

INSURANCE

DEPARTMENT OF BANKING AND INSURANCE

OFFICE OF LIFE AND HEALTH

**Advertisement of Life Insurance and Annuities; Disclosure and Suitability Requirements
for Annuities Directly Solicited to Consumers**

Adopted Amendment: N.J.A.C. 11:2-23.5

Adopted New Rules: N.J.A.C. 11:4-59

Proposed: July 6, 2010 at 42 N.J.R. 1303(a).

Adopted: May 2, 2011 by Douglas A. Wheeler, Director, Division of Insurance, Department of Banking and Insurance.

Filed: May 3, 2011 as R. 2011 d.153, **with substantive and technical 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, 17:1-15e and 17B:25-34 et seq.

Effective Date: June 6, 2011.

Expiration Dates: January 6, 2018, N.J.A.C. 11:2;
September 10, 2013, N.J.A.C. 11:4.

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance (Department) timely received one written comment from the American Council of Life Insurers.

COMMENT: The commenter expressed concern with the disclosure template provided in the Appendix to the proposed new rules. The commenter stated that companies provide disclosure information in a variety of documents, including the application, company-specific disclosure

forms, the Buyer's Guide from the National Association of Insurance Commissioners (NAIC), and other point of sale documents. The commenter further stated that while the disclosure template contains information already found in annuity contracts, the disclosure template is intended to be a simple, concise document in which the "legalese" is translated into "plain English." The commenter stated that the template in the proposed new rules is significantly more extensive than the disclosure template that was recommended for use by the Department in Bulletin No. 09-06. The commenter believed that some of the additional requirements may make the disclosure statement too complex and create more confusion for consumers. In addition, the commenter stated that some of the additional requirements for information are already included in the documents that insurers provide to the consumer, including the annuity contract and the NAIC Buyer's Guide. The commenter thus requested that the Department utilize the fixed annuity disclosure template that was included in Bulletin No. 09-06.

RESPONSE: Upon review of the commenter's concerns, the Department has determined that no change is required. The disclosure statement set forth in the Appendix to the subchapter is consistent with Bulletin No. 09-06. The "template" to which the commenter refers is one part of the Bulletin which provides an example of a disclosure statement, and was not intended to provide all of the information that may be required. The Department believes that the disclosure statement as set forth in the rules implements the intent of the Legislature as set forth in N.J.S.A. 17B:25-34 et seq. As was noted in the rule proposal, the rules implement that intent by providing standards for the disclosure of information about annuity products so that consumers will better understand the basic features of these products.

COMMENT: The commenter expressed concern with N.J.A.C. 11:4-59.1(b), which provides that the rules shall apply to any annuity, both immediate and deferred, directly solicited to a consumer. The commenter suggested that the rules be changed upon adoption to exclude immediate and deferred annuities that contain no non-guaranteed elements, which the commenter stated would be consistent with the NAIC Annuity Disclosure Model Rule. The commenter stated that New Jersey would be the only state of which it is aware whose rules imposing such disclosure requirements would extend to immediate and deferred annuities that contain no non-guaranteed elements. The commenter stated that the reason these specific annuities are excluded in the NAIC Model and other states is that they are completely different products. The commenter stated that for these particular annuity products, nothing in the contract can change after issue. Accordingly, all elements that determine current and future benefits are disclosed on the specifications page, and the commenter believed that there is no need to provide additional disclosure material. The commenter further believed that providing such information may result in confusion since any references to non-guaranteed elements or cash surrender values would not be relevant to the contract being purchased. The commenter also stated that if disclosure applied to annuities with no non-guaranteed elements, then the disclosure template would have to be revised in that there are a number of terms that would not be applicable. Accordingly, the commenter stated that insurers would be required to prepare and issue a New Jersey-specific disclosure form as New Jersey would be the only state to require disclosure for these products. The commenter also stated that disclosure for these types of products is “problematic” with respect to the NAIC Buyer’s Guide in that the Buyer’s Guide for immediate annuities does not exist, regardless of whether such annuities do or do not contain non-guaranteed elements.

