

## **SEPARATE ACCOUNT AGREEMENTS**

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## SEPARATE ACCOUNT AGREEMENTS

### VIII. Applicability

- A. **Scope:** This product outline covers all unallocated group annuity contracts, funding agreements and separate account accumulation agreements delivered or issued for delivery in New York that are funded, in whole or in part, through one or more commingled or single-client separate accounts, including:
1. **Traditional Equity Type Separate Account Agreements**
    - (a) **Guarantees.** Under the traditional equity type separate account agreement, the insurer's liability under the contract is limited to the contractholder's interest in assets allocated to the separate account. The contractholder's account value fluctuates with changes in market value of the separate account.
    - (b) **Valuation.** Pursuant to §4240(a)(7) of the Insurance Law, assets allocated to separate account shall be valued at their market value.
  2. **Book Value Separate Account Agreements**
    - (a) **Guarantees.** Book value separate account agreements provide guarantees of value of the assets allocated to a separate account, or any interest therein, or the investment results thereof, or income thereon, without limitation of liability under all such guarantees to the extent of the contractholder's interest in assets allocated to the separate account.
      - (i) The contracts can be used as an accumulation vehicle and contain an annuity purchase option. Initially the most common product design was the fixed rate, fixed maturity guaranteed interest contract. Today, the most common product design provides a fixed rate that is periodically adjusted to reflect the contract's cash flow activity, earnings on supporting assets and current interest rates.
      - (ii) Interest credited will be based on the rate or rates guaranteed (fixed rate, determinable by a formula contained in the contract or tied to an external index) and will not be variable based solely on the performance of the book value separate account.
    - (b) **Book Value Requirement.** Pursuant to §4240(a)(10) of the Insurance Law, except with respect to separate accounts qualifying under §4240(a)(5)(iii), assets supporting reserves which do not vary with the investment experience of the separate account must be maintained in the separate account at their value determined in accordance with §1414 of the Insurance Law (i.e., at book value, not market value).
    - (c) **Insulated and Non-insulated Products.** Pursuant to §4240(a)(5) of the Insurance Law, there are two types of book value separate account agreements.
      - (i) **Non-insulated Products.** The investments allocated to the separate account are deemed to be part of the general assets of the insurer and

are subject to the qualitative and quantitative limitations contained in §1404 or §1405 of the Insurance Law. [§4240(a)(5)(i)]

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

3. **Market Value Separate Account Agreements Funding Guaranteed Benefits - ("Regulation No. 128 Guaranteed Separate Account Agreements).**

- (a) *Guarantees*. Market value separate account agreements are group annuity contracts, funding agreements and certain group life insurance policies that provide guarantees of value of the assets allocated to a separate account, or any interest therein, or the investment results thereof, or income thereon, without limitation of liability under all such guarantees to the extent of the contractholder's interest in assets allocated to the separate account. Such market value separate account agreements provide for fixed or guaranteed minimum benefits.
  - (i) *Fixed benefits* means any annuity benefits (and other periodic payments) and benefit types A, B, or C described in §97.5(l)(2). See 97.3(k) of Regulation No. 128.
  - (ii) *Guaranteed minimum benefits* means contract benefits payable on a specified date that are the greater of the market value of account assets (to the extent such assets determine the contractholder's benefits) or a fixed minimum guarantee related to the initial considerations. §97.3(m) of Regulation No. 128.
- (b) *Product Designs*. The most common product designs include:
  - (i) Fixed rate, fixed maturity GICs.
  - (ii) Evergreen products that provide for the periodic interest rate reset applicable the unallocated amounts held under the contract.
  - (iii) Indexed products that guarantee a return of a specified index.
  - (iv) Products that guarantee a minimum return, such as the return of principal.
  - (v) Immediate participation guarantee type arrangements fund fixed annuity benefits for retirees through a market value separate account. Often used to provide guaranteed annuities for participants in plan termination or other settlement situations.
- (c) *Valuation*. Pursuant to §4240(a)(7) and (10) of the Insurance Law, assets of separate accounts qualifying under §4240(a)(5)(iii) shall be valued at their market value.
- (d) *Actuarial Opinion and Memorandum*. Section 4240(a)(5)(iii) requires that the insurer annually submit

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

## B. **Basic Features**

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

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

## C. **Excluded Contracts**

1. **Allocated Separate Account Agreements**
  - (a) Contracts funded solely by employee or individual contributions and subject to §4223 and Regulation no. 127. See *Allocated Group Variable and Separate Account Annuity Contract* outline
  - (b) Contracts funded in whole or in part by employer contributions. See *Allocated Group Annuity Contracts Not Subject to Section 4223*.

2. **Group Annuity Contracts and Funding Agreements Funded Solely Through The Insurer's General Account**

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

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

3. **Synthetic Guaranteed Investment Contracts**

D. **Definitions**

1. **Annuitant** refers to any person upon whose continued life such annuity is dependent. Section 4238(a).
2. **Annuities** mean all agreements to make periodical payment for a period certain or where the making or continuance of all or some of a series of such payments, or the amount of such payment depends upon the continuance of human life. Section 1113(a)(2).
  - (a) *Period certain* annuities first authorized in New York by Section 1 of Chapter 864 of the Laws of 1985.
3. **Contractholder** means the party or parties to whom or to which the contract is issued. Section 4238(a).
4. **Employee** may include retired employees, employees of affiliates and subsidiaries of the employer, individual proprietors affiliated with the employer, and partners and employees of individuals affiliated with the employer and of firms controlled by the employer. §4238(c).
5. **Funding agreement** is defined in §40.2(g) of Regulation No. 139 to be a contract described in §3222 of the Insurance Law.
  - (a) Section 3222(c) places two requirements on funding agreements. The requirements are as follows:
    - (i) No amounts shall be guaranteed or credited under any such funding agreement, except upon reasonable assumptions as to investment income and expenses, and on a basis equitable to all holders of funding agreements of a given class.
    - (ii) Such funding agreement shall not provide for payments to or by the insurer based on mortality or morbidity contingencies.

- (b) This definition is somewhat broad. Section 3222 neither defines nor restricts funding agreements, except by limiting to whom they may be issued. It can be interpreted to allow most types of annuity contracts, as long as such contracts eliminate all provisions that provide for payments to or by the insurer based on mortality or morbidity contingencies.
  - (i) The typical group funding agreement, when first authorized, resembled fixed rate/fixed maturity guaranteed interest contracts described in the *Guaranteed Interest Contract Outline*, except that no provision is made for the purchase of annuities under the contract.
  - (ii) However, group funding agreements today often provide for a fixed interest rate or indexed rate that is reset periodically and need not provide for a fixed maturity date.
  
- 6. **Group Annuity Contract** means any policy or contract, except a joint, reversionary or survivorship annuity contract, whereby annuities are payable dependent upon the continuance of the lives of more than one person. Section 4238(a).
  - (a) We view group contracts that provide for the purchase of annuities or the payment of annuity benefits for plan participants or their beneficiaries to be group annuity contracts
  - (b) The terminology used in Sections 3223 and 4238 was drafted to apply to group deferred annuity contracts which are rarely sold today.
  - (c) Plans funded by group annuity contracts include 401(a), 401(k), 457, 414(d), and 403(b), among others.
  
- 7. **Participant** means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. See §3(7) of ERISA.
  
- 8. **Separate account accumulation agreement** means any contract which provides that amounts paid to the insurer shall be allocated by the insurer, in whole or in part, to one or more separate accounts for the purpose of accumulating or holding in such separate account amounts to
  - (a) accumulate or hold in such separate account funds to be applied to provide health insurance;
  - (b) accumulate or hold in such separate account funds credited under funding agreements delivered pursuant to section 3222 of the Insurance Law;
  - (c) accumulate or hold in such separate account funds for any purpose authorized in section 4240(a), provided that such agreement is not subject to Regulation No. 77.
  
- 9. **Separate account agreement** means a separate account accumulation agreement, a separate account annuity contract or a variable annuity contract.

10. **Separate account annuity contract** means any contract which provides that amounts paid to the insurer to provide annuities shall be allocated by the insurer, in whole or in part, to one or more separate accounts pursuant to §4240 of the Insurance Law, whether such annuities are payable in fixed or variable amounts or both. See §50.1(a)(3) of Regulation No. 47 [11 NYCRR 50].
  - (a) Amounts allocated to the insurer's general account are subject to standards that apply to general account products.
11. **Variable annuity contract** means a separate account annuity contract that includes provision for deferred or immediate annuity payments the amount of which, after such payments have commenced, varies according to the investment experience of any separate account maintained by the insurer as to such contract, as provided in §4240 of the Insurance Law. See §50.1(a)(4) of Regulation No, 47 [11 NYCRR 50]. Unallocated separate account annuity contracts may provide for the purchase of variable annuity contracts for employees upon termination of employment.
12. **Unallocated Contract** means any contract that does not provide for the maintenance of one or more accounts for each employee or member of all deposits made by or on behalf of such employee or member.
  - (a) This term usually applies to the active life or accumulation fund of a group annuity contract. Amounts set aside for retired lives are usually allocated to specific plan participants. Annuities are generally purchased and retired life certificates are issued to such retirees or terminated employees.
  - (b) The insurer is not required to issue an active life certificate pursuant to §3219(b) or §3223(d) of the Insurance Law (but see §50.7(b)(2) of Regulation No. 47).
  - (c) The insurer is not irrevocably committed to apply under the terms of the contract to the payment of benefits by it to specific plan participants or their beneficiaries or to the purchase of annuities for specific plan participants.
13. **Unallocated amounts** means any funds credited to the accumulation fund which the insurer is not currently irrevocably committed to apply under the terms of the contract to the payment of benefits by it to specific plan participants or beneficiaries or to the purchase of annuities for specific plan participants, adjusted for any accrued experience rating charges or credits, including expenses and administrative, sales and surrender charges provided for under the contract. See §40.2(z) of Regulation No. 139.

## IX. Filing Requirements

### A. Overview

1. **Prior Approval Requirement:** Section 3201(b)(1) provides that no policy form shall be delivered or issued for delivery in this state unless it has been filed with and approved by the superintendent *as conforming to the requirements of the*

*Insurance Law* (standard and generally applicable provisions) and *not inconsistent with law* (federal and state statutory, regulatory and decisional law).

- (a) *Non-Conforming Contract Requirement*. Note that pursuant to §3103(a) of the Insurance Law, any life insurance policy or annuity contract which contain provisions that violate the requirements or prohibitions of the Insurance Law shall be enforceable as if it conformed to the requirements or prohibitions of the Insurance Law.
  2. **Discretionary Authority For Disapproval:** Section 3201(c)(1) and (2) permits the Superintendent to disapprove any policy form that contains provisions that are misleading, deceptive, unfair, unjust, or inequitable or if its issuance would be prejudicial to the interests of policyholders or members. See also §§2123, 3209, 4224, 4226, 4228(h), 4231, 4239.
  3. **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.
  4. **Recent Procedural Changes**
    - (a) Pursuant to Circular Letter No. 14 (1997), submissions that are incomplete or not drafted to conform to New York requirements **will** be rejected. Submissions that are poorly organized, difficult to understand or that contain several substantive omissions or objectionable provisions **may** be rejected.
    - (b) Circular Letter No. 8 (1999) describes the requirements for the caption of the submission letter and provided for a fifteen-day response limit to comment letters.
    - (c) Administrative Procedure: The Department may limit the number of comment letters on any one file to no more than two each from the reviewing attorney and actuary.
- B. **Preparation of Forms for Submission.** Basic Rules - See Circular Letters 1963-6 and 1969-4.
1. No filing fee required.
  2. Each policy form should be designated with a form number on lower left- hand corner of face page to distinguish the form from all others of the insurer.
  3. New policy forms should be submitted without amendatory riders or endorsements, unless:
    - (a) changes are necessitated by distinctive New York requirements.
    - (b) riders are expressly permitted.
    - (c) Riders are permitted to conform policy to change in law, rules or regulations, unless resulting policy would have tendency to confuse or mislead.
  4. Submit duplicate copies of forms.
  5. Printed forms should be used unless its use is too limited to justify printing. The form should be clear, legible and reasonably permanent. Computer generated forms are acceptable. See also readability provision Section 3102.
  6. Blank spaces in form should be filled in and completed with hypothetical data to indicate purpose and use of forms. Alternatively, the submission letter can also explain purpose and use of the form.

7. All incorporations by reference should be attached to or accompany the submission. See also Section 3204.
  8. If application (or enrollment form) will be attached to policy, it should be submitted. If previously approved, the form or submission letter should so indicate.
  9. Variable material used with impairment, waiver or exclusion riders should be submitted with the form for approval.
  10. Illustrative material may be used for items that vary from case to case, such as names, dates, eligibility requirements.
- C. **Submission Letters** - Circular Letters 1963-6, 1969-4 and No. 8 (1999).
1. Caption of submission letter should identify all forms submitted for approval or acceptance. Specify form number, designate form as individual or group, provide a generic product description and generic form description. See Circular Letter No. 8 (1999).
  2. Submit two copies of the submission letter (and all other correspondence regarding the file) signed by a representative of the company authorized to submit forms filing for approval. C.L. 63-6 § I.G.
  3. Identification of Insurer.
  4. Listing of form numbers. C.L. 63-6 § I.G.1.
  5. Table of Contents of all material in the filing.
  6. When the policy form is designed as an insert page form, the insurer must submit a statement of the mandatory pages which must always be included in the policy form, and a list of all optional pages, if any, including application forms, together with an explanation of how the form will be used (previously approved forms should be identified by form number and approval date).
    - (a) We object to a company's use of the matrix approach that identifies benefit provisions within a document with separate form numbers.
    - (b) See Circular Letter No. 6 (1963) § I.G.8. and Circular Letter No. 4 (1963) § I.A.2.
  7. Statement as to whether the form is new or is intended to replace a previously approved form. Rule I.G.3, 4, 5, 6 and 8.
    - (a) If the form is intended to supersede another approved or filed form, the form number of the form approved or filed by the Department, together with a statement, of the material changes made; if the previous form is still in process, the form number, control number and submission date. A redlined copy is helpful.
    - (b) If a form submitted for approval had previously been submitted for preliminary review, a reference to the previous submission and a statement setting out either (a) that the formal filing agrees precisely with the previous submission or (b) the changes made in the form since the time of preliminary review. Submit a highlighted copy showing the differences or changes made to the form. A redlined copy is helpful.
    - (c) If the form is other than a policy or contract, give the form number of the policy or contract form or forms with which it will be used, or, if for more general use describe the type or group of such forms.

