



SYNTHETIC GUARANTEED INVESTMENT CONTRACTS

(Last Updated 06-03-13)

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SYNTHETIC GUARANTEED INVESTMENT CONTRACTS

(Last Updated 06-03-13)

This product outline is current as of June 3, 2013. Subsequent changes to statutes, regulations, circular letters, etc., may not be reflected in the outline. In case of any doubt, please contact the Life Bureau.

I) Applicability

I.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. This product outline replaces the Synthetic Guaranteed Investment Contracts outline dated 7/17/00.

I.B) Market Limitations

B.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.

B.2) Defined Benefit Plans

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

B.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) The Department has limited its exercise of discretion in approving synthetic guaranteed investment contracts to use only in conjunction with employer pension plans.

I.C) Product Design Features

C.1) General Note

The synthetic guaranteed investment contracts are generally modeled after unallocated benefit responsive Regulation 128 guaranteed separate account products funding defined contribution plans offered by life insurers.

- (a) Such Regulation 128 contracts are supported primarily by high quality fixed income assets in a pooled or non-pooled separate account. 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.

C.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.

C.3) Fixed Rate/Fixed Maturity Product

We have granted synthetic guaranteed investment contract approval where the contract is modeled after the traditional general account fixed rate, fixed maturity (non-experience-rated) contract.
Recommended Practice: Additional safeguards are recommended for this design, including a requirement that the insurer serve as the investment manager.

C.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-and-hold strategy assets are not actively managed and are sold only as needed to accommodate withdrawals and payments.

C.5) Pooled Arrangements

(a) Synthetic GICs have typically been approved for non-pooled arrangements (i.e. single client). However, we have also approved pooled arrangements in which supporting assets are held in trust on behalf of two or more plans.

(b) Pooled arrangements 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.

C.6) No Guaranteed Index or Minimum Return Products

Synthetic guaranteed investment contracts have not been approved for use 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.

C.7) No Immediate Participation Guarantee Arrangements

Synthetic guaranteed investment contracts have not been approved for use in connection with defined benefit plans funding annuity benefits on retired and terminated vested employees under immediate participation guarantee arrangements.

I.D) Authority

D.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 Section 1113(a)(32) (formerly Section 1113(a)(30)) of the Insurance Law.

(b) Section 1113(a)(32) 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 Section 1113 and for purposes of the Insurance Law shall be deemed to be included in that kind of insurance.

D.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 in group life insurance or reinsurance.

(b) The use of the term “ancillary activity” is unfortunate because

- (i) The term was intentionally omitted from current Section 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 Section 1113(a)(32) characterization, guaranty fund protection appears to be available.
- (c) A synthetic guaranteed investment contract authorized under Section 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” for purposes of guaranty fund protection under Article 77 of the Insurance Law.

D.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.

D.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.

D.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 Section 1113 of the Insurance Law; or
- (b) Engaging in any business authorized by Section 1714 of the Insurance Law.

I.E) Definitions

E.1) Annuities

Annuities means all agreements to make periodic 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 any such payment depends upon the continuance of human life. Section 1113(a)(2). Note that period certain annuities were first authorized in New York by Section 1 of Chapter 864 of the Laws of 1985.

E.2) Contractholder

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

E.3) Contract value record

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.

E.4) Crediting rate formula

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.

E.5) Employee

Employee may include retired employees, employees of affiliates and subsidiaries of the employer, individual proprietors affiliated with the

employer, and partners and employees of individuals affiliated with the employer and of firms controlled by the employer. Section 4238(c).

E.6) Group annuity contract

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.

E.7) Investment guidelines

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 guidelines 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.

E.8) Investment manager

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.

E.9) Market value record

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.

E.10) Participant

Participant means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or

members of such organization, or whose beneficiaries may be eligible to receive any such benefit. See Section 3(7) of ERISA.

E.11) Permitted custodial institution

Permitted custodial institution means a bank, trust company or other licensed fiduciary services provider authorized to act as a custodial institution.

E.12) Segregated portfolio

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.

E.13) Synthetic guaranteed investment contract

Synthetic guaranteed investment contract means a group contractual 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.

E.14) Unallocated contract

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 Section 3219(b) or Section 3223(d) of the Insurance Law for unallocated contracts.
- (c) The insurer is not irrevocably committed to support under the terms of the contract the payment of benefits by the contractholder to specific plan participants or their beneficiaries or the purchase of annuities for specific plan participants.

E.15) Unallocated amounts

Unallocated amounts means any funds credited to the segregated portfolio which the insurer is not currently irrevocably committed to support under the terms of the contract for the payment of benefits to specific plan participants or beneficiaries or for 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 Section 40.2(z) of Regulation 139.

