

**ALLOCATED GROUP ANNUITY CONTRACTS**  
**NOT SUBJECT TO SECTION 4223**  
(Last Updated 2/25/02)

I. Applicability.....	1
A. Scope.....	1
II. Filing Process.....	1
A. General Information.....	1
1. Prior Approval Requirement.....	1
2. Discretionary Authority For Disapproval.....	1
B. Types of Policy Form Filings with the Life Bureau.....	2
1. Traditional Prior Approval.....	2
2. Alternative Approval Procedure (Deemer Submissions).....	2
3. Prior Approval With Certification Procedure.....	2
4. Prefiled Insurance Coverage.....	2
5. Out-of-State Filings.....	2
C. Policy Form Submission Rules.....	3
1. Preparation of Forms For Submission.....	3
2. Explanation of Variable Material.....	4
3. Submission Letters.....	4
D. Other Attachments To Submission.....	7
1. Readability Requirement -- Flesch Score Certification.....	7
2. Certification of Compliance For Deemer Submissions.....	7
3. Certified Filing -- Circular Letter No. 27 (2000) Submissions.....	7
4. Prospectus.....	7
E. Key Legal Sources.....	7
III. Contract Requirements.....	8
A. Cover Page.....	8
1. Company's Name and Address.....	8
2. Form Identification Number.....	8
3. Brief Description of the Contract.....	8
4. Separate Account Disclosures.....	9
5. Officer's Signatures.....	9
B. Specification Page.....	9
C. Table of Contents.....	10
D. Standard Provisions.....	10
1. Grace Period-§3223(a).....	10
2. Entire Contract-§3223(b).....	10
3. Misstatement of Age or Sex-§3223(c).....	10
4. Active Life Certificate.....	10
5. Retired Life Certificate.....	12
E. Regulation No. 139 Provisions.....	13
1. Plan Benefit Rule.....	13
2. Betterment of Rates.....	14
3. Allocated Share of Benefit Payments.....	14
4. Participant Directed Investment Option.....	14
5. Plan Amendments or Changes In Plan Administration.....	15
6. Bona Fide Termination of Employment.....	15
7. Contract Termination.....	15
8. Market-Value Adjustment Provision.....	16
9. Liquidated Damages Provision.....	17
F. Section 4240 and Regulation No. 47 Provisions.....	17
1. Isolation/Segregation Provision.....	17
2. Asset Identification.....	17

3.	Guarantees of Value .....	17
4.	Valuation .....	18
5.	Asset Maintenance .....	18
6.	Disclosures .....	18
7.	Asset Ownership.....	18
8.	Insulation Provision.....	18
9.	Incidental Death Benefit.....	18
10.	Involuntary Cashout - Small Annuities. ....	19
11.	Mortality and Expense Guarantees.....	19
12.	Variable Annuity Computation Method.....	19
13.	Deferral of Payment. ....	20
14.	Annual Reports.....	20
15.	Illustrations.....	20
16.	Nonforfeiture Requirements Applicable to Separate Account Annuity Contracts .....	21
17.	Paid Up Annuity Option.....	21
18.	Termination of Employment and Death Benefit.....	22
G.	Other Provisions.....	22
1.	Loan Provisions.....	22
2.	Dividend Provision.....	22
3.	Non-Benefit Related Withdrawals and Transfers.....	22
4.	Competing Funds Provision .....	23
5.	Liquidity Protection Provision .....	23
6.	Purchase Rate Guarantee/Unilateral Change.....	23
7.	Credit Rating Downgrade Provisions .....	23
8.	Annuity Settlement Options .....	24
9.	Annuity Commencement Date Waiting Period.....	24
10.	Maturity Date .....	25
11.	Transfers Between Accounts.....	25
12.	Owner and Beneficiary Provisions .....	25
13.	Waiver of Surrender Charges or Reduction in Fees .....	25
14.	Telephone Transfers .....	26
15.	Interest on Surrenders.....	26
16.	Interest on Deferrals of Death Proceeds.....	26
17.	Claims of Creditors .....	26
18.	Assignments .....	26
19.	Arbitration.....	26
IV.	Separate Account Plan of Operation .....	26
1.	Prior Approval Requirement .....	27
2.	Qualification Requirements.....	27
3.	Informal Guidelines.....	27
V.	Group Requirements.....	27
A.	Eligible Groups .....	28
1.	Insurer Responsibilities .....	28
2.	Recognized Groups .....	28
B.	Non-Recognized Groups .....	28
C.	Unauthorized Insurers .....	28

