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**ALLOCATED GROUP ANNUITY CONTRACTS**  
**NOT SUBJECT TO SECTION 4223**

(Last Updated 5/21/13)

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**ALLOCATED GROUP ANNUITY CONTRACTS  
NOT SUBJECT TO SECTION 4223**

(Last Updated 5/21/13)

This outline is current as of 5/21/13. Subsequent changes to statutes, regulations, circular letters, etc., may not be reflected in the outline. In case of any doubt, please contact the Life Bureau.

I) Applicability

I.A) Scope

A.1) This product outline applies to all allocated group annuity contracts and certificates delivered or issued for delivery in New York that are not subject to Insurance Law §4223. See §4223(b)(1) and (2) for a complete description of the types of contracts and certificates that are not subject to §4223.

A.2) An “allocated contract” is any contract providing 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. Such contracts provide for the allocation of deposits into one or more separate accounts and/or the insurer’s general account.

A.3) Of particular note, this outline applies to:

(a) any allocated group annuity contract delivered or issued for delivery in this state that is purchased in connection with one or more retirement plans or plans of deferred compensation established or maintained by or for one or more employers, employee organizations, or any combination thereof.

(b) any certificate issued, or issued for delivery, under an allocated group annuity contract issued to an employee benefit plan within the meaning of ERISA 29 U.S.C. §1001 et seq.

(c) any other certificate issued, or issued for delivery, under an allocated group annuity contract issued to a person solicited for the sale of such certificate in this state, except if:

(i) such certificate provides benefits under an individual retirement account or is issued as an individual retirement annuity, both as defined in §408 of the Internal Revenue Code (IRC) (except that a certificate providing benefits under a simplified employee pension as defined in IRC §408(k) would be subject to this outline); or

(ii) such certificate is issued as an annuity contract in accordance with IRC §403(b) of such code under a program for the purchase of such annuity contract where the payments are derived wholly from a salary reduction agreement or an agreement to forego an increase in salary;  
or

- (iii) the benefits provided under such group annuity contract are derived wholly from funds contributed by the persons covered thereunder.

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

With respect to IRC §403(b) plans, the safe harbor rules in Department of Labor (DOL) Regulation 29 CFR §2510.3-2(f) describe the circumstances in which §403(b) plans are not employee pension benefit plans under ERISA. See also DOL Field Assistance Bulletin No. 2007-02.

- A.4) This outline does not apply to unallocated group annuity contracts or allocated group annuity contracts and certificates that are subject to Insurance Law §4223.
- A.5) This outline replaces the 2/25/02 Allocated Group Annuity Contracts Not Subject to Section 4223 outline.

## II) Filing Process

### II.A) General Information

#### A.1) Prior Approval Requirement

- (a) Section 3201(b)(1) provides that no policy form shall be delivered or issued for delivery in this state unless it has been filed with and approved by the superintendent as conforming to the requirements of the Insurance Law (standard and generally applicable provisions) and not inconsistent with law (federal and state statutory, regulatory and decisional law).
- (b) Section 50.5 of Regulation No. 47 provides that the filing and approval requirements applicable to individual and group annuity contracts and certificates used in connection with group annuity contracts shall, to the extent appropriate, be applicable to individual and group separate account annuity contracts and certificates used in connection with group separate account annuity contracts, respectively.

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

Section 3201(c)(1) and (2) permits the Superintendent to disapprove any policy form that contains provisions that are misleading, deceptive, unfair, unjust, or inequitable or if its issuance would be prejudicial to the interests of policyholders or members.

- (a) Misleading or Deceptive Provisions. Section 3201(c)(1). See also Sections 2123, 3209, 4226.
- (b) Prejudicial to the Interests of Policyholders or Members. Section 3201(c)(2). See also Section 4238(e) with respect to self-support.

(c) Unjust, Unfair, Inequitable Provisions. Section 3201(c)(2). See also Sections 2403, 4224, 4231, 4239.

A.3) No Filing Fee

A.4) Self-Support Requirement

Upon its issuance each group annuity contract must appear to be self-supporting based on reasonable assumptions as to interest, mortality, and expense. See §4238(e).

II.B) Types of Filings

B.1) Prior Approval

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

B.2) Alternative Approval Procedure

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

Circular Letter No. 2 (1998) provides that the certification of compliance 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. An alternative would be to submit a certification of compliance with the applicable laws and regulations cited in this product outline. A statement that the filing is in compliance with all applicable laws and regulations is not acceptable.

B.3) Prior Approval With Certification Procedure

Circular Letter No. 6 (2004) provides for an expedited approval procedure based on an appropriate certification of compliance signed by an officer of the company in the format provided by Circular Letter No. 6 (2004). Certifications that have altered or otherwise modified the language of the certification will not be accepted.

The original signed certification must be provided. The form number of each form and the memorandum of variable material for each form must be listed in the body of the certification. For long lists, it would be acceptable to begin the list in the body of the certification and include the rest of the list in an attachment to the certification. However, it would be unacceptable to list all of the forms in a separate attachment.

The submission letters for paper submissions and the Filing Description for submissions made via the State Electronic Rate and Forms Filing system (SERFF) will need to comply with applicable circular letter and product outline guidance.



Substitution filings/follow-up correspondence with post-approval form changes requested prior to initial issuance of forms will not be permitted for Circular Letter No. 6 (2004) filings.

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

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

**B.5) Out-of-State Filings**

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

**II.C) Prefiled Insurance Coverage**

**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 policy forms.

C.2) Conditions for Providing Coverage Prior to Approval

- (a) Immediate coverage requested to meet specific need of policyholder.
- (b) Insurer has reasonable expectation of approval or acceptance for filing.
- (c) Confirmation letter sent to policyholder by the insurer stating:
  - (i) The nature and extent of benefits or change in benefits;
  - (ii) That 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) Statement explaining circumstances and reasons for delay in submitting forms within 12 months for group annuity contracts.
  - (ii) Follow-up statement 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.

C.3) Recommended Practice

- (a) It is recommended that insurers notify the Department of coverage within 30 days (i.e., copy of confirmation letter) of coverage and submit forms within six months, notwithstanding the twelve month period noted in Circular Letter 64-1. (Best Practice).
- (b) Insurers should review pre-filings periodically (monthly) to verify compliance with conditions for pre-filing.
- (c) 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.

II.D) Preparation of Forms – Circular Letter 1963-6

D.1) Duplicates

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

D.2) Form Numbers

Form numbers need to appear in lower left-hand corner of the cover page of the form. §I.D. of Circular Letter 63-6. The lower left-hand corner of the subsequent

pages of the form should either contain the same form number as appears on the cover page or should be left blank. The subsequent pages should not contain form numbers that differ from the form number on the cover page.

D.3) Hypothetical Data

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

D.4) Application

If an application/enrollment form will be attached to the contract, it must be submitted with the contract for approval. If previously approved, the submission letter should so indicate. §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. §I.F.1 of Circular Letter 63-6.

D.6) Submissions Made on Behalf of the Insurer

If the filing is made on behalf of the insurer by another party, a letter authorizing the third party to act on behalf of the insurer 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 insurer's responsibility to ensure that 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 §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 for each form that is being submitted for approval or filed for informational purposes and must be in compliance with Circular Letter No. 8 (1999). Section 3201(b)(6) (“Deemer”) filings must be identified in the “re” or caption. Circular Letter No. 6 (2004) filings must be identified in bold print in the body of the submission letter or in the “re” or caption. For SERFF filings, please see the Department’s guidance for SERFF filings 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) §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 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 replacing a previously submitted form. If there have not been a substantial number of changes, submit a highlighted copy showing the material differences or changes made to the form. If the changes are too extensive, then a highlighted copy is not required, but the changes must be identified in the submission letter. State whether the previously submitted form was approved, disapproved, withdrawn or otherwise disposed or is still pending approval (under review) with the Department and provide the form number and file number of the such form.
- (d) If a form being filed for formal 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 and identify the changes made to the corrected form. The insurer may, under these circumstances, use the same form number on the corrected form being

submitted. If the original form was approved in paper format the insurer must also return the stamped original of the approved form to the Department. 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 (i.e. rider, endorsement, or insert page), give the form number of the contract and certificate forms with which it will be used, or, if for more general use, describe the type or group of such forms as well as whether the pending form(s) will be used with new and/or previously issued/delivered contracts/certificates.
- (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) § I.G.8. and Circular Letter No. 4 (1963) § I.A.2.
- (h) Statement as to how the form will be used as described in Circular Letter 1976-12.
- (i) Description of the benefits and coverage provided. Circular Letter 1963-6 § I.G.2 and 7.
- (j) Identify the type of group as defined in §4238(b). Specify the applicable paragraph or paragraphs in §4238(b) which best describe the group or groups for which the policy forms are intended. The statement that the forms are for use with all eligible groups should be avoided.
- (k) Description of the type of plan or program funded by the contract (i.e., defined benefit plan, defined contribution plan, profit sharing, money purchase, etc.) and identify the applicable Code provision (e.g., IRC §§401(a), 401(k), 403(b), 408 Simple IRA and SEP IRA, 457, etc.).
- (l) Statement as to whether the contract is contributory or noncontributory, together with a description of the contribution as voluntary or involuntary and tax status of the contribution. We regard salary reduction contributions in IRC §§401(k), 403(b), 457 and other similar plans as employee contributions.
- (m) For contracts with variable accounts, submission letters should indicate whether the contract has been filed with the Securities and Exchange Commission ("SEC") and the current status of such filing.
- (n) If the contract provides commutation benefits the letter must so indicate.

