



NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

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**GROUP FIXED AND/OR VARIABLE DEFERRED ANNUITY CONTRACTS SUBJECT TO
INDIVIDUAL STANDARDS OUTLINE**
(Last Update 7/25/2014)

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**GROUP FIXED AND/OR VARIABLE DEFERRED ANNUITY CONTRACTS
SUBJECT TO INDIVIDUAL STANDARDS OUTLINE**
(Last Updated 7/25/14)

This outline is current as of 7/25/14. 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

A.1) This product outline applies to allocated group annuity contracts and certificates that are subject to Insurance Law §4223. Specifically, the outline applies to:

- (a) all allocated group annuity contracts delivered or issued for delivery in this state except contracts that are purchased in connection with one or more retirement plans or plans of deferred compensation established or maintained by or for one or more employers, employee organizations, or any combination thereof. See §4223(a)(1) and (b)(1)(B); and
- (b) any group annuity certificate issued, or issued for delivery, under an allocated group annuity contract (other than a group annuity contract issued to an employee benefit plan within the meaning of ERISA 29 U.S.C. §1001 et seq.) to a person solicited for the sale of such certificate in this state if:
 - (i) such certificate provides benefits under an individual retirement account or is issued as an individual retirement annuity, both as defined in §408 of the Internal Revenue Code (IRC), except for a simplified employee pension as defined in IRC §408(k); or
 - (ii) such certificate is issued as an annuity contract in accordance with IRC §403(b) of such code under a program for the purchase of such annuity contract where the payments are derived wholly from a salary reduction agreement or an agreement to forego an increase in salary; or
 - (iii) the benefits provided under such group annuity contract are derived wholly from funds contributed by the persons covered thereunder. See §4223(b)(2).

We note that the exception for certificates issued under group annuity contracts funding employee benefit plans within the meaning of ERISA extends to employee benefit plans that are not subject to ERISA (e.g. governmental plans). See 6/5/06 Office of General Counsel Opinion No. 06-06-01, "Treatment of Government Plans Under N.Y. Ins. Law 4223."

With respect to IRC §403(b) plans, the safe harbor rules in Department of Labor (DOL) Regulation 29 CFR §2510.3-2(f) describe the circumstances in

which §403(b) plans are not employee pension benefit plans under ERISA. See also DOL Field Assistance Bulletin No. 2007-02.

- A.2) This outline does not apply to unallocated group annuity contracts or allocated group annuity contracts and certificates funding an employee benefit plan (i.e. IRC §§401(a) plans, 401(k) plans, most 403(b) plans, 457 plans, 408 SIMPLE and SEP plans, etc.) to the extent that such plan qualifies as an employee benefit plan within the meaning of ERISA.
- A.3) This outline replaces the 8/2/12 Group Fixed and/or Variable Annuity outline.
- A.4) For purposes of this outline, Deferred Annuities include all annuities other than Immediate Annuities. 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 IRC §72(u)(4). See also §(III)(G)(3) of this outline.

The outline applies to allocated group fixed deferred annuities including excess interest annuities, modified guaranteed annuities, guaranteed paid-up deferred annuities and equity index annuities as well as to variable annuities and fixed and variable annuities, as those terms are defined below. For purposes of this outline only, the terms excess interest annuities, modified guaranteed annuities, equity indexed annuities, guaranteed paid-up deferred annuities, variable annuities and fixed and variable annuities shall be defined as set forth below. In other contexts, different definitions may be appropriate.

Allocated Annuities – Annuities providing for the maintenance of one or more accounts for each participant of all deposits made by or on behalf of such participant. Such annuities provide for the allocation of deposits into one or more separate accounts and/or the insurer's general account.

Excess Interest Annuities – Fixed deferred annuities in which premiums less expenses are accumulated at a guaranteed minimum interest rate and provide for the possibility of additional amounts (excess interest) above the guaranteed minimum interest rate at the discretion of the insurer.

Market Value Adjusted Annuities (also referred to as MVA annuities or Modified Guaranteed Annuities) – Fixed deferred annuities that guarantee principal and a high rate of interest on amounts deposited for a specified time period up to ten years with an unqualified right to withdraw an unadjusted cash surrender benefit upon the expiration of the specified time period. Withdrawals that are not made at maturity or at the expiration of the specified period may be subject to a market value adjustment.

Equity Index Annuities – Fixed deferred annuities that credit excess interest in accordance with an external market equity index, such as the Standard & Poor's 500 Composite Stock Price Index, and provide a guaranteed minimum floor to limit downside risk.

Guaranteed Paid-Up Deferred Annuities – Fixed deferred annuities in which each contribution purchases guaranteed income determined at the time of contribution to commence at a stated date. Guaranteed paid-up deferred annuities do not credit additional amounts (excess interest) or provide for the distribution of dividends and may not provide for cash surrender or death benefits.

Variable Annuities – Deferred separate account annuities in which the account value or amounts payable or credited under the contract during the accumulation phase vary with the investment performance of the assets allocated to the separate account.

Fixed and Variable Annuities – Deferred annuities that combine both fixed and variable accounts in one contract. Some companies accomplish this by including both the fixed and variable accounts in one contract form while others add the fixed account(s) to a base variable annuity contract by rider.

II) Filing Process

II.A) General Information

A.1) Prior Approval Requirement

- (a) 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).
- (b) 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, 4238, and 4239. Filings that are incomplete or do not comply with applicable laws and regulations will be rejected. See Circular Letter No. 4 (1997).

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 should make reference to any law or regulation that specifically applies or is unique to the type of contract form (and rates as applicable) 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.

B.4) Filing of non-English versions of forms

- (a) The English 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. (For example, the Spanish version of form APP-123 could be APP-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 should not use qualifying language such as “to the best of my knowledge and belief”.
- (d) An original certification by an officer of the company 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. The certification must state that the underlying English language policy form achieves a minimum Flesch score of 45 in accordance with Section 3102(c)(1)(D). §3102(b)(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.

II.C) Preparation of Forms – Circular Letter No. 6 (1963)

C.1) Duplicates

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

C.2) Form Numbers

Form numbers need to appear in the 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. 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 policy forms need to be filled in with hypothetical data. § I.E.1 of Circular Letter 63-6.

C.4) Application

The application to be used with the contract/certificate must be an approved form. When submitting a contract/certificate form to which a copy of the application will be attached when issued, the form and file number for the previously approved application must be supplied. If the application has not been approved, the application form must be submitted with the contract/certificate forms for approval. If the application is already pending approval, please provide the Department's file number. §I.E.4 of Circular Letter 63-6.

C.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. Revisions to font style, paper, weight and ink color are permitted provided that the forms continue to comply with all applicable laws, including but not limited to Insurance Law §§ 3102 and 3201(c)(4).

C.6) Submission Made on Behalf of Company

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

(a) on company letterhead or include the company name in the "Re" line of the authorization;

(b) specifically addressed to the New York State Department of Financial Services;

(c) properly executed by an authorized officer of the company;

(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.

II.D) Submission Letter/SERFF Requirements

D.1) Caption Requirement

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. Please see the Department’s guidance for SERFF filings available on the Department’s website at <http://www.dfs.ny.gov/insurance/serflife.htm>

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

D.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, for SERFF submissions, 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.

(c) A statement of the type of coverage provided.

(d) Advise 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.

- (e) If the form being submitted is other than a contract (i.e. rider, endorsement, or insert page), give the form number of the contract and certificate 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 form(s) will be used with new and/or previously issued/delivered contracts/certificates.
- (f) When the contract is designed in an insert page format, the insurer must submit a statement of the pages that always must be included in the policy form and a list of all optional pages, if any, together with an explanation of the use thereof.
- (g) 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 has not been 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 must 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. The substitution option is not available for policy forms approved under Circular Letter 6 (2004) filings.

Note: If the form has been issued, the substitution option is not available and the insurer must place a new form number on the corrected form and file the form as a new submission under any of the filing options.

- (h) For contracts with variable accounts, the submission letter should indicate whether a contract filing with the Securities and Exchange Commission ("SEC") is required and the current status of such filing.
- (i) If the contract provides commutation benefits the letter must so indicate.
- (j) If partial withdrawals do not result in pro rata reduction in the death benefit provided under the variable annuity contract, the letter must disclose this fact.

D.3) Explanation of Unique Features and Market

- (a) Submission letters should be as detailed as possible explaining any innovative or unique 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 or is new to the marketplace in New York.)
- (b) Specify the type(s) of group contractholder(s) under §4238(b).

- (c) Describe the type of plan, fund or program funded by the policy form, such as IRC §§403(b), 408 IRA and ROTH IRA, CRAT, CRUT, and NIMCRUT.

D.4) Guaranteed Living Benefits

- (a) These benefits provide for a guaranteed floor on certain elective benefits (e.g., cash surrender value) regardless of the performance of the variable funds. The submission letter must disclose any guaranteed living benefits (e.g., guaranteed minimum account balance [GMAB], guaranteed minimum income benefit [GMIB], or guaranteed minimum withdrawal benefit [GMWB]) provided under the contract, including whether the contract owner can discontinue the benefit (and charge for the benefit) once elected.
- (b) The submission letter must include confirmation that the guaranteed living benefit when combined with any other benefits (e.g. death benefits) does not provide for a guaranteed return of considerations accumulated at an interest rate of 3% or more. Section 4240(d)(1).
- (c) The submission letter must include a description of any asset allocation models, (e.g., investment allocation restrictions or limitations as well as transfer limitations) associated with the VAGLB. Detailed trading rules associated with the VAGLB, if any are applicable, must be submitted to the Department for filing.

D.5) Availability of Cash Surrender Benefit and Death Benefit

- (a) For fixed annuities, if cash surrender benefits are not provided, the submission letter must indicate that no cash surrender benefits are provided and must specify the applicable exception under Section 44.6 of Regulation 127. See §4223(h). In the event the insurer believes the discretionary exception of Section 44.6(a)(6) is applicable, the filing must be made under the regular prior approval process, rather than the Circular Letter 6 of 2004 process, unless approval under Section 44.6(a)(6) of Reg. 127 has already been received. Similarly, for variable annuities, if the insurer believes the Department should exercise discretion to determine that cash values are not appropriate, the filing must be made under the regular prior approval process. See Section 50.7(a)(3) of Regulation 47. See also §§(III)(F)(10) and (III)(E)(11) of this outline (Cash Surrender Benefits).
- (b) If prior to the commencement of annuity payments no death benefit is provided or the death benefit is not at least equal to the actual accumulation amount (in the case of a fixed account other than an equity index account), or the equity index value (in the case of an equity index account) or the account value (in the case of a variable account), the submission letter must so indicate and, if applicable, must explain why no death benefit is provided prior to the commencement of annuity payments. See §4223 (c)(1), (f) and (h) and Section 50.3(a)(8) of Regulation No. 47. See also §§(III)(F)(9) and (III)(E)(9) of this outline (Death Benefits).

D.6) Applicability of a Market-Value Adjustment

(a) Submission letter must indicate whether a market value adjustment (MVA) formula is applicable.

(b) Submission letter must indicate whether a withdrawal charge formula (with an embedded MVA pursuant to §44.4 of Regulation 127) is applicable.

D.7) Maximum Maturity Date or Maximum Annuitization Age

If the contract provides for a maximum annuitization age or maximum maturity date, the submission letter must specify the maximum issue age. See also §(III)(G)(4) of this outline.

D.8) Noncompliance Explanation

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.

D.9) 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.

D.10) 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.

D.11) 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".

D.12) Sex-Distinct/Unisex

Submission letters should advise as to whether the contract is sex-distinct or unisex. If sex-distinct, the letter should confirm that the policy 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. If a previously approved unisex endorsement or unisex pages will be used with the contract for Norris or Title VII situations, the submission letter should so state.

D.13) Fixed Account Availability Restrictions and Right to Refuse Premium Contributions

- (a) Where the forms include a reserved right to restrict availability of the fixed account in a flexible premium fixed and variable deferred annuity or a reserved right to restrict premium payments in a flexible premium fixed deferred annuity, the submission letter must include the insurer's (a) confirmation that the reserved right will only be exercised when the yield on investments would not support the contract's guaranteed minimum interest rate or, in the case of a flexible premium fixed annuity, where additional premium would exceed maximum premium limitations set forth in the contract and (b) assurance that the discontinuance or restriction would not be exercised in an unfairly discriminatory manner pursuant to §4224. See §§(III)(A)(9) and (III)(H) of this Outline for more on fixed account availability.
- (b) For any flexible premium contract (fixed and variable, fixed or variable only) that includes a reserved right to stop accepting premium payments or any contract that reserves the right to restrict the availability of the fixed account, the submission letter must include the insurer's assurance that the discontinuance or restriction would not be exercised in an unfairly discriminatory manner pursuant to §4224.

See Sections (III)(A)(9) and (10) and (III)(H) of this Outline for more on fixed account availability restrictions and reservation of right to refuse premium payment

II.E) Attachments

E.1) Flesch Score Certification – Readability Requirement

- (a) Unless excluded under §3102(b)(1), provide a Flesch score certification signed by an officer of the company in accordance with §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, available on the Department's website, for a sample certification.

<http://www.dfs.ny.gov/insurance/life/product/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 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.

E.2) Actuarial Opinion and Memorandum

Section 3201 (c)(10) and Section 44.7 of Regulation 127 require an actuarial opinion and memorandum (AOM) for annuity contracts that include a market value adjustment formula

E.3) Plan of Operation

For an annuity contract that permits amounts to be allocated to one or more separate accounts, the filing must include a copy of the approval letter from the Department for each plan of operation (or amendment thereof) or 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. §4240(e).

E.4) Prospectus/Offering Memorandum

If a prospectus or offering memorandum will be used with the annuity, a copy of the draft or final prospectus/offering memorandum must be made available upon Department request.

