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## IMMEDIATE ANNUITY PRODUCT OUTLINE

(Last Updated February 28, 2013)

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## IMMEDIATE ANNUITY PRODUCT OUTLINE

(Last Updated February 28, 2013)

This outline is current as of February 28, 2013. 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) Scope

This product outline applies to:

- A. All individual immediate annuity contracts and fraternal benefit certificates delivered or issued for delivery in New York State.
- B. All immediate group annuity contracts and certificates delivered or issued for delivery in New York State where the premiums are derived wholly from funds contributed by the certificate holder.

Immediate Annuities are annuity contracts in which the first annuity income payment begins in 13 or fewer months after issue and provides for a series of substantially equal periodic payments to be made not less frequently than annually during the annuity period. See Internal Revenue Code §72(u)(4) and §99.6 of Regulation 151. This outline does not apply to structured settlements and does not replace any previous outline.

The reference to the term “contract” in this outline includes fraternal benefit certificates and certificates issued to an individual under a group annuity contract.

### II) Filing Process

#### II.A) General Information

##### A.1) Prior Approval Requirement

§3201(b)(1) provides that no contract 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).

##### A.2) Discretionary Authority for Disapproval

§3201(c)(1) and (2) permit the Superintendent to disapprove any contract form that contains provisions that are misleading, unfair, unjust, or inequitable or if its issuance would be prejudicial to the interests of contractholders or members.

##### A.3) No filing fee required

## II.B) Types of Filings

### B.1) Prior Approval

Contract forms submitted under §3201(b)(1) of the Insurance Law are subject to the submission rules noted herein, especially Circular Letter Nos. 6 (1963) and 14 (1997).

### B.2) Alternative Approval Procedure

- (a) §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.
- (b) Circular Letter No. 2 (1998) provides that the certification of compliance should make reference to any law or regulation that specifically applies or is unique to the type of contract form submitted. An alternative would be to submit a certification of compliance with the applicable laws and regulation 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

- (a) Circular Letter No. 6 (2004) provides for an expedited approval procedure based on an appropriate certification of compliance signed by an officer of the insurer 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.
- (b) 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, rather than in an attached list. For a certification pertaining to a large number of forms, the list may begin in the body of the certification and continue in list form on the second page.
- (c) The submission letters for paper submissions and the Filing Description for submissions made via the State Electronic Rate and Forms Filing System (SERFF) must comply with the applicable circular letter and product outline guidance.
- (d) 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.

### B.4) Filing of Non-English Versions of Forms

- (a) The English language version of the form must be approved before the non-English version can be approved. The submission letter must identify, by form

number, date of approval and Department file number, the previously approved form that is being translated into a non-English version.

- (b) The non-English version must have a different form number to distinguish it from the English version (e.g.: the Spanish version of form Term-123 could be Term - 123-S).
- (c) An original certification by a translator must be provided indicating that the text of the form is an accurate and complete translation of the English version of the form. The certification must reference the specific form numbers of both the English and non-English forms and must reference the memorandum of variable material. The certification may not use qualifying language such as “to the best of my knowledge and belief.”
- (d) An original certification by an officer of the insurer must be provided indicating that the officer has exercised due diligence in choosing a competent translator or translation service. The certification must reference the specific form numbers of both the English and non-English forms. Section 3102(b)(H)(3).
- (e) If the approval of the English version of the form was subject to any conditions or limitations, then the non-English language version of the form will be subject to the same conditions or limitations.
- (f) If the non-English version of the form contains variable material, a memorandum of variable material must be provided. The exact language of any non-English alternate text must be set forth.

#### B.5) Filing for Out-Of-State Delivery

The Department no longer requires the filing of contract forms to be delivered out of state by domestic insurers (except unallocated group annuity contracts, funding agreements or any other contract form specified by the superintendent pursuant to regulation). Insurance Law §3201(b)(2). Domestic insurers are required to annually file a list of contract forms issued by the insurer for delivery out of state. § 3201(c)(6)(b).

### II.C) Preparation of Forms

#### C.1) Duplicates

Filings, except SERFF filings, must be made in duplicate. § I.E.7 of Circular Letter No. 6 (1963).

