

SEPARATE ACCOUNT AGREEMENTS

(Last Updated 10/11/13)

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SEPARATE ACCOUNT AGREEMENTS

(Last Updated 10/11/13)

This outline is current as of 10/11/13. Subsequent changes to statutes, regulations, circular letters, etc., may not be reflected in the outline. In case of any doubt, please contact the Life Bureau.

I) Applicability

I.A) Scope

This product outline covers all unallocated group annuity contracts, funding agreements and separate account accumulation agreements delivered or issued for delivery in New York that are funded, in whole or in part, through one or more commingled or single-client separate accounts, including:

A.1) Traditional Equity Type Separate Account Agreements

(a) Guarantees

Under the traditional equity type separate account agreement, the insurer's liability under the contract is limited to the contractholder's interest in assets allocated to the separate account. The contractholder's account value fluctuates with changes in market value of the separate account.

(b) Valuation

Pursuant to §4240(a)(7) of the Insurance Law, assets allocated to separate account shall be valued at their market value.

A.2) Book Value Separate Account Agreements

(a) Guarantees

Book value separate account agreements provide guarantees of value of the assets allocated to a separate account, or any interest therein, or the investment results thereof, or income thereon, without limitation of liability under all such guarantees to the extent of the contractholder's interest in assets allocated to the separate account.

(i) The contracts can be used as an accumulation vehicle and contain an annuity purchase option. Initially the most common product design was the fixed rate, fixed maturity guaranteed interest contract. Today, the most common product design provides a fixed rate that is periodically adjusted to reflect the contract's cash flow activity, earnings on supporting assets and current interest rates.

(ii) Interest credited will be based on the rate or rates guaranteed (fixed rate, determinable by a formula contained

in the contract or tied to an external index) and will not be variable based solely on the performance of the book value separate account.

(b) Book Value Requirement.

Pursuant to §4240(a)(10) of the Insurance Law, except with respect to separate accounts qualifying under §4240(a)(5)(iii), assets supporting reserves which do not vary with the investment experience of the separate account must be maintained in the separate account at their value determined in accordance with §1414 of the Insurance Law (i.e., at book value, not market value).

(c) Insulated and Non-insulated Products

Pursuant to §4240(a)(5) of the Insurance Law, there are two types of book value separate account agreements.

(i) Non-insulated Products

The investments allocated to the separate account are deemed to be part of the general assets of the insurer and are subject to the qualitative and quantitative limitations contained in §1404 or §1405 of the Insurance Law. [§4240(a)(5)(i)]

(ii) Insulated Products.

If the agreements provide that the assets of the separate account shall not be chargeable with liabilities arising out of any other business of the insurer, the investments allocated to the separate account are subject to the requirements and limitations imposed by Articles 13 and 14 (except §1402) of the Insurance Law applied as though the aggregate assets allocated to the separate account were the insurer's total admitted assets (i.e., mini-general account). [§4240(a)(5)(ii)].

A.3) Market Value Separate Account Agreements Funding Guaranteed Benefits

Regulation No. 128 Guaranteed Separate Account Agreements.

(a) Guarantees

Market value separate account agreements are group annuity contracts, funding agreements and certain group life insurance policies that provide guarantees of value of the assets allocated to a separate account, or any interest therein, or the investment results thereof, or income thereon, without limitation of liability under all such guarantees to the extent of the contractholder's interest in assets allocated to the separate account. Such market value separate account agreements provide for fixed or guaranteed minimum benefits.

- (i) *Fixed benefits* means any annuity benefits (and other periodic payments) and benefit types A, B, or C described in §97.5(l)(2). See 97.3(k) of Regulation No. 128.
- (ii) *Guaranteed minimum benefits* means contract benefits payable on a specified date that are the greater of the market value of account assets (to the extent such assets determine the contractholder's benefits) or a fixed minimum guarantee related to the initial considerations. §97.3(m) of Regulation No. 128.

(b) Product Designs

- (i) The most common product designs include:
 - (I) Fixed rate, fixed maturity GICs.
 - (II) Evergreen products that provide for the periodic interest rate reset applicable the unallocated amounts held under the contract.
 - (III) Indexed products that guarantee a return of a specified index.
 - (IV) Products that guarantee a minimum return, such as the return of principal.
 - (V) Immediate participation guarantee type arrangements fund fixed annuity benefits for retirees through a market value separate account. Often used to provide guaranteed annuities for participants in plan termination or other settlement situations.

(c) Valuation

Pursuant to §4240(a)(7) and (10) of the Insurance Law, assets of separate accounts qualifying under §4240(a)(5)(iii) shall be valued at their market value.

(d) Actuarial Opinion and Memorandum

Section 4240(a)(5)(iii) requires that the insurer annually submit

- (i) An actuarial opinion that, after taking into account any risk charge payable from the assets of such separate account with respect to such guarantee, the assets in such separate account make good and sufficient provision for the liabilities of the insurer with respect thereto.
- (ii) Such opinion must be accompanied by an actuarial memorandum describing the calculations made in support of such opinion and the assumptions used in support of the calculations

I.B) Basic Features

This product outline assumes that separate account agreements will have the following critical basic features:

- B.1) The agreement can be written as a group annuity contract, funding agreement, group life insurance policy or group accident and health insurance policy.
- B.2) The separate account agreement can be used as either an accumulation vehicle or for non-accumulation immediate or deferred annuities. Contracts written on a group annuity form and used primarily as an accumulation vehicle may contain an annuity purchase option exercisable by eligible third-party beneficiaries. Funding agreements cannot contain any form of annuity purchase option.
- B.3) For non-equity type separate accounts, interest will accrue on the balance held from time to time under most guaranteed separate account contracts.
 - (a) Interest will be fixed, not variable; meaning that the amount of interest credited under guaranteed separate account contracts will not depend upon the performance of the underlying assets held in the separate account.
 - (b) However, interest rates may be reset periodically and may reflect the difference in the contractual book value and market value of the separate account.
 - (c) Interest may be credited based upon a stated amount or will be determinable either from a formula contained in the contract or tied to an external financial index.
- B.4) The separate account assets support the guaranteed separate account contracts. However, to the extent that the separate account assets are insufficient, the general account stands behind the guarantees in such contracts.
- B.5) The separate account agreement will contain detailed provisions governing withdrawals from the contract and amounts payable in connection with any full or partial surrender.

I.C) Excluded Contracts

C.1) Allocated Separate Account Agreements

- (a) Contracts sold in the individual market that are subject to §4223 and Regulation No. 127. See *Group Fixed and/or Variable Deferred Annuity Contracts Subject to Individual Standards* outline.
- (b) Contracts funding employee benefit plans and other contracts not subject to §4223. See *Allocated Group Annuity Contracts Not Subject to Section 4223* outline.

C.2) Group Annuity Contracts and Funding Agreements Funded Solely Through the Insurer's General Account

- (a) Group Annuity Contracts subject to Section 4223
- (b) Immediate Participation Guarantee Contracts
- (c) Deposit Administration Contracts
- (d) Guaranteed Interest Contracts
- (e) Funding Agreements
- (f) Terminal Funding Contracts
- (g) Close Out Contracts

Note that all of the above types of general account contracts can also be funded through book value separate account and market value separate account contracts.

C.3) Synthetic Guaranteed Investment Contracts

I.D) Definitions

D.1) Annuitant

Any person upon whose continued life such annuity is dependent. Section 4238(a).

D.2) Annuities

All agreements to make periodical payment for a period certain or where the making or continuance of all or some of a series of such payments, or the amount of such payment depends upon the continuance of human life. Section 1113(a)(2).

Period certain annuities first authorized in New York by Section 1 of Chapter 864 of the Laws of 1985.

D.3) Contractholder

The party or parties to whom or to which the contract is issued. Section 4238(a).

D.4) Employee

May include retired employees, employees of affiliates and subsidiaries of the employer, individual proprietors affiliated with the employer, and partners and employees of individuals affiliated with the employer and of firms controlled by the employer. §4238(c).

D.5) Funding agreement

Defined in §40.2(g) of Regulation No. 139 to be a contract described in §3222 of the Insurance Law.

- (a) Section 3222(c) places two requirements on funding agreements. The requirements are as follows:

- (i) No amounts shall be guaranteed or credited under any such funding agreement, except upon reasonable assumptions as to investment income and expenses, and on a basis equitable to all holders of funding agreements of a given class.
 - (ii) Such funding agreement shall not provide for payments to or by the insurer based on mortality or morbidity contingencies.
- (b) This definition is somewhat broad. Section 3222 neither defines nor restricts funding agreements, except by limiting to whom they may be issued. It can be interpreted to allow most types of annuity contracts, as long as such contracts eliminate all provisions that provide for payments to or by the insurer based on mortality or morbidity contingencies.
- (i) The typical group funding agreement, when first authorized, resembled fixed rate/fixed maturity guaranteed interest contracts described in the *Guaranteed Interest Contract Outline*, except that no provision is made for the purchase of annuities under the contract.
 - (ii) However, group funding agreements today often provide for a fixed interest rate or indexed rate that is reset periodically and need not provide for a fixed maturity date.

D.6) Group Annuity Contract

Any policy or contract, except a joint, reversionary or survivorship annuity contract, whereby annuities are payable dependent upon the continuance of the lives of more than one person. Section 4238(a).

- (a) We view group contracts that provide for the purchase of annuities or the payment of annuity benefits for plan participants or their beneficiaries to be group annuity contracts
- (b) The terminology used in Sections 3223 and 4238 was drafted to apply to group deferred annuity contracts which are rarely sold today.
- (c) Plans funded by group annuity contracts include 401(a), 401(k), 457, 414(d), and 403(b), among others.

D.7) Participant

Any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. See §3(7) of ERISA.

D.8) Separate account accumulation agreement

Any contract which provides that amounts paid to the insurer shall be allocated by the insurer, in whole or in part, to one or more separate accounts for the purpose of accumulating or holding in such separate account amounts to

- (a) accumulate or hold in such separate account funds to be applied to provide health insurance;
- (b) accumulate or hold in such separate account funds credited under funding agreements delivered pursuant to section 3222 of the Insurance Law;
- (c) accumulate or hold in such separate account funds for any purpose authorized in section 4240(a), provided that such agreement is not subject to Regulation No. 77.

D.9) Separate account agreement

An agreement which is a separate account accumulation agreement, a separate account annuity contract or a variable annuity contract.

D.10) Separate account annuity contract

Any contract which provides that amounts paid to the insurer to provide annuities shall be allocated by the insurer, in whole or in part, to one or more separate accounts pursuant to §4240 of the Insurance Law, whether such annuities are payable in fixed or variable amounts or both. See §50.1(a)(3) of Regulation No. 47 [11 NYCRR 50].

Amounts allocated to the insurer's general account are subject to standards that apply to general account products.

D.11) Variable annuity contract

A separate account annuity contract that includes provision for deferred or immediate annuity payments the amount of which, after such payments have commenced, varies according to the investment experience of any separate account maintained by the insurer as to such contract, as provided in §4240 of the Insurance Law. See §50.1(a)(4) of Regulation No, 47 [11 NYCRR 50]. Unallocated separate account annuity contracts may provide for the purchase of variable annuity contracts for employees upon termination of employment.

D.12) Unallocated Contract

Any contract that does not provide for the maintenance of one or more accounts for each employee or member of all deposits made by or on behalf of such employee or member.

- (a) This term usually applies to the active life or accumulation fund of a group annuity contract. Amounts set aside for retired lives are usually allocated to specific plan participants. Annuities are generally purchased and retired life certificates are issued to such retirees or terminated employees.

- (b) The insurer is not required to issue an active life certificate pursuant to §3219(b) or §3223(d) of the Insurance Law (but see §50.7(b)(2) of Regulation No. 47).
- (c) The insurer is not irrevocably committed to apply under the terms of the contract to the payment of benefits by it to specific plan participants or their beneficiaries or to the purchase of annuities for specific plan participants.

D.13) Unallocated amounts

Any funds credited to the accumulation fund which the insurer is not currently irrevocably committed to apply under the terms of the contract to the payment of benefits by it to specific plan participants or beneficiaries or to the purchase of annuities for specific plan participants, adjusted for any accrued experience rating charges or credits, including expenses and administrative, sales and surrender charges provided for under the contract. See §40.2(z) of Regulation No. 139.

II) Filing Process

II.A) General Information

A.1) Prior Approval Requirement

Section 3201(b)(1) provides that no policy form shall be delivered or issued for delivery in this state unless it has been filed with and approved by the superintendent *as conforming to the requirements of the Insurance Law* (standard and generally applicable provisions) and *not inconsistent with law* (federal and state statutory, regulatory and decisional law).

Section 50.5 of Regulation No. 47 provides that the filing and approval requirements applicable to individual and group annuity contracts and certificates used in connection with group annuity contracts shall, to the extent appropriate, be applicable to individual and group separate account annuity contracts and certificates used in connection with group separate account annuity contracts, respectively.

A.2) Discretionary Authority For Disapproval

Section 3201(c)(1) and (2) permits the Superintendent to disapprove any policy form that contains provisions that are misleading, deceptive, unfair, unjust, or inequitable or if its issuance would be prejudicial to the interests of policyholders or members. See also §§2123, 3209, 4224, 4226, 4228(h), 4231, 4239.

A.3) No Filing Fee

A.4) Self-Support Requirement

Upon its issuance each group annuity contract must appear to be self-supporting based on reasonable assumptions as to interest, mortality, and expense. See §4238(e).

II.B) Types of Filings

B.1) Prior Approval

Policy forms submitted under §3201(b)(1) of the Insurance Law are subject to the submission rules noted herein, especially Circular Letter Nos. 63-6 and 97-14. Submissions are generally handled on a first-in, first-out basis.

B.2) Alternative Approval Procedure

Section 3201(b)(6) and Circular Letter No. 2 (1998) provide for an expedited approval procedure designed to prevent delays by deeming forms to be approved or denied if the Department or insurer fail to act in a timely manner.