# ALLOCATED GROUP ANNUITY CONTRACTS NOT SUBJECT TO SECTION 4223

(Last Updated 2/25/02)

## I. Applicability

### A. Scope

This product outline applies to all allocated group annuity contracts and certificates delivered or issued for delivery in New York that are not solely funded by contributions of the persons covered thereunder.<sup>1</sup> 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.

## II. Filing Process

### A. General Information

#### 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.

#### 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.

---

<sup>1</sup> Allocated group annuity contracts and certificates funded solely by contributions of the persons covered thereunder are discussed in the Group Variable Annuity and Group Annuity Contracts Subject to Section 4223 Fixed Account Only outlines.

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

B. Types of Policy Form Filings with the Life Bureau

1. Traditional Prior Approval

Section 3201(b)(1).

2. Alternative Approval Procedure (Deemer Submissions)

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.

3. Prior Approval With Certification Procedure

Circular Letter No. 27 (2000) provides for an expedited approval procedure based on completed product checklists and an appropriate certification of compliance signed by an officer of the Company.

4. Prefiled Insurance Coverage

Circular Letter 64-1 establishes the conditions and procedures under which insurers may provide or assume risk for group annuity coverage prior to the filing or approval of policy forms. The conditions include the following:

- (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
- (d) Department notification.
  - (i) Statement explaining circumstances and reasons for delay in submitting forms within 12 months for group annuity contracts. As a best practice, we recommend providing a copy of confirmation letter within 30 days of agreement to provide insurance.
  - (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.

5. Out-of-State Filings

- (a) Domestic insurers must file all policy forms intended for delivery outside of the state, pursuant to Section 3201(b)(2).

(b) Section 3201(c)(6) permits disapproval of such out-of-state filing if the issuance would be prejudicial to the interests of the insurer's policyholders or members.

(c) Procedures

- (i) File one copy 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.
- (ii) The transmittal letter shall include the following information (Circular Letter 63-6):
  - (I) An explanation of how the provisions and rates of the policy form(s) submitted differ from comparable form(s), if any, approved for delivery in New York.
  - (II) A statement that the form submitted are not readily comparable with any forms approved for delivery in New York.
  - (III) A list of the states or jurisdictions in which the form is to be delivered.
  - (IV) A commitment to notify the Department in the event any such state disapproves any of the forms.

C. Policy Form Submission Rules

1. Preparation of Forms For Submission.

Basic Rules - See Circular Letters 1963-4, 1963-6 and 1969-4. References are to Circular letter 6 (1963), unless otherwise indicated.

- (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. § I.D. We object to a company's use of the matrix approach that identifies benefit provisions on each page with separate form numbers.
- (b) Submit duplicate copies of forms § I.G. and I.E.7.
- (c) Printed forms should be used unless its use is too limited to justify printing. The form should be clear, legible and reasonably permanent. § I.F.1. Computer-generated forms are acceptable. See also readability provision Section 3102.
- (d) Blank spaces in forms (other than application forms) should be filled in and completed with hypothetical data to indicate purpose and use of forms. In the alternative, the submission letter should explain purpose and use of each form submitted for review. §I.E.1.
- (e) All incorporations by reference should be attached to the forms and submitted for approval and/or filing for informational purposes or if previously approved or filed, accompany the submission. See Section 3204 and 3201.
- (f) The application (or enrollment form), regardless of whether it will be attached to policy, should be submitted. If previously approved, the form or submission letter should so indicate (with Department file number, form number and approval date). § I.E.4.
- (g) All endorsements to be applied by stamp should be submitted, with separate form number, on company letterhead for prior approval. § I.E.5.
- (h) Variable material used with impairment, waiver or exclusion riders should be submitted with the form for approval. § I.E.2.

