



STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004

David A. Paterson
Governor

James J. Wrynn
Superintendent

Circular Letter No. 8 (2010)
June 29, 2010

TO: All Authorized Life Insurers and Fraternal Benefit Societies (collectively, “Insurers”)

RE: Bonus Recapture From Death Benefit Proceeds Is No Longer Permitted

STATUTORY REFERENCES: New York Insurance Law §§ 3201, 3103 and 4223

The purpose of this Circular Letter is to clarify for insurers that as a result of amendments to Insurance Law § 4223(c)(1), insurers may not “recapture” any bonus interest rates or credits from: 1) the death benefit proceeds of a fixed deferred annuity contract or certificate, or 2) the portion of the death benefit proceeds related to the fixed account portion of an annuity contract or certificate that combines both fixed and variable benefits. Because Insurance Law § 4240(d) states that Insurance Law § 4223 does not apply to variable annuities, these amendments do not affect the variable portion of a fixed and variable annuity.

Section 1 of Chapter 170 of the Laws of 2008 amended Insurance Law § 4223(c)(1) to state:

Except as provided in paragraph four of this subsection, the minimum values as specified in subsections (d), (e), (f), (g) and (i) of this section of any paid-up annuity, cash surrender or death benefits attributable to any account subject to this section under an annuity contract shall be based (except as provided in subsection (e) of this section with respect to the use of a market-value adjustment formula) upon the actual accumulation amount computed as provided in this subsection. *For contracts that provide a cash surrender benefit prior to the commencement of annuity payments, the death benefit attributable to any account, other than an equity index account, shall not be less than the actual accumulation amount, as defined in paragraph two of this subsection, and the death benefit attributable to an equity index account shall not be less than the value of the equity index account, as defined in paragraph four of this subsection.* [Emphasis supplied.]

Thus, if an annuity contract or certificate provides for a cash surrender benefit prior to the commencement of annuity payments, and a death benefit becomes payable before those annuity payments commence, insurers must pay an amount not less than the actual accumulation amount or, in the case of an equity index account, the value of the equity index account. Put another way, if a death benefit becomes payable before annuity payments commence, then insurers may not reduce—even by recapturing any bonus interest rate or credit—1) the death benefit proceeds of a fixed deferred annuity contract or certificate, or 2) the portion of the death benefit proceeds related to the fixed account portion of an annuity contract or certificate that combines both fixed and variable benefits.

Prior to April 30, 2002, the Department's longstanding position held that an annuity contract's death benefit must not be less than the actual accumulation amount. But, since April 30, 2002, the Department permitted insurers to recapture bonus interest rates or credits from a death benefit only when death occurred within the 12 months immediately following the bonus credit. However, in light of the 2008 revisions to Insurance Law § 4223(c)(1), the law now is explicit that 1) the death benefit proceeds of a fixed deferred annuity contract or certificate, or 2) the portion of the death benefit proceeds related to the fixed account portion of an annuity contract or certificate that combines both fixed and variable benefits, must not be less than the actual accumulation amount if death occurs before annuity payments commence. Accordingly, the Department has updated its annuity product outline to reflect this position.

The effective date of Chapter 170 of the Laws of 2008 was October 5, 2008. Thus, any contract or certificate issued prior to October 5, 2008 is not subject to the prohibition in Insurance Law § 4223(c)(1). However, in accordance with Insurance Law § 3103, any contract or certificate issued on or after October 5, 2008 shall be enforceable as if it conformed to the law. Accordingly, to prevent any confusion, every insurer must endorse any annuity contract or certificate issued on or after October 5, 2008 to remove any death benefit bonus recapture provisions or in the case of a fixed and variable annuity contract or certificate be endorsed to provide that the recapture will not be applied to the fixed account portion of the contract. An insurer need not issue an endorsement for a contract or certificate where the bonus recapture period provided for in the contract or certificate has expired prior to the date of this Circular Letter.

For new issues of annuity contracts and certificates, insurers may use endorsements or may submit new policy forms that include the revisions. All endorsements and revised policy forms must be submitted to the Life Bureau for approval.

An insurer that has recaptured bonus credits from contracts or certificates issued after October 5, 2008 shall take appropriate steps to provide restitution to the beneficiary or beneficiaries. If an insurer takes appropriate steps to provide such restitution, the Department does not intend to take further enforcement action against the insurer related to the recaptures.

In making its filing, an insurer must comply with the following procedural requirements:

1. The "Re" or caption of the submission letter must comply with Circular Letter No. 8 (1999). If the "Re" or caption identifies the filing as a "Removal of Death Benefit Bonus Recapture" submission, the filing will be given priority.

2. If an endorsement is being submitted, the submission letter must identify the previously approved policy forms with which the endorsement will be used by the form number, Department file number and approval date.
3. If revised policy forms are being submitted, the insurer must submit a highlighted copy of the new forms showing the changes or explain the changes in the submission letter.

Please contact Peter Dumar, Associate Insurance Attorney, Life Bureau, at (518) 474-4552 or by email at pdumar@ins.state.ny.us, with any questions about policy form submissions.

Sincerely,

Michael E. Maffei
Assistant Deputy Superintendent and Chief
Life Bureau