9) as apply to a non-spouse, an insurer should provide minimum disclosure to consumers that explains such consequences. Without such disclosure, the policy forms may be misleading. See Insurance Law § 3201(c)(1). Accordingly, effective May 1, 2010, with respect to any new annuity contract or certificate that sets forth rights or benefits for spouses, and with regard to any application form for an annuity contract or certificate, every insurer should include a clear and conspicuous disclosure to consumers that explains that the favorable tax treatment provided by federal tax law to opposite-sex spouses is not available to same-sex spouses because of Section 3 of DOMA. Further, the disclosure should advise same-sex spouses to consult a tax advisor prior to the purchase of any annuity product that provides benefits based upon one’s status as a spouse. For contracts issued prior to May 1, 2010 that set forth rights or benefits for spouses, insurers should provide the disclosure to the contract owner or certificate holder in a communication to such persons during calendar year 2010. Effective May 1, 2010, for both new issues and in-force contracts and certificates that set forth rights or benefits for spouses, insurers should also provide the disclosure to the beneficiary upon the death of the contract holder or certificate holder, except that, in the event that the insurer lacks primary responsibility for maintaining beneficiary records, administration of payments, or distributions upon the death in favor of the beneficiary, the insurer should use its best efforts to cause the person or persons with such primary responsibility to provide such disclosure to the beneficiary. In addition, every insurer should review its policy forms to determine if revisions are needed so that a same-sex spouse will not be defaulted to the spousal continuation option, and to ensure that the default option for a same-sex spouse is adequately disclosed.

The Department’s Life Bureau will institute an expedited approval process for any form filings made solely to comply with this Supplement. Filing guidance for using the expedited process will be posted on the Department’s website. Please contact Peter Dumar, Associate Insurance Attorney, Life Bureau, at (518) 474-4552 or by email at [pdumar@ins.state.ny.us](mailto:pdumar@ins.state.ny.us), with any questions about policy form submissions.

Sincerely,

Martin Schwartzman  
Assistant Deputy Superintendent and  
Chief  
Life Bureau

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<sup>1</sup> There are currently two lawsuits pending that challenge the constitutionality of Congress's purporting to define marriage via Section 3 of DOMA. See Commonwealth of Massachusetts v. U.S. Dep't of Health & Human Servs., et al., No. 09-cv-11156 (D. Mass. filed July 8, 2009); Gill, et al. v. Office of Personnel Management, et al., No. 09-cv-10309 (D. Mass. amended complaint filed July 31, 2009).