- (d) If a form is intended to replace a very recently approved form because of an error found in the approved form, the insurer must, if the approved form has not been issued, return the approved form with a statement in the submission letter that the form has not been issued. The insurer may, under these circumstances, use the same form number on the corrected form being submitted. If, however, the form has been issued, the insurer must place a new form number on the corrected form and need not return the previously approved form.
8. Statement as to how the form will be used and how it will be marketed, as described in Circular Letter 1976-12.
    - (a) Description of benefits/coverage provided. Circular Letter No. 6 (1963) § I.G.2 and 7.
    - (b) Type of group policyholder, as defined in Section 4238(b) Specify
 

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      - (c) Classes covered, as defined in §4238 if not all persons are eligible (i.e., conditions pertaining to employment or a combination of conditions pertaining to employment and family status),
      - (d) Statement as to whether the contract is noncontributory, contributory or funded solely by employee or member contributions. If the policy is contributory for some insureds, or for some levels of insurance, or under some conditions, indicate what situations or conditions would permit or require contributions from the insureds.
      - (e) Statement describing the type of pension plan or other program funded by the policy.
      - (f) Submission letters should be as detailed as possible explaining the need for the product, any unique features and any special market or intended use of the form.
  9. Submission letter should indicate whether the contract has been filed with the Securities and Exchange Commission ("SEC") (or is exempt from such requirement) and the current status of such filing, if applicable.
  10. Include a statement in the submission letter indicating whether the plan of operation of the separate account or separate accounts have been approved by the Life Bureau (New York Office). Please identify the file number and approval date and attach a copy of the approval letter, if the plan has already been approved.
  11. For Regulation No. 128 market value separate account contracts funding guaranteed benefits, the contract form submission must identify the product as one whose reserving and asset maintenance are subject to Regulation No. 128 and shall identify the type of product and whether it is subject to §97.5(g)(1) for fixed benefit only contracts or §97.5(g)(2) for contracts that do not provide fixed benefits only. See §97.4(c) of Regulation No. 128.
  12. For §3201(b)(6) expedited approval submissions, the caption of the submission letter should identify the submission as a *Section 3201(b)(6) Deemer Submission*. The certification of compliance should be attached to the submission letter.

## D. Attachments To Submission

### 1. Explanation of Variable Material

- (a) Illustrative material may be used for items which may vary from case to case such as names, dates, eligibility requirements, premiums and schedules for determining the amount of insurance for each person insured.
- (b) If an explanatory memorandum accompanying a cover letter or appropriate reference to material filed with schedules of premium rates (in duplicate) clearly indicates the nature and scope of the variations to be used. Portions of other provisions such as insuring clauses, benefit provisions, restrictions, and termination of coverage provisions may be submitted as variable. The areas of the forms to be considered variable should be suitably indicated by red ink, underlining, bracketing or otherwise. The method of indicating variable material should be clearly stated in both the submission letter and the explanation of variable material.
  - (i) For example, it may be indicated that variations will be made within the limits set out in the explanatory memorandum or that any one of several alternative provisions may be used or that a provision may be either included as submitted or else completely omitted.
  - (ii) An explanation of variable material that the variations "will conform to law" or "as requested by the policyholder" is not acceptable.
- (c) The alternative language, if any, should be supplied in duplicate, independent of the insurer's letter. For alternative text, exact language is required.
- (d) Ranges for actuarial items must be specified in the explanation. Include the minimum and maximum amounts, where applicable.
- (e) Open-face riders or endorsements may be filed for general use in amending illustrative or variable material within the limitations of the preceding paragraph.
- (f) The available funds or sub-accounts in the separate account should be bracketed to denote variable material. The available funds or sub-accounts in the separate account should be set forth in the contract and certificate either the specification page or in the application to be attached to and made part of the contract.
  - (i) The approval letter should provide, with respect to such variable material, that "any addition of new funds may be made available only if the amendment to the plan of operation adding such fund or funds has been approved or deemed approved by the Department."
  - (ii) When funds are added or deleted, the company should send in the updated specification pages or the application form, together with confirmation that the amendment to the plan of operation has been approved (or deemed approved), as an informational filing to reflect the available funds or sub-accounts.
    - The form number does not need to be changed.
    - The Company does not need to request an extension of approval for the form.

- A copy of the approval letter from the Department for the amended plan of operations to reflect the new funds available should accompany the informational filing.
- The company should advise if the plan amendment is deemed approved pursuant to §4240(e) of the Insurance Law.

## 2. **Flesch Score Certification -- Readability Requirement**

- (a) Section 3102(b)(1) excludes most group contracts and
  - (i) any certificates issued pursuant to a group annuity contract issued to an employer covering persons employed in more than one state,
  - (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 delivered or issued for delivery in this state.
- (b) 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 on Section 3102 compliance for a sample certification form.
- (c) "Text" includes all printed matter **except**:
  - (i) name and address of the insurer; name, number or title of the policy; the table of contents or index; captions and subcaptions; specification pages, schedules or tables; and
  - (ii) any language which is drafted to conform to the requirements of any state or federal law, regulation or agency interpretation; any language required by any collectively bargained agreement; any medical terminology; words which are defined in the insurance policy; any language required by law or regulation - provided the insurer identifies the language excepted by Section 3102 and certifies in writing that the language or terminology is entitled to be excepted.
- (d) The text must achieve a minimum score of 45 on the Flesch reading ease test or an equivalent score on any other comparable test, as described in this subsection;
- (e) The text must be printed in at least 10 point type, and such type must be at least one point leaded, except for specification pages, schedules and tables;
- (f) Each section must contain an underlined, boldface or otherwise conspicuous title or caption at the beginning that indicates the nature of the subject matter included in or covered by the section;
- (g) There must be a Table of Contents or an index of the principal sections of the policy if the policy has more than 3000 words or if the policy has more than three pages, regardless of the number of words;
- (h) The policy must have adequate margins, and be printed in such a manner that it includes sufficient contrast of ink and paper to be legible;
- (i) Filings must include a certification by an officer of the insurer that the filing meets the minimum reading ease score on the test used. To confirm the accuracy of the certification, the superintendent may require the submission of further information to verify the certification in question.

- (j) At the option of the insurer, riders, endorsements, applications and other forms may be scored as separate forms or as part of the insurance policy with which they may be used;
- (k) Lower scores are permitted under certain circumstances described in Section 3102.

3. **Certification of Compliance For §3201(b)(6) Submissions**

- (a) Submit a certification of compliance signed by an officer of the insurer who is knowledgeable of the law and regulation applicable to the type of policy form.
- (b) The certification should state that the form complies with applicable laws and regulations. The certification should make reference to any law regulation or circular letter that specifically applies or is unique to the type of form.
  - (i) The certification need not refer to all generally applicable provisions.
  - (ii) At a minimum, the certification should refer to §§ 3223, 4238, and 4240 of the New York Insurance Law as well as Regulation Nos. 47, 128 and 139 to the extent applicable.
- (c) The certification should indicate that the forms comply with all requirements set forth in the product outline, including Department interpretations.
  - (i) Because of the penalties provided for in §3201(b)(6) an insurer should be wary of making a submission under §3201(b)(6) that does not comply in all respects with the product outline.
  - (ii) Although the alternative approval procedure may be used for all types of forms, we do not recommend its use for new, innovative or controversial product filings.
- (d) A certification to the effect that the contract is in compliance with all applicable laws and regulations is not acceptable.
- (e) Expedited review is not available when the form filed is to be used with a form currently under review by the Department. (Department Interpretation).

4. **Regulation No. 128 Plan of Operation**

- (a) The contract form submission shall be accompanied by the
  - (i) Plan of operation (§97.4(c) of Regulation No. 128.
  - (ii) An undertaking to file actuarial opinions and memoranda in conformity with Regulation No. 128.

5. **Product Outline Checklist**

A completed checklist and/or summary sheet should be attached to the submission letter.

E. **Filing Requirements For Separate Account Plans of Operation**

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

- (a) An authorized insurer shall not make any separate account agreement in New York providing for the allocation of amounts to a separate account until such insurer has filed the plan of operation with the Superintendent and the Superintendent has approved such plan.
  - (i) Please file such plans of operation and amendments thereof with Peter Kreuter of the New York Office of the Life Bureau.
- (b) Subject to the approval of the Superintendent, any such plan of operation may apply to one or more groups of separate accounts classified by investment policy, number or kinds of separate account participants, methods of distribution of such agreements or otherwise.
- (c) The filing of an amendment to a plan of operation with the Superintendent that does not change the investment policy of a separate account shall be deemed to be approved within thirty days after such filing, if the Superintendent does not approve, disapprove or request further information on the plan of operation within such thirty day period.
  - (i) If the Superintendent requests further information during such period from the insurer, such thirty day deemer period will be extended until thirty days after the day on which the Superintendent receives such information.
- (d) An amendment to any plan of operation that changes the investment policy of a separate account shall be treated as an original filing.

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

- (a) A description of the kinds and characteristics of separate account annuity contracts it intends to deliver or issue for delivery [§50.2(a)(1)];
  - (i) Pursuant to informal guidelines noted in Section II.E. 3. below, the plan of operation of separate accounts funding group variable annuity contracts should describe the types of plans and markets for which the contracts are intended, (e.g., qualified or nonqualified pension or profit-sharing plans, deferred compensation plan, IRC §§401(k), 403(b), 457, etc.).
- (b) 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)];
  - (i) The informal guidelines require a description of the investment objectives of each investment division of the separate account, including requirements for diversification, type and quality of assets.
- (c) Section 50.2(a)(3) of Regulation No. 47 provides that, unless expressly exempted from this requirement as inapplicable to the proposed separate account annuity contracts, a plan of repayment of the special contingent reserve fund pursuant to §4240(b)(2) of the Insurance Law. Note that

subsection (b) of §4240 was repealed by L.1994, c. 14, §1, effective March 21, 1994. As such, this requirement no longer applies.

- (d) 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;
  - (e) 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
  - (f) Such further information as the Superintendent may require.
- \* Please note that amending Regulation No. 47 is on the Department's Regulatory Agenda. The regulation needs to be updated to reflect changes in the law since 1971 and product innovations that have occurred since that time.

3. **Informal Guidelines** -- The Department has not issued formal guidelines concerning the filing requirements for separate account plans of operation. Until formal guidelines are issued, insurers can rely upon informal guidelines drafted in 1994. See *Guidelines For The Preparation Of Plans Of Operation For Separate Accounts (July 1, 1994)*. The guidelines expressly reserve the right to ask for additional information. Such informal guidelines request the following:
- (a) A statement as to whether "seed" money will be infused initially, and, if so, the dollar amount of such seed money and the plan of reimbursement to the general account of the advance.
    - (i) It should be acknowledged that such advances would be invested in accordance with the requirements of §1405 of the New York Insurance Law. See §4240(a)(3) of the Insurance Law and §50.4(a) of Regulation No. 47;
    - (ii) Generally, the period for repayment of seed money has been limited to two years.
  - (b) A display of all fees and charges that will be deducted from separate account, including a statement that in no respect will allocations be made which discriminate unfairly between separate accounts or between separate or other accounts (See §4240(a)(6) of the Insurance Law, §50.3(a)(5) of Regulation No. 47 and Regulation No 33);
  - (c) A statement as to what charges will be made to establish contingency reserves for expense or mortality fluctuations and whether such reserves will be held in a separate account or the general account, (See §50.3(a)(6) of Regulation No. 47);
  - (d) A statement as to the method of periodic valuation of separate account assets, including the frequency of such valuations;
  - (e) A statement as to the method of determining separate account unit values both initially and at the time when subsequent contributions are made to the account;

- (f) A statement that the plan will be operated in compliance with the requirements of §4240 of the New York Insurance Law, including applicable regulations;
- (g) An acknowledgment that the “prudent man rule” will be followed;
- (h) An acknowledgment that the company will maintain separate account assets at least equal to the fund accumulation, including variable annuities in the course of payment (See §4240(a)(8) of the Insurance Law);
- (i) An acknowledgment that no assets will be transferred between separate accounts or between separate accounts and the general account without previous approval by the Superintendent, [See §4240(a)(9) of the Insurance Law, §50.3(a)(3) of Regulation No. 47 and IRS Revenue Ruling 73-67)];
- (j) A statement that assets supporting reserves which do not vary with investment experience and which are maintained in the separate account will have their value determined in accordance with §1414 of the New York Insurance Law (See §4240(a)(10) of the Insurance Law);
- (k) A statement that if one separate account is permitted to invest in one or more separate accounts there will be no double counting of assets and liabilities;
- (l) A statement that assets allocated to a separate account shall be owned by the insurer and assets therein shall be the property of the insurer, which shall not be or hold itself out to be a trustee of such assets, (See §4240(a)(12) of the Insurance Law);
- (m) A statement as to whether the separate account states that the assets of the separate account shall not be chargeable with liabilities arising out of any other business of the insurer, (See §4240(a)(12) of the Insurance Law);
- (n) A statement as to whether the separate account agreement provides any guarantee of value of the assets allocated to the separate account as provided in §4240(a)(5) and the extent to which such assets are insulated from other liabilities of the insurer.

#### 4. **Plan Amendments**

- (a) An amendment to a plan of operation that does not change the investment policy of a separate account shall be deemed approved within thirty days, unless the Superintendent
  - (i) actually approves the amendment;
  - (ii) disapproves the amendment to the plan of operation ; or
  - (iii) requests additional information. The filing will be deemed approved within thirty days of receipt of the additional information, unless it is approved, disapproval or additional information is requested.
- (b) The submission of an amendment to a separate account plan of operation which does not change the investment policy, investment guidelines, or investment constraints of the separate account must include
  - (i) a copy of the approved plan of operation showing the proposed changes by striking out deletions and underlining insertions (or a comparable marking process); and

- (ii) be accompanied by a submission letter that includes a statement in bold print clearly indicating use of the Section 4240(e) deemer procedure.
  - (iii) The caption describing the subject matter of the submission letter (and all subsequent correspondence regarding the amended plan of operation) should include the phrase "SECTION 4240(e) DEEMER FILING" in addition to the file number and other identifying information. An amended plan of operation is considered filed when it is received by the Department.
  - (iv) The Department will provide an acknowledgement letter to the insurer confirming the date of receipt and identifying the reviewing staff person.
- (c) Any amendment to a plan of operation that discontinues, replaces or eliminates an investment division or sub-account of a mutual fund to which contractholder, policyholder or certificate holder funds are allocated shall be considered a change in investment policy which must be approved in writing by the Superintendent pursuant to Section 4240(e).