#### C.2) Form Numbers

Form numbers must appear in the lower left corner. § I.D of Circular Letter No. 6 (1963). The lower left corner of subsequent pages of the form should either contain the same form number as 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. However, the data page of the contract may be separately approved as a different form with a different form number.

C.3) Hypothetical Data

All blank spaces for contract forms, except application/enrollment forms, must be filled in with hypothetical data. § I.E.1 of Circular Letter No. 6 (1963).

C.4) Application/Enrollment Form

- (a) The application/enrollment form to be used to obtain an immediate annuity must be an approved form. When submitting a contract form to which a copy of the application/enrollment form will be attached when issued, the form and Department file number for the previously approved application/enrollment form must be supplied. If the application/enrollment form has not been approved, the application/enrollment form must be submitted with the contract forms for approval. If the application/enrollment form is already pending approval, please provide the Department's file number. § I.E.4 of Circular Letter No. 6 (1963).
- (b) The application/enrollment form must either contain all annuity payment options that are made available with this contract or, alternatively, an insurer may have separate approved application/enrollment forms for each payment option.

C.5) Final Format

Contract forms submitted for formal approval should be submitted in the form intended for actual issue. § I.F.1 of Circular Letter No. 6 (1963).

C.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 is provided. The letter must be dated, properly executed by an authorized officer of the insurer and applicable to the forms in the filing.

C.7) Circular Letter 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.

## II.D) Submission Letter Requirements/SERFF Requirements

Note: For SERFF submissions, the Life Bureau no longer requires that a separate signed cover letter be included with submission. Instead, for SERFF filings, any information that would ordinarily be included in the signed cover letter must be in the Filing Description under General Information. Inclusion of “please see cover letter” or phrases of similar intent will not meet this requirement.

References in this outline to submission letter content requirements are also requirements for SERFF General Information unless otherwise noted.

### D.1) Caption Requirement

The “re” or caption of the submission letter for paper submissions must identify each of the forms that is being submitted for approval or filed for informational purposes and must be in compliance with Circular Letter No. 8 (1999). § 3201(b)(6) (“Deemer”) filings must be identified in the “re” or caption. Circular Letter No. 6 (2004) must be identified in bold print in the “re” of the submission letter. Please see the Department’s guidance for SERFF filings available on the website at <http://www.dfs.ny.gov/insurance/serflife.htm>.

### D.2) Compliance with § I.G of Circular Letter No. 6 (1963)

- (a) Submit in duplicate except SERFF filings
- (b) The submission letter must be signed by a representative of the insurer authorized to submit forms for filing or approval for the insurer.
- (c) Identify form numbers of each form submitted.
- (d) State the type of coverage provided.
- (e) Indicate whether:
  - (i) the form is replacing a previously approved form (provide the form number and date of approval);
  - (ii) the form will be issued in addition to other similar forms and/or benefits (provide form numbers and approval dates); or
  - (iii) the form is a new form unlike any previously issued/delivered policies.
- (f) If the form is other than an annuity contract (e.g. a rider, endorsement or insert page), give the form number of the contract form or forms 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 forms will be used with new and/or previously issued/delivered policies.
- (g) If there are similar forms not being replaced, identify those forms and indicate why they are not being replaced.

- (h) If a form is intended to replace a very recently approved form because an error found in the approved form, the insurer must:
- (i) If the approved form has not been issued, return the approved form with a statement in the submission letter that the form has not been issued. The insurer may, under these circumstances, use the same form number on the corrected form being submitted.
  - (ii) If 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.

NOTE: These options are not available for contract form approved under the Circular Letter No. 6 (2004).

The corrected form must be submitted using the regular prior approval process and the submission must identify the changes made to the corrected form.

D.3) Explanation of Unique Features and Markets

Submission letters should be as detailed as possible explaining any innovative or unique products or features and identifying any special market 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 or is new to the marketplace in New York.

D.4) Sex-Distinct/Unisex

Submission letters must advise whether the contract is sex-distinct or unisex. If sex-distinct, the letter must confirm that the contract will not be issued in any employer-employee situation subject to the Norris decision and/or Title VII of the Civil Rights Act of 1964. For employer-employee groups subject to the Norris decision, the insurer must submit either a unisex endorsement or a separate unisex contract to be used in such cases. If a previously approved unisex endorsement will be used with the contract for Norris or Title VII situations, the submission letter should so state (provide the form number and date of approval).

