FUNDING AGREEMENTS

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I. Applicability

A. *Scope*: This product outline applies to all individual and group funding agreements delivered or issued for delivery in this state by an authorized insurer, regardless of whether the amounts paid to the insurer are allocated to the insurer's general account or one or more of its separate accounts.

1. Funding agreements generally provide for the accumulation of funds at guaranteed rates for a specified time period with repayment to the holder in lump sum or installments. Funding agreements may be simple interest contracts with interest paid out periodically
2. Funding agreements cannot provide for payments to or by the insurer based on mortality or morbidity contingencies.

B. *Excluded Contracts*:

1. All individual and group annuity contracts that provide for the payment or purchase of life contingent annuity benefits to covered person(s), regardless of whether the contract is funded through the company's general account or one or more separate accounts.

II. Filing Requirements

A. *Overview*

1. *Statutory Requirements*: 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 law). The term "policy form" is defined to include a funding agreement authorized by Section 3222.
2. *Discretionary Authority For Disapproval*: Section 3201(c)(1) and (2) permits the Superintendent to disapprove any policy form that contains provisions that are misleading, deceptive, unfair, unjust, or inequitable or if its issuance would be prejudicial to the interests of policyholders or members. See also §§2123, 3209, 4224, 4226, 4228(h), 4231, 4239.

B. *Policy Form Submission Rules*

1. *Preparation of Forms for Submission*. Basic Rules - See Circular Letters 1963-6 and 1969-4.
   (a) Each policy form should be designated with form number on lower left-hand corner of face page to distinguish the form from all others of the insurer.
   (b) New policy forms should be submitted without amendatory riders or endorsements, unless:
      (i) Changes are necessitated by distinctive New York requirements.
      (ii) Riders are expressly permitted.

(iii) Riders permitted to conform policy to change in law, rules or regulations, unless resulting policy would have tendency to confuse or mislead.

(c) Submit duplicate copies of forms

(d) Printed forms should be used unless its use is too limited to justify printing. The form should be clear, legible and reasonably permanent. Computer generated forms are acceptable. See also readability provision Section 3102.

(e) Blank spaces in form should be filled in and completed with hypothetical data to indicate purpose and use of forms. Alternatively, the submission letter can also explain purpose and use of the form.

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

(g) If application (or enrollment form) will be attached to policy, it should be submitted. If previously approved, the form or submission letter should so indicate.

(h) All endorsements to be applied by stamp should be submitted on company letterhead.

(i) Variable material used with impairment, waiver or exclusion riders should be submitted with the form for approval.

(j) Illustrative material may be used for items that vary from case to case, such as names, dates, eligibility requirements.

2. *Explanation of Variable Material*

(a) Illustrative material may be used for items which may vary from case to case such as names, dates, eligibility requirements, premiums and schedules for determining the amount of insurance for each person insured.

(b) If an explanatory memorandum accompanying a cover letter or appropriate reference to material filed with schedules of premium rates (in duplicate) clearly indicates the nature and scope of the variations to be used, portions of other provisions such as insuring clauses, benefit provisions, restrictions, and termination of coverage provisions may be submitted as variable, if suitably indicated by red ink, underlining, bracketing or otherwise.

(i) For example, it may be indicated that variations will be made within the limits set out in the explanatory memorandum or that any one of several alternative provisions may be used or that a provision may be either included as submitted or else completely omitted.

(ii) An explanation of variable material that the variations "will conform to law" or "as requested by the policyholder" is <u>not</u> acceptable.

(c) The alternative language, if any, should be supplied in duplicate, independent of the insurer's letter. For alternative text, exact language is required.

(d) Ranges for actuarial items must be specified in the explanation. Include the minimum and maximum amounts, where applicable.

(e) Open-face riders or endorsements may be filed for general use in amending illustrative or variable material within the limitations of the preceding paragraph.

3. *Submission Letters* - Circular Letters 1963-6 and 1969-4
   (a) In duplicate, signed by a representative of the company authorized to submit forms filing or approval. Rules I.G.
   (b) Identification of Insurer
   (c) Listing of form numbers. Rule I.G.1.
   (d) Table of Contents of all material in the filing
   (e) 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. Rule I.G.8.
   (f) Description of benefits/coverage provided. Rule I.G.2, 7.
   (g) Type of holder, as defined in Section 3222(b) (i.e., insurer or subsidiary thereof, employee benefit plan, tax-exempt organization, large institution, government). Specify _____
   (h) Classes covered, if not all persons are eligible
   (i) Statement as to whether the contract is noncontributory, contributory or funded solely by employee contributions in the case of an employee benefit plan. If the policy is contributory for some insureds, or for some levels of insurance, or under some conditions, indicate what situations or conditions would permit or require contributions from the insureds.
   (j) Statement as to whether the form is new or is intended to replace a previously approved form. Rule I.G.3, 4, 5, 6, 8
      (i) If the form is intended to supersede another approved or filed form, the form number of the form approved or filed by the Department, together with a statement, of the material changes made; if the previous form is still in process, the form number, control number and submission date. A redlined copy is helpful.
      (ii) If a form submitted for approval had previously been submitted for preliminary review, a reference to the previous submission and a statement setting out either (a) that the formal filing agrees precisely with the previous submission or (b) the changes made in the form since the time of preliminary review. A redlined copy is helpful.
      (iii) If the form is other than a policy or contract, give the form number of the policy or contract form or forms with which it will be used, or, if for more general use describe the type or group of such forms.
      (iv) If a form is intended to replace a very recently approved form because of an error found in the approved form, the insurer must, if the approved form has not been issued, return the approved form with a statement in the submission letter that the form has not been issued.

The insurer may, under these circumstances, use the same form number on the corrected form being submitted. If, however, the form has been issued, the insurer must place a new form number on the corrected form and need not return the previously approved form.

(v) For funding agreements marketed to individuals, if there are similar (same product type) forms that are not being replaced, then identify those forms and indicate why they cannot be replaced. For the particular type of product (e.g., structured settlement), a discussion of each available product not being replaced and its product and/or market distinction from the subject form should be provided. For a given market, the discussion should cover all individual contracts and group certificates sold in such market.