**5. Regulation No. 128 Requirements – §97.4**

- (a) To establish a market-value separate account, the insurance company shall file for approval a plan of operations for the separate account, accompanied by the contract providing for allocation of amounts to the separate account, and an undertaking to file actuarial opinions and memoranda.
- (b) Pursuant to §97.4(b) of Regulation No. 128, the plan of operations must include the following:
  - (i) a statement of the investment policy for the separate account, including requirements for diversification, maturity, type and quality of assets and, if applicable, for matching guaranteed contract liabilities;
  - (ii) a description of how the market-value of the separate account assets is to be determined, including (but not limited to) a statement of procedures and rules for valuing securities and other separate account assets which are not publicly traded;
  - (iii) a description of how the guaranteed contract liabilities are to be valued, including with respect to fixed or guaranteed minimum benefits, a description of the methodology for calculating spot rates and the rates proposed to be used to discount guaranteed contract liabilities if higher than the applicable spot rates, provided that the rate or rates used shall not exceed 104.5 percent of the spot rate, except that if the expected time of payment of a contract benefit is more than 30 years, it shall be discounted from the expected time of payment to year 30 at a rate of no more than the lesser of six percent and of 80 percent of the 30-year spot rate and for 30 additional years at a rate not greater than 104.5 percent of the 30-year spot rate, and must conservatively reflect expected investment returns (taking into account foreign exchange risks) [See §97.4(b)(3) and (d) of Regulation No. 128];

- (iv) a statement of how the separate accounts operations are designed to provide for payment of contract benefits as they become due, including (but not limited to) a description of the method for estimating the amount and timing of benefit payments, the arrangements necessary to provide liquidity to cover contingencies, and the method to be used to comply with the asset maintenance requirement;
- (v) a demonstration that the consideration charged for account contracts is appropriate in view of the risks to the insurance company with respect to such account contracts;
- (vi) a description of the charges to be made against the separate account assets, and a description of the manner in which the risk charge, if any, payable from separate account assets will be determined;
- (vii) a description of how any surrender charges under the account contracts are to be computed;
- (viii) if hedging techniques or dynamic hedging techniques are to be utilized in managing separate account assets a description of such techniques and an explanation of how they are intended to reduce risk of loss;
- (ix) if the amount of the asset maintenance requirement depends on the separate account or a subportfolio thereof being duration matched, a description of the method used and assumptions made to determine the durations of separate account assets and guaranteed contract liabilities;
- (x) if the amount of the asset maintenance requirement depends on the separate account or a subportfolio thereof being cash-flow matched, a description of the method used to determine the cash inflows to be received from separate account assets and the cash outflows needed to meet guaranteed contract liabilities (including, where applicable, a description of any provisions contained in the account contracts which are designed to transfer substantially all of the investment risk to the contractholder);
- (xi) if the insurance company proposes to create a duration matched or cash-flow matched subportfolio, a justification for creating such a subportfolio, a description of the method by which the specified guaranteed contract liabilities to be duration or cash-flow matched will be determined and a description of how the duration matched or cash-flow matched subportfolio will be managed separately so as to continue to maintain duration or cash-flow matching;
- (xii) if a part of the asset maintenance requirement is to be met by maintaining a reserve liability in the general account, a description of:
  - the circumstances under which increases and decreases in such reserve liability will be made;
  - the circumstances under which transfers will be made between the separate account and the general account; and
  - any arrangements needed to provide sufficient liquidity in the general account to enable the insurance company to make transfers to the separate account when due;

- (xiii) a statement as to whether or not the account contracts will provide that the separate account assets shall not be chargeable with liabilities arising out of any other business of the insurance company; and
  - (xiv) if any person is empowered under §4240 of the Insurance Law to authorize, approve or review the acquisition and disposition of investments for the account, a statement of the safeguards adopted by the insurance company to assure that the actions to be taken by such person are appropriate.
- (c) The superintendent may require an insurer to file additional information as part of the plan of operations if the superintendent determines that the plan of operations is not sufficient. See §97.4(f)

6. **Policy Form Filing Aspects.**

- (a) The plan of operations has to be approved prior to the contract being issued. See Section 4240(e).
  - (i) Deposits cannot be allocated to a separate account prior to approval of the plan of operation.
  - (ii) Note that the Department permits insurers to bind risk under group annuity contracts prior to approval of the contract pursuant to Circular Letter No. 64-1.
- (b) The submission letter should indicate that a plan of operations has been filed and if approved a copy of the approval letter from the Department should accompany the submission letter.
- (c) Please note that the annuity contract can still be reviewed and approved even if the plan of operations has not yet been formally approved.
- (d) The approval of the contract form will be conditioned upon the company's receipt of the approval of the plan of operations.
  - (i) The approval letter should then be immediately forwarded to the Albany office.
  - (ii) Please include the Department control number, the form number of the contract and approval date when submitting a copy of the approval letter for the plan of operation in relation to a contract that has already been approved.

F. **Pre-filed Group Insurance Coverage** - Circular Letter 1964-1.

1. Purpose. Circular Letter 64-1 permits insurers to provide or assume risk for group life and annuity coverage prior to the filing or approved of such forms. We have extended this procedure to funding agreements.
2. Conditions For Providing Coverage Prior to Approval.
  - (a) Immediate coverage requested by policyholder to meet specific need of policyholder.
  - (b) Insurer has reasonable expectation of approval or acceptance. The reasonable expectation is usually based on the nature and extent of benefits provided and the similarity of the form (or provisions in the form) to other previously approved forms (or provisions) for the insurer or other insurers.
  - (c) Confirmation letter sent to policyholder by insurer stating:

- (i) The nature and extent of benefits or change in benefits.
  - (ii) The forms may be executed and issued for delivery only after filing with or approval by the Department;
  - (iii) An understanding that, if such forms are not filed or approved or are disapproved, the parties will be returned to status quo insofar as possible, or the coverage will be modified retroactively to meet all requirements necessary for approval; and
  - (iv) The effective date of coverage (Best Practice).
- (d) Department Notification.
- (i) It is suggested that insurers notify Department of coverage within 30 days (i.e., copy of confirmation letter) of coverage and submit forms within six months. (Best Practice).
  - (ii) The notification should include a statement explaining circumstances and reasons for the delay in submitting forms within twelve months for group annuity.
  - (iii) Follow-up statement every six months for group annuity until form is submitted. If reason for delay is unacceptable, Department may pursue a violation under Section 4241 for willful violation of the prior approval requirement.
3. Recommended Practice.
- (a) Insurers should review pre-filings periodically (monthly) to verify compliance with conditions for pre-filing.
  - (b) Insurers should vigorously pursue approval (or acceptance for out-of-state filings) of pre-filed cases after forms have been submitted to mitigate harm if forms are found not to comply with applicable requirements.

**G. Out-of-State Filings**

- 1. Filing Requirement for Domestic Insurers: Pursuant to §3201(b)(2), domestic insurers must file all policy forms intended for delivery outside of the state.
- 2. Disapproval Standard: §3201(c)(6) permits disapproval of such out-of-state filing if the issuance would be prejudicial to the interests of the insurers, policyholders or members.
- 3. Procedures: (Circular Letter 63-6)
  - (a) File two copies of each policy form issued by a domestic insurer for delivery only outside of New York or with policies or contracts delivered outside New York.
  - (b) The transmittal letter shall include the following information:
    - (i) a comparison of benefits and premiums with similar forms approved or pending approval for use in New York.
    - (ii) a list of the states or jurisdiction in which the form is to be delivered.
    - (iii) a commitment to notify the Department in the event any such state disapproves any of the forms.

**X. Eligible Group Requirements**

**A. Types of Contractholders for Group Annuity Contracts**

1. **Employer Group.** Section 4238(a)(1).
  - (a) Contract issued to an employer.
  - (b) Contract permits all employees or all of any specified class or classes of employees to become annuitants.
  - (c) Payments to the insurer need not be remitted by the contractholder. L1991, c.349, Section 2.
  - (d) Note:
    - (i) Contracts issued to the trustees of a trust established by an employer are described in Section 4238(b)(4).
    - (ii) This approach differs from the eligible group provisions in Section 4216 for group life insurance and Section 4235 for group accident and health insurance.
  
2. **Employers' Association Group.** Section 4238(a)(2).
  - (a) Contract issued to an employers' association.
  - (b) Contract permits all of the employees of such employers or all of any specified class or classes to become annuitants.
  - (c) The employers' association may provide for representation by annuitants on its board of directors.
  
3. **Labor Union Group.** Section 4238(b)(3).
  - (a) Contract is issued to a labor union.
  - (b) Contract permits all of the members of such union or all of any specified class or classes to become annuitants.
  
4. **Bona Fide Trust Group.** §4238(b)(4).
  - (a) Contract issued to the trustees of a trust.
  - (b) Trust established by
    - (i) an employer;
    - (ii) an employers' association;
    - (iii) one or more labor unions;
    - (iv) one or more employers and one or more labor unions (Taft-Hartley Trust).
  - (c) Contract permits all of the employees of the employers or all of the members of the unions or of any specified class or classes thereof to become annuitants.
  - (d) Note - The trust must be established by an eligible entity. It cannot be merely participated in by such entities. Contrast this requirement with Section 4216(b)(4) and Section 4235(c)(1)(D) and §4238(b)(7).
  
5. **Association Group.** Section 4238(b)(5).
  - (a) Contract issued to an association or the trustees established by such association of persons having a common interest, calling or profession who constitute a homogeneous group.
  - (b) Association has a constitution and by-laws.

- (c) Association is organized and maintained in good faith for purposes other than obtaining annuities.
- (d) Contract permits all members of the association and their employees or any specified class or classes thereof to become annuitants.
- (e) Note:
  - (i) This group is used primarily for professional associations.
  - (ii) The “common interest, calling or profession” requirement appears to be more flexible than corresponding group life and group accident and health sections.

6. **IRC Section 408 IRA Groups:** Added by L.1997, c.544

- (a) Contract issued to a
  - (i) Bank;
  - (ii) Trust Company;
  - (iii) Trustees of one or more trusts.
- (b) Contract permits individuals for whom contributions are made to:
  - (i) Individual retirement accounts; or
  - (ii) Individual retirement annuities.
- (c) Individual Pay-all Program -- Contracts and certificates are subject to the provisions of the Insurance Law applicable to individual annuities.
- (d) Groups described in Section 4238(b)(6) do not qualify for the group exception to the mail order prohibition for unauthorized insurers in Section 1101(b)(2)(B)(i)(III).

7. **Other Trust Groups.** Section 4238(b)(7).

- (a) Contract issued to the trustees of one or more trust for employees of one or more employers.
  - (i) Not a trust described in Section 4238(b)(4) (i.e., not “established by” an employer, employers’ association, labor union or Taft-Hartley Trust)
  - (ii) Employers need not adopt (establish or participate in) the trust. See L.1991, c.349, Section 1.
- (b) Contract permits all of the employees of each such employer or of any specified class or classes to become annuitants.
- (c) If payments are derived wholly from funds contributed by such employees, the insurer must issue a certificate complying with the requirements of the Insurance Law applicable to individual annuities for delivery to each employee who contributes to the contract. (See Sections 3219, 4223, 4240 and Regulations 47 and 127).
- (d) This group appears to allow bank collective investment funds or pooled GIC funds. Gives small plan sponsors access to well-diversified, competitively priced GICs that are otherwise only available to larger plans.
- (e) Groups described in Section 4238(b)(7) do not qualify for group exception from mail order prohibition for unauthorized insurers in Section 1101(b)(2)(B)(i)(III).

8. **Foundation or Endowment Fund Groups.** Section 4228(b)(8). L.1993, c.541, §1.
  - (a) Contract issued to the trustees of a foundation or endowment fund
  - (b) Contract permits any specified class or classes of professional person to become annuitants.

## B. Types Of Funding Agreement Holders

1. **Another Insurer or Subsidiary Thereof** -- §3222(b) provides that a funding agreement may be issued to persons authorized by a state or foreign country to engage in an insurance business or subsidiaries of such person. This eligible funding agreement holder was authorized in 1983 by §2 of Chapter 919 of the Laws of 1983.
  - (a) Funding agreements may be issued to insurance companies (or their subsidiaries) without restriction as to purpose.
    - (i) An affiliate of an insurer (other than a subsidiary) must satisfy one of the purposes listed in §3222(b) to be eligible to purchase a funding agreement. See L.1984, c. 867, §2.
    - (ii) Prior to Chapter 876 of the Laws of 1984, funding agreements could be issued to individuals without restriction as to purpose.
  - (b) The 1983 amendment permitted insurers to sell structured settlements to a casualty insurer directly, typically in the context of a structured settlement. Prior to the 1983 amendment, a casualty insurer could only purchase annuities from a life insurer to fund structured settlements.
  - (c) Insurance companies may fund their obligations to make payments under groups of policies through reinsurance, which generally transfers to the reinsurer both the investment function and the risk function in the insurance. Insurers that want to retain risk or transfer it independently of the investment function can do so by purchasing a funding agreement. In addition, smaller companies can use funding agreements to obtain access to the investment opportunities and expertise of larger companies without having to enter into costly reinsurance contracts.
2. **Other Entities And Individuals/Permitted Purpose.** §3222(b) also provides that funding agreements may be issued to entities other than insurers and subsidiaries thereof and to individuals for the following purposes:
  - (a) **Employee Benefit Plans.** To fund benefits under any employee benefit plan as defined in the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq, maintained in the United States or in any foreign country.
    - (i) An *employee benefit plan* under ERISA means a *welfare plan* or a *pension plan* or a plan that is both a *welfare plan* and a *pension plan*. See §3(3) of ERISA.
    - (ii) A *welfare plan* means any plan, fund or program established or maintained by an employer or by an employee organization or by both for purpose of providing welfare benefits for its participants or their beneficiaries through the purchase of insurance or otherwise. *Welfare benefits* include medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death

or unemployment, or vacation benefits, prepaid legal services, etc. See §3(1) of ERISA. Funding agreements have been used to fund post-retirement health benefits.