E.5) Actuarial Nonforfeiture Certification

A certification must be provided, which is signed and dated by an actuary stating, as applicable, that:

- (a) the actuary signing the certification is a member in good standing of the American Academy of Actuaries or the Society of Actuaries, and
- (b) the fixed account portion of the annuity contract, whether in the general account or separate account, is in compliance with the nonforfeiture requirements of the New York Insurance Law and regulations applicable to individual fixed deferred annuities, and
- (c) the variable account portion of the annuity contract is in compliance with the nonforfeiture requirements of the New York Insurance Law and regulations applicable to the variable account portions of separate account deferred annuities, and
- (d) the actuary has read the forms and supporting material submitted with the file.

(Note: The nonforfeiture certification is not required for submissions made pursuant to Circular Letter 6 (2004). The general certification required by Circular Letter 6 (2004) eliminates the need for this more specific certification.)

E.6) Memorandum of Variable Material

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 is subject to approval and must comply with all substantive and procedural filing guidance issued by the Department.

E.7) Tax Qualified Endorsements and Riders

- (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.
- (b) It is recommended that an insurer's tax counsel review all such tax-qualified endorsements prior to submission to ensure compliance with current requirements.
- (c) A certification of compliance from the tax counsel or other evidence of compliance (i.e. IRS approval) would obviate the need for a detailed review by Department staff. (Note: The general certification required for Circular Letter 6 of 2004 filings would eliminate the need for this more specific certification.)

E.8) Key References

- (a) Insurance Law. §§ 3102, 3105, 3201, 3204, 3206, 3214, 3219, 3227, 4223, 4231, 4232, 4238, 4240.
- (b) Federal Law. IRC §§72(p) and (s), 403(b), 408. Securities Act of 1933, Securities Exchange Act of 1934, Investment Companies Act of 1940, Investment Advisors Act of 1940
- (c) Regulations. Regulation Nos. 34-A, 47, 60 and 127.
- (d) Circular Letters. CL 6 (1963), CL 1 (1964), CL 14 (1997), CL 2 (1998), CL 33 (1998), CL 13 (2000), CL 21 (2000), CL 6 (2004), CL 27 (2008), CL 8 (2010) and CL 5 (2011).

III) Specific Requirements

Note that separate account annuity contracts provide that amounts paid to the insurer to provide annuities shall be allocated, in whole or part, to one or more separate accounts. See Section 50.1(a)(3) of Regulation No. 47. For purposes of this outline, separate account annuity contracts that permit allocations to a fixed account will also be referred to as combination fixed and variable annuity contracts. Amounts allocated to the insurer's general account under a separate account annuity contract are subject to the provisions of

the Insurance Law applicable to individual fixed deferred annuity contracts. In addition, amounts allocated to a guaranteed separate account are subject to the provisions of the Insurance Law applicable to individual fixed deferred annuity contracts to the extent that 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. See §4240(d)(1 and 2) of the Insurance Law and 2-15-02 Office of General Counsel opinion regarding “Guaranteed Minimum Income Benefit and N.Y. Ins. Law §4223 (McKinney 2000).” The language in §4240(d)(1) was added to require that fixed annuities funded through an insurer’s separate account comply with the provisions of the Insurance Law applicable to individual fixed deferred annuity contracts. In general, the separate account provisions of this outline apply to amounts allocated to a separate account or accounts that provide for benefits that vary according to the investment experience of such separate account or accounts. Also, the reference to the term “contract” in this outline includes “certificate” where a certificate is issued to an individual under any group annuity contract.

III.A) Cover Page

A.1) Company’s Name and Address

- (a) The licensed New York company’s name must appear on the cover page of the contract and certificate as well as the cover page of each rider and endorsement form.
- (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 and certificate. 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 and certificates. 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 and certificate. 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) At least one signature of a company officer must be provided on each contract, certificate, rider, and endorsement form.
- (e) The forms must exclude any references to an insurer not licensed to do business in New York. §3201(c)(1).
- (f) 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. §3201(c)(1). This would apply to applications as well.

- (i) The name of the issuing insurer must be clearly disclosed, with equal prominence to any other entity mentioned.
- (ii) The contract must be clearly identified as an annuity contract issued by the insurer.
- (iii) See FINRA 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) Free Look Provision

- (a) The contract/certificate or a notice attached to the contract/certificate must contain a provision to the effect that it may be surrendered to the insurer together with a written request for cancellation during a period specified in the provision or notice. §§3219(a)(9) and 4240(a)(13).
- (b) The period specified must not be less than ten days nor more than thirty days from the date the contract was received by the contractholder. A 30-day "free look" period is required for mail order situations. §§3219(a)(9) and 4240(a)(13). A 60-day "free look" period is required for replacement contracts. Section 51.6(d) of Regulation 60.
- (c) The refund must be no less than the following:
 - (i) For a fixed account without an MVA, the consideration paid for the contract, including any fees or other charges. §3219(a)(9);
 - (ii) For a fixed account with an MVA, the amount of the cash surrender benefit plus the amount of all fees and other charges deducted from gross considerations or imposed under the contract. §3219(a)(9);
 - (iii) 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)).

(d) 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).

(e) The “date of surrender” means the date the contract is actually mailed to the company or the date the contract holder actually delivers the contract to the company or to an authorized representative of the company. 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 (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.4) Brief Description of the Contract

(a) A brief description of the contract/certificate (e.g., “group separate account flexible premium deferred annuity” or “group variable single premium deferred annuity”) appears on the cover page. To the extent that general account or fixed account funding is provided in the separate account annuity contract, the description may also indicate the following: “fixed account funding,” “modified guaranteed annuity” (“MGA,” also known as “market-value adjustment annuity” or “MVA annuity”), or “equity-indexed annuity” (“EIA”). No marketing name may appear in the contract or riders. (Note, a marketing name may be used in the application form for the contract, but only if it appears in addition to a generic description of the contract.

(i) *Variable annuity contract* is defined in §50.1(a)(4) of Regulation No 47 as “a separate account annuity contract which 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, as amended.” The Department recognizes that the phrase “variable annuity” is often also used to refer to a contract in which the account value varies during the accumulation phase according to the investment experience of the separate account.

(ii) *Separate account annuity contract* is defined in §50.1(a)(3) of Regulation No. 47 as “any contract which provides that amounts paid to the insurer to provide for 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.”

(b) Include a statement as to whether the contract is participating or non-participating. Section II.F.1. of Circular Letter No. 4 (1963). This requirement generally applies to the portion of the contract funded through the insurer’s general account.

A.5) Separate Account Disclosures

(a) There must be a statement identifying the elements of the contract (such as benefits or premiums) which are on a variable basis. §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. §4240(a)(11).

(c) Every variable annuity contract that provides for variable annuity payout options must include a statement which (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 payments will not decrease. §50.6(b) of Regulation No. 47).

(i) Note that 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 contract/certificate, such amounts would not decrease. For example, if the assumed interest rate underlying the annuity payments were 5% and the asset-based charges exceeded 1.5%, then the method of computing the variable annuity payments would fail to comply with §50.6(a)(1).

(ii) Note the First Amendment to Regulation No. 47 amended §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.

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

A.6) Officer's Signatures

- (a) The signature of at least one officer of the company in order to execute the contract is required as a matter of contract law.
- (b) Signatures appearing on contract and certificate forms are to be underlined or bracketed to denote variable material.

A.7) Disclosure of No Cash Surrender Benefit

If the contract fails to provide cash surrender benefits at any time prior to commencement of annuity payments, a statement to this effect must appear in a prominent place (i.e. the cover page) §4223(h) and 3201(c)(1). See also §§(III)(F)(10) and (III)(E)(11) of this outline (Cash Surrender Benefits).

A.8) Disclosure Regarding Death Benefits Prior to the Commencement of Annuity Payments

If prior to the commencement of annuity payments no death benefit is provided or the death benefit is not at least equal to the actual accumulation amount (in the case of a fixed account other than an equity index account) or the account value, (in the case of a variable account), a statement to this effect must appear in a prominent place (i.e. the cover page). §§4223(h) and 3201(c)(1). See also §§(III)(F)(9) and (III)(E)(9) of this outline (Death Benefits).

A.9) Disclosure of Restrictions or Reserved Right to Restrict Availability of Fixed Account

- (a) With regard to a separate account annuity contract with a fixed account funded through the insurer's general account or a guaranteed separate account, there must be prominent disclosure on the cover page and specifications page of the contract and certificate, and in the application, stating, if applicable, that
 - (i) the fixed account is not available at issue (e.g., The face page could include the following: "The fixed account (or one or more fixed account guarantee periods) may not be available on the issue date. Please check the specification page to determine whether the fixed account (or one or more fixed account guarantee period) is currently available."), or
 - (ii) the insurer reserves the right under the contract and certificate to restrict the availability of the fixed account after issue.
- (b) See additional requirements related to reserved rights to restrict the availability of the fixed account in §(III)(H) of this outline.

A.10) Disclosure of Reserved Right to Refuse Premium Contributions

- (a) If a flexible premium deferred annuity contract contains a reserved right to refuse premium contributions, there must be prominent disclosure on the cover page and specification page of the contract and certificate and in the application form. Section 3201(c). Without proper disclosure the Department finds it misleading if a consumer is sold a flexible premium contract and then after issue that flexibility is taken away.
- (b) See additional requirements related to reserved rights to refuse premium contributions in Section III(H) of this outline.

A.11) Disclosure of Market-Value Adjustment (MVA)

- (a) A prominent statement that the contract contains a market-value adjustment formula,
- (b) A statement that the operation of the market value adjustment formula may result in both upward and downward adjustments in cash surrender benefits. Section 44.9(a) of Regulation 127, and
- (c) A description of the points in time when cash surrender benefits are available without the application of the market-value adjustment formula. Section 44.9(a) of Regulation 127.

III.B) Specification Page

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

B.1) Hypothetical Data

The specification page must be complete with hypothetical data. Circular Letter No. 6 (1963) I.E.1.

B.2) Current Interest Rate

The current interest rate for the fixed account(s), if any, must be specified. It can be bracketed to denote variable material.

B.3) Guaranteed Minimum Interest Rate

The guaranteed minimum interest rate for the fixed account, which is in compliance with §4223(c)(2)(C), must be set forth. Bracketing for variability is recommended. 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, with related disclosure appearing on the contract and certificate cover pages. See "Filing Guidance on the Change to §4223(c)(2)(c) of the Insurance Law effective May 15, 2005."

B.4) Guaranteed Maximum Charges/Minimum Credits

The guaranteed maximum expense charges and surrender charges, including the withdrawal charge schedule, market-value adjustment, optional feature/rider charges, contract charges, premium charges, administrative, expense, or other charges, if applicable, must be specified. With respect to the market-value adjustment, the specification page should identify the page of the contract on which the MVA formula or description is provided. §§3219(a)(3) and 4223(c)(3). The contract and/or rider charges and credits must be specified in a manner that clearly indicates how the charges and/or credits will be allocated among the accounts available under the separate account annuity contract.

B.5) Current Charges/Credits

The rider charges and contract credits other than interest, if any, must be set forth. If the contract includes a reserved right to change the rider charge(s) after issue (i.e. indeterminate charge), the specification page must set forth both the current and maximum rider charge. If the contract includes a reserved right to change the contract credits other than interest after issue, the specification page must set forth both the current and minimum contract credits.

B.6) Sub-accounts of Separate Account

The sub-accounts of the separate account, within the scope of an approved plan of operations, may be set forth in brackets 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. See Filing Guidance on Changes in the Investment Options of a Separate Account for Group and Individual Variable Products (dated 11/1/10). 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.

III.C) Table of Contents

A table of contents (or an index of principal sections) is required for contracts and certificates with more than 3,000 words or three pages regardless of the number of words in accordance with §3102(c)(1)(G), unless the contract is otherwise exempt pursuant to §3102(b).

III.D) Standard Provisions

D.1) Entire Contract

(a) The contract must provide for an entire contract provision and the contract language must comply with §§3219(a)(3) and 3204.

- (b) The application must be attached to the contract if it is to be part of the entire contract. [No application 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 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 policy 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.
- (f) The phrase “In absence of fraud” must not be used – Section (II)(H)(7) of Circular Letter No. 4 (1963).
- (g) The contract forms must not include a unilateral amendment provision that grants the insurer the right to change terms and conditions of the contract, except where such change or amendment is required to conform to applicable New York and federal law. Any such change or amendment cannot be effective, without prior approval of the Department. Prior written consent of the contractholder and certificateholder is required if such change diminishes the rights and/or benefits under a previously issued contract/certificate in any manner.

D.2) Certificate Delivery and Validity

- (a) The contract must provide for the issuance of a certificate for delivery to each person covered under the contract. §3219(b). The certificate form sets forth all essential terms and conditions of the contract pertaining to rights and benefits of the certificate holder under the contract.
- (b) The contract and certificate must state that nothing in the group annuity contract invalidates or impairs any right granted to the certificate holder by the certificate or §3219 of the Insurance Law. §3219(a)(4).

D.3) Grace Period

- (a) A fixed annuity that requires payments to be made to the insurer after the initial payment must provide for a 31-day grace period within which any required payment to the insurer falling due after the first may be made.

During the grace period, the contract shall continue in full force.
§3219(a)(1).

- (b) A variable annuity that requires payments to be made to the insurer after the initial payment must provide for either a 30-day or one month grace period within which any required payment to the insurer falling due after the first may be made. During the grace period, the contract shall continue in full force. §50.7(a)(1) of Regulation No. 47.
- (c) A fixed and variable annuity that requires payments to be made to the insurer after the initial payment must provide for a 31-day grace period in order to comply with both §3219(a)(1) and §50.7(a)(1) of Regulation No. 47.
- (d) The contract must include a statement of the basis for determining the date as of which any such payment received during the period of grace shall be applied to produce the values arising therefrom under the certificate. §50.7(a)(1) of Regulation No. 47.

D.4) 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 or may be incontestable from date of issue.
 - (i) A two-year or less contestable period is provided. If the contract is incontestable from date of issue the contract must so state. 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) violations of conditions, if any, relating to service in the armed forces
 - (iii) total and permanent disability benefits
 - (iv) accidental death benefits,
 - (v) statements relating to age, sex or identity. §3219(a)(2).
- (c) An exception to the incontestability provision for fraud is NOT authorized under §3219(a).