(k) Statement as to how the form will be used and how it will be marketed, as described in Circular Letter 1976-12

(l) Caption of submission letter should identify all forms submitted for approval or acceptance. Specify form number, designate form as individual or group, provide a generic product description and generic form description. See Circular Letter No. 8 (1999)

(m) Statement describing the type of pension plan (i.e., defined contribution or defined benefit) and identifying the applicable Code reference, such as IRC§§401(a), 401(k), 403(b), 408(b), 457 ,etc.; type of welfare plan, if applicable or the type of program funded by the funding agreement.

(n) Statement describing the program or activity to be funded by the funding agreement.

4. *Readability Requirement* - Flesch Score Certification - Section 3102(b)(H) excludes any funding agreement issued pursuant to §3222. See February 18, 1982 letter.

5. *Procedural Changes*

(a) Circular Letter No. 14 (1997). Submissions that are incomplete or not drafted to conform to New York requirements will be rejected. Submissions that are poorly organized, difficult to understand or that contain several substantive omissions or objectionable provisions will be rejected.

(b) Circular Letter No. 8 (1999). Fifteen-day response limit to comment letters.

(c) Provide a single contact person to coordinate and prioritize all filings or at least all filings of a given block of business.

(d) To reduce the overall, time period for completion of review, the Department may limit the number of comment letters on any one file to no more than two each from the reviewing attorney and actuary.

C. *Alternative Approval Procedure* - Section 3201(b)(6), C. L. No. 2 (1998).

1. Purpose. Expedited approval procedure prevents delays by deeming forms to be approved or denied if the Department or insurer fail to act in a timely manner.

2. Expedited Approval Requirements.

(a) Submit complete filing package, including the policy forms, actuarial material and all necessary supporting material. The caption of the submission letter should identify the submission as a *Section 3201(b)(6) Deemer Submission.*

(b) Submit a certification of compliance signed by an officer of the insurer who is knowledgeable of the law and regulation applicable to the type of policy form. The certification should state that the form complies with applicable laws and regulations and make reference to any law regulation or circular letter that specifically applies or is unique to the type of form.

3. Time Constraints Applicable to the Department.

(a) Return incomplete submissions within sixty days with notice stating that no action is being taken by the Superintendent and that the time period for substantive review has not commenced, if the submission does not include all necessary form, rate or supporting material or fails to comply with applicable requirements.

(b) Superintendent notifies the Insurer in writing within ninety days of receipt of initial submission that the Department approves the form, requests additional information, or denies the filing stating the reason for such disapproval.

(c) The form is deemed approved if no comment letter is provided within 90 days of receipt of the initial submission or within 45 days of receipt if a response to a previous comment letter. The form will eventually be reviewed if deemed approved. Notice and hearing is required to withdraw approval or retroactively modify such form(s). See §§3201(b)(6)(B), 3110, 3202.

4. Time Constraints Applicable to Insurer.

(a) Response required within 45 days of receipt of comment letter, unless extension is granted. The response must provide all requested information and respond to all objections.

(b) The failure to provide timely response will result in the form being deemed denied and the insurer cannot resubmit for 90 days from the date the response was due.

5. Additional Requirements.

(a) Initial correspondence from the Department should state all objections. Current practice is to send separate letters from an actuary and an attorney.

(b) New objections in follow-up correspondence from the Department can only be based upon modifications of policy or new material submitted. However, the Department can always raise objections that are based on the Insurance Law and applicable regulations.

(c) Loss of Eligibility for Expedited Approval for one year if a deemed approved form is subsequently found to fail to comply with the provisions of the Insurance Law.

D. *Prefiled Group Insurance Coverage* - Circular Letter 1964-1.

1. Purpose. Circular Letter 64-1 permits insurers to provide or assume risk for group life and annuity coverage prior to the filing of approved forms. This procedure can be used for funding agreements.
2. Conditions For Providing Coverage Prior to Approval
   (a) Immediate coverage requested by policyholder to meet specific need of policyholder.
   (b) Insurer has reasonable expectation of approval or acceptance.
   (c) Confirmation letter sent to policyholder by insurer stating:
      (i) The nature and extent of benefits or change in benefits.
      (ii) The forms may be executed and issued for delivery only after filing with or approval by the Department;
      (iii) An understanding that, if such forms are not filed or approved or are disapproved, the parties will be returned to status quo insofar as possible, or the coverage will be modified retroactively to meet all requirements necessary for approval; and
      (iv) The effective date of coverage (Best Practice).
   (d) Department Notification.
      (i) Insurers are advised to notify Department of coverage within 30 days (i.e., copy of confirmation letter) of coverage and submit forms within six months. (Best Practice).
      (ii) Statement explaining circumstances and reasons for delay in submitting forms within twelve months for group annuity.
      (iii) Follow-up statement every six months for group annuity until form is submitted. If reason for delay is unacceptable, Department may pursue a violation under Section 4241 for willful violation of the prior approval requirement.
3. Recommended Practice.
   (a) Insurers should review prefilings periodically (monthly) to verify compliance with conditions for prefiling.
   (b) Insurers should vigorously pursue approval (or acceptance for out-of-state filings) of prefiled cases after forms have been submitted to mitigate harm if forms are found not to comply with applicable requirements.

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

(iii) a commitment to notify the Department in the event any such state disapproves any of the forms.

(c) Provide a self support statement. See §4228(h).

III. Other Considerations Pertaining To Section 3222

A. *Definition of Funding Agreement*

1. The term "funding agreement" is defined in §40.2(g) of Regulation No. 139 to be a contract described in §3222 of the Insurance Law. Section 3222(c) places two requirements on funding agreements. The requirements are as follows:
   (a) No amounts shall be guaranteed or credited under any such funding agreement, except
      (i) upon reasonable assumptions as to investment income and expenses, and
      (ii) on a basis equitable to all holders of funding agreements of a given class.
   (b) Such funding agreement shall not provide for payments to or by the insurer based on mortality or morbidity contingencies.
2. This definition is somewhat broad. Section 3222 neither defines nor restricts funding agreements, except by limiting to whom they may be issued. It can be interpreted to allow most types of annuity contracts, as long as such contracts eliminate all provisions that provide for payments to or by the insurer based on mortality or morbidity contingencies.
   (a) The typical group funding agreement, when first authorized, resembled fixed rate/fixed maturity guaranteed interest contracts described in the *Guaranteed Interest Product Outline,* except that no provision is made for the purchase of annuities under the contract.
   (b) However, group funding agreements today often provide for a fixed interest rate or indexed rate that is reset periodically and need not provide for a fixed maturity date.

