

# SYNTHETIC GUARANTEED INVESTMENT CONTRACTS

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# SYNTHETIC GUARANTEED INVESTMENT CONTRACTS

## I. **Applicability**

### A. **Scope**

This product outline covers all synthetic guaranteed investment contracts delivered or issued for delivery in New York to pension plan sponsors that provide guarantees in connection to fixed income portfolio of assets owned by the pension plan sponsor/contractholder.

### B. **Market Limitations**

#### 1. *Defined Contribution Plans.*

(a) Synthetic guaranteed investment contracts have served primarily as funding vehicles for the fixed income fund (stable value fund) of defined contribution plans.

(b) Under such plans, book value accounting is essential.

#### 2. *Defined Benefit Plans.*

We would not object to a similar use of synthetic guaranteed investment contracts for defined benefit plans.

#### 3. *Welfare Plans and Other Programs.*

(a) No insurer has submitted a synthetic guaranteed investment contract to serve as a funding vehicle for a welfare plan (i.e., health benefits or life insurance) or for any non-employee benefit plan or program or on behalf of any other entity.

(b) An insurer should contact the Department to discuss such a plan or program.

### C. **Product Design Features**

1. *General Note.* The synthetic guaranteed investment contracts are generally modeled after unallocated benefit responsive Regulation No. 128 guaranteed separate account products funding defined contribution plans offered by life insurers. See AICPA Statement of Position 94-4.

(a) Such Regulation 128 contracts are supported primarily by high quality fixed income assets in a pooled or non-pooled separate account. Although synthetic guaranteed investment contracts submitted to date have been non-pooled arrangements, we will consider a pooled arrangement. Assets are generally managed to a fixed or laddered maturity or to maintain a constant duration;

(b) Such Regulation 128 contracts generally provide that interest will be periodically redetermined (monthly, quarterly, semi-annually or annually) on an experience rated basis.

#### 2. *Experience-Rated Fixed Maturity and Constant Duration Products.*

(a) To date, most synthetic guaranteed investment contracts submitted by insurers have been experience-rated contracts with the segregated portfolio managed to maintain a constant duration, collapsing duration (natural maturity) or to provide for a fixed maturity. In such contracts, the segregated portfolio is usually actively managed.

- (b) Such contracts guarantee principal and interest, with the interest rate either:
    - (i) Fixed at issue for a specified time interval (i.e., until maturity): or
    - (ii) Periodically reset to adjust for differences in the contract's book value (contract value record) and the aggregate market value of all of the assets held in the segregated portfolio (i.e., the fixed rate of return may reflect prior and current market conditions with respect to the segregated asset portfolio).
  - (c) Such contracts provide a fixed maturity date (or laddered maturity dates) or maintain assets at a constant duration (evergreen structure) and permit the insurer or contractholder to trigger a maturity phase.
    - (i) Under a fixed or laddered maturity structure, the asset portfolio is invested to meet the target duration of the payout dates. (Collapsing duration).
    - (ii) Under an evergreen structure, there is no fixed maturity. The asset portfolio is maintained at a constant duration. However, a maturity phase can be elected by the contractholder or insurer under the contract.
3. *Fixed Rate/Fixed Maturity Product.*  
 We have approved one synthetic guaranteed investment contract that is modeled after the traditional general account fixed rate, fixed maturity (non-experience-rated) contract. Additional safeguards are recommended for this design, including a requirement that the insurer serve as the investment manager. See P.T.E. 94-55.
  4. *Buy-and-Hold.*  
 Under some synthetic guaranteed investment contracts, the insurer provides guarantees as to the sufficiency of plan assets by guaranteeing the purchase of plan assets at book value in order to ensure the plan can meet its benefit obligations to plan participants. Under the buy-an-hold strategy assets are not actively managed and are sold only as needed to accommodate withdrawals and payments.
  5. *Non-Pooled Arrangements.*
    - (a) To date, we have only approved non-pooled arrangements (i.e., single clients arrangements).
    - (b) Pooled arrangements in which the supporting assets are held in trust on behalf of two or more plans raise additional concerns regarding the allocation of assets on transfer and termination as well as investment management controls. Additional controls are needed over the investment management agreement and the investment manager.
  6. *No Guaranteed Index or Minimum Return Products.*  
 Synthetic guaranteed investment contracts have not been used in connection with equity funds to provide guaranteed minimum benefits (i.e., a fixed minimum guarantee related to the initial contribution) or guarantee that the total return will match the return of an external index.
  7. *No Immediate Participation Guarantee Arrangements.*  
 Synthetic guaranteed investment contracts have not been used in connection with defined benefit plans funding annuity benefits on retired

and terminated vested employees under immediate participation guarantee arrangements.