E.16) Unilateral contract termination event

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.

I.F) Key References

F.1) Insurance Law

Sections 1101, 1113, 1313, 1714, 2123, 3103, 3201, 3204, 3209, 3212, 3214, 3222, 3223, 3227, 4217, 4224, 4226, 4231, 4238, 4239, 4240, 4241; N.Y. Education Law, Art. 8-C, Section 398 *et seq.*; N.Y. State Finance Law Section 5.

F.2) Regulations

Under 11 NYCRR: Regulation 139, Regulation 128, Regulation 34A, Regulation 151; also 9 NYCRR 9000 *et seq.*

F.3) Circular Letters

CL 4 (1963), CL 6 (1963), CL 1 (1964), CL 12 (1976), CL 2 (1992), CL 12 (1995), CL 12 (1995) Supp. 1, CL 14 (1997), CL 14 (1983), CL 2 (1998), CL 8 (1998), CL 8 (1999), CL 6 (2004), CL 27 (2008)

II) Filing Process

II.A) General Information

A.1) Prior Approval Requirement:

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

(a) Non-Conforming Contract Requirement

Note that pursuant to Section 3103(a) of the Insurance Law, any life insurance policy or annuity contract which contains 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

Approvals are typically granted on a one-case basis. The contract provisions must be consistent with the approved plan of operation.

A.2) Discretionary Authority For Disapproval

Section 3201(c)(1) and (2) permits the Superintendent to disapprove any policy form that contains provisions that are misleading, deceptive, unfair, unjust, or inequitable or if its issuance would be prejudicial to the interests of policyholders or members. See also Sections 2123, 3209, 4224, 4226, 4238(e), 4231, 4239.

A.3) No Filing Fee

A.4) Self-Support Requirement

No domestic, foreign or alien life insurance company shall be permitted to do business in this state if it hereafter issues, within or without this state, any Synthetic Guaranteed Investment Contract which on its issuance does not appear to be self-supporting on reasonable assumptions as to interest, mortality and expenses. See Section 4238(e).

II.B) Types of Filings

B.1) Prior Approval

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

B.2) Alternative Approval Procedure

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

Circular Letter No. 2 (1998) provides that the certification of compliance for this type of submission should make reference to any

law or regulation that specifically applies or is unique to the type of policy form submitted. At a minimum, the certification should refer to Sections 1714, 3223, 4238, and 4240 of the Insurance Law, Regulation Nos. 128 and 139, to the extent applicable, and the scope of the Department plan of operation approval for the synthetic guaranteed investment contract. An alternative would be to submit a certification of compliance with the applicable laws and regulations cited in this product outline. A statement that the filing is in compliance with all applicable laws and regulations is not acceptable.

B.3) Prior Approval with Certification Procedure

The Circular Letter No. 6 (2004) expedited approval procedure is not available for synthetic guaranteed investment contracts unless the Department has given prior permission.

B.4) Out-of-State Filings

Filing Requirement for Domestic Insurers: Pursuant to Section 3201(b)(2), domestic insurers must file all unallocated synthetic guaranteed investment contracts intended for delivery outside of the state.

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

C.1) Purpose

Circular Letter 64-1 permits insurers to provide or assume risk for group life and group annuity coverage prior to the filing or approval of such forms.

C.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 for filing. 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) A statement explaining the circumstances and reasons for the delay in submitting the forms must be submitted within twelve months.
 - (ii) A follow-up statement must be submitted every six months until form is submitted. If reason for delay is unacceptable, Department may pursue a violation under Section 4241 for willful violation of the prior approval requirement.
- (e) Recommended Practice
 - (i) It is recommended that insurers notify the Department of coverage within 30 days (i.e. copy of the confirmation letter) of coverage and submit forms within six months, notwithstanding the twelve month period noted in Circular Letter 64-1. (Best Practice).
 - (ii) Insurers should review pre-filings periodically (monthly) to verify compliance with conditions for pre-filing.
 - (iii) 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.