(o) If partial withdrawals do not result in a pro rata reduction in the death benefit provided under a variable annuity contract, the letter must disclose this fact.

E.3) Explanation of Unique Features and Market

Submission letters should be as detailed as possible explaining any unique or innovative products or features and any special markets intended. (In general, an innovative or unique product or feature would include one that has not been previously approved by the Department for the insurer).

E.4) Guaranteed Living Benefits

(a) These benefits provide for a guaranteed floor on certain elective benefits (e.g., cash surrender value) regardless of the performance of the variable funds. The submission letter must disclose any guaranteed living benefits (e.g., guaranteed minimum account balance [GMAB], guaranteed minimum income benefit [GMIB], or guaranteed minimum withdrawal benefit [GMWB]) provided under the contract, including whether the certificate holder can discontinue the benefit (and charge for the benefit) once elected.

(b) The submission letter must include a description of any asset allocation models, (e.g., investment allocation restrictions or limitations as well as transfer limitations) associated with the VAGLB. Detailed trading rules associated with the VAGLB, if any are applicable, must be submitted to the Department for filing.

E.5) Maximum Maturity Date or Maximum Annuitization Age

If the contract provides for a maximum annuitization age or maximum maturity date, the submission letter must specify the maximum issue age. See also §IV.G.11 of this outline.

E.6) Sex-Distinct/Unisex

Submission letter must advise whether the policy/certificate is sex-distinct or unisex. If sex-distinct, the letter must confirm that the certificate will not be delivered under the policy in any employer-employee situation subject to the Norris decision and/or Title VII of the Civil Rights Act of 1964. If a previously approved unisex endorsement or unisex pages will be used with the contract for Norris or Title VII situations, the submission letter should so state.

E.7) Applicability of Market-Value Adjustment

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

E.8) Fixed Account Availability Restrictions and Rights to Refuse Premium Contributions

(a) Where the forms include a reserved right to restrict availability of the fixed account in a flexible premium fixed and variable deferred annuity or a reserved right to restrict premium payments in a flexible premium fixed deferred

annuity, the submission letter must include the insurer's confirmation that the reserved right will only be exercised when the yield on investments would not support the contract's guaranteed minimum interest rate or, in the case of a flexible premium fixed annuity, where additional premium would exceed maximum premium limitations set forth in the contract. See §IV.H. of this Outline for more on fixed account availability.

- (b) For any flexible premium contract (fixed and variable, fixed or variable only) that includes a reserved right to stop accepting premium payments or any contract that reserves the right to restrict the availability of the fixed account, the submission letter must include the insurer's assurance that the discontinuance or restriction would not be exercised in an unfairly discriminatory manner pursuant to §4224.

#### E.9) Noncompliance Explanation

If the annuity does not comply with a specific product outline provision or if the Company has an alternate interpretation of a product outline provision, the submission letter must identify the provision and provide a complete explanation of the Company's position on the issue. Such submissions may not be submitted through the Circular Letter 6 (2004) certified process unless the Department has given permission.

#### E.10) Circular Letter No. 14 (1997)

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

#### E.11) Resubmissions

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

#### E.12) Informational Filing

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

## II.F) Attachments

### F.1) Memorandum of Variable Material

- (a) 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.
- (b) Open-face riders or endorsements may be filed for general 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) Readability Requirement -- Flesch Score Certification

- (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. The number of words, sentences and syllables in the form should be set forth as part of the certification. Please refer to the Department's February 18, 1982 letter for a sample certification available on the Department's website at: <http://www.dfs.ny.gov/insurance/life/product/3102Intro.doc>.
- (b) Section 3102(b)(1) excludes
  - (i) any insurance policy that has been determined to be a security subject to federal jurisdiction;
  - (ii) any certificates issued pursuant to a group annuity contract issued to an employer covering persons employed in more than one state;
  - (iii) any group insurance policy covering a group of one hundred or more lives, other than dependents, at the date of issue, provided that this exclusion does not apply to certificates issued pursuant to a group insurance policy delivered or issued for delivery in this state; and
  - (iv) 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) Plan of Operation

For an annuity contract that permits amounts to be allocated to one or more separate accounts, the filing must include a copy of the approval letter from the Department for each plan of operation (or amendment thereof) or if approval has not yet been received include a statement advising as to when the plan of operation was filed with the Department or deemed approved by operation of law. Section 4240(e).

### F.4) Prospectus/Offering Memorandum

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

### F.5) Tax Qualified Endorsements and Riders

(a) All annuities being issued on a tax-qualified basis should be reviewed for compliance with the Internal Revenue Code requirements prior to submission to the Department.

(b) It is recommended that an insurer's tax counsel review all such tax-qualified endorsements prior to submission to ensure compliance with current requirements.

(c) A certification of compliance from the tax counsel or other evidence of compliance (i.e. IRS approval) would obviate the need for a detailed review by Department staff. (Note: The general certification required for Circular Letter 6 of 2004 filings would eliminate the need for this more specific certification.)

### F.6) Group Annuity Summary Sheet

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

## II.G) Key Legal Sources

G.1) Insurance Law Sections 3102, 3105, 3201 (Approval of Forms), 3204, 3214, 3223 (Standard Provisions), 3227, 4224, 4231, 4238, and 4240.

G.2) Insurance Regulation Nos. 34-A, 47 and 139.

G.3) Circular Letters CL6 (1963), CL1 (1964), CL4 (1969), CL14 (1983), CL14 (1997) (Submission and Approval Process), CL2 (1998), and CL8 (1999) (Submission Letters), CL6 (2004) (Prior Approval With Certification), CL27 (2008), CL5 (2011).

G.4) Federal Law. IRC §§72(p) and (s), 401(a), 401(k), 403(b), 408, 412(i), 457. Securities Act of 1933, Securities Exchange Act of 1934, Investment Companies Act of 1940, Investment Advisors Act of 1940.

### III) Group Requirements

#### III.A) Eligible Groups

##### A.1) Insurer Responsibilities

It is the insurer's responsibility to determine whether the definitional requirements in Section 4238(b) for an eligible group are satisfied at the time of issue and thereafter. The insurer should determine whether all employees or members eligible are covered;

##### A.2) Recognized Groups

- (a) Employer/Employee -- Section 4238(b)(1)
- (b) Employer Association -- Section 4238(b)(2)
- (c) Labor Union -- Section 4238(b)(3)
- (d) Employer/Labor Union Trust -- Section 4238(b)(4)
- (e) Association (common interest, calling, profession) -- Section 4238(b)(5)
- (f) IRA -- Section 4238(b)(6)
- (g) Other Employer Trust -- Section 4238(b)(7)
- (h) Foundation or Endowment Fund -- Section 4238(b)(8)
- (i) Affinity Association -- Section 4238(b)(9)
- (j) Financial Institution -- Section 4238(b)(10)
- (k) Plaintiffs or Claimants -- Section 4238(b)(11)

#### III.B) Non-Recognized Groups

Section 4238 was not modernized to permit Discretionary Groups like those permitted for group life insurance in §4216(b)(14) and for group accident and health insurance in §4235(c)(1)(M). As such, groups that fail to satisfy the definitional requirements in §4238(b) of the Insurance Law are not recognized groups under the Insurance Law. Such group annuity contracts cannot be delivered in this state. However, certificates covering New York residents under such group annuity contracts delivered out-of-state must be delivered in this State pursuant to §3219(b). Group annuity certificates delivered in this state that are funded solely by individual contributions must comply with the provisions of the Insurance Law applicable to individual annuities and are subject to the product outline for Group Fixed and/or Variable Deferred Annuity Contracts Subject to Individual Standards. The certificates should be submitted for review and approval. The group annuity contract should be submitted as well. It will be reviewed to ensure that the contract and certificate are not inconsistent. The contract cannot include provisions that invalidate or impair the terms of the certificate.

### 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 §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 §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.
- 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, including IRC §408 contracts (IRAs), IRC §403(b) 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 Requirements

The requirements applicable to the contract apply equally to the active life certificate unless otherwise indicated.

#### IV.A) Cover Page

##### A.1) Company’s Name and Address

- (a) The licensed New York company’s name must appear on the cover page (front or back) of the contract.
- (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) No unlicensed insurer name can appear anywhere on the form. Section 3201(c)(1).

- (e) If the name of another entity is included on the cover page (insurance group designation, name of the licensed parent company or licensed affiliate, etc.) or if a logo, trademark or other device is included, such name or device shall not be displayed in a manner that would have a tendency to mislead or deceive as to the true identity of the insurer, or create the impression that someone other than the insurer would have any responsibility for the financial obligations under the contract. See §3201(c)(1). This would apply to applications as well.
- (f) The name of the issuing insurer should be clearly disclosed, with equal prominence to any other entity mentioned.
- (g) The contract should be clearly identified as an annuity contract issued by the insurer.