B. Enabling Legislation. The memoranda in support of §5 of Chapter 172 of the Laws of 1982 make it clear that the authorization of funding agreements (annuities without life contingencies) was intended to implement recommendation IV, 3.2 of the *Report of the Executive Advisory Commission on Insurance Regulatory Reform* (May 6,1982) at page 43 and specifically authorize by statute contracts that were permitted under the Department's authority to authorize insurers to engage in activities reasonably ancillary to an insurance business pursuant to §46-a(9) (now §1714).

1. Ancillary Activity Authorized Prior To 1982. The Department had permitted insurers to issue the following ancillary agreements:
   (a) Qualified Pension Plans. Prior to 1982, some plans eliminated life annuities as a distribution option to avoid burdensome and costly requirements.
      (i) The qualified joint and survivor annuity required by ERISA increased administrative responsibilities.

(ii) Sex discrimination cases under Title VII of the Civil Rights Act involving the use of sex distinct annuity purchase rates could be avoided if life annuity options were not offered. See *Arizona v. Norris.*

(b) Pension Plans in Foreign Country. Tax ramifications of the life annuity requirement effectively barred foreign plans from funding arrangements offered by licensed insurers.

(c) Governmental Programs. Governmental plans were affected by the same concerns that applied to private plans. In addition, some governmental plans prescribed by statute did not provide for an annuity option.

(d) Tax-Exempt Organization Activities. It was recognized that tax exempt organizations, like pension plans, would like to fund their programs through insurance company investment facilities. However, life annuities are an inappropriate payment option for such organizations. Direct distribution of annuities to the beneficiaries would not be feasible because:
(i) Their identities may not yet be known,
(ii) The benefit ultimately to be conferred upon them may take the form of goods or services furnished by or through the tax-exempt organization rather than money.

(e) Periodic Payments for a Period Certain.
(i) Structured settlements
(ii) Foreign individuals of considerable net worth and investment sophistication prefer funding agreement because of unfavorable tax consequences of individual annuities. In addition, the annuity rate tables used in existing individual deferred annuity contracts are based on mortality assumptions that are of questionable validity in the case of foreign individuals.

2. The *Report of the Executive Advisory Commission on Insurance Regulatory Reform* also indicated that the funding agreement legislation was needed in order to compete with out-of-state companies and with other providers of financial services. This portion of the report was cited in the memorandum in support of the bill provided by the Life Insurance Council of New York.
(a) The report noted that almost every other state permitted period certain annuities.
(b) The report also stated that New York insurance companies should be permitted to unbundle their annuity contracts and issue contracts covering the accumulation phase separately from the payout phase.

C. *Funding Agreement Not An Annuity Contract*. Section 3222(a) states that the issuance or delivery of a funding agreement shall not be deemed to be doing a kind of business authorized by §1113 of the Insurance Law or engaging in any business authorized by §1714 of the Insurance Law.

1. In 1982, the term “annuity” was defined to mean “all agreements to make periodical payments where the making or continuance of all or some of a series of such payments, or the amount of any such payment, depends on the continuance of human life”, except payments made under the authority of §1113(a)(1) (i.e., optional modes of settlement of life insurance proceeds).

(a) As such, a funding agreement could provide for periodic payments over a period certain for individuals in structured settlements or in cases where an annuity with life contingencies was not wanted.

2. In 1985, the term "annuity" was amended by adding the phrase "for a period certain or" following "periodical payments" in the definition of annuity. See §1 of Chapter 864 of the Laws of 1985. As such, an agreement to make "periodical payments for a period certain" could now be considered to be an annuity as defined in §1113(a)(2).
   (a) The sponsor's memorandum in support of Chapter 864 of the Laws of 1985 states that the bill would bring New York into conformity with approximately 38 other states that permit period certain contracts to be written for a period of years rather than for a period dependent on the continued life of the annuitant.
3. Funding agreements sold to entities are not annuities because:
   (a) *Annuitant must be a natural person*. There is nothing in the bill jacket of Chapter 864 of the Laws of 1985 to suggest that the change in §1113(a)(2) was intended to broaden the class of purchasers beyond annuitants (i.e., natural persons).
   (b) *Installment payments at maturity of a guaranteed interest contract does not make the contract an annuity*. There is nothing in the bill jacket of Chapter 864 of the Laws of 1985 to suggest that the change in §1113(a)(2) was intended to expand the scope of such contracts to include unallocated funding agreements, such as fixed rate, fixed maturity guaranteed interest contracts that provide for installment payments at maturity rather than a lump sum payment. An unallocated guaranteed interest contract is either a funding agreement or a group annuity contract depending on whether the contract provides for or permits the purchase of annuity payments dependent on the continuance of the lives of more than one person. See §4238(a).
4. In addition, a period certain annuity is not a funding agreement because the issuance or delivery of a funding agreement cannot be deemed to be doing a kind of business authorized by §1113.
   (a) It has been argued that structured settlements providing for periodic payments to individuals can be considered annuity contracts. However, because §3222(b)(iv) specifically refers to agreements " providing for <u>periodic payments</u> in satisfaction of a claim", we continue to classify such agreements to be funding agreements for review purposes.
   (b) Agreements that provide for lump sum payments at maturity are considered to be funding agreements.

D. *Doing An Insurance Business.* Section 3222(a) states that, notwithstanding the definition of *insurance contract* in §1101(a)(1) of the Insurance Law, the issuance or delivery of a funding agreement *by an insurer* in this state shall constitute doing an insurance business herein. The purpose of this provision was to ensure that the Superintendent would have the sole authority to regulate the issuance and

sale of funding agreements, including the persons selling such funding agreements on behalf of the insurer. See §3222(e).