C.3) Additional Conditions for Synthetic GICs

- (a) We have approved the use of Circular Letter 64-1 procedures for single-case synthetic GIC filings, subject to the following conditions:
 - (i) All explanations, conditions and assurances required for synthetic GIC filings generally must be provided in the correspondence file;
 - (ii) The submission letter must state that the contract: (i) does not vary from the contract terms specified in the product outline, and (ii) is in agreement with the scope and conditions of the approval for the plan of operation;
 - (iii) The submission letter must state that on the effective date of the contract, the market value of assets (less deductions provided for in Section 97.5(d) of Regulation 128) equaled or exceeded 100% of the minimum value of guaranteed contract liabilities (determined in accordance with Section 97.5(k) of Regulation 128);
 - (iv) Notice of such coverage be furnished to the Department within 30 days of the effective date (Best Practice);
 - (v) The Life Bureau (New York Office) must approve the plan of operation prior to binding the risk; and
 - (vi) The company must submit a copy of the custodial agreement for our file, if requested.

II.D) Preparation of Forms -- Circular Letters 1963-6 and 1963-4

D.1) Duplicates

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

D.2) Form Numbers

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

D.3) Hypothetical Data

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

D.4) Application

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

D.5) Final format

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

D.6) Submissions Made on Behalf of Company

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

- (a) on company letterhead or include the company name in the subject line of the letter;
- (b) specifically addressed to the New York State Department of Financial Services;
- (c) properly executed by an authorized officer of the insurer;
- (d) dated; and
- (e) either (i) specific to the file submitted for approval by including form number(s); or (ii) generally applicable to all policy forms filed on behalf of the insurer as long as a copy of such authorization is included in each submission.

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

D.7) Incorporation by Reference

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

II.E) Submission Letters/SERFF Requirements

E.1) Caption Requirement

For paper filings, the “re” of the submission letter must identify each form and the memorandum of variable material, if any, for each form that is being submitted for approval or filed for informational purposes, must designate each form as group (rather than individual), and must provide a generic product description and generic form description. See Circular Letter No. 8 (1999). Section 3201(b)(6) (“Deemer”) filings must be identified in the “re” or caption.

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

E.2) Submission Letters/SERFF Filing Description

Circular Letter No. 6 (1963) Section I.G

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

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

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

- (e) If a form is intended to replace a very recently approved form because of an error found in the approved form and the approved form was not issued, the insurer may request to make a substitution of the approved form. The substitution request letter must confirm that the form has not been issued. The insurer may, under these circumstances, use the same form number on the corrected form being submitted. If the original form was approved in paper format, the insurer must also return the stamped original of the approved form to the Department. If, however, the form has been issued, the insurer must place a new form number on the corrected form and need not return the previously approved form. This option is not available for policy forms approved under Circular Letter 6 (2004) filings.
- (f) If the form being submitted is other than a contract (e.g., rider, endorsement, or insert page), give the form number of the contract with which it will be used, or, if for more general use, describe the type or group of such forms as well as whether the pending form(s) will be used with new and/or previously issued/delivered contracts.
- (g) When the policy form is designed as an insert page form, the insurer must submit a statement of the mandatory pages which must always be included in the policy form, and a list of all optional pages, if any, including application forms, together with an explanation of how the form will be used (previously approved forms should be identified by form number and approval date). We object to a company's use of the matrix approach that identifies benefit provisions within a document with separate form numbers. See Circular Letter No. 6 (1963) Section I.G.8 and Circular Letter No. 4 (1963) Section I.A.2.
- (h) Statement as to how the form will be used and how it will be marketed, as described in Circular Letter 1976-12.
- (i) Description of benefits/coverage provided. Circular Letter No. 6 (1963) Section I.G.2 and 7.
- (j) Type of group contractholder. Specify relevant paragraph of Section 4238(b) or describe Section 1714 holder. See Section III below.
- (k) Classes covered, as defined in Section 4238 if not all persons are eligible (i.e. conditions pertaining to employment or a combination of conditions pertaining to employment and family status).
- (l) Statement as to whether the contract is noncontributory, contributory or funded solely by employee or member contributions. If the policy is contributory for some insureds, or for some levels of insurance, or under some conditions, indicate what situations or conditions would permit or require contributions from the insureds.
- (m) Statement describing the type of pension plan or other program funded by the policy.

- (n) 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.
- (o) If the form does not comply with a specific product outline provision or if the company has an alternate interpretation of a product outline provision, the submission letter must identify the provision and provide a complete explanation of the company's position on the issue.

E.3) Resubmissions

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

E.4) Circular Letter No. 14 (1997)

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

E.5) Informational Filing

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

E.6) Synthetic GIC – Plan of Operation

For synthetic guaranteed investment contracts, the submission letter should indicate whether the plan of operation of the synthetic guaranteed investment contract 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 operation has to be approved prior to a contract being issued.

- (b) The synthetic guaranteed investment contract can be reviewed and approved even if the plan of operation 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 operation.
 - (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.