#### 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 §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 the Contract

(a) A description of the contract, such as “group separate account deferred annuity” or “group variable deferred annuity”. To the extent that general account or fixed account funding is provided in the separate account annuity contract, the description may also indicate the following: “fixed account funding”, “flexible (or single) premium”, modified guaranteed annuity (“MGA”, also known as market-value adjustment annuity or “MVA annuity”), or “equity indexed annuity” (“EIA”). The contract should not be described using a product marketing name. (Similarly, the application form for the contracts should not describe the contract solely by a product marketing name.)

- (i) *Variable annuity contract* is defined in §50.1(a)(4) of Regulation No 47 as “a separate account annuity contract which includes provision for deferred or immediate annuity payments the amount of which, after such payments have commenced, varies according to the investment experience of any separate account maintained by the insurer as to such contract, as provided in §4240 of the Insurance Law, as amended.” The Department recognizes that the phrase “variable annuity” is often also used to refer to a contract in which the account value varies during the accumulation phase according to the investment experience of the separate account.
- (ii) *Separate account annuity contract* is defined in §50.1(a)(3) of Regulation No. 47 as “any contract which provides that amounts paid to the insurer to provide for annuities shall be allocated by the insurer, in

whole or in part, to one or more separate accounts pursuant to §4240 of the Insurance Law, whether such annuities are payable in fixed or variable amounts or both.”

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

A.4) Separate Account Disclosures

- (a) There must be a statement identifying the elements of the contract (such as benefits or premiums) which are on a variable basis. Section 4240 (a)(11)(C).
- (b) There must be a statement that the contract value of the variable sub-accounts (and any other variable contract elements) is based on the value of the separate account assets which are not guaranteed as to fixed dollar amounts and will increase or decrease in value based upon investment results. Section 4240(a)(11).
- (c) Every variable annuity contract that provides for variable annuity payout options must include a statement which (i) discloses the smallest annual rate of investment return which would have to be earned on the assets of the separate account so that the dollar amount of variable annuity payments will not decrease; or (ii) sets forth the conditions under which the dollar amount of variable payments will not decrease. Section 50.6(b) of Regulation No. 47. As an alternative, this information may be placed on the first page of the contract/certificate specification page.
  - (i) Note that the smallest annual rate of return cannot exceed 6.5% pursuant to Section 50.6(a)(1) of Regulation 47, except as noted in item (iii) below.
  - (ii) Section 50.6(a)(1) of Regulation 47 provides that the method of computing the dollar amount of variable annuity payments shall be such that, if the annual rate of investment return of the separate account were six and one-half percent at all times from the issue of the contract/certificate, such amounts would not decrease. If the assumed interest rate underlying the annuity payments is 5% or more, the method of computing the variable annuity payments may fail to comply with §50.6(a)(1). An AIR of 5% or more would leave a potentially inadequate margin of 1.5% (i.e., 6.5% less 5%) or less for mortality, expenses and risk charges.
  - (iii) Note the First Amendment to Regulation No. 47 amended §50.6(a) and (b) to permit insurers to use other methods or rates in computing the dollar amount of variable annuity payments where such methods or

rates are determined by the Superintendent to be fair, equitable, reasonable and not less favorable to participants or annuitants.

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

A.5) Officer's Signatures

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

(b) Signatures should be denoted as variable material.

A.6) Disclosure of Restrictions or Reserved Right to Restrict Availability of Fixed Account

(a) With regard to a separate account annuity contract with a fixed account funded through the insurer's general account or a guaranteed separate account, there must be prominent disclosure on the cover page and specifications page of the contract and certificate, and in the application, stating, if applicable, that

(i) the fixed account is not available at issue (e.g., The face page could include the following: "The fixed account (or one or more fixed account guarantee periods) may not be available on the issue date. Please check the specification page to determine whether the fixed account (or one or more fixed account guarantee period) is currently available."), or

(ii) the insurer reserves the right under the contract and certificate to restrict the availability of the fixed account after issue.

(b) See additional requirements related to reserved rights to restrict the availability of the fixed account in §(IV)(H) of this outline.

A.7) Disclosure of Reserved Right to Refuse Premium Contributions

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

(b) See additional requirements related to reserved rights to refuse premium contributions in §(IV)(H) of this outline.

IV.B) Specification Page

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

**B.1) Hypothetical Data**

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

**B.2) Current Interest Rate**

The current interest rate for the fixed account must be specified in the contract. It can be bracketed to denote variable material.

**B.3) Guaranteed Minimum Interest Rate**

The guaranteed minimum interest rate for the fixed account must be set forth. Bracketing for variability is recommended. If the minimum annual effective rate of interest is subject to redetermination after issue, the redetermination date(s) basis, calculation and period must be stated in the contract, with related disclosure appearing on the contract and certificate cover pages.

**B.4) Guaranteed Maximum Charges/Minimum Credits**

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

**B.5) Current Charges/Credits**

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

**B.6) Sub-accounts of the Separate Account**

The available sub-accounts in any separate account may be set forth on the specification page. The sub-accounts should be bracketed to denote variable material. When sub-accounts of the separate account are added, deleted, or changed, the Company must make an informational filing indicating the updated list of sub-accounts. A copy of the approval letter from the Department's Life Bureau in New York City for the amended Plan of Operations, or if such approval has not been received, a copy of the Department's acknowledgement letter for that filing is to be included in the filing. Please note that the new funds cannot be utilized until the Life Bureau in New York City has approved the new/amended

Plan of Operations. Any available fixed account should not be bracketed. Bracketing indicates that the material is variable and subject to change.

B.7) Smallest Annual Rate of Return

As noted in §IV.A.4(c) of this Outline, the smallest rate of return information must be provided on the specification page if this information is not presented on the cover page.

IV.C) Table of Contents

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

IV.D) Standard Provisions

Every group annuity contract delivered or issued for delivery in this state and every certificate used in connection therewith shall contain in substance the following provisions to the extent that such provisions are applicable or provisions which are more favorable to the annuitants or not less favorable to annuitants and more favorable to the contractholders. See §3223.

D.1) Grace Period-§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.

(a) This provision applies if a payment is required to pay any fee or expense charges.

(b) If the contract continues in force without penalty, no grace period provision is necessary.

(c) See liquidated damages provision §IV.E.9 of this outline.

D.2) Entire Contract-§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 §3204.

(a) The application must be attached to the contract if it is to be part of the entire contract. [No application is admissible in evidence unless a true copy was attached to such contract when issued.] No insertion in or other alteration of any written application shall be made by any person other than the applicant without his or her written consent, except that insertions may be made by the insurer for administrative purposes only in such manner as to indicate clearly that the insertions are not to be ascribed to the applicant. §3204.



- (b) All statements made *by or under the authority of, the applicant* for the issuance, reinstatement or renewal of the policy shall be deemed representations and not warranties. §§3105 and 3204(c)
- (c) Nothing can be incorporated by reference, unless a copy is endorsed upon or attached to the contract. §3204.
- (d) The contract cannot be modified, nor can any rights or requirements be waived, except in writing signed by a person specified by the insurer in the contract. §3204.
- (e) The phrase “In absence of fraud” must not be used – Section II(H)(7) of Circular Letter No. 4 (1963).
- (f) The contract forms must not include a unilateral amendment provision that grants the insurer the unqualified right to change terms and conditions of the contract, except where such change or amendment is required to conform to applicable New York and federal law. Any such change or amendment cannot be effective without prior approval of the Department.

D.3) Misstatement of Age or Sex-§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 which omit the reference to sex.
- (c) The §3223(c) provision should also state whether and how much interest will be charged against or credited to such underpayments and overpayments. (Best Practice). We may question if the rates for overpayments and underpayments are not the same or if they exceed the six percent limit provided in §3219(a)(5).

D.4) Active Life Certificate

- (a) Section 3223(d) requires a provision that the insurer shall issue a certificate for delivery to each annuitant who contributes to the contract. We have permitted the plan’s summary plan description to satisfy the active life certificate requirement for those plans that issue a summary plan description. This avoids unnecessary duplication.
  - (i) The summary plan description will satisfy the certificate requirement only where the summary plan description explicitly provides that it is part of the plan documents. See *Cigna Corp. v. Amara*, 131 S. Ct. 1866

(2011) and *Eugene S. v. Horizon Blue Cross Blue Shield of N.J.*, 663 F.3d 1124 (10<sup>th</sup> Cir.2011).

- (ii) If an insurer intends to rely on the summary plan description to satisfy its certificate requirement, the summary plan description would need to be provided to the Department with the contract and could not be submitted using a certified filing process without the Department's permission.
- (b) Section 3223(d) requires that the certificate specify the nature and basis of ascertainment of benefits. As such, the contract and certificate must include or describe the interest crediting procedures and any charges applied to withdrawals, including surrender charges and/or market-value adjustments.
- (i) Interest crediting practices used in §4223 contracts are acceptable.
  - (ii) Insurer cannot switch from investment year method approach to portfolio method approach (or vice versa) without Department approval. See Regulation No. 33.
  - (iii) Any additional amounts should be credited in accordance with §4232 requirements and should be non-forfeitable upon crediting.
  - (iv) Surrender charge may be assessed as a flat dollar amount, fixed percentage of premium received or of the accumulation value or as a capped market-value adjustment.
  - (v) We may question a market value adjustment formula that does not comply with Regulation No. 127. However, we have not required a two-way MVA for contracts not subject to Section 4223. Market value adjustment formulas that do not comply with Regulation No. 127 may not be submitted under a certified procedure unless the Department has given permission.
- (c) Such benefits must be deemed by the Superintendent to be equitable to the annuitant and the contractholder, in the event of either the termination of the annuitant's employment, except by death, or the discontinuance of payments under the contract.
- (i) Surrender charges that exceed the §4223 limits for the two basic fixed account product designs (i.e., maximum withdrawal charge of 10% or 7% with maximum amortization period) may require justification to be deemed to be equitable and therefore may not be submitted under a certified procedure unless the Department has given permission.
  - (ii) We would not object to any waiver of surrender charges recognized for products subject to Section 4223.
- (d) Contractholder termination, transfer and withdrawal rights also must be equitable to the annuitant and the contractholder. Contractholder-initiated

withdrawals or transfers will be considered equitable if either (i) or (ii) below apply.