(i) No filing fee required in New York.

2. Explanation of Variable Material

(a) Illustrative material may be used for items which may vary from case to case such as names, dates, premiums and schedules for determining the amount of insurance for each person insured. § I.F.4.

(b) Material in forms other than illustrative items may vary if filing includes an explanatory memorandum (i.e. explanation of variability separate from cover letter). The variable material must be clearly indicated in forms (e.g., with bracketing or underlining). How material is designated as variable should be stated in the *submission letter* and in the explanatory memorandum. The explanation of variability must clearly indicate the nature and scope of the variations to be used for the bracketed portions of provisions such as insuring clauses, benefit provisions, restrictions, eligibility requirements, and termination of coverage provisions. § I.F.4.

(i) The explanation of variability should be drafted in sufficient detail to determine the scope of variation for each bracketed item. Where text is bracketed, the memorandum should include alternative text and/or an explanation of when the bracketed text will be omitted from the form. Similarly, bracketed numerical items should include the range (i.e. minimum and maximum) of variation.

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

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

(d) Ranges for actuarial items (minimum and maximum amounts) must be specified in the explanation of variables.

(e) Open-face riders or endorsements may be submitted for approval for general use in amending illustrative or variable material within the limitations of § I.F.4 of Circular Letter 63-6.

3. Submission Letters

Circular Letter 1963-4; Circular Letter 1963-6; Circular Letter 1969-4, Circular Letter 1999-8.

(a) In duplicate, signed by a representative of the company authorized to submit forms filing or approval. Circular Letter 1963-6 § I.G.

(b) Identification of Insurer.

(c) Listing of form numbers. Circular Letter 1963-6 § 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. See § I.G.8.

(f) Description of the benefits and coverage provided. Circular Letter 1963-6 § I.G.2 and 7.

- (g) The submission letter should explain purpose and use of each form submitted if such purpose and use is not indicated on the policy form. Circular Letter 1963-6 § I.E.1.
- (h) Type of group, as defined in Section 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.
- (i) 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.
  - (i) We regard salary reduction contributions in IRC Sections 401(k), 403(b), 457 and other similar plans as employee contributions.
  - (ii) Note contracts funded solely by employee contributions are not within the scope of this outline.
- (j) Description of the type of plan fund or program funded by the contract (i.e., defined benefit plan, defined contribution plan, profit sharing, money purchase, target benefit plan, cash balance plan, Keough plan with common law employees, etc.). Identify the applicable Code provision (e.g., IRC Section 401(a), 401(k), 403(b), 408 (traditional IRA, Roth IRA, Simple IRA, SEP IRA), 457, etc.).
- (k) Statement as to whether the form is new or is intended to replace a previously approved form. Circular Letter 1963-6(I)(G)(3), (4), (5), (6), and (8).
  - (i) If the form is intended to supersede another approved or filed form, the number of the approved or filed form, 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 being filed for formal approval had previously been submitted for preliminary review, a reference to the previous submission and a statement setting out either (1) that the formal filing agrees precisely with the previous submission or (2) the changes made in the form since the time of preliminary review. A redlined copy is helpful. Any resubmission of the forms must address all outstanding issues in the new submission letter. The new submission must be complete in and of itself and not incorporate previously submitted material by reference.
  - (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 original approval-stamped 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.

- (l) Advise which application form is to be used with the annuity contract (include form number, approval date and sample copy even if the application will not be attached to the contract).
- (m) If the form is other than a contract (i.e. rider), 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.
- (n) Explanation of any unique or innovative product or product feature and identification of any special market. Innovative or unique is defined in Circular Letter 2000-27.
- (o) Submission letter should indicate whether the contract has been filed with the Securities and Exchange Commission (“SEC”) and the current status of such filing.
- (p) For a separate account annuity contract include a copy of the approval letter of the 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)).
- (q) A numerical demonstration of compliance with Section 50.7(a)(3) should be provided if the withdrawal charges are a percentage of the accumulated value. The demonstration should show that the withdrawal charge would not be significantly greater than the unamortized acquisition expenses.
- (r) Noncompliance explanation. If the policy does not comply with a specific product outline provision, the submission letter should identify the provision and provide a complete explanation of the Company’s position on the issue.
- (s) 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.
- (t) Caption of Submission Letter
  - (i) The “re” or caption of the 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).
  - (ii) Section 3201(b)(6) (“Deemer”) filings must be identified in the “re” or caption.
  - (iii) Circular Letter No. 27 (2000) filings must be identified in bold print in the body of the submission letter or in the “re” or caption.
- (u) Circular Letter 1997-14. Filings that are incomplete or do not comply with applicable law and regulations will be closed.
- (v) If filing is made on behalf of the company by another party, a letter of authorization from the company must be submitted by the party authorized to submit the filing.