D.5) 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 rate of interest charged on overpayments must not exceed the rate of interest credited on underpayments. §3201(c)(2).

D.6) Participating/Dividend Provision

- (a) Annuity contracts that are participating are required to state that the insurer shall annually ascertain and apportion any divisible surplus accruing on the contract. §3219(a)(6) and §4231. Annual distributions must comply with §4231.
- (b) Annual distributions of dividends must comply with §4231. The dividend may, at the option of the contractholder, be:
 - (i) Payable in cash except that cash payment will not be required:
 - (I) for a 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.
 - (ii) Applicable to the payment of any premium or premiums upon said contract. §4231(b)(7).
 - (iii) Permitted to accumulate with interest to the credit of the contract if the contract so provides. (Not a required option)
- (c) The automatic option in the event that an option is not selected by the contractholder must be set forth in the contract.
- (d) Note that pursuant to §4240(d)(1) separate account annuity contracts are not subject to the requirements of §4231(e). In general, §4231(e)(1)

requires domestic mutual insurers to secure a special revocable permit to issue nonparticipating contracts. As such, separate account annuity contracts can be issued on a nonparticipating basis without the insurer securing a special revocable permit. The law provides a similar requirement for foreign and alien mutual life insurance companies. See §4231(e)(3).

D.7) Reinstatement

- (a) A contract that requires payments to be made to the insurer after the initial payment must provide for a minimum reinstatement period of three years (one year for separate account annuity contracts) from the date of default during the life of the annuitant, unless the cash surrender value has been paid. §3219(a)(8) and Section 50.7(a)(2) of Regulation 47. However, since single and flexible premium deferred annuity contracts do not require payments after the first payment, this provision is not required for such contracts.
 - (i) Interest on overdue payments at a specified rate not to exceed 6%. §3219(a)(8).
 - (ii) Interest on any indebtedness not to exceed the applicable loan interest rate. §3219(a)(8).
 - (iii) Evidence of insurability including good health satisfactory to the insurer may be required by the insurer. §3219(a)(8)
 - (iv) A new incontestability period can begin again upon reinstatement based on the application for reinstatement. §3210.
- (b) The contract shall include a statement of the basis for determining the date as of which the amount to cover such overdue payments and indebtedness shall be applied to produce the values arising therefrom under the contract or certificate. §50.7(a)(2) of Regulation 47.

D.8) Termination Options

The options upon cessation of payment of considerations under the contract must be specified. For amounts allocated to a fixed account, the discontinuance options must be in accordance with the requirements of §4223(a)(2). §3219(a)(7). See also §III (F)(10) of this outline (Cash Surrender Benefits). For amounts allocated to a separate account, the discontinuance options must be in accordance with the requirements of Section 50.7 of Regulation 47. See also §III (E)(11) of this outline (Cash Surrender Benefits). Certificateholder consent is required for any contractholder-initiated withdrawal that would reduce the certificateholder's account value. Under such circumstances, if the contractholder terminates the contract, each certificateholder who does not consent to the transfer of funds must be given the right to continue his or her account with the insurer.

D.9) Involuntary Cashout - Small Annuities.

- (a) A scheduled premium or flexible premium fixed annuity may provide that the insurer may, at its option, cancel the annuity prior to the annuitization date and pay the actual accumulation amount (i.e. no reduction for surrender charges or MVA) to the contractholder if no premium payments have been made for a period of three full years and either (i) the actual accumulation amount is less than \$5,000 (or the dollar limit established pursuant to §411(a)(11) of the Internal Revenue Code of 1986, as amended) or (ii) the income payments at maturity would be less than \$20 per month calculated on the basis guaranteed in the contract. §4223(a)(2).
- (b) A single premium fixed annuity may provide that the insurer may, at its option, cancel the annuity prior to the annuitization date and pay the actual accumulation amount (i.e. no reduction for surrender charges or MVA) to the contractholder after three full years from the issue date of the contract, and either (i) the actual accumulation amount is less than \$5,000 (or the dollar limit established pursuant to §411(a)(11) of the Internal Revenue Code of 1986, as amended) or (ii) the income payments at maturity would be less than \$20 per month calculated on the basis guaranteed in the contract. §4223(a)(2).
- (c) If a fixed annuity permits the insurer to refuse to commence the annuity payments due to minimum size requirements (i.e. the actual accumulation amount is less than \$5,000 or the amount of annuity payments would be less than \$20 per month calculated on the basis guaranteed in the contract) at the annuity date, the contract must provide for payment by the insurer of the actual accumulation amount (i.e. no reduction for surrender charges or MVA).
- (d) A variable annuity 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 contractholder its accumulated value (i.e. no reduction for surrender charges or MVA), if such accumulated value is less than \$2000, or would provide an income the initial amount of which is 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)(9) of Regulation No. 47.

D.10) Deferral of Payment

- (a) In connection with the reservation of the right to defer any cash surrender payments (not death benefits, annuity payments, previously scheduled GMWB payments or payments made to comply with the required minimum distribution requirements of the Internal Revenue Code with respect to amounts in the contract), any individual separate account annuity contract and certificate shall provide, if and to the extent permitted or required under the 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, and related rules and regulations of the SEC:
 - (I) for any period (A) during which the New York Stock Exchange is closed other than customary week-end and holiday closings or (B) during which trading on the New York Stock Exchange is restricted;
 - (II) for any period during which an emergency exists as a result of which (A) disposal by the company of securities owned by it is not reasonably practicable or (B) it is not reasonably practicable for such company fairly to determine the value of its net assets; or
 - (III) for such other periods as the Commission may by order permit for the protection of security holders of the company

(Investment Company Act of 1940 at Section 22(e). Section 50.7 (a)(4) of Regulation 47)

- (b) In connection with the fixed account portion of the contract, the contract must include a provision reserving the right to defer payment of the cash surrender benefit (not death benefits, annuity payments, previously scheduled GMWB payments or payments made to comply with the required minimum distribution requirements of the Internal Revenue Code with respect to amounts in the contract) for a period of six months. §4223(a)(1)(B).
- (c) See also §(III)(G)(20) of this outline with respect to contracts used in the Private Placement market.
- (d) Where the amount of benefits are based on the value of assets in the separate account and an insurer cannot determine the value of assets in the separate account because the New York Stock Exchange is closed, we would not object to a company deferring payment until the exchange reopens.

D.11) Annual Reports

Reference to an annual report is not required in the contract or certificate. However, the contract may explicitly reference the annual report.

- (a) An annual report is required to be provided by the insurer to every separate account annuity contractholder, who has accumulation units credited to his or her account, pursuant to Section 50.9 of Regulation No. 47. The report must include a statement or statements reporting the investments held in the separate account and in the case of contracts 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, and the dollar value of each such unit or the total value of the contractholder'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.
- (b) With regard to the fixed account portion of the contract, an annual report is required by §4223(k). The annual report must describe any paid-up annuity benefit or the amount available to provide a paid-up annuity benefit, cash surrender benefit, and death benefit available under the contract, including the actual accumulation amount, withdrawal charge, market-value adjustment, if applicable, any policy loan amounts under the contract, and description of minimum annual effective rate of interest. §4223(k) and Section 44.8(b) of Regulation 127.
- (c) If the contract contains a guaranteed minimum withdrawal benefit, the annual report and withdrawal request forms should include disclosure in accordance with Circular Letter 5 (2011).

III.E) Separate Account Provisions for a Variable Annuity or the Variable Portion of a Fixed and Variable Annuity.

E.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 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.

E.2) Permitted Investments

The separate account contract (or the 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), §3204(a)(1) and §3219(a)(3).

E.3) Guarantees of Value

- (a) The separate account annuity 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 separate account 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), 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. 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. Section 50.3(a)(1) of Regulation No. 47 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.*

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

At all times, the company 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 contracts 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 company 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 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.

E.6) Disclosures

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 III.A.5 above and §4240(a)(11)(C).

E.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.

E.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, Section 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.

E.9) 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) or (ii):
 - (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 prior to the time of death (i.e. return of premium).
- (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 greater than items (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 to separate account annuities 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) The contract must specify the date on which the death benefit will be determined and explain the effect of contributions and withdrawals on the death benefit.
- (d) 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.
- (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 - §3219(a)(3) and §3204(a)(1).
- (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. See also §(III)(E)(12) of this outline (Withdrawal Charges). See also §(III)(G)(6) of this outline (Owner and Beneficiary)

E.10) 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. Section 50.6(a)(1) of Regulation 47.

E.11) Cash Surrender Benefits

- (a) With respect to amounts allocated to a separate account, a provision specifying the options available, prior to the annuity commencement date, in the event of default of a stipulated premium payment or of surrender of the contract is required. Section 50.7(a)(3) of Regulation 47. The certificateholder must be allowed, at his or her option, to elect:
 - (i) to receive the cash surrender value, or
 - (ii) if the insurer makes a paid-up annuity available, to receive a paid-up annuity to commence at the maturity date provided in the contract, if the contract is not surrendered for cash.
- (b) With respect to amounts allocated to a separate account, the contract must specify the method by which, and the date as of which, the accumulated value of the contract shall be determined and may provide for the deduction

therefrom of a reasonable charge for unamortized acquisition expenses in arriving at the cash surrender value payable. Section 50.7(a)(3) of Regulation 47.

- (c) With respect to amounts allocated to a separate account, if the insurer makes a paid-up annuity available and the certificateholder elects that option, the accumulated value of the contract in the separate account or accounts of the company at the time of default must, at the option of the certificateholder, be transferred to the general account of the company to provide a fixed dollar paid-up annuity. Section 50.7(a)(3) of Regulation 47.
 - (i) The kind and amount of paid-up annuity and the conditions of its payment shall be in accordance with the provisions of the contract and the purchase rates stipulated in the contract.
 - (ii) Any amounts so transferred shall be considered cash surrender values for purposes of deferral in Section 50.7(a)(4) of Regulation No. 47 (and not for purposes of applying a surrender charge). See also Section 50.7 (a)(3) of Regulation 47.

E.12) Withdrawal Charges (Unamortized Acquisition Expenses)

- (a) With regard to amounts allocated to a separate account, the charge deducted in the event of cash surrender may not exceed a reasonable charge for unamortized acquisition expenses. Withdrawal charges may not be deducted from death benefits or upon annuitization as those benefits are not cash surrender benefits. Section 50.7(a)(3) of Regulation No. 47.
- (b) Free Withdrawal - A contract may provide that an amount be withdrawn from the contract value each year without the application of a withdrawal charge. For example, the contract may allow the certificateholder to withdraw an amount equal to 10% of the prior year's account value without a withdrawal charge.
 - (i) The provision must state whether or not it is applicable if a full surrender is made or if an amount in excess of the "free" amount is withdrawn.
 - (ii) Any restrictions on the ability to take the free withdrawal must be set forth in the contract. For example, if the contractholder may only exercise the free withdrawal once per contract year, that must be stated in the contract. Also, the contract should explain what happens if the contractholder does not withdraw the full free withdrawal amount. For example, it should be clear whether or not amounts not withdrawn carry over to the next year.
 - (iii) If applicable, the provision must state whether or not a market value adjustment applies to the free withdrawal amount.

- (iv) If the insurer intends to retroactively apply withdrawal charges to amounts withdrawn under a free withdrawal provision within a specified period of time (e.g. 12 months) prior to a full surrender, that must be prominently disclosed in the contract. If the contract contains such a provision, the company must demonstrate that such retroactive application would not result in charges that exceed a reasonable charge for unamortized acquisition expenses. Section 50.7(a)(3) of Regulation No. 47. Because the Department would need to exercise discretion in reviewing the demonstration and determining that the charge would be a reasonable charge for unamortized acquisition expenses, a contract including this type of retroactive application of the withdrawal charge could not be submitted under the Circular Letter 6 (2004) certified process without permission from the Department. (Note: Such retroactive application is not permitted for fixed accounts. See § III(F)(11)(j) of this outline.)
- (v) The Department has approved waiver of withdrawal charge provisions. See §III(G)(9) of this outline for more detail.

E.13) Variable Income Payment Computation

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. Section 50.6(c) of Regulation 47

- (a) The method of computing the dollar amount of variable annuity payments 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. 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.

E.14) 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 Section 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):

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.

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.

III.F) Nonforfeiture Provisions for a Fixed Annuity or the Fixed Account Portion of a Fixed and Variable Annuity.

F.1) Minimum Benefits Statement

There must be a statement that the paid-up annuity benefits, cash surrender benefits, or death benefits provided under the certificate are not less than those required by the state where the certificate was delivered. §4223(a)(1)(D). The certificate, or application if made part of the certificate, must clearly indicate where the certificate was delivered unless the certificate indicates that the benefits provided under the certificate are not less than those required by New York.

F.2) Guaranteed Benefit Statement

Section 4223(a)(1)(C)

- (a) The contract must describe the guaranteed benefits, with sufficient detail to determine such benefits, including
 - (i) Minimum Paid-Up Annuity Benefit (The mortality and interest basis for guaranteed purchase rates used in the minimum paid-up annuity benefit must be stated in the contract. With regard to annuities where the periodic payments are variable, Section 50.6(c) of Regulation 47 requires a concise and clear statement of the method used in computing the dollar amount.)
 - (ii) Cash Surrender Benefit
 - (iii) Death Benefit
- (b) The contract must specify the times at which guaranteed benefits are payable and provide sufficient information to determine the amounts of such benefits.
- (c) For MVA annuities, the contract must provide sufficient information to determine the amount of guaranteed benefits, including a brief description of the MVA formula, the circumstances in which it is applied and a statement that a detailed description has been filed with the Superintendent. §4223(a)(1)(C).
- (d) For Equity Index annuities, the contract must specify the index and all other features/limits (i.e. caps, participation rates, etc.) and any minimums and maximums for such features/limits. See also Section(III)(F)(7)(e) below.

F.3) Alteration of Benefit Explanation

The contract must include an explanation of the manner in which any paid-up annuity benefit, cash surrender benefit or death benefit are altered by the existence of any additional amounts credited, any indebtedness to the company or any prior withdrawals or partial surrenders. §4223(a)(1)(D).