D.5) Noncompliance Explanation

If the form does not comply with a specific product outline provision, or if the Insurer has an alternate interpretation of a product outline provision, the submission letter must identify the provision and provide a complete explanation of the Insurer'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.



D.6) Compliance Standards

The Department will review all annuity contract forms for compliance with the Insurance Law and not inconsistent with Internal Revenue Code §§ 72(s) and 401(a)(9). See Insurance Law §3201(b)(1), IRC §72(s), IRC §401(a)(9).

D.7) 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 “Form”, and a SERFF requested Filing Mode of “Informational”.

D.8) Extension of Use

If an insurer wishes to use a form in a manner that was not originally approved, the extension of use must be approved by the Department in a new submission.

D.9) Resubmissions

If the form has been previously submitted to the Department and the file was closed, any resubmission of the form to the Department must reference the file number of the previously closed file and address all outstanding issues in the new submission letter. The submission must be complete and may not incorporate previously submitted material by reference.

II.E) Attachments

E.1) Readability Certification

Provide a Flesch score certification signed by an officer of the insurer in accordance with §3102. The Flesch score must be at least 45. Please refer to the Department’s February 18, 1982 letter, available on the Department’s website, for a sample certification.

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

Please note that a Flesch score certification is not required for: (a) Any annuity contract that has been determined to be a security subject to federal jurisdiction (e.g., an immediate variable annuity).

(b) Certificates issued pursuant to a group annuity contract issued to an employer covering persons employed in more than one state.

(c) Any group annuity contract that serves as a funding vehicle for pension, profit sharing or deferred compensation plans; provided, however, this shall not exempt any certificate issued pursuant to such group annuity contract.

See Insurance Law §3102(b)(1)(A).

E.2) Memorandum of Variable Material

The submission must include a separate detailed Memorandum of Variable Material to explain any variable material in the contract 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. 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.

E.3) Self Support

Provide a statement of self-support in compliance with §4228(h) for each form in the submission except application forms and forms accompanied by a statement signed by the insurer's actuary that the forms provide supplementary benefits which in the opinion of the actuary are *de minimis*. The self-support statement should state that it is valid for any combination of variable material submitted for approval. (Note: This requirement does not apply to fraternal benefit societies or to group annuity forms.)

II.F) Key References

F.1) Insurance Law. §§3102, 3105, 3201, 3204, 3206, 3219, 4228, 4231, 4240.

F.2) Regulations. Regulation Nos. 22, 47, 60, 127, and 151.

F.3) Circular Letters. CL 4 (1963), CL 6 (1963), CL 14 (1997), CL 2 (1998), CL 8 (1999), CL 6 (2004), CL 27 (2008), and Supp. No. 1 to CL 27 (2008).

### III) Specific Requirements

#### III.A) Cover Page

##### A.1) Insurer's Name and Address

- (a) The licensed New York insurer's name should appear on the cover page (front or back) as well as the cover page of each rider.
- (b) The full street address of the insurer's Home Office must appear on the cover page, front or back, and should be bracketed or underlined to reflect possible future changes. For changes applicable to new business, an informational 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 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 cover page, front or back. 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) 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 any corporate 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. §3201(c)(1). The name of the issuing insurer must be clearly disclosed and must be at least as prominent as any other entity mentioned. This would apply to any application/enrollment form as well.
- (e) No unlicensed insurer's name may appear anywhere on the form. §3201(c)(1).
- (f) Marketing names may not appear in the contract form. §3201(c)(1).

##### A.2) Free Look Provision

- (a) Applicable language in accordance with §3219(a)(9) that provides for a 10 to 30 days for free look period.
- (b) A 60 day Free Look Period is required in replacement situations. §51.6(d) of Regulation 60.
- (c) A 30 day Free Look period is required for mail order situations. §3219(a)(9).
- (d) The refund must be no less than the following:

- (i) For a fixed annuity, the consideration paid for the contract, including any fees or other charges. §3219(a)(9);
- (ii) For annuity contracts that include a separate account,
  - (I) premiums paid, including any fees or other charges (whether deducted from considerations received or taken from account values); minus
  - (II) the net amount allocated to the separate account; plus
  - (III) the cash value of any amounts allocated to the separate account (or if the contract does not have a cash value, the reserve for the contract of any amounts allocated to a separate account. §4240(a)(13).

