

**SUBCHAPTER PP. ANNUITY DISCLOSURES**  
**28 TAC §§3.9701 - 3.9712**

**1. INTRODUCTION.** The Commissioner of Insurance (Commissioner) adopts new Subchapter PP, §§3.9701 – 3.9712, concerning disclosures pertaining to annuities. Sections 3.9702, 3.9703, 3.9706, 3.9708, 3.9709, 3.9710, 3.9711 are adopted with changes to the proposed text published in the August 13, 2010 issue of the *Texas Register* (35 TexReg 6924). Sections 3.9701, 3.9704, 3.9705, 3.9707, and 3.9712 are adopted without changes.

**2. REASONED JUSTIFICATION.** These rules are necessary to require insurers to provide annuity applicants and contract owners with necessary information regarding annuities. The purpose of the required disclosures is to provide consumers with educational and identifying information regarding annuities that will enable them to make a decision that is more likely in their best interest and to reduce the opportunity for misrepresentation and incomplete disclosure. On April 15, 2010, the Department posted on its website the proposed rule text and cost note estimates for informal comment. On April 26, 2010, the Department held a public meeting to receive comments relating to the informal rule text and cost note estimates. These rules are based on the National Association of Insurance Commissioners (NAIC) Annuity Disclosure Model Regulation.

The sections apply to all group and individual annuity contracts and certificates unless specifically excepted by the rules. The rules require that insurers provide

specific disclosures to both annuity applicants and annuity contract owners. The disclosures required under the sections consist of a report to contract owners on at least an annual basis and a disclosure document and a buyer's guide for annuity applicants. The report to contract owners provides consumers with information regarding the current status of their contract and changes that have occurred to their account since the inception of their contract or their last report. The buyer's guide provides annuity applicants with educational information regarding annuity types and features. The disclosure document provides annuity applicants with information regarding the features and restrictions of a particular annuity product. The rules specify that if the required buyer's guide and disclosure document are not provided to an applicant at or before the time of application, a free look period of at least 15 calendar days beginning upon contract receipt must be provided during which the applicant may return the contract without penalty.

The following statutes provide the authority for the new subchapter. The Insurance Code §1108.002 provides that for the purpose of regulation under the Insurance Code, an annuity contract is considered an insurance policy or contract if the annuity contract is issued by a life, health, or accident insurance company, including a mutual company or fraternal benefit society, or issued under an annuity or benefit plan used by an employer or individual. Under the Insurance Code §101.051(b)(1), an insurer that makes or proposes to make an insurance contract is engaging in the business of insurance in this state. The Insurance Code §101.051(b)(3) specifies that taking or receiving an insurance application constitutes the business of insurance in this

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state. The Insurance Code §101.051(b)(5)(A) specifies that issuing or delivering a contract to a resident of this state constitutes the business of insurance. The Insurance Code §31.002 specifies in pertinent part that in addition to other required duties, the Department shall regulate the business of insurance in this state and ensure that the Insurance Code and other laws regarding insurance and insurance companies are executed. The Insurance Code §36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state. Because the new subchapter applies to annuities issued by life, health, or accident insurance companies, including a mutual company or fraternal benefit society, or issued under an annuity or benefit plan used by an employer or individual, the subchapter regulates annuities that are considered insurance contracts for the purpose of regulation under the Insurance Code pursuant to the Insurance Code §1108.002. The acts that trigger the requirements of the new subchapter are the taking of an annuity application and an insurer's issuance of an annuity contract. Both of these acts are expressly listed among the acts that constitute the business of insurance under the Insurance Code §101.051(b). Therefore, because the new subchapter applies to annuities that constitute insurance contracts for the purpose of the Insurance Code, and because the acts that trigger the requirements of the new subchapter are expressly listed in the Insurance Code as acts constituting the business of insurance, the Department has the authority to adopt the new subchapter pursuant to the Insurance Code §§31.002 and 36.001. Sections 1108.002, 101.051(b)(1), 101.051(b)(3) and 101(b)(5)(A) specify

business transactions and subject matters for which the Commissioner is authorized pursuant to the Insurance Code §36.001 to adopt necessary and appropriate rules. It is the Department's position that the provision of basic educational and identifying information relating to annuities is necessary to effectively regulate the sale of annuities in this state.

In addition to this authority, §1152.005 and §1114.007 of the Insurance Code provide rulemaking authority for certain transactions that will be regulated under the new rules and specific types of annuities that will be subject to the new rule requirements and procedures. The Insurance Code §1152.005 specifies that the Commissioner may adopt rules that are fair, reasonable, and appropriate to augment and implement the Insurance Code Chapter 1152, relating to separate accounts and variable annuity contracts, including rules establishing agent licensing, standard policy provisions, and disclosures. Although the new rules will apply to all types of annuities and not just variable annuity contracts, §1152.005 expressly authorizes the Commissioner to adopt rules relating to disclosures for variable annuities. Additionally, in the context of annuity replacement transactions, the Commissioner has specific authority to promulgate rules pertaining to (i) regulating the actions of insurers and agents concerning annuity replacement transactions; (ii) ensuring that purchasers receive information with which a decision in the purchaser's best interest may be made; and (iii) reducing the opportunity for misrepresentation and incomplete disclosure. The Insurance Code §1114.007 specifies that the Commissioner may adopt reasonable rules in the manner prescribed by Subchapter A, Chapter 36, to accomplish and enforce