- (iii) A *pension plan* means any plan, fund or program established or maintained by an employer or by an employee organization or by both to the extent it (a) provides retirement income to employees, or (b) results in the deferral of income by employees for a period extending to the termination of the covered employment and beyond. See §3(2) of ERISA.
  - (iv) Note that the employee benefit plan does not necessarily have to be covered by or subject to ERISA.
  - (v) The holder of the funding agreement is typically the plan sponsor (employer or employee organization) or plan trustee. However, funding agreements that fund this purpose can be issued to individuals.
- (b) **Tax Exempt Organizations.** To fund the activities of any organization exempt from taxation under IRC§501(c) or similar organization in any foreign country.
- (c) **Government Programs.** To fund any program of the government of the United States, the government of any state, foreign country or political subdivision thereof, or any agency or instrumentality thereof.
- (i) The 1983 amendment deleted the phrase “for benefit payments” between “program” and “of the government” to make it clear that the government program purpose was as broad as the tax-exempt activity purpose (i.e., the government program need not be limited to a benefit payment program). See L.1983, c. 919, §2 and L.1984, c.867, §2.
  - (ii) This section has been used for municipal bond programs as well as State lottery contracts.
  - (iii) The municipality may be the holder. However, a single purpose corporation may serve as the holder of the funding agreement.
- (d) **Structured Settlements.** To fund any agreement providing for periodic payments in satisfaction of a claim. See L.1983, c.919, §2.
- (e) **Large Institution Program.** To fund any program of an institution which has assets in excess of \$25 million. See L.1984, c.867, §2.
- (i) Types of programs of taxable institutions that might be funded by funding agreements include
    - Anticipated liabilities resulting from product liability or employee litigation and facility expansion projects. See memoranda in support of L.1984, c.864, §2,
    - *Debt or securities issuance programs.* An institution with assets in excess of \$25 million may purchase a funding agreement to support the obligations under a securities issuance program. The proceeds of the sale of securities may be used to purchase a funding agreement that will be pledged for the benefit of the holders of the related securities;

- A special purpose vehicle or corporation may serve as the holder of the funding agreement, as long as the purpose requirement is satisfied.
- (ii) This holder was added to §3222 to provide some parity for taxable institutions with tax exempt organization and governments.

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

1. See §4216(b) of the Insurance Law for group life insurance.
  - (a) See Group Term Life Insurance and Group Universal Life Insurance Outlines on Department's website.
2. See §4235(c)(1) of the Insurance Law for accident and health insurance.

**D. Special Rules For Specific Plan Purchasers**

1. N.Y. Education Law, Art. 8-C, §398 *et seq.*—contains special statutory rules relating to tax-sheltered annuity (TSA) programs (referred to in the statute as "Special Annuity Programs").
2. N.Y. State Finance Law §5—basic statutory rules establishing the N.Y. Deferred Compensation Board for the administration of governmental deferred compensation plans (§457 plans) in New York State.
3. 9 NYCRR 9000—rules and regulations of the N.Y. State Deferred Compensation Board, which, among other things, impose substantive requirements on the content of annuity contracts (and other contracts) issued to §457 plans in New York State.
4. N.Y. Circular Letter. No. 88-17 (1988)—additional administrative guidance on annuity contracts issued to N.Y. governmental §457 Plans.

**E. Non-Recognized Groups -- Out-of-State Cases**

1. Note that Section 4238 was not modernized to permit the newly recognized groups for group life insurance in Section 4216(b), (12), (13) and (14) and for group accident and health insurance in Section 4235(c), (K), (L) or (M) for:
  - (a) Affinity Association Groups
  - (b) Financial Institution Groups
  - (c) Discretionary Groups
2. As such, group contracts that are not recognized or described in §4238(b) of the Insurance Law must be delivered outside of New York.
  - (a) Insurers must deliver group annuity contracts issued to financial institution groups and discretionary groups outside of New York.
3. Group annuity contracts delivered outside of New York need not comply with New York's eligible group requirements in §4238(b).
4. However, group annuity certificates delivered in this state that are funded solely by individual contributions must comply with the provisions of the Insurance Law applicable to individual annuities.
  - (a) Such certificates should be submitted for review and approval.
  - (b) The group annuity contract should be submitted as well. It will be reviewed to ensure that the contract and certificate are not inconsistent. The contract cannot include provisions that invalidate or impair the terms of the certificate.

## F. **Unauthorized Insurers**

1. Section 1101(b)(1) prohibits unlicensed insurers from doing an insurance business in this state by mail or otherwise.
2. Section 1101(b)(2)(B) provides an exception (referred to as the “group exception”) to the prohibition in Section 1101(b)(1) for certain types of group insurance issued outside of New York.
  - (a) The group exception applies to group annuity contracts where the group conforms to the definitions of eligibility in §4238(b) of the Insurance Law, except paragraphs (6) and (7), and the master contracts were lawfully issued without this state in a jurisdiction where the insurer was authorized to do an insurance business.
3. Section 1101(b)(2)(B) excepts from the group exception to the mail order prohibition any transaction with respect to a group annuity contract used in the individual insurance market noted above, including
  - (a) IRC §408 contracts (IRAs);
  - (b) IRC§403(b) (Tax Sheltered Annuities), and
  - (c) Plans under which payments are derived wholly from funds contributed by the persons covered thereunder. See L.1978, c.428.
4. As such, any New York certificate funded solely by employee or individual contributions is subject to prior approval.

## XI. **Contract Provisions**

### A. **Cover Page of the Contract and Certificate**

1. **Company’s Name and Address**
  - (a) The New York licensed insurer’s name should appear on the cover page (front or back).
  - (b) The contract cannot be labeled or advertised in a manner that would have a tendency to mislead or deceive as to the true identity of the insurer, or create the impression that someone other than the insurer would have any responsibility for the financial obligations under the contract. See §219.4(a), (l) and (p) of Regulation No. 34-A. See also §1313(d).
    - (i) The name of the issuing insurer should be clearly disclosed, with equal prominence to any other entity mentioned.
    - (ii) The contract should be clearly identified as an annuity contract issued by the insurer.
    - (iii) See Article III Section 35 of the NASD Rules of Fair Practice which requires that the name of the NASD 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 Rule 134, Rule 135a and Rule 482 of the Securities Act of 1933 and NASD Conduct Rule 2210.

2. **Form Identification Number** -- The form number should be stated in the lower left-hand corner of the face page pursuant to Section I. D. of Circular Letter 63-6.
3. **Brief Description of Contract – Participation Status and Variability**
  - (a) A description of the contract, such as “Market Value Separate Account Agreement Funding Guaranteed Benefits”.
  - (b) There must be a statement indicating whether the contract is participating or nonparticipating. This requirement generally applies to the portion of the contract funded through the insurer’s general account.
    - (i) §4240(d)(1) generally excepts separate account annuity contracts from the requirement in §4231(e) of the Insurance Law for mutual insurers to provide coverage on a participating basis.
    - (ii) Pursuant to §4231(e)(1), any policies or contracts described in §4231(g)(2) and deferred annuity providing a period of deferment of annuity payments not in excess of one year can be issued on a nonparticipating basis.
    - (iii) Section 4231(g)(2) provides, in part, that dividends need not be distributed on any deferred annuity contract for the period following the period of deferment of annuity payments nor on any group annuity contract providing deferred annuities for a class or classes of participants in a qualified pension or profit sharing plan who have terminated their participation under such plan, or with respect to which class or classes further contributions have been discontinued under the plan and notice of such discontinuance has been given to the commissioner of internal revenue (or regulatory authority of such other jurisdiction).
  - (c) There must be a statement identifying the elements (such as benefits, premiums etc.) of the contract which are on a variable basis. Section 4240(a)(11)(C).
  - (d) There must be a statement that the contract value of the variable sub-accounts (and any other variable contract elements) is based on the value of the separate account assets which are not guaranteed as to fixed dollar amounts and will increase or decrease in value based upon investment results. Section 4240(a)(11).
4. **Smallest Rate Of Return Or Conditions For Payments To Decrease For Variable Annuity Contracts And Certificates** -- (As an alternative may be included on the first page of the contract specification pages). Every variable annuity certificate that provides for variable annuity payout options must include a statement which states either (a) or (b) plus (c) below:
  - (a) 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 (§50.6(b) of Regulation No. 47).
    - (i) The smallest annual rate of return cannot exceed 6.5%. Section 50.6(a)(1) of Regulation 47 provides that the method of computing the dollar amount of variable annuity payments shall be such that, if the

annual rate of investment return of the separate account were six and one-half percent at all times from the issue of the certificate, such amounts would not decrease.

- (ii) Acceptable sample language would be “ With the combined annual Sub-Account charges of “1%,” the smallest rate of investment return required to ensure that the dollar amount of variable annuity payments does not decrease is “5%”for variable annuity options based on an assumed interest rate (AIR) of “4%”. (Note: the AIR is the rate used to calculate the first annuity payment by dividing the accumulation value by an annuity factor.)
  - (iii) If the assumed interest rate underlying the annuity payments is 5% or more, the method of computing the variable annuity payments may fail to comply with §50.6(a)(1). An AIR of 5% or more would leave a potentially inadequate margin of 1.5% (i.e., 6.5% less 5%) or less for mortality, expenses and risk charges.
- (b) Sets forth the conditions under which the dollar amount of variable annuity payments will not decrease, [See First Amendment to Regulation No. 47].
- (i) Note the First Amendment to Regulation No. 47 amends §50.6(a) and (b) to permit insurers to use other methods or rates in computing the dollar amount of variable annuity payments where such methods or rates are determined by the Superintendent to be fair, equitable, reasonable and not less favorable to participants or annuitants.
- (c) A statement of any explicit charges against the assets of the separate account (Section 50.6(b) of Regulation No. 47).
- \* Note that this provision would not be required for an unallocated separate account agreement that not provide for variable annuity payments upon annuitization. It would only apply at the retired life certificate level.

## 5. **Officer’s Signatures**

- (a) The signature of at least one officer of the company is needed to execute the separate account group annuity contract or funding agreement as a matter of contract law.
- (b) Signatures are usually underlined or placed in brackets to denote variable material.
- (c) When the signature is changed, the insurer should notify the Department for informational purposes. The contracts do not need to be re-filed.

## 6. **Specification Page**

- (a) Complete with hypothetical data pursuant to Section I. E. I. of Circular Letter No. 6 (1963).
- (b) The current interest rate being credited bracketed to denote variable material and the guaranteed minimum interest rate should be set forth.
- (c) The available funds in the Separate Account may be set forth on the specification page. If so the funds should be bracketed. If a fixed account is available do not bracket. Bracketing indicates that the material is variable and subject to change.

- (d) The smallest rate of return information, in accordance with Section IV.A.4. above, if this information is not presented on the cover page.

## B. Standard Provisions

### 1. General Notes.

- (a) *Separate Account Exceptions.* Section 4240(d) of the Insurance Law provides that all pertinent provisions of the Insurance Law apply to separate accounts and agreements relating thereto, except as otherwise provided in §4240.
- (i) Section 4240(d)(1) of the Insurance Law states that the following provisions of the Insurance Law shall not apply to annuity contracts or to certificates subject to §§3219(a) and 4240 of the Insurance Law (i.e., contracts and certificates sold in the individual insurance market, including IRAs, TSAs and other employee pay-all programs):
- Section 3219(a)(1) [grace period] ,
  - Section 3219(a)(7) [discontinuance options],
  - Section 3219(a)(8) [reinstatement]
  - Section 3219(a)(9) [free look];
  - Section 3223(a) [grace period];
  - Section 3223(d) [active life certificate];
  - Section 4217 [valuation of life insurance policies and annuity contracts];
  - Section 4221 [standard nonforfeiture law for life insurance];
  - Section 4223 [standard nonforfeiture law for annuities];
  - Section 4231(e) [mutual life insurer's authority to write nonparticipating business].
- (ii) Pursuant to Section 4240(d)(1), the exceptions provided in §4240(d)(1) do not apply to any contract or certificate providing benefits with respect to the amounts allocated to a separate account, if such benefits are guaranteed at any time to be not less than an amount equal to or greater than such allocated amounts accumulated to such time at three percent per annum.
- (iii) Section 4240(d)(2) of the Insurance Law states that contracts for individual variable annuities and such certificates delivered or issued for delivery in this state shall contain grace, reinstatement, and nonforfeiture provisions appropriate to such variable contracts and certificates.
- (b) *More Favorable Provisions.* Pursuant to §3223 of the Insurance Law and also §50.7(b) of Regulation No. 47, every group separate account annuity contract delivered or issued for delivery in this state (and every certificate used in connection therewith) shall contain in substance the standard provisions to the extent that such provisions are applicable or provisions which are appropriate and more favorable to the annuitants, or not less favorable to annuitants and more favorable to the holders of such contracts.