#### D. Other Attachments To Submission

##### 1. Readability Requirement -- Flesch Score Certification

- (a) Readability requirements described in Section 3102 of the Insurance Law generally apply to any certificate issued pursuant to a group annuity contract, unless the contract is determined to be a security subject to federal jurisdiction.
- (b) Provide Flesch score certification.
  - (i) The Flesch score must be at least 45.
  - (ii) See February 18, 1982 letter from Department for sample certification form. Copies of this letter can be obtained from this Bureau.

##### 2. Certification of Compliance For Deemer Submissions

- (a) For Section 3201(b)(6) submissions, submit a certification of compliance signed by an officer of the insurer who is knowledgeable of the law and regulation applicable to the type of policy form.
- (b) Circular Letter No. 2 (1998) provides that the certification of compliance should make reference to any law or regulation that specifically applies or is unique to the type of contract form (and rates as required) submitted.
  - (i) The certification should refer to §§ 3223, 4238, and 4240 of the New York Insurance Law as well as Regulation Nos. 47 and 139 and Regulation No. 128, if applicable.
  - (ii) The certification need not refer to all generally applicable provisions.
- (c) An alternative would be to submit a certification of compliance with the applicable laws and regulations cited in this product outline.
- (d) A certification to the effect that the contract is in compliance with all applicable laws and regulations is not acceptable.

##### 3. Certified Filing -- Circular Letter No. 27 (2000) Submissions

- (a) Submit a completed certification of compliance. See Circular Letter No. 27 for certification form.
- (b) Submit a completed product checklist. See Department website for applicable checklist.

##### 4. Prospectus

Provide a copy of the prospectus in draft or final form if a prospectus is required to be filed with the SEC.

#### E. Key Legal Sources

- 1. Insurance Law Sections 3102, 3105, 3201 (Approval of Forms), 3204, 3223 (Standard Provisions), 4238, and 4240.
- 2. Insurance Regulation Nos. 47 and 139.

3. Circular Letters CL6 (1963), CL1 (1964), CL4 (1969), CL14 (1983), CL14 (1997) (Submission and Approval Process), CL2 (1998), and CL8 (1999) (Submission Letters), 1 CL27 (2000) (Prior Approval With Certification).
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. Contract Requirements<sup>2</sup>

#### A. Cover Page

##### 1. Company's Name and Address

- (a) The licensed New York company's name should appear on the cover page (front or back).
- (b) Full street address of the company's Home Office for disclosure purposes on the front or back cover page.
- (c) Any corporate logo, trademarks or affiliations will be reviewed on a case by case basis pursuant to Section 219.4(p) of Regulation 34-A.
- (d) No unlicensed insurer name can appear anywhere on the form. Section 3201(c)(1).
- (e) The contract cannot be labeled in a manner that would have a tendency to mislead or deceive as to the true identity of the insurer, or create the impression that someone other than the insurer would have any responsibility for the financial obligations under the contract. See §219.4(a), (l) and (p) of Regulation No. 34-A.
- (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.

##### 2. Form Identification Number

A form identification number should appear in the lower left-hand corner in accordance with Section I.(D) of Department Circular Letter No. 6 (1963).

##### 3. Brief Description of the Contract

- (a) A description of the contract 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").

---

<sup>2</sup> Note that most of the requirements applicable to the contract apply equally to the active life certificate.

- (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.