E.7) Synthetic GIC – Reserves

For synthetic guaranteed investment contracts, the submission letter should state that the Regulation 128 reserve and asset maintenance requirements will be satisfied. See Section 97.4(c) of Regulation 128.

E.8) Synthetic GIC – Minimum Values

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.

II.F) Attachments To Submission

F.1) Explanation of Variable Material

Bracketing of the form provisions for variability would not be expected for a one-case basis filing. If a general basis filing includes forms with bracketed material, the submission must include a separate detailed Memorandum of Variable Material to explain any variable material in the policy forms. The Memorandum of Variable Material should be drafted in sufficient detail to determine the scope of variation for each variable item. Where text is variable, the memorandum should include alternative text and/or an explanation of when the bracketed text will be omitted from the form. Similarly, variable numerical items should include the range (i.e. minimum and maximum) of variation. It should be clear which item in the explanation corresponds to which variable item in the form. One option would be to number the items in the explanation of variable material and place the number of the item from the explanation next to the corresponding variable item in the form.

The Memorandum of Variable Material is subject to approval and must comply with all substantive and procedural filing guidance issued by the Department.

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

F.2) Flesch Score Certification – Readability Requirement

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

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

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

- (i) any certificates issued pursuant to a group life or accident and health insurance policy or group annuity contract issued to an employer covering persons employed in more than one state,
- (ii) any group insurance policy covering a group of one hundred or more lives, other than dependents, at the date of issue, provided that this exclusion does not apply to certificates delivered or issued for delivery in this state,
- (iii) any group annuity contract which serves as a funding vehicle for pension, profit sharing or deferred compensation plans; provided that this exclusion does not apply to any certificate issued pursuant to such group annuity contract.

F.3) Summary Sheet

For group products, including group annuity, group funding agreement, and synthetic GIC policy forms, a completed summary sheet must be included with the submission regardless of the submission method.

The summary sheet is available on the Department's website at

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

F.4) Plan of Operation and Actuarial Materials

The synthetic GIC contract form submission shall be accompanied by a copy of the approved or pending plan of operation subject to Section 97.4 of Regulation 128 and an undertaking to file annual actuarial opinions and memoranda in conformity with Section 97.6 of Regulation 128.

II.G) Guidelines For Synthetic GIC Contract Plan of Operation

The insurance company shall file for approval with our NYC office a plan of operation, subject to Section 97.4 of Regulation 128 for the synthetic

guaranteed investment contract, accompanied by the synthetic guaranteed investment contract, and an undertaking to file actuarial opinions and memoranda satisfying the requirements of Section 97.6 of Regulation 128. [Until a synthetic guaranteed investment contracts regulation is promulgated by the Department, the term “segregated portfolio” should be substituted for “separate account” in Section 97.4 and other sections of Regulation 128.] Additionally, the Department requires a report to our NYC office once each year from insurers that fail to terminate a synthetic guaranteed investment contract when a termination event occurs, describing the corrective action to be taken. Questions related to the procedures or content of Synthetic GIC plan of operations filings or reports should be directed to our NYC office.

III) Eligible Group Requirements

III.A) Eligible Groups

Since synthetic guaranteed investment contracts have been approved in New York only for issue to wrap pension plans, the types of eligible group contractholders are described in Section 4238(b)(1)-(4).

- A.1) Employer Group. Section 4238(b)(1).
- A.2) Employers’ Association Group. Section 4238(b)(2).
- A.3) Labor Union Group. Section 4238(b)(3).
- A.4) Bona Fide Trust Group. Section 4238(b)(4).

Synthetic guaranteed investment contracts are not approved for issue to 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.

III.B) Special Rules For Specific Plan Purchasers

- B.1) N.Y. Education Law, Art. 8-C, Section 398 *et seq.*—contains special statutory rules relating to tax-sheltered annuity (TSA) programs (referred to in the statute as “Special Annuity Programs”).
- B.2) N.Y. State Finance Law Section 5—basic statutory rules establishing the N.Y. Deferred Compensation Board for the administration of governmental deferred compensation plans (Section 457 plans) in New York State.
- B.3) New York State Deferred Compensation Board Rules. See 9 NYCRR 9000 *et seq.* The rules impose substantive requirements on the content of annuity contracts (and other contracts) issued to the Section 457 plans of the State and local governments in New York.

III.C) Unauthorized Insurers

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

The group exception applies to group annuity contracts where the group conforms to the definitions of eligibility in certain paragraphs of Section 4238(b) of the Insurance Law, including paragraphs (1) through (4), and the master contracts were lawfully issued without this state in a jurisdiction where the insurer was authorized to do an insurance business.