- (i) Pursuant to §3103(b) of the Insurance Law, in any action to recover under any provisions of any insurance policy or annuity contract which the Superintendent is authorized to approve if it contains provisions that are more favorable to policyholders, the court shall enforce such policy or contract as if its provisions were the same as those specified in the Insurance Law, unless the court finds that its actual provisions were more favorable to policyholders at the date when the policy or contract was issued.
- 2. **Grace Period.** There shall be a 31-day grace period following the due date of any required payment after the first payment within which the payment may be made. During such grace period, the contract shall continue in full force. See §3223(a), §4240(d)(2) and §50.7(b)(1) of Regulation No. 47.
  - (a) This provision applies to GICs with a deposit window, many of which are funded through book value separate accounts.
  - (b) It also applies if a payment is required to pay any fee or expense charges.
  - (c) If the contract continues in force without penalty, no grace period provision is necessary.
  - (d) §50.7(b)(1) provides that the contract shall include a statement of the basis for determining the date as of which any such payment received during the grace period shall be applied to produce the values arising therefrom under the contract.
- 3. **Entire Contract.** A provision specifying the document or documents, which shall include the contract and, if a copy is attached thereto, the application of the contractholder, constituting the entire contract between the parties. See §3223(b) and §3204.
  - (a) Many GICs funded through book value separate accounts have deposit agreements or deposit riders. These forms must be attached to the contract. If the initial deposit account terms are bracketed and there is a satisfactory explanation of variables, the deposit agreement and/or rider need not be resubmitted for new deposit windows or deposit cells.
- 4. **Misstatement of Age or Sex.** A provision for the equitable adjustment of the benefits payable or of the payments to be made to the insurer if the age or sex of any person, or of any other fact affecting the amount or date of payment by or to the insurer has been misstated. See §3223(c).
  - (a) The *Arizona vs. Norris* decision held that Title VII of the Civil Rights Act of 1964 prohibits an employer from offering its employees a retirement benefit option where a women is paid a lower monthly retirement benefit than a man who has made the same contributions.
  - (b) We have permitted misstatement provisions that omit the reference to sex.
  - (c) §3219(a)(5) requires that the interest rate to be charged or credited to underpayments and overpayments be specified in the contract and cannot exceed six percent. . (Best Practice)--The §3223(c) provision should also state whether and how much interest will be charged against or credited to

such underpayments and overpayments. The rate must be the same for overpayments and underpayments. We may question any rate above six percent.

5. **Active Life Certificate**

- (a) The Department has not required an active life certificate when a general account contract is unallocated, even if it is contributory. Chapter 172 of the Laws of 1982 amended §160(d) [now §3223(d)] of the Insurance Law to eliminate the requirement for an active life certificate for contributory plans if the contract does not provide for the maintenance of one or more accounts for each annuitant.
- (b) However, Section 50.7(b)(2) of Regulation No. 47 has not been amended to reflect the change. Said section still requires a provision, with an appropriate reference thereto in the certificate, specifying the options available to an annuitant who contributes to the cost of his annuity, or to his beneficiary or beneficiaries in the event of
  - (i) the termination of his employment or the termination of the group separate account annuity contract, while the annuitant is alive and prior to the commencement date of the annuity, or
  - (ii) death prior to the commencement date of the annuity. Such options shall, in any case, include either
    - an option to receive a cash payment at least equal to the aggregate amount of the annuitant's contributions made under the contract, without interest, or
    - an option to receive a cash payment equal to the accumulated value of the annuitant's contributions made under the contract.
- (c) We have permitted the plan's summary plan description to satisfy the active life certificate requirement. This avoids unnecessary duplication.
- (d) Until §50.7(b)(2) is amended, it appears that insurers should indicate that a summary plan description will be provided to plan participants and that the participant will receive benefits at least equal to those specified in §50.7(b)(2) of Regulation No. 47. Please note that we intend to amend this provision in Regulation No. 47 to be consistent with §3223(d), notwithstanding the language in §4240(d)(1) making §3223(d) inapplicable to separate account annuity contracts.

6. **Retired Life Certificate.** A provision stating that the insurer shall issue for delivery to each person to whom annuity benefits are being paid thereunder a certificate setting forth a statement in substance of the benefits to which such person is entitled under the contract. See §3223(e).

7. **Governing Law**

- (a) Pursuant to §3103(b), no annuity contract delivered or issued for delivery in this state shall provide that the rights or obligations of the insured or of any person rightfully claiming thereunder, with respect to an annuity contract

upon a person resident in this state, shall be governed by the laws of any jurisdiction other than this state.

- (b) For group annuity contracts delivered out-of-state, the governing law provision must make it clear that New York law governs certificates delivered in this state, where the certificates are funded solely by contributions by the persons covered thereunder.

C. **Section 4240 and Regulation No. 47 Provisions**

These provisions are common to all separate account agreements.

1. **Isolation/Segregation Provision** – 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.
  - (a) This provision is essential because it discloses to the contractholder and certificate holder that the separate account assets and investment experience is separate/segregated from the insurer’s general account and other separate accounts to the extent provided in the contract.
2. **Asset Identification** -- Pursuant to Section 4240(a)(2)(A), the should identify the investments that are contractually permitted for such separate account.
  - (a) Except for seed money provided for in §4240(a)(3) and guaranteed separate accounts provided for in §4240(a)(5) [i.e., for book value separate account agreements and market value separate account contracts funding guaranteed benefits], the restrictions, limitations, and other provisions relating to investments do not apply to such investments.
  - (b) Such investments shall be disregarded and excluded from admitted assets in applying the quantitative investment limitations contained in the Insurance Law to other investments.
3. **Guarantees of Value** -- Unless the separate account and separate account agreement satisfies items (i), (ii), or (iii) of §4240(a)(5) of the Insurance Law, the contract cannot provide any guarantee of the value of the assets allocated to a separate account, or any interest therein, or investment results thereof, or income thereon, without limitation of liability under all such guarantees to the extent of the interest of the contractholder in assets allocated to the separate account.
  - (a) Reserve liabilities for guaranteed minimum death benefits must be maintained in the insurer’s general account.
  - (b) There may be no guarantee of the value of the assets allocated to a separate account, except as permitted under Section 4240(a)(5).
4. **Valuation** -- Pursuant to §4240(a)(7) of the Insurance Law, the contract should specify the dates on which the assets of the separate account will be valued and

if there is no readily available market for assets in the separate account the agreements should specify how such assets will be valued.

- (a) Separate account assets should be valued at least as often as contract benefits vary, typically at least monthly.
- (b) For separate account agreements funding defined contribution plans, we have reservations concerning assets that are not valued frequently or are difficult to value.

5. **Asset Maintenance** – Pursuant to §4240(a)(8) of the Insurance Law, the contract should 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. See also §50.3(a)(1) of Regulation No. 47.
6. **Disclosures** – Any contract providing for benefits, contributions or both, payable on a variable basis, shall contain
  - (a) A statement of the essential features of the procedures used to determine the dollar amount of the variable elements thereunder. Section 4240(a)(11)(A).
    - (i) The Department will review the method for determining the account value to confirm that the method is reasonable and equitable.
  - (b) A statement in clear terms that the dollar amounts of such variable payments may decrease or increase according to such procedure. Section 4240(a)(11)(B).
  - (c) A statement on its first page that such elements thereunder are on a variable basis.
7. **Asset Ownership** – 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.
  - (a) Most separate account agreements include this language.
  - (b) Contractholders should be advised that insurer are not fiduciaries with respect to separate account assets, at least in the traditional sense. Historically, the relationship between the insurer and insured has been viewed as that of a debtor-creditor, rather than trustee-beneficiary.
  - (c) The insurer shall not, in connection with the allocation of investments or expenses, or in any other respect, discriminate unfairly between separate accounts or between separate and other accounts. This provision does not require an insurer to follow uniform investment policies for its accounts. Section 4240(a)(6). See also §50.3(a)(7) of Regulation No. 47.
8. **Insulation Provision** – Section 4240(a)(12) of the Insurance Law provides that the assets in a separate account shall not be chargeable with liabilities arising out of any other business of the insurer if and to the extent so provided in the

applicable agreements. See Chapter 601 of the Laws of 1968. See also §4240(a)(5)(ii) and (iii).

- (a) The contract should provide that the portion of the assets in a 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. See §50.3(a)(2) of Regulation No. 47.
  - (i) Traditional equity type separate account agreements can include an insulation provision.
  - (ii) Guaranteed separate account agreements authorized under §4240(a)(5)(ii) and (iii) can include an insulation provision.
- (b) Failure to include this language may result in a non-insulated separate account.
  - (i) Section 4240(a)(12) clearly states that separate account assets will be insulated “If and to the extent so provided in the applicable agreements.”
  - (ii) Section 50.3(a)(2) of Regulation No. 47 clearly indicates that this provision is permissive.
- (c) The Department’s memorandum in support of Chapter 601 of the Laws of 1968 stated that the insulation language was added because “This insulation of separate account assets may be needed to allow insurers to comply with Securities Exchange Commission requirements and recently enacted laws of several states.”
  - (i) The insulation provision is essential to comply with SEC requirements that treat a separate account for variable life insurance or variable annuities as though it were a separate mutual fund subject to the Investment Companies Act of 1940.
  - (ii) See 17 C.F.R. §270.0-1(e) which requires that the portion of assets having a value equal to the reserves and contract liabilities shall not be charged with liabilities arising out of any other business which the insurer may conduct. See also 17 C.F.R. §270.6e-2
- (d) The Office of General Counsel has concluded that the assets in a separate account established pursuant to §4240 would retain their separate status in the event of insolvency to the extent of the insulation provision.
  - (i) 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.
  - (ii) Section 7435(b) provides that every claim under a separate account agreement providing, in effect, that the assets in the separate account shall not be chargeable with liabilities arising out of any other business of the insurer shall be satisfied out of the assets in the separate account equal to the reserves maintained in such account for such agreement and, to the extent, if not fully discharged thereby, shall be treated as a class four claim against the estate of the life insurance company.

- (iii) A class four claim includes all claims under insurance policies, annuity contracts and funding agreements, among others.
- (iv) When the distribution law for life insurers was being revised in 1985 (i.e., §7435) to provide, among other things, for priorities on liquidation, both the Department and Industry believed that it was important to include provisions that
  - would show how the operation of the insulation provision fitted into the new distribution law, and
  - would make it indisputably clear that variable policy and contract holders had first claim on the assets of an insulated separate account, thereby assuring the continued compliance of separate accounts with SEC requirements.
- (e) Insulation is also an ERISA fiduciary concern. Some insurers established book value separate accounts for their GIC business in the late 1970s and early 1980s because of the ability to segregate and insulate assets.
- (f) Section 97.5(j) of Regulation No. 128 provides that for any account contract that provides for insulation, the insurance company must maintain in a supplemental account the amount of any separate account assets in excess of the amounts contributed by the contractholder and the earnings thereon. Amounts allocated to one or more supplemental accounts to meet the minimum asset requirement cannot be insulated. See §97.3(ag) of Regulation No. 128.

## 9. **Voting Rights**

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

## 10. **Incidental Death Benefit –**

- (a) Section 50.3(a)(8) of Regulation No. 47 permits a separate account annuity contract to provide, as an incidental benefit, for the payment of a death benefit in the event of death prior to the annuity commencement date. The amount of such death benefit shall not exceed the greater of:
  - (i) The accumulated value of the contract, or

- (ii) The aggregate amount of stipulated payments or employee contributions, whichever is applicable, made under the contract or certificate prior to the time of death.
- (b) The Department has approved a “ratchet” or “step-up” death benefit in which the highest accumulation amount on any given anniversary would be the new minimum death benefit if it were greater than item (i) or (ii) above.
  - (i) The Department recognized that the holder could surrender his or her account, withdraw the accumulation value, and redeposit the amounts received with the same or different insurer. The redeposited amount would then be considered contribution for purposes of the minimum incidental death benefit.
  - (ii) This ratchet feature is controversial in cases where the contract has a surrender charge or the new contract imposes a new set of withdrawal charges.
- (c) The Department has not recognized a roll-up death benefit that accumulates contributions a minimum rate of interest as an incidental death benefit. Section 50.3(a)(8) of Regulation No. 47 provides that a death benefit that is not an incidental death benefit during the deferred period is subject to the provisions of the Insurance Law applicable to life insurance contracts.
- (d) Section 50.3(a)(8) requires that a reserve liability for any incidental benefit in excess of the accumulated value of the contract be accumulated and maintained in the general account of the company pursuant to a plan for such accumulation which specifies a reasonable maximum target for such reserve and is approved by the Superintendent as otherwise reasonable.
- (e) The contract and certificate should specify the date on which the death benefit will be determined.
- (f) The contract and certificate should explain the effect of withdrawals on the death benefit. For contracts and certificates that include a ratchet death benefit (highest account value on any anniversary), there should be a proportional adjustment in both the sum of all contributions and such highest accumulation value.
  - (i) There must be a disclosure statement in the partial withdrawal provision and the death benefit provision of the contract regarding adjustment to the death benefit following partial withdrawals.
  - (ii) The insurer should justify any adjustment other than a prorata reduction. The Department believes a dollar for dollar reduction is imprudent since the contract could degenerate into term life insurance with no or minimal cost if there has been a substantial drop in the value of the variable sub-accounts.
- (g) The Department recommends that the contract provide a numerical example to make it clear how this provision works. An example of a proportional adjustment follows:
 

|   |       |
|---|-------|
| (i) Death Benefit:                            | \$100 |
| (ii) Account Value Before Partial Withdrawal: | \$50  |
| (iii) Partial Withdrawal (96% of AV):         | \$48  |
| (iv) New Account Value:                       | \$2   |

(v) New Death Benefit (DB reduced by 96%): \$4

11. **Involuntary Cashout - Small Annuities** -- The contract and certificate may provide that, at the time the annuity becomes payable, the insurer may, at its option, in lieu of commencing annuity payments, cancel the annuity and pay the accumulated value to the contractholder or certificate holder if the accumulated value is less than \$2,000, or would provide an income of less than \$20 per month or if the amount of the annuity does not meet other minimum requirements as approved in writing by the Superintendent. Section 50.3(a)(9) of Regulation 47.
- (a) ERISA Section 203(e)(1) and IRC Section 411(a)(11) provide for a \$5,000 threshold, but involuntary cashout by the contractholder/plan sponsor is permissive, (i.e. not mandated). Federal law does not preempt state law in this case.
  - (b) If the contract and certificate permit the insurer to refuse to commence the annuity payments due to minimum size requirements (e.g., at least \$20 per month), the contract must permit surrender with no withdrawal charges if such refusal takes place. (Department Interpretation).
12. **Mortality and Expense Guarantees** – Contracts and certificates must contain a statement that neither expenses actually incurred, other than taxes on the investment return, nor mortality actually experienced, shall adversely affect the dollar amount of variable annuity payments after such payments have commenced. Section 50.6(a)(1) of Regulation 47.
- (a) Where a group variable annuity contract provides that the scale of charges to be made against the assets of a separate account may be changed without the consent of the participants for whom variable annuity payments have commenced, the contract and certificate shall provide that changes may not adversely affect the dollar amount of variable annuity payments that have commenced. Section 50.6(a)(1) of Regulation No. 47.
  - (b) Note that expenses must be allocated to the separate account business in accordance of §4240(a)(6) of the Insurance Law and Regulation No. 33 (11 NYCRR 91).
13. **Variable Annuity Computation Method** -- Section 50.6(c) of Regulation 47 provides that every variable annuity contract and certificate must contain a concise and clear statement of the method used in computing the dollar amount of the variable benefit.
- (a) Again, note that Section 50.6(a)(1) of Regulation 47 provides that
    - (i) The method of computing the dollar amount of variable annuity payments shall be such that, if the annual rate of investment return of the separate account were six and one-half percent at all times from the issue of the certificate, such amounts would not decrease;
    - (ii) The Superintendent may authorize the use of other methods or rates in computing the dollar amount of variable annuity payments where such methods or rate are determined to be fair, equitable, reasonable and not less favorable to participants or annuitants.