1. §1101(b)(1) defines the acts and transactions in this state, effected by mail from outside this state or otherwise, that constitutes doing an insurance business in this state and doing business within the meaning of §302 of the Civil Practice Laws and Rules. Pursuant to §1101(b)(1)(D), any kind of business that is specifically recognized as doing an insurance business within the meaning of the Insurance Law, such as provided in §3222(a), constitutes the doing of an insurance business in the state.
   (a) Note that funding agreement is not defined to be an *insurance contract* as such term is defined in §1101(a)(1). Since a funding agreement cannot provide for payments to or by the insurer based on mortality or morbidity contingencies, such payments are not dependent upon the happening of a fortuitous event as required for an *insurance contract.*
   (b) Note also that the issuance or delivery of a funding agreement by an entity other than an insurer does not constitute the doing of an insurance business in the state. We have not asserted jurisdiction over banks and other financial intermediaries that issue similar financial products.
2. The group exception in §1101(b)(2)(B) allows unauthorized insurers to transact business by mail in the state with respect to specified groups in §§4216, 4235, 4237 and 4238. The group exception does not specify any eligible groups in §3222. As such, it can be argued that an unlicensed insurer cannot issue or deliver funding agreements in the state through the mail or otherwise.

E. *Annuity Provider*. Section 3222(a) states that any insurer authorized to deliver or issue for delivery annuity contracts in the state may deliver or issue for delivery one or more funding agreements. Life insurers, fraternal benefit societies and charitable annuity societies are authorized to deliver annuity contracts in the state.

F. *Regulations.* Section 3222(e) grants the Superintendent broad authority to promulgate regulations specifically addressing funding agreements, but this has not been done.
   1. The Superintendent is given sole authority to regulate funding agreements to make it clear that they are not regulated by the New York securities laws.
   2. Of course, federal securities laws may apply, since the amount paid to the insurer, and proceeds applied under optional modes of settlement, under such funding agreements may be allocated by the insurer to one or more separate accounts.

IV. Eligible Funding Agreement Holders

A. *Another Insurer or Subsidiary Thereof*. §3222(b) provides that a funding agreement may be issued to persons authorized by a state or foreign country to engage in an insurance business or subsidiaries of such person. This eligible

funding agreement holder was authorized in 1983 by §2 of Chapter 919 of the Laws of 1983.

1. Funding agreements may be issued to insurance companies (or their subsidiaries) without restriction as to purpose.
   (a) An affiliate of an insurer (other than a subsidiary) must satisfy one of the purposes listed in §3222(b) to be eligible to purchase a funding agreement. See L.1984, c. 867, §2.
   (b) Prior to Chapter 876 of the Laws of 1984, funding agreements could be issued to individuals without restriction as to purpose.
2. The 1983 amendment permitted insurers to sell structured settlements to a casualty insurer directly typically in the context of a structured settlement. Prior to the 1983 amendment, a casualty insurer could only purchase annuities from a life insurer to fund structured settlements.
3. Insurance companies may fund their obligations to make payments under groups of policies through reinsurance, which generally transfers to the reinsurer both the investment function and the risk function in the insurance. Insurers that want to retain risk or transfer it independently of the investment function can do so by purchasing a funding agreement. In addition, smaller companies can use funding agreements to obtain access to the investment opportunities and expertise of larger companies without having to enter into costly reinsurance contracts.

B. *Other Entities And Individuals/Permitted Purpose.* §3222(b) also provides that funding agreements may be issued to <u>entities</u> other than insurers and subsidiaries thereof and to <u>individuals</u> for the following purposes:
   1. *Employee Benefit Plans*. To fund benefits under any employee benefit plan as defined in the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq, maintained in the United States or in any foreign country.
      (a) An "employee benefit plan" under ERISA means a welfare plan or a pension plan or a plan which is both a welfare plan and a pension plan. See §3(3) of ERISA.
      (b) A welfare plan means any plan, fund or program established or maintained by an employer or by an employee organization or by both for purpose of providing welfare benefits for its participants or their beneficiaries through the purchase of insurance or otherwise. Welfare benefits include medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, prepaid legal services, etc. See §3(1) of ERISA.
         (i) Funding agreements have been used to fund post-retirement health benefits.
      (c) A pension plan means any plan, fund or program established or maintained by an employer or by an employee organization or by both to the extent it (a) provides retirement income to employees, or (b) results in the deferral of income by employees for a period extending to the termination of the covered employment and beyond. See §3(2) of ERISA.

(d) Note that the employee benefit plan does not necessarily have to be covered by or subject to ERISA.
(e) The holder of the funding agreement is typically the plan sponsor (employer or employee organization) or plan trustee. However, funding agreements that fund this purpose can be issued to individuals.

2. *Tax Exempt Organizations.* To fund the activities of any organization exempt from taxation under IRC§501(c) or similar organization in any foreign country.
3. *Government Programs*. To fund any program of the government of the United States, the government of any state, foreign country or political subdivision thereof, or any agency or instrumentality thereof.
   (a) The 1983 amendment deleted the phrase "for benefit payments" between "program" and "of the government" to make it clear that the government program purpose was as broad as the tax-exempt activity purpose (i.e., the government program need not be limited to a benefit payment program). See L.1983, c. 919, §2 and L.1984, c.867, §2.
   (b) This section has been used for municipal bond programs as well as State lottery contracts.
   (c) The municipality may be the holder. However, a single purpose corporation may serve as the holder of the funding agreement.
4. *Structured Settlements.* To fund any agreement providing for periodic payments in satisfaction of a claim. See L.1983, c.919, §2.
5. *Large Institution Program.* To fund any program of an institution which has assets in excess of $25 million. See L.1984, c.867, §2.
   (a) Types of programs of taxable institutions that might be funded by funding agreements include:
      (i) Anticipated liabilities resulting from product liability or employee litigation and facility expansion projects. See memoranda in support of L.1984, c.864, §2.
      (ii) *Debt or securities issuance programs*. An institution with assets in excess of $25 million may purchase a funding agreement to support the obligations under a securities issuance program. The proceeds of the sale of securities may be used to purchase a funding agreement that will be pledged for the benefit of the holders of the related securities
      (iii) A special purpose vehicle or corporation may serve as the holder of the funding agreement, as long as the purpose requirement is satisfied.
   (b) This holder was added to §3222 to provide some parity for taxable institutions with tax exempt organization and governments.