- (i) Participant consent is required for contractholder withdrawals and transfers that have a negative impact on the vested portion of participant account balances. There can be a presumption of consent if there is no response to a request within a reasonable period such as 14 days for participants. Participant consent is not required for:
  - (I) Contractholder-initiated book value transfers from the fixed account.
  - (II) Contractholder-initiated withdrawals or transfers from one or more separate accounts, unless a surrender charge was applied to such withdrawals or transfers.
  - (III) Contractholder-initiated transfers or withdrawals of the non-vested portion of such fixed account (forfeitures).
  - (IV) Contractholder-initiated transfers or withdrawals for which the participant account balances will be reimbursed for any losses resulting from such transfers or withdrawals.
- (ii) The contract and certificate disclose that:
  - (I) The contract permits the contractholder to retain fiduciary responsibility for the decision to transfer or withdraw funds from the contract.
  - (II) If the contractholder exercises such discretion to withdraw or transfer funds from the contract, participant consent is not required.
  - (III) If funds are withdrawn, there may be charges against the participant account balance, such as a market-value adjustment and/or a surrender charge.
  - (IV) The contract does not require the contractholder to make the withdrawal or transfer that results in a reduction in participant account balances. The contract permits funds to be left in the contract until maturity or the expiration of the surrender charge period (in the case of a sub-account guaranteed interest contract product) or paid in installments over a period not exceeding five years with no reduction in the interest rate credited during such installment.
- (e) The contract and certificate must provide that if the annuitant dies before the commencement date of the annuity, the insurer shall pay a death benefit at least equal to the accumulated amount in the annuitant's account arising from the annuitant's contributions. To avoid being misleading, such provision

should make it clear whether the death benefit includes any of the vested portion of employer contributions.

#### D.5) Retired Life Certificate

- (a) Section 3223(e) of the Insurance Law requires 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.
- (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 any 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 Disabilities Act. In New York, until a person is found to be legally incompetent to handle annuity payments and no 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 §3201(a).

#### IV.E) Regulation No. 139 Provisions

##### E.1) Plan Benefit Rule

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.

- (a) If the contract is benefit responsive, it must comply with this rule.
- (b) The lump sum payment cannot be subject to a market value adjustment.
- (c) The interest rate credited cannot be affected by such withdrawals until the next reset.
  - (i) We have approved an interest adjusted withdrawal provision, which 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 which require repayment of withdrawals from the contract from the next available cash flow as long as there is no penalty for nonpayment.
- (d) We have permitted graded surrender charges in allocated group annuity contracts not subject to §4223 that are designed solely to recoup acquisition expenses.
  - (i) The insurer should describe all acquisition expenses and explain how such expenses will be amortized (i.e., identify the charge and amortization period) so that we can verify that the charge is not excessive and does not reflect other factors such as disintermediation, liquidity, cash flow, asset depreciation etc.
  - (ii) Generally, the charge must be premium based, that is, not based on the accumulation value. We will permit accumulation-based charges that are capped at a percentage of premium (not to exceed the percentage that reflects acquisition expenses) which gradually reduce as acquisition expenses are recouped.
  - (iii) Please note that no surrender charge is permitted if the participant's account value is applied to purchase an annuity.

## E.2) Betterment of Rates

Section 40.4(b) of Regulation No. 139 provides that for any group annuity contract funding a defined contribution plan, the contract 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 to the same class of contracts.

- (a) The Department has generally applied this requirement to fixed and variable payout annuity options from variable sub-accounts. The full account value in a variable annuity certificate should be applied to the guaranteed purchase rate.
- (b) If the insurer does not sell single consideration immediate annuities, the contract should indicate this fact. In such case, the company should indicate its practice with respect to current purchase rates (e.g., reasonable in relation to the market SPIA rates). §3201(c)(2).

#### E.3) Allocated Share of Benefit Payments

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. §40.4(c)

- (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.

#### E.4) Participant Directed Investment Option

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. §40.4(d)

- (a) In such cases, the contract may permit withdrawals prior to maturity for the contribution that are subject to a negative market value adjustment and/or surrender charge. We have not required positive market-value adjustments.
- (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 §40.4(b) is similar to §44.3(t) in Regulation No. 127.

- (c) The exception to the plan benefit rule is intended to recognize contracts that are similar to modified guaranteed annuities authorized by Chapter 864 of the Laws of 1985 and Regulation 127. Note that in contracts subject to §4223 and Regulation 127 the MVA must be positive as well as negative.

E.5) Plan Amendments or Changes In Plan Administration

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. §40.4(e)

- (a) Contracts should include this provision to protect against anti-selection.
- (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.

E.6) Bona Fide Termination of Employment

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. §40.4(f)

- (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 risk for these transactions are typically not considered by the insurer in making the guarantees provided in the contract. Such transactions may result in unexpected withdrawal activity that was not priced for when the contract was issued.]
  - (v) Plan termination or partial plan termination.

E.7) Contract Termination

- (a) The contract termination rules in Section 40.5 of Regulation No. 139 apply to unallocated amounts under group annuity contracts other than guaranteed

interest contracts. Although allocated amounts and allocated contracts are not synonymous terms, we have not applied Regulation No. 139 contract termination rules to allocated group annuity contracts not subject to §4223.

- (b) We have relied on the definitions of Plan Type C contracts in § 4217(c)(4)(D)(iii)(V) of the Insurance Law and of guaranteed interest contract in Section 40.2(j)(2) of Regulation No. 139 as well as the discretionary authority under §3223(d) to approve a contractholder initiated five year book value installment withdrawal option, without participant consent for allocated, contributory contracts, not subject to §4223.
  - (i) Plan benefit payments made during the installment can be used to reduce subsequent installments.
  - (ii) Contractholder initiated lump sum withdrawals, subject to a negative market-value adjustment, are subject to the participant consent or disclosure alternative noted above for active life certificates in §IV.D.4(d).

#### E.8) Market-Value Adjustment Provision

- (a) Most allocated group annuity contracts merely provide for a fixed or declining surrender charge. However, we have not objected to market-value adjustment provisions.
- (b) Section 40.2(o) of Regulation 139 defines market-value adjustment as an adjustment for increasing or decreasing the accumulation fund in the event of full or partial surrender or contract termination to reflect changes in interest rates or asset values since the receipt of funds by the insurer according to a formula described in the contract.
  - (i) Section 3204 (Entire Contract) of the Insurance Law requires that the MVA formula be incorporated in the contract or attached to the contract.
  - (ii) The market-value adjustment formula should be sufficiently clear so that the contractholder can calculate the adjustment at any time.
  - (iii) The factors used in the calculation should be sufficiently definite and not based on items solely within the insurer's discretion. For example, the formula can refer to an outside index or to rates guaranteed or credited under the contract. If the formula referred to the insurer's earnings rate on supporting assets, we would require justification because the contractholder cannot verify such rate.
- (c) Note that §40.5(i) of Regulation 139 which gives the insurer in certain contracts the right to change the method for determining the market-value adjustment upon at least 31 days prior written notice to the contractholder, does not apply to GICs.



- (d) Insurers should consider only using liability based adjustment formula. In Prohibited Transaction Exemption 81-82, the U.S. Department of Labor granted an exemption from the prohibited transaction rules for separate account GICs. The DOL did not believe that any market-value adjustment requirements were necessary for separate account GICs “so long as the adjustment is not made with reference to the investment performance of a separate account”.

This exemption was repealed when the plan asset regulation was promulgated. §2510.3-101(h) carves out an exception for separate accounts that are “maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable, or credited, to the plan and to any participant or beneficiary of the plan (including an annuitant) are not affected in any manner by the investment performance of the separate account”.

- (e) Asset-based market-value adjustment formulas in general account contracts may raise concerns with the DOL. In any event, the standards applicable to market-value adjustments should be the same for general account and separate account GICs. We may question an asset-based formula if the assets do not appear to closely match the contractual guarantees, especially with respect to duration
- (f) Although Regulation 127 requires a two-way market-value adjustment for contracts subject to §4223, we have not made this requirement applicable to GICs.

#### E.9) Liquidated Damages Provision

Section 40.2(m) of Regulation 139 defines liquidated damages as the charges or adjustments which may become applicable in the event contributions are not made in the amounts or on the dates specified in the contract and which reasonably reflect the actual losses anticipated by the insurer in making commitments in advance of the receipt of the specified contributions. A liquidated damages provision is an alternative to contract termination in the event that the contractholder fails to make a scheduled contribution.