Circular Letter No. 2 (1998) provides that the certification of compliance for this type of submission should make reference to any law or regulation that specifically applies or is unique to the type of policy form submitted. An alternative would be to submit a certification of compliance with the applicable laws and regulations cited in this product outline. A statement that the filing is in compliance with all applicable laws and regulations is not acceptable.

B.3) Prior Approval With Certification Procedure

Circular Letter No. 6 (2004) provides for an expedited approval procedure based on an appropriate certification of compliance signed by an officer of the company in the format provided by Circular Letter No. 6 (2004). Certifications that have altered or otherwise modified the language of the certification will not be accepted.

The original signed certification must be provided. The form number of each form and the memorandum of variable material for each form must be listed in the body of the certification. For long lists, it would be acceptable to begin the list in the body of the certification and include the rest of the list in an attachment to the certification. However, it would be unacceptable to list all of the forms in a separate attachment.

The submission letters for paper submissions and the Filing Description for submissions made via the System for Electronic Rate and Forms Filing (SERFF) will need to comply with applicable circular letter and product outline guidance.

Substitution filings/follow-up correspondence with post-approval form changes requested prior to initial issuance of forms will not be permitted for Circular Letter No. 6 (2004) filings.

Unless the Department has granted permission, the Circular Letter No. 6 (2004) process may not be used for guaranteed separate account products utilizing one or more non-pooled separate accounts or for unallocated group annuity or funding agreement products with an initial deposit in excess of \$50 million. See the Department's Filing Guidance dated 08/12/2009.

B.4) Out-of-State Filings

Pursuant to §3201(b)(2), domestic insurers must file with the Superintendent all unallocated group annuity contracts and funding agreements intended for delivery outside of the state.

II.C) Pre-filed Group Insurance Coverage – Circular Letter 1964-1

C.1) Purpose

Circular Letter 64-1 permits insurers to provide or assume risk for group life and group annuity coverage prior to the filing or approval of policy forms. We have extended the use of this procedure to funding agreements.

C.2) Conditions for Providing Coverage Prior to Approval

- (a) Immediate coverage requested to meet specific need of policyholder.
- (b) Insurer has reasonable expectation of approval or acceptance.
- (c) Confirmation letter sent to policyholder by the insurer stating:
 - (i) The nature and extent of benefits or change in benefits;
 - (ii) That the forms may be executed and issued for delivery only after filing with or approval by the department;
 - (iii) An understanding that, if such forms are not filed or approved or are disapproved, the parties will be returned to status quo insofar as possible, or the coverage will be modified retroactively to meet all requirements necessary for approval; and
 - (iv) The effective date of coverage (Best Practice)
- (d) Department notification.
 - (i) Statement explaining circumstances and reasons for delay in submitting forms within 12 months for group annuity contracts.
 - (ii) Follow-up statement every six months until form is submitted. If reason for delay is unacceptable, Department may pursue a violation under Section 4241 for willful violation of the prior approval requirement.

C.3) Recommended Practice

- (a) It is recommended that insurers notify the Department of coverage within 30 days (i.e., copy of confirmation letter) of coverage and submit forms within six months, notwithstanding the twelve month period noted in Circular Letter 64-1.
- (b) Insurers should review pre-filings periodically (monthly) to verify compliance with conditions for pre-filing.
- (c) Insurers should vigorously pursue approval (or acceptance for out-of-state filings) of pre-filed cases after forms have been submitted to mitigate harm if forms are found not to comply with applicable requirements.

II.D) Preparation of Forms – Circular Letter 1963-6

D.1) Duplicates

Filings, except for SERFF, need to be made in duplicate. §I.E.7 of Circular Letter 63-6.

D.2) Form Numbers

Form numbers need to appear in lower left-hand corner of the cover page of the form. §I.D. of Circular Letter 63-6. The lower left-hand corner of the subsequent pages of the form should either contain the same form number as appears on the cover page or should be left blank. The subsequent pages should not contain form numbers that differ from the form number on the cover page.

D.3) Hypothetical Data

All blank spaces for policy forms need to be filled in with hypothetical data. § I.E.1 of Circular Letter 63-6.

D.4) Application

If an application will be attached to the contract, it must be submitted with the contract for approval. If previously approved, the submission letter should so indicate. §I.E.4 of Circular Letter 63-6.

D.5) Final Format

Policy forms submitted for formal approval should be submitted in the form intended for actual issue. §I.F.1 of Circular Letter 63-6.

D.6) Submissions Made on Behalf of the Insurer

If the filing is made on behalf of the insurer by another party, a letter authorizing the third party to act on behalf of the insurer must be provided. The letter must be:

- (a) on company letterhead or include the company name in the subject line of the letter;
- (b) specifically addressed to the New York State Department of Financial Services;
- (c) properly executed by an authorized officer of the insurer;

- (d) dated; and
- (e) either
 - (i) specific to the file submitted for approval by including form number(s); or
 - (ii) generally applicable to all policy forms filed on behalf of the insurer as long as a copy of such authorization is included in each submission.

It is the insurer's responsibility to ensure that their authorizations are accurate and reflect their current relationship with the third party filer.

D.7) Incorporation by Reference

All incorporations by reference should be attached to or accompany the submission. See also Section 3204.

II.E) Submission Letters/SERFF Requirements

E.1) Caption Requirement

For paper filings, the "re" of the submission letter must identify each form and the memorandum of variable material for each form that is being submitted for approval or filed for informational purposes and must be in compliance with Circular Letter No. 8 (1999). Section 3201(b)(6) ("Deemer") filings must be identified in the "re" or caption. Circular Letter No. 6 (2004) filings must be identified in bold print in the body of the submission letter or in the "re" or caption.

For SERFF filings, please see the guidance available on the Department's website at <http://www.dfs.ny.gov/insurance/serflife.htm>.

E.2) Submission Letters/SERFF Filing Description

Circular Letter No. 6 (1963) §I.G.

- (a) For paper submissions, the submission letter must be submitted in duplicate and signed by a representative of the company authorized to submit forms for the company.
- (b) For SERFF submissions, the Life Bureau no longer requires that a separate signed cover letter be included with submissions. Instead, any information that would ordinarily be included in the signed Cover Letter must be placed in the SERFF Filing Description. Inclusion of "Please see cover letter" or phrases of similar intent in the filing description section will not be considered as meeting filing requirements.

Note: References in this outline to submission letter content requirements are also requirements for the SERFF Filing Description unless otherwise noted.

- (c) Advise as to whether or not the form is replacing a previously submitted form. If there have not been a substantial number of

changes, submit a highlighted copy showing the material differences or changes made to the form. If the changes are too extensive, then a highlighted copy is not required, but the changes must be identified in the submission letter. State whether the previously submitted form was approved, disapproved, withdrawn or otherwise disposed or is still pending approval (under review) with the Department and provide the form number and file number of the such form.

- (d) If a form being filed for formal approval had previously been submitted for preliminary review, a reference to the previous submission and a statement setting out either (1) that the formal filing agrees precisely with the previous submission or (2) the changes made in the form since the time of preliminary review. Submit a highlighted copy showing the differences or changes made to the form. A redlined copy is helpful.
- (e) If a form is intended to replace a very recently approved form because of an error found in the approved form and the approved form was not issued, the insurer may request to make a substitution of the approved form. The substitution request letter must confirm that the form has not been issued and identify the changes made to the corrected form. The insurer may, under these circumstances, use the same form number on the corrected form being submitted. If the original form was approved in paper format the insurer must also return the stamped original of the approved form to the Department. If, however, the form has been issued, the insurer must place a new form number on the corrected form and need not return the previously approved form. This option is not available for policy forms approved under Circular Letter 6 (2004) filings.
- (f) If the form being submitted is other than a contract (i.e. rider, endorsement, or insert page), give the form number of the contract with which it will be used, or, if for more general use, describe the type or group of such forms as well as whether the pending form(s) will be used with new and/or previously issued/delivered contracts.
- (g) When the policy form is designed as an insert page form, the insurer must submit a statement of the mandatory pages which must always be included in the policy form, and a list of all optional pages, if any, including application forms, together with an explanation of how the form will be used (previously approved forms should be identified by form number and approval date). We object to a company's use of the matrix approach that identifies benefit provisions within a document with separate form numbers. See Circular Letter No. 6 (1963) § I.G.8. and Circular Letter No. 4 (1963) § I.A.2.

- (h) Statement as to how the form will be used as described in Circular Letter 1976-12.
- (i) Description of benefits/coverage provided. Circular Letter No. 6 (1963) § I.G.2 and 7.
- (j) Description of the type of group contractholder, as defined in Section 4238(b). Specify the applicable paragraph or paragraphs in §4238(b) which best describe the group or groups for which the policy forms are intended. The statement that the forms are for use with all eligible groups should be avoided.
- (k) Statement describing the type of pension plan or other program funded by the contract.
- (l) Statement as to whether the contract is noncontributory, contributory or funded solely by employee or member contributions. If the policy is contributory for some insureds, or for some levels of insurance, or under some conditions, indicate what situations or conditions would permit or require contributions from the insureds.
- (m) Submission letters should be as detailed as possible explaining any unique or innovative products or features and any special markets intended. (In general, an innovative or unique product or feature would include one that has not been previously approved by the Department for the insurer).
- (n) Submission letter should indicate whether the contract has been filed with the Securities and Exchange Commission ("SEC") (or is exempt from such requirement) and the current status of such filing, if applicable.
- (o) Statement indicating whether the plan of operation of the separate account or separate accounts have been approved by the Life Bureau (New York Office). Please identify the file number and approval date and attach a copy of the approval letter, if the plan has already been approved.
- (p) For Regulation No. 128 market value separate account contracts funding guaranteed benefits, the submission must identify the product as one whose reserving and asset maintenance are subject to Regulation No. 128 and shall identify the type of product and whether it is subject to §97.5(g)(1) for fixed benefit only contracts or §97.5(g)(2) for contracts that do not provide fixed benefits only. See §97.4(c) of Regulation No. 128.
- (q) If the annuity does not comply with a specific product outline provision or if the Company has an alternate interpretation of a product outline provision, the submission letter must identify the provision and provide a complete explanation of the Company's position on the issue. Such submissions may not be submitted

through the Circular Letter 6 (2004) certified process unless the Department has given permission.

E.3) Circular Letter No. 14 (1997)

Filings that are incomplete or do not comply with laws and regulations will be closed. See Circular Letter No. 14 (1997). Note a product that does not comply with a specific product outline requirement or which is considered a substantive noncomplying product will be a factor in determining whether a file will be closed, unless a noncompliance explanation is included in the submission letter.

E.4) Resubmissions

If the annuity has been previously submitted to the Department and the file was closed or withdrawn, any resubmission of the annuity to the Department must be complete by itself, reference the file number of the previously closed file and address all outstanding issues in the new submission letter.

E.5) Informational Filing

An informational filing should be identified in the "Re" of the submission letter. All informational filings will be acknowledged by the Department indicating that the information submitted has been placed on file with the Department for informational purposes only. The company should wait for the acknowledgement from the Department that the information has been filed prior to its use. For the submission of an informational filing through SERFF, the company should use a SERFF TOI of "Life – Informational", a SERFF Sub-TOI of "Form or Rate Related", a SERFF Filing Type of either "Form" or "Rate" as appropriate, and a SERFF requested Filing Mode of "Informational".

II.F) Attachments

F.1) Memorandum of Variable Material

(a) The submission must include a separate detailed Memorandum of Variable Material to explain any variable material in the policy forms. The Memorandum of Variable Material should be drafted in sufficient detail to determine the scope of variation for each variable item. Where text is variable, the memorandum should include alternative text and/or an explanation of when the bracketed text will be omitted from the form. Similarly, variable numerical items should include the range (i.e. minimum and maximum) of variation. An explanation of variable material that the variations "will conform to law" or "as requested by the policyholder" is not acceptable. It should be clear which item in the explanation corresponds to which variable item in the form. One option would be to number the items in the explanation of

variable material and place the number of the item from the explanation next to the corresponding variable item in the form. The Memorandum of Variable Material is subject to approval and must comply with all substantive and procedural filing guidance issued by the Department.

- (b) Open-face riders or endorsements may be filed for general use in amending illustrative or variable material within the scope of the approved memorandum of variable material for the form being amended. The memorandum of variability should include an explanation to that effect.

F.2) Flesch Score Certification - Readability Requirement

- (a) Provide a Flesch score certification signed by an officer of the company in accordance with Section 3102. The Flesch score must be at least 45. The number of words, sentences and syllables in the form should be set forth as part of the certification. Please refer to the Department's February 18, 1982 letter for a sample certification available on the Department's website at:

<http://www.dfs.ny.gov/insurance/life/guidance/3102Intro.doc>

- (b) Section 3102(b)(1) excludes:

- (i) any insurance policy that has been determined to be a security subject to federal jurisdiction;
- (ii) any certificates issued pursuant to a group annuity contract issued to an employer covering persons employed in more than one state,
- (iii) any group insurance policy covering a group of one hundred or more lives, other than dependents, at the date of issue, provided that this exclusion does not apply to certificates issued pursuant to a group insurance policy delivered or issued for delivery in this state.
- (iv) any group annuity contract which serves as a funding vehicle for pension, profit sharing or deferred compensation plans; provided that this exclusion does not apply to any certificate issued pursuant to such group annuity contract.
- (v) any funding agreement issued pursuant to §3222.

F.3) Plan of Operation and Actuarial Materials

- (a) The filing must include a copy of the approval letter from the Department for each plan of operation (or amendment thereof). If approval has not yet been received, include a statement advising as to when the plan of operation was filed with the Department or deemed approved by operation of law. Section 4240(e).
- (b) For contracts subject to Regulation 128, the submission shall be accompanied by a copy of the approved or pending Plan of

operation pursuant to Section 97.4 of Regulation 128 and an undertaking to file actuarial opinions and memoranda in conformity with Section 97.6 of Regulation No. 128.