V. Contract Provisions

A. *Funding Agreements Issued to Fund Pension Plans*. Generally, funding agreements that are used to fund pension plans have been modeled after guaranteed interest contracts. The majority of such funding agreements fund defined contribution plans. See *Guaranteed Interest Contract Outline* for

additional information. [In our view funding agreements funded solely by employee or individual contributions are subject to the provisions of the Insurance Law applicable to individual annuities, to the extent practicable, including §§ 3219 and 4223.]

1. Entire Contract Provision.
2. Grace Period Provision (for funding agreements with two or more deposits).
3. Plan Benefit Rule -- §40.4(a) of Regulation 139 – Any contract, including a funding agreement, issued in connection with a defined contribution plan which provides the contract holder 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) Funding agreements do not need to be benefit responsive. However, if the funding agreement is benefit responsive, it must comply with this §40.4(a) of Regulation 139.
   (b) The lump sum payment cannot be subject to a market value adjustment.
   (c) No special interest rate adjustment may result from such withdrawals.
4. Allocated Share of Benefit Payments -- §40.4(c) – In the event that there is more than one funding vehicle or cash is available under a defined contribution plan, a funding agreement 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 funding agreement holder.
   (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.
5. Participant Directed Investment Option -- §40.4(d) –In the case of a contract which funds a participant directed investment option under which each contribution allocated to such option is credited with a specified rate of interest to a stated maturity date which rate and maturity date are disclosed to the participant prior to the allocation, such contract may provide that any withdrawals (other than withdrawals on account of bona fide termination of employment due to death or disability of the participant on whose behalf the withdrawal is made) be postponed until the stated maturity date for the contribution.
   (a) In such cases, the contract may permit withdrawals 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 in the non-§4223 market.

(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.

(i) Note that in contracts subject to §4223 and Regulation 127 the MVA must be positive as well as negative.

6. Plan Amendments or Changes In Plan Administration -- §40.4(e) – If the plan terms or the manner in which plan is administered materially change after issue, withdrawals from the contract to pay plan benefits are not subject to the plan benefit rule.

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

(b) If the insurer determines that the amendment or change will not adversely affect the insurer's rights and liabilities under the contract, benefit payments will continue to be subject to the plan benefit rule.

7. Bona Fide Termination of Employment -- §40.4(f) – The contract can include procedures or conditions in order to establish that a requested contractual withdrawal is being made in accordance with a bona fide termination of employment and in accordance with the plan provisions.

(a) Termination of employment means the cessation of an employment relationship with an employer, multiple employer or membership in an employee organization sponsoring the plan, including cessations due to retirement, death, and disability.

(b) Termination of employment does not include:

(i) Any temporary absence,

(ii) A change in position or other occurrence qualifying as a temporary break in service under the plan,

(iii) Transfer or other change of position resulting in employment by an entity controlling, controlled by, or under common control with the employer,

(iv) Cessation of an employment relationship resulting from a reorganization, merger, or sale or discontinuance of all or any part of the plan sponsor's business. The risk for these transactions is typically not considered by the insurer in making the guarantees provided in the contract. Such transaction may result in unexpected withdrawal activity that was not priced for when the contract was issued.

(v) Plan termination or partial plan termination.

8. Market-Value Adjustment Provision

(a) §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 <u>according to a formula described in the contract</u>. *§3204- Entire Contract of the Insurance Law requires that the MVA formula be incorporated in the contract or attached to the contract.*

(i) The market-value adjustment formula should be sufficiently clear so that the holder can calculate the adjustment at any time.

(ii) The factors used in the calculation should be sufficiently definite and not based items solely within the insurers discretion. For example, the formula can refer to an outside index or to rates guaranteed or credited under the contract, but not to the earnings rate on supporting assets because the holder cannot verify such rate.

(b) Note that §40.5(i) of Regulation 139 which gives the insurer the right to change the method for determining the market-value adjustment upon at least 31 days prior written notice does not apply to guaranteed interest contracts. The insurer can amend the formula for new deposit windows under the same contract.

(c) Liability-Based Formula -- For guaranteed interest contracts and funding agreements, 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 requirements applicable to market-value adjustments was necessary "so long as the adjustment is not made with reference to the investment performance of a separate account".

(i) 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".

(ii) Asset-based market-value adjustment formulas in general account GICs and funding agreements may raise concerns with the DOL.

(iii) We may question an asset-based formula if the assets do not appear to closely match the contractual guarantees, especially with respect to duration.

(iv) Regulation 127 provides guidance with respect to liability-based market-value adjustments.

(d) Two-Way MVA Not Required – Although Regulation 127 requires a two-way market-value adjustment for contracts subject to §4223, we have not made this requirement applicable to GICs or funding agreements.

9. Liquidated Damages Provision -- §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 funding agreement holder 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 funding agreement holder 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.

10. Non-Benefit Related Withdrawals and Transfers – For withdrawals that are not subject to §40.4(a), an insurer should protect against anti-selection. Such withdrawals are usually 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.
11. Clone Contract Provision– We have approved provisions that provide for the issuance of a substantially similar GIC with the same maturity date and interest rate in the event of a partial termination triggered by a reorganization, merger, or sale or discontinuance of all or part of the plan sponsor's business.
    (a) The clone contract should satisfy the insurer's underwriting requirements.
    (b) The cost of the conversion can be prorated among the two surviving contracts or covered by the plan sponsor. In any event, the actual charges, if any, should be specified in the contract.
12. 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.
13. Liquidity Protection Provision – We encourage insurers to include a contractual liquidity protection provision in all benefit responsive GICs/funding agreements and all other such contracts that permit withdrawals prior to maturity. The Department and insurers need to monitor the liquidity exposure in their GIC portfolio and other liquid group annuity contracts. The market-value adjustment formula (even if liability-based) may reflect a close approximation of the market value of supporting assets; but it may not reflect the liquidation value.
    (a) A six month deferral provision is most common.
    (b) A contractual provision that gives the insurer the option on the maturity date of paying funds in lump sum or installments over five years or less (at book value with the interest rate specified in the contract) is approvable.
    (c) An insurer should consider a diversification requirement applicable to contractholders. No single contractholder, such as GIC broker should have a disproportionate share of the insurers liquid contracts.
    (d) A contractual formula embedding a "spread" over the benchmark rate used to calculate a one-way market value adjustment is approvable.