- (a) We have objected to provisions that provide for a fixed charge or fixed interest rate reduction for any such failure to contribute
- (b) The method for calculating the charge should be set forth in the contract. The contractholder should be able to calculate the adjustment from the terms of the contract. Many insurers use an explicit formula similar to the market-value adjustment formula.

#### IV.F) Separate Account Provisions -- Section 4240 and Regulation No. 47

##### F.1) Isolation/Segregation Provision

- (a) Section 4240(a)(1) provides that in accordance with applicable agreements income, gains and losses, whether or not realized, from assets allocated to a

separate account shall be credited to or charged against such account without regard to other income, gains or losses of the insurer.

- (b) This provision is essential because it discloses the separate account assets and investment experience is segregated from the insurer's general account and other separate accounts to the extent provided in the contract.

#### F.2) Asset Identification

The separate account contract (or application if the application is part of the entire contract) must identify or describe the permitted investments for such separate account. See §4240(a)(2)(A) and §3204(a)(1).

#### F.3) Guarantees of Value

- (a) The contract must not 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, except as permitted under Section 4240(a)(5).
- (b) For non-guaranteed separate account contracts, the liability under any contract guarantees must be limited to the contractholder's interest in assets allocated to the separate account. Otherwise, the separate account and separate account agreement must satisfy items (i), (ii), or (iii) of §4240(a)(5) of the Insurance Law.
- (c) Under §4240(a)(5)(iii), an annual actuarial opinion and memorandum by a qualified actuary and acceptable to the Superintendent must be submitted. This requirement applies to variable annuities with guaranteed living benefits, including guaranteed minimum account benefits, guaranteed minimum income benefits and guaranteed minimum withdrawal benefits.
- (d) Note that reserve liabilities for guaranteed minimum death benefits must be maintained in the insurer's general account.

#### F.4) Valuation

Pursuant to §4240(a)(7) of the Insurance Law, the contract must specify the dates on which the assets of the separate account will be valued and if there is no readily available market for assets in the separate account the agreements should specify how such assets would be valued.

#### F.5) Asset Maintenance

Pursuant to §4240(a)(8) of the Insurance Law, unless otherwise provided in approvals given by the superintendent and under such conditions as he may prescribe, the contract must state that the insurer will maintain in each separate account assets with a value at least equal to the amounts accumulated in accordance with the applicable agreements with respect to such separate account and the reserves for annuities in the course of payment that vary with the investment experience of such separate account. Section 50.3(a)(1) of Regulation No. 47 also provides: *Except as may be permitted in writing by the superintendent,*

*every company shall maintain in each separate account assets with a value at least equal to the reserves and other contract liabilities with respect to such account.*

Separate account agreements and plans of operations should not extend insulation to any amounts allocated to the separate account (and any earnings thereon) from the general account to support applicable asset maintenance requirements. The asset maintenance and transfer provisions in the contract and plan of operation should be clarified to prevent the insulation of assets allocated to a separate account by the insurer from its general account solely to support the asset maintenance requirement.

F.6) Disclosures

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

- (a) Contain a statement of the essential features of the procedures used to determine the dollar amount of the variable elements thereunder. Section 4240(a)(11)(A).
- (b) State in clear terms that such amounts may decrease or increase according to such procedure. Section 4240(a)(11)(B).
- (c) Contain on its first page a statement that such elements thereunder are on a variable basis. See §IV.A.4(a) above and §4240(a)(11)(C).

F.7) Asset Ownership

- (a) Section 4240(a)(12) of the Insurance Law provides that amounts allocated by the insurer to a separate account shall be owned by the insurer, the assets therein shall be the property of the insurer, and no insurer by reason of such accounts shall be or hold itself out to be a trustee.
- (b) The contract should not include any language that would have a tendency to mislead the contractholder as to the ownership of the separate account assets or the status of the insurer as trustee. Historically, the relationship between the insurer and insured has been viewed as that of a debtor-creditor, rather than trustee-beneficiary.

F.8) Insulation Provision

- (a) Section 4240(a)(12) of the Insurance Law provides: ... If and to the extent so provided in the applicable agreements, the assets in a separate account shall not be chargeable with liabilities arising out of any other business of the insurer. In addition, §50.3(a)(2) of Regulation 47 provides that a separate account annuity contract may provide ... that the portion of the assets of the separate account not exceeding the reserves and other contract liabilities with respect to such separate account shall not be chargeable with liabilities arising out of any other business of the insurer.

- (b) Section 4240(a)(12) of the Insurance Law and Section 50.3(a)(2) of Regulation 47 permit, but do not require, separate account agreements to provide that the assets in a separate account shall not be chargeable with liabilities arising out of any other business of the insurer. The Department has determined that separate account asset insulation should be limited to the contractholder's allocations to the separate account and the investment gains or losses attributable thereto.
  - (i) Separate account assets will not be insulated from the liabilities arising out of other business of the insurer unless insulation language is included in the separate account annuity contract.
  - (ii) Section 7435(c)(1) of the Insurance Law provides that the estate of the life insurance company shall mean the general assets of such company less any assets held in separate accounts that, pursuant to §4240, are not chargeable with liabilities arising out of any other business of the insurer.

F.9) Incidental Death Benefit

- (a) Section 50.3(a)(7) of Regulation No. 47 permits a separate account annuity contract to provide, as an incidental benefit, for the payment of a death benefit in the event of death prior to the annuity commencement date. The amount of such death benefit shall not exceed the greater of (i) or (ii):
  - (i) The accumulated value of the contract, or
  - (ii) The aggregate amount of stipulated payments or employee contributions, whichever is applicable, made under the contract prior to the time of death.
- (b) In addition to the above, the Department has taken the following actions:
  - (i) Approved as an incidental death benefit a "ratchet" or "step-up" death benefit in which the highest accumulation amount on any given anniversary would be the new minimum death benefit if greater than items (i) or (ii) above.
  - (ii) Disapproved a "roll-up" death benefit that accumulates contributions at a minimum rate of interest as an incidental death benefit.
  - (iii) Approved incidental death benefits in single premium, flexible premium and stipulated premium contracts.
  - (iv) Note that for the return of premium death benefits there must be a reduction in the amount of the death benefit to reflect any premium that was already returned to the contract holder in the form of withdrawals prior to the death benefit becoming payable.
- (c) The contract should specify the date on which the death benefit will be determined and explain the effect of withdrawals on the death benefit.

- (d) Section 50.3(a)(7) of Regulation No. 47 provides that a death benefit that is not an incidental death benefit during the deferred period is subject to the provisions of the Insurance Law applicable to life insurance contracts.
- (e) If the contract offers death benefit payment options in addition to a lump sum, the contract must indicate what the default option will be in the event that the beneficiary does not elect an option. Entire Contract issue - §3204(a)(1). See also Circular Letter No. 27 (2008) with respect to default payment option for same-sex spouses.
- (f) Withdrawal charges may not be deducted from death benefits regardless of the manner of payout (i.e. lump sum, installments, etc.) as death benefits are not cash surrender benefits.

F.10) Involuntary Cashout - Small Annuities

- (a) The contract may provide that, at the time the annuity becomes payable, the insurer may, at its option, in lieu of commencing annuity payments, cancel the annuity and pay the accumulated value to the contractholder if the accumulated value is less than \$2,000, or would provide an income of less than \$20 per month or if the amount of the annuity does not meet other minimum requirements as approved in writing by the Superintendent. Section 50.3(a)(8) of Regulation 47.
- (b) If the contract permits the insurer to refuse to commence the annuity payments due to minimum size requirements (e.g., at least \$20 per month), the contract must permit surrender with no withdrawal charges if such refusal takes place. Section 3201(c)(2).

F.11) Mortality and Expense Guarantees

If the contract provides for variable annuity payments, it must contain a statement that neither expenses actually incurred, other than taxes on the investment return, nor mortality actually experienced, shall adversely affect the dollar amount of variable annuity payments after such payments have commenced. Section 50.6(a)(1) of Regulation 47.

F.12) Variable Annuity Payment Computation

- (a) Section 50.6(c) of Regulation 47 provides that every variable annuity contract must contain a concise and clear statement of the method used in computing the dollar amount of the variable benefit.
- (b) The method of computing the dollar amount of variable annuity payments must be such that, if the annual rate of investment return of the separate account were six and one-half percent at all times from the issue of the certificate, such amounts would not decrease. Section 50.6(a)(1) of Regulation 47

- (c) The mortality table (including any projection scale and the years of projection) and assumed interest rate must be stated in the contract.

#### F.13) Deferral of Payment

- (a) In connection with the reservation of the right to defer cash surrender payments, any separate account annuity contract shall provide, if and to the extent permitted or required under the Investment Company Act of 1940, as amended, and any other applicable federal and state law, either:
  - (i) That the company reserves the right, at its option, to defer the determination and payment of any cash surrender value for a period of six months after the demand therefor with the surrender of the contract, or
  - (ii) That the company reserves the right, at its option, to defer the determination and payment of any cash surrender value for a period of nine months in which installments will be paid, or
  - (iii) That the company reserves the right, at its option, to defer the payment of any cash surrender value in accordance with the deferment provisions of the federal Investment Company Act of 1940, as amended. Section 50.7(a)(4).
- (b) See also §IV.G.22. of this outline with respect to contracts used in the Private Placement market.