**D. Authority**

1. *Circular Letter No. 12 (1995) -- Supplement No. 1* – November 1, 1995
  - (a) The Department determined that synthetic guaranteed investment contracts that include traditional group annuity features, including annuity purchase rights and guaranteed annuity purchase rates, can be considered substantially similar to annuities pursuant to §1113(a)(30) of the Insurance Law.
  - (b) Section 1113(a)(30) of the Insurance Law defines “substantially similar kind of insurance” to mean such insurance which in the opinion of the Superintendent is determined to be substantially similar to one of the kinds of insurance in §1113 and for purposes of the Insurance Law shall be deemed to be included in that kind of insurance.
2. *Circular Letter No. 12 (1995)* – August 17, 1995
  - (a) The Department determined that synthetic guaranteed investment contracts can be considered ancillary activity to companies engaged group life insurance or reinsurance.
  - (b) The use of the phrase “ancillary activity” is unfortunate because
    - (i) The phrase was intentionally omitted from current §1714 of the Insurance Law by legislation implementing the Heimann Commission Report (Chapter 567 of the Laws of 1983); and
    - (ii) It refers to non-insurance activities that may not be covered by the insurance guaranty fund and may be subordinate to policyholder claims under any rehabilitation proceedings. Note that under the §1113(a)(30) characterization, guaranty fund protection appears to be available.
  - (c) A synthetic guaranteed investment contracts authorized under §1714(a)(ii) of the Insurance Law should not
    - (i) be labeled as a group annuity contract or funding agreement;
    - (ii) mislead the contractholder as to whether the contract is a “covered policy” under Article 77 of the Insurance Law.
3. *Section 1714 of the Insurance Law*

Section 1714 permits an insurer to engage directly in the following:

  - (a) Any business, to the extent necessarily or properly incidental to the insurer’s business, including
    - (i) investment advice,
    - (ii) investment management services, and
    - (iii) services related to the functions involved in the operation of an insurance business, and
  - (b) Any other business to the extent approved by the Superintendent. The Superintendent may prescribe limitations for the protection of the interest of policyholders of the insurer after taking into account:
    - (i) The effect of such business on the insurer’s existing insurance business and its surplus;
    - (ii) The proposed allocation of the estimated cost of such business;
    - (iii) The risks inherent in such business;

- (iv) The relative advantages of conducting such business directly instead of through a subsidiary.
- 4. *Repeal of Circular Letter No. 9 (1994).*  
The Department Circular Letter No. 12 (1995) rescinded Circular Letter No. 9 (1994).
  - (a) Circular Letter No. 9 (1994) held that synthetic guaranteed investment contracts constitute financial guaranty insurance of a type that is not authorized by law.
  - (b) Circular Letter No. 9 (1994) stated that synthetic guaranteed investment contracts are not annuity contracts or funding agreements, and are not substantially similar to either, because funds are not deposited with nor accumulated by an insurer under the contract.
- 5. *Not Section 3222 Funding Agreement*  
A synthetic guaranteed investment contract cannot be issued as a funding agreement. Section 3222(a) explicitly states that funding agreements shall not be deemed to be
  - (a) Doing a kind of business authorized by §1113 of the Insurance Law; or
  - (b) Engaging in any business authorized by §1714 of the Insurance Law.

#### E. **Definitions**

1. **Annuities** means 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). Note that a *period certain* annuities first authorized in New York by Section 1 of Chapter 864 of the Laws of 1985.
2. **Contract value record** means an accounting record, provided by the contract in relation to a segregated portfolio of assets, that is credited with a fixed rate of return over regular periods, and is used to measure the extent of the insurer's obligation to the contractholder. The fixed rate of return credited to the contract value record is determined by means of a crediting rate formula or declared at the inception of the contract and valid for the entire term of the contract.
3. **Crediting rate formula** means a mathematical formula used to calculate the fixed rate of return credited to the contract value record during any rate period. In most cases, the formula is based in part upon the difference between the contract value record and the market value record amortized over an appropriate period. The fixed rate of return calculated by means of this formula may reflect prior and current market conditions with respect to the segregated portfolio.
4. **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) Plans funded by group annuity contracts include 401(a), 401(k), 457, 414(d), and 403(b), among others.
5. **Investment guidelines** means a set of written guidelines, established in advance by the person with investment authority over the segregated portfolio, to be followed by the investment manager. The guideline shall include a description of:
- (a) The segregated portfolio's investment objectives and limitations;
  - (b) The investment manager's degree of discretion;
  - (c) The duration, asset class, quality, diversification, and other requirements of the segregated portfolio; and
  - (d) The manner in which derivative instruments may be used, if at all, in the segregated portfolio.
6. **Investment manager** means the person (including the contractholder) responsible for managing the assets in the segregated portfolio in accordance with the investment guidelines in a fiduciary capacity to the owner of the assets.
7. **Market value record** means an accounting record provided by the contract to reflect the aggregate fair market value of all of the assets held in the segregated portfolio.
8. **Permitted custodial institution** means a bank, trust company or other licensed fiduciary services provided authorized to act as a custodial institution.
9. **Segregated portfolio** means
- (a) A portfolio or sub-portfolio of assets to which the contract pertains that is held in a custody or trust account by the permitted custodial institution and identified on the records of the permitted custodial institution as special custody assets held for the exclusive benefit of the retirement plans or other entities on whose behalf the contractholder holds the contract; and
  - (b) Any related cash or currency received by the permitted custodial institution for the account of the contractholder and held in a deposit account for the exclusive benefit of the retirement plans or other entities on whose behalf the contractholder holds the contract.
10. **Synthetic guaranteed investment contract** means a group annuity contract or other agreement that, in whole or in part, establishes the insurer's obligation by reference to a segregated portfolio of assets that is not owned by the insurer.
- (a) The term usually refers to a contractual arrangement between a pension plan sponsor (or trustee on behalf of a pension plan) and an

insurer in which the insurer wraps book value accounting guarantees around a portfolio of assets owned by the pension plan sponsor.

