

INSURANCE
BANKING
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF INSURANCE

Accelerated Death Benefits
Definition of a Qualifying Event

Adopted Amendment: N.J.A.C. 11:4-30.3

Proposed: September 16, 2002 at 34 N.J.R. 3193

Adopted May 19, 2003 by Holly C. Bakke, Commissioner,
Department of Banking and Insurance

Filed May 19, 2003 as R. 2003 d.234, **with substantive changes** not requiring
additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 17:1-8.1, 17:1C-6(e), 17B:17-3, 17B:25-18 and 17B:27-25.

Effective Date: June 16, 2003

Expiration Date: November 30, 2005

Summary of Public Comments and Agency Responses:

The Department received four written comments on the proposed amendments. The comments were received from Guardian Life Insurance Company, Viatical and Life Settlement Association of America, Medical Society of New Jersey, and New York Life Insurance Company.

COMMENT: The commenter commended the Department for taking a proactive step in revising its accelerated death benefit regulation to specifically include chronic illness, stating that the change will benefit New Jersey residents. The commenter further suggests that the Department review N.J.A.C. 11:4-30.6 which requires that liens under accelerated benefit riders be taken only from the policy's net amount at risk.

RESPONSE: The Department appreciates the commenter's favorable view of this amendment. However, the Department notes that the review of N.J.A.C. 11:4-30.6 is beyond the scope of this proposal.

COMMENT: The commenter expressed their gratification for and approval of the amendment of the accelerated death benefits provisions, noting it expands the availability of advance death benefits for New Jersey residents and enables consumers to obtain the best financial option possible while managing their assets.

RESPONSE: The Department appreciates the commendation.

COMMENT: The commenter is of the belief that this amendment provides more options and benefits to the insured to manage end of life or debilitating conditions, but it does not provide safeguards to ensure that the money will be spent for that purpose. According to the commenter, the elderly will be particularly vulnerable because they may have a real need for the use of these resources to provide for their care due to a chronic illness. The elderly are particularly susceptible to those who would commit fraud or otherwise take advantage of their condition. The commenter also suggested that additional safeguards be established to ensure that people with chronic illness are not overcharged for the care they receive.

RESPONSE: The Department appreciates the concern expressed by the commenter but notes that it cannot dictate how accelerated death benefits, or any death benefits, are utilized by the

recipient. Addressing the possibility of overcharging for care is beyond the scope of this proposal.

COMMENT: The commenter raised a number of issues on the proposed amendment. They are as follows:

1. The definition of chronic illness should be revised to conform to the Federal definition of a chronically ill individual, which requires that the individual be certified as chronically ill by a licensed health care practitioner. The certification may be issued where the individual has become dependent with respect to at least two of the six activities of daily living and is expected to remain so dependent for at least 90 days, or the individual has become severely cognitively impaired;
2. A definition of qualified long-term care services consistent with 26 U.S.C. § 7702B should be added to the definitions section of the amended regulation, thereby allowing insurers to offer chronic illness accelerated death benefits life products on a services model as well as an indemnity basis;
3. The accelerated death benefit regulation should be revised to account for single-premium life insurance policies. These are policies where the policyholder pays an initial single premium, and then the insurer credits interest against the cash value and deducts monthly administration charges, mortality charges and morbidity charges;
4. The amended regulation should be revised to permit limits on the amount that may be accelerated when the insured has become chronically ill consistent with the limits imposed by 26 U.S.C. § 7702B.

5. Revisions should be made to allow for appropriate limitations and conditions on the insured's right to accelerate the death benefit based on chronic illness consistent with Federal law, including the prohibition upon insurers providing benefits on account of qualified long-term care services for which Medicare has paid in whole or in part. Also, the amendment should impose a waiting period before benefits are payable based on chronic illness;
6. The regulation should be amended to allow different standards for the acceleration of the payment of death benefits on life insurance policies based on terminal illness and on chronic illness, in order to afford the insured favorable Federal tax treatment; and
7. A revision should be made so as not to result in discrimination among insureds if life policies contain different requirements for terminal illness accelerated death benefits and for chronic illness accelerated death benefits.

RESPONSE: With respect to item 1, the Federal law the commenter refers to is the section of the Health Insurance Portability and Accountability Act (HIPAA), 26 U.S.C. § 7702B, that provides favorable tax treatment for qualified long term care insurance and sets standards for qualified long term care insurance. The Department agrees with the commenter that it would be prudent to use the Federal definition of chronic illness found in this law in the amended rule and has made the appropriate change.