- C.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, such as IRC §408 contracts (IRAs), IRC §403(b) contracts (Tax Sheltered Annuities), and plans under which payments are derived wholly from funds contributed by the persons covered thereunder. See L.1978, c.428.
- C.4) As such, any New York certificate funded solely by employee or individual contributions is subject to prior approval.

IV) Contract Provisions

IV.A) Cover Page of the Contract and Certificate

A.1) Company's Name and Address

- (a) The New York licensed insurer's name should appear on the cover page (front or back).
- (b) Full street address of the company's Home Office (bracketed or underlined to reflect possible future changes) for disclosure purposes on the front or back cover page of the contract. For changes applicable to new business, an information filing is required. For changes applicable to existing business, an endorsement setting forth the new address must be submitted for approval and sent to all holders of in-force contracts. Please refer to the guidance available on the Department's website.
- (c) In addition to the home office address, the full street address of the administrative or service office (if different than the home office address) may be set forth on the front or back cover of each contract. The administrative or service office address, if any, should be bracketed or underlined to reflect possible future changes. (An informational filing is required for such changes.)
- (d) If the name of another entity is included on the cover page (e.g., insurance group designation, name of licensed parent company or licensed affiliate, etc.) or if a logo, trademark or other device is included, such name or device shall not be displayed in a manner that would have a tendency to mislead or deceive as to the true identity of the insurer, or create the impression that someone other than the insurer would have any responsibility for the financial obligations under the contract. See Section 3201(c)(1). This would apply to applications as well.

A.2) Form Identification Number

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

A.3) Brief Description of Contract – 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. See Section II.F.1 of Circular Letter No. 4 (1963).

A.4) Officer’s Signature

- (a) The signature of at least one officer of the company is needed to execute the synthetic guaranteed investment contract 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.

IV.B) Standard Provisions

B.1) Grace Period – Section 3223(a)

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. 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.

B.2) Entire Contract – Section 3223(b)

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 also Section 3204. Synthetic guaranteed investment contracts often refer to the following:

- (a) Investment Management Agreement;
- (b) Investment Guidelines; and
- (c) Custodial Agreement.

B.3) Misstatement of Age or Sex – Section 3223(c)

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.

- (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) Section 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 Section 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.*

B.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 Section 160(d) [now Section 3223(d)] of the Insurance Law to eliminate the requirement for an active life certificate for contributory plans if the contract does not provide for the maintenance of one or more accounts for each annuitant.

B.5) Retired Life Certificate

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

- (v) A facility of payment provision. Note that such provision should not conflict with Article 81 of the New York Mental Hygiene Law and the Americans with Disability Act. In New York, until a person is found to be legally incompetent to handle annuity payments and a guardian has been appointed, the insured is entitled to such payments.
- (vi) A beneficiary provision.
- (c) Section 3223(e) requires delivery of a certificate to each person to whom annuity benefits are being paid. This requirement is not dependent upon whether or not such annuity payments are guaranteed. For example, certificates would be required where the contract provides for annuity benefits that are not guaranteed by the insurer and are paid by the insurer at the direction of the contractholder. If non-guaranteed annuity benefits are provided, the retired life certificate must clearly disclose any limitations on the insurer's guarantees under the certificate.
- (d) The retired life certificate should be submitted for review, unless a previously approved certificate will be used. In such case, the submission letter should specify the form number, file number and approval date. Please note that retired life certificates are considered policy forms as defined in Section 3201(a).

B.6) Governing Law

Pursuant to Section 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.

IV.C) Regulation 139 -- Plan Benefit Rule Provisions

C.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 139.

C.2) Purchase of Annuities

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.

C.3) Plan Benefit Rule

Section 40.4(a) of Regulation 139 -- 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.

- (a) Contracts funding defined contribution plans that are benefit responsive must comply with the plan benefit rule.
- (b) The lump sum payment cannot be subject to a market value adjustment.
- (c) 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 Section 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.

C.4) Betterment of Rates

Section 40.4(b) of Regulation 139 -- Contracts funding defined contribution plans must 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.

The betterment of rates provision ensures that annuities will be purchased on a new money basis.

C.5) Allocated Share of Benefit Payments

Section 40.4(c) of Regulation 139 -- 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.

- (a) 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.
- (b) We have approved last-in, first-out provisions; first-in, first-out provisions; pro-rata provisions; buffer fund provisions and combination provisions.

C.6) Participant Directed Investment Option

Section 40.4(d) of Regulation 139 -- 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.

- (a) 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.
- (b) 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 Section 40.4(b) is similar to Section 44.3(t) in Regulation 127.