#### F.14) Annual Reports

- (a) Reference to an annual report is not a required provision in a separate account annuity contract. However, the contract may explicitly reference the annual report.
- (b) An annual report is required to be provided by the insurer to every separate account annuity contractholder, who has accumulation units credited to his or her account, pursuant to Section 50.9 of Regulation No. 47.
- (c) The report must include a statement or statements reporting the investments held in the separate account and in the case of contracts under which benefit payments have not yet commenced, a statement reporting as of the date not more than four months prior to the date of mailing, the number of accumulation units, and the dollar value of each such unit or the total value of the contractholder's account, account, except that such statements need not be mailed with respect to such contracts which have been issued not more than four months prior to the date of the mailing.
- (d) If the contract contains a guaranteed minimum withdrawal benefit, the annual report and withdrawal request forms should include disclosure in accordance with Circular Letter 5 (2011).

#### F.15) Illustrations

- (a) Section 50.8 of Regulation No. 47 provides that illustrations of benefits payable under any separate account annuity contract, which are incorporated in or attached to any such contract or are utilized in advertising or sales material relating to any such contract, shall not include projections of past investment experience into the future or attempted predictions of future experience;
- (b) Section 50.8 permits the use of hypothetical rates of investment return, clearly designated as such, to illustrate possible levels of variable annuity payments, provided that:
  - (i) The use of such hypothetical rates is not in conflict with applicable requirements of the Securities and Exchange Commission;
  - (ii) If any hypothetical rate of investment return is used for illustration purposes, a corresponding additional illustration must be included using a hypothetical rate of investment return at least at the same interval below the pivotal rate of investment return. The “pivotal rate of investment return” is the smallest annual rate of investment return that must be earned by the separate account if the dollar amount of variable annuity payments is not to decrease.
  - (iii) Except as approved by the Superintendent, no hypothetical rate of investment return in excess of eight percent may be used in such illustration. Investment Return is defined in §50.1 of Regulation 47 as investment income plus capital gains less capital losses, whether realized or unrealized, on the assets of the separate account, less taxes incurred thereon (adjusted for any increase or decrease in reserves for potential taxes).
  - (iv) Variation in the eight percent rate in illustrations (whether it must be a flat rate or whether it can vary from year to year):
    - (I) Gross Rate in excess of 8% may be used in an illustration provided that in any year the accumulation at the gross rates used in the illustration does not exceed the accumulation at an 8% gross rate.
    - (II) For example, if the gross rate of 5% is used in the first year, a gross rate of 11% may be used in the second year. This is permissible because 1.05 multiplied by 1.11 is 1.1655 and is less than 1.08 multiplied by 1.08 or 1.1664.

After the second year, gross rates other than 8% may be used provided the accumulation does not exceed the accumulation at 8%.

The Circular Letter 6 (2004) process may be used for filings with illustrated forms that conform to the above guidance regarding variation in the eight percent rate in illustrations. The submission letter should indicate that the forms are illustrated and this Guidance should be cited. Other variations may

not be submitted using the Circular Letter 6 (2004) process unless the Department has given permission.

F.16) Nonforfeiture Requirements Applicable to Separate Account Annuity Contracts

- (a) With respect to amounts allocated to a separate account, a provision specifying the options available, prior to the annuity commencement date, in the event of default of a stipulated premium payment or of surrender of the contract is required. §50.7(a)(3) of Regulation 47. The certificate holder must be allowed, at his or her option, to elect:
  - (i) to receive the cash surrender value, or
  - (ii) if the insurer makes a paid-up annuity available, to receive a paid-up annuity to commence at the maturity date provided in the certificate, if the certificate is not surrendered for cash.
- (b) With respect to the separate account annuity portion, the certificate must specify the method by which, and the date as of which, the accumulated value of the certificate shall be determined and may provide for the deduction therefrom of a reasonable charge for unamortized acquisition expenses in arriving at the cash surrender value payable. The cash surrender value must be equal to the accumulated value less withdrawal charges.
- (c) If only the paid up annuity option is available, the accumulated value of the certificate of the separate account or accounts of the company at the time of default shall, at the option of the contractholder or certificate holder in the case of a certificate, be transferred to the general account of the company to provide a fixed dollar paid-up annuity.
  - (i) The kind and amount of paid-up annuity and the conditions of its payment shall be in accordance with the provisions of the contract and the purchase rates stipulated in the certificate.
  - (ii) Any amounts so transferred shall be considered cash surrender values for purposes deferral in §50.7(a)(4) of Regulation No. 47 (and not for purposes of applying a surrender charge). See also §50.7(a)(3) of Regulation 47.
- (d) **Withdrawal Charge** - With regard to amounts allocated to a separate account, the charge deducted in the event of cash surrender may not exceed a reasonable charge for unamortized acquisition expenses. Withdrawal charges may not be deducted from death benefits or upon annuitization as those benefits are not cash surrender benefits. §50.7(a)(3) of Regulation No. 47.
- (e) Withdrawal charges that are a decreasing percent of premium are assumed to meet the requirements of Section 50.7(a)(3) of Regulation 47, unless the initial percentage appears unreasonably high. A numerical demonstration should be provided if the withdrawal charges are a percentage of the accumulated value. Such demonstration should be based on relatively high equity market returns



(of 20%) and should show that the withdrawal charge would not be significantly greater than the initial acquisition expenses reduced by any subsequent recovery of such expenses through contract charges. That is, amortization should be based on actual cash flows and accounting based amortization schedules are not acceptable.

- (f) Free Withdrawal - A contract may provide that an amount be withdrawn from the contract value each year without the application of a withdrawal charge. For example, the contract may allow the certificateholder to withdraw an amount equal to 10% of the prior year's account value without a withdrawal charge.
  - (i) The provision must state whether or not it is applicable if a full surrender is made or if an amount in excess of the "free" amount is withdrawn.
  - (ii) Any restrictions on the ability to take the free withdrawal must be set forth in the contract. For example, if the contractholder may only exercise the free withdrawal once per contract year, that must be stated in the contract. Also, the contract should explain what happens if the contractholder does not withdraw the full free withdrawal amount. For example, it should be clear whether or not amounts not withdrawn carry over to the next year.
  - (iii) If applicable, the provision must state whether or not a market value adjustment applies to the free withdrawal amount.
  - (iv) If the insurer intends to retroactively apply withdrawal charges to amounts withdrawn under a free withdrawal provision within a specified period of time (e.g. 12 months) prior to a full surrender, that must be prominently disclosed in the contract. If the contract contains such a provision, the company must demonstrate that such retroactive application would not result in charges that exceed a reasonable charge for unamortized acquisition expenses. §50.7(a)(3) of Regulation No. 47. Because the Department would need to exercise discretion in reviewing the demonstration and determining that the charge would be a reasonable charge for unamortized acquisition expenses, a contract including this type of retroactive application of the withdrawal charge could not be submitted under the Circular Letter 6 (2004) certified process without permission from the Department.
  - (v) The Department has approved waiver of withdrawal charge provisions. See §IV.G.15 of this outline for more detail.

#### F.17) Termination of Employment and Death Benefit

Section 50.7(b)(2) of Regulation No. 47 requires a provision in the group variable annuity contract and certificate specifying the options available to the annuitant or

certificate holder who contributes to the cost of his or her annuity, or to his or her beneficiary or beneficiaries in the event of:

- (a) The termination of the annuitant's or certificate holder's employment or the termination of the group separate account annuity contract, while the annuitant or certificate holder (participant) is alive and prior to the commencement date of the annuity, or
- (b) The annuitant's or certificate holder's death prior to the commencement date of the annuity. Such options shall include either
  - (i) an option to receive a cash payment at least equal to the aggregate amount of the annuitant's or certificate holder's contributions made under the certificate, without interest, or
  - (ii) an option to receive a cash payment equal to the accumulated value of the annuitant's or certificate holder's contributions under the contract.

#### IV.G) Other Provisions

##### G.1) Loan Provisions

- (a) Loan provisions are not required for annuity contracts but are permissible.
- (b) We have taken the position that the adjustable interest rate in Section 3206 complies with Internal Revenue Code and ERISA requirements for a reasonable rate of return. See IRC Section 72(p) - Qualified Employer Plan Loans. Loans intended to qualify under Section 72(p) should set forth all applicable requirements. U.S. DOL Regulation 2550.408b-1(e) and IRS Notice 93-3.

##### G.2) Dividend Provision

- (a) Annuity contracts that are participating are required to state that the insurer shall annually ascertain and apportion any divisible surplus accruing on the contract. Annual distributions must comply with §4231.
- (b) We have permitted language to the effect that due to the nature of guarantees under the contract no dividends are anticipated. Section 4231(e)(1) and (g)(2) address the issue of whether the annuities must provide for the distribution of dividends.
- (c) The dividend may, at the option of the contractholder, be:
  - (i) Payable in cash except that cash payment will not be required:
    - (I) for a contract qualified for special tax treatment under IRC §403(b) to the extent that such payment would prevent such qualification, or
    - (II) for a contract with respect to which the superintendent has determined that cash payment of dividends would be inappropriate.