(e) For the variable portion of separate account annuity contracts, we have permitted insurers to refund the entire premium allocated to one or more separate accounts during the free look period on the basis that such provision is at least as favorable as §4240(a)(13).

(f) The “date of surrender” means the date the contract is actually mailed to the insurer or the date the contract holder actually delivers the contract to the insurer or to an authorized representative of the insurer. The contract holder could surrender the contract to either a sales representative or a corporate officer at one of the regional offices. The date of such transfer should be the date used to determine the cash value of the contract.

#### A.3) Form Identification Number

A form identification number should appear in the lower left corner in accordance with §I.(D) of Department Circular Letter No. 6 (1963).

#### A.4) Brief Description of the Contract

(a) A description of the contract must appear in accordance with §I.A. of Circular Letter No. 4 (1963). The word “individual” must also appear as part of the contract description.

(b) Include a statement as to whether the contract is participating or non-participating. §II.F.1 of Circular Letter No. 4 (1963).

#### A.5) Officer’s Signatures

(a) The signature of at least one officer of the insurer in order to execute the contract is required as a matter of contract law.

(b) Signatures are underlined or bracketed to denote variable material.

III.B) 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.)

- B.1) Complete with hypothetical data. Circular Letter No. 6 (1963) I.E.1
- B.2) Identify the Contract holder/Owner(s) and Annuitant(s) and their gender(s), age(s) and date(s) of birth.
- B.3) Identify the date annuity payments are scheduled to begin.
- B.4) Identify the amount, duration, and frequency of the annuity income payments.
- B.5) Identify the amount of the premium paid.
- B.6) Identify the issue date of the contract.
- B.7) Disclose any payment limitations i.e., if there is no refund of premium when the annuitant dies prior to the commencement of annuity payments.

III.C) Standard Provisions

C.1) Table of Contents

A table of contents is required for policies that are over 3,000 words or more than 3 pages regardless of the number of words in accordance with §3102(c)(1)(G), unless the contract is otherwise exempt pursuant to §3102(b).

C.2) Entire Contract

- (a) The contract provides for an entire contract provision and the contract language complies with §3219(a)(3), §3204, or §3223(b), as applicable.
- (b) The application/enrollment form must be attached to the contract or certificate if it is to be part of the entire contract. [No application/enrollment form is admissible in evidence unless a true copy was attached to such contract when issued.] No insertion in or other alteration of any written application/enrollment form shall be made by any person other than the applicant without his or her written consent, except that insertions may be made by the insurer for administrative purposes only in such manner as to indicate clearly that the insertions are not to be ascribed to the applicant. §3204
- (c) All statements made by or under the authority of the applicant for the issuance, reinstatement or renewal of the contract shall be deemed representations and not warranties. §3105 and 3204(c).
- (d) Nothing can be incorporated by reference, unless a copy is endorsed upon or attached to the contract. §3204.

- (e) The contract cannot be modified, nor can any rights or requirements be waived, except in writing signed by a person specified by the insurer in the contract. §3204(a)(3).
- (f) No reduction in the rights and benefits granted in the contract can be made without the prior written consent of the owner.
- (g) The phrase “In the absence of fraud” cannot be used. §II(H)(7) of Circular Letter No.4 (1963).
- (h) The contract form must not include a unilateral amendment provision that grants the insurer the right to change the terms and conditions of the contract, except where such change or amendment is required to conform the contract with applicable New York and federal law. Any such change or amendment may not be effective without prior approval of the Department. Prior written consent of the contract holder is required if such change diminishes the rights and/or benefits under a previously issued contract in any manner. §3204.