F.4) Summary Sheet

For group products, including group annuity, group funding agreement, and synthetic GIC policy forms, a completed summary sheet must be included with the submission regardless of the submission method. The summary sheet is available on the Department's website at:

http://www.dfs.ny.gov/insurance/life/product/ga_summary_08032012.pdf

II.G) Key References

G.1) Insurance Law

§§2123, 3102, 3201, 3204, 3209, 3222, 3223, 4224, 4226, 4231, 4238, 4239, 4240,

G.2) Regulations

Insurance Regulation Nos. 34-A , 47, 128, 139 (11 NYCRR); also 9 NYCRR 9000 et seq.

G.3) Circular Letters

CL 4 (1963), CL6 (1963), CL 1 (1964), CL 12 (1976), CL 2 (1992), CL 14 (1997), CL 2 (1998), CL 8 (1999), CL 6 (2004), CL27 (2008)

III) Eligible Group Requirements

It is the insurer's responsibility to determine whether the definitional requirements for an eligible group are satisfied at the time of issue and thereafter. The insurer should determine whether all employees or members eligible are covered;

III.A) Types of Contractholders for Group Annuity Contracts - §4238(b)

A.1) Employer/Employee -- Section 4238(b)(1)

A.2) Employer Association -- Section 4238(b)(2)

A.3) Labor Union -- Section 4238(b)(3)

A.4) Employer/Labor Union Trust -- Section 4238(b)(4)

A.5) Association (common interest, calling, profession) -- Section 4238(b)(5)

A.6) IRA -- Section 4238(b)(6)

A.7) Other Employer Trust -- Section 4238(b)(7)

A.8) Foundation or Endowment Fund -- Section 4238(b)(8)

A.9) Affinity Association -- Section 4238(b)(9)

A.10) Financial Institution -- Section 4238(b)(10)

A.11) Plaintiffs or Claimants -- Section 4238(b)(11)

III.B) Types Of Funding Agreement Holders - §3222(b)

B.1) Another Insurer or Subsidiary Thereof

- (a) Funding agreements may be issued to insurance companies (or their subsidiaries) without restriction as to purpose.
- (b) An affiliate of an insurer (other than a subsidiary) must satisfy one of the purposes listed in §3222(b) to be eligible to purchase a funding agreement. See L.1984, c. 867, §2.

B.2) Other Entities And Individuals/Permitted Purpose

Funding agreements may be issued to entities other than insurers and subsidiaries thereof and to individuals for the following purposes:

- (a) Employee Benefit Plans. To fund benefits under any employee benefit plan as defined in the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq, maintained in the United States or in any foreign country.
- (b) Tax Exempt Organizations. To fund the activities of any organization exempt from taxation under IRC§501(c) or similar organization in any foreign country.
- (c) Government Programs. To fund any program of the government of the United States, the government of any state, foreign country or political subdivision thereof, or any agency or instrumentality thereof.
- (d) Structured Settlements. To fund any agreement providing for periodic payments in satisfaction of a claim. See L.1983, c.919, §2.
- (e) Large Institution Program. To fund any program of an institution which has assets in excess of \$25 million. See L.1984, c.867, §2.

III.C) Types of Group Policyholders For Life and Accident and Health Insurance

C.1) See §4216(b) of the Insurance Law for group life insurance. See also Group Term Life Insurance and Group Universal Life Insurance product outlines.

C.2) See §4235(c)(1) of the Insurance Law for accident and health insurance.

III.D) Special Rules For Specific Plan Purchasers

D.1) N.Y. Education Law, Art. 8-C, §398 *et seq.*—contains special statutory rules relating to tax-sheltered annuity (TSA) programs (referred to in the statute as "Special Annuity Programs").

D.2) N.Y. State Finance Law §5—basic statutory rules establishing the N.Y. Deferred Compensation Board for the administration of governmental deferred compensation plans (§457 plans) in New York State.

- D.3) 9 NYCRR 9000—rules and regulations of the N.Y. State Deferred Compensation Board, which, among other things, impose substantive requirements on the content of annuity contracts (and other contracts) issued to §457 plans in New York State.

III.E) Non-Recognized Groups

- E.1) Section 4238 was not modernized to permit Discretionary groups like those permitted for group life insurance in Section 4216(b)(14) and for group accident and health insurance in Section 4235(c)(1)(M). As such, groups that fail to satisfy the definitional requirements in §4238(b) of the Insurance Law are not recognized groups under the Insurance Law. Such group annuity contracts cannot be delivered in this state. However, certificates covering New York residents under such group annuity contracts delivered out-of-state must be delivered in this State pursuant to Section 3219(b). Group annuity certificates delivered in this state that are funded solely by individual contributions must comply with the provisions of the Insurance Law applicable to individual annuities. Such certificates should be submitted for review and approval. The group annuity contract should be submitted as well. It will be reviewed to ensure that the contract and certificate are not inconsistent. The contract cannot include provisions that invalidate or impair the terms of the certificate.

III.F) Unauthorized Insurers

- F.1) Section 1101(b)(1) prohibits unlicensed insurers from doing an insurance business in this state by mail or otherwise.
- F.2) Section 1101(b)(2)(B) provides an exception (referred to as the “group exception”) to the prohibition in Section 1101(b)(1) for certain types of group insurance issued outside of New York.

The group exception applies to group annuity contracts where the group conforms to the definitions of eligibility in §4238(b) of the Insurance Law, except paragraphs (6) and (7), and the master contracts were lawfully issued without this state in a jurisdiction where the insurer was authorized to do an insurance business.

- F.3) Section 1101(b)(2)(B) excepts from the group exception to the mail order prohibition any transaction with respect to a group annuity contract used in the individual insurance market, including
 - (a) IRC §408 contracts (IRAs);
 - (b) IRC§403(b) (Tax Sheltered Annuities), and
 - (c) Plans under which payments are derived wholly from funds contributed by the persons covered thereunder. See L.1978, c.428.
- F.4) As such, any New York certificate funded solely by employee or individual contributions is subject to prior approval.

IV) Contract Provisions

IV.A) Cover Page of the Contract and Certificate

A.1) Company's Name and Address

- (a) The New York licensed insurer's name must appear on the cover page (front or back).
- (b) Full street address of the company's Home Office (bracketed or underlined to reflect possible future changes) for disclosure purposes on the front or back cover page of the contract. For changes applicable to new business, an information filing is required. For changes applicable to existing business, an endorsement setting forth the new address must be submitted for approval and sent to all holders of in-force contracts. Please refer to the guidance available on the Department's website.
- (c) In addition to the home office address, the full street address of the administrative or service office (if different than the home office address) may be set forth on the front or back cover of each contract. The administrative or service office address, if any, should be bracketed or underlined to reflect possible future changes. (An informational filing is required for such changes.)
- (d) The forms must exclude any references to an insurer not licensed to do business in New York. Section 3201(c)(1).
- (e) If the name of another entity is included on the cover page (insurance group designation, name of the licensed parent company or licensed affiliate, etc.) or if a logo, trademark or other device is included, such name or device shall not be displayed in a manner that would have a tendency to mislead or deceive as to the true identity of the insurer, or create the impression that someone other than the insurer would have any responsibility for the financial obligations under the contract. See §3201(c)(1). This would apply to applications as well.
 - (i) The name of the issuing insurer should be clearly disclosed, with equal prominence to any other entity mentioned.
 - (ii) The contract should be clearly identified as an annuity contract issued by the insurer.
 - (iii) See NASD Rule 2210 (Communications with the Public), which requires that the name of the Financial Industry Regulatory Authority ("FINRA") member (and nonmember) be disclosed clearly and prominently and that the nature of the relationship, if any, and the products offered by each entity be clearly identified.
 - (iv) See also Rules 134, 135a and 482 of the Securities Act of 1933.

A.2) Form Identification Number

A form identification number (consisting of numerical digits, letters or both) must appear in the lower left-hand corner of the cover page in accordance with §I.D. of Department Circular Letter No. 6 (1963). Each form number should be sufficiently unique so as to distinguish the form from all others used by the insurer.

A.3) Brief Description of Contract

- (a) A description of the contract, such as “Market Value Separate Account Agreement Funding Guaranteed Benefits”.
- (b) There must be a statement indicating whether the contract is participating or nonparticipating. This requirement generally applies to the portion of the contract funded through the insurer’s general account. Section II.F.1. of Circular Letter No. 4 (1963).
 - (i) §4240(d)(1) generally excepts separate account annuity contracts from the requirement in §4231(e) of the Insurance Law for mutual insurers to provide coverage on a participating basis.
 - (ii) Pursuant to §4231(e)(1), any policies or contracts described in §4231(g)(2) and deferred annuity providing a period of deferment of annuity payments not in excess of one year can be issued on a nonparticipating basis.
 - (iii) Section 4231(g)(2) provides, in part, that dividends need not be distributed on any deferred annuity contract for the period following the period of deferment of annuity payments nor on any group annuity contract providing deferred annuities for a class or classes of participants in a qualified pension or profit sharing plan who have terminated their participation under such plan, or with respect to which class or classes further contributions have been discontinued under the plan and notice of such discontinuance has been given to the commissioner of internal revenue (or regulatory authority of such other jurisdiction).

A.4) Separate Account Disclosures

- (a) There must be a statement identifying the elements (such as benefits, premiums etc.) of the contract which are on a variable basis. Section 4240(a)(11)(C).
- (b) There must be a statement that the contract value of the variable sub-accounts (and any other variable contract elements) is based on the value of the separate account assets which are not guaranteed as to fixed dollar amounts and will increase or decrease in value based upon investment results. Section 4240(a)(11).

(c) Every variable annuity certificate that provides for variable annuity payout options must include a statement which either (i) discloses the smallest annual rate of investment return which would have to be earned on the assets of the separate account so that the dollar amount of variable annuity payments will not decrease; or (ii) sets forth the conditions under which the dollar amount of variable annuity payments will not decrease. Section 50.6(b) of Regulation No. 47. As an alternative, this information may be included on the first page of the specification page.

(i) The smallest annual rate of return cannot exceed 6.5%, except as noted in item (ii) below. Section 50.6(a)(1) of Regulation 47 provides that the method of computing the dollar amount of variable annuity payments shall be such that, if the annual rate of investment return of the separate account were six and one-half percent at all times from the issue of the certificate, such amounts would not decrease. If the assumed interest rate underlying the annuity payments is 5% or more, the method of computing the variable annuity payments may fail to comply with §50.6(a)(1). An AIR of 5% or more would leave a potentially inadequate margin of 1.5% (i.e., 6.5% less 5%) or less for mortality, expenses and risk charges.

(ii) Note the First Amendment to Regulation No. 47 amends §50.6(a) and (b) to permit insurers to use other methods or rates in computing the dollar amount of variable annuity payments where such methods or rates are determined by the Superintendent to be fair, equitable, reasonable and not less favorable to participants or annuitants.

Note that this provision would not be required for an unallocated separate account agreement that provides for variable annuity payments upon annuitization. It would only apply at the retired life certificate level.

(d) A statement of any explicit charges against the assets of the separate account. Section 50.6(b) of Regulation No. 47.

A.5) Officer's Signatures

(a) The signature of at least one officer of the company is needed to execute the contract as a matter of contract law.

(b) Signatures should be denoted as variable material.

A.6) Specification Page

Note: An application/enrollment form that is attached to and included as part of the entire contract may be used in lieu of the specification page provided the application/enrollment form includes the same items as are required for the specification page. For unallocated

group annuity contracts and funding agreements, this information may be provided in the body of the contract.

- (a) Complete with hypothetical data pursuant to Section I.E.I. of Circular Letter No. 6 (1963).
- (b) The current interest rate being credited must be set forth. The rate may be bracketed to denote variable material.
- (c) The guaranteed minimum interest rate, if any, must be set forth. If the minimum annual effective rate of interest is subject to redetermination after issue, the redetermination date(s), basis, calculation and period must be stated in the contract.
- (d) The available sub-accounts in any separate account may be set forth on the specification page. The sub-accounts should be bracketed to denote variable material. When sub-accounts of the separate account are added, deleted, or changed, the Company must make an informational filing indicating the updated list of sub-accounts. A copy of the approval letter from the Department's Life Bureau in New York City for the amended Plan of Operations, or if such approval has not been received, a copy of the Department's acknowledgement letter for that filing is to be included in the filing. Please note that the new funds cannot be utilized until the Life Bureau in New York City has approved the new/amended Plan of Operations. Any available fixed account should not be bracketed. Bracketing indicates that the material is variable and subject to change.
- (e) As noted in §IV.A.4(c) above, the smallest rate of return information must be provided on the specification page if this information is not presented on the cover page.

IV.B) Standard Provisions

B.1) General Notes.

- (a) *Separate Account Exceptions.* Section 4240(d) of the Insurance Law provides that all pertinent provisions of the Insurance Law apply to separate accounts and agreements relating thereto, except as otherwise provided in §4240.
 - (i) Section 4240(d)(1) of the Insurance Law states that the following provisions of the Insurance Law shall not apply to annuity contracts or to certificates subject to §§3219(a) and 4240 of the Insurance Law (i.e., contracts and certificates sold in the individual insurance market):
 - (I) Section 3219(a)(1) [grace period] ,
 - (II) Section 3219(a)(7) [discontinuance options],
 - (III) Section 3219(a)(8) [reinstatement]
 - (IV) Section 3219(a)(9) [free look];

- (V) Section 3223(a) [grace period];
 - (VI) Section 3223(d) [active life certificate];
 - (VII) Section 4217 [valuation of life insurance policies and annuity contracts];
 - (VIII) Section 4221 [standard nonforfeiture law for life insurance];
 - (IX) Section 4223 [standard nonforfeiture law for annuities];
 - (X) Section 4231(e) [mutual life insurer's authority to write nonparticipating business].
- (ii) Pursuant to Section 4240(d)(1), the exceptions provided in §4240(d)(1) do not apply to any contract or certificate providing benefits with respect to the amounts allocated to a separate account, if such benefits are guaranteed at any time to be not less than an amount equal to or greater than such allocated amounts accumulated to such time at three percent per annum.
 - (iii) Section 4240(d)(2) of the Insurance Law states that contracts for individual variable annuities and such certificates delivered or issued for delivery in this state shall contain grace, reinstatement, and nonforfeiture provisions appropriate to such variable contracts and certificates.
- (b) *More Favorable Provisions.* Pursuant to §3223 of the Insurance Law and also §50.7(b) of Regulation No. 47, every group separate account annuity contract delivered or issued for delivery in this state (and every certificate used in connection therewith) shall contain in substance the standard provisions to the extent that such provisions are applicable or provisions which are appropriate and more favorable to the annuitants, or not less favorable to annuitants and more favorable to the holders of such contracts.