The Department notes that HIPAA amended the Internal Revenue Code to provide that accelerated death benefits are not taxable in cases of terminal or chronic illness and to define these terms. The Federal definition of a chronically ill individual is somewhat different than the definition of chronic illness that was contained in the proposal. The Federal statutory definition of a chronically ill individual refers to the inability to perform two of the six activities of daily

living, which are mentioned in HIPAA and in the amendment as proposed, for a period of 90 days. The definition of “chronic illness” in the proposal referred to the permanent inability to do so. In addition, the Federal definition requires that the individual making the claim be “certified by a licensed healthcare practitioner” as chronically ill. The amendment as proposed was silent with respect to what evidence of “permanent inability to perform two of the six activities of daily living” a carrier could require to establish that an insured suffered from a “chronic illness.” Compliance with the Federal definition is necessary in order for the accelerated payment of the death benefit to receive favorable tax treatment.

It is currently the custom and practice in the industry to craft the requirements to receive an accelerated death benefit in such a way as to require that the individual meet the Federal definition of a chronically ill individual, so as to ensure that any accelerated death benefit paid does receive favorable tax treatment. Thus in practical effect, this change, upon adoption, does not operate to enlarge or curtail who is affected by the rule. Given this fact, and given that, as proposed and as adopted, the definition of “qualifying event” in the amended rule provides that, “At the option of the insurer, the contract may also define qualifying event to include: ... 2. Chronic illness...,” pursuant to N.J.A.C. 1:30-6.3, this change upon adoption is not a substantive change requiring reproposal. Rather, the change conforms what is merely an optional provision in the rule to current industry practice and to the Federal law on which that practice is based.

With respect to item 2, the Department reiterates that it lacks the authority to prescribe how life insurance proceeds are used. The HIPAA standards do not constitute a basis upon which the Department can empower insurers to require that accelerated death benefits proceeds be used to pay for certain health care services.

With respect to item 3, the Department does not understand this comment since the regulation does not prohibit the acceleration of the benefits payable under single premium plans. All plans of individual and group life insurance are eligible for acceleration.

With respect to item 4, since there is no prohibition in the regulation on insurers limiting the amount available for acceleration, the Federal limits can be met.

With respect to item 5, the Department repeats that nothing in the regulation prescribes or limits how accelerated death benefits are used. The definition in HIPAA to which the commenter refers addresses what benefits must be provided in long term care contracts, a type of health insurance, in order for those contracts to be considered qualified long term care insurance and receive preferential federal tax treatment. Accelerated death benefits are life insurance and, as with traditional life insurance, there are no limits or restrictions on how the proceeds may be used. A chronically ill individual is not required to use his accelerated death benefits to pay for medical care, but instead may use the proceeds in any manner he chooses. The comment concerning the waiting period has been addressed through the new definition of chronic illness.

In response to item 6, the Department reiterates that different standards for payment of accelerated death benefits for terminal illness and for chronic illness are not prohibited by the regulation and may be established by insurers in order to qualify for favorable Federal tax treatment.

Finally, the Department does not believe that different requirements for various qualifying events results in unfair discrimination, since each event has it own determining characteristics. In addition, N.J.S.A. 17B:30-1, et seq., the Fair Trade Practices Act, and N.J.A.C. 11:4-30.12, prohibit any unfair discrimination among insureds.

Federal Standards Statement

A Federal standards analysis is required when any State agency proposes to adopt, readopt, or amend State rules that exceed any Federal standards or requirements, and must include in the rule making document a comparison with Federal law.

The Department notes that the subject of these amendments deals with private life insurance coverage in New Jersey, which is exclusively subject to the laws of this State and is not subject to any Federal standards or requirements. Thus, the Department concludes that no Federal standards analysis is required. However, as noted above, the amendments as proposed have been revised to make the definition of “chronic illness” in the rule consistent with the definition of a chronically ill individual contained in federal law

Full text of the adopted amendments follows: (additions to proposal indicated in bold face with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

11:4-30.3 Definitions

The following terms, when used in this subchapter, shall have the following meanings:

...

“Qualifying event” means a medical condition which is reasonably expected to result in a drastically limited life span for the insured, such limitation to be specified in the contract; for example, a remaining life span of 24 months. At the option of the insurer, the contract may also define qualifying event to include:

1. (No change from proposal);
2. A chronic illness ***as*** defined ***[as either the permanent inability to perform two of the six activities of daily living (bathing, continence,**

dressing, eating, toileting and transferring or the presence of a debilitating cognitive impairment]* **in 26 U.S.C. § 7702B(c)(2)(A)***; and

3. Any other qualifying events which the Commissioner may approve.

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