### C.3) Incontestability

- (a) If any statements, other than those related to age, sex and identity are required as a condition of issuing the annuity contract, the contract must state that it is incontestable after it has been in force during the lifetime of the person or of each of the persons to whom the statements are required for a period of two years from its date of issue. §3219(a)(2). A contract may permit an incontestability period of less than two years.
  - (i) A two-year or less contestable period is provided. The contract must be in force during the person’s lifetime for such two-year contestable period.
  - (ii) Contests are based only on “material” misrepresentations and the provision includes this language or is not contrary to §3105.
- (b) Exceptions to the incontestability provision are permitted for:
  - (i) non-payment of required premiums,
  - (ii) statements relating to age, sex or identity. §3219(a)(2) & §3223(c).
- (c) An exception to the incontestability provision for fraud is NOT authorized under §3219(a).

### C.4) Misstatement of Age or Sex

- (a) If the age or sex (if applicable) of the person or persons upon whose life or lives the annuity contract has been made is misstated, the amount payable shall be calculated based on the correct age or sex and include interest at a specified rate in the contract not exceeding 6% to be credited to or charged against any underpayments or overpayments. §3219(a)(5). The contract must set forth a

specific rate of interest. Language indicating that interest will be paid “at a rate not to exceed 6%” does not comply with §3219(a)(5).

- (b) Note that the Arizona v Norris decision limits the use of sex-distinct annuity purchase rates where there is sufficient employer involvement to trigger Title VII of the Civil Rights Act of 1964.
- (c) If an insurer chooses not to charge interest on overpayments, this procedure is acceptable. However, interest must be credited on underpayments. §3219(a)(5). The rates of interest charged on overpayments must not exceed the rate of interest credited on underpayments. §3201(c)(2).

#### C.5) Participating/Dividend Provision

- (a) Immediate Annuity Contracts are not required to be participating (See Insurance Law §§4231(e)(1) and (g)(2)). However, if the contract is participating, the contract must include language stating that the insurer shall annually ascertain and apportion any divisible surplus accruing on the contract. (See Insurance Law §§3219(a)(6) and 4231). Annual distributions must comply with §4231.
- (b) Pursuant to §4231(b)(6), the dividend may, at the option of the contract holder, be:
  - (i) Payable in cash except that cash payment will not be required:
    - (I) for a contract or contract qualified for special tax treatment under IRC §403(b) to the extent that such payment would prevent such qualification or
    - (II) for a contract with respect to which the Superintendent has determined that cash payment of dividends would be inappropriate, or
  - (ii) Applicable to the payment of any premium or premiums upon said contract. (Generally not applicable to immediate annuity contracts.)
  - (iii) Permitted to accumulate to the credit of the contract.
- (c) The automatic dividend option when none is elected shall be determined by the insurer with Department approval, as provided by §4231(b)(6) and must be set forth in the contract.
- (d) If dividends are not expected to be paid, the contract should so state.

#### C.6) Annuity Payment Options

- (a) The contract must contain a description of the annuity payment option selected by the Owner. This description must include an explanation of the payment interval chosen, an explanation of how the annuity payments change upon the

death of one of the annuitants (for those payment options with more than one annuitant), a description of the guarantee period (if any), and, if applicable, an explanation of what benefits are available upon the death of the annuitant. See §§ 3201(c)(2), 3204, 3219, & 3223.

- (b) The contract must describe any payment limitations.
- (c) If the contract includes period certain and/or refund feature (i.e., cash or installment refund) payment options, the contract must include a facility of payment and/or death benefit provision that provides an explanation of who the payments will be paid to in the event the annuitant dies before reaching the end of the period certain or, for refund features, before a sum equal to the premium has been paid out.
- (d) In the event that there is a gap in time between the purchase of an immediate annuity and the commencement of payments and the annuitant dies in that period prior to the commencement of annuity payments (but after any free look period), the Department suggests as a best practice that the insurer refund the premium paid for the contract. In the event an insurer plans on keeping the premium paid instead of refunding it, this fact must be disclosed in the contract. (See §III B.7above).

C.7) Qualification as an Annuity Pursuant to the Internal Revenue Code

- (a) The contract should include those provisions necessary to comply with Internal Revenue Code §72(s) in order to be treated as an annuity contract for federal tax purposes.