- (b) Under the contract, the insurer guarantees to pay the book value, regardless of the actual market value of supporting assets owned by the plan, upon the occurrence of specified circumstances, including making required benefit payments to plan participants and payments to the contractholder at maturity or contractually specified dates.

- 11. **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.
    - (i) Amounts set aside for retired lives are usually allocated to specific plan participants.
    - (ii) 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 to plan participants. Such certificates are not required by §3219(b) or §3223(d) of the Insurance Law for unallocated contracts.
  - (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.
- 12. **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.
- 13. **Unilateral contract termination event** means an event allowing the insurer to unilaterally and immediately terminate the contract, without future liability or obligation to the contractholder.

## II. 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.

- (b) *Current Procedure For Synthetic GICs*. Until the Department and insurers gain sufficient experience with synthetic guaranteed investment contracts, approvals will only be granted on a one case basis.
  - (i) The Department reviews products submitted on a general basis and authorizes the use of Circular Letter 64-1 procedures to bind risk for a specific contractholder prior to approval as long as the contract satisfies stated parameters in the general submission.
  - (ii) When sufficient experience develops, the Department will grant general approvals and require periodic reporting to assist the Department in assessing the risks associated with this business.

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, 4238(e), 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, and 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 or 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 contractholder. Specify relevant paragraph of Section 4238(b) or describe §1714 holder
- 
- (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. The submission letter should indicate whether the plan of operation of the synthetic guaranteed investment contracts has been filed with and approved by the Department. Please identify the file number and approval date and attach a copy of the approval letter, if the plan has already been approved.
- (a) The plan of operations has to be approved prior to a contract being issued. See Circular Letter No. 64-1 discussion below.

- (b) The synthetic guaranteed investment contracts can be reviewed and approved even if the plan of operations has not yet been formally approved.
  - (i) The approval of the contract form will be conditioned upon the company's receipt of the approval of the plan of operations.
  - (ii) The plan of operation approval letter should be forwarded to the Albany office.
  - (iii) The plan of operation should be submitted as an attachment to the form filing.
- 10. For synthetic guaranteed investment contracts, the submission letter should state that the Regulation No. 128 reserve and asset maintenance requirements will be satisfied. See §97.4(c) of Regulation No. 128.
- 11. For synthetic guaranteed investment contracts that qualify for the Circular Letter 64-1 procedure noted II.F.3. below, the submission letter must state that
  - (a) The contract does not vary from the contract terms and explanations provided in the general submission;
  - (b) On the effective date of the contract, the market value of assets (less deductions provided for in §97.5(d) of Regulation No. 128) equaled or exceeded 100% of the minimum value of guaranteed contract liabilities (determined in accordance with §97.5(k) of Regulation No. 128).
- 12. For synthetic guaranteed investment contracts, the submission letter should specify the minimum initial market value of the segregated portfolio to be wrapped by the contract and the minimum balance requirement, if any, in the case of a constant duration experience-rated product.
  - (a) Note that minimum deposit amounts are generally based on stable value market conditions that vary from time to time and minimum account balances are often a function of client relationships;
  - (b) An insurer should always have the right to trigger a termination to get out of an account which had become too small.
- 13. 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) An explanatory memorandum (in duplicate) accompanying a cover letter or appropriate reference to material filed as variable, including schedules of premium rates, should clearly indicate 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 to 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.

## 2. **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 §§ 1714, 3223, 4238, and 4240 of the Insurance Law, Regulation Nos. 128 and 139, to the extent applicable, and the Department guidelines for plans of operation for synthetic guaranteed investment contracts.
- (c) The certification should indicate that the forms comply with all requirements set forth in the product outline, including Department interpretations, or identify all form provisions that do not conform to the product outline. The certification of compliance should describe and explain how and why the policy form departs from the product outline.
  - (i) Although the alternative approval procedure may be used for all types of forms, the procedure is not recommend its use for new, innovative or controversial product filings.
- (d) A certification that merely states that the contract is in compliance with all applicable laws and regulations is not sufficient.
- (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).

3. **Synthetic Guaranteed Investment Contracts Plan of Operation**  
The contract form submission shall be accompanied by a copy of the approved or pending plan of operation Subject to §97.4 of Regulation No. 128 and an undertaking to file annual actuarial opinions and memoranda in conformity with §97.6 of Regulation No. 128.

4. **Product Outline Checklist**  
A completed checklist (attached to this outline) and/or summary sheet should be attached to the submission letter.