F.4) Minimum Values Required by Nonforfeiture Law

- (a) General nonforfeiture requirement for accounts other than an equity index account: Minimum values for any paid-up annuity, cash surrender or death benefit available under the contract shall be based on the actual accumulation amount. §4223(c)(1).
- (b) Actual Accumulation Amount (with respect to an account other than an equity index account). §4223(c)(2) and Section 44.3(a) of Regulation 127.
 - (i) Net considerations; minus

- (ii) Premium taxes and premium charges; plus
 - (iii) Additional amounts (See §4232(a)), including interest (which with regard to the fixed account portion of the contract shall not be less than the amount specified in §4223(c)(2)(C) and (F) applied to the sum of the actual accumulation amount and the amount of indebtedness) and dividends, credited by the Company to the contract; minus
 - (iv) administrative charges (which with regard to the fixed account portion of the contract shall not to exceed the amount specified in §4223(c)(2)(D) per year, capped at \$50), prior withdrawals and partial surrenders, and the amount of any indebtedness including interest due and accrued. (Note that §4223(c)(2) does not authorize the deduction of rider charges from the actual accumulation amount for riders providing life, endowment or annuity benefits. However, a contract that does not otherwise have an administrative charge could deduct an amount up to \$50 per year for the benefit.)
- (c) Net Considerations. §4223(c)(3)(A) and Section 44.3(m) of Regulation 127.
- (i) Gross considerations less contract charges.
 - (ii) Net considerations shall not be less than zero for any contract year.
- (d) Contract Charges. §4223(c)(3)(B), Section 44.3(d) of Regulation 127. Fixed dollar charges provided for in the contract shall not exceed amount specified in §4223(c)(3)(B), capped at \$50. Note that these requirements supersede contract charges in §44.3(d) of Regulation 127.
- (e) Premium Charge Percentage.
- (i) For contracts that do not contain an MVA, a charge provided in the contract not to exceed 10% of net consideration. The withdrawal charge percentage is limited to the extent there is a premium charge. See the Withdrawal Charges section of this Outline.
 - (ii) For contracts that contain an MVA, a charge provided in the contract not to exceed 7.0% of net consideration. The withdrawal charge percentage is limited to the extent there is a premium charge. See the Withdrawal Charges section of this Outline.
 - (iii) Note that these requirements supersede §44.3(p) of Regulation 127. Section 4223(c)(3)(C and D).

F.5) Guaranteed Interest Rate and Additional Amounts

- (a) Additional amounts, including interest must be guaranteed to be credited at a rate not less than the amount specified in §4223(c)(2)(C) with regard to fixed account allocations. Additional amounts may be credited no less

frequently than annually. The minimum interest rate must be credited from the date of deposit to the date of withdrawal. §4223(c)(2)(C).

- (b) The minimum interest rate may be set at the time of application as long as the rate at contract issue is based on the constant maturity treasury rates reported by the Federal Reserve within the previous 15 months.
§4223(c)(2)(F)
- (c) Additional amounts must be credited in a manner that complies with §4232(a) of the Insurance Law.
- (d) Additional amounts credited to the contract must be available to the contract holder upon surrender of the contract for its cash surrender benefit, subject to withdrawal charges and/or market value adjustments permitted by §4223. See §4232(a)(1).
- (e) The annuity contract cannot track (i.e. provide) two account balances one of which credits a higher interest rate on amounts that must be applied to annuitization or credits the higher rate only if the contract is held for long periods of time. Similarly, it would be impermissible to have living benefits on a fixed annuity similar to the variable annuity living benefits described in §(III)(G)(7) of this outline if those benefits are based on a benefit base separate from the actual accumulation amount. See §§3201(c)(1), 4223, and 4232(a)(1). [Two-Tier Annuity Prohibition]
- (f) For market-value adjustment contracts, a guaranteed rate may be declared for each premium. Alternatively, a guaranteed rate may be declared for a series of premiums made during a specified window of time. Such premium payment window may not be longer than two years. The interest rate guarantee on any premium payment must not exceed ten years in duration. See §4223(a)(1)(B), Sections 44.3(t), 44.5(c) and 44.6(c) of Regulation No. 127.
- (g) For market-value adjustment contracts, after age 55 the contractholder must be able to choose a guarantee period that does not exceed five years. Section 44.3(t) of Regulation No. 127.
- (h) For a market-value adjustment contract, the guaranteed rate credited to the actual accumulation amount under a contract must:
 - (i) be guaranteed for a specified period of time equal to the specified time interval;
 - (ii) be constant or conforms to a schedule of rates provided in, or declared in advance of crediting pursuant to, the contract;
 - (iii) not be based on actual investment experience; and

- (iv) be a high interest rate such that not more than a minimal increase in the interest rate is likely to be credited not less frequently than annually.

F.6) Paid-Up Annuity Benefit Upon Cessation of Payments. Section 4223(a)(1)

- (a) Present value on commencement date equals or exceeds the actual accumulation amount, with present value computed using the mortality table, if any, and interest rate, if any, specified in the contract for determining any minimum paid-up annuity benefit guaranteed in the contract. Therefore, income payments cannot be less than the full account value applied to the guaranteed purchase rates and the guaranteed purchase rates cannot have expense loadings. §4223(d).
 - (i) The mortality and interest basis for guaranteed purchase rates used in the minimum paid-up annuity benefit must be stated in the contract.
 - (ii) An expense loading is not applied to the guaranteed annuity purchase rates for all annuity payout options other than the lump sum option.
- (b) For contracts without cash surrender benefits, the present value of any paid-up annuity benefit prior to maturity (i.e. not later than the anniversary of the contract next following the annuitant's seventieth birthday or the tenth anniversary if later, §4223(g)) shall not be less than the present value of that portion of the maturity value of the paid-up annuity benefit arising from considerations paid prior to the change to a deferred paid-up annuity, calculated for the period prior to maturity on the basis of the accumulation interest rate and increased by any existing additional amounts. § 4223(f).
- (c) For contracts without death benefits prior to the commencement of any annuity payments, present value must be calculated using the interest rate and mortality table specified in the contract for determining the maturity value of a paid-up annuity benefit. §4223(f)

F.7) Minimum Nonforfeiture Requirements for Equity Index Accounts:

- (a) Minimum values for any paid-up annuity, cash surrender or death benefit available under an equity index account in the contract shall be based upon the greater of the minimum accumulation value and the equity index value as defined in §4223(c)(4) provided that
 - (i) at least once every 10 years the minimum accumulation value and the equity index value will be reset to equal the greater of the two values; and
 - (ii) the value of an equity index account during any contract year may not be less than the value of the equity index account at the start of the contract year plus net considerations credited to the equity index

account during the contract year less transfers, withdrawals and surrenders from the equity index account during the contract year.

- (iii) if an amount is withdrawn from the equity index account, the greater of the minimum accumulation value and the equity index value shall not be reduced by more than the amount withdrawn. The lesser of the two values shall not be reduced by more than the amount withdrawn multiplied by the ratio of the lesser of the two values to the greater of the two values.
- (b) The minimum accumulation value for an equity index account shall equal the actual accumulation amount, as defined in §4223(c)(2), with the following adjustments:
- (i) the amounts added pursuant to §4223(c)(2)(C) shall not include any additional amounts, but shall include the amounts, if any, credited to the minimum accumulation value when values are reset in accordance with §4223(c)(4)(A)(i); and
 - (ii) the reduction in the minimum interest rate described in §4223(c)(2)(F)(ii) may be increased by not more than one percent upon demonstration satisfactory to the superintendent that the present value of the additional reduction does not exceed the market value of the benefit at the contract issue date, and, if applicable, at each date thereafter that the guaranteed interest rate, or equity index formula, can be changed. If this increase is used, the form can not be submitted for approval under the CL-6 (2004) certified process unless the Department has granted permission after reviewing the demonstration and finding it to be satisfactory.
- (c) The equity index value (for each equity index segment) shall equal the actual accumulation amount as defined in §4223(c)(2), with the following adjustments:
- (i) the amounts added pursuant to §4223(c)(2)(C) shall not include any minimum interest; but shall include the amounts, if any, credited based on an equity index formula and the amounts, if any, credited to the equity index value when values are reset in accordance with §4223(c)(4)(A)(i);
 - (ii) the amounts credited to the equity index value shall be based upon an equity index formula specified in the contract meeting the requirements of §4223(c)(4)(D); and
 - (iii) the equity index value at the end of any contract year may not be less than the equity index value at the start of the contract year plus net considerations credited to the equity index account during the contract year less transfers, withdrawals and surrenders from the equity index account during the contract year.

Where there are multiple equity index segments, the equity index value for the contract is equal to the sum of the equity index values for all segments as determined in accordance with §(III)(F)(7)(c) immediately above.

(d) The equity index formula shall be based on:

- (i) a percentage change in an equity index;
- (ii) guaranteed factors, such as participation rates, margins, caps and floors that adjust the percentage change in the equity index or where such factors are not guaranteed but subject to change after contract issue, and:
 - (I) such changes occur not more frequently than annually;
 - (II) such changes are limited by guaranteed factors stated in the contract; and
 - (III) the use of factors other than the guaranteed factors stated in the contract are considered additional amounts within the meaning of §4232(a).
- (iii) be applied not more frequently than monthly nor less frequently than annually; and
- (iv) use the equity index value as the base to which the percentage change in the equity index as modified by factors in the formula is applied.
- (v) in the absence of withdrawals and net considerations, not result in a percentage change in the equity index value over a contract year of less than the percentage change in the equity index as adjusted and applied by the terms of the contract.

(e) The contract and certificate shall describe:

- (i) the equity index used in the formula, including any alternative index should the equity index no longer be publicly available (An alternative to specifically setting forth the alternative index would be to indicate that it would be such alternative index as approved by the superintendent);
- (ii) the period of time over which the percentage change in the index is calculated;
- (iii) any initial participation rate, margin, cap, floor or other factor used to adjust the percentage change in the equity index, the period or periods of time for which such factor is applicable and if the factor is subject to change after the contract is issued, the maximum or minimum as applicable for such factor over the contract's lifetime and the

procedures for determining and disclosing any change in such factor;
and

- (iv) the application of the equity index formula under all possible contingencies.
- (v) the timing and allocation of considerations and transfers into the equity index account and the establishment of segments within the equity index account.

Note: The submission of Equity Index Annuity forms (whether issued through the company's general account or a separate account) may not be made using the Prior Approval with Certification process outlined in Circular Letter 6 of 2004 unless the Department has given permission. However the submission of an Equity Index Annuity contract that identifies itself as such by including in the "Re" of the submission letter "Equity Index Annuity" for paper submission or starts the Filing Description field with "Equity Index Annuity" for SERFF submissions will be given priority treatment.

For equity index annuities issued out of a separate account, section 4223 would apply if the contract were to provide benefits with respect to amounts allocated to the separate account that 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. See §4240(d)(1). Where there is no such guarantee, the insurance law gives the superintendent broad discretion to require appropriate and fair nonforfeiture provisions in products issued through a separate account. See §4240(b)(14) and §3201. Pursuant to that discretion, we have applied §4223 of the insurance law to the typical equity index annuity or equity index account regardless of whether it is issued out of the general account or a separate account. The Department will review requests for alternative approaches on a case-by-case basis.

F.8) Minimum Nonforfeiture Requirements for Guaranteed Paid-Up Deferred Annuities.

- (a) Section §4223(a) requires annuity contracts subject to §4223 to contain in substance the provisions of §4223 or corresponding provisions that in the opinion of the superintendent are at least as favorable to the contract holder. In addition, for any annuity contract subject to §4223, Section 44.6(a) of Regulation 127 requires the annuity contract to have cash surrender values available, unless the contract meets one of the listed exemptions. Pursuant to Section 44.6(a)(6) of Regulation 127, the superintendent may approve annuity contracts subject to §4223 without cash surrender benefits upon a demonstration that cash surrender benefits are not appropriate. Guaranteed paid-up deferred annuities may require approval under the authority granted to the superintendent in §4223(a) and Section 44.6(a)(6) of Regulation 127 for features such as:

- (i) Limited or no death benefit; for the purpose of this guidance death benefit excludes amounts payable as a result of the annuity form income option selected (e.g., certain payments);
 - (ii) No cash values;
 - (iii) No specification of interest rate or mortality table as specified in §4223(a)(1)(C);
 - (iv) A provision for annuity benefits other than as specified in §4223(a)(1)(E);
 - (v) No explicit account value or actual accumulation amount as specified in §4223(c);
 - (vi) No specification of an interest rate or mortality table as specified in §4223(d).
- (b) The Circular Letter 6 (2004) process may not be used for contracts with such features when the superintendent must exercise discretion pursuant to §4223(a) or Section 44.6(a)(6) of Regulation 127, unless the Department has given permission.
- (c) A form submission requiring approval based on the authority granted to the superintendent under §4223(a) or Section 44.6(a)(6) should comply with the following items as applicable:
- (i) The cover page of the contract contains a statement to the effect that the contract does not provide cash surrender benefits prior to the commencement of annuity payments. See §4223(h).
 - (ii) If the contract does not provide death benefits prior to the commencement of annuity payments then the cover page of the contract contains a statement to the effect that the contract does not provide death benefits prior to the commencement of annuity payments. See §4223(h).
 - (iii) For contracts with a death benefit and without an explicit accumulation amount, the cover page must describe how the death benefit is calculated.
 - (iv) The contract must have provisions at least as favorable as the provisions required by §4223(a)(1)(C). §4223(a)(1)(C) requires a statement of the mortality table, if any, interest rate and sufficient information to determine the amounts and times of any minimum guaranteed paid-up, cash surrender or death benefits.
 - (v) For a single premium contract where the amount of benefits are fully defined in the contract, the inclusion of the mortality table, if any, and interest rate is not required because the Department considers the

inclusion of the actual benefits to be at least as favorable as the ability to calculate the benefits.