B.2) Grace Period

There shall be a 31-day grace period following the due date of any required payment after the first payment within which the payment may be made. During such grace period, the contract shall continue in full force. See §3223(a), §4240(d)(2) and §50.7(b)(1) of Regulation No. 47.

- (a) This provision applies to GICs with a deposit window, many of which are funded through book value separate accounts.
- (b) It also applies if a payment is required to pay any fee or expense charges.
- (c) If the contract continues in force without penalty, no grace period provision is necessary.

(d) §50.7(b)(1) provides that the contract shall include a statement of the basis for determining the date as of which any such payment received during the grace period shall be applied to produce the values arising therefrom under the contract.

B.3) Entire Contract

(a) A provision specifying the document or documents, which shall include the contract and, if a copy is attached thereto, the application of the contractholder, constituting the entire contract between the parties. See §3223(b) and §3204.

(b) Many GICs funded through book value separate accounts have deposit agreements or deposit riders. These forms must be attached to the contract. If the initial deposit account terms are bracketed and there is a satisfactory explanation of variables, the deposit agreement and/or rider need not be resubmitted for new deposit windows or deposit cells.

B.4) Misstatement of Age or Sex

A provision for the equitable adjustment of the benefits payable or of the payments to be made to the insurer if the age or sex of any person, or of any other fact affecting the amount or date of payment by or to the insurer has been misstated. See §3223(c).

(a) The *Arizona vs. Norris* decision held that Title VII of the Civil Rights Act of 1964 prohibits an employer from offering its employees a retirement benefit option where a woman is paid a lower monthly retirement benefit than a man who has made the same contributions.

(b) We have permitted misstatement provisions that omit the reference to sex.

(c) §3219(a)(5) requires that the interest rate to be charged or credited to underpayments and overpayments be specified in the contract and cannot exceed six percent. (Best Practice)--The §3223(c) provision should also state whether and how much interest will be charged against or credited to such underpayments and overpayments. The rate for overpayments may not exceed the rate for underpayments. We may question any rate above six percent.

B.5) Active Life Certificate

(a) The Department has not required an active life certificate when a general account contract is unallocated, even if it is contributory. Chapter 172 of the Laws of 1982 amended §160(d) [now §3223(d)] of the Insurance Law to eliminate the requirement for an active life certificate for contributory plans if the contract does not provide for the maintenance of one or more accounts for each annuitant.

- (b) However, Section 50.7(b)(2) of Regulation No. 47 has not been amended to reflect the change. Said section still requires a provision, with an appropriate reference thereto in the certificate, specifying the options available to an annuitant who contributes to the cost of his annuity, or to his beneficiary or beneficiaries in the event of
 - (i) the termination of his employment or the termination of the group separate account annuity contract, while the annuitant is alive and prior to the commencement date of the annuity, or
 - (ii) death prior to the commencement date of the annuity. Such options shall, in any case, include either
 - (I) an option to receive a cash payment at least equal to the aggregate amount of the annuitant's contributions made under the contract, without interest, or
 - (II) an option to receive a cash payment equal to the accumulated value of the annuitant's contributions made under the contract.
- (c) We have permitted the plan's summary plan description to satisfy the active life certificate requirement. This avoids unnecessary duplication.
- (d) Until §50.7(b)(2) is amended, it appears that insurers should indicate that a summary plan description will be provided to plan participants and that the participant will receive benefits at least equal to those specified in §50.7(b)(2) of Regulation No. 47. Please note that we intend to amend this provision in Regulation No. 47 to be consistent with §3223(d), notwithstanding the language in §4240(d)(1) making §3223(d) inapplicable to separate account annuity contracts.

B.6) Retired Life Certificate

- (a) A provision stating that the insurer shall issue for delivery to each person to whom annuity benefits are being paid thereunder a certificate setting forth a statement in substance of the benefits to which such person is entitled under the contract. See §3223(e).
- (b) The retired life certificate should include the following provisions:
 - (i) Entire contract provision.
 - (ii) Misstatements provision.
 - (iii) A provision identifying the insurer, including the mailing address.
 - (iv) A provision describing the annuity benefit and any limitations, if any, on the insurer's guarantees with respect to such benefit, including the amount and frequency of annuity

payments, the minimum number of payments, any refund features and survivorship rights, etc.

- (v) A facility of payment provision. Note that such provision should not conflict with Article 81 of the New York Mental Hygiene Law and the Americans with Disabilities Act. In New York, until a person is found to be legally incompetent to handle annuity payments and no guardian has been appointed, the insured is entitled to such payments.
- (vi) A beneficiary provision.
- (c) Section 3223(e) requires delivery of a certificate to each person to whom annuity benefits are being paid. This requirement is not dependent upon whether or not such annuity payments are guaranteed. For example, certificates would be required where the contract provides for annuity benefits that are not guaranteed by the insurer and are paid by the insurer at the direction of the contractholder. If non-guaranteed annuity benefits are provided, the retired life certificate must clearly disclose any limitations on the insurer's guarantees under the certificate.
- (d) The retired life certificate should be submitted for review, unless a previously approved certificate will be used. In such case, the submission letter should specify the form number, file number and approval date. Please note that retired life certificates are considered policy forms as defined in §3201(a).

B.7) Governing Law

- (a) Pursuant to §3103(b), no annuity contract delivered or issued for delivery in this state shall provide that the rights or obligations of the insured or of any person rightfully claiming thereunder, with respect to an annuity contract upon a person resident in this state, shall be governed by the laws of any jurisdiction other than this state.
- (b) For group annuity contracts delivered out-of-state, the governing law provision must make it clear that New York law governs certificates delivered in this state, where the certificates are funded solely by contributions by the persons covered thereunder.

IV.C) Separate Account Provisions -- Section 4240 and Regulation No. 47

These provisions are common to all separate account agreements.

C.1) Isolation/Segregation Provision

- (a) Section 4240(a)(1) provides that in accordance with applicable agreements income, gains and losses, whether or not realized, from assets allocated to a separate account shall be credited to or charged against such account without regard to other income, gains or losses of the insurer.

- (b) This provision is essential because it discloses that the separate account assets and investment experience is segregated from the insurer's general account and other separate accounts to the extent provided in the contract.

C.2) Asset Identification

- (a) The separate account contract (or application if the application is part of the entire contract) must identify or describe the permitted investments for such separate account. See §4240(a)(2)(A).
- (b) Except for seed money provided for in §4240(a)(3) and guaranteed separate accounts provided for in §4240(a)(5) [i.e., for book value separate account agreements and market value separate account contracts funding guaranteed benefits], the restrictions, limitations, and other provisions relating to investments do not apply to such investments.
- (c) Such investments shall be disregarded and excluded from admitted assets in applying the quantitative investment limitations contained in the Insurance Law to other investments.

C.3) Guarantees of Value

- (a) The contract must not provide any guarantee of the value of the assets allocated to a separate account, or any interest therein, or investment results thereof, or income thereon, except as permitted under §4240(a)(5), without limitation of liability under all such guarantees to the extent of the interest of the contractholder in assets allocated to the separate account.
- (b) For non-guaranteed separate account contracts, the liability under any contract guarantees must be limited to the contractholder's interest in assets allocated to the separate account. Otherwise, the separate account and separate account agreement must satisfy items (i), (ii), or (iii) of §4240(a)(5) of the Insurance Law
- (c) Under §4240(a)(5)(iii), an annual actuarial opinion and memorandum by a qualified actuary and acceptable to the Superintendent must be submitted.
- (d) Reserve liabilities for guaranteed minimum death benefits must be maintained in the insurer's general account.

C.4) Valuation

Pursuant to §4240(a)(7) of the Insurance Law, the contract should specify the dates on which the assets of the separate account will be valued and if there is no readily available market for assets in the separate account the agreements should specify how such assets will be valued.

- (a) Separate account assets should be valued at least as often as contract benefits vary, typically at least monthly.

- (b) For separate account agreements funding defined contribution plans, we have reservations concerning assets that are not valued frequently or are difficult to value.

C.5) Asset Maintenance

- (a) Pursuant to §4240(a)(8) of the Insurance Law, unless otherwise provided in approvals given by the superintendent and under conditions prescribed by the superintendent, the contract must state that the insurer will maintain in each separate account assets with a value at least equal to the amounts accumulated in accordance with the terms of the applicable agreements with respect to such separate account and the reserves for annuities in the course of payment that vary with the investment experience of such separate account. Section 50.3(a)(1) of Regulation No. 47 also provides: *Except as may be permitted in writing by the superintendent, every company shall maintain in each separate account assets with a value at least equal to the reserves and other contract liabilities with respect to such account.*
- (b) Separate account agreements and plans of operations should not extend insulation to any amounts allocated to the separate account (and any earnings thereon) from the general account to support applicable asset maintenance requirements. The asset maintenance and transfer provisions in the contract and plan of operation should be clarified to prevent the insulation of assets allocated to a separate account by the insurer from its general account solely to support the asset maintenance requirement.
- (c) In the case of separate account annuity contracts and funding agreements providing fixed or minimum guaranteed benefits, unless otherwise required, insurers shall comply with the asset maintenance requirement if, in the aggregate, amounts held in the general account, a supplemental non-insulated account and applicable separate account are sufficient to satisfy the asset maintenance requirement.

C.6) Disclosures

Any contract providing for benefits, contributions or both, payable on a variable basis, shall contain

- (a) A statement of the essential features of the procedures used to determine the dollar amount of the variable elements thereunder. Section 4240(a)(11)(A).

The Department will review the method for determining the account value to confirm that the method is reasonable and equitable.

- (b) A statement in clear terms that the dollar amounts of such variable payments may decrease or increase according to such procedure. Section 4240(a)(11)(B).
- (c) A statement on its first page that such elements thereunder are on a variable basis. See §IV.A.4(a) of this Outline and §4240(a)(11)(C).

C.7) Asset Ownership

- (a) Section 4240(a)(12) of the Insurance Law provides that amounts allocated by the insurer to a separate account shall be owned by the insurer, the assets therein shall be the property of the insurer, and no insurer by reason of such accounts shall be or hold itself out to be a trustee.
- (b) The contract should not include any language that would have a tendency to mislead the contractholder as to the ownership of the separate account assets or the status of the insurer as trustee. Historically, the relationship between the insurer and insured has been viewed as that of a debtor-creditor, rather than trustee-beneficiary.
- (c) The insurer shall not, in connection with the allocation of investments or expenses, or in any other respect, discriminate unfairly between separate accounts or between separate and other accounts. This provision does not require an insurer to follow uniform investment policies for its accounts. Section 4240(a)(6). See also §50.3(a)(7) of Regulation No. 47.

C.8) Insulation Provision

- (a) Section 4240(a)(12) of the Insurance Law provides: ... If and to the extent so provided in the applicable agreements, the assets in a separate account shall not be chargeable with liabilities arising out of any other business of the insurer. In addition, §50.3(a)(2) of Regulation 47 provides that a separate account annuity contract may provide ... that the portion of the assets of the separate account not exceeding the reserves and other contract liabilities with respect to such separate account shall not be chargeable with liabilities arising out of any other business of the insurer.
- (b) Section 4240(a)(12) of the Insurance Law and Section 50.3(a)(2) of Regulation 47 permit, but do not require, separate account agreements to provide that the assets in a separate account shall not be chargeable with liabilities arising out of any other business of the insurer. The Department has determined that separate account asset insulation should be limited to the contractholder's allocations to the separate account and the investment gains or losses attributable thereto.

- (i) Separate account assets will not be insulated from the liabilities arising out of other business of the insurer unless insulation language is included in the separate account annuity contract.
- (ii) Section 7435(c)(1) of the Insurance Law provides that the estate of the life insurance company shall mean the general assets of such company less any assets held in separate accounts that, pursuant to §4240, are not chargeable with liabilities arising out of any other business of the insurer.

C.9) Voting Rights

- (a) Section 4240(f) of the Insurance Law authorizes the insurer to exercise any voting rights of any securities allocated to the separate account in accordance with instructions from persons having interests in such account ratably as determined by the insurer.
- (b) Section 4240(f) of the Insurance Law also authorizes the insurer to establish a committee for such account consisting of members elected by the vote of persons having interests in such account ratably as determined by the insurer.
 - (i) Members of the committee may be directors, officers, employees of the insurer or persons having no relationship to the insurer.
 - (ii) Such committee may have the power as investment manager or investment advisor to authorize, approve or review the acquisition and disposition of investments for such account.
- (c) The contract and certificate should adequately describe any such voting rights or committee.