**E. Guidelines For Plans of Operation For Synthetic Guaranteed Investment Contracts**

The insurance company shall file for approval a plan of operations, subject to §97.4 of regulation No. 128 for the synthetic guaranteed investment contracts, accompanied by the synthetic guaranteed investment contracts, and an undertaking to file actuarial opinions and memoranda satisfying the requirements of §97.6 of Regulation No. 128. [Until a synthetic guaranteed investment contracts regulation is promulgated by the Department, the term "segregated portfolio" should be substituted for "separate account" in §97.4 and other sections of Regulation No. 128.] The plan of operations must include the following:

1. A statement that the plan of operation will be administered in accordance with the limitation prescribed by the Superintendent pursuant to §1714(b) and §1113(a)(30) of the Insurance Law.
2. A description of how the contract value record will be determined, and, where applicable, adjusted by experience rating.
3. A statement of how the guaranteed contract liabilities are to be valued.
  - (a) Section 97.4(b)(3) and (d) of Regulation No. 128 requires a description of how the guaranteed contract liabilities are to be valued, including 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).
  - (b) A similar description of methodology for calculating spot rates should be provided for synthetic guaranteed investment contracts.
4. A statement of how the procedures required under Regulation 128 will recognize the fact that the assets are not owned or possessed by the insurance company.
5. A description of the method by which the fixed rate of return credited to the contract value will be determined, and whether such rate will be periodically adjusted to reflect experience rating.
6. A description of how the market-value will be established and maintained, including a description of the rules for valuing securities and other assets that are not publicly traded;

7. A description of how information concerning the assets in the segregated portfolio and related transactions will be reported to and verified by the insurer.
8. A description of how the investments in the segregated portfolio reflect provision for benefits wrapped by the contract.
  - (a) Note that §97.4(b)(4) requires 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.
  - (b) A similar statement should be provided for synthetic guaranteed investment contracts that are benefit responsive.
9. A description of any requirement for plans purchasing synthetic guaranteed investment contracts to establish a buffer fund or an allocation procedure which limits the allocable share of benefit payments made from the segregated portfolio.
10. A description of the experience rating formula and how it will operate to take into account differences between market value and contract value records.
11. A description of all termination events, discontinuance triggers and options, notice requirements, corrective action procedures and all other contractual safeguards, including any right of the insurer or contractholder to terminate the contract without cause with prior notice (e.g., 30 days). Include also a list of events that give the insurer the right to terminate the contract immediately, distinguishing between events unique to synthetic guaranteed investment contracts, and events that apply generally to group annuity contracts providing guaranteed benefits.
12. A description of the procedures to be followed when a termination event occurs but the company fails to terminate the contract.
  - (a) The Department will require reports from insurers that fail to terminate a synthetic guaranteed investment contracts when a termination event occurs, describing the corrective action to be taken.
  - (b) The Department will require in the March 1<sup>st</sup> annual report, an inventory of all material termination events which occurred during the preceding year but where the company decided not to terminate the contract, plus illustrative examples of such events which were not deemed to be material.
  - (c) The company should also provide an analysis of each such material event, including any increased risk to the company and whether corrective action was fully taken by the March 1 date of the report.
  - (d) The Department will also require a similar report as of July 1 of each year, such report to be made by September 1 of each year would include the following statements:
    - (i) A statement that no such events have occurred; or
    - (ii) A statement that no such material events have occurred, with an illustrative example of the most significant event; or
    - (iii) An enumeration of all material events together with information as provided in 16(b) below.
13. A description of the procedures which will be followed by the insurance company in evaluating the appropriateness of the investment guidelines submitted by the contractholder, including a description of the manner by which the insurance company shall monitor the segregated portfolio and verify that it is being managed

in accordance with the investment guidelines. In addition, please provide the following information based on the NAIC Model Regulation

- (a) Section 5.B.(1)(d) of the NAIC Model Regulation requires
    - (i) a description of the insurer's requirement for reports concerning the assets in each segregated portfolio and transactions involving the assets, and
    - (ii) a description of how the insurer can use the information in a report to determine that the segregated portfolio is being managed in accordance with its investment guidelines.
    - (iii) The insurer shall require that the report be prepared no less frequently than quarterly, and include a complete statement of segregated portfolio holdings and their fair market value;
  - (b) Section 5.B.(1)(g) of the NAIC Model Regulation requires a description of the allowable investment parameters (such as objectives, asset classes, quality, duration and diversification requirements applied to the assets held within the segregated portfolio) to be reflected in the investment guidelines.
14. The name and qualifications of the investment manager who will be used in managing the segregated portfolio, if other than the insurance company, including a description of the criteria used by the insurance company in approving the investment manager.
- (a) Section 97.4(b)(14) of Regulation No. 128 requires a statement of the safeguards adopted by the insurance company to assure that the actions to be taken by persons empowered under §4240 of the Insurance Law to authorize, approve or review the acquisition and disposition of investments for the account are appropriate.
  - (b) The NAIC Model Regulation requires a description of the criteria used by the insurer in approving the investment manager for the segregated portfolio of assets associated with a contract in the class, if the investment manager is an entity other than the insurer or its wholly owned subsidiary.
  - (c) The plan of operation for synthetic guaranteed investment contracts should provide for similar safeguards.
15. A demonstration as to the adequacy of the consideration charged by the insurance company for the risks it has assumed with respect to synthetic guaranteed investment contracts. See §97.4(b)(5) and (6) and §97.6(b)(2) of Regulation No. 128.
16. A statement that the opinion and memorandum due each March 1 will be expanded to embody reporting required with respect to synthetic guaranteed investment contracts, including:
- (a) The separate accumulation of risk charges for synthetic guaranteed investment contracts net of any losses, and the amount of any losses incurred in the preceding calendar year; and
  - (b) A statement that the applicable investment guidelines were adhered to during the preceding calendar year.
17. A description of the procedures to be followed (which should be consistent with those of §97.4(b) of Regulation No. 128) in accounting for any risk charges made.
18. An illustration of how the contract will perform under diverse hypothetical interest rate and withdrawal scenarios, based on the NAIC Model Regulation.