- (b) There is no other limitation in Regulation No. 47 concerning the methodology or procedures used to determine the annuitant's annuity payments. The method will be reviewed to ensure that it reasonable and equitable.
- (c) The mortality table and assumed interest rate must be stated in the contract and certificate. The purchase rates will be checked for reasonableness.

#### 14. **Deferral of Payment**

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

#### 15. **Annual Reports**

- (a) Reference to an annual report is not a required provision in a variable annuity contract that does not have a fixed account. However, an annual report is required to be provided by the insurer to every separate account annuity contractholder, including every certificate holder who has accumulation units credited to his or her account, pursuant to Section 50.9 of Regulation No. 47. The majority of variable annuity contracts and certificates reference such annual report and describe the contents of the report, including
  - (i) A statement or statements reporting the investments held in the separate account;
  - (ii) In the case of contracts and certificates under which benefit payments have not yet commenced, a statement reporting as of the date not more than four months prior to the date of mailing, the number of accumulation units credited to such contract or certificate, and the dollar value of each such unit or the total value of the contractholder's or certificate holder's account.
- (b) If the variable annuity contract has a fixed account then reference to an annual report in the contract is required by Section 4223(k).

#### 16. **Illustrations**

- (a) Section 50.8 of Regulation No. 47 provides that illustrations of benefits payable under any separate account annuity contract, which are incorporated

in or attached to any such contract or are utilized in advertising or sales material relating to any such contract, shall not include projections of past investment experience into the future or attempted predictions of future experience;

- (b) Section 50.8 permits the use of hypothetical rates of investment return, clearly designated as such, to illustrate possible levels of variable annuity payments, provided that:
  - (i) The use of such hypothetical rates is not in conflict with applicable requirements of the Securities and Exchange Commission;
  - (ii) If any hypothetical rate of investment return is used for illustration purposes, a corresponding additional illustration must be included using a hypothetical rate of investment return at least at the same interval below the pivotal rate of investment return. The “pivotal rate of investment return” is the smallest annual rate of investment return that must be earned by the separate account if the dollar amount of variable annuity payments is not to decrease.
  - (iii) Except as approved by the Superintendent, no hypothetical rate of investment return in excess of eight percent may be used in such illustration.

**17. Nonforfeiture Requirements Applicable to Separate Account Annuity Contracts**

- (a) As noted above, Section 50.7(b)(2) of Regulation No. 47 requires a provision, with an appropriate reference thereto in the certificate, specifying the options available to an annuitant who contributes to the cost of his annuity, or to his beneficiary or beneficiaries in the event of:
  - (i) the termination of his employment or the termination of the group separate account annuity contract, while the annuitant is alive and prior to the commencement date of the annuity, or
  - (ii) death prior to the commencement date of the annuity. Such options shall, in any case, include either
    - an option to receive a cash payment at least equal to the aggregate amount of the annuitant's contributions made under the contract, without interest, or
    - an option to receive a cash payment equal to the accumulated value of the annuitant's contributions made under the contract.
- (b) Contracts and certificates must provide for a cash surrender value equal to the accumulated value less withdrawal charges. These charges should be reasonable and based solely on unamortized acquisition expenses. Section 50.7(a)(3) of Regulation 47. See IV. D. 9 above.
- (c) Surrender charges that are a decreasing percent of premium are assumed to meet the requirements of Section 50.7(a)(3) of Regulation 47 unless the initial percentage appears unreasonably high. A numerical demonstration of compliance with such section should be provided if the withdrawal charges are a percentage of the accumulated value.

- (d) Guaranteed minimum income and accumulation benefits. A self-support opinion and demonstration from a qualified actuary must be filed for any contract providing these benefits. The assumptions regarding the election rate of such benefits and the results of sensitivity testing must be provided.
  - (i) A Cash flow testing scenario analysis based on stochastic scenarios or a large number of deterministic scenarios of equity and fixed income returns must be provided.
  - (ii) The formula reserve method must be fully described and should produce reserves at least as great as would be required by Regulation 128. We will consider use of any adopted NAIC guidelines covering these products.
- (e) Fund based charges in excess of 2% per year may be considered unreasonably high. (Department Interpretation)

#### **D. Regulation No. 139 Plan Benefit Rule Provisions Applicable To Guaranteed Separate Accounts**

##### **1. General Note**

- (a) Paragraphs (2) and (6) of §40.1(a) of Regulation No. 139 expressly provide that Regulation No. 139 does not apply to:
  - (i) The provisions of a group annuity contract or funding agreement relating to a separate account which limits the liability under any guarantees to the extent of the interest of the contractholder in assets allocated to such separate account. (Traditional Equity Type Separate Account Agreements)
  - (ii) The provisions of a group annuity contract or funding agreement subject to any regulation promulgated pursuant to §4240(a)(5)(iii) of the Insurance Law. (Regulation No. 128 Guaranteed Separate Account Agreements).
- (b) Book value separate account agreements are not exempted from the provisions of Regulation No. 139.
  - (i) See the *Guaranteed Interest Contract* product outline on the Department' website for book value separate account guaranteed interest contracts.
- (c) In the absence of any product requirements in Regulation No. 128 for market value separate accounts funding guaranteed benefits, we have generally looked to Regulation No. 139 for guidance.

##### **2. Plan Benefit Rule**

- (a) Section 40.4(a) of Regulation 139 provides that any contract issued in connection with a defined contribution plan which provides the contractholder with the right to withdraw from the contract the amounts required to pay lump sum benefits of the participant's individual account balance as they arise in accordance with the provisions of the plan upon bona fide termination of employment must provide for such withdrawals to be made on a basis pursuant to which neither the amount withdrawn from the contract nor the

amount of the remaining principal balance of the accumulation fund following such withdrawal is adjusted to reflect changes in interest rates or asset values since the receipt of funds.

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

### 3. **Betterment of Rates**

- (a) Section 40.4(b) of Regulation No. 139 requires contracts funding defined contribution plans to provide that any annuity benefit purchased with respect to an amount equal to the plan participant’s account value as determined at the time of its commencement shall not be less than that which would be determined by the application of such amount to purchase a single consideration immediate annuity offered by the company to the same class of contracts.
- (b) The betterment of rates provision ensures that annuities will be purchased on a new money basis.

### 4. **Allocated Share of Benefit Payments**

- (a) Section 40.4(c) of Regulation No. 139 provides that in the event that there is more than one funding vehicle or cash is available under a defined contribution plan, a contract need not provide for withdrawals (in accordance with the plan benefit rule) in an amount in excess of the contract’s allocated share of benefit payments as determined pursuant to the agreement of the insurance company and contractholder.
- (b) This provision operates much like a coordination of benefits provision. If the contract is silent as to its allocable share, benefits will be paid as if it is the only funding vehicle.
- (c) We have approved last-in, first-out provisions; first-in, first-out provisions; pro-rata provisions; buffer fund provisions and combination provisions.

### 5. **Participant Directed Investment Option**

- (a) Section 40.4(d) provides that in the case of a contract which funds a participant directed investment option under which each contribution

allocated to such option is credited with a specified rate of interest to a stated maturity date which rate and maturity date are disclosed to the participant prior to the allocation, such contract may provide that any withdrawals (other than withdrawals on account of bona fide termination of employment due to death or disability of the participant on whose behalf the withdrawal is made) be postponed until the stated maturity date for the contribution.

- (b) In such cases, the contract may permit withdrawals prior to maturity for the contribution that are subject to a negative market value adjustment and/or surrender charge. We have not required positive market-value adjustments.
- (c) Such contracts must have at least one option for participants age 55 and over on the date contributions are received where the maturity date will not exceed five years. The “age 55” rule in §40.4(b) is similar to §44.3(t) in Regulation No. 127.

**6. Plan Amendments or Changes In Plan Administration**

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

**7. Bona Fide Termination of Employment**

- (a) Section 40.4(f) of Regulation No. 139 provides that the contract can include procedures or conditions in order to establish that a requested contractual withdrawal is being made in accordance with a bona fide termination of employment and in accordance with the plan provisions.
- (b) Termination of employment means the cessation of an employment relationship with an employer, multiple employer or membership in an employee organization sponsoring the plan, including cessations due to retirement, death, and disability.
- (c) Termination of employment does not include:
  - (i) Any temporary absence,
  - (ii) A change in position or other occurrence qualifying as a temporary break in service under the plan,
  - (iii) Transfer or other change of position resulting in employment by an entity controlling, controlled by, or under common control with the employer,
  - (iv) Cessation of an employment relationship resulting from a reorganization, merger, or sale or discontinuance of all or any part of the plan sponsor’s business. [The risk for these transactions are typically not considered by the insurer in making the guarantees provided in the contract. Such transaction may result in unexpected

withdrawal activity that was not priced for when the contract was issued.]

- (v) Plan termination or partial plan termination.

8. **Non-Benefit Related Withdrawals and Transfers**

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

9. **Clone Contract Provision**

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

10. **Competing Funds Provision**

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

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

1. **General Notes**

- (a) Book value separate account agreements are not exempted from the provisions of Regulation No. 139. As such, the contract termination rules in §40.5 of Regulation No. 139 apply.
- (b) In addition, we have looked to Regulation No. 139 for guidance in reviewing termination provisions in market value separate accounts funding guaranteed benefits.
  - (i) We would object to Regulation No. 128 products that guarantee principal and periodically adjusted interest rates that do not allow contractholders to discontinue/terminate the contract and receive a lump sum payment at market value and/or a book value installment option.
  - (ii) Regulation No. 128 market value separate account products that guarantee a minimum return or a return based on an external index

must include provisions that are fair and equitable to terminating contractholders and persisting contractholders.

- (c) Pursuant to §40.5(a) of Regulation No. 139, the contract termination rules do not apply to guaranteed interest contracts. The term *guaranteed interest contract* is defined in §40.2(j) to mean a contract which guarantees principal and either:
  - (i) provides a specified rate of interest on amounts deposited with an unqualified right to withdraw the accumulation fund upon the expiration of the time period for which the amount deposited and the specified rate of interest are guaranteed under the contract, either in a lump sum or in installments over a period less than five years with the amount and timing of each such installment specified in the contract (i.e., fixed rate, fixed maturity GICs); or
  - (ii) provides an indeterminate rate of interest for an indefinite period with an unqualified right to withdraw the accumulation fund at least once a year in either a lump sum, subject to a surrender charge no greater than seven percent, or in substantially equal periodic, at least annual, installments over a period less than five years which does not reflect investment experience of the underlying assets.
- (d) The contract termination rules only apply to *unallocated amounts*. As such, guaranteed separate account products (i.e., book value separate account and Regulation 128 separate account products) that fund annuity payments of retired and terminated vested employees under an immediate participation guarantee arrangement do not have to include termination provisions that comply with §40.5 of Regulation No. 139.
  - (i) Note that the first Regulation No. 128 products marketed in New York were Immediate Participation Guarantee contracts funded by market value separate accounts.
  - (ii) However, if such contract provides for termination, the termination provisions will be reviewed to determine whether the terminating contractholder, remaining contractholders and other policyholders of the insurer are treated fairly and equitably.

## 2. **Contract Termination Options**

- (a) Section 40.5(c) of Regulation No. 139 provides that the contract shall permit the contractholder, upon the discontinuance or termination of any such contract, to withdraw unallocated amounts credited to the accumulation fund on any basis or bases provided for under the contract, provided that the contract contains in substance:
  - (i) The ten-year book value installment withdrawal option described in §40.5(d) of Regulation No. 139.
  - (ii) The five-year installment withdrawal option described in §40.5(e) of Regulation No. 139;
  - (iii) A lump sum withdrawal option; or
  - (iv) One or more corresponding options which in the opinion of the superintendent are fair and equitable for the terminating

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

- (b) Pursuant to §40.5(c), group annuity contracts must permit a contractholder to terminate or discontinue the contract at least once each contract year upon providing the insurance company with reasonable advance notice.

3. **Ten Year Book Value Installment Option**

- (a) Section 40.5(d) provides for a withdrawal option in which the contractholder may withdraw all unallocated amounts of the accumulation fund on an installment payment basis which provides for
  - (i) the repayment of all the unallocated amounts in level installments over a period not to exceed 10 years; and
  - (ii) the crediting of interest to the unpaid portion of such accumulation fund during the installment payment period at a rate of interest not less than 1.5 % below the net effective rate of interest being credited to the contract at the time of its termination or discontinuance.
- (b) The contract's allocable share of plan benefit payments may change after discontinuance. In LIFO plans, the new or replacing contract may be looked to first. We have allowed insurers to offset future installments by the amount of plan benefit payments made between each installment payment.

4. **Five Year Installment or Lump Sum Market Value Option**

- (a) Section 40.5(e) provides that group annuity contract must provide at least one withdrawal option pursuant to which the unallocated amounts of the accumulation fund to which the contractholder is entitled are payable within five years. Such option (which may either be an immediate lump sum or equal installment option) may, if the insurance company elects, provide
  - (i) for market value adjustments of the unallocated amounts of the accumulation fund payable on withdrawal; or
  - (ii) for an adjustment in the interest rate credited on the unpaid balance during the period of repayment.
- (b) There shall have been filed with the superintendent a memorandum, in form and substance satisfactory to the superintendent, describing:
  - (i) the method for determining the market value adjustment;
  - (ii) the method used to determine the interest rate credited to the unpaid portion of such accumulation fund during the installment payment period if such rate is more than 1.5 % below the net effective rate of interest being credited to the contract at the time of its termination or discontinuance; and
- (c) There shall have been filed with the superintendent an opinion of the insurance company stating that the method provides reasonable equity to terminating and continuing contractholders and complies with Regulation No. 139.
- (d) If a market value adjustment is used by the insurance company for the option satisfying this subdivision, then the method shall not preclude the market

value of the unallocated amounts of the accumulation fund from being greater than the book value or unadjusted transfer value of such fund.