C.7) Plan Amendments or Changes In Plan Administration

Section 40.4(e) of Regulation 139 -- If the plan terms or the manner in which the plan is administered materially change after issue, withdrawals from the contract to pay plan benefits are not subject to the plan benefit rule.

- (a) Contracts should include this provision to protect against antiselection.
- (b) 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.

C.8) Bona Fide Termination of Employment

Section 40.4(f) of Regulation 139 -- 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.

- (a) 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.
- (b) 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 risks 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.

C.9) Non-Benefit Related Withdrawals and Transfers

For withdrawals that are not subject to Section 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.

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.

C.10) Competing Funds Provision

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

IV.D) Other Contract Provisions Applicable To Synthetic GICs

D.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 referenced in section II.G above, *Guidelines For Plan of Operation For Synthetic Guaranteed Investment Contracts*.

D.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% as a Best Practice. 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 million or \$50 million.

D.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.

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.

D.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 must be subject to safeguards, including prior 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.

D.5) Clone Contract Provision

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, sale, or discontinuance of all or part of the plan sponsor's business.

- (a) The clone contract should satisfy the insurer's underwriting requirements.
- (b) 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.

D.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 Section 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.
- (c) 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.
- (d) The asset identification provision requires the contract to identify the investments that are contractually permitted for such segregated portfolio.
- (e) This provision should identify the owner of the segregated portfolio assets.
- (f) The use of a segregated portfolio makes an insulation provision unnecessary. It is clear that the assets in the segregated portfolio owned by the contractholder will not be chargeable with liabilities arising out of any other business of the insurer.

- (g) Section 97.5(j) of Regulation 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.

D.7) Supplemental accounts

Amounts allocated to one or more supplemental accounts (i.e. market value separate account(s)) to meet the minimum asset requirement for a synthetic guaranteed investment contracts cannot be insulated. See Section 97.3(ag) of Regulation 128.

D.8) 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.

D.9) 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.
- (b) 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 item (i), (ii), or (iii) of Section 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).
- (c) Synthetic guaranteed investment contracts most closely resemble Section 4240(a)(5)(iii) and Regulation 128 contracts.

D.10) 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.

D.11) Crediting Rate

The contract shall state the:

- (a) Fixed interest rate and the duration of such guaranteed crediting rate;
- (b) Maximum rate period between crediting rate formula recalculations that will be permitted, if any, for experience-rated evergreen contracts; and
- (c) 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.
- (d) 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).
- (e) The contract may provide for a modification in the crediting rate if the contractholder requests withdrawals other than for participant-initiated withdrawals and plan benefit payments or makes contributions in excess of those anticipated under the initial formula or upon discontinuance. The interest rate credited cannot be affected by such withdrawals until the next reset except for exceptional circumstances as specified in the contract.

D.12) 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.

D.13) 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.

D.14) 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.

D.15) Market Value Withdrawals

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

D.16) 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 superintendent in any future rehabilitation or insolvency proceedings against the insurer unless approved in advance in writing by the superintendent.”

- (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.

D.17) 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 Section 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 Section 3201(c)(6).

D.18) Market Value Make-Up/Advance Interest Credit Provisions

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

The Department has permitted the use of these provisions for synthetic GICs under the following conditions and circumstances:

- (a) The advance interest credit or book-in amount cannot exceed 5% of the asset portfolio corresponding to the guarantees provided by the synthetic GIC contract. The Department will consider book-ins that exceed this amount on a case-by-case basis taking into account the safeguards in place to address the risk assumed by the company.
- (b) The book-in provision can only be used with unallocated contract funding the fixed income fund (stable value fund) of defined contribution plans and the funds cannot derive from equity separate account agreements. This provision should not be used to recover losses on equity investments.
- (c) The insurer must not be proactive in using book-ins as a marketing strategy. Book-ins should only be used as a business conservation measure or in limited cases at the request of a plan sponsor. Book-ins used in connection with new business should represent a small percentage of new business and only a small number (i.e. less than ten) per year. As an alternative, we would consider an aggregate book-in limit, the amount of which will depend on the circumstances of each insurer.
- (d) 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.
- (e) Except as noted below, 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 value of the asset portfolio corresponding to the guarantees provided by the synthetic GIC contract) for the previous year. Such notification is not required if in the previous year:
 - (i) the total of all book-in amounts in force is less than \$25 million; and
 - (ii) either:
 - (I) there were fewer than 20 book-ins; or
 - (II) the total book-in amount for was less than \$5 million dollars.

In determining whether the Department must receive this notification all book-ins should be considered.