C.8) Compliance with Circular Letter 27 (2008) and its Supplement No. 1

- (a) Circular Letter 27 (2008) is applicable to an immediate annuity to the extent that the immediate annuity provides rights and benefits that differ depending upon one's status as a spouse.
- (b) The disclosure issue for immediate annuities is related to joint & survivor benefits. IRS regulations require a reduction in the income paid to a non-spouse surviving joint annuitant under a joint & survivor annuity issued in a tax qualified setting if the primary annuitant's age exceeds that of the non-spouse joint annuitant by more than 10 years. See Treas. Reg. §1.401(a)(9)-6. Since same-sex spouses are not treated as spouses under federal law, it is important for same-sex spouses considering the purchase of a joint and survivor immediate annuity to be aware of this potential reduction.

Insurers already typically provide disclosure of the potential reduction for surviving non-spouse annuitants in this setting. Further disclosure should be provided so that same-sex spouses know that they will be treated as non-spouses under the code for this purpose. The disclosure should also advise



same-sex spouses who own or are considering the purchase of annuity products that provide benefits based upon status as a spouse to consult a tax advisor prior to purchase and/or prior to exercising benefits provided by the annuity product. (If the Insurer treats all surviving spouse and non-spouse joint annuitants the same by reducing the income for all joint annuitants additional disclosure solely for same-sex spouses is not required.) Accordingly, the submission must describe how the insurer's application process provides applicants with appropriate notice of this potential reduction in payments.

C.9) Claims of Creditors

If there is contract language regarding claims of creditors, the provision must comply with §3212.

III.D) Other Provisions

D.1) Assignments

- (a) Generally, the Department finds restrictions on assignment, including the reduction or termination of benefits upon assignment, as prejudicial to the interests of the contract holders and unjust, unfair and inequitable. §3201(c)(2). See also §3212(e)(4) and New York Uniform Commercial Code §9-406(d). The Department has approved restrictions on assignment for tax-qualification purposes. Any other restrictions would be reviewed on a case-by-case basis. Accordingly, any contract form containing a restriction on assignment other than a restriction for tax-qualification purposes may not be submitted to the Department under the certified process without permission.
- (b) Insurer's procedures on assignments should be described in the annuity contract for disclosure purposes. For example, assignments must be in writing, filed with the insurer, etc. §3204.
- (c) The contract should provide that assignments are effective as of the date the written notice of assignment was signed, subject to action taken by the insurer prior to receipt of notice.
- (d) Note that Rule 12h-7(e) of the Securities and Exchange Act of 1934 includes an exception providing that the restrictions discussed in that rule are not required to the extent they are prohibited by the law of any State or by action of the insurance commissioner, bank commissioner, or any agency or officer performing like functions of any State.

D.2) Commutation of Payments

- (a) The Superintendent has exercised discretion pursuant to §3201 to permit commutation provisions providing for full or partial commutation of future annuity income payments.

- (b) If commutation of payments after annuitization is permitted, the commutation provision must fully describe how the commuted value is determined. §3204.
- (c) If the contract includes a commutation provision, the submission materials must explain how the commutation provision is not unjust, unfair, inequitable, or otherwise prejudicial to the interests of contractholders as required by §3201(c)(2) of the Insurance Law. In particular, the explanation should address 1) how the difference between the value of the benefits if taken normally and the value of the benefits if commuted is disclosed to the consumer, 2) the fairness in the level of commuted benefits, and 3) the insurer’s approach to ameliorating anti-selection and expense risks.
- (d) Commutation of the period certain portion of a life and period certain annuity must include resumption of the life contingent payments at the end of the certain period if the annuitant is alive at the end of the certain period.
- (e) The insurer must retain the right to defer a commutation for 6 months from the date of the request and that during any such deferral scheduled payments will continue.
- (f) Approval of a commutation provision requires exercise of the Superintendent’s judgment that the provision is not unjust, unfair, inequitable or otherwise prejudicial to the interest of contractholders under §3201(c)(2) of the Insurance Law. Insurers may not use the Circular Letter No. 6 (2004) submission procedure for forms with commutation provisions unless the Department has given permission to do so. Insurers may use the Circular Letter No. 6 (2004) procedure without first obtaining permission to do so if the commutation provision only allows for the commutation of period certain payments (not life contingent payments) and meets one of the following conditions:
  - (i) Payments are commuted based on a rate guaranteed at annuitization. The commuted value is not less than the present value of the commuted certain payments discounted at the Original Interest Rate plus 1.75%. The Original Interest Rate is the annual rate that together with the mortality table guaranteed in the contract equates the amount applied at annuitization with the present value of the annuity payment (i.e., without expense loads).
  - (ii) Payments are commuted based on a rate guaranteed at annuitization. The commuted value is not less than the present value of the commuted certain payments discounted at the Original Interest Rate and subject to a charge as a percentage of the commuted value of the following:

Completed years since annuitization						
Years	0	1	2	3	4	

Charge	10%	9%	8%	7%	6%	
Years	5	6	7	8	9	>9
Charge	5%	4%	3%	2%	1%	0

- (iii) Payments are commuted using an Adjusted Rate which is the Original Interest Rate plus an adjustment for changes in the general level of interest rates from the time of annuitization to commutation based on a published index. The commuted value is not less than the present value of the commuted certain payments discounted at the Adjusted Rate plus 1%.
- (iv) Payments are commuted using an Adjusted Rate. The commuted value is not less than the present value of the commuted certain payments discounted at the Adjusted Rate and subject to a charge as a percentage of the commuted value of the following:

Completed years since annuitization								
Years	0	1	2	3	4	5	6	>6
Charge	7%	6%	5%	4%	3%	2%	1%	0%

D.3) Cost of Living Increases to Annuity Payouts

- (a) If the cost of living increase is based on a set percentage (i.e. 1%, 2%, 3%) the contract must describe the frequency of the increase and the method applied to determine the increase (i.e. simple or compound method of increasing the payments). The application/enrollment form must disclose how election of a cost of living option will affect initial income payments (i.e. the larger the percentage elected the lower the initial payments will be)
- (b) If a cost of living increase is based on an external index the contract must specifically name the index, identify the source or publication where the index can be found and indicate the frequency of the increase.
- (c) If the contract allows for both positive and negative adjustments based on an external index, this fact must be clearly disclosed on the specifications page.

D.4) Tax-Qualified Contracts

- (a) All annuities being issued on a tax qualified basis should be reviewed for compliance with the Internal Revenue Code requirements prior to submission to the Department. It is recommended that an insurer's tax counsel review all such tax-qualified endorsements prior to submission to ensure compliance with the most updated requirements. A certification of compliance from the tax counsel or other evidence of compliance (i.e. IRS approval) should be made with the submission of such forms to obviate the need for a detailed review by Department staff.

- (b) If applicable, the contract provisions may not be inconsistent with the Internal Revenue Code's minimum distribution rules.
- (c) If applicable, the contract should be on a unisex basis for the purpose of compliance with the Norris decision and/or Title VII of the Civil Rights Act.

D.5) Substandard Annuities

- (a) The use of substandard annuity mortality tables is only allowed where there is a medical assessment of the annuitant based on relevant hospital records, treating physicians' reports, or independent medical evaluations that support at least a 25% reduction in the expectation of life compared to a normally healthy individual of the same age and gender. See §99.6(j)(2) of Regulation 151.
- (b) In order to issue substandard annuities, an Insurer must conduct medical underwriting on an individual basis (based on review of an individual's medical information) and not on a class basis (i.e., not based on responses to lifestyle questions, socio-geographic factors, or solely on health indicators such as high blood pressure, diabetes, obesity, etc.)
- (c) The Insurer must retain the information used in the medical assessment in its underwriting file as proof of the individual's impaired health and shortened longevity for as long as the contract remains in force. See §99.6(j)(2) of Regulation 151.
- (d) The reserves for substandard annuities must comply with §99.6(j)(3) of Regulation 151.
- (e) All medical underwriting questionnaires and application/enrollment forms as well as release for medical information must follow the standards set forth in the Department's Individual Life Insurance Application Product Outline.
- (f) The submission letter must contain a description of the Insurer's underwriting procedures as well as identify the MIB disclosures and medical releases to be used with the substandard annuity (as applicable) by form number and Department file number.
- (g) Insurers using the Circular Letter No. 6 (2004) procedure for submitting a substandard annuity must also submit a separate certification signed by the Insurer's actuary stating that the Insurer will comply with the underwriting and reserve requirements for substandard annuities set forth in §99.6(j) of Regulation 151.