- (ii) Applicable to the payment of any premium or premiums upon said contract. §4231(b)(7).
    - (iii) Permitted to accumulate with interest to the credit of the contract if the contract so provides. (Not a required option)
  - (d) The automatic option in the event that an option is not selected by the contractholder must be set forth in the contract.
  - (e) Section 4240(d)(1) of the Insurance Law provides that §4231(e) is not applicable to separate account annuity contracts. Therefore, separate account annuity contracts and certificates are not required to be participating.
- G.3) Non-Benefit Related Withdrawals and Transfers
- For withdrawals that are not subject to §40.4(a) of Regulation 139, an insurer should protect against anti-selection. Such withdrawals may be subject to a negative market-value adjustment. 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.
- G.4) 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.
- G.5) Liquidity Protection Provision
- We encourage insurers to include a contractual liquidity protection provision in all benefit responsive contracts that permit withdrawals prior to maturity. The Department and insurers need to monitor the liquidity exposure of their group annuity contracts. The market-value adjustment formula (even if liability-based) may reflect a close approximation of the market value of supporting assets under normal circumstances; but it may not reflect the liquidation value if assets need to be sold in times of distress. A six month deferral provision and/or a five year installment payout provision afford some protection.
- G.6) 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) Purchase rates must be adequate and should not be excessive. If rates are excessive and the current rates are not competitive, the betterment of rates provision will be less effective.
- G.7) Credit Rating Downgrade Provisions

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

#### G.8) Annuity Settlement Options

- (a) For all accumulation type deferred annuities, the guaranteed interest rate and annuity mortality table being utilized for the guaranteed purchase rates must be identified in the contract.
  - (i) If projection factors are used, they must also be specified (e.g., if the 1983a table with projection scale G is used, the year to which the mortality rates are projected needs to be specified).
  - (ii) If a percentage of the specified mortality table is to be used, then that percentage must be stated in the description.
  - (iii) Contracts subject to the Arizona v Norris decision and Title VII of the Civil Rights Act of 1964 must provide for unisex annuity purchase rates. The description of the unisex mortality must be such that the mortality used is reasonably determined. If a pivot age approach is used then the pivot age must be specified.
- (b) For all accumulation type fixed deferred annuities, the income at annuitization cannot be less than the full account value applied to the guaranteed purchase rates (i.e. actual accumulation amount without deduction of surrender charges and without being reduced by a market value adjustment) applied to the

guaranteed purchase rates. This applies to all payout options other than the lump sum option (i.e. this includes certain only options even if short term, e.g., less than five years). Similarly, the income at the time of any partial annuitization of the account value cannot be less than the full amount the contract holder elects to annuitize (i.e. without deduction of withdrawal charges and without being reduced by a market value adjustment) applied to the guaranteed purchase rates.

- (c) The contract may permit the insurer to make unilateral changes in guaranteed annuity purchase rates for new contributions.
- (d) The contract's annuity payment provision shall describe how annuity benefits are affected by the market-value adjustment formula. If the amount applied to provide annuities is adjusted by a market-value adjustment formula, then such adjusted value must be treated as new funds and current annuity purchase rates must be based on new monies.
- (e) The contract must specify the minimum periodic payment amount, if any, for any monthly, quarterly, semi-annual, annual or other periodic annuity benefit payment and provide for a lump sum withdrawal equal to the actual accumulation amount if none of the annuity benefit payments calculated under the contract for such periods equals or exceeds the minimum payment amount for such periods. §3201(c)(2) and 3204.
- (f) The automatic/default settlement option must be a life annuity with a minimum of five year certain period, unless otherwise required under the IRC.
- (g) If commutation of payments after annuitization is permitted, the commutation provision must fully describe how the commuted value is determined. §3204.
- (h) If any income settlement option with a period certain provides for installment payments of the same amount at some ages for different periods certain, the contract must provide that the insurer will deem an election to have been made for the longest period certain which could have been elected for such age and amount.
- (i) For variable annuity purchase rates, the assumed interest rate (AIR) and mortality table must be stated in the contract.
  - (i) If projection factors are used, they should be specified (e.g., if the 1983a table with projection scale G is used, the year to which the mortality rates are projected needs to be specified).
  - (ii) The full account value must be applied to guaranteed purchase rates.

#### G.9) Commutation of Payments

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

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

Completed years since annuitization

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

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

Completed years since annuitization

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

G.10) Annuity Commencement Date Waiting Period

- (a) With respect to deferred annuity contracts other than guaranteed paid-up deferred annuity contracts, the contractholder must be allowed to elect to commence annuity payments as early as 13 months from the date of issue.
- (b) Any restriction on the ability to annuitize may not extend beyond the first 13 months after issue and must be fully disclosed in the contract. While not required, the Department encourages insurers to include an exception to any such annuitization restriction for hardship and disability. See IRC §72(u)(4) and Insurance Law §4231(e)(1).
- (c) Except for the 13 month period following issue of the contract, the contract holder must be allowed to commence annuity payments upon request, subject to the insurer's reasonable requirements set forth in the contract for advance notice of such request.

G.11) Maturity Date or Maximum Annuitization Age

The maximum annuitization age or maximum maturity date, if any, must be stated in the contract. See §1113(a)(2) of the Insurance Law for the definition of annuities.

#### G.12) Transfers Between Accounts

- (a) Any restrictions or limitations on transfers between separate accounts or sub-accounts within a separate account and the general account, including market timing restrictions, must be described in the contract with sufficient detail to clearly indicate the circumstances under which such restrictions will be imposed.. Section 3204. Restrictions or limitations on transfers in or out of a separate account or subaccount may be imposed in order to meet requirements imposed by a fund or funds held by the separate account.
  - (i) The Department has not approved an unqualified reservation of right to restrict transfers.
  - (ii) The number of transfers permitted on a monthly or annual basis, with or without charge, the minimum transfer amount or minimum balance requirement, if any, and any other fees or charges applicable to transfers must not be unreasonable.
  - (iii) Restrictions on transfers to prevent “market timing” activity, if any, must be specified.
- (b) It is recommended that transfers from the general account provide protection against disintermediation. For example, the six-month deferral provision required for surrenders should also be applicable to transfers. In addition, an equity wash provision (i.e. right to delay transfer of funds back into the fixed account for a period of time [e.g., 3-6 months] after the transfer of funds out of the fixed account) is recommended.

#### G.13) Owner and Beneficiary Provisions

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

#### G.14) Variable Annuity Guaranteed Living Benefits (VAGLB)

The requirements herein should be provided in the contract and certificate forms. If the benefit is provided by rider form, then such form should include the



provisions noted below. Where applicable, reference to application form disclosures are also provided.

(a) General

- (i) Any investment restrictions or required asset allocation programs associated with the guaranteed living benefits, including the following, must be adequately described in the contract and referenced in the application. §3204(a)(1).
  - (I) If the investment options available under the contract are limited as the result of election of the VAGLB benefit, the nature of such limitations as well as a description of the circumstances under which such restrictions will be imposed must be described in the contract as well as referenced in the application form. The contract and application must provide that at the point when the VAGLB has been elected, no further change or limitation of the available investment options may be made until reset of the guaranteed benefit initiated by the certificateholder or termination of the VAGLB without prior approval of the Department.
  - (II) Any limitations on transfers among the fixed accounts and the variable subaccounts associated with election of the VAGLB feature must be described in the contract and referenced in the application forms. This would include any company-initiated transfers.
  - (III) The contract must include an adequate description of any asset allocation program (a.k.a. trading rules) such that the customer can understand how the program works. The Department finds it especially critical that any asset allocation program rule regarding involuntary transfers among accounts must be adequately described in the contract, including numerical thresholds triggering involuntary transfers. In addition, numerical examples may be called for when the trading rules are complex. The Department has not required that every detail of a program be included in the contract so long as the full description of the program (with all details) is placed on file with the Department and the contract states that such details may be requested from the Company. The contract and application must provide that at the point when the VAGLB has been elected, no changes will be made to any asset allocation program until reset of the guaranteed benefit initiated by the certificateholder or termination of the VAGLB by the certificateholder.

- (IV) The contract must indicate what happens if the certificateholder attempts to make a restricted trade/transfer while the VAGLB is in effect (e.g., reduction or termination of the VAGLB, a program in effect prevents transfers/allocations to prohibited funds for the duration of the VAGLB feature, etc.).
  - (ii) Depending on the complexity of the narrative description in the contract, numeric examples may be needed to clearly demonstrate how the benefit formula functions when the VAGLB benefit base exceeds the actual accumulation amount (i.e. the VAGLB is “in the money”) and partial withdrawals are made prior to realizing the benefit.
  - (iii) The contract must specify the charge for the benefit and include a description of whether the charge is calculated based on amounts allocated to the fixed account, if any, as well as the separate accounts. The contract must disclose and the application must reference whether the benefit and its charges may be terminated at any time or whether the charges will remain in effect for the life of the contract, and whether the charges may change upon exercise of any reset option. The calculation of the amount of the charge for the benefit can be based on amounts allocated to both the fixed account and the separate account.
  - (iv) The Department has significant concerns about the use of living benefits in employer sponsored defined contribution plans. Our concern is the potential for participants under a group annuity contract to forfeit the guaranteed living benefit (after years of the participant paying potentially significant fees) due to circumstances beyond the participant's control and, in some instances, beyond the insurer's control (e.g., termination of the group contract by the insurer or plan sponsor/group contractholder, termination of employment, small account value triggering auto cashout provision under the plan, etc.) At a minimum, the enrollment form/application, contract and certificate should provide prominent disclosure of the potential for an involuntary loss of the guaranteed living benefits. The Department recommends as a best practice that insurers develop non-forfeiture options by which a participant may preserve his or her guaranteed living benefit in the event that the certificate would otherwise terminate due to circumstances beyond the participant’s control.
- (b) Guaranteed Minimum Income Benefit (GMIB)
- (i) The opening paragraph must describe the benefit in clear and simple terms, such as, “This benefit provides a minimum income benefit upon annuitization by establishing a benefit base and applying such benefit base to guaranteed purchase rates. The benefit base is established for

the sole purpose of determining the minimum *income* benefit and is not used in calculating the cash surrender benefit, death benefit, or other guaranteed paid-up annuity benefits.” (The benefit base should not receive more emphasis than the associated guaranteed annuity purchase rates. §3201(c)(1).)