Accordingly, the commenter believed that providing a copy of the Buyer's Guide for deferred annuities to a consumer who purchased an immediate annuity would be misleading.

RESPONSE: Upon review, the Department has determined that no change is required. The statute by its terms applies to all annuities, except as expressly excluded pursuant to N.J.S.A. 17B:25-37a and 17B:25-38a. The scope of the rules at N.J.A.C. 11:4-59.1(b) reflects the scope of the statute. In addition, the Department disagrees with the statement that no disclosure should be required for annuities with no non-guaranteed elements. For example, if an insured spends \$10,000 for an annuity that irrevocably will provide \$100.00 per month for life, with no liquidity, the Department believes that it is reasonable that the consumer receive disclosure that the contract cannot be reversed and if the person passes away before he or she recoups \$10,000 in payouts, he or she may receive significantly less than the original \$10,000 premium. Moreover, the NAIC Buyer's Guide does contain information on immediate annuities.

COMMENT: The commenter expressed concern with N.J.A.C. 11:4-59.3(b), which provides that the Buyer's Guide be modified to reflect the 10-day cancellation period and the 15-day cancellation period for consumers. The commenter questioned whether that is correct, and if so, it suggested that providing both a 10-day and a 15-day cancellation period would be confusing to consumers and could cause timing issues. Accordingly, the commenter suggested that the word "and" be changed to "or."

RESPONSE: Upon review of the commenter's suggestion, the Department has determined that no change is required. The cancellation periods referenced in the rule reflect two different

cancellation periods from two different statutes. The 10-day cancellation period is set forth in N.J.S.A. 17B:25-39. The 15-day cancellation period is set forth in N.J.S.A. 17B:25-37d(3). The latter period applies if the Buyer's Guide and contract disclosure statements are not provided to the consumer in accordance with the statute. Accordingly, both cancellation periods apply in different contexts and therefore both should be referenced in the Buyer's Guide. N.J.A.C. 11:4-59.3(a)3 makes clear that the 15-day cancellation period runs concurrently with the 10-day cancellation period (that is, that the cancellation period is either 10 days or 15 days, not 25 days).

COMMENT: The commenter expressed concern with N.J.A.C. 11:4-59.4(d), which provides that the disclosure statement form to be used in connection with an annuity shall be filed with the Department as part of the filing of annuity forms pursuant to N.J.A.C. 11:4-40. For contract forms previously approved, the rule provides that the insurer shall file a copy of a disclosure statement that complies with that section and that will be utilized with such form no later than 180 days from the effective date of the rules. The commenter stated that a number of companies have already filed and received approval of their disclosure statements based on the requirements in Bulletin No. 09-06. The commenter questioned if disclosure statements filed in accordance with the Bulletin are no longer acceptable, will insurers be required to start over and file another disclosure statement in accordance with the proposed rules? If so, the commenter stated that this would require every insurer to immediately file a new disclosure statement for approval. The commenter questioned the Department's timeframe for the review and approval of these statements in consideration of the significant volume of form submissions that will result from an industry-wide filing requirement. The commenter also requested that the Department confirm that filing within 180 days from the effective date of the rules for previously approved contract

forms is all that is required to avoid disapproval of the contract form upon which the disclosure statement is based.

RESPONSE: Disclosure statements previously filed and approved in accordance with Bulletin No. 09-06 will not be required to be refiled under these rules. The contract forms must be filed and approved within 180 days of the effective date of the rules.

COMMENT: The commenter expressed concern with N.J.A.C. 11:4-59.5(b), which provides that the information required pursuant to N.J.S.A. 17B:25-38b(2)(d) will be utilized for assessing the suitability of an annuity. The commenter stated that the information required to be recorded on the form has been expanded from the statutory requirements to also include information as required in the recently adopted NAIC Suitability in Annuity Transactions Model rule. While the commenter did not object to the rules more closely tracking the NAIC Model, it suggested that the proposed rules also more closely track the NAIC Model with regard to exclusions as set forth in N.J.A.C. 11:4-59.1(b) so that immediate and deferred annuities that contain non-guaranteed elements be excluded.