III.E) §4240 and Regulation 47 Requirements

These apply to a Variable Annuity or the Variable Portion of a Fixed and Variable Annuity.

E.1) Isolation/Segregation Provision

- (a) §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 the separate account assets and investment experience is segregated from the insurer's general accounts and other separate accounts to the extent provided in the contract.

E.2) Permitted Investments

The separate account contract must identify or describe the permitted investments for such separate account. See §4240(a)(2)(A).

E.3) Guarantees of Value

- (a) The separate account contract must not provide any guarantee of the value by the insurer 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).
- (b) For non-guaranteed annuity 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), and (iii) of §4240(a)(2)(A).
- (c) Under §4240(a)(5)(iii), an annual actuarial opinion and memorandum by a qualified actuary and acceptable to the Superintendent must be submitted. This requirement applies to variable annuities with guaranteed living benefits, including guaranteed minimum account benefits, guaranteed minimum income benefits and guaranteed minimum withdrawal benefits.

E.4) Valuation

Pursuant to §4240(a)(7) of the Insurance Law, the separate account contract must 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 must specify how such assets would be valued.

E.5) Asset Maintenance

Pursuant to §4240(a)(8) of the Insurance Law, unless otherwise provided in approvals given by the Superintendent and under such conditions as he may prescribe, the separate account 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 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.

§50.3(a)(1) of Regulation 47 provides: *Except as may be permitted in writing by the Superintendent, every insurer 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.*

However, §44.11(b)(5) of Regulation 127 provides, in pertinent part:

*At all times, the insurer shall maintain assets in the separate account having an aggregate market value at least equal to the greater of (i) an amount equal to the aggregate cash surrender values of the contract funded by the account (as adjusted by any market-value adjustment formulae), and (ii) an amount of assets deemed by the qualified actuary to be necessary to make good and sufficient provision for the contract liabilities.... If the aggregate market value of such assets should fall below such amount, the insurer shall transfer assets into the separate account so that market value of the separate assets is at least equal to such amount.*

As such, separate account agreements and plans of operation 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.

#### E.6) Disclosure

Any contract providing for benefits, contributions or both, payable on a variable basis, must:

- (a) Contain a statement of the essential features of the procedures used to determine the dollar amount of the variable elements thereunder. §4240(a)(11)(A).
- (b) State in clear terms that such amounts may decrease or increase according to such procedure. §4240(a)(11)(B).
- (c) Contain on its first page a statement that such elements thereunder are on a variable basis. See II.A.5 above and §4240(a)(11)(C).

#### E.7) Asset Ownership

- (a) §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.

E.8) Insulation Provision

- (a) §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) §4240(a)(12) of the Insurance Law and §50.3(a)(2) of Regulation 47 permits, 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) §7435(c)(1) of the Insurance Law provides that the estate of the life insurance insurer shall mean the general assets of such insurer 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.

E.9) Mortality and Expense Guarantees

If the contract provides for variable annuity payments, the forms 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. §50.6(a)(1) of Regulation 47.

E.10) Variable Annuity Computation Method

- (a) For variable income payments, the contract must contain a concise and clear statement of the method used in computing the dollar amount of the variable benefit. §50.6(c) of Regulation 47.

- (b) The method of computing the dollar amount of variable annuity payment must 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 contract, such amounts would not decrease. §50.6(a)(1) of Regulation 47.
- (c) The mortality table (including any projection scale and the years of projection) and assumed interest rate must be stated in the contract.

III.F) Provisions Applicable to Fraternal Benefit Societies

The statutory requirements for Fraternal Benefit Societies are set forth in Article 45 of the Insurance Law. The majority of this Outline is also applicable to annuity contracts issued by Fraternal Benefit Societies. (See 11 NYCRR 49.3, applying Insurance Law §3219 to annuity certificates issued by fraternal benefit societies.) Additional requirements and special limitations set forth in Article 45 are discussed in detail in the Department's forthcoming Fraternal Products Outline.