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

#### 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 are underlined or bracketed to denote variable material.

#### B. Specification Page

1. Complete with hypothetical data. Circular Letter No. 6 (1963) § I.E.1.
2. The current interest rate for the fixed account must be specified in the contract. It can be bracketed to denote variable material.
3. The available funds in any separate accounts may be set forth on the specification page. If so the funds should be bracketed. If a fixed account is available do not bracket. Bracketing indicates that the material is variable and subject to change.

4. The smallest rate of return information, as noted above, if this information is not presented on the cover page.

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).

D. Standard Provisions

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 below.

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.

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 women 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. 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).

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.
- (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.
  - (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.
    - (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.

#### 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) 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).

E. Regulation No. 139 Provisions

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 to the accumulation amount cannot be affected by such withdrawals.
  - (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.

## 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).

## 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.

## 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.

5. Plan Amendments or Changes In Plan Administration

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. §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.

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 transaction may result in unexpected withdrawal activity that was not priced for when the contract was issued.]
  - (v) Plan termination or partial plan termination.

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 options, 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.

#### 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 items solely within the insurers discretion. For example, the formula can refer to an outside index or to rates guaranteed or credited under the contract. If the formula referred to the insurer's earnings rate on supporting assets, we would require justification because the contractholder cannot verify such rate.
- (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".
  - (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".
- (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.

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.

F. Section 4240 and Regulation No. 47 Provisions

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.

2. Asset Identification

Pursuant to Section 4240(a)(2)(A), the contract must identify the investments that are contractually permitted for such separate account.

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) The liability under any contract guarantees must be limited to the contractholder's interest in assets allocated to the separate account, unless the separate account and separate account agreement satisfies items (i), (ii), or (iii) of §4240(a)(5) of the Insurance Law.

(c) Note that reserve liabilities for guaranteed minimum death benefits must be maintained in the insurer's general account.

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.

5. Asset Maintenance

Pursuant to §4240(a)(8) of the Insurance Law, 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. See also §50.3(a)(1) of Regulation No. 47.

6. Disclosures

Any contract providing for benefits, contributions or both, payable on a variable basis, 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 II.A.5 above and §4240(a)(11)(C).

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 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.

8. Insulation Provision

Section 4240(a)(12) of the Insurance Law provides that the assets in a separate account shall not be chargeable with liabilities arising out of any other business of the insurer if and to the extent so provided in the applicable agreements. See Chapter 601 of the Laws of 1968.

9. Incidental Death Benefit

(a) Section 50.3(a)(8) of Regulation No. 47 permits a separate account annuity contract to provide, as an incidental benefit, for the payment of a death benefit in the event of death

- prior to the annuity commencement date. The amount of such death benefit shall not exceed the greater of (i) 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.
- (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)(8) of Regulation No. 47 provides that a death benefit that is not an incidental death benefit during the deferred period is subject to the provisions of the Insurance Law applicable to life insurance contracts.

#### 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)(9) of Regulation 47.
- (b) If the contract permit the insurer to refuse to commence the annuity payments due to minimum size requirements (e.g., at least \$20 per month), the contract must permit surrender with no withdrawal charges if such refusal takes place. Section 3201(c)(2).

#### 11. Mortality and Expense Guarantees

The contracts 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.

#### 12. Variable Annuity Computation Method

- (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 and assumed interest rate must be stated in the contract.

### 13. Deferral of Payment.

In connection with the reservation of the right to defer cash surrender payments, any individual separate account annuity contract shall provide, if and to the extent permitted or required under the Investment Company Act of 1940, as amended, and any other applicable federal and state law, either:

- (a) 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
- (b) 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
- (c) 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).

### 14. Annual Reports

- (a) Reference to an annual report is not a required provision in a separate account annuity contract.
- (b) However, 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.

### 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.

16. Nonforfeiture Requirements Applicable to Separate Account Annuity Contracts

- (a) Section 50.7(a)(3) of Regulation 47 requires 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. The options shall include:
  - (i) the option to receive the cash surrender value, or
  - (ii) the option 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.
  - (i) The cash surrender value must be equal to the accumulated value less withdrawal charges.
  - (ii) The withdrawal charges should be reasonable and based solely on unamortized acquisition expenses. Section 50.7(a)(3) of Regulation 47.
- (c) Surrender charges that are a decreasing percent of premium are assumed to meet the requirements of Section 50.7(a)(3) of Regulation 47, unless the initial percentage appears unreasonably high. A numerical demonstration 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.