B. *Funding Agreements Issued To Fund Other Purposes Or Issued To Other Insurers (And Their Subsidiaries)*.
    1. Common Provisions
        (a) Entire Contract Provision. See §3204

(b) Grace Period Provision (for funding agreements with two or more deposits)
(c) Liquidated Damages Provision.
(d) Interest Rate Guarantee
    (i) Specify the fixed interest rate or index if index rate.
    (ii) Specify duration of the guarantee and, if applicable, the reset periods.
(e) Expense Charges and Fees.
(f) Maturity Date, if fixed at issue.
(g) Termination Provisions
    (i) Insurer's right to terminate the funding agreement.
    (ii) The funding agreement holder's rights to terminate the funding agreement.
    (iii) Specify any surrender charges.
    (iv) Specify the market-value adjustment formula.
(h) Pre-Maturity Withdrawal Provisions
    (i) Specify whether any such withdrawals are permitted and the purpose of such withdrawals.
    (ii) Specify any charges applicable premature withdrawals.

2. Enumerated Purpose and Entity:
   (a) The reviewing attorney or actuary, if applicable, will make sure that the purpose requirement is satisfied and will rely on broad discretionary approval authority in reviewing such products.
   (b) For example, a funding agreement that provides for the accumulation of funds, either in the insurer's general account or one or more separate accounts, to fund the post-retirement health benefits would be subject to the requirements applicable to similar funding agreements funding pension plans, to the extent practicable.
3. Structured Settlement Agreements:
   Structured settlement agreements, such as those subject to Articles 50-A and 50-B of the Civil Practice Laws and Rules ("CPLR"), may need to comply with other state and federal laws. For example, structured settlement agreements subject to Article 50-B may include a commutation provision. See VIII. B and C. below.

VI. Department Interpretations

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

B. *Maximum Guarantee Period*. --- In connection with the form filing process, we have limited the guarantee duration attributable to any deposit cell in funding agreements to ten years, but we are willing to reconsider this requirement on an exception basis. No surrender charge should apply at the expiration of the interest rate guarantee. Otherwise, the interest rate guarantee can be viewed as misleading (i.e., the interest rate guarantee should be calculated so as to amortize any charges prior to maturity).

C. *Credit Rating Downgrade Provisions*

1. Circular Letter No. 2 (1992) states that the Department will not approve a provision which would permit the holder to terminate the contract prior to maturity at book value due only to the insurer's credit rating downgrade. The provision is considered unfair, unjust and inequitable pursuant to §3201(c)(2).
   (a) Waiver of a surrender charge or market value adjustment upon credit rating downgrade would be unfair, unjust and inequitable to persisting holders who would be required to subsidize the withdrawal activity of other contract holders. Surrender charges and market-value adjustments are designed to protect against disintermediation.
   (b) 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.
2. 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).
3. We have disapproved any credit rating downgrade provision included in a funding agreement funding a pension plan that gives the holder the right to terminate a contract prior to maturity even if the withdrawals are subject to a negative market-value adjustment because the provision will increase the risk of disintermediation.
4. For the municipal GIC market (funded by funding agreements), we have approved on a limited and experimental basis an over collateralization option that is triggered on a credit rating downgrade in which the insurer pledges the lesser of market value of supporting assets in the general account or book value to the holder. A reinsurer or other mechanism is used to satisfy the overcollaterization amount if market value is less than book value.
   (a) The approval was granted, in part, because of the differences in the municipal bond and the pension markets.
      (i) Without a downgrade remedy provision, the insurers cannot participate in the muni-GIC market. However, a credit rating downgrade provision is not required in the pension market. Although the USDOL proposed a regulation that included the insurer's credit rating as a selection criteria for plan fiduciaries, the proposal was never adopted.
      (ii) Pension plan sponsors are much more concerned with the interest rates credited than holders of muni-GICs. In addition, muni-GIC

holders are not as likely to trigger a termination because the premature termination might jeopardize the entire municipal program

(b) The provision that we approved does not allow the holder to terminate the contract and demand that either book value or market value of the contract funds be paid out immediately. As such, the contract is not terminated and the muni-GIC continues in effect until it matures. The likelihood of a run caused by a credit rating downgrade is minimized.

(c) The insurer may offer to pay book value when market value exceeds book value, but the holder does not have to accept such payment. The holder may prefer to continue the funding agreement (i.e., the overcollaterization option) because it will not unravel the entire municipal bond program.

(d) The approval limited the amount of muni-GIC business that the insurer can write and required periodic reporting to monitor the provision.

D. *Market Value Make-Up/Advance Interest Credit Provisions*. -- In the early 1980s, the Department permitted insurers to issue GICs that credited an amount in excess to the actual contribution equal to the market-value adjustment charged on the transfer of funds from the insurer's IPG or DA contracts and credited a reduced interest rate designed to amortize the excess amount or credit over the life of the contract. This market value make-up or advance interest credit allowed plan sponsors to maintain book value accounting at the plan participant level and allowed insurers to conserve existing group annuity business at a time when contractholders were generally dissatisfied with the interest crediting rates on IPG and DA contracts in the high interest rate environment. More recently, we allowed one or more insurers to use market make-up type provisions to help Confederation Life GIC contractholders maintain book value accounting. The Department has permitted the use of these provisions under the following conditions and circumstances:

1. The advance interest credit or book-in amount cannot exceed 5% of the market value of the amount deposited.
2. The book-in provision can only be used with unallocated contracts funding defined contribution plans and the funds cannot derive from equity separate accounts. This provision should not be used to recover losses on equity investments.
3. The insurer must not be proactive in using book-ins as a marketing strategy.
   (a) Book-ins should only be used as a business conservation measure or in limited cases at the request of a plan sponsor.
   (b) Book-ins used in connection with new business should represent a small percentage of new business and only a small number (i.e., less than ten) per year.
4. The contract must provide that in the event that the contract is terminated or discontinued prior to the date on which the advance credit is fully amortized, the unrecouped amount will be deducted as a separate charge prior to any final payment to the contractholder.
5. The insurer must notify the Department each year of the circumstances of each book-in, including the credit provided (dollar value and as a percentage

of the initial deposit), the amortization period and the source of funds (business conservation or new business).