- (a) Section 5.B.(1)(e) of the NAIC Model Regulation requires a demonstration of financial results for one or more sample contracts from the class of contracts, showing at a minimum the projected contract value records, the applicable fixed rate or rates of return, and the projected market value records, describing how the investments in the segregated portfolio reflect provision for benefits insured by the contract and how the contract value and market values and the rates of return may be affected by changes in the investment returns of the segregated portfolio and reasonably anticipated deposits to and withdrawals from the segregated portfolio by the contractholder, as well as any advances made by the insurer to the contractholder. The sample contracts shall be chosen to reasonably represent the range of results that could be expected from possible combinations of contract provisions of all contracts within the class. The demonstration shall include at least three (3) hypothetical return scenarios (level, increasing and decreasing) and for each of these scenarios, at least three (3) withdrawal scenarios (zero, moderate and high) shall be modeled. The commissioner may require additional scenarios if deemed necessary to fully understand the risks under the class of contracts. The demonstration period shall be the greater of five (5) years or the minimum period the insurer must underwrite the risk;
- 19. A statement of the understanding that the approval of the plan is subject to separate approval of the Life Bureau and of policy forms and procedures consistent with those of Regulation No. 128.
- 20. Acknowledgment that the “prudent man rule” will be adhered to in all investment procedures;
- 21. Acknowledgment that the insurance company will:
  - (a) Maintain adequate risk reserves;
  - (b) Collect adequate consideration for the cost of fixed annuities purchased under contract option by transfer from the segregated portfolio;
  - (c) Maintain reserves required by §4217 of the Insurance Law for such fixed annuities.
- 22. A statement as to whether the contract provides that assets in the segregated portfolio shall not be chargeable with liabilities arising from any other source.
- 23. A statement that the insurance company is complying with all requirements of the New York Insurance Law.
- 24. The superintendent may require an insurer to file additional information to supplement the plan of operations. See §97.4(f)

**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 group annuity coverage prior to the filing or approved of such forms.
- 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.
  - (e) Recommended Practice.
    - (i) Insurers should review pre-filings periodically (monthly) to verify compliance with conditions for pre-filing.
    - (ii) 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.
3. Additional Conditions for Synthetic GICs
- (a) To date, we have only approved synthetic guaranteed investment contracts on a one case basis. However, we have reviewed general submissions and approved the use of Circular Letter 64-1 procedures for single case filings, subject to the following conditions:
    - (i) The single case filings must fall within the parameters of the general submission (i.e., all explanations, conditions and assurances provided in the correspondence file);
    - (ii) Notice of such coverage must be furnished to the Department within 30 days of the effective date;
    - (iii) The Life Bureau (New York Office) must approve the plan of operation prior to issuance of the contract; and
    - (iv) The company must submit a copy of the custodial agreement for our file.
  - (b) Synthetic guaranteed investment contracts which qualify for the Circular Letter 64-1 procedure will be approved on an expedited basis provided that:

- (i) The submission letter states that the contract does not vary from the contract terms and explanations provided in the general submission;
- (ii) The submission letter states that on the effective date of the contract, the market value of assets (less deductions provided for in §97.5(d) of Regulation No. 128) equaled or exceeded 100% of the minimum value of guaranteed contract liabilities (determined in accordance with §97.5(k) of Regulation No. 128).

**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 be delivered.
    - (iii) a commitment to notify the Department in the event a state has disapproved any of the forms.

**III. Eligible Group Requirements**

**A. Eligible Groups**

Since synthetic guaranteed investment contracts have only be issued to fund pension plans at this time, the types of eligible group contractholders are described in §4238(b)(1)-(4). For groups described in §4238(b)(5)-(8), the insurer must provide an appropriate explanation. As noted in I.C.4 above, since synthetic guaranteed investment contracts cannot be funding agreements the descriptions in §3222 for eligible holders is not applicable.

1. **Employer Group.** Section 4238(b)(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(b)(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 purchase:
  - (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. **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. New York State Deferred Compensation Board Rules. See 9 NYCRR 9000. The rules impose substantive requirements on the content of annuity contracts (and other contracts) issued to the §457 plans of the State and local governments in New York. See Circular Letter. No. 88-17 (1988)—additional administrative guidance on annuity contracts issued to N.Y. governmental §457 Plans.

#### C. **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.

### IV. **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.

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**
  - (a) A description of the contract, such as “Synthetic guaranteed investment contract”.
  - (b) There must be a statement indicating whether the contract is participating or nonparticipating in the divisible surplus of the company. This requirement generally applies to the portion of the contract funded through the insurer’s general account.
4. **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.

#### B. **Standard Provisions**

1. **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) of the Insurance Law. It appears that a grace period provision should be applicable
  - (a) if the contractholder is required to make additional contributions to the segregated portfolio; or
  - (b) if a payment to the insurer is required for any fee or expense charges.
2. **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. Synthetic guaranteed investment contracts often refer to the following:
  - (a) Investment Management Agreement;
  - (b) Investment Guidelines; and
  - (c) Custodial Agreement.
3. **Misstatement of Age or Sex.** A provision for the equitable adjustment of the benefits payable or of the payments to be made to the insurer if the age or sex of any person, or of any other fact affecting the amount or date of payment by or to the insurer has been misstated. See §3223(c).