17. Paid Up Annuity Option

- (a) 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.

- (b) 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.
- (c) Any amounts so transferred shall be considered cash surrender values for purposes of §50.7(a)(4) of Regulation No. 47 relating to deferral rights of the insurer. See also Section 50.7 (a) (3) of Regulation 47.

18. Termination of Employment and Death Benefit

- (a) A provision in the group variable annuity contract and certificate specifying the options available to the annuitant who contributes to the cost of his or her annuity, or to his or her beneficiary or beneficiaries in the event of: (Section 50.7(b)(2) of Regulation No. 47)
- (b) The termination of his or her employment or the termination of the group separate account annuity contract, while the annuitant (participant) is alive and prior to the commencement date of the annuity, or
- (c) His or her 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 contributions made under the certificate, without interest, or
  - (ii) an option to receive a cash payment equal to the accumulate value of the annuitant's contributions under the contract.

G. Other Provisions

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.

2. Dividend Provision

- (a) 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.
- (b) Section 4240(d)(1) of the Insurance Law provides that §4231(e) is not applicable to variable annuity contracts. Therefore, variable annuity contracts and certificates are not required to be participating.

3. 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 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.

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.

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.

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.

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.

#### 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. 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.
- (b) For all accumulation type deferred annuities, the income at annuitization cannot be less than the full account value 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.
- (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 interest rate used for commutation must be the interest rate that equated the amount applied at annuitization to the present value of annuity payments (i.e., no expense load is permitted). However, it would be acceptable to have a reasonable adjustment to reflect changes in the general level of interest rates since annuitization. Justification must be made for any surrender charges imposed. A full description of how the risk of antiselection is addressed must be provided if life contingent payments are commutable or are accelerated upon commutation of certain period payments. Appropriate disclosure must be provided at time of commutation. §§ 3201(c)(2) and 3204.
- (h) For variable annuity purchase rates, the assumed interest rate (AIR) and mortality table must be stated in the contract.

#### 9. Annuity Commencement Date Waiting Period

The contractholder must be allowed to elect to commence annuity payments within 13 months from the date of issue. Under a deferred annuity contract, annuity payments cannot be scheduled under the contract to commence earlier than 12 months from the date of issue (i.e., the period of deferment of annuity payments must exceed one year). See IRC § 72(u)(4) and § 4231(e)(1) of the Insurance Law.

## 10. Maturity Date

- (a) The contract must specify a maximum annuitization or maturity age. The contract may specify the annuitant's age 90 or lower as the maximum annuitization age. Alternatively, the contract may provide that the maximum annuitization date or maturity date is the later of the annuitant's age 90 or the end of the tenth contract year, unless the contractholder elects a later annuity commencement date, subject to laws and regulations then in effect and approval by the company.
- (b) A contractholder making periodic withdrawals from the contract (or receiving periodic payments from all plan funds) intended to comply with the minimum distribution requirements of IRC § 401(a)(9) may continue such withdrawals (or payments) beyond the contract's maturity date. The definition of "annuities" in § 1113(a)(2) of the Insurance Law refers to "all agreements to make periodical payments for a period certain or where the making or continuance of all or some of a series of such payments, or the amount of any such payment, depends upon the continuance of human life...". Withdrawals made and/or payments received pursuant to the minimum distribution requirements of the Code appear to satisfy the "periodical payment" intent of the § 1113(a)(2).

## 11. Transfers Between Accounts

- (a) Any restrictions or limitations on transfers between separate accounts or sub-accounts within a separate account and the general account must be described in the contract. Section 3204.
- (b) 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.
- (c) 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, a 90-day equity wash provision is recommended.

## 12. Owner and Beneficiary Provisions

- (a) Must be in compliance with all the requirements of Section 72(s) of the Internal Revenue Code.
- (b) 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.