**5. Corresponding Options**

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

**6. Other Termination Rules**

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

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

#### 7. **Market-Value Adjustment Provision**

- (a) Section 40.2(o) of Regulation 139 defines market-value adjustment as an adjustment for increasing or decreasing the accumulation fund in the event of full or partial surrender or contract termination to reflect changes in interest rates or asset values since the receipt of funds by the insurer *according to a formula described in the contract*. §3204- Entire Contract\_of the Insurance Law requires that the MVA formula be incorporated in the contract or attached to the contract.
  - (i) The market-value adjustment formula should be sufficiently clear so that the contractholder can calculate the adjustment at any time.
  - (ii) The factors used in the calculation should be sufficiently definite and not based items solely within the insurers discretion. For example, the formula can refer to an outside index or to rates guaranteed or credited under the contract. If the formula referred to the insurer's earnings rate on supporting assets, we would require justification because the contractholder cannot verify such rate.
- (b) Liability-Based Formula -- For separate account GICs, insurers should use liability based adjustment formula. The first separate account GICs were funded through "book value" separate accounts in the late 1970s.
  - (i) In Prohibited Transaction Exemption 81-82, the U.S. Department of Labor granted an exemption from the prohibited transaction rules for book value separate account GICs. The DOL did not believe that any market-value adjustment requirements were necessary for separate account GICs "so long as the adjustment is not made with reference to the investment performance of a separate account". This exemption was repealed when the plan asset regulation was promulgated.

- (ii) However, §2510.3-101(h) carves out an exception for separate accounts that are “maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable, or credited, to the plan and to any participant or beneficiary of the plan (including an annuitant) are not affected in any manner by the investment performance of the separate account”.
- (c) Asset-based market-value adjustment formulas used in general account group annuity contracts do not appear to be necessary for guaranteed separate account products. In such contracts, the actual market value can be paid to the withdrawing contractholders.

#### 8. **Liquidated Damages Provision**

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

#### 9. **Liquidity Protection Provision**

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

## F. Other Provisions

### 1. Maximum Window Period

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

### 2. Maximum Guarantee Period

- (a) We have limited the guarantee duration attributable to any deposit cell in fixed rate, fixed maturity GIC contracts to ten years. No insurer has objected to this limit. We will consider an exception in the future if a case arises.
- (b) No surrender charge or market-value adjustment should apply at the expiration of the interest rate guarantee. Otherwise, the interest rate guarantee can be viewed as misleading (i.e., the interest rate guarantee should be calculated so as to amortize any charges prior to maturity).
- (c) We have permitted installment payments to be made over a period in excess of five years as long as the total guarantee period does not exceed ten years.

### 3. Credit Rating Downgrade Provisions

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

subject to a negative market-value adjustment because the provision will increase the risk of disintermediation.

#### 4. **Market Value Make-Up/Advance Interest Credit Provisions**

- (a) In the early 1980s, the Department permitted insurers to issue GICs that credited an amount in excess to the actual contribution equal to the market-value adjustment charged on the transfer of funds from the insurer's IPG or DA contracts and credited a reduced interest rate designed to amortize the excess amount or credit over the life of the contract.
  - (i) This market value make-up or advance interest credit allowed plan sponsors to maintain book value accounting at the plan participant level and allowed insurers to conserve existing group annuity business at a time when contractholders were generally dissatisfied with the interest crediting rates on IPG and DA contracts in the high interest rate environment.
  - (ii) More recently, we allowed one or more insurers to use market make-up type provisions to help Confederation Life GIC contractholders maintain book value accounting.
- (b) The Department has permitted the use of these provisions under the following conditions and circumstances:
  - (i) The advance interest credit or book-in amount cannot exceed 5% of the market value of the amount deposited.
  - (ii) The book-in provision can only be used with unallocated contracts funding defined contribution plans and the funds cannot derive from equity separate account agreements. This provision should not be used to recover losses on equity investments.
  - (iii) The insurer must not be proactive in using book-ins as a marketing strategy.
    - Book-ins should only be used as a business conservation measure or in limited cases at the request of a plan sponsor.
    - Book-ins used in connection with new business should represent a small percentage of new business and only a small number (i.e., less than ten) per year.
  - (iv) The contract must provide that in the event that the contract is terminated or discontinued prior to the date on which the advance credit is fully amortized, the unrecouped amount will be deducted as a separate charge prior to any final payment to the contractholder.
  - (v) The insurer must notify the Department each year of the circumstances of each book-in, including the credit provided (dollar value and as a percentage of the initial deposit), the amortization period and the source of funds (business conservation or new business).

#### 5. **Purchase Rate Guarantee/Unilateral Change**

- (a) The mortality and interest basis for guaranteed purchase rates should be stated in the contract. Companies can make unilateral changes in guaranteed annuity purchase rates for new contributions.

- (b) With respect to mortality, insurers should start using the 94 GAR Table. We have accepted the 83 GAM with projection scale H. Of course, insurers can use their own experience tables as long as such tables are credible.
- (c) With respect to interest, the interest rate guarantee should be conservative such as 3% or 4%.
- (d) Although we have approved expense loads in the past, we may question and require justification for the use of any expense loading when the guaranteed purchase rates comply with the mortality and interest limitations above. It can be argued that such loading does not comply with §40.4(a) of Regulation No. 139.
- (e) N.Y. Circular Letter. No. 83-14 (1983)—*Contract Approval Procedures to Comply With Norris decision & Amplification of Circular Letter 83-14*—describes special review and conditional approval procedures for policy form amendments designed primarily to comply with the unisex mortality pricing requirements of the *Norris* decision.
- (f) See also Regulation No. 117 (11 NYCRR 58)—*Use of New Mortality Tables by Life Insurers in Determining Reserve Liabilities for Annuities and Pure Endowments*—Under Reg. 117, the 1983 Group Annuity Mortality (GAM) table must be used to determine minimum standards of valuation for all annuities purchased on or after January 1, 1985 under a group annuity contract, excluding any disability and accidental death benefits purchased under such contracts. See §58.3(b).
  - (i) Regulation No. 117 acknowledges that the 1983 GAM Table is sex distinct and intended to be used to place "sound value" on liability assumed for benefits purchased.
  - (ii) To comply with state and federal statutes prohibiting sex discrimination, Reg. 117 permits insurers to use appropriate mortality tables having the same rates for men and women to determine nonforfeiture benefits, the purchase price of annuities, and the equivalent value of optional benefits. See §58.4(a)

## XII. Separate Account Operational Requirements

### A. Establishment of Separate Account

1. Kinds of Insurance – §4240(a)
  - (a) Life insurance §1113(a)(1)
  - (b) Annuities §1113(a)(2)
  - (c) Accident and health insurance §1113(a)(3)
  - (d) Funding agreement §3222
2. Purpose – §4240(a)
  - (a) Provide fixed and variable annuities;
  - (b) Provide life insurance with benefits, premium or both payable on a variable basis;
  - (c) Accumulate funds to be applied to provide fixed and variable life insurance (i.e., continued (retired) life insurance reserves);

- (d) Accumulate or hold funds to be applied to provide health insurance (i.e., post-retirement health benefits);
- (e) Accumulate or hold proceeds applied under settlement or dividend options;
- (f) Accumulate or hold funds credited under funding agreements.

**B. Operational Requirements**

1. Asset segregation/isolation. §4240(a)(1).
2. Investment Provisions. §4240(a)(2).
  - (a) Except for seed money and guaranteed separate accounts, the insurer may invest in investments contractually permitted. §4240(a)(2)(A).
    - (i) the restrictions, limitations and other provisions relating to investment do not apply.
    - (ii) such investments shall be disregarded and excluded from admitted assets in applying the quantitative investment limitations in the Insurance Law to other investments.
  - (b) Different classes of securities of a subsidiary, affiliate or company under common control limited if allocated to separate account. §4240(a)(2)(B)
  - (c) Prudent person good faith investment standard. §4240(a)(2)(C).
  - (d) Section 50.3(a)(4) of Regulation No. 47 provides that a separate account may invest in the securities of a registered investment company provided that the Superintendent is satisfied that the investment is not hazardous to the public or to New York policyholders of the insurer and the insurer complies with the investment restrictions and limitations of §227.1(b) [recodified as §4240(a)(2)]. The investment restrictions and limitations in §227.1(b) were repealed by §34 of the Chapter 567 of the Laws of 1983.
3. Seed money used to facilitate initial operation of separate account deemed to be invested under §1404 or §1405. §4240(a)(3).
  - (a) Each company issuing a separate account annuity contract shall maintain a record of the special contingent reserve fund showing progress in the repayment of the fund and the sum of advances from surplus made to establish or maintain the fund. A current statement of such records as of the end of each calendar year shall be filed with the superintendent on or before March 1 of the following calendar year. §50.3(a)(6) of Regulation 47.
  - (b) A company may upon establishment and during the initial stages of a separate account participate therein by allocating and contributing funds to such separate account as a participant (with a proportionate interest in the separate account) [§ 50.4(a) of Regulation No. 47]
    - (i) for a limited period
    - (ii) without the purpose of funding annuities,
    - (iii) for the purpose of providing economical diversification of investments by such separate account so as to facilitate the orderly establishment and maintenance,
    - (iv) Subject to aggregate limits specified in §50.4(b) of Regulation No. 47.
4. Amounts received by insurer pursuant to one or more separate account agreements may be maintained in one or more separate accounts. Section 4240(a)(4).

5. Generally no guarantee of the value of assets allocated to a separate account is permitted. Section 4240(a)(5) applies special rules with respect to guaranteed separate accounts. Clauses (i) and (ii) apply to book value separate accounts and clause (iii) applies solely to market value guaranteed separate accounts.
6. Discrimination between separate accounts and other accounts in connection with the allocation of investments and expenses or in any other respect is prohibited. However, uniform investment policies for all accounts are not required. Section 4240(a)(6).
  - (a) Expenses shall be allocated to the separate account business in accordance with the provisions of §4240(a)(6) of the Insurance law and Regulation No. 33. §50.3(a)(5) of Regulation 47.
  - (b) Conflicts of interest rules applicable to the officers or directors of insurance companies shall also apply to the members of the committee, board or other similar body of every separate account. §50.3(a)(7) of Regulation 47.
  - (c) No officer or director of any company maintaining a separate account nor any member of the committee, board or other similar body of the separate account shall receive any commission or compensation either directly or indirectly with respect to the purchase or sale of the assets of the separate account. §50.3(a)(7) of Regulation 47.
7. Non-guaranteed separate account assets must be valued at market value at the date as of which valued in accordance with the applicable agreements. If there is no readily available market the terms of the separate account agreement should specify how assets are to be valued. §4240(a)(7).
8. Assets in a separate account must be maintained with a value at least equal to the amounts accumulated in accordance with the terms of the applicable agreements and reserve for annuities in the course of payment that vary with the investment experience of the separate account. Section 4240(a)(8) and §50.3(a)(1) of Regulation No. 47.
9. Transfer of investments or assets between separate accounts and other accounts are not permitted, unless authorized by the Superintendent in circumstances where such transfer would not be inequitable. Section 4240(a)(9).
  - (a) No sale, exchange or transfer of assets may be made by a company between any of its separate accounts unless such transfer meets certain requirements. Regulation 47, 11 NYCRR 50.3(a)(3).
    - (i) Transfer is made solely to establish the account or to support the operation of the contracts with respect to the separate account to which transfer is made, and
    - (ii) Such transfer is made, to or from the separate account:
      - by a transfer of cash, or
      - by a transfer of securities having a valuation which can be readily determined in the marketplace, and approved by the superintendent.
    - (iii) The Superintendent may authorize other transfers if such transfers would not be inequitable.
  - (b) For example, the Department has approved such transfers to support the liquidity needs of real estate separate accounts

10. Except for market value separate account funding guaranteed benefits pursuant to §4240(a)(5)(iii), assets supporting reserves which do not vary with the investment experience of the separate account shall be maintained in the separate account at their value determined in section 1414. Section 4240(a)(10).
11. Amounts allocated to separate accounts shall be owned by the insurer. The insurer shall not be or hold itself out to be a trustee. Section 4240(a)(12).
  - (a) The assets may be insulated from other liabilities of the insurer. Section 4240(a)(12) and §50.3(a)(2) of Regulation No. 47.
12. The reserve liability for variable contracts shall be established in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees provided in the contract.
  - (a) A reserve liability for an incidental death benefit in excess of the accumulated value of the contract shall be accumulated and maintained in the general account of the insurer pursuant to a plan which specifies a reasonable maximum target for such reserve and is approved by the Superintendent. §50.3(a)(8) of Regulation No. 47.
  - (b) The reserve liability for variable annuities shall be established in compliance with the applicable provisions of §4217 of the Insurance law and in accordance with actuarial procedures that recognize the variable nature of the benefits provided and their dependence on the net investment return to the separate account or accounts.

**C. Special Rules for Book Value Separate Accounts.**

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

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

1. **General Note.** Regulation No. 128 prescribes the terms and conditions under which insurers may issue group annuity contracts, funding agreements and certain group life insurance policies funded by separate accounts with assets valued at market that provide fixed or guaranteed minimum benefits.
2. **AOM Requirement -- §97.6**
  - (a) The insurer may guarantee benefits in the separate account provided that the insurer annually submits an opinion and memorandum of a qualified actuary

that, after taking into account any risk charge payable from the assets of the separate account with respect to such guarantee, the assets of the separate account make good and sufficient provision for the liabilities of the insurance company with respect thereto. See §4240(a)(5)(iii).