D.19) Purchase Rate Guarantee/Unilateral Change

The mortality and interest basis for guaranteed purchase rates should be stated in the contract. Any change in the guaranteed annuity

purchase rates may only be effective for new contributions and such change may only be made if the contract specifically allows for it.

- (a) With respect to mortality, the mortality rates should be conservative
- (b) With respect to interest, the interest rate guarantee should be a conservative rate.
- (c) 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 Section 40.4(a) of Regulation 139.
- (d) Circular Letter No. 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.
- (e) See also Regulation 151 (11 NYCRR 99) — *Mortality Tables to be Used in Determining Reserve Liabilities for Annuities and Pure Endowments*—Under Reg. 151, the 1994 Group Annuity Mortality (GAM) table must be used to determine minimum standards of valuation for all annuities purchased on or after January 1, 2000 under a group annuity contract, excluding any disability and accidental death benefits purchased under such contracts. See Section 99.10(d).
- (f) Regulation 151 acknowledges that the 1994 GAM Table is sex-distinct and intended to be used to place "sound value" on liability assumed for benefits purchased. See Section 99.10(h)(1).
- (g) To comply with state and federal statutes prohibiting sex discrimination, Reg. 151 permits insurers to use appropriate mortality tables having the same rates for men and women to determine nonforfeiture benefits, the purchase price of annuities, and the equivalent value of optional benefits. See Section 99.10(h)(2).

V) Regulation 128 Rules for Synthetic Guaranteed Investment Contracts

V.A) General Note

In general, synthetic GIC arrangements must comply with the operational requirements of Regulation 128. Please note that we have substituted *segregated portfolio* for *separate account* in Regulation 128.

V.B) Demonstrate Adequacy of Risk Charges Section 97.6

- B.1) *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 Section 4240(a)(5)(iii).

- B.2) 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:
- (a) Actual benefit payments conformed to the benefit payments estimated to be made as described in the plan of operation;
 - (b) 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 Section 97.5(m)(1);
 - (c) 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;
 - (d) The determination of the market-value of the segregated portfolio conformed to the valuation procedures described in the plan of operation, including (but not limited to) a statement of the procedures and sources of information used during such year;
 - (e) The fixed-income asset portfolio(s) conformed to, and justified, the rates used to discount contract liabilities for valuation pursuant to Section 97.5(k);
 - (f) 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 operation for determining the duration of such assets and the duration of guaranteed contract liabilities (or the guaranteed contract liabilities funded by the subportfolio);
 - (g) If the amount of the asset maintenance requirement depended on the 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);
 - (h) Any rate or rates used pursuant to Section 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 operation filed pursuant to Section 97.4(b); and
 - (i) 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.

V.C) Asset Maintenance Requirement -- Section 97.5(b) of Regulation 128

The insurer shall maintain assets in one or more segregated portfolios at all times such that:

- C.1) The market value of the assets equals or exceeds the minimum value of guaranteed contract liabilities (determined in accordance with Section 97.5(k)), and
- C.2) The market value of assets (less deductions provided for in Section 97.5(d)) equals or exceeds 92% of the minimum value of guaranteed contract liabilities.
- C.3) If the actual percentage referenced above is less than 100%, the insurer must maintain assets in the general account and a general account reserve for guaranteed contract liabilities in an amount at least equal to the minimum value of guaranteed contract liabilities less the market value of separate account assets (or segregated portfolio assets) less the deductions.

V.D) Asset Shaves or Deductions -- Section 97.5(d) of Regulation 128

- D.1) The insurer must deduct the percentage specified in Section 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 obligations, publicly traded common stock, real estate, private placement securities and other non-publicly traded investments.
- D.2) The deductions can be increased if:
 - (a) The diversification requirements are not satisfied (10% increase). See Section 97.5(g).
 - (b) There is a currency exchange risk that is not adequately hedged (15% increase). See Section 97.5(i).

V.E) Diversification Requirements -- Section 97.5(g) of Regulation 128

- E.1) For contracts funding fixed benefits only, the segregated portfolio assets are subject to the following limitations: For synthetic guaranteed investment contracts, segregated portfolio assets shall consist in whole or in part of assets which meet the limitation in Section 1405 of the Insurance Law computed as though the insurer's admitted assets consisted solely of such separate account (or segregated portfolio) assets.
- E.2) Segregated portfolio assets that do not comply with item E.1 above are subject to an additional 10% deduction from market value.
- E.3) 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.