- (a) The *Arizona vs. Norris* decision held that Title VII of the Civil Rights Act of 1964 prohibits an employer from offering its employees a retirement benefit option where a woman is paid a lower monthly retirement benefit than a man who has made the same contributions.
- (b) We have permitted misstatement provisions that omit the reference to sex.
- (c) §3219(a)(5) requires that the interest rate to be charged or credited to underpayments and overpayments be specified in the contract and cannot exceed six percent. . (Best Practice)--The §3223(c) provision should also state whether and how much interest will be charged against or credited to such underpayments and overpayments. The rate must be the same for overpayments and underpayments. We may question any rate above six percent.

4. **Active Life Certificate**

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.

5. **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).

6. **Governing Law**

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.

C. **Regulation No. 139 -- Plan Benefit Rule Provisions Applicable To Synthetic Guaranteed Investment Contracts**

1. **General Notes**

To date, synthetic guaranteed investment contracts have been benefit responsive contracts funding defined contribution plans. As such, we applied the plan benefit rule provisions of Regulation No. 139.

2. **Purchase of Annuities**

- (a) For contracts that are group annuity contracts, and that make available to the contractholder the purchase of immediate or deferred annuities for the benefit of individual members of the group, an annuity may not be purchased without the delivery of the contractually agreed upon consideration in cash to the insurer from the segregated portfolio for

allocation to the insurer's general account or a separate account. The insurer shall collect adequate consideration for the cost of annuities purchased under contract option by transfer from the segregated portfolio.

**3. 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) Contracts 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.

**4. 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 at that time for the same class of contracts.
- (b) The betterment of rates provision ensures that annuities will be purchased on a new money basis.

**5. 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.
6. **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 at market value prior to maturity for the contribution. The contract must describe how such payment will be determined and identify the assets that will be liquidated to make such payment.
  - (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.
7. **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.
8. **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.

9. **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. The contract should describe how market value will be determined and what assets will be liquidated.
- (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.

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.

D. **Other Contract Provisions Applicable To Synthetic GICs**

1. **Unilateral Contract Terminations**

- (a) A contract must allow the insurer to unilaterally and immediately terminate, without future liability of the insurer or obligation to provide further benefits, upon the occurrence of any one of the following events that is material and that is not cured within thirty (30) days following the insurer's discovery of it:
  - (i) The investment guidelines, investment manager or custodian are changed without the advance consent or approval of the insurer and the investment manager is not controlling, controlled by or under common control with the insurer;

- (ii) The segregated portfolio, if managed by an entity that is not controlling, controlled by or under common control with the insurer, is invested in a manner that does not comply with the investment guidelines; or
  - (iii) Investment discretion over the segregated portfolio is exercised by or granted to anyone other than the investment manager.
  - (iv) Failure to provide required reports or information regarding current status of the segregated portfolio and of any and all transactions pertaining to the segregated portfolio on a timely basis;
  - (v) Limiting or restricting access to the permitted custodial institution in violation of the audit and inspection rights under the contract.
- (b) An insurer's decision not to terminate a contract upon the happening of a termination event should not be construed to constitute a waiver of such right. See *Waiver of Remedies* provision below.
- (c) Note that an insurer's decision not to terminate a contract upon the happening of a termination event triggers reporting requirements noted in the *Guidelines For Plans of Operation For Synthetic Guaranteed Investment Contracts*. See II.E.12.

## 2. **Automatic Discontinuance**

- (a) *Minimum Interest Rate Trigger*. We recommend that experience-rated contracts that provide for the periodic adjustment in interest rates to reflect the difference between the contract value record and the market value of the segregated portfolio include an automatic discontinuance provision.
- (i) The automatic discontinuance provision should be triggered when the contract value record exceeds the market value of the segregated portfolio to such an extent that the difference in value cannot reasonably be amortized over the duration of assets in the segregated portfolio or the period remaining until the contract's maturity date.
  - (ii) We have approved an automatic discontinuance if the credited rate falls below 3.0%. This minimum rate trigger serves to reduce the risk of loss when the difference between book value and market value increases.
  - (iii) The discontinuance would trigger a book value installment.
- (b) *Minimum Balance Trigger*. We would not object if a contract provides for automatic discontinuance when the market value of the segregated portfolio falls below a specified amount, such as \$25 or \$50 million.

## 3. **Investment Management Controls – Contract Safeguards**

- (a) The contract should provide that the insurer will receive prior notice of and the right to approve any appointment or change of investment managers, if the investment manager is an entity other than the insurer or its wholly owned subsidiary;
- (b) The contract should provide that the insurer must approve the investment guidelines before the contract becomes effective and that

the insurer will receive prior notice of and the right to approve any change in the investment guidelines.