- (b) The opinion shall be accompanied by a certificate of an officer of the company responsible for the daily monitoring compliance with the asset maintenance and reserve requirements for such separate accounts, describing the extent to and manner in which during the preceding year:
- (i) actual benefit payments conformed to the benefit payments estimated to be made as described in the plan of operations;
  - (ii) the level of risk charges, if any, retained in the general account was appropriate in view of such factors as the nature of the guaranteed contract liabilities and losses experienced in connection with account contracts; and disclosing the data required to be reported in accordance with §97.(m)(1);
  - (iii) after taking into account any reserve liability of the general account with respect to the asset maintenance requirement, the amount of the account assets satisfied the asset maintenance requirement;
  - (iv) the determination of the market-value of the separate account assets conformed to the valuation procedures described in the plan of operations, including (but not limited to), a statement of the procedures and sources of information used during such year;
  - (v) the fixed-income asset portfolio(s) conformed to, and justified, the rates used to discount contract liabilities for valuation pursuant to §97.5(k);
  - (vi) If the amount of the asset maintenance requirement depended on the separate account assets, or a subportfolio thereof, being duration matched, the actual experience of the separate account assets or such subportfolio thereof and actual benefit payments conformed to the assumptions made in the plan of operations for determining the duration of such assets and the duration of guaranteed contract liabilities (or the guaranteed contract liabilities funded by the subportfolio);
  - (vii) if the amount of the asset maintenance requirement depended on the separate account assets, or a subportfolio thereof, being cash-flow matched, the cash inflows from the separate account assets or such subportfolio thereof matched the cash outflows to meet guaranteed contract liabilities (or the guaranteed contract liabilities funded by the subportfolio);
  - (viii) any rate or rates used pursuant to §97.5(k) to discount guaranteed contract liabilities and other items applicable to the separate account were modified from the rate or rates described in the plan of operations filed pursuant to §97.4(b); and
  - (ix) any assets were transferred to or from the insurance company's general account, or any amounts were paid to the insurance company by any contractholder to support the insurance company's guarantee.

3. **Asset Maintenance Requirement -- §97.5(b).** The insurer shall maintain assets in one or more separate accounts at all times such that:
  - (a) The market value of the assets equals or exceeds the minimum value of guaranteed contract liabilities, and
  - (b) The market value of assets (less deductions) equals or exceeds 92% of the minimum value of guaranteed contract liabilities.
    - (i) If the actual percentage above is less than 100%, the insurer must maintain assets in the general account and a general account reserve for guaranteed contract liabilities in an amount at least equal to the minimum value of guaranteed contract liabilities less the market value of separate account assets less the deductions.
4. **Asset Shaves or Deductions -- §97.5(d).** The insurer must deduct the percentage specified in §97.5(d) based on the type of separate account assets and whether the assets are duration or cash-flow matched. The percentage deductions range from 0% to 50% and are highest for non-investment grade obligation, publicly traded common stock, real estate, private placement securities and other non-publicly traded investments. The deductions can be increased if
  - (a) The diversification requirements are not satisfied (10% increase);
  - (b) There is a currency exchange risk that is not adequately hedged (15% increase).
5. **Diversification Requirements -- §97.5(g)**
  - (a) For contracts funding fixed benefits only, the separate account assets are subject to the following limitations:
    - (i) For non-insulated contracts, the separate account assets shall consist in whole or in part of assets which together with general account assets meet the limitation in §1405 of the Insurance Law computed as though the insurer's admitted assets included such separate account assets.
    - (ii) For insulated contracts, separate account assets shall consist in whole or in part of assets meet the limitation in §1405 of the Insurance Law computed as though the insurer's admitted assets consisted solely of such separate account assets.
    - (iii) Separate account assets that do not comply with items (i) and (ii) above are subject to an additional 10% deduction from market value.
  - (b) For contracts not funding fixed benefits only, the insurer must, upon request of the Superintendent, justify the concentration or diversification of separate account assets and any failure of any separate account assets to comply with additional investment restrictions or additional deductions from market value in determining asset maintenance and reserve requirements.
6. **Supplemental Accounts -- §97.5(j).**
  - (a) All or any portion of the amount needed to meet the minimum asset requirements can be allocated to one or more supplemental accounts.
  - (b) For insulated separate account contracts, the insurer must maintain in the supplemental account assets in excess of the amounts contributed by the contractholder and the earnings thereon.

7. **Minimum Value of Contract Liabilities -- §97.5(k).** The minimum value of contract liabilities is the product of the base amount of guaranteed contract liabilities and one plus the contract risk factor.
  - (a) The base amount of guaranteed contract liabilities is the sum of the expected guaranteed contract benefits discounted at a rate not greater than 104.5% of the spot rate (using the mortality tables required by §4217 for annuity and life insurance benefit cashflows).
  - (b) The contract risk factors are provided in §97.5(l) for contracts providing annuities, other fixed benefits and minimum guaranteed benefits.
8. **Disclosure of Accumulated Amounts -- §97.5(m).** The amount accumulated from risk charges deducted from considerations received or from the separate account, net of losses and the amount of losses, must be shown on the annual statement. The amounts for the current year and the cumulative amounts from inception to date should be specified.
  - (a) The Amount of the annual deduction for risk charges and the maximum accumulation must
    - (i) Comply with the insurer's plan for compensating the general account,
    - (ii) Vary in proportion to the various risks and guarantees for risks undertaken by the general account, and
    - (iii) Vary depending on whether the assets are insulated from other company liabilities.

### XIII. Advertising and Disclosure

#### A. Regulation 139 - Section 40.3

1. Written statement and/or specimen contract with a statement citing location in contract of disclosures required by paragraphs (1), (3), (4), (5), (6), (9) and (10) of §40.3(b) of Regulation 139. See §40.3(a)
  - (a) Statement indicating any restrictions as to amount and timing of contributions, and penalties for non-payment. §40.3(b)(1)
  - (b) Description of the right to discontinue contributions to contract, and penalties resulting from such action. §40.3(b)(2)
  - (c) Statement of all current fees and charges that are or may be assessed against the contractholder or deducted from the contract, including a description of the extent and frequency to which such fees and charges may be modified and the extent to which they take precedence over other payments. §40.3(b)(3)
  - (d) Statement of the interest rates and/or method of determination of rates and a description as to how any withdrawals, transfers or payments will affect the amount of interest credited. §40.3(b)(4)
  - (e) Description of expense, interest and benefit guarantees under the contract and any rights to modify or eliminate such guarantees, including the right to apply surrender charges or market-value adjustments to plan benefit payments if there are plan amendments or changes in the manner of plan administration. §40.3(b)(5)

- (f) Description of the contractholder's and participant's right to withdraw funds (or apply to purchase annuities), along with a description of any charges, fees or market-value adjustments applicable to such withdrawals or a statement that no such withdrawals or payment are permissible prior to maturity or the happening of a certain event. §40.3(b)(6)
- (g) Statement indicating any pro rata, percentage or other limitations that may apply to benefit payments to be purchased or provided under the contract when the plan is not funded entirely under the contract. §40.3(b)(7)
- (h) Statement that contractholder or participant withdrawals under the contract are to be made in a FIFO or LIFO basis or other applicable basis. §40.3(b)(8)
- (i) Statement that the contract may be amended, including any right of the insurer to unilaterally amend the contract. §40.3(b)(9)
- (j) Statement, if applicable, that any dividends and experience rate credits are subject to the insurer's discretion. § 40.3(b)(10)
- (k) Statement, if applicable, concerning supporting asset's affect on withdrawal timing. § 40.3(b)(11)
- (l) Statement that the contractholder or plan sponsor is solely responsible for determining whether the contract is a suitable funding vehicle. §40.3(b)(12)
- (m) Statement, if applicable, that the insurer does not have responsibility to reconcile participants' individual account balances with the accumulation fund balance where the insurer does not maintain individual account balances. §40.3(b)(13)

**B. Regulation 34-A - Rules Governing Advertisements of Life Insurance and Annuity Contracts.**

Regulation No. 34-A contains substantive regulations governing the form, content and disclosure requirements of advertisements for life insurance and annuities. Reg. 34-A contains a detailed, non-exclusive listing of items considered "advertising" within the scope of Reg. 34-A. See §219.3(a). The regulation also imposes specific compliance procedures to be followed with respect to all advertising.

**C. Contents of Advertisements Concerning Financial Condition of Insurer.**

Section 1313 of the Insurance Law imposes substantive limitations on the content of any advertisement or public announcement published, issued or distributed in New York by any domestic or foreign insurer or affiliate, or by any agent on its behalf, that purports to make known the insurer's separate financial condition.

**XIV. Additional Matters**

**A. IRC Section 457 Public Deferred Compensation Plans.**

1. See New York State Deferred Compensation Board Rules 9 NYCRR 9000 and Circular Letter 1988-17.

- (a) No plan shall permit any distribution option that provides for installment payments over a period measured by one or more natural lives. See §9001.4(b).
  - (i) The regulation prohibits traditional annuity payout options, in part, because some annuity options allow for the forfeiture of undistributed account balances upon a participant's death. The Board may not have been aware of annuity options that minimize any forfeiture, including the modified cash (or installment) refund annuity or the life annuity with (5,10 or 20 year) period certain option.
  - (ii) Installment payments may be made with reference the life expectancy of both the participant and his/her beneficiary.
  - (iii) The Board was undecided as to the permissibility of the annual recalculation of life expectancy method of determining installment distribution payments. The Board is concerned that while the number of payments may increase, the amount of each payment would decrease. The Board did not revise the language in the regulation to permit the annual recalculation method because it claimed that it did not have sufficient time to study this issue.
  - (iv) The Board intends to permit participants to continue to enjoy full benefits of market participation for plan assets until distribution (i.e., similar to variable annuities).
  - (v) Comment: As a result of this rule, plan participants bear the risk of outliving their §457 retirement benefits. The Board has noted that the vast majority of plan participants also have a defined benefit plan that provides for a lifetime income stream.
- (b) Loans are not permitted. See §9001.4(d).
- (c) Maximum contract term for NY State Deferred Compensation Board is five years. See §§9003.5(a) and 9003.7.
- (d) No penalties or surrender charges are permitted at the expiration of the contract or agreement for the transfer of assets. See §9003.5(a)
- (e) Contracts subject to a competitive bidding process issue and renewal. See §9003.1 and 2.
- (f) Prompt payments by state or local employer (two days from payroll date) and appointed trustee (one day after receipt). Amounts held in interest bearing account until financial organization receives necessary instructions or determines that it is prudent to transfer to another investment fund. See §9003.8.
- (g) Every contract must contain a provision that it is subject to the plan and regulation, and that such plan and regulation are made a part of the contract. See §9006.2.

## SEPARATE ACCOUNT AGREEMENTS Checklist

### I. Filing Process

#### A. Type of Filing:

- For prior approval - §3201(b)(1); Circular Letter 1997-14
- Expedited approval -§3201(b)(6); Circular Letter 1998-2
- For delivery outside of New York, only - Circular Letter 1963-6
- Pre-filed Insurance Coverage - Circular Letter 1964-1

#### B. Submission Letter - Circular Letter 1963-4; Circular Letter 1963-6; Circular Letter 1969-4

- 2 copies
- Identification of Insurer
- Listing of form numbers
- Table of Contents of all material in the filing
- Listing of the mandatory or optional insert pages, if any
- Description of the benefits provided
- Type of group. Provide specific citation. \_\_\_\_\_
- Classes covered
- Statement as to source of contributions -- Employer  -- Employee
- Statement as to whether the form is new or is intended to replace previously approved form. Identify prior submission(s) \_\_\_\_\_
- Statement as to how the form will be used and how it will be marketed, as described in Circular Letter 1976-12. Specify type of plans to be funded.
  - Defined Benefit Plan;  Defined Contribution Plan;  401(a)
  - 401(k);  403(b);  457;  414(d);  SIMPLE IRA;
  - Regular IRA;  SEP;  Roth IRA;  Welfare Plan
- Plan of operation. File No. \_\_\_\_\_; Approval Date \_\_\_\_\_
- SEC filing status \_\_\_\_\_
- Regulation No. 128 Information
  - Reserve and Asset Maintenance subject to regulation 128
  - Fixed Benefit Only Contract:  Non-Fixed Benefit Only Contract
  - Undertaking to File AOM in conformity with Regulation 128
- Caption identifies all forms, describe type of insurance and type of form  
Circular Letter No. 8 (1999)
- Certification of compliance if deemer submission with appropriate caption

#### C. Preparation of Forms and Attachments- Circular Letter Nos. 63-4, 63-6 and 69-4

- 2 copies of Forms
- 2 copies of Explanatory Memorandum describing variability
- Any incorporations by reference
- Readability Certification, in accordance with §3102

- Regulation No. 128 Plan of Operation
- Summary sheet or checklist completed.

## II. Contract Provisions

- A. Cover Page
  - Company's Name and Address
  - Form Identification Number
  - Brief Description of Policy
  - Smallest Rate of Return or Other Method
  - Officer's Signatures
  
- B. Specification Page
  - Hypothetical data
  - Available funds listed
  
- C. Standard Provisions
  - Grace Period
  - Entire Contract
  - Misstatement of Age or Sex
  - Active Life Certificate
  - Retired Life Certificate
  - Governing Law
  
- C. Section 4240 and Regulation No. 47 Provisions
  - Isolation/Segregation Provision
  - Asset Identification
  - Guarantees of Value
  - Valuation
  - Asset Maintenance
  - Disclosures
  - Asset Ownership
  - Insulation Provision
  - Voting Rights
  - Incidental Death Benefit
  - Involuntary Cashout - Small Annuities
  - Mortality and Expense Guarantees
  - Variable Annuity Computation Method
  - Deferral of Payment
  - Annual Reports
  - Illustrations
  - Nonforfeiture Requirements Applicable To Separate Account Annuity Contracts
  
- D. Regulation No. 139 Plan Benefit Rule Provisions Applicable To Guaranteed Separate Accounts
  - Plan Benefit Rule

- Betterment of Rates
- Allocated Share of Benefit Payments
- Participant Directed Investment Option
- Plan Amendments or Changes in Plan Administration
- Bona Fide Termination of Employment
- Non-Benefit Related Withdrawals and Transfers
- Clone Contract Provision
- Competing Funds Provision

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

- Contract Termination Options
- Ten Year Book Value Installment Option
- Five Year Installment or Lump Sum Market Value Option
- Corresponding Options
- Other Termination Rules
- Market-Value Adjustment Provision
- Liquidated Damages Provision
- Liquidity Protection Provision

F Other Provisions

- Maximum Window Period
- Maximum Guarantee Period
- Credit Rating Downgrade Provisions
- Market Value Make-Up/Advance Interest Credit Provisions
- Purchase Rate Guarantee/Unilateral Change