RESPONSE: This issue was addressed in the Response to the second Comment above.

COMMENT: The commenter expressed concern with N.J.A.C. 11:4-59.5(f), which provides that copies of the signed or notated suitability and acknowledgement forms shall be provided to the consumer. The commenter suggested that this requirement be deleted as it is outside of the scope of the statute. The commenter stated that N.J.S.A. 17B:25-38b(2)(e) provides that the

insurer or insurance producer should record on a form prescribed by the Commissioner of Banking and Insurance (Commissioner) certain information including “the consumer’s acknowledgement.” The commenter stated that the statute does not require that copies of the signed or notated suitability and acknowledgement forms be provided to the consumer. In addition, the commenter believed that providing consumers with copies of these forms would be inconsistent with the NAIC Model and is not required in any other state. The commenter stated that it would be extremely burdensome for New Jersey producers and does not appear to provide any value if the insurer and/or producer is otherwise maintaining a copy of the original signed documents.

RESPONSE: The Department does not agree that provision of the form to consumers will impose an undue burden for producers. The Department notes that no producers expressed concern with this requirement. The Department believes that the requirement is consistent with the statutory requirement that a consumer’s acknowledgement be recorded. The rule merely requires that consumers be provided with a copy of the document they sign. Upon review, however, the Department has determined to change the rule upon adoption to provide that the notice of acknowledgement shall be provided to consumers *upon request*. This eliminates the need for producers to provide information that the consumer does not need or request.

COMMENT: The commenter expressed concern with N.J.A.C. 11:4-59.6(a), which provides standards for insurer supervision procedures. The rule provides that “the periodic reviews should consist of such items as the insurer deems necessary, including but not limited to ...” (emphasis supplied). The commenter suggested that the word “should” be changed to “may.” The

commenter believed that, otherwise, the periodic reviews required of insurers would be too prescriptive. For example, the commenter stated that some insurers are currently performing pre-sale sampling, not post-sale sampling. The commenter stated that every company has different procedures of review based on their particular book of business and their method of sales. Accordingly, the commenter requested that the Department not mandate how an insurer performs its periodic reviews.

RESPONSE: The Department did not intend the rules to be prescriptive. The use of the word “should” was intended to convey suggested items, not mandatory ones. In order to clarify the intent of the rule, the word “should” has been changed to “may” upon adoption for the reasons expressed herein and by the commenter.

COMMENT: As set forth above, the commenter suggested that the annuity disclosure statement set forth in the proposed rules be changed to reflect the disclosure statement provided in Bulletin No. 09-06. If the Department determines that it is necessary to utilize the annuity disclosure statement set forth in the Appendix to the proposed rules, the commenter requested clarification of several of the provisions as set forth below:

1. Section (d)1 requires a “detailed description of the crediting interest rate.” The commenter questioned whether the Department is seeking a general statement of the crediting interest rate or something more specific. If something more specific is sought, the commenter requested that the Department provide more information on what is required.

2. Section (d)6 requires that the form include a statement concerning premium taxes that shall specifically address the fact that New Jersey currently does not impose premium tax on

annuities. The commenter suggested that this be deleted as it may be confusing to consumers. While the commenter noted that the statement is correct and that it could be included, the commenter believed that it is unnecessary and may cause more confusion.

3. Section (d)7 requires any fixed or variable accrediting interest rate and information concerning the method of its calculation and the duration of any rate period. The commenter requested clarification whether the Department is seeking a general statement or something more specific. If more specific information is required, the commenter requested that the Department elaborate on the information so required.