- (vi) For Flexible Premium contracts the contract must provide contact information for the contract holder to quickly obtain information on current purchase rates and the benefits purchased to date (e.g. a telephone number and web address); and a report no less frequently than annually which will state the amount of benefits purchased with the premiums received since the last report, including death benefits, the total amount of benefits purchased to date and the scheduled commencement date(s) of income benefits. The report must include any death benefits as well as the annuity income benefits,
- (vii) The contract must have provisions as determined by the superintendent that are at least as favorable as the provisions required by §4223(a)(1)(E) and §4223(d).
 - (I) For single premium contracts, the Department considers the use of competitive purchase rates based on current market conditions at the time of purchase for fully guaranteed benefits to be as least as favorable as the requirements of §4223(a)(1)(E) and §4223(d).
 - (II) For flexible premium contracts, the Department considers the following to be as least as favorable as the requirements of §4223(a)(1)(E) and §4223(d):

The contract must include purchase rates guaranteed for the life of the contract using a full table of purchase rate guarantees or by providing a mortality table, interest rate and any additional information from which the purchase rate guarantees can be derived; and

The contract must provide that at the time of premium payment the amount of income benefits purchased will not be less than the greater of the amount that could be purchased by applying the premium payment to the purchase rate guarantees in the contract and the amount that could be purchased by applying the premium payment under any guaranteed paid-up deferred annuity contract offered by the company at the time to the same class of annuitants.
- (viii) The application and contract must describe any discretion retained by the insurer to limit the frequency or dollar amount of premium. A contract where the insurer retains the discretion to limit premium must provide a statement to the effect that the right to limit premium would not be exercised in an unfairly discriminatory manner.

- (ix) If the contract allows a change in the annuitization start date, annuity income option or annuitant, the contract must describe how such change will affect contract benefits and the contract must state any explicit charge for the change. The contract must include a description of the method and factors used to determine the income resulting from the change. The contract must provide that the contract holder can request replacement ratios to evaluate specific changes being considered. The replacement ratio is defined below. The contract must also provide that the replacement ratio will be provided to the contract holder for any change made.
- (x) If the contract has any commutation or surrender provision, the contract must provide a detailed description of such provision. The contract must include a description of the method and factors used to determine the commutation or surrender value. The contract must provide that the contract holder can request replacement ratios to help evaluate commutation or surrender values.
- (xi) The replacement ratio is (a)/(b) where (a) and (b) are defined as follows:
 - a. The present value of benefits as applicable after the change; and
 - b. The present value of benefits before the change.

Present values are calculated on the basis of either (i) the current mortality and interest pricing assumptions that would be used to price a guaranteed paid-up deferred annuity with the same income payments and annuitant as the income payments and annuitant for which the present value is being determined, or (ii) a current interest rate under a readily available public index and, if applicable, a mortality table provided that the index and mortality table with projection if applicable are reasonable and disclosed in the contract. If current pricing assumptions are used and not available, then the present value shall be calculated on the basis of the interest and mortality assumptions used to price any annuity for which the company is determining competitive rates and for which the mortality is available over the appropriate time frame.

- (xii) A contract subject to items (ix) and (x) above must describe the replacement ratio with words to the effect that, "The replacement ratio is the value of benefits after they are changed as a percent of their value before they were changed."
- (xiii) The submission must be accompanied by an actuarial memorandum which is signed and dated and addresses the following, as applicable:
 - (I) A description of the benefits in the contract.

- (II) A statement explaining why the annuity benefits purchased with each consideration will be at least as favorable as the annuity benefits required by §4223 including §4223(a)(1)(E) and §4223(d).
 - (III) If no cash surrender benefit or death benefit is provided, the actuarial memorandum must explain why the omission of such benefit or benefits is appropriate. See the requirements to omit cash values in Section 44.6(a)(6) of Regulation 127.
 - (IV) If the contract has a commutation feature, surrender option, or allows a change in the income start date, annuity option, or annuitant, the actuarial memorandum must explain how such provisions are fair (provide reasonable values) and limit anti-selection risk.
- (xiv) An application or a special disclosure document to be signed and dated by the applicant must provide statements, as applicable, to the effect that:
- (I) I understand the start date for income payments cannot be changed after issue;
 - (II) I understand the restrictions in the changes to the start date for income payments;
 - (III) I understand the annuity option cannot be changed after issue;
 - (IV) I understand the restrictions in the changes in the annuity option;
 - (V) I understand the annuity has no death benefit;
 - (VI) I understand how the death benefit is calculated;
 - (VII) I understand the policy has no cash value, loan value or surrender value;
 - (VIII) I understand the annuity income payments are guaranteed at purchase and will neither increase nor decrease in response to changes in interest rates or inflation. [If the income does increase / decrease by the terms of the contract then the increase or decrease should be stated as well as how such increase and decrease varies with interest rates or inflation].

F.9) Death Benefit

- (a) The contract must provide for the payment of a death benefit in the event of death prior to the annuity commencement date, unless the contract is a paid-up deferred annuity and the Superintendent has exercised discretion to

find the benefits provided to be at least as favorable as those required by §4223.

- (b) The death benefit prior to the maturity date attributable to any account, other than an equity index account, shall not be less than the actual accumulation amount. §4223(c)(1). The death benefit attributable to an equity index account shall not be less than the value of the equity index account determined in accordance with §4223(c)(4).
 - (i) The contract may not apply a surrender charge/withdrawal charge or other charge on death benefit payments, regardless of the manner of payout (i.e. lump sum, installments, etc.). See also §(III)(G)(6) of this outline (Owner and Beneficiary).
 - (ii) A market-value adjustment may not be used to reduce death benefits.
 - (iii) Bonus interest or credits, if any, may not be recaptured from 1) the death benefit proceeds of a fixed deferred annuity or 2) the portion of the death benefit proceeds related to the fixed account portion of an annuity that combines both fixed and variable benefits. Circular Letter 8 (2010) and Chapter 170 of the Laws of 2008.
 - (iv) 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 - §3219(a)(3) and §3204(a)(1).

F.10) Cash Surrender Benefit

- (a) Pursuant to §44.6 of Regulation 127, all contracts subject to §4223 shall make cash surrender values available, except:
 - (i) contracts issued by any life insurance or annuity company organized and operated, without profit to any private shareholder or individual, exclusively for the purpose of aiding educational or scientific institutions which are also organized and operated without profit, and which are issued only to or for the benefit of such institutions or individuals engaged in the service of such institutions;
 - (ii) contracts issued to fund any benefits under a *pension plan* within the meaning of the Employee Retirement Income Security Act of 1974. [Note: since some 403(b) plans are not “pension plans” under ERISA, the statutory change to §4223(a)(1)(B) was required for such 403(b) plans.];
 - (iii) contracts issued to employers to fund deferred compensation arrangements;

- (iv) contracts issued to employers to fund lotteries or other programs of states, municipalities, or agencies or instrumentalities thereof;
 - (v) structured settlements with payment deferred in accordance with a settlement of a lawsuit involving claims such as liability claims or medical malpractice claims; and
 - (vi) such other contracts as specifically approved by the superintendent upon a demonstration that cash surrender benefits are not appropriate. (Note: Form filings for annuity contracts that do not provide a cash surrender value based on the discretionary exception of §44.6(a)(6) of Regulation No. 127 must be submitted under the regular prior review procedure, rather than the Circular Letter 6 of 2004 certification process, unless approval under §44.6(a)(6) of Reg. 127 has already been received.
- (b) Cash surrender benefit requirement is not applicable to IRC §403(b) annuity to the extent such application would prevent qualification for special tax treatment. §4223(a)(1)(B). Note that many §403(b) plans are not pension plans within the meaning of ERISA.
- (c) A cash surrender benefit is required at least every 10 years in lieu of paid-up annuity benefit, if contract provides for a full or partial lump sum settlement at maturity or at any other time. §4223(a)(1)(B).

Contracts (or certain plans available within contracts) that provide cash surrender values but do not provide guaranteed rates as defined in Regulation 127 must provide a cash surrender value without any MVA (but subject to any applicable withdrawal charges) at least once each year. Section 44.6(d) of Regulation 127.

- (d) For contracts not providing “guaranteed rates,” the cash surrender benefit must be greater than or equal to the actual accumulation amount, minus the withdrawal charge percentage times the sum of (i) actual accumulation amount, and (ii) amount of indebtedness.
- (e) For MVA contracts, an “unadjusted cash surrender benefit” must be available on each “guaranteed benefit date.” See §4223(a)(1)(B) and §44.6(c) of Regulation No. 127. (“Unadjusted cash surrender benefit” is an amount equal to the actual accumulation amount less withdrawal charge, but not subject to an MVA.)
- (f) For MVA contracts that are not “premium-specific”, the cash surrender benefit must not be less than the excess of (i) the actual accumulation amount, as adjusted by a market-value adjustment formula, over (ii) the withdrawal charge percentage times the sum of (I) the actual accumulation amount, as adjusted by such market-value adjustment formula and (II) the amount of any indebtedness under the contract to the company. See §4223(e)(2).

- (g) For MVA contracts that are “premium-specific”, the cash surrender benefit must not be less than the excess of (i) the actual accumulation amount, as adjusted by a market-value adjustment formula, over (ii) the aggregate of the withdrawal charge percentage under the contract times the sum of (I) the corresponding portion of the actual accumulation amount, as adjusted by such market-value adjustment formula, and (II) the corresponding portion of the amount of any indebtedness under the contract to the company. See §4223(e)(2).
- (h) Cash surrender benefits must be determined in a manner established pursuant to authority granted by board of directors or a committee thereof (including any formula that takes into account changes in interest rates of publicly traded obligations or other investments). §4223(e)(1).
- (i) An MVA contract must provide a minimum period of 30 days during which the certificateholder may apply for a cash surrender value without adjustment. The unadjusted cash surrender value need be available only on a single date, namely on the guaranteed benefit date in which case the 30-day application period must precede such date. §44.5(b)(iii) of Regulation 127.
- (j) If an MVA contract allows for a different procedure or a different specified time interval, or a different index, or a different guaranteed rate for a new guaranteed benefit period, the new data, to the extent available, must be fully disclosed to the contractholder and the contractholder shall have a period of at least 30 days commencing after the date of such disclosures during which he or she may apply for a cash surrender value without a market-value adjustment. §44.5(b)(3)(iv) of Regulation 127.
- (k) For partial cash surrenders, the contract must state whether withdrawals will be made from the actual accumulation amount attributable to each premium on (i) a first-in, first-out basis; (ii) a last-in, first-out basis; or (iii) a pro rata basis. The actual accumulation amount attributable to each premium is reduced as of that date by the amount withdrawn from it to provide the cash surrender value. §3204 and §44.5(d)(1) of Regulation 127.
- (l) For equity indexed accounts, the contract must permit the contract holder to surrender funds without losing any index credits by making a series of withdrawals over no more than one year. Loss of index credits on withdrawal because they are not credited continuously can be approved but only with appropriate disclosure included in the contract.

F.11) Withdrawal Charges

- (a) Notwithstanding §44.4(b)(1) of Regulation 127, a withdrawal charge may not be assessed at the annuity commencement date if an annuity benefit is provided or upon a death benefit.

- (i) For an annuity benefit determined by using the SPIA rate pursuant to the betterment of rates provision, §4223(a)(1)(E) limits the charge to the lesser of 5% or the withdrawal charge percentage for these contracts. This benefit must not be less than an annuity benefit determined by using the actual accumulation amount applied to the guaranteed annuity purchase rates in the contract, §4223(c)(1) and (d).
 - (ii) A death benefit is not a cash surrender benefit. As such, the withdrawal charge is not permissible. Section 4223(c)(1) explicitly provides that the death benefit shall not be less than the actual accumulation amount. This is true regardless of the manner in which the death benefit is paid. For example, if the death benefit is paid to the beneficiary in installments or upon request over a period of time (up to 5 years, see §72(s) of the Internal Revenue Code), a withdrawal charge may not be imposed on those payments. We note that if a spouse elects pursuant to §72(s) of the Code to continue the contract indefinitely as the new owner in lieu of taking the death benefit, we would not object to applying the existing withdrawal charge schedule to withdrawals made by the spouse.
- (b) The withdrawal charge may be assessed as a flat dollar charge, as a fixed percentage of the premium received or the accumulation value, or, for non-MVA contracts, as a variable amount based upon a formula. Any surrender charge calculated based on a formula must be capped at 10% less the premium charge percentage. §4223. Unlike a market value adjustment formula, the formula based surrender charge need not result in credits.
- (c) For withdrawal charge assessed as a variable amount, the contract must contain a description of any withdrawal charge formula (§44.4(d) of Regulation No. 127), including:
- (i) the provisions of the formula, a description of each element of the formula and identification of source or publication where any data used in the formula may be found;
 - (ii) a statement of frequency with which adjustments made in accordance with the formula will be made;
 - (iii) a statement of points in time when contract values are available without application of the formula, and for how long they are available on an unadjusted basis;
 - (iv) a description of any waivers of the withdrawal charge;
 - (v) a description of application to additional premiums under flexible contracts.
- (d) If any withdrawal charge is applicable, the contract must include:

- (i) a description of the withdrawal charge or withdrawal charge schedule;
 - (ii) a description of the amounts the withdrawal charge will be applied against, when, and in what order, (e.g., first in, first-out basis);
 - (iii) a description of how withdrawal charge schedule applies to additional deposits under flexible premium contracts; and
 - (iv) the circumstances under which any waiver of the withdrawal/surrender charge will be available.
- (e) For contracts that do not provide cash surrender benefit subject to a MVA, the withdrawal charge percentage must not be greater than 10% of the amount being surrendered less the premium charge percentage, if any, provided for under the contract. §4223(e)(3)(A).
- (f) If the contract has an equity index account, the withdrawal charge percentage for such account must not be greater than 10% of the amount being surrendered less the premium charge percentage, if any, provided for under the contract, reduced by one percent for each year beginning after the third year the contract has been in force and further reduced to zero after the tenth year the contract has been in force. §4223(e)(3)(B).
- (g) For MVA contracts, the withdrawal charge percentage must not be greater than seven percent of the amount being surrendered reduced by one percent for each year the contract has been in force or, if the contract is premium-specific, for each year after the net consideration associated with such withdrawal charge percentage was credited to the contract and less the premium charge percentage, if any, provided in the contract (but not less than zero). §4223(e)(4).
- (h) For MVA contracts, after any period during which interest was credited to the contract at a specified rate and the company, pursuant to the contract, set a new specified rate and a new period during which such rate is to be so credited, the withdrawal charge percentage for such new period must be a percentage not in excess of the greater of (A) any remaining withdrawal charge percentage at the beginning of the new period and (B) the lesser of (i) five percent and (ii) one percent times the number of years in such new period, reduced (but not below zero) by one percent for each year the contract remains in force during such period. §4223(e)(4).
- (i) For MVA contracts, the contract must provide for a date, within thirty days of the last day of such new period, on which the contract may be surrendered for a cash surrender benefit determined without the use of a market-value adjustment formula. (Note if the 30-day period is not provided, the withdrawal charge percentage for the subsequent specified period is zero.) §4223(e)(4).