- E.4) As noted above, we have only approved synthetic guaranteed investment contracts that provide fixed benefits only.
- V.F) Supplemental Accounts -- Section 97.5(j) of Regulation 128
- F.1) All or any portion of the amount needed to meet the minimum asset requirements can be allocated to one or more supplemental accounts.
 - F.2) 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.
 - F.3) Regulation 128 would also permit excess reserves to be held in the company's general account. If the excess reserves are held in the general account, the company must provide confirmation that the funds will be held in cash or short-term assets. The Regulation 128 memorandum should state what the company has the funds invested in.
- V.G) Minimum Value of Contract Liabilities -- Section 97.5(k) of Regulation 128
- The minimum value of contract liabilities is the product of the base amount of guaranteed contract liabilities and one plus the contract risk factor.
- G.1) 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 Section 4217 for annuity and life insurance benefit cash flows).
 - G.2) The contract risk factors are provided in Section 97.5(l) for contracts providing annuities, other fixed benefits and minimum guaranteed benefits.
- V.H) Disclosure of Accumulated Amounts -- Section 97.5(m) of Regulation 128
- H.1) 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.
 - H.2) The amount of the annual deduction for risk charges and the maximum accumulation must:
 - (a) Comply with the insurer's plan for compensating the general account,
 - (b) Vary in proportion to the various risks and guarantees for risks undertaken by the general account, and
 - (c) Vary depending on whether the assets are insulated from other company liabilities.

VI) Advertising and Disclosure

VI.A) Regulation 139 - Section 40.3

- A.1) Written statement and/or specimen contract with a statement citing location in contract of disclosures required by paragraphs (1), (3), (4), (5), (6), (9) and (10) of Section 40.3(b) of Regulation 139. See Section 40.3(a).
- A.2) The written statement and/or specimen contract shall contain the following information to the extent applicable:
 - (a) Statement indicating any restrictions as to amount and timing of contributions, and penalties for non-payment. See Section 40.3(b)(1).
 - (b) Description of the right to discontinue contributions to contract, and penalties resulting from such action. See Section 40.3(b)(2).
 - (c) Statement of all current fees and charges that are or may be assessed against the contractholder or deducted from the contract, including a description of the extent and frequency to which such fees and charges may be modified and the extent to which they take precedence over other payments. See Section 40.3(b)(3).
 - (d) Statement of the interest rates and/or method of determination of rates and a description as to how any withdrawals, transfers or payments will affect the amount of interest credited. See Section 40.3(b)(4).
 - (e) Description of expense, interest and benefit guarantees under the contract and any rights to modify or eliminate such guarantees, including the right to apply surrender charges or market-value adjustments to plan benefit payments if there are plan amendments or changes in the manner of plan administration. See Section 40.3(b)(5).
 - (f) Description of the contractholder's and participant's right to withdraw funds (or apply to purchase annuities), along with a description of any charges, fees or market-value adjustments applicable to such withdrawals or a statement that no such withdrawals or payment are permissible prior to maturity or the happening of a certain event. See Section 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. See Section 40.3(b)(7).
 - (h) Statement that contractholder or participant withdrawals under the contract are to be made in a FIFO or LIFO basis or other applicable basis. See Section 40.3(b)(8).

- (i) Statement that the contract may be amended, including any right of the insurer to unilaterally amend the contract. See Section 40.3(b)(9).
- (j) Statement, if applicable, that any dividends and experience rate credits are subject to the insurer's discretion. See Section 40.3(b)(10).
- (k) Statement, if applicable, concerning supporting asset's effect on withdrawal timing. See Section 40.3(b)(11).
- (l) Statement that the contractholder or plan sponsor is solely responsible for determining whether the contract is a suitable funding vehicle. See Section 40.3(b)(12).
- (m) Statement, if applicable, that the insurer does not have responsibility to reconcile participants' individual account balances with the accumulation fund balance where the insurer does not maintain individual account balances. See Section 40.3(b)(13).

VII) IRC Section 457 Public Deferred Compensation Plans

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

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

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

- VII.B) Loans are allowed to the extent in compliance with IRC Sections 457 and 72(p) only if the plan permits and establishes clear procedures for administration of loans. See Section 9001.4(d).
- VII.C) Maximum contract term for NY State Deferred Compensation Board must be in compliance with Sections 9003.5(a) and 9003.7.
- VII.D) No penalties or surrender charges are permitted at the expiration of the contract or agreement for the transfer of assets. See Sections 9003.5(a) and 9003.5(c)(2)(iii)(c).
- VII.E) Contracts subject to a competitive bidding process on issue and renewal. See Section 9003.
- VII.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 Section 9003.8.
- VII.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 Section 9006.2.