E. *Rebating Commissions for Placement of Structured Settlements* –Circular Letter No. 13 (1989).
   1. Articles 50-A and 50-B of the Civil Practice Laws and Rules ("CPLR") require that damage awards in excess of $250,000 be paid in periodic installments, unless otherwise ordered by the court. Periodic payments may be spread up to, but not more than, ten years. Security must be posted by the defendant(s) or their insurance carrier(s) in the form of an annuity contract issued by a qualified insurer approved by the Superintendent and the court entering the judgment. See L.1985, c.294 and L.1986, c.682.
   2. With respect to annuity contracts written to fulfill the security requirements under the CPLR, property/casualty insurers cannot require a rebate of a portion of the commission as a condition of giving the business to an agent when purchasing such annuity contracts. Such practice violates §§2114, 2103(i) and 4224 which prohibit discrimination and rebating in the sale of annuity contracts.
      (a) The rebate cannot be paid to the insurer's subsidiary, unless the subsidiary is licensed as an agent and performs services in placing the coverage on which the commission is earned and paid. However, the limitations set forth in §2103(i) as they relate to the receipt of commissions earned on insurance of properties or risks of the parent insurer must be considered.
      (b) Agents cannot offer to reduce their commissions by rebating directly to the property/casualty insurer purchasing the annuity contract.
      (c) A property/casualty insurer purchasing an annuity contract is not one of the parties specified in §2114 who can lawfully be paid all of, or share in, the commission earned for the placement of an annuity contract.

F. *Beneficiary Designation for Structured Settlements. Insurable Interest*.
   1. A property/casualty insurer can be the owner of a structured settlement annuity contract/funding agreement.
      (a) The ownership of the contract does not necessarily create a wagering contract or endanger the life of the annuitant.
      (b) The owner/casualty insurer may not have a lawful insurable interest in the continuance of the payee's life (i.e., the owner/casualty insurer may profit on the death of the payee if such death occurs before the end of the guarantee period).
      (c) If no beneficiary is designated, any remaining payments or a lump sum payment must be paid to the estate of the payee. Sections 5035(b) and 5045(b) of the CPLR require that in the event of the death of a judgment creditor any remaining payments due under the annuity (or funding agreement) shall be paid to persons whom the judgment creditor owed a duty of support immediately prior to his/her death, and if no such person exists, then payment must be made to his/her estate.

2. The annuitant/judgment creditor must choose the beneficiary not the insurer. It has been argued that a casualty insurer having control of the beneficiary designation and exercising such designation to favor itself would result in a lack of insurable interest under §3205 of the Insurance Law.
   (a) Actual control of the beneficiary designation is prescribed by the settlement agreement between the insurer and the claimant. .
   (b) The casualty claimant (named annuitant) should have control of the beneficiary designation and assignment of the contract.

G. *Salary Reduction Plans And Other Individual Or Employee Pay-all Programs.* Pension plans that are funded solely by employee contribution, including salary reduction plans, and other individual or employee pay-all programs are subject to the provisions of the Insurance Law applicable to individual annuities to the extent practicable. See §§3219 and 4223 and Regulation 127.

VII. Advertising and Disclosure

A. Regulation 139. Section 40.3. Written statement and/or specimen contract with a statement citing location in contract of disclosures required by paragraphs (1),(3),(4),(5),(6),(9) and (10) of §40.3(b) of Regulation 139. See §40.3(a)
   1. Statement indicating any restrictions as to amount and timing of contributions, and penalties for non-payment. §40.3(b)(1)
   2. Description of the right to discontinue contributions to contract, and penalties resulting from such action. §40.3(b)(2)
   3. Statement of all current fees and charges that are or may be assessed against the holder or deducted from the funding agreement, including a description of the extent and frequency to which such fees and charges may be modified and the extent to which they take precedence over other payments. §40.3(b)(3).
   4. Statement of the interest rates and/or method of determination of rates and a description as to how any withdrawals, transfers or payments will affect the amount of interest credited. §40.3(b)(4).
   5. Description of expense, interest and benefit guarantees under the contract and any rights to modify or eliminate such guarantees, including the right to apply surrender charges or market-value adjustments to plan benefit payments if there are plan amendments or changes in the manner of plan administration. .§40.3(b)(5).
   6. Description of the holder's and participant's right to withdraw funds (or apply to purchase annuities), along with a description of any charges, fees or market-value adjustments applicable to such withdrawals or a statement that no such withdrawals or payment are permissible prior to maturity or the happening of a certain event. §40.3(b)(6).
   7. Statement indicating any pro rata, percentage or other limitations that may apply to benefit payments to be purchased or provided under the contract when the plan is not funded entirely under the contract. §40.3(b)(7).

8. Statement that the holder or participant withdrawals under the contract are to be made in a FIFO or LIFO basis or other applicable basis. §40.3(b)(8).
9. Statement that the contract may be amended, including any right of the insurer to unilaterally amend the contract. §40.3(b)(9).
10. Statement, if applicable, that any dividends and experience rate credits are subject to the insurer's discretion. § 40.3(b)(10).
11. Statement, if applicable, that any dividends and experience rate credits are subject to the insurer's discretion. § 40.3(b)(10).
12. Statement that the holder or plan sponsor is solely responsible for determining whether the contract is a suitable funding vehicle. §40.3(b)(12).
13. Statement, if applicable, that the insurer does not have responsibility to reconcile participants' individual account balances with the accumulation fund balance where the insurer does not maintain individual account balances. §40.3(b)(13).

VIII. **Additional Matters**

A. *IRC Section 457 Public Deferred Compensation Plans*.
   1. See New York State Deferred Compensation Board Rules 9 NYCRR 9000 and Circular Letter 1988-17.
      (a) Maximum contract term for NY State Deferred Compensation Board is five years. §9003.5(a)
      (b) New contracts subject to a bidding process.