- (j) Free Withdrawal - A contract may provide that an amount be withdrawn from the contract value each year without the application of a withdrawal charge. For example, the contract may allow the contractholder to withdraw an amount equal to 10% of the prior year's contract value without a withdrawal charge.
 - (i) The provision must state whether or not it is applicable if a full surrender is made or if an amount in excess of the "free" amount is withdrawn.
 - (ii) Any restrictions on the ability to take the free withdrawal must be set forth in the contract. For example, if the contractholder may only exercise the free withdrawal once per contract year, that must be indicated in the contract. Also, the contract should explain what happens if the contractholder does not withdraw the full free withdrawal amount.
 - (iii) If applicable, the provision must state whether or not a market value adjustment applies to the free withdrawal amount.
 - (iv) A withdrawal charge may not be retroactively applied to an amount previously withdrawn under the free withdrawal provision. For example, language providing for the retroactive application of withdrawal charges to amounts withdrawn under a free withdrawal provision within 12 months prior to a full surrender is not permitted. The cash surrender benefit must be based on the actual accumulation amount being surrendered. §4223(e). The Department also has concerns that such a provision could be misleading. §3201.
 - (v) The Department has approved waiver of withdrawal charge provisions triggered by terminal illness, total and permanent disability, chronic illness, involuntary unemployment and nursing home confinement of the contractholder or the contractholder's spouse. We would consider other waiver of withdrawal charge provisions on a case-by-case basis. As with the free withdrawal provision, the waiver of withdrawal charge provisions must set forth all terms, conditions and restrictions related to the benefit.

F.12) Market-Value Adjustment

- (a) For MVA contracts, the MVA formula must be described in the contract and must provide for upward and downward adjustments. See §44.9(b) of Regulation No. 127. The description must contain the following:
 - (i) The provisions of the formula and a description of each of the elements used in the formula, along with an identification of the source or publication where the data used in the formula can be found;

- (ii) If an index of publicly traded obligations is used in the formula, a statement that in the event this index is no longer available, a suitable replacement index, subject to approval of the superintendent, would then be utilized;
 - (iii) If the new guarantee rate is used in the formula, a statement of the procedure to determine the rate to be used in the event that the new guarantee rate cannot be determined from the company's contracts then being offered (or then in force), and a statement of the procedure to determine the adjustment in the event that the company no longer issues guaranteed rate contracts;
 - (iv) A statement of the frequency with which market-value adjustments will be calculated, including the dates to be used in identifying the interest factors;
 - (v) A statement of the points in time when contract values are available without the application of any market-value adjustment formula, and for how long they are available on an unadjusted basis;
 - (vi) A statement that a notice will be mailed at least 15 but not more than 45 days prior to the beginning of each of the 30-day periods referred to in §44.5(b)(3)(iii) and (iv) of Regulation No. 127 and containing at least the information specified therein (if the periods coincide, a combined notice will suffice); and
 - (vii) In case of flexible premium contracts, a statement as to any separate treatment of premiums as to guaranteed rates, withdrawal charges, specified time intervals and guaranteed benefit dates.
- (b) The same MVA formula must be applied during periods when its application would result in an increase in cash surrender benefits as is applied during periods when its application would result in a decrease in cash surrender benefits. If not, the company must demonstrate, to the satisfaction of the superintendent, that equity to terminating and continuing contractholders and to the company is better served by use of a different formula in such circumstances. See §44.5(a)(2) of Regulation No. 127.
- (c) If a contract limits the amount by which cash surrender benefits may be increased by application of a MVA formula to a specific percentage of the actual accumulation amount before deduction of any withdrawal charge, the same percentage limit must apply during periods when the application of the formula results in a decrease in cash surrender benefits. If not, the company must demonstrate, to the satisfaction of the superintendent, that equity to terminating and continuing contractholders and to the company is better served by using a different percentage limit in such circumstances. See §44.5(a)(3) of Regulation No. 127.

- (d) The MVA formula must take into account changes in interest rates on publicly traded obligations or other investments or interest rates guaranteed in contracts of the same class as the contract being surrendered. See §4223(e)(5), §§44.3(l) and 44.5(b) of Regulation No. 127.
- (e) If the MVA formula is based on the interest rate guaranteed in the contract and the new guarantee rate at the time of surrender, then the new guarantee rate must be the guaranteed rate applicable to new contracts having a guarantee period approximately equal to the remaining amount of time in the current guarantee period. See §44.3(n) regarding the definition of the new guarantee rate and §44.5(b)(1)(i) of Regulation No. 127.
- (f) If the MVA formula is based on changes in interest rates on publicly traded obligations or other investments, the appropriate index for the current guarantee period and the same index for the period remaining in the guarantee period must be used. See §44.5(b)(2)(i) of Regulation No. 127.
- (g) We have exercised discretion to approve the use of an interest rate based on the original term of the MVA if there is a guarantee that the balance will not be less than the application of the minimum guaranteed rate without a market value adjustment. We would consider other approaches on a case-by-case basis. Note that the Circular Letter 6 (2004) certified process may not be used until the Superintendent has reviewed the demonstration and made an affirmative determination on the proposed use of a different formula. See §44.5(b)(5) of Regulation No. 127.
- (h) The interest rates used in the MVA formula must be determined in a consistent manner. See §44.5(b)(3)(i) of Regulation No. 127.
- (i) For MVA formulas based on the difference between contract guaranteed rates and new guarantee rates, the company may increase the new guarantee rate by not more than 0.25%. §44.5(b)(3)(vi) of Regulation No. 127.
- (j) The MVA formula must take into account the length of time between the date on which the contract is surrendered and the next date on which the contract would have provided cash surrender benefits determined without the use of any market-value adjustment formula. See §4223(e)(5) and §44.3(l) of Regulation No. 127.
- (k) The MVA formula cannot pass any material risk of asset default or deterioration in asset quality from the company to the certificate holder. See §44.5(b)(4) of Regulation No. 127.
- (l) The contract may re-impose a market-value adjustment after a guaranteed benefit date based on a new guaranteed benefit period, subject to disclosure requirement if there is a different procedure, specified time interval, index, or guaranteed rate. See §44.5(b)(3)(iv) of Regulation No. 127.

F.13) Betterment of Rates Statement

- (a) There must be a statement that the annuity benefits at the time of their commencement will not be less than those that would be provided by the application of “an amount” to purchase any single consideration immediate annuity contract offered by the company at the time to the same class of annuitants. §4223(a)(1)(E). The amount must be defined in the contract as either (i) or (ii) below.
 - (i) For contracts with cash surrender benefits, “the amount” is the greater of the cash surrender benefit or 95% of what the cash surrender benefit would be if there were no withdrawal charge. (For MVA annuities, the phrase “95% of what the cash surrender benefit would be if there were no withdrawal charge” means 95% of the actual accumulation amount after being adjusted by the MVA.)
 - (ii) For contracts without cash surrender benefits, “the amount” is the present value of the paid-up annuity benefit using the mortality table, if any, and interest rate, if any, specified in the contract for determining any guaranteed minimum paid-up annuity benefits (which shall be at least equal to the actual accumulation amount).
- (b) If the insurer does not sell single consideration immediate annuities, the contract should indicate this fact. In such case, the filing materials must include the company’s method and practice for calculating current purchase rates (e.g., reasonable in relation to the market SPIA rates). §3201(c)(2).
- (c) The betterment of rates provision applies to all payout options other than the lump sum option (i.e., including certain only options even if short term, e.g., less than five years).
- (d) For a separate account annuity providing for fixed annuity income benefits, the betterment of rates provision must be applied to amounts allocated to the fixed account and separate account investment options under the contract.

III.G) Other Provisions

G.1) Annuity Settlement Options / Annuitization

- (a) For all accumulation type deferred annuities (rather than fixed scheduled premium or other paid-up deferred annuities), the guaranteed interest rate and annuity mortality table being utilized for the guaranteed purchase rates must be identified in the contract. Section 4223(a)(1)(C). The Department has not approved an annuity purchase basis with an interest rate lower than 0.5%. §3201(c).

- (i) If projection factors are used, they must also be specified (e.g., if the 1983a table with projection scale G is used, the year to which the mortality rates are projected needs to be specified).

The following is an example of language that has been found acceptable:

“For annuity payment options 2 and 3 in determining the monthly installment factor, the adjusted age mortality rates are projected for improvement each year. The first mortality rate for each attained age is projected for improvement five (5) years, the second mortality rate is projected for six (6) years and then each successive mortality rate is projected for one additional year.”

The language in the example would need to be modified as appropriate to accurately reflect the actual calculation and options under the particular contract.

- (ii) If a percentage of the specified mortality table is to be used, then that percentage must be stated in the description.
 - (iii) Contracts subject to the Arizona v Norris decision and Title VII of the Civil Rights Act of 1964 must provide for unisex annuity purchase rates. The description of the unisex mortality must be such that the mortality used is reasonably determined. If a pivot age approach is used then the pivot age must be specified.
- (b) Annuity contracts utilizing a static annuity mortality table typically include a table of guaranteed purchase rates. For contracts utilizing a non-static (dynamic) annuity mortality table (e.g., 2012 Individual Annuity Reserving Table or the 2012 Individual Annuity Mortality Table), the inclusion of the table of guaranteed purchase rates is not required. For contracts utilizing a non-static table:
- (i) The contract/certificate must describe the guaranteed purchase rates by reference to interest and mortality assumptions;
 - (ii) The contract/certificate must provide the insurer’s contact information for the certificate holder to obtain more detailed information, including a purchase rate quote. The contact information should provide more than just the company’s website address in view of certificate holders who may not have access to the internet;
 - (iii) The annual report must include a statement that the certificate holder may contact the insurer for a purchase rate quote as well as the contact information to obtain the quote;
 - (iv) We recommend that additional information be provided in the contract/certificate and/or annual report, such as a set of illustrative guaranteed purchase rates or a list of the guaranteed purchase rates for a specific age and for specific birth years in 10 year increments. An

insurer could also include the complete set for either the specific annuitant or for all annuitants.

- (c) With respect to the guaranteed annuity purchase rates, expense loading is not permitted. §4223(d). This applies to all payout options other than the lump sum option (i.e. including any life contingent options and any period certain only options even if short term, e.g., less than five years).
- (d) For all accumulation type fixed deferred annuities (rather than fixed scheduled premium or other paid-up deferred annuities), the income at annuitization cannot be less than the full account value (i.e. actual accumulation amount and/or equity index value without deduction of surrender charges and without being reduced by a market value adjustment) applied to the guaranteed purchase rates. See §4223(d). This applies to all payout options other than the lump sum option (i.e. This includes certain only options even if short term, e.g., less than five years). Similarly, the income at the time of any partial annuitization of the account value cannot be less than the full amount the contract holder elects to annuitize (i.e. without deduction of withdrawal charges and without being reduced by a market value adjustment) applied to the guaranteed purchase rates.
- (e) The contract's annuity payment provision shall describe how annuity benefits are affected by the market-value adjustment formula. If the amount applied to provide annuities is adjusted by a market-value adjustment formula, then such adjusted value must be treated as new funds and current annuity purchase rates must be based on new monies. Section 44.9(c) of Regulation 127.
- (f) The contract must specify the minimum periodic payment amount, if any, for any monthly, quarterly, semi-annual, annual or other periodic annuity benefit payment and provide for a lump sum withdrawal equal to the actual accumulation amount if none of the annuity benefit payments calculated under the contract for such periods equals or exceeds the minimum payment amount for such periods. §§ 3201(c)(2) and 3204.
- (g) The automatic/default settlement option must be a life annuity with a minimum of a five-year certain period, unless otherwise required under the IRC.
- (h) If commutation of payments after annuitization is permitted, the commutation provision must fully describe how the commuted value is determined. §3204.
- (i) If any income settlement option with a period certain provides for installment payments of the same amount at some ages for different periods certain, the contract must provide that the insurer will deem an election to have been made for the longest period certain which could have been elected for such age and amount.

- (j) For variable annuity guaranteed purchase rates, the assumed interest rate (AIR) and mortality table must be stated in the contract. Expense loadings are not permitted in guaranteed purchase rates.
 - (i) If projection factors are used, they should be specified (e.g., if the 1983a table with projection scale G is used, the year to which the mortality rates are projected needs to be specified).
 - (ii) The full account value must be applied to guaranteed purchase rates.

G.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 policyholders as required by Section 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 company'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 an exercise of the Superintendent's judgment that the provisions is not unjust, unfair, inequitable or otherwise prejudicial to the interest of policyholders 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 payments (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%

G.3) Annuity Commencement Date Waiting Period

- (a) With respect to deferred annuity contracts other than guaranteed paid-up deferred annuity contracts, the contractholder must be allowed to commence annuity payments as early as 13 months from the date of issue.
- (b) Any restriction on the ability to annuitize may not extend beyond the first 13 months after issue and must be fully disclosed in the contract. While not required, the Department encourages insurers to include an exception to any such annuitization restriction for hardship and disability. See IRC §72(u)(4) and Insurance Law §4231(e)(1). (Note: If a partial annuitization is permitted during the first 13 months after issue, the remaining account

balance not annuitized continues to be subject to the nonforfeiture requirements for deferred annuities).