- (ii) A full description of the benefit must be included in the contract, including how the benefit base and amount of the benefit is calculated as well as any restrictions on allocations/transfers to the fixed account or any separate account (or sub-account within a separate account). §3204(a)(1).
- (iii) The application or supplemental application must identify the investment options available or not available with the GMIB.
- (iv) The contract must describe (and application must reference) how the guaranteed benefit is affected by
  - (I) additional contributions;
  - (II) partial withdrawals; (Numerical examples should be used to explain the difference between dollar-for-dollar and proportional reductions in the benefit base resulting from withdrawals. See also (a)(ii) above.)
  - (III) amounts allocated to the fixed account, if any;
  - (IV) transfers between or among investment options available under the contract.

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

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

the application forms are not attached to the contract and certificate forms when delivered.

(c) Guaranteed Minimum Withdrawal Benefit (GMWB)

- (i) The opening paragraph must describe the benefit in clear and simple terms, such as, “This benefit provides a minimum withdrawal benefit that guarantees, upon election, a series of withdrawals from the contract equal to x% of the benefit base. The benefit base is established for the sole purpose of determining the minimum withdrawal benefit and is not used in calculating the cash surrender benefit or other guaranteed benefits.”
- (ii) A full description of the benefit must be included in the contract, including any restrictions on allocations/transfers to the fixed account or any separate account (or sub-account within a separate account). §3204(a)(1).
- (iii) The application or supplemental application must identify the investment options available or not available with the GMWB.
- (iv) The contract must describe (and application must reference) how the guaranteed benefit is affected by
  - (I) additional contributions;
  - (II) partial withdrawals;
  - (III) amounts allocated to the fixed account, if any,
  - (IV) transfers between or among investment options available under the contract.
- (v) The benefit base should not receive more emphasis than the associated guaranteed annuity purchase rates. Section 3201(c)(1).
- (vi) Insurers should provide disclosure to contractowners that explains the impact of excess withdrawals on the guaranteed withdrawal amount in accordance with Circular Letter 5 (2011).
- (vii) For tax-qualified programs, the application form must include a statement similar to the following: “The *benefit* may have limited usefulness in connection with contracts funding tax-qualified programs because partial withdrawals made to satisfy the minimum distribution rules might result in a dollar-for-dollar or proportional reduction in the benefit base or an inability to exercise the benefit altogether. If you plan to exercise the benefit before or after your required minimum distribution beginning date under the specified contract, you should consider whether the *benefit* is appropriate for your circumstances. You should consult your tax advisor.” This disclosure must be included in the schedule page of the contract/certificate forms in cases where

the applications are not attached to the contract and certificate forms when delivered. Such disclosure is not necessary if, under the terms of the contract, withdrawals taken to satisfy minimum distribution requirements of the Internal Revenue Code will not result in such a reduction to the benefit base and will not terminate any benefit base step-up provided for in the contract.

(d) Guaranteed Minimum Account Benefit (GMAB)

- (i) The opening paragraph must describe the benefit in clear and simple terms, such as, "This benefit provides a minimum account value so long as the contract is maintained for X years.
- (ii) A full description of the benefit must be included in the contract, including any restrictions on allocations/transfers to the fixed account or any separate account (or sub-account within a separate account). §3204(a)(1).
- (iii) The application or supplemental application must identify the investment options available or not available with the GMAB.
- (iv) The contract must describe (and application must reference) how the guaranteed benefit is affected by
  - (I) additional contributions;
  - (II) partial withdrawals; (Numerical examples should be used to explain the difference between dollar-for-dollar and proportional reductions in the benefit base resulting from withdrawals. See also (a)(ii) above.)
  - (III) amounts allocated to the fixed account, if any,
  - (IV) transfers between or among investment options available under the contract, including any funds not permitted for this benefit.

G.15) Waiver of Surrender Charges or Reduction in Fees

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

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

#### G.16) Telephone Transfers

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

#### G.17) Interest on Surrenders

If the contract provides for interest to be credited during any deferral period triggered by a surrender, the interest rate must comply with the interest crediting provisions of §3227 (i.e., deferral of 10 days or more are credited with interest from the date the documentation necessary to complete the transaction is received by the insurer at the current interest rate payable on the interest only settlement option).

#### G.18) Interest on Deferrals of Death Proceeds

If the contract provides for interest to be credited during any deferral of death benefit payments,

- (a) The interest rate credited for fixed annuities must comply with §3214.
- (b) The interest rate credited for variable annuities must comply with §4240(d)(2).
- (c) Note that §3214 and §4240(d)(2) requirements are not the same. For example, while §4240(d)(2) requires interest to be credited only if payment is not made within seven calendar days of receipt of the beneficiary's election

form, §3214 requires interest to be credited from the date of death regardless of when payment is made.

- (d) If the company wishes to treat the fixed account portion of the contract and the separate account portion of the contract the same with respect to the crediting of interest on death benefits, such treatment would need to be in compliance with both §3214 and §4240(d)(2).

#### G.19) Claims of Creditors

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

#### G.20) Assignments

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

#### G.21) Arbitration

The Department has not approved contract provisions requiring binding mandatory arbitration.

#### G.22) Private Placement

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

approved delays in excess of 15 months from the date the request for payment is received.

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

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

#### IV.H) Fixed Account Availability and Rights to Refuse Premium Contributions

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

##### H.1) Insurer-Initiated Transfers

All transfers or withdrawals caused by the insurer's decision to discontinue the fixed account (for any period of time during the accumulation phase) must be in an amount at least equal to the actual accumulation amount, not subject to a negative market value adjustment, transfer charge, or withdrawal charge. Insurer-initiated transfers must be at the higher of book value or market value.

##### H.2) Money Market Option/Default

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



### H.3) Prior Notice Restriction

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

### H.4) Scope of Reserved Right

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

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

## V) Separate Account Plan of Operation

### V.A) Prior Approval Requirement

#### A.1) Filing

Section 4240(e) of the New York Insurance Law requires prior approval of the statement of the separate account's methods of operation. The statement is customarily referred to as the separate account's "plan of operation". All plan of operation filings should be made directly to Mr. Peter Kreuter, Chief Life Actuary 3, NYS Insurance Department, Life Bureau, 25 Beaver Street, New York New York 10004.

#### A.2) Form Marketing

An authorized insurer shall not make any separate account agreement in New York providing for the allocation of amounts to a separate account until such insurer has filed the plan of operation with the Superintendent and the Superintendent has approved such plan.

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

#### A.3) Fund Changes

When sub-accounts of the separate account are added, deleted, or changed, the company must make an informational filing with the Albany office. Such filing must include a copy of the approval letter from the Department's Life Bureau in New York City for the amended Plan of Operations, or if such approval has not been received, a copy of the Department's acknowledgement letter for that filing and, if applicable, a statement explaining the plan was deemed approved by operation of law under §4240(e) of the Insurance Law. (Note: The new funds cannot be utilized until the Life Bureau in New York City has approved the new/amended Plan of Operations.)

#### V.B) Qualification Requirements

Regulation No. 47 (11 NYCRR 50) sets forth the qualification requirements for insurance companies to issue separate account annuity contracts. Section 50.2 requires an insurer to submit the following information to the Superintendent before it can qualify to deliver or issue for delivery any separate account annuity contract within the State:

##### B.1) Contract Description

A description of the kinds and characteristics of separate account annuity contracts it intends to deliver or issue for delivery. §50.2(a)(1) of Regulation No. 47.

##### B.2) Method of Operation

A description of the proposed method of operating the separate account or accounts established with respect to such separate account annuity contracts. §50.2(a)(2) of Regulation No. 47.

##### B.3) Biographical Data

If requested by the Superintendent, biographical data with respect to the officers and directors of the company and the members of the committee, board or other similar body of the separate account.

##### B.4) Authorized Foreign Insurer

With respect to an authorized foreign insurer, if requested by the Superintendent, a copy of the statutes and regulations of its State of domicile under which it is authorized to issue such separate account annuity contracts; and

##### B.5) Other Information

Such further information as the Superintendent may require.

V.C) Informal Guidelines

The Department has prepared informal guidelines concerning the filing requirements for separate account plans of operation. See *Guidelines For The Preparation Of Plans Of Operation For Separate Accounts (July 1, 1994)*.