4. Section (j) requires a statement that once payouts begin, the annuitant cannot surrender (cancel) the annuity. The commenter stated that this may not be true for all deferred annuity products and therefore suggested that it be deleted. The commenter also stated that it may not be true for immediate annuity products that are not irrevocable.

5. Section (k)1 provides that the tax implication shall be explained under the detailed description on death options. The commenter suggested that this provision be removed as tax implications are explained in sections (r) and (s).

6. Section (k)2 requires a description of all the permitted ways that the death benefit can be received under Section 72f of the Internal Revenue Code and are also discussed in the Buyer's Guide. The commenter requested that the Department provide clarification on what is to be provided under this section which the commenter believed may be different from what is already provided in the Buyer's Guide.

7. For sections (l) through (o), the commenter requested that the Department explain in more detail what type of information is required to be provided under each of these sections. The commenter stated that the Buyer's Guide is detailed and most likely already provides the

information being sought in these sections. If the Buyer's Guide does not provide this information, the commenter believed that the information would most likely be contained in the annuity contract. Depending on the specific information required in these sections, the length of the disclosure statement could significantly increase and cause more consumer confusion. More importantly, the commenter believed that this could result in consumers not reading the document.

8. Section (s) requires that the form identify some of the exceptions to the 10 percent penalty tax for distribution prior to age 59½. The commenter requested that the Department explain why this information needs to be provided. The commenter believed that the level of detail required by this section could be confusing to consumers since the penalty itself may or may not be charged.

RESPONSE: The Department will respond to each comment in the order presented:

1. Section (d)1 – the Department would accept a general statement of the crediting interest rate.

2. Section (d)6 – The Department agrees that since New Jersey does not currently impose premium taxes on annuities, a statement related to premium taxes could be confusing to consumers. Accordingly, this provision is deleted upon adoption.

3. Section (d)7 – The Department is deleting this upon adoption in that it is covered under (d)1 and thus is redundant.

4. Section (j) – The Department recognizes that the statement may not be true in all circumstances. Accordingly, this section has been changed upon adoption to reference the inability, as well as the ability, to cancel or surrender the annuity once payouts begin.

5. Section (k)1 – The last sentence reference to tax implications has been deleted upon adoption as it is redundant in that it is addressed in sections (r) and (s).

6. Section (k)2 – The Department has deleted this provision upon adoption because it is redundant in that this matter is addressed in the Buyer’s Guide required to be provided to consumers.

7. Sections (l) through (o) are addressed as follows:

Section (l) is deleted upon adoption as it is redundant because it is addressed in section (r) as also modified upon adoption. The second sentence in section (r) (recodified upon adoption as section (n)) is changed upon adoption to incorporate the reference to qualified and non-qualified tax status;

Section (m) is deleted upon adoption as unnecessary. The factual statements about the performance of the annuity are addressed in the other items required to be disclosed; and

Sections (n) and (o) are deleted upon adoption as they are redundant in that the issues are addressed in paragraph (d)3.

8. Section (s) – The Department recognizes that the exceptions to the penalty tax on early withdrawals should be addressed by tax professionals. Accordingly, the section has been changed upon adoption to delete the phrase “the form shall identify some of the exceptions to this pursuant to the Internal Revenue Service, such as a series of payments or death” to read “there may be exceptions, consult with your tax professional.” This retains notice to consumers that there may exceptions to the penalty tax for early withdrawals, but that consumers should contact tax professionals for tax advice.

Federal Standards Statement

A Federal standards analysis is not required because the adopted new rules and amendment are not subject to any Federal requirements or standards.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

11:4-59.4 Disclosure statement

(a) – (c) (No change from proposal.)

(d) The disclosure statement form to be used in connection with an annuity shall be filed with the Department as part of the filing of the annuity form pursuant to N.J.A.C. 11:4-40. For contract forms previously approved, the insurer shall file a copy of a disclosure statement that complies with this section that is to be utilized with such form no later than ***[(180 days from the effective date of these rules)]* *December 3, 2011***. Failure to timely file a disclosure statement that complies with this section for use with a previously approved annuity form shall result in such previously filed and approved form being deemed withdrawn.