- (c) Except for the 13 month period following issue of the contract, the contract holder must be allowed to commence annuity payments upon request, subject to the insurer's reasonable requirements set forth in the contract for advance notice of such request.

G.4) Maturity Date or Maximum Annuitization Age

- (a) The maximum annuitization age or maximum maturity date, if any, must be stated in the contract. See §1113(a)(2) of the Insurance Law for the definition of annuities.
- (b) If the contract includes a maximum maturity date and also provides for guaranteed living benefits that would extend beyond the scheduled maximum maturity date (e.g. guaranteed lifetime withdrawals), the contract must include an option by which the contract holder can preserve the guarantee. We have approved provisions that allow the contract holder to further defer the annuity payment commencement date. We have also approved provisions under which the amount of the annuity payments will not be less than the amount of the guaranteed withdrawal payments. We would review other options on a case-by-case basis.

G.5) Transfers Between Accounts

- (a) Any restrictions or limitations on transfers between separate accounts or sub-accounts within a separate account and the general account, including market timing restrictions, must be described in the contract with sufficient detail to clearly indicate the circumstances under which such restrictions will be imposed. §3204. Restrictions or limitations on transfers in or out of a separate account or subaccount may be imposed in order to meet requirements imposed by a fund or funds held by the separate account.
 - (i) The Department has not approved an unqualified reservation of right to restrict transfers.
 - (ii) The number of transfers permitted on a monthly basis without charge, the minimum transfer amount and the minimum balance requirements, if any, must be specified in the contract.
 - (iii) Restrictions on transfers to prevent "market timing" activity, if any, must be specified in the contract and certificate.
- (b) The Department recommends that protection against disintermediation attributable to transfers from the general account should be included in the policy. An equity wash, (i.e. right to delay transfer of funds back into the fixed account for a period of time [e.g., 3-6 months] after the transfer of funds out of the fixed account) or other provision might be prudent.

- (c) In cases where a fund is eliminated or two funds merge the insurer may not assess a fee or charge for the resulting fund transfer. This includes any action by the insurer or a third party that results in a fund no longer being made available and thereby requiring the contract holder to transfer funds.

G.6) Owner and Beneficiary Provisions

- (a) The owner or beneficiary provisions must be in compliance with all the requirements of §72(s) of the Internal Revenue Code. The IRC provisions should be reviewed by the Company's tax counsel prior to submitting the forms to the Department.
- (b) The IRC §72(s) distribution upon the death of the owner may not be treated as a surrender (i.e. reduced by surrender charges or MVA) unless the contract provides for an annuitant driven death benefit amount that is not reduced by surrender charges or MVA.
- (c) Any change in the owner or beneficiary designation should take effect on the date the notice is signed subject to any actions taken by the insurer prior to receipt of the notice by the insurer. (The change should not take effect only when recorded by the insurer because there could be substantial delays beyond the control of the contract/certificate holder.) §3201(c)(2).

G.7) Variable Annuity Guaranteed Living Benefits (VAGLB)

The requirements herein should be provided in the contract and certificate forms. If the benefit is provided by rider form, then such form should include the provisions noted below. Where applicable, reference to the application form disclosures are also provided.

(a) General

- (i) Any investment restrictions or required asset allocation programs associated with the guaranteed living benefits, including the following, must be adequately described in the contract and referenced in the application. Section 3219(a)(3).
 - (I) If the investment options available under the contract are limited as the result of election of the VAGLB benefit, the nature of such limitations as well as a description of the circumstances under which such restrictions will be imposed must be described in the contract as well as referenced in the application form. The contract and application must provide that at the point when the VAGLB has been elected, no further change or limitation of the available investment options may be made until reset of the guaranteed benefit initiated by the certificateholder or termination of the VAGLB without prior approval of the Department.

- (II) Any limitations on transfers among the fixed accounts and the variable subaccounts associated with election of the VAGLB feature must be described in the contract and referenced in the application forms. This would include any company-initiated transfers.
 - (III) The contract must include an adequate description of any asset allocation program (a.k.a. trading rules) such that the customer can understand how the program works. The Department finds it especially critical that any asset allocation program rule regarding involuntary transfers among accounts must be adequately described in the contract, including numerical thresholds triggering involuntary transfers. In addition, numerical examples may be called for when the trading rules are complex. The Department has not required that every detail of a program be included in the contract so long as the full description of the program (with all details) is placed on file with the Department and the contract states that such details may be requested from the Company. The contract and application must provide that at the point when the VAGLB has been elected, no changes will be made to any asset allocation program until reset of the guaranteed benefit initiated by the certificateholder or termination of the VAGLB by the certificateholder.
 - (IV) The contract must indicate what happens if the certificateholder attempts to make a restricted trade/transfer while the VAGLB is in effect (e.g., reduction or termination of the VAGLB, a program in effect prevents transfers/allocations to prohibited funds for the duration of the VAGLB feature, etc.).
- (ii) The guaranteed living benefits when combined with any other benefits (e.g. death benefit) must not provide for a return of considerations accumulated at an interest rate of 3% or more. Otherwise the entire contract will be subject to §4223 (fixed deferred annuity nonforfeiture law). §4240(d)(1).
 - (iii) Depending on the complexity of the narrative description in the contract, numeric examples may be needed to clearly demonstrate how the benefit formula functions when the VAGLB benefit base exceeds the actual accumulation amount (i.e. the VAGLB is “in the money”) and partial withdrawals are made prior to realizing the benefit.
 - (iv) The contract must specify the charge for the benefit and include a description of whether the charge is calculated based on amounts allocated to the fixed account, if any, as well as the separate accounts. The contract must disclose and the application must reference whether the benefit and its charges may be terminated at any time or whether the charges will remain in effect for the life of the contract, and whether

the charges may change upon exercise of any reset option. The calculation of the amount of the charge for the benefit can be based on amounts allocated to both the fixed account and the separate account. However, any portion of the benefit charge deducted from amounts allocated to the fixed account may not result in charges to the fixed account beyond those authorized in §4223. In particular, §4223 permits an administrative charge in an amount not to exceed fifty dollars per year. If, for example, the contract does not otherwise have an administrative charge, an amount up to fifty dollars per year could be assessed against the fixed account for the benefit charge.

(b) Guaranteed Minimum Income Benefit (GMIB)

- (i) The opening paragraph must describe the benefit in clear and simple terms, such as, “This benefit provides a minimum income benefit upon annuitization by establishing a benefit base and applying such benefit base to guaranteed purchase rates. The benefit base is established for the sole purpose of determining the minimum *income* benefit and is not used in calculating the cash surrender benefit, death benefit, or other guaranteed paid-up annuity benefits.” (The benefit base should not receive more emphasis than the associated guaranteed annuity purchase rates. §3201(c)(1).)
- (ii) A full description of the benefit must be included in the contract, including how the benefit base and amount of the benefit is calculated as well as any restrictions on allocations/transfers to the fixed account or any separate account (or sub-account within a separate account). §3219(a)(3).
- (iii) The application or supplemental application must identify the investment options available or not available with the GMIB.
- (iv) The contract must describe (and application must reference) how the guaranteed benefit is affected by
 - (I) additional contributions;
 - (II) partial withdrawals; (Numerical examples should be used to explain the difference between dollar-for-dollar and proportional reductions in the benefit base resulting from withdrawals. See also (a)(iii) above.)
 - (III) amounts allocated to the fixed account, if any;
 - (IV) transfers between or among investment options available under the contract.

If transfers or partial withdrawals result in termination of the guaranteed benefit, then the forms must provide for 30 days prior written notice to such termination with an opportunity to remedy.

- (v) The contract must include a statement explaining how the guaranteed purchase rates used to determine the income benefit in contracts differ, if at all, from the guaranteed purchase rates used in the base contract if the guaranteed minimum income benefit is not elected.
- (vi) For tax-qualified programs, the application form must include a statement similar to the following: “The *benefit* may have limited usefulness in connection with contracts funding tax-qualified programs because partial withdrawals made to satisfy the minimum distribution rules might result in a dollar-for-dollar or proportional reduction in the benefit base or an inability to exercise the benefit altogether. If you plan to exercise the benefit before or after your required minimum distribution beginning date under the specified contract, you should consider whether the *benefit* is appropriate for your circumstances. You should consult your tax advisor.” This disclosure must be included in the schedule page of the contract/certificate forms in cases where the application forms are not attached to the contract and certificate forms when delivered.

(c) Guaranteed Minimum Withdrawal Benefit (GMWB)

- (i) The opening paragraph must describe the benefit in clear and simple terms, such as, “This benefit provides a minimum withdrawal benefit that guarantees, upon election, a series of withdrawals from the contract equal to x% of the benefit base. The benefit base is established for the sole purpose of determining the minimum withdrawal benefit and is not used in calculating the cash surrender benefit or other guaranteed benefits.”
- (ii) A full description of the benefit must be included in the contract, including any restrictions on allocations/transfers to the fixed account or any separate account (or sub-account within a separate account). §3219(a)(3).
- (iii) The application or supplemental application must identify the investment options available or not available with the GMWB.
- (iv) The contract must describe (and application must reference) how the guaranteed benefit is affected by
 - (I) additional contributions;
 - (II) partial withdrawals;
 - (III) amounts allocated to the fixed account, if any,

- (IV) transfers between or among investment options available under the contract.
 - (v) The benefit base should not receive more emphasis than the associated guaranteed annuity purchase rates. §3201(c)(1).
 - (vi) Insurers should provide disclosure to contractowners that explains the impact of excess withdrawals on the guaranteed withdrawal amount in accordance with Circular Letter 5 (2011).
 - (vii) For tax-qualified programs, the application form must include a statement similar to the following: “The *benefit* may have limited usefulness in connection with contracts funding tax-qualified programs because partial withdrawals made to satisfy the minimum distribution rules might result in a dollar-for-dollar or proportional reduction in the benefit base or an inability to exercise the benefit altogether. If you plan to exercise the benefit before or after your required minimum distribution beginning date under the specified contract, you should consider whether the *benefit* is appropriate for your circumstances. You should consult your tax advisor.” This disclosure must be included in the schedule page of the contract/certificate forms in cases where the applications are not attached to the contract and certificate forms when delivered. Such disclosure is not necessary if, under the terms of the contract, withdrawals taken to satisfy minimum distribution requirements of the Internal Revenue Code will not result in such a reduction to the benefit base and will not terminate any benefit base step-up provided for in the contract.
- (d) Guaranteed Minimum Account Benefit (GMAB)
- (i) The opening paragraph must describe the benefit in clear and simple terms, such as, “This benefit provides a minimum account value so long as the contract is maintained for X years.”
 - (ii) A full description of the benefit must be included in the contract, including any restrictions on allocations/transfers to the fixed account or any separate account (or sub-account within a separate account). §3219(a)(3).
 - (iii) The application or supplemental application must identify the investment options available or not available with the GMAB.
 - (iv) The contract must describe (and application must reference how the guaranteed benefit is affected by):
 - (I) additional contributions;
 - (II) partial withdrawals; (Numerical examples should be used to explain the difference between dollar-for-dollar and proportional

reductions in the benefit base resulting from withdrawals. (See also (a)(iii) above.

(III) amounts allocated to the fixed account, if any,

(IV) transfers between or among investment options available under the contract, including any funds not permitted for this benefit.

G.8) Loan Provisions

(a) Loan provisions are not required for annuity contracts but are permissible.

(b) The Department has applied §3203(a)(8) to annuities that provide loans.

(i) For fixed interest loans, §3203(a)(8)(F), (G) and (H) provide for a maximum loan rate of 7.4% if payable in advance or equivalent effective rate of interest if otherwise payable (i.e. 8.0%), or an adjustable maximum rate.

(ii) Contract may provide:

- interest not paid when due will be added to existing loan if total indebtedness exceeds loan.
- if total indebtedness exceeds loan value, policy may be cancelled with 30 days prior notice.

(c) Section 3219(c) permits adjustable maximum interest rates in which adjustments occur at least once every 12 months, but not more frequently than once in any three-month period. Section 3206 applies to annuities subject to §3219(c) with adjustable maximum rate of interest on loans.

(i) Adjustable maximum loan rate shall not exceed the greater of:

- Published Monthly Average for calendar month ending two months previous or
- Cash Surrender Value rate plus 1%

(ii) Adjustments made on regular intervals:

- may be increased when rate increases by ½% or more
- must be decreased when rate declines by ½% or more.

(iii) The published monthly average is the Moody's Corporate Bond Yield Averages – Monthly Average Corporates.

- (d) Loan provision must describe how contract loans and loan accounts are affected by the MVA formula, including the effects of loan repayments on actual accumulation amount. §44.9(e) of Regulation No. 127.
- (e) For MVA contracts, the amount of loan may be treated as a partial cash surrender (but without imposition of withdrawal charge) which is subtracted from the actual accumulation amount prior to such loan and transferred to a separate loan account. Loan repayments would then result in transfers from the loan account to the actual accumulation amount under the contract and could be treated as a current premium remittance for purposes of determining future market-value adjustments, §44.5(d)(2) of Regulation 127.
- (f) The Department interprets §3203(a)(8) so as to not allow loan origination or loan administration fees.
- (g) The interest rate credited on loaned amounts cannot fall below the minimum guaranteed interest rate in the contract. §4223(c)(2)(C).
- (h) For adjustable loan rate contracts, the contract should provide that the loan rate cannot fall below the minimum guaranteed interest rate in the contract. Solvency issue. §3201(c)(2).
- (i) We have taken the position that the adjustable interest rate in §3206 complies with Internal Revenue Code and ERISA requirements for a reasonable rate of return.
- (j) Other References
 - (i) IRC §72(p) - Qualified Employer Plan Loans. Loans intended to qualify under §72(p) should set forth all applicable requirements.
 - (ii) U.S. DOL Regulation 2550.408b-1(e).
 - (iii) IRS Notice 93-3.