- (i) Note that if the investment guidelines do not conform to the investment guidelines submitted with the plan of operation, the plan of operation and the contract may need to be amended and approved by the Department.
- (c) The contract should give the insurer the unilateral right to discontinue or terminate the contract whenever
  - (i) the investment guidelines and/or the investment manager are changed, without the insurer's prior consent, or
  - (ii) the segregated portfolio is not managed in accordance with the investment guidelines.
- (d) The contract may provide a reasonable time period for the investment manager and/or the contractholder to take corrective action.

#### 4. **Contract Discontinuance and Termination**

- (a) The contract should provide either a fixed maturity schedule or a settlement option permitting the contractholder to receive the contract value record over time, provided that no unilateral contract termination event has occurred;
- (b) Market Value Option
  - (i) When the synthetic guaranteed investment contract terminates, no transfer of assets to the contractholder is necessary, since the segregated portfolio is not held by the insurer.
  - (ii) Any transfer to the contractholder is limited to the excess of the contract value over market value.
- (c) Installment Option (for Evergreen Contracts)
  - (i) The contract may provide for a book value installment option to preserve book value accounting. In such case, the synthetic guaranteed investment contract converts to provide a laddered maturity.
  - (ii) Any transfer of assets to the insurer should be subject to safeguards, such as Department approval, to prevent the transfer of questionable assets.
  - (iii) The contract should indicate whether it will continue to be benefit responsive and describe the contract's allocable share of plan benefit withdrawals during the discontinuance phase.
  - (iv) This option need not be made available in the case of a unilateral contract termination event.

#### 5. **Clone Contract Provision**

- (a) We have approved provisions that provide for the issuance of a substantially similar contract 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 contractholder should be advised of the actual charges, if any, at the time of the event.
6. **Segregated Portfolio.**
- (a) The contract shall provide that the assets to which the contract pertains and for which a contract value record is established will be maintained in a segregated portfolio of a permitted custodial institution;
  - (b) This provision addresses a number of provisions in §4240 of the Insurance Law, including the isolation/segregation, asset identification, asset ownership and insulation provisions in Section 4240(a)(1), (2) and (12) of the Insurance Law.
    - (i) The segregation provision makes it clear that income, gains and losses, whether or not realized, from assets allocated to a segregated portfolio shall be credited to or charged against such account without regard to other income, gains or losses of the insurer.
    - (ii) The asset identification provision requires the contract to identify the investments that are contractually permitted for such separate account.
  - (c) This provision should identify the owner of the segregated portfolio assets.
  - (d) The use of a segregated portfolio makes an insulation provision unnecessary. It is clear that the assets in segregated portfolio owned by the contractholder will not be chargeable with liabilities arising out of any other business of the insurer.
    - (i) 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.
    - (ii) Amounts allocated to one or more supplemental accounts to meet the minimum asset requirement for a synthetic guaranteed investment contracts cannot be insulated. See §97.3(ag) of Regulation No. 128.
7. **Audit and Inspection Rights and Reports.**
- (a) The contract should grant the insurer the right to perform audits and inspections of assets held in the segregated portfolio from time to time upon reasonable notice to the permitted custodial institution;
  - (b) The contract should provide for periodic reporting of the investments held in the segregated portfolio as well as the transactions affecting such investments since the last report.
8. **Guarantees of Value.**

- (a) *Guarantees.* The contract should identify and describe any guarantee of the value of the assets allocated to the segregated portfolio, or any interest therein, or investment results thereof, or income thereon.
  - (i) Note that separate account agreements 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 or certificate holder in assets allocated to the separate account, unless the separate account and separate account agreement satisfies items (i), (ii), or (iii) of §4240(a)(5) of the Insurance Law,. There may be no guarantee of the value of the assets allocated to a separate account, except as permitted under Section 4240(a)(5).
  - (ii) Synthetic guaranteed investment contracts most closely resemble §4240(a)(5)(iii) and Regulation No. 128 contracts.
- (b) *Contract Value Record.* The contract shall give a description of how the contract value record will be determined, and, where applicable, adjusted by a crediting rate formula;
- (c) *Crediting Rate.* The contract shall state the
  - (i) Fixed interest rate and the duration of such guaranteed crediting rate;
  - (ii) Maximum rate period between crediting rate formula recalculations that will be permitted, if any, for experience-rated evergreen contracts; and
  - (iii) Crediting rate formula, if any, with an explanation that such formula takes into account the difference between the market value record and the contract value record over time.
  - (iv) A contract may provide for adjustments in the crediting rate formula or more frequent redeterminations of the crediting rate when the duration of the segregated portfolio falls below a specified level (e.g., 1.0).
  - (v) The contract may provide for a modification in the crediting rate if the contractholder requests withdrawals other than for participant initiated withdrawals or makes contributions in excess of those anticipated under the initial formula or upon discontinuance.

9. **Valuation.**

The contract or investment guidelines attached to the contract should describe how fair market value will be determined and specify the dates on which the assets of the segregated portfolio will be valued. If there is no readily available market for assets in the segregated portfolio, the contract or investment guidelines attached to the contract should include a description of the rules for valuing securities and other assets that are not publicly traded.

10. **Deposit Restrictions.**

The contract shall provide the insurer with the right to refuse to recognize any new deposits to the segregated portfolio unless there is a written agreement between the insurer and the contractholder as to the permissible levels and timing of new deposits;

**11. Benefit Responsiveness.**

The contract should identify all circumstances under which insurer payments or advances to the contractholder are to be made, including any deferral rights with respect to such payments or advances;

**12. Market Value Withdrawals.**

The contract shall clearly identify the types of withdrawals made on a market value basis.