C.10) Incidental Death Benefit

- (a) Section 50.3(a)(7) of Regulation No. 47 permits a separate account annuity contract to provide, as an incidental benefit, for the payment of a death benefit in the event of death prior to the annuity commencement date. The amount of such death benefit shall not exceed the greater of:
 - (i) The accumulated value of the contract, or
 - (ii) The aggregate amount of stipulated payments or employee contributions, whichever is applicable, made under the contract or certificate prior to the time of death.
- (b) In addition to the above, the Department has taken the following actions:

- (i) Approved as an incidental death benefit a “ratchet” or “step-up” death benefit in which the highest accumulation amount on any given anniversary would be the new minimum death benefit if it were greater than item (i) or (ii) above. Such “step-up” or “ratchet” may be calculated no more frequently than annually. The Department initially allowed this step-up after the surrender charge period expired as a means of preserving business.
 - (ii) Not approved a “roll-up” death benefit that accumulates contributions at a minimum rate of interest as an incidental death benefit.
 - (iii) Approved incidental death benefits in single premium, flexible premium and stipulated premium contracts.
 - (iv) Note that for the return of premium death benefits there must be a reduction in the amount of the death benefit to reflect any premium that was already returned to the contract holder in the form of withdrawals prior to the death benefit becoming payable.
- (c) Section 50.3(a)(8) of Regulation No. 47 provides that a death benefit that is not an incidental death benefit during the deferred period is subject to the provisions of the Insurance Law applicable to life insurance contracts.
- (d) The contract and certificate should specify the date on which the death benefit will be determined and explain the effect of contributions and withdrawals on the death benefit.
- (e) If the contract offers death benefit payment options in addition to a lump sum, the contract must indicate what the default option will be in the event that the beneficiary does not elect an option. Entire Contract issue - §3204(a)(1). See also Circular Letter No. 27 (2008) with respect to default payment option for same-sex spouses.
- (f) Withdrawal charges may not be deducted from death benefits regardless of the manner of payout (i.e. lump sum, installments, etc.) as death benefits are not cash surrender benefits.

C.11) Involuntary Cashout - Small Annuities

The contract and certificate may provide that, at the time the annuity becomes payable, the insurer may, at its option, in lieu of commencing annuity payments, cancel the annuity and pay the accumulated value to the contractholder or certificate holder if the accumulated value is less than \$2,000, or would provide an income of less than \$20 per month or if the amount of the annuity does not meet other minimum requirements as approved in writing by the Superintendent. Section 50.3(a)(8) of Regulation 47.

- (a) ERISA Section 203(e)(1) and IRC Section 411(a)(11) provide for a \$5,000 threshold, but involuntary cashout by the contractholder/plan sponsor is permissive, (i.e. not mandated). Federal law does not preempt state law in this case.
- (b) If the contract and certificate permit the insurer to refuse to commence the annuity payments due to minimum size requirements (e.g., at least \$20 per month), the contract must permit surrender with no withdrawal charges if such refusal takes place. Section 3201(c)(2).

C.12) Mortality and Expense Guarantees

Contracts and certificates that provide for variable annuity payments must contain a statement that neither expenses actually incurred, other than taxes on the investment return, nor mortality actually experienced, shall adversely affect the dollar amount of variable annuity payments after such payments have commenced. Section 50.6(a)(1) of Regulation 47.

- (a) Where a group variable annuity contract provides that the scale of charges to be made against the assets of a separate account may be changed without the consent of the participants for whom variable annuity payments have commenced, the contract and certificate shall provide that changes may not adversely affect the dollar amount of variable annuity payments that have commenced. Section 50.6(a)(1) of Regulation No. 47.
- (b) Note that expenses must be allocated to the separate account business in accordance of §4240(a)(6) of the Insurance Law and Regulation No. 33 (11 NYCRR 91).

C.13) Variable Annuity Payment Computation

Section 50.6(c) of Regulation 47 provides that every variable annuity contract and certificate must contain a concise and clear statement of the method used in computing the dollar amount of the variable benefit.

- (a) The method of computing the dollar amount of variable annuity payments shall be such that, if the annual rate of investment return of the separate account were six and one-half percent at all times from the issue of the certificate, such amounts would not decrease. Section 50.6(a)(1) of Regulation 47.
- (b) The mortality table (including any projection scale and the years of projection) and assumed interest rate must be stated in the contract and certificate. The purchase rates will be checked for reasonableness.

C.14) Deferral of Payment

- (a) In connection with the reservation of the right to defer cash surrender payments, any separate account annuity contract shall

provide, if and to the extent permitted or required under the federal Investment Company Act of 1940, as amended, and any other applicable federal and state law, either:

- (i) That the company reserves the right, at its option, to defer the determination and payment of any cash surrender value for a period of six months after the demand therefor with the surrender of the contract, or
 - (ii) That the company reserves the right, at its option, to defer the determination and payment of any cash surrender value for a period of nine months in which installments will be paid, or
 - (iii) That the company reserves the right, at its option, to defer the payment of any cash surrender value in accordance with the deferment provisions of the federal Investment Company Act of 1940, as amended. Section 50.7(a)(4).
- (b) We have permitted group variable annuity contracts and certificates to include the same deferral provisions as individual separate account annuity contracts.

C.15) Annual Reports

- (a) Reference to an annual report is not a required provision in a separate account annuity contract that does not have a fixed account. However, the contract may explicitly reference the annual report.
- (b) An annual report is required to be provided by the insurer to every separate account annuity contractholder and certificate holder who has accumulation units credited to his or her account, pursuant to Section 50.9 of Regulation No. 47.
- (c) The annual report must include a statement or statements reporting the investments held in the separate account and in the case of contracts and certificates under which benefit payments have not yet commenced, a statement reporting as of the date not more than four months prior to the date of mailing, the number of accumulation units credited to such contract or certificate, and the dollar value of each such unit or the total value of the contractholder's or certificate holder's account, except that such statements need not be mailed with respect to such contracts which have been issued not more than four months prior to the date of the mailing.
- (d) If the separate account annuity contract has a fixed account then reference to an annual report in the contract is required by Section 4223(k).

C.16) Illustrations

- (a) Section 50.8 of Regulation No. 47 provides that illustrations of benefits payable under any separate account annuity contract, which are incorporated in or attached to any such contract or are utilized in advertising or sales material relating to any such contract, shall not include projections of past investment experience into the future or attempted predictions of future experience;
- (b) Section 50.8 permits the use of hypothetical rates of investment return, clearly designated as such, to illustrate possible levels of variable annuity payments, provided that:
 - (i) The use of such hypothetical rates is not in conflict with applicable requirements of the Securities and Exchange Commission;
 - (ii) If any hypothetical rate of investment return is used for illustration purposes, a corresponding additional illustration must be included using a hypothetical rate of investment return at least at the same interval below the pivotal rate of investment return. The “pivotal rate of investment return” is the smallest annual rate of investment return that must be earned by the separate account if the dollar amount of variable annuity payments is not to decrease.
 - (iii) Except as approved by the Superintendent, no hypothetical rate of investment return in excess of eight percent may be used in such illustration. Investment Return is defined in §50.1 of Regulation 47 as investment income plus capital gains less capital losses, whether realized or unrealized, on the assets of the separate account, less taxes incurred thereon (adjusted for any increase or decrease in reserves for potential taxes).
 - (iv) Variation in the eight percent rate in illustrations (whether it must be a flat rate or whether it can vary from year to year):
 - (I) Gross Rate in excess of 8% may be used in an illustration provided that in any year the accumulation at the gross rates used in the illustration does not exceed the accumulation at an 8% gross rate.
 - (II) For example, if the gross rate of 5% is used in the first year, a gross rate of 11% may be used in the second year. This is permissible because 1.05 multiplied by 1.11 is 1.1655 and is less than 1.08 multiplied by 1.08 or 1.1664.

After the second year, gross rates other than 8% may be used provided the accumulation does not exceed the accumulation at 8%.

The Circular Letter 6 (2004) process may be used for filings with illustrated forms that conform to the above guidance regarding variation in the eight percent rate in illustrations. The submission letter should indicate that the forms are illustrated and this Guidance should be cited. Other variations may not be submitted using the Circular Letter 6 (2004) process unless the Department has given permission.

C.17) Nonforfeiture Requirements

- (a) Section 50.7(b)(2) of Regulation No. 47 requires a provision, with an appropriate reference thereto in the certificate, specifying the options available to an annuitant who contributes to the cost of his annuity, or to his beneficiary or beneficiaries in the event of:
 - (i) the termination of his employment or the termination of the group separate account annuity contract, while the annuitant is alive and prior to the commencement date of the annuity, or
 - (ii) death prior to the commencement date of the annuity. Such options shall, in any case, include either
 - (I) an option to receive a cash payment at least equal to the aggregate amount of the annuitant's contributions made under the contract, without interest, or
 - (II) an option to receive a cash payment equal to the accumulated value of the annuitant's contributions made under the contract.
- (b) Contracts and certificates must provide for a cash surrender value equal to the accumulated value less withdrawal charges. These charges must be reasonable and based solely on unamortized acquisition expenses. Section 50.7(a)(3) of Regulation 47.
- (c) Surrender charges that are a decreasing percent of premium are assumed to meet the requirements of Section 50.7(a)(3) of Regulation 47 unless the initial percentage appears unreasonably high. A numerical demonstration of compliance with such section should be provided if the withdrawal charges are a percentage of the accumulated value. Such demonstration should be based on relatively high equity market returns (of 20%) and should show that the withdrawal charge would not be significantly greater than the initial acquisition expenses reduced by any subsequent recovery of such expenses through contract charges. That is, amortization should be based on actual cash flows and accounting based amortization schedules are not acceptable.
- (d) Guaranteed minimum income and accumulation benefits. A self-support opinion and demonstration from a qualified actuary must be filed for any contract providing these benefits. The

assumptions regarding the election rate of such benefits and the results of sensitivity testing must be provided.

- (i) A Cash flow testing scenario analysis based on stochastic scenarios or a large number of deterministic scenarios of equity and fixed income returns must be provided.
 - (ii) The formula reserve method must be fully described and should produce reserves at least as great as would be required by Regulation 128. We will consider use of any adopted NAIC guidelines covering these products.
- (e) Fund based charges in excess of 2% per year may be considered unreasonably high. (Department Interpretation)

IV.D) Regulation No. 139 Provisions Applicable To Guaranteed Separate Accounts

D.1) General Note

- (a) Paragraphs (2) and (6) of §40.1(a) of Regulation No. 139 expressly provide that Regulation No. 139 does not apply to:
 - (i) The provisions of a group annuity contract or funding agreement relating to a separate account which limits the liability under any guarantees to the extent of the interest of the contractholder in assets allocated to such separate account. (Traditional Equity Type Separate Account Agreements)
 - (ii) The provisions of a group annuity contract or funding agreement subject to any regulation promulgated pursuant to §4240(a)(5)(iii) of the Insurance Law. (Regulation No. 128 Guaranteed Separate Account Agreements).
- (b) Book value separate account agreements are not exempted from the provisions of Regulation No. 139.

See the *Guaranteed Interest Contract* product outline on the Department's website for book value separate account guaranteed interest contracts.
- (c) In the absence of any product requirements in Regulation No. 128 for market value separate accounts funding guaranteed benefits, we have generally looked to Regulation No. 139 for guidance.

D.2) Plan Benefit Rule

- (a) Section 40.4(a) of Regulation 139 provides that any contract issued in connection with a defined contribution plan which provides the contractholder with the right to withdraw from the contract the amounts required to pay lump sum benefits of the participant's individual account balance as they arise in accordance with the provisions of the plan upon bona fide termination of employment must provide for such withdrawals to

be made on a basis pursuant to which neither the amount withdrawn from the contract nor the amount of the remaining principal balance of the accumulation fund following such withdrawal is adjusted to reflect changes in interest rates or asset values since the receipt of funds.

- (b) If the contract is benefit responsive it must comply with the plan benefit rule.
- (c) The lump sum payment cannot be subject to a market value adjustment.
- (d) The interest rate credited cannot be affected by such withdrawals until the next reset.
 - (i) We have approved an interest adjusted withdrawal provision that permits the insurer to recognize the gain or loss due to the difference between the actual and expected plan withdrawals in calculating the next reset rate. As long as the estimated withdrawal activity is factored into the guarantees, we believe that there is good faith compliance with §40.4(a) because the initial rate guarantee will not be illusory or misleading.
 - (ii) We have also approved “make whole” provisions in GICs that require repayment of withdrawals from the contract from the next available cash flow as long as there is no penalty for nonpayment.

D.3) Betterment of Rates

- (a) Section 40.4(b) of Regulation No. 139 requires contracts funding defined contribution plans to provide that any annuity benefit purchased with respect to an amount equal to the plan participant’s account value as determined at the time of its commencement shall not be less than that which would be determined by the application of such amount to purchase a single consideration immediate annuity offered by the company to the same class of contracts.
- (b) The betterment of rates provision ensures that annuities will be purchased on a new money basis. As such, contracts funding defined benefit plans should also include this provision to the extent that annuities are provided for under the contract. If the contractholder cannot purchase annuities on a new money basis, it can be argued that the interest rate guarantees are misleading.

D.4) Allocated Share of Benefit Payments

- (a) Section 40.4(c) of Regulation No. 139 provides that in the event that there is more than one funding vehicle or cash is available under a defined contribution plan, a contract need not provide for withdrawals (in accordance with the plan benefit rule) in an

amount in excess of the contract's allocated share of benefit payments as determined pursuant to the agreement of the insurance company and contractholder.

- (b) This provision operates much like a coordination of benefits provision. If the contract is silent as to its allocable share, benefits will be paid as if it is the only funding vehicle.
- (c) We have approved last-in, first-out provisions; first-in, first-out provisions; pro-rata provisions; buffer fund provisions and combination provisions.

D.5) Participant Directed Investment Option

- (a) Section 40.4(d) provides that in the case of a contract which funds a participant directed investment option under which each contribution allocated to such option is credited with a specified rate of interest to a stated maturity date which rate and maturity date are disclosed to the participant prior to the allocation, such contract may provide that any withdrawals (other than withdrawals on account of bona fide termination of employment due to death or disability of the participant on whose behalf the withdrawal is made) be postponed until the stated maturity date for the contribution.
- (b) In such cases, the contract may permit withdrawals prior to maturity for the contribution that are subject to a negative market value adjustment and/or surrender charge. We have not required positive market-value adjustments.
- (c) Such contracts must have at least one option for participants age 55 and over on the date contributions are received where the maturity date will not exceed five years. The "age 55" rule in §40.4(b) is similar to §44.3(t) in Regulation No. 127.