G.9) Waiver of Surrender Charges or Reduction in Fees

- (a) The Department has approved waiver of withdrawal charge/fee provisions triggered by terminal illness, total and permanent disability, chronic illness, involuntary unemployment, nursing home confinement or provision of long-term care with regard to the contractholder or the contractholder's spouse. We would consider other waiver of withdrawal charge/fee provisions on a case-by-case basis. The waiver of withdrawal charge/fee provisions must set forth all terms, conditions and restrictions related to the benefit.
- (b) If based upon total and permanent disability, the benefit must be drafted in accordance with §3215 of the Insurance Law or may include provisions that are more favorable to the contractholder.

- (c) Waivers based upon terminal illness, nursing home confinement or the provision of long-term care either at home or in a nursing home will be reviewed on a case-by-case basis. An annuity with this feature cannot be marketed, advertised or sold as long-term care coverage or as an alternative to long-term care insurance.
- (d) Bail-out provision. The contract may provide for the waiver of withdrawal charge for contracts providing guaranteed rates for a short specified time interval such as one year, if the company fails to declare a new rate for a new specified time interval, at least equal to a specified rate which rate shall be at least 0.5 percent lower than the initially declared rate. See § 44.4(b)(3) of Regulation 127.
- (e) The contract cannot permit a waiver of the withdrawal charge (or market-value adjustment) upon a credit rating downgrade. Solvency issue – § 3201(c)(2).
- (f) The contract may provide that an insurer will waive a fixed contract fee when the contract reaches thresholds set forth in the contract. For example, some insurers waive certain contract fees when the account value reaches a specified value or when a specified dollar amount of premium has been paid.

G.10) Telephone Transfers

If there are references to telephone transfers in either the contract or in the application, the insurer must confirm in the submission letter that its telephone transfer procedures are in compliance with the federal Electronic Signatures in Global and National Commerce Act (ESIGN), the New York Electronic Signatures and Records Act (ESRA) and any regulations thereunder.

G.11) Persistency Enhancement

Persistency enhancements (i.e., additional interest that is credited for each year of the contract after a specified period of time, e.g., 10 years) are permissible subject to the following:

- (a) Such additional interest shall be described in the contract.
- (b) The contract should indicate whether or not the additional interest will be credited if the crediting rate for considerations received prior to the end of the specified period falls to the contractual minimum guaranteed interest rate. The contract should also be clear as to whether the contractual minimum guaranteed interest rate is impacted by the persistency enhancement (e.g., if the additional interest will be credited in all cases, then the contractual minimum guaranteed interest rate should be shown as increasing at the end of the specified period).

- (c) Such enhancements should not be described as “reward for persistency”. §3201(c)(1).
- (d) Any lump sum persistency enhancements (“bonuses”) must be fully guaranteed in the contract. Otherwise, the lump sum payment would violate §4232(a) of the Law, which requires that any additional amounts (which are not guaranteed in the contract) must be credited at least annually, i.e., not held back for a later date.

G.12) Interest on Surrenders

If there is contract language regarding deferral of surrenders or loans, such language must comply with §3227 (i.e. deferral of 10 days or more are credited with interest from the date the documentation necessary to complete the transaction is received by the insurer at the current interest rate payable on the interest only settlement option).

G.13) Interest on Death Proceeds

If there is contract language regarding interest on death benefit proceeds,

- (a) Such language for fixed annuities must comply with §3214.
- (b) Such language for variable annuities must comply with §4240(d)(2).
- (c) Note that §3214 and §4240(d)(2) requirements are not the same. For example, while §4240(d)(2) requires interest to be credited only if payment is not made within seven calendar days of receipt of the beneficiary’s election form, §3214 requires interest to be credited from the date of death regardless of when payment is made.
- (d) If the company wishes to treat the fixed account portion of the contract and the separate account portion of the contract the same with respect to the crediting of interest on death benefits, such treatment would need to be in compliance with both §3214 and §4240(d)(2).

G.14) Claims of Creditors

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

G.15) Assignments

- (a) Generally, the Department finds restrictions on assignment, including the reduction or termination of benefits upon assignment, as prejudicial to the interests of certificateholders 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 policy 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 company, etc. §3204.
- (c) The contract/certificate should provide that assignments are effective as of 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.

G.16) Enhanced Dollar Cost Averaging

- (a) Any enhanced interest rate credited on amounts allocated to a dollar cost averaging option that is in excess of the gross investment earnings rate (less appropriate expense and risk charges) must be clearly described in the contract.
- (b) The contract must identify the maximum enhanced rate (or the maximum enhancement over the net investment earnings rate), the deposits to which such rate applies (i.e., lump sum, first-year, etc.) and the dollar cost averaging accounts available under the contract.
- (c) At the time of sale, the applicant must be provided with appropriate disclosure as required by Circular Letter No. 33 (1998) including disclosure of how the excess rate is recovered (e.g., by fund-based charges in later years).

G.17) Bonus Interest or Bonus Credit Provisions

- (a) Any bonus interest rate or credit on amounts deposited to the contract in excess of the gross investment earnings rate less appropriate expense and risk must be clearly described in the contract. The bonus interest rate or credit is the amount guaranteed above the sum of the minimum interest rate and any additional amounts that would otherwise be guaranteed or credited under the contract.
- (b) Essential terms and conditions relating to bonus feature:
 - (i) Identification of all deposits to which the bonus rate or credit will apply (i.e. single lump sum deposit, first-year deposits only, all deposits, etc.).
 - (ii) Indication of duration and amount of bonus rate or credit, usually on the schedule page (i.e., an additional [X% in interest credited] for the [first

year] or an additional [Z%] added to all deposits made during the [first year]).

- (iii) Indication whether and how unrecouped bonus amount will be recaptured in event of early withdrawals or surrenders.
- (iv) Description of whether the bonus provision will be offered at all times.
- (v) The bonus interest or credit must not be recaptured from the death benefit or upon annuitization. Prior to April 30, 2002, the Department's longstanding position held that an annuity contract's death benefit must not be less than the actual accumulation amount. But, since April 30, 2002, the Department permitted insurers to recapture bonus interest rates or credits from a death benefit only when death occurred within the 12 months immediately following the bonus credit. However, in light of the revisions to Insurance Law §4223(c)(1) made in Chapter 170 of the Laws of 2008, the law now is explicit that 1) the death benefit proceeds of a fixed deferred annuity contract, or 2) the portion of the death benefit proceeds related to the fixed account portion of an annuity contract that combines both fixed and variable benefits, must not be less than the actual accumulation amount if death occurs before annuity payments commence. See Circular Letter 8 (2010).
- (vi) The contract must clearly describe any adjustments in the credits, charges or settlement option rates necessary to offset the cost to the insurer for providing the bonus. For example:
 - The interest credits will be [x%] less than the rate that would be credited if the contract did not contain a bonus or credit.
 - Alternatively, the interest rate credited to the contract will be reduced by [x%] for [five years] to pay for such bonus interest or credit amount.
 - An additional surrender charge beginning at [z%] and declining to [0%] after [five years] will apply until the credit or bonus amount is fully recovered by the higher charges or interest rate reductions.
 - If an insurer is unable to explicitly identify the difference in charges, interest credits and/or settlement option rates between the contract with the bonus and the contract without the bonus, there should be a general disclosure to the effect that expense charges may be higher, the interest credits lower and/or settlement option rates lower for an annuity with a bonus than an annuity without a bonus and that the amount of the additional charges, reduction in interest credits and/or lower settlement option rates associated with the bonus may exceed the amount of the bonus.

- (c) The maximum surrender charge, including any recapture of the unamortized credit, cannot exceed 10% pursuant to §4223(e)(3) for non-MVA fixed accounts. For MVA fixed accounts, the withdrawal charge is capped at 7.0% with reductions noted above in §(III)(F)(11)(g) and (h). For variable accounts, the withdrawal charge is limited to the provision for unamortized acquisition expense. Section 50.7(a)(3) of Regulation 47. Benefits (e.g. Bonus) are not acquisition expenses.
- (d) Disclosure. See Circular Letters Nos. 13 and 21 (2000)
 - (i) Disclosure must be in compliance with Circular Letter No. 13 (2000) and Circular Letter No. 27 (2000). This disclosure will be earmarked for later market conduct review.
 - (ii) The actual disclosure must alert the consumer to the true cost of the bonus, including any:
 - (I) Higher surrender charge and longer surrender charge period to recapture unamortized acquisition expenses.
 - (II) Higher fees and charges.

G.18) Long Term Care Riders

- (a) Long term care (LTC) riders to be used with annuity contracts must be submitted to the Health Bureau for the appropriate form and rate approvals.
- (b) A single application form may be used to apply for both the annuity and the LTC rider. Such application must be submitted for approval to both the Life Bureau and the Health Bureau.
- (c) The annuity contract with which the LTC rider will be used must be submitted to the Life Bureau for approval. If the LTC rider submitted to the Health Bureau will be used with a previously approved annuity contract, the company should make an informational filing to the Life Bureau identifying by form number, Department file number and date of approval, the previously approved annuity contract with which the LTC rider will be used.
- (d) Generally, charges from an annuity's actual accumulation amount may not be deducted unless authorized by §4223. Section 4223 does not authorize the deduction of rider charges. See §4223(c). However, the Department has determined that LTC benefits would be considered "other policy benefits additional to life insurance, endowment and annuity benefits" and would, in accordance with §4223(j), be disregarded in ascertaining the actual accumulation amount. Accordingly, we have approved a deduction from the annuity contract to pay for LTC benefits provided in a LTC rider. Any amendment of a previously approved annuity contract to provide for this deduction would have to be submitted to the Life Bureau for approval.

G.19) Arbitration

Mandatory binding arbitration provisions applicable to combination fixed and variable annuity contracts are not permissible in New York.

G.20) Private Placement

The Department has permitted deferral of the payment of cash surrender benefits, annuity payments or loan amounts in situations where funds are not available due to the illiquid nature of the assets to which the contract holder has allocated premium. Payment should be made as expeditiously as possible. We have not approved delays in excess of 15 months from the date the request for payment is received.

The Department has also permitted deferral of the payment of death benefits in situations where funds are not available due to the illiquid nature of the assets to which the contract holder has allocated premium. The payment of death benefits should be made as expeditiously as possible. We have not approved delays in excess of 30 days from the date the request for payment and all necessary documentation is received. Any delay in the payment of a death benefit must comply with the interest crediting requirements of §4240(d)(2) of the Insurance Law.

Contracts that provide for deferral periods longer than those noted above would be reviewed on a case-by-case basis and therefore may not be submitted under the CL-6 (2004) certified procedure without permission from the Department.

III.H) Fixed Account Availability and Right to Refuse Premium Contributions

If a fixed deferred annuity contract or a separate account annuity contract with a fixed account includes a fixed account availability restriction (either in the base contract and certificate forms or in rider/endorsement forms) in which the insurer reserves the right to (i) not offer the fixed account or specific fixed account guarantee periods for current or future deposits or transfers and/or (ii) for separate account annuity contracts with modified guaranteed annuity options, discontinue the fixed account guarantee period at the expiration of the interest rate guarantee period and/or (iii) for separate account annuity contracts, discontinue/diminish the availability of any other fixed interest accountthen such restrictions on availability must be disclosed in the application and on the cover pages of the contract and certificate and on the specification pages of each. Similar disclosure must also be provided if the insurer reserves the right to refuse future premium contributions to any flexible premium annuity contract (fixed and variable, fixed only, or variable only.) In addition, pursuant to §3204 the policy form(s) (i.e., contract, certificate, rider, endorsement or application) must include provisions consistent with the following guidelines:

H.1) Insurer-Initiated Transfers

All transfers or withdrawals caused by the insurer's decision to discontinue the fixed account (for any period of time during the accumulation phase) must be in

an amount at least equal to the actual accumulation amount, not subject to a negative market value adjustment, transfer charge, or withdrawal charge. Insurer-initiated transfers must be at the higher of book value or market value.

H.2) Money Market Option/Default

The contract must include a money market account or non-market value adjusted guaranteed interest account as an investment option and such account must be the automatic or default destination account option for transfers in the event of insurer-initiated discontinuation of the fixed account.

H.3) Prior Notice of Restriction

The contract and certificate must provide for written notice 30 days in advance of the date the insurer will cease to offer the fixed account option or not renew the guarantee period or cease to accept future premium contributions. An advance notice to customers of fixed account availability restrictions to customers similar to the following, would be acceptable: "The company will not be accepting new premiums or transfers to the fixed account with an effective date 30 days or more after the date of this letter. Therefore, we must receive your allocation or transfer instructions within the allowable timeframe, regarding which investment options other than the fixed account to which you may wish to allocate premiums and/or transfers. You will be notified in writing as soon as the company's restriction on such fixed account activity no longer exists."

H.4) Scope of Reserved Right

If the Company wishes to reserve the right to restrict availability of the fixed account or to refuse future premium contributions, such reserved right must be stated in the contract and certificate forms and must specifically set forth the restrictions that may be imposed and explain the circumstances under which such reserved right would be exercised. An unqualified reserved right to impose restrictions is not permitted. Contracts issued without this right cannot be amended to grant the insurer this right.

The Department has approved provisions that allow the insurer to refuse premium contributions or transfers that do not comply with contribution minimum and maximum amount requirements set forth in the contract or where the yield on investments would not support the minimum interest rate guaranteed under the fixed account. Other reserved rights provisions would be reviewed on a case by case basis..

IV) Separate Account Plan of Operation

IV.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". All plan of operation filings must be made directly to the Life Bureau's New York City office. Any questions pertaining to such filing requirements should be addressed to Mr. Mensch.

A.2) Form Marketing

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.

- (a) A contract form cannot be marketed nor issued until the plan of operation has been approved.
- (b) A contract form can be approved contingent on the company's receipt of the approval of the plan of operation.
- (c) The company should forward a copy of the plan of operation approval letter.

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. See §(II)(E)(5) of this outline. 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.)

IV.B) Qualification Requirements

Regulation No. 47 (11 NYCRR 50) sets forth the qualification requirements for insurance companies to issue separate account annuity contracts. Section 50.2 requires an insurer 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. §50.2(a)(1) of Regulation No. 47.

B.2) Method of Operating

A description of the proposed method of operating the separate account or accounts established with respect to such separate account annuity contracts. §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.

IV.C) Informal Guidelines for Plan of Operations

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)*.