(e) – (g) (No change from proposal.)

11:4-59.5 Suitability standards

(a) – (e) (No change from proposal.)

(f) Copies of the signed or notated suitability and acknowledgement forms shall be provided to the consumer ***upon the request of the consumer***.

11:4-59.6 Insurer supervision procedures

(a) Insurers shall establish and maintain a system of supervision, or contract with a third party to establish and maintain such a system in accordance with N.J.S.A. 17B:25-38c(1), (2) and (3). Any insurance producer or non-licensed society agent, representative or member authorized to act on behalf of the insurer shall adopt the insurer's system of supervision for its own employees and contracted persons who negotiate and sell annuities, or establish and maintain a system to ensure compliance with the consumer suitability requirements set forth in N.J.S.A. 17B:25-38b. The system of supervision shall include: a written set of procedures concerning the negotiation and sale of annuities; a system establishing responsibility for retention of copies of all suitability forms and acknowledgements of receipt of notices by the consumer; and a process for periodic reviews to detect and prevent violations of N.J.S.A. 17B:25-38b. The periodic reviews **[should]** ***may*** consist of such items as the insurer deems necessary, including, but not limited to:

1. – 4. (No change from proposal.)

APPENDIX**ANNUITY DISCLOSURE STATEMENT**

(a) – (c) (No change from proposal.)

(d) A summary describing how the annuity earns interest, clearly distinguishing between guaranteed, non-guaranteed, and determinable elements, including any charge, by dollar amount or percentage, and other considerations provided for the annuity, with an explanation of their application under the contract.

1. – 5. (No change from proposal.)

*[6. Any premium taxes from withdrawals or payouts, including a statement describing the deduction. In addition, the form shall include a statement concerning premium taxes, which shall specifically address the fact that New Jersey currently does not impose a premium tax on annuities.

7. Any fixed or variable crediting interest rate and information concerning the method of its calculation and the duration of any rate period.]*

(e) – (i) (No change from proposal.)

(j) A statement *[that]* ***addressing the ability (or inability) of the annuitant to surrender (cancel) the annuity*** once payouts begin*[, the annuitant cannot surrender (cancel) the annuity]*.

(k) Any death benefit and the method of its calculation.

1. A detailed description on death options. The different options for a spouse, civil union partner, or other beneficiary must be mentioned, if applicable. *[The tax implications also shall be explained.

2. The Death Benefit section must describe all of the permitted ways that the Death Benefit can be received under Section 72(s) of the Internal Revenue Code, 26 U.S.C §72(s).

(l) Different disclosure forms shall be used if the annuity is non-qualified or is used as part of an Individual Retirement Account. Alternatively, a check-off or fill-in box can be used to identify the tax status.

(m) Factual statements about the performance of the annuity.

(n) The availability of withdrawing from the insurer any portion of the annuity's contract value.

(o) Any value reduction on the annuity or benefits provided by the annuity as a result of a withdrawal, if permitted.]*

[(p)] **(l)*** A brief description of all optional riders, including either the range or maximum fee charged for each option.

[(q)] **(m)*** If no optional benefit riders are offered, a statement that no such riders are available.

[(r)] **(n)*** A summary of the Federal tax status of the annuity, and any tax penalty applicable based upon a withdrawal or surrender. The disclosure should clearly indicate the tax status **(i.e., qualified, non-qualified)*** of the annuity contract.

[(s)] **(o)*** In addition to including wording that a penalty tax of 10 percent may be charged on distributions prior to age 59½, *[the form shall identify some of the exceptions to this pursuant to the Internal Revenue Service, such as a series of payments, or death]* **the form shall also state that there may be exceptions to the penalty, and that the person may wish to consult a tax professional for further information***.

Recodify proposed (t) through (y) as **(p) through (u)*** (No change in text from proposal.)