D.6) Plan Amendments or Changes In Plan Administration

- (a) Section 40.4(e) of Regulation No. 139 provides that if the plan terms or the manner in which plan is administered materially change after issue, withdrawals from the contract to pay plan benefits are not subject to the plan benefit rule.
- (b) Contracts should include this provision to protect against antiselection.
- (c) If the insurer determines that the amendment or change will not adversely affect the insurer's rights and liabilities under the contract, benefit payments will continue to be subject to the plan benefit rule.

D.7) Bona Fide Termination of Employment

- (a) Section 40.4(f) of Regulation No. 139 provides that the contract can include procedures or conditions in order to establish that a

requested contractual withdrawal is being made in accordance with a bona fide termination of employment and in accordance with the plan provisions.

- (b) Termination of employment means the cessation of an employment relationship with an employer, multiple employer or membership in an employee organization sponsoring the plan, including cessations due to retirement, death, and disability.
- (c) Termination of employment does not include:
 - (i) Any temporary absence,
 - (ii) A change in position or other occurrence qualifying as a temporary break in service under the plan,
 - (iii) Transfer or other change of position resulting in employment by an entity controlling, controlled by, or under common control with the employer,
 - (iv) Cessation of an employment relationship resulting from a reorganization, merger, or sale or discontinuance of all or any part of the plan sponsor's business. [The risk for these transactions are typically not considered by the insurer in making the guarantees provided in the contract. Such transaction may result in unexpected withdrawal activity that was not priced for when the contract was issued.]
 - (v) Plan termination or partial plan termination.

D.8) Non-Benefit Related Withdrawals and Transfers

- (a) For withdrawals that are not subject to §40.4(a), an insurer should protect against anti-selection. Such withdrawals are usually paid out at market value.
- (b) We have permitted insurers to make a certain percentage of such withdrawals from 10% to 20% on a book value basis annually. This percentage is often called the free corridor amount.

D.9) Clone Contract Provision

- (a) We have approved provisions that provide for the issuance of a substantially similar GIC with the same maturity date and interest rate in the event of a partial termination triggered by a reorganization, merger, or sale or discontinuance of all or part of the plan sponsor's business.
- (b) The clone contract should satisfy the insurer's underwriting requirements.
- (c) The cost of the conversion can be prorated among the two surviving contracts or covered by the plan sponsor. In any event, the actual charges, if any, should be specified in the contract.

D.10) Competing Funds Provision

We have approved provisions, which limit deposits and/or transfers to competing fixed income funds offered by the plan to plan participants. This provision is designed to ensure that all scheduled deposits are made to the contract and to prevent transfers to other fixed income or stable value funds when interest rates increase.

IV.E) Regulation No. 139 Contract Termination Provisions Applicable To Guaranteed Separate Accounts

E.1) General Notes

- (a) Book value separate account agreements are not exempted from the provisions of Regulation No. 139. As such, the contract termination rules in §40.5 of Regulation No. 139 apply.
- (b) In addition, we have looked to Regulation No. 139 for guidance in reviewing termination provisions in market value separate accounts funding guaranteed benefits.
 - (i) We would object to Regulation No. 128 products that guarantee principal and periodically adjusted interest rates that do not allow contractholders to discontinue/terminate the contract and receive a lump sum payment at market value and/or a book value installment option.
 - (ii) Regulation No. 128 market value separate account products that guarantee a minimum return or a return based on an external index must include provisions that are fair and equitable to terminating contractholders and persisting contractholders.
- (c) Pursuant to §40.5(a) of Regulation No. 139, the contract termination rules do not apply to guaranteed interest contracts. The term *guaranteed interest contract* is defined in §40.2(j) to mean a contract which guarantees principal and either:
 - (i) provides a specified rate of interest on amounts deposited with an unqualified right to withdraw the accumulation fund upon the expiration of the time period for which the amount deposited and the specified rate of interest are guaranteed under the contract, either in a lump sum or in installments over a period less than five years with the amount and timing of each such installment specified in the contract (i.e., fixed rate, fixed maturity GICs); or
 - (ii) provides an indeterminate rate of interest for an indefinite period with an unqualified right to withdraw the accumulation fund at least once a year in either a lump sum, subject to a surrender charge no greater than seven percent, or in substantially equal periodic, at least annual, installments over a period less than five years which does not reflect investment experience of the underlying assets.

- (d) The contract termination rules only apply to *unallocated amounts*. As such, guaranteed separate account products (i.e., book value separate account and Regulation 128 separate account products) that fund annuity payments of retired and terminated vested employees under an immediate participation guarantee arrangement do not have to include termination provisions that comply with §40.5 of Regulation No. 139.
 - (i) Note that the first Regulation No. 128 products marketed in New York were Immediate Participation Guarantee contracts funded by market value separate accounts.
 - (ii) However, if such contract provides for termination, the termination provisions will be reviewed to determine whether the terminating contractholder, remaining contractholders and other policyholders of the insurer are treated fairly and equitably.

E.2) Contract Termination Options

- (a) Section 40.5(c) of Regulation No. 139 provides that the contract shall permit the contractholder, upon the discontinuance or termination of any such contract, to withdraw unallocated amounts credited to the accumulation fund on any basis or bases provided for under the contract, provided that the contract contains in substance:
 - (i) The ten-year book value installment withdrawal option described in §40.5(d) of Regulation No. 139.
 - (ii) The five-year installment withdrawal option described in §40.5(e) of Regulation No. 139;
 - (iii) A lump sum withdrawal option; or
 - (iv) One or more corresponding options which in the opinion of the superintendent are fair and equitable for the terminating contractholder, remaining contractholders and other policyholders of the insurance company.
- (b) Pursuant to §40.5(c), group annuity contracts must permit a contractholder to terminate or discontinue the contract at least once each contract year upon providing the insurance company with reasonable advance notice.

E.3) Ten Year Book Value Installment Option

- (a) Section 40.5(d) provides for a withdrawal option in which the contractholder may withdraw all unallocated amounts of the accumulation fund on an installment payment basis which provides for
 - (i) the repayment of all the unallocated amounts in level installments over a period not to exceed 10 years; and

- (ii) the crediting of interest to the unpaid portion of such accumulation fund during the installment payment period at a rate of interest not less than 1.5 % below the net effective rate of interest being credited to the contract at the time of its termination or discontinuance.
 - (b) The contract's allocable share of plan benefit payments may change after discontinuance. In LIFO plans, the new or replacing contract may be looked to first. We have allowed insurers to offset future installments by the amount of plan benefit payments made between each installment payment.
- E.4) Five Year Installment or Lump Sum Market Value Option
- (a) Section 40.5(e) provides that group annuity contract must provide at least one withdrawal option pursuant to which the unallocated amounts of the accumulation fund to which the contractholder is entitled are payable within five years. Such option (which may either be an immediate lump sum or equal installment option) may, if the insurance company elects, provide
 - (i) for market value adjustments of the unallocated amounts of the accumulation fund payable on withdrawal; or
 - (ii) for an adjustment in the interest rate credited on the unpaid balance during the period of repayment.
 - (b) There shall have been filed with the superintendent a memorandum, in form and substance satisfactory to the superintendent, describing:
 - (i) the method for determining the market value adjustment;
 - (ii) the method used to determine the interest rate credited to the unpaid portion of such accumulation fund during the installment payment period if such rate is more than 1.5 % below the net effective rate of interest being credited to the contract at the time of its termination or discontinuance; and
 - (c) There shall have been filed with the superintendent an opinion of the insurance company stating that the method provides reasonable equity to terminating and continuing contractholders and complies with Regulation No. 139.
 - (d) If a market value adjustment is used by the insurance company for the option satisfying this subdivision, then the method shall not preclude the market value of the unallocated amounts of the accumulation fund from being greater than the book value or unadjusted transfer value of such fund.
- E.5) Corresponding Options
- (a) As noted above, §40.5(c) permits one or more corresponding options which in the opinion of the superintendent are fair and

equitable for the terminating contractholder, remaining contractholders and other policyholders of the insurance company.

- (b) In determining whether a corresponding contract option is satisfactory, the superintendent may consider, among other factors, the degree to which the terms of such option reflect the maturity characteristics (e.g., expected pattern of principal repayments and investment yield to repayment) of those investments in the insurance company's general account whose investment results are allocated to the contract under the insurance company's method of investment income allocation.
- (c) A company cannot rely on the corresponding option provision to circumvent the lump sum requirement. One insurer wanted to prohibit the lump sum payment for five years. We argued that this would give the insurer a competitive advantage.
- (d) We have permitted an insurer to use a "natural maturity" installment in lieu of the five-year installment. However, we insisted that the insurer provide a ten-year book value installment. Section 40.5(d) is intended to be a true book value payment, whereas the five-year installment is intended to be the financial equivalent of an MVA.
- (e) In one case, we told an insurer that we would consider a five year installment as satisfying both the ten year and five year installment option even though the interest rate was not fixed at discontinuance. The insurer never followed up with our offer. It appeared that the company's contract was closer to a Type C contract than a Type A contract and interest was not based upon the insurer's investment year method of allocating income at the contract level.

E.6) Other Termination Rules

- (a) Pursuant to §40.5(f), separate withdrawal options are not required to satisfy the conditions of the subdivision (d) ten-year book value installment option and the subdivision (e) five-year installment option if a single withdrawal option satisfies both conditions.
- (b) Pursuant to §40.5(g), once a contractholder elects a withdrawal option under the contract at contract discontinuance or termination, it is no longer necessary for any other withdrawal option under the contract to remain selectable.
- (c) Pursuant to §40.5(h), the subdivision (d) ten-year book value installment option and the subdivisions (e) five-year installment option may provide that payments thereunder supersede all payments from unallocated amounts otherwise provided for under the contract.

- (d) Pursuant to §40.5(i), a group annuity contract may provide that the insurance company has the right to change the method for determining a market value adjustment upon at least 31 days prior written notice to the contractholder.
 - (i) Note that §40.5(i) of Regulation 139 does not apply to GICs.
 - (ii) Since GICs provide for a specified maturity there is no need to make any unilateral change in the formula.
 - (iii) The insurer can amend the formula for new deposit windows under the same contract. The contractholder can agree to the change by continuing to make deposits under new deposit riders or agreements.
- (e) Pursuant to §40.5(j), any requested modification of the application of §40.5 by an insurance company shall be accompanied by an explanation of the basis for such modification, and shall be permitted only if, in the opinion of the superintendent, it
 - (i) would achieve the purpose of §40.5 (i.e., termination provisions that are fair and equitable for terminating contractholders, remaining contractholders and other policyholders of the insurance company); and
 - (ii) would not be prejudicial to the interests of the insurance company's policyholders.

E.7) Market-Value Adjustment Provision

- (a) Section 40.2(o) of Regulation 139 defines market-value adjustment as an adjustment for increasing or decreasing the accumulation fund in the event of full or partial surrender or contract termination to reflect changes in interest rates or asset values since the receipt of funds by the insurer *according to a formula described in the contract*. §3204- Entire Contract of the Insurance Law requires that the MVA formula be incorporated in the contract or attached to the contract.
 - (i) The market-value adjustment formula should be sufficiently clear so that the contractholder can calculate the adjustment at any time.
 - (ii) The factors used in the calculation should be sufficiently definite and not based on items solely within the insurer's discretion. For example, the formula can refer to an outside index or to rates guaranteed or credited under the contract. If the formula referred to the insurer's earnings rate on supporting assets, we would require justification because the contractholder cannot verify such rate.
- (b) Liability-Based Formula -- For separate account GICs, insurers should use liability based adjustment formula. The first separate

account GICs were funded through “book value” separate accounts in the late 1970s.

- (i) In Prohibited Transaction Exemption 81-82, the U.S. Department of Labor granted an exemption from the prohibited transaction rules for book value separate account GICs. The DOL did not believe that any market-value adjustment requirements were necessary for separate account GICs “so long as the adjustment is not made with reference to the investment performance of a separate account”. This exemption was repealed when the plan asset regulation was promulgated.
 - (ii) However, §2510.3-101(h) carves out an exception for separate accounts that are “maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable, or credited, to the plan and to any participant or beneficiary of the plan (including an annuitant) are not affected in any manner by the investment performance of the separate account”.
- (c) Asset-based market-value adjustment formulas used in general account group annuity contracts do not appear to be necessary for guaranteed separate account products. In such contracts, the actual market value can be paid to the withdrawing contractholders.

E.8) Liquidated Damages Provision

- (a) Section 40.2(m) of Regulation 139 defines liquidated damages as the charges or adjustments which may become applicable in the event contributions are not made in the amounts or on the dates specified in the contract and which reasonably reflect the actual losses anticipated by the insurer in making commitments in advance of the receipt of the specified contributions. A liquidated damages provision is an alternative to contract termination in the event that the contractholder fails to make a scheduled contribution.
- (b) We have objected to provisions that provide for a fixed charge or fixed interest rate reduction for any such failure to contribute
- (c) The method for calculating the charge should be set forth in the contract. The contractholder should be able to calculate the adjustment from the terms of the contract. Many insurers use an explicit formula similar to the market-value adjustment formula.

E.9) Liquidity Protection Provision

- (a) We encourage insurers to include a contractual liquidity protection provision in all group annuity contracts, including guaranteed separate account contracts.

- (b) The Department and insurers need to monitor the liquidity exposure in their group annuity contracts.
- (c) The market-value adjustment formula for book value separate account contracts (even if liability-based) may reflect a close approximation of the market value of supporting assets under normal circumstances; but it may not reflect the liquidation value if assets need to be sold in times of distress.
- (d) Supporting separate account assets need to be as liquid as the withdrawal options under the contracts.
- (e) We would not object to a six-month deferral provision or a provision that gives the insurer the option on the maturity date of paying funds in lump sum or installments over five years or less.
- (f) An insurer should consider a diversification requirement applicable to contractholders. No single contractholder should have a disproportionate share of the insurer's liquid contracts.