B. *Article 50-A of the Civil Practice Laws and Rules*. Periodic Payment of Judgments in Medical Malpractice and Dental Malpractice Actions. "Annuity" under the CPLR includes funding agreements, even though this is not true under the NY Insurance Code.
   1. §5031 of the CPLR. Damage awards in excess of $250,00 must be paid in periodic installments, unless otherwise ordered by the court. Periodic payments may be spread up to, but not more than, ten years.
   2. §5032 of the CPLR. Security must be posted by the defendant(s) or their insurance carrier(s) in the form of an annuity contract issued by a qualified insurer approved by the Superintendent and the court entering the judgment.
   3. §5036 of the CPLR. The court can order that remaining payments (or portion thereof) be paid in lump sum calculated on the basis of the present value of the annuity contract, which shall be based on its cost at the such time, for remaining payments or portion thereof, that are converted into a lump sum. As a result, insurer's must use current interest rates rather than the original pricing assumptions. In no event shall such lump sum payment be greater than the present value of the annuity contract for the remaining periodic payments.
      (a) Insurers typically are unwilling to write life contingent annuities with the right to invade principal.

(b) In view of Articles 50-A and 50-B, the Department has requested that insurers add language to the effect: "Payment may not be accelerated, increased, decreased, commuted or encumbered, except by court order."

(c) We strongly suggest that contracts issued pursuant to Article 50-B also include language to the effect: "Notwithstanding any other provision to the contrary, we will make a lump sum payment of amounts due hereunder or any portion of such amounts, if so ordered by a court of competent jurisdiction in accordance with Section 5046 of the CPLR. Any future payments that remain due hereunder after such lump sum payment shall be reduced by us accordingly. We shall calculate any such lump sum payment on the basis of the present value of any remaining amounts due hereunder or any portion thereof that is converted into such lump sum payment. The present value of any such lump sum payment shall be calculated based on the interest rate and mortality assumptions, if applicable, at the time such lump sum payment is made as determined by us."

(d) The ability to accelerate the structured award under Section 5036 and 5046 raise the question as whether the need for a court order is a substantial restriction on the insured's right to accelerate the award for purposes of constructive receipt under the Internal Revenue Code. See Private Letter Ruling 9017011.

4. §5038 of the CPLR needs to be consulted with respect to permissible assignments of periodic installments.
5. §5039 of the CPLR requires the Superintendent to establish rules and procedures for determining qualified insurers.

C. *Article 50-B of the CPLR*. Periodic Payments of Judgments in Personal Injury, Injury to Property and Wrongful Death Actions. [Virtually identical to Article 50-A]. However, Section 5046(b) expressly provides that the method for determining present value be in accordance with regulations promulgated by the Superintendent. [No such regulations have been promulgated at this time. However, we review each form and insurer's procedures for fairness and to ensure that current interest rates are used as opposed to the original pricing assumptions.]

D. *12 CFR 9 Fiduciary Powers of National Banks*. The Office of the Controller of the Currency requires that a federally-chartered bank permit commingled fund investors to withdraw from the fund with twelve months notice. Insurers may issue funding agreements to commingled GIC-BIC (Bank Investment Contract) pools that are managed by GIC brokers. These pools provide a stable value fund to defined contribution plans. The Department permits a funding agreement to contain a provision allowing the contractholder, upon 12 months advance written notice to the insurer, to withdraw at book value the portion attributable to the withdrawing plan.

FUNDING AGREEMENT CHECKLIST

I. Filing Process

A. Type of Filing:
___ For prior approval - §3201(b)(1); Circular Letter 1997-14
___ Expedited approval -§3201(b)(6); Circular Letter 1998-2
___ For delivery outside of New York, only - Circular Letter 1963-6
___ Pre-Filed or Pre-Approved Insurance Coverage - Circular Letter 1964-1
___ Confirmation Letter
___ Department Notification
___ Self-Support Statement for Out-of-State Filings

B. Submission Letter - Circular Letter 1963-6; Circular Letter 1969-4, Circular Letter No. 8 (1999)
___ 2 copies
___ Identification of Insurer
___ Caption of submiision letter lists all forms, designates each form as group or individual, provides generic product and form description
___ Table of Contents of all material in the filing
___ Listing of the mandatory or optional insert pages with which the submitted forms must or may be used, including the application forms used for a policy
___ Description of the benefits provided
___ Type of holder, as defined in §3222(b). Specify paragraph(s) _____
___ Classes covered, as defined in §3222
___ Statement as to source of contributions. Employer ___ Employee ___
___ Statement as to whether the form is new or is intended to replace a previously approved form.
Identify prior submission(s) _____
___ Redlined Copy Attached
___ Statement as to how the form will be used and how it will be marketed, as described in Circular Letter 1976-12. Specify Type of Plan(s) Program or Activity to be funded _____
___ Defined Benefit Plan ___ Defined Contribution Plan ___Welfare Plan
___ 401(a) ___ 401(k) ___ 403(b) ___ 457 ___ 414(d)
___ SIMPLE ___ IRA ___ SEP ___ Roth IRA
Specify Funding Agreement Purpose _____

C. Preparation of Forms - Circular Letter 1963-4; Circular Letter 1963-6; Circular Letter 1969-4
___ 3 copies of Forms
___ 3 copies of Explanatory Memorandum describing variability

D. Additional Information Required
___ Readability Certification, in accordance with the requirements described in §3102

II. Contract Provisions

A. Funding agreements Issued To Pension Plans
___ Grace Period
___ Entire Contract
___ Plan Benefit Rule - §40.4(a)
___ Allocated Share of Benefit Payments - §40.4(c)
___ Participant Directed Investment Option - §40.4(d)
___ Plan Amendments or Change In Plan Administration - §40.4(e)
___ Bona Fide Termination of Employment - §40.2(x)
___ Market Value Adjustment
___ Liability-based formula ___ Asset-based formula
___ Negative MVA only ___ Two-way MVA
___ Liquidated Damages Provision
___ Non-Benefit Related Withdrawals or Transfers
___ Free Corridor Amount, Specify Percentage _____
___ Clone Contract Provision
___ Competing Funds Provision
___ Liquidity Protection Provision
___ Six-Month Deferral
___ Premature Withdrawals Not Permitted

B. Funding agreements Issued To Fund Other Purposes Or Issued To Other Insurers And Their Subsidiaries
___ Entire Contract
___ Grace Period
___ Liquidated Damages
___ Expense Charges and Fees
___ Maturity Date
___ Termination Provisions
___ Pre-Maturity Withdrawals
___ Enumerated Purpose

C. Structured Settlement Agreement
___ Commutation Provision
___ Beneficiary Provision
___ Assignment Provision