## 13. Waiver of Surrender Charges or Reduction in Fees

- (a) Permitted if based upon total and permanent disability in accordance with Section 3215 of the Insurance Law or provisions that are more favorable to the contractholder .
- (b) Permissible if based upon terminal illness, nursing home confinement or the provision of long term care either at home or in a nursing home. Such waivers 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.

- (c) 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.
- (d) 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).
- (e) An insurer may waive a fixed contract fee of a minimal amount (i.e., \$30) for a separate account annuity contract when the account value including both the fixed and separate accounts are over a certain dollar limit on the contract anniversary.

#### 14. Telephone Transfers

References to telephone transfers are not permitted in either the contract or in the application. Section 5-701 and Section 15-301 of the New York General Obligations Law.

#### 15. 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 at the current interest rate payable on the interest only settlement option).

#### 16. Interest on Deferrals of Death Proceeds

If the contract provides for interest to be credited during any deferral of death benefit payments, the interest rate credited must comply with the interest crediting provisions of §3214.

#### 17. Claims of Creditors

If the contract provides for claims of creditors, the provision must comply with Section 3212.

#### 18. Assignments

- (a) Annuity contracts are freely assignable, unless otherwise restricted under the contract for tax-qualification purposes.
- (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.

#### 19. Arbitration

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

### IV. Separate Account Plan of Operation

1. Prior Approval Requirement

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

2. Qualification Requirements

- (a) Regulation No. 47 (11 NYCRR 50) sets forth the qualification requirements for insurance companies to issue separate account annuity contracts. Section 52.2 requires an insurer 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) A description of the kinds and characteristics of separate account annuity contracts it intends to deliver or issue for delivery [§50.2(a)(1)].
- (c) 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)].
- (d) Section 50.2(a)(3) of Regulation No. 47 provides that unless expressly exempted from this requirement as inapplicable to the proposed separate account annuity contracts, a plan of repayment of the special contingent reserve fund pursuant to §4240(b)(2) of the Insurance Law. However, subsection (b) of §4240 was repealed by L.1994,c. 14, §1, effective March 21, 1994. As such, this requirement no longer applies.
- (e) 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.
- (f) 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
- (g) Such further information as the Superintendent may require.

3. 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)*.

V. Group Requirements

## A. Eligible Groups

### 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;

### 2. Recognized Groups

- (a) Employer/Employee Group – Section 4238(b)(1)
- (b) Employer Association Group -- Section 4238(b)(2)
- (c) Labor Union -- Section 4238(b)(3)
- (d) Multiple Employer Trust -- Section 4238(b)(2)4)
- (e) Common Interest, Calling or Profession Group -- Section 4238(b)(5)
- (f) IRA Group – Section 4238(b)(6)
- (g) Other Trust Group -- Section 4238(b)(2)4)
- (h) Foundation or Endowment Fund Group – Section 4238(b)(8)
- (i) Newly Recognized Financial Institution Groups -- Section 4238(b)(10)
- (j) Newly Recognized Discretionary Groups -- Section 4238(b)(9):
- (k) Newly Recognized Specified Class of Plaintiffs or Claimants – Section 4238(b)(11)

## B. Non-Recognized Groups

Groups that fail to satisfy the definitional requirements in Section 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 Section 3219(b). Group annuity certificates delivered in this state that are founded solely by individual contributions must comply with the provisions of the Insurance Law applicable to individual annuities. Such 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.

## C. Unauthorized Insurers

- 1. Section 1101(b)(1) prohibits unlicensed insurers from doing an insurance business in this state by mail or otherwise.
- 2. Section 1101(b)(2)(B) provides an exception (referred to as the “group exception”) to the prohibition in Section 1101(b)(1) for certain types of group insurance issued outside of New York. The group exception applies to group annuity contracts where the group conforms to the definitions of eligibility in §4238(b) of the Insurance Law, except paragraphs (6) and (7), and the master contracts were lawfully issued without this state in a jurisdiction where the insurer was authorized to do an insurance business.

3. Section 1101(b)(2)(B) excepts from the group exception to the mail order prohibition any transaction with respect to a group annuity contract used in the individual insurance market noted above, including 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. As such, any New York certificate funded solely by employee or individual contributions is subject to prior approval.