IV.F) Other Provisions

F.1) Maximum Window Period

- (a) We have permitted deposit windows for recurring deposits of up to two years, without requiring any actuarial justification.
- (b) When the deposit window exceeds two years, an actuarial demonstration that the contract can be hedged will be requested.
- (c) For deposit windows that exceed two years, if the required deposits are not fixed in the contract, the contract should specify the minimum and maximum deposits as well as the ratio of initial deposits to the deposit maximum. If the range between the minimum and maximum deposit is too wide, the contract will be impossible to hedge.

F.2) Maximum Guarantee Period

- (a) We have limited the guarantee duration attributable to any deposit cell in fixed rate, fixed maturity GIC contracts to ten years. No insurer has objected to this limit. We will consider an exception in the future if a case arises. Any contract with a guarantee duration longer than ten years may not be filed under the Circular Letter No. 6 (2004) procedure without the Department's permission.
- (b) No surrender charge or market-value adjustment should apply at the expiration of the interest rate guarantee. Otherwise, the interest rate guarantee can be viewed as misleading (i.e., the interest rate guarantee should be calculated so as to amortize any charges prior to maturity).
- (c) We have permitted installment payments to be made over a period in excess of five years as long as the total guarantee period does not exceed ten years.

F.3) Credit Rating Downgrade Provisions

- (a) Circular Letter No. 2 (1992) states that the Department will not approve a credit rating bailout provision which would permit the contractholder to terminate the contract prior to maturity at book value in the event the insurer's credit rating is downgraded. The provision is considered unfair, unjust and inequitable pursuant to §3201(c)(2).
 - (i) Waiver of a surrender charge or market value adjustment upon credit rating downgrade would be unfair, unjust and inequitable to persisting contractholders who would be required to subsidize the withdrawal activity of other contractholders. Surrender charges and market-value adjustments are designed to protect against disintermediation.
 - (ii) A credit rating bailout provision would enhance the probability of a panic run that could impair or threaten the solvency of the insurer and result in regulatory intervention under Article 74.
- (b) Circular Letter No. 2 (1992) also states that we will disapprove any such provision submitted by a domestic insurer for use outside of New York on the grounds that the issuance would be prejudicial to the interests of policyholders pursuant to §3201(c)(6).
- (c) We have disapproved any credit rating downgrade provision included in a group annuity contract funding a pension plan that gives the contractholder the right to terminate a contract prior to maturity even if the withdrawals are subject to a negative market-value adjustment because the provision will increase the risk of disintermediation.

F.4) Market Value Make-Up/Advance Interest Credit Provisions

- (a) The Department has permitted provisions that enable insurers to credit an initial book value amount in excess of the actual contribution to the contract. The amount of the excess credit is equal to the market-value adjustment charged on the transfer of funds from the plan sponsor's terminating contract. The excess credit, also called a book-in, allows the plan sponsor to maintain book value accounting at the plan participant level. In order to recoup the extra credit, the insurer will credit a reduced interest rate designed to amortize the excess amount or credit over the life of the contract.
- (b) The Department has permitted the use of these provisions under the following conditions and circumstances:

- (i) The advance interest credit or book-in amount cannot exceed 5% of the market value of the amount deposited. The Department will consider book-ins that exceed this amount on a case-by-case basis taking into account the safeguards in place to address the risk assumed by the company.
- (ii) The book-in provision can only be used with unallocated contracts funding defined contribution plans and the funds cannot derive from equity separate account agreements. This provision should not be used to recover losses on equity investments.
- (iii) The insurer must not be proactive in using book-ins as a marketing strategy. Book-ins should only be used as a business conservation measure or in limited cases at the request of a plan sponsor. Book-ins used in connection with new business should represent a small percentage of new business and only a small number (i.e., less than ten) per year. As an alternative, we would consider an aggregate book-in limit, the amount of which will depend on the circumstances of each insurer.
- (iv) The contract must provide that in the event that the contract is terminated or discontinued prior to the date on which the advance credit is fully amortized, the unrecouped amount will be deducted as a separate charge prior to any final payment to the contractholder.
- (v) The insurer must notify the Department each year of the circumstances of each book-in, including the credit provided (dollar value and as a percentage of the initial deposit), the amortization period and the source of funds (business conservation or new business). Such notification is not required if the insurer has (1) fewer than 20 book-ins per year or a total book-in amount of less than \$5 million per year and (2) an aggregate book-in amount of less than \$25 million.

F.5) Purchase Rate Guarantee/Unilateral Change

- (a) The mortality and interest basis for guaranteed purchase rates must be stated in the contract. Companies can make unilateral changes in guaranteed annuity purchase rates for new contributions.
- (b) Although we have approved expense loads in the past, we may question and require justification for the use of any expense loading when conservative guaranteed purchase rates are used. It can be argued that such loading does not comply with §40.4(a) of Regulation No. 139.

- (c) N.Y. Circular Letter. No. 83-14 (1983)—*Contract Approval Procedures to Comply With Norris decision & Amplification of Circular Letter 83-14*—describes special review and conditional approval procedures for policy form amendments designed primarily to comply with the unisex mortality pricing requirements of the *Norris* decision.
- (d) See also Regulation No. 151 (11 NYCRR 99)—*Mortality Tables to be Used in Determining Reserve Liabilities for Annuities and Pure Endowments*—Under Reg. 151 the 1994 Group Annuity Mortality (GAM) table must be used to determine minimum standards of valuation for all annuities purchased on or after January 1, 2000 under a group annuity contract, excluding any disability and accidental death benefits purchased under such contracts. See §99.10 (d).
 - (i) Regulation No. 151 acknowledges that the 1994 GAM Table is sex distinct and intended to be used to place "sound value" on liability assumed for benefits purchased. See §99.10(h)(1).
 - (ii) To comply with state and federal statutes prohibiting sex discrimination, Reg. 151 permits insurers to use appropriate mortality tables having the same rates for men and women to determine nonforfeiture benefits, the purchase price of annuities, and the equivalent value of optional benefits. See §99.10(h)(2).

V) Separate Account Operational Requirements

V.A) Establishment of Separate Account

A.1) Kinds of Insurance – §4240(a)

- (a) Life insurance §1113(a)(1)
- (b) Annuities §1113(a)(2)
- (c) Accident and health insurance §1113(a)(3)
- (d) Funding agreement §3222

A.2) Purpose

§4240(a)

- (a) Provide fixed and variable annuities;
- (b) Provide life insurance with benefits, premium or both payable on a variable basis;
- (c) Accumulate funds to be applied to provide fixed and variable life insurance (i.e., continued (retired) life insurance reserves);
- (d) Accumulate or hold funds to be applied to provide health insurance (i.e., post-retirement health benefits);

- (e) Accumulate or hold proceeds applied under settlement or dividend options;
- (f) Accumulate or hold funds credited under funding agreements.

V.B) Operational Requirements

B.1) Asset segregation/isolation. §4240(a)(1).

B.2) Investment Provisions. §4240(a)(2).

(a) Except for seed money and guaranteed separate accounts, the insurer may invest in investments contractually permitted. §4240(a)(2)(A).

(i) The restrictions, limitations and other provisions relating to investment do not apply.

(ii) Such investments shall be disregarded and excluded from admitted assets in applying the quantitative investment limitations in the Insurance Law to other investments.

(b) Different classes of securities of a subsidiary, affiliate or company under common control limited if allocated to separate account. §4240(a)(2)(B)

(c) Prudent person good faith investment standard. §4240(a)(2)(C).

(d) Section 50.3(a)(4) of Regulation No. 47 provides that a separate account may invest in the securities of a registered investment company provided that the Superintendent is satisfied that the investment is not hazardous to the public or to New York policyholders of the insurer and the insurer complies with the investment restrictions and limitations of §227.1(b) [recodified as §4240(a)(2)]. The investment restrictions and limitations in §227.1(b) were repealed by §34 of the Chapter 567 of the Laws of 1983.

B.3) Seed money used to facilitate initial operation of separate account deemed to be invested under §1404 or §1405. §4240(a)(3).

(a) Each company issuing a separate account annuity contract shall maintain a record of the special contingent reserve fund showing progress in the repayment of the fund and the sum of advances from surplus made to establish or maintain the fund. A current statement of such records as of the end of each calendar year shall be filed with the superintendent on or before March 1 of the following calendar year. §50.3(a)(6) of Regulation 47.

(b) A company may upon establishment and during the initial stages of a separate account participate therein by allocating and contributing funds to such separate account as a participant (with a proportionate interest in the separate account) [§ 50.4(a) of Regulation No. 47]

- (i) for a limited period,
 - (ii) without the purpose of funding annuities,
 - (iii) for the purpose of providing economical diversification of investments by such separate account so as to facilitate the orderly establishment and maintenance,
 - (iv) Subject to aggregate limits specified in §50.4(b) of Regulation No. 47.
- B.4) Amounts received by insurer pursuant to one or more separate account agreements may be maintained in one or more separate accounts. Section 4240(a)(4).
- B.5) Generally no guarantee of the value of assets allocated to a separate account is permitted. Section 4240(a)(5) applies special rules with respect to guaranteed separate accounts. Clauses (i) and (ii) apply to book value separate accounts and clause (iii) applies solely to market value guaranteed separate accounts.
- B.6) Discrimination between separate accounts and other accounts in connection with the allocation of investments and expenses or in any other respect is prohibited. However, uniform investment policies for all accounts are not required. Section 4240(a)(6).
- (a) Expenses shall be allocated to the separate account business in accordance with the provisions of §4240(a)(6) of the Insurance law and Regulation No. 33. §50.3(a)(5) of Regulation 47.
 - (b) Conflicts of interest rules applicable to the officers or directors of insurance companies shall also apply to the members of the committee, board or other similar body of every separate account. §50.3(a)(7) of Regulation 47.
 - (c) No officer or director of any company maintaining a separate account nor any member of the committee, board or other similar body of the separate account shall receive any commission or compensation either directly or indirectly with respect to the purchase or sale of the assets of the separate account. §50.3(a)(7) of Regulation 47.
- B.7) Non-guaranteed separate account assets must be valued at market value at the date as of which valued in accordance with the applicable agreements. If there is no readily available market the terms of the separate account agreement should specify how assets are to be valued. §4240(a)(7).
- B.8) Assets in a separate account must be maintained with a value at least equal to the amounts accumulated in accordance with the terms of the applicable agreements and reserve for annuities in the course of payment that vary with the investment experience of the separate account. Section 4240(a)(8) and §50.3(a)(1) of Regulation No. 47.

- B.9) Transfer of investments or assets between separate accounts and other accounts are not permitted, unless authorized by the Superintendent in circumstances where such transfer would not be inequitable. Section 4240(a)(9).
- (a) No sale, exchange or transfer of assets may be made by a company between any of its separate accounts unless such transfer meets certain requirements. Regulation 47, 11 NYCRR 50.3(a)(3).
- (i) Transfer is made solely to establish the account or to support the operation of the contracts with respect to the separate account to which transfer is made, and
- (ii) Such transfer is made, to or from the separate account:
- (I) by a transfer of cash, or
- (II) by a transfer of securities having a valuation which can be readily determined in the marketplace, and approved by the superintendent.
- (iii) The Superintendent may authorize other transfers if such transfers would not be inequitable.
- (b) For example, the Department has approved such transfers to support the liquidity needs of real estate separate accounts
- B.10) Except for market value separate account funding guaranteed benefits pursuant to §4240(a)(5)(iii), assets supporting reserves which do not vary with the investment experience of the separate account shall be maintained in the separate account at their value determined in section 1414. Section 4240(a)(10).
- B.11) Amounts allocated to separate accounts shall be owned by the insurer. The insurer shall not be or hold itself out to be a trustee. Section 4240(a)(12).
- B.12) The assets may be insulated from other liabilities of the insurer. Section 4240(a)(12) and §50.3(a)(2) of Regulation No. 47.
- B.13) The reserve liability for variable contracts shall be established in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees provided in the contract.
- (a) A reserve liability for an incidental death benefit in excess of the accumulated value of the contract shall be accumulated and maintained in the general account of the insurer pursuant to a plan which specifies a reasonable maximum target for such reserve and is approved by the Superintendent. §50.3(a)(8) of Regulation No. 47.
- (b) The reserve liability for variable annuities shall be established in compliance with the applicable provisions of §4217 of the

Insurance law and in accordance with actuarial procedures that recognize the variable nature of the benefits provided and their dependence on the net investment return to the separate account or accounts.

V.C) Special Rules for Book Value Separate Accounts

- C.1) Non-insulated Agreements. Section 4240(a)(5)(i) of the Insurance Law provides that the investments allocated to the separate account are deemed to be part of the general assets of the insurer and are subject to the qualitative standards and quantitative limitations contained in §1404 or §1405 of the Insurance Law.
- C.2) Insulated Agreements. The investments allocated to the separate account are subject to the requirements and limitations on investments imposed by Articles 13 and 14 (except §1402) of the Insurance Law applied as though the aggregate assets allocated to the separate account were the total admitted assets of the insurer.
- C.3) Book Valuation. Assets supporting reserves that do not vary with the investment experience of the separate account must be maintained in the separate account at their value determined in section 1414. Section 4240(a)(10).