**13. Waiver of Remedies**

(a) The contract shall include a provision stating, or substantially similar to, the following:

“No waiver of remedies by the insurer that is a party to this agreement, following the breach of any contractual provision of the agreement or of the investment guidelines applicable to it, or failure to enforce the provisions or guidelines, which constitutes grounds for termination of this agreement for cause by the insurer, and is not cured within thirty (30) days following the insurer's discovery of it, shall be effective against an insurance commissioner in any future rehabilitation or insolvency proceedings against the insurer unless approved in advance in writing by the commissioner.”

(b) This waiver language is designed to protect the Department in the event that the insurer is placed in rehabilitation. The Department would replace a domestic insurer in such case and could exercise contractual termination rights to reduce and/or eliminate the contract liabilities.

**14. 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) Requiring a book value payment upon credit rating downgrade would be prejudicial to persisting contractholders who would be required to subsidize such termination and withdrawal activity.

(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).

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

- (a) The Department has permitted insurers to issue GICs that credit an amount in excess to the actual contribution equal to the market-value adjustment charged on the transfer of funds from the another contract and credit a reduced interest rate designed to amortize the excess amount over guaranteed interest period. This market value make-up or advance interest credit allows plan sponsors to maintain book value accounting at the plan participant level and allowed insurers to conserve existing group annuity business.
- (b) For synthetic guaranteed investment contracts, on the effective date of coverage, the market value of assets (less deductions provided for in §97.5(d) of Regulation No. 128) must equal or exceed 100% of the minimum value of guaranteed contract liabilities (determined in accordance with §97.5(k) of Regulation No. 128). The submission letter should indicate whether any such excess amount will be credited to the contract.
- (c) 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.
- (d) 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).

**16. 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, we have accepted the 83 GAM with projection scale H. We encourage insurers to begin to use the 94 GAR Table.
- (c) With respect to interest, the interest rate guarantee should be conservative such as 3%.
- (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).

## V. Regulation No. 128 Rules for Synthetic Guaranteed Investment Contracts

1. **General Note.** In general, synthetic GIC arrangements must comply with the operational requirements of Regulation No. 128. Please note that we have substituted segregated portfolio for separate account in Regulation No. 128.
2. **Demonstrate Adequacy of Risk Charges §97.6**
  - (a) *AOM Requirement.* The insurer may guarantee benefits in the segregated portfolio 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 segregated portfolio with respect to such guarantee, the assets of the segregated portfolio 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 segregated portfolio, 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 segregated portfolio 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 segregated portfolio, or a subportfolio thereof, being duration matched, the actual experience of the segregated portfolio 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 or segregated portfolio, or a subportfolio thereof, being cash-flow matched, the cash inflows from the segregated portfolio 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 segregated portfolio 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 segregated portfolio 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.
  - (c) 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 (or segregated portfolio) less the deductions.
4. **Asset Shaves or Deductions -- §97.5(d).**
- (a) The insurer must deduct the percentage specified in §97.5(d) based on the type of segregated portfolio 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
    - (i) The diversification requirements are not satisfied (10% increase);
    - (ii) 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 segregated portfolio assets are subject to the following limitations:
    - (i) For synthetic guaranteed investment contracts, segregated portfolio 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 (or segregated portfolio) assets.
    - (ii) Segregated portfolio assets that do not comply with items (i) 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 segregated portfolio assets and any failure of any such assets to comply with additional investment restrictions or additional deductions from market value in determining asset maintenance and reserve requirements.
    - (i) As noted above, we have only approved synthetic guaranteed investment contracts that provide fixed benefits only.
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 synthetic guaranteed investment 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 cash flows).
  - (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)**
- (a) The amount accumulated from risk charges deducted from considerations received or from the segregated portfolio), 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.
  - (b) 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.

## VI. 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 which 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.

**VII. 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 on 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.

# SYNTHETIC GUARANTEED INVESTMENT CONTRACTS 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
- Minimum Deposit Amount;  Minimum Account Balance
- 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 \_\_\_\_\_
- 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 ( Investment Management Agreement;  
 Investment Guidelines;  Custodial Agreement)
- 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
- Officer's Signatures

### B. Standard Provisions

- Grace Period
- Entire Contract
- Misstatement of Age or Sex
- Retired Life Certificate
- Governing Law

### Regulation No. 139 -- Plan Benefit Rule Provisions Applicable To Synthetic Guaranteed Investment Contracts

- Purchase of Annuities
- 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
- Competing Funds Provision

### Other Contract Provisions Applicable To Synthetic GICs

- Unilateral Contract Terminations
- Automatic Discontinuance
- Investment Management Controls – Contract Safeguards
- Contract Discontinuance and Termination
- Clone Contract Provision
- Segregated Portfolio
- Audit and Inspection Rights and Reports
- Guarantees of Value
- Valuation
- Deposit Restrictions
- Benefit Responsiveness
- Market Value Withdrawals
- Waiver of Remedies
- Credit Rating Downgrade Provisions
- Market value Make-Up/Advance Interest Credit Provisions
- Purchase Rate Guarantee/Unilateral Change