V.D) Special Rules for Market Value Separate Accounts Funding Guaranteed Benefits

- D.1) General Note. Regulation No. 128 prescribes the terms and conditions under which insurers may issue group annuity contracts, funding agreements and certain group life insurance policies funded by separate accounts with assets valued at market that provide fixed or guaranteed minimum benefits.
- D.2) AOM Requirement -- §97.6
 - (a) The insurer may guarantee benefits in the separate account provided that the insurer annually submits an opinion and memorandum of a qualified actuary that, after taking into account any risk charge payable from the assets of the separate account with respect to such guarantee, the assets of the separate account make good and sufficient provision for the liabilities of the insurance company with respect thereto. See §4240(a)(5)(iii).
 - (b) The opinion shall be accompanied by a certificate of an officer of the company responsible for the daily monitoring compliance with the asset maintenance and reserve requirements for such separate accounts, describing the extent to and manner in which during the preceding year:
 - (i) actual benefit payments conformed to the benefit payments estimated to be made as described in the plan of operations;
 - (ii) the level of risk charges, if any, retained in the general account was appropriate in view of such factors as the

nature of the guaranteed contract liabilities and losses experienced in connection with account contracts; and disclosing the data required to be reported in accordance with §97.5(m)(1);

- (iii) after taking into account any reserve liability of the general account with respect to the asset maintenance requirement, the amount of the account assets satisfied the asset maintenance requirement;
- (iv) the determination of the market-value of the separate account assets conformed to the valuation procedures described in the plan of operations, including (but not limited to), a statement of the procedures and sources of information used during such year;
- (v) the fixed-income asset portfolio(s) conformed to, and justified, the rates used to discount contract liabilities for valuation pursuant to §97.5(k);
- (vi) if the amount of the asset maintenance requirement depended on the separate account assets, or a subportfolio thereof, being duration matched, the actual experience of the separate account assets or such subportfolio thereof and actual benefit payments conformed to the assumptions made in the plan of operations for determining the duration of such assets and the duration of guaranteed contract liabilities (or the guaranteed contract liabilities funded by the subportfolio);
- (vii) if the amount of the asset maintenance requirement depended on the separate account assets, or a subportfolio thereof, being cash-flow matched, the cash inflows from the separate account assets or such subportfolio thereof matched the cash outflows to meet guaranteed contract liabilities (or the guaranteed contract liabilities funded by the subportfolio);
- (viii) any rate or rates used pursuant to §97.5(k) to discount guaranteed contract liabilities and other items applicable to the separate account were modified from the rate or rates described in the plan of operations filed pursuant to §97.4(b); and
- (ix) any assets were transferred to or from the insurance company's general account, or any amounts were paid to the insurance company by any contractholder to support the insurance company's guarantee.

D.3) Asset Maintenance Requirement -- §97.5(b)

The insurer shall maintain assets in one or more separate accounts at all times such that:

- (a) The market value of the assets equals or exceeds the minimum value of guaranteed contract liabilities (determined in accordance with §97.5(k)), and
- (b) The market value of assets (less deductions provided for in §97.5(d)) equals or exceeds 92% of the minimum value of guaranteed contract liabilities.

If the actual percentage referenced above is less than 100%, the insurer must maintain assets in the general account and a general account reserve for guaranteed contract liabilities in an amount at least equal to the minimum value of guaranteed contract liabilities less the market value of separate account assets less the deductions.

D.4) Asset Shaves or Deductions -- §97.5(d)

The insurer must deduct the percentage specified in §97.5(d) based on the type of separate account assets and whether the assets are duration or cash-flow matched. The percentage deductions range from 0% to 50% and are highest for non-investment grade obligation, publicly traded common stock, real estate, private placement securities and other non-publicly traded investments. The deductions can be increased if

- (a) The diversification requirements are not satisfied (10% increase). See §97.5(g).
- (b) There is a currency exchange risk that is not adequately hedged (15% increase). See §97.5(i).

D.5) Diversification Requirements -- §97.5(g)

- (a) For contracts funding fixed benefits only, the separate account assets are subject to the following limitations:
 - (i) For non-insulated contracts, the separate account assets shall consist in whole or in part of assets which together with general account assets meet the limitation in §1405 of the Insurance Law computed as though the insurer's admitted assets included such separate account assets.
 - (ii) For insulated contracts, separate account assets shall consist in whole or in part of assets which meet the limitation in §1405 of the Insurance Law computed as though the insurer's admitted assets consisted solely of such separate account assets.
 - (iii) Separate account assets that do not comply with items (i) and (ii) above are subject to an additional 10% deduction from market value.

- (b) For contracts not funding fixed benefits only, the insurer must, upon request of the Superintendent, justify the concentration or diversification of separate account assets and any failure of any separate account assets to comply with additional investment restrictions or additional deductions from market value in determining asset maintenance and reserve requirements.

D.6) Supplemental Accounts -- §97.5(j)

- (a) All or any portion of the amount needed to meet the minimum asset requirements can be allocated to one or more supplemental accounts.
- (b) For insulated separate account contracts, the insurer must maintain in the supplemental account assets in excess of the amounts contributed by the contractholder and the earnings thereon.
- (c) Regulation 128 would also permit excess reserves to be held in the company's general account, provided the arrangement provides sufficient liquidity in the general account to enable the company to make transfers to the separate account when due. Depending on the guarantees provided in the contract, the company may be asked to provide confirmation that the funds will be held in cash or short-term assets. The Regulation 128 memorandum should state what the company has the funds invested in.

D.7) Minimum Value of Contract Liabilities -- §97.5(k)

The minimum value of contract liabilities is the product of the base amount of guaranteed contract liabilities and one plus the contract risk factor.

- (a) The base amount of guaranteed contract liabilities is the sum of the expected guaranteed contract benefits discounted at a rate not greater than 104.5% of the spot rate (using the mortality tables required by §4217 for annuity and life insurance benefit cashflows).
- (b) The contract risk factors are provided in §97.5(l) for contracts providing annuities, other fixed benefits and minimum guaranteed benefits.

D.8) Disclosure of Accumulated Amounts -- §97.5(m)

The amount accumulated from risk charges deducted from considerations received or from the separate account, net of losses and the amount of losses, must be shown on the annual statement. The amounts for the current year and the cumulative amounts from inception to date should be specified.

The amount of the annual deduction for risk charges and the maximum accumulation must:

- (a) Comply with the insurer's plan for compensating the general account,
- (b) Vary in proportion to the various risks and guarantees for risks undertaken by the general account, and
- (c) Vary depending on whether the assets are insulated from other company liabilities.

VI) Plan of Operation Filing Requirements

VI.A) Prior Approval Requirement

A.1) Filing

Section 4240(e) of the New York Insurance Law requires prior approval of the statement of the separate account's methods of operation. The statement is customarily referred to as the separate account's "plan of operation".

A.2) Form Marketing

- (a) An authorized insurer shall not make any separate account agreement in New York providing for the allocation of amounts to a separate account until such insurer has filed the plan of operation with the Superintendent and the Superintendent has approved such plan.
 - (i) Deposits cannot be allocated to a separate account prior to approval of the plan of operation.
 - (ii) Note that the Department permits insurers to bind risk under group annuity contracts prior to approval of the contract pursuant to Circular Letter No. 64-1.
- (b) Please note that the annuity contract can still be reviewed and approved even if the plan of operations has not yet been formally approved.
 - (i) The approval of the contract form will be conditioned upon the company's receipt of the approval of the plan of operations.
 - (ii) The approval letter should then be immediately forwarded to the Albany office.
 - (iii) Please include the Department control number, the form number of the contract and approval date when submitting a copy of the approval letter for the plan of operation in relation to a contract that has already been approved.

A.3) Fund Changes

When sub-accounts of the separate account are added, deleted, or changed, the company must make an informational filing with the Albany office. Such filing must include a copy of the approval letter

from the Department's Life Bureau in New York City for the amended Plan of Operations, or if such approval has not been received, a copy of the Department's acknowledgement letter for that filing and, if applicable, a statement explaining the plan was deemed approved by operation of law under §4240(e) of the Insurance Law. (Note: The new funds cannot be utilized until the Life Bureau in New York City has approved the new/amended Plan of Operations.)

VI.B) Qualification Requirements

Regulation No. 47 (11 NYCRR 50) sets forth the qualification requirements for insurance companies to issue separate account annuity contracts. Section 52.2 requires an insurer (including an authorized foreign and alien insurer pursuant to §50.10 of Regulation No. 47) to submit the following information to the Superintendent before it can qualify to deliver or issue for delivery any separate account annuity contract within the State:

B.1) Contract Description

A description of the kinds and characteristics of separate account annuity contracts it intends to deliver or issue for delivery. See §50.2(a)(1) of Regulation No. 47.

B.2) Method of Operation

A description of the proposed method of operating the separate account or accounts established with respect to such separate account annuity contracts. See §50.2(a)(2) of Regulation No. 47.

B.3) Biographical Data

If requested by the Superintendent, biographical data with respect to the officers and directors of the company and the members of the committee, board or other similar body of the separate account.

B.4) Authorized Foreign Insurer

With respect to an authorized foreign insurer, if requested by the Superintendent, a copy of the statutes and regulations of its State of domicile under which it is authorized to issue such separate account annuity contracts; and

B.5) Other Information

Such further information as the Superintendent may require.

VI.C) Informal Guidelines

The Department has prepared informal guidelines concerning the filing requirements for separate account plans of operation. See *Guidelines For The Preparation Of Plans Of Operation For Separate Accounts (July 1, 1994)*. Any questions related to the procedures or content of Plan of Operation filings should be directed to Roy Mensch in our NYC office.

VII) Advertising and Disclosure

VII.A) Regulation 139 - Section 40.3

- A.1) Written statement and/or specimen contract with a statement citing location in contract of disclosures required by paragraphs (1), (3), (4), (5), (6), (9) and (10) of §40.3(b) of Regulation 139. See §40.3(a).
- A.2) The written statement and/or specimen contract shall contain the following information to the extent applicable:
 - (a) Statement indicating any restrictions as to amount and timing of contributions, and penalties for non-payment. See §40.3(b)(1).
 - (b) Description of the right to discontinue contributions to contract, and penalties resulting from such action. See §40.3(b)(2).
 - (c) Statement of all current fees and charges that are or may be assessed against the contractholder or deducted from the contract, including a description of the extent and frequency to which such fees and charges may be modified and the extent to which they take precedence over other payments. See §40.3(b)(3).
 - (d) Statement of the interest rates and/or method of determination of rates and a description as to how any withdrawals, transfers or payments will affect the amount of interest credited. See §40.3(b)(4).
 - (e) Description of expense, interest and benefit guarantees under the contract and any rights to modify or eliminate such guarantees, including the right to apply surrender charges or market-value adjustments to plan benefit payments if there are plan amendments or changes in the manner of plan administration. See §40.3(b)(5).
 - (f) Description of the contractholder's and participant's right to withdraw funds (or apply to purchase annuities), along with a description of any charges, fees or market-value adjustments applicable to such withdrawals or a statement that no such withdrawals or payment are permissible prior to maturity or the happening of a certain event. See §40.3(b)(6).
 - (g) Statement indicating any pro rata, percentage or other limitations that may apply to benefit payments to be purchased or provided under the contract when the plan is not funded entirely under the contract. See §40.3(b)(7).
 - (h) Statement that contractholder or participant withdrawals under the contract are to be made in a FIFO or LIFO basis or other applicable basis. See §40.3(b)(8).
 - (i) Statement that the contract may be amended, including any right of the insurer to unilaterally amend the contract. See §40.3(b)(9).

- (j) Statement, if applicable, that any dividends and experience rate credits are subject to the insurer's discretion. See §40.3(b)(10).
- (k) Statement, if applicable, concerning supporting asset's effect on withdrawal timing. See §40.3(b)(11).
- (l) Statement that the contractholder or plan sponsor is solely responsible for determining whether the contract is a suitable funding vehicle. See §40.3(b)(12).
- (m) Statement, if applicable, that the insurer does not have responsibility to reconcile participants' individual account balances with the accumulation fund balance where the insurer does not maintain individual account balances. See §40.3(b)(13).

VII.B) Rules Governing Advertisements of Life Insurance and Annuity Contracts

See Regulation 34-A.

VIII) IRC Section 457 Public Deferred Compensation Plans.

See New York State Deferred Compensation Board Rules 9 NYCRR 9000.

VIII.A) No plan shall permit any distribution option that provides for installment payments over a period measured by one or more natural lives. See §§9001.4(b) and 9003.7.

- A.1) The regulation prohibits traditional annuity payout options, in part, because some annuity options allow for the forfeiture of undistributed account balances upon a participant's death.
- A.2) Installment payments may be made with reference to the life expectancy of both the participant and his/her beneficiary. See §9001.4(b).
- A.3) The Board was undecided as to the permissibility of the annual recalculation of life expectancy method of determining installment distribution payments due to concern that while the number of payments may increase, the amount of each payment would decrease. The Board did not revise the language in the regulation to permit the annual recalculation method.
- A.4) The Board intends to permit participants to continue to enjoy full benefits of market participation for plan assets until distribution (i.e., similar to variable annuities).
- A.5) Comment: As a result of this rule, plan participants bear the risk of outliving their §457 retirement benefits. The Board has noted that the vast majority of plan participants also have a defined benefit plan that provides for a lifetime income stream.

VIII.B) Loans are allowed to the extent in compliance with IRC §§457 and 72(p) only if the plan permits and establishes clear procedures for administration of loans. See §9001.4(d).

- VIII.C) Maximum contract term for NY State Deferred Compensation Board must be in compliance with §§9003.5(a) and 9003.7.
- VIII.D) No penalties or surrender charges are permitted at the expiration of the contract or agreement for the transfer of assets. See §9003.5(a) and 9003.5(c)(2)(iii)(c).
- VIII.E) Contracts subject to a competitive bidding process on issue and renewal. See §9003.1 and 2.
- VIII.F) Prompt payments by state or local employer (two days from payroll date) and appointed trustee (one day after receipt). Amounts held in interest bearing account until financial organization receives necessary instructions or determines that it is prudent to transfer to another investment fund. See §9003.8.
- VIII.G) Every contract must contain a provision that it is subject to the plan and regulation, and that such plan and regulation are made a part of the contract. See §9006.2.