the purpose of Chapter 1114. The Insurance Code §1114.001 in pertinent part states that the purpose of Chapter 1114 is to regulate the activities of insurers and agents with respect to the replacement of existing annuities; protect the interests of purchasers of annuities by establishing minimum standards of conduct to be observed in certain transactions; ensure that purchasers receive information with which a decision in the purchaser's best interest may be made; reduce the opportunity for misrepresentation and incomplete disclosure; and establish penalties for failure to comply with the requirements adopted under Chapter 1114. The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

No public hearing on the rule proposal was requested. In response to written comments on the published proposal, the Department has changed some of the proposed language in the text of the rule as adopted. The Department has also made non-substantive changes for purposes of clarification. Additionally, this adoption includes minor editorial corrections to two sections. None of the changes made to the proposed text, however, either as a result of comments or necessary clarification, materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

The following changes are made to the proposed text as a result of comments.

As a result of comments, proposed §3.9702(b)(1) is revised to read "immediate and deferred annuities that contain no non-guaranteed elements" rather than the

proposed language that read “immediate and deferred annuities that contain only guaranteed elements.” A commenter pointed out that annuities that have no non-guaranteed elements but do contain determinable elements would be excluded by the proposed language. Excluding from the applicability of the rules those annuities that contain determinable elements but no guaranteed elements was not the intent of the Department. Therefore, the proposed language has been revised as suggested.

As a result of comments, the Department changed proposed §3.9703 to provide that the rule applies only to annuity transactions that occur on or after the date that is six months after the effective date of the rule. The Department recognizes that insurers will need time to comply with the new regulations, including time to update computer systems and training manuals, develop and/or update application forms and disclosure documents, as well as conduct agent training to ensure compliance with the new rules. Therefore, §3.9703 as adopted is revised to read “This subchapter shall apply only to annuity transactions subject to regulation under this subchapter that occur on or after the date that is six months after the effective date of this subchapter.”

As a result of comments, the Department has also made changes to proposed §3.9708(d) to allow insurers that have the technical capability to deliver buyer’s guide and disclosure documents via the Internet in lieu of delivering hard copies of these documents. As adopted, §3.9708(d) clarifies that the delivery of the buyer’s guide and disclosure documents through the insurer’s website is not a requirement, but rather an optional method to satisfy the general requirement to provide the necessary documents to the prospective applicant. The subsection as adopted reads: “(d) If the application

is received through the Internet, and if the insurer takes reasonable steps to ensure that the appropriate buyer's guide and a disclosure document are available for viewing and printing on the insurer's website which are opened or acknowledged by the prospective applicant, the provided buyer's guide and disclosure document shall be deemed to satisfy the requirement that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application.

In addition to the change made to proposed §3.9708 as the result of comments on proposed §3.9708(d), the Department has added new §3.9708(f) as a result of comments on proposed §3.9702. The new §3.9708(f) exempts insurer's receiving an application for private placement contracts as defined by the Insurance Code §1152.110(a) from the requirement to provide the buyer's guide specified in §3.9710. This change is in response to a comment on proposed §3.9702 in which the commenter recommends that private placement contracts involving accredited investors be exempt from the entire subchapter. The commenter states that buyers of private placement contracts are sophisticated investors and Securities Exchange Commission (SEC) rules do not require a prospectus for private placement contracts. Therefore, the commenter suggests the consumer notices required in proposed §3.9708 serve no purpose. The Department agrees that accredited investors are more sophisticated purchasers and do not need every protection that is designed for the more unsophisticated consumers. The Department, however, declines to revise §3.9702 by excepting private placement contracts altogether from the applicability of the rules and instead has added the new

subsection (f) to §3.9708 to except private placement contracts from the buyer's guide requirement. This change is consistent with the intent of the rules to balance the consumer protection interests of accredited investors while still ensuring that those investors are provided sufficient information to make a fully informed investment decision. Section 3.9708(f) as adopted reads: "Insurers receiving an application for private placement contracts as defined by the Insurance Code §1152.110(a) are not required to provide the buyer's guide specified in §3.9710 of this subchapter."

A new subsection (g) has been added to proposed §3.9708 as a result of comments. A commenter recommended deleting "If the buyer's guide and disclosure document required by this subchapter are not provided at or before the time of application". The commenter states that §3.9711(a) is vague and could be interpreted to provide a safe harbor to insurers who as a routine matter already provide a 15-day free look period. The Department disagrees with the commenter's suggestion to delete part of §3.9711(a) and has instead added a new subsection (g) to §3.9708 to clarify that insurers have an independent duty to provide consumer notices, and that the consumer notice requirements apply even if the insurer provides a 15-day free look period prior to the adoption of these rules. Section 3.9708(g) as adopted reads: "This section applies regardless of whether an insurer is providing a 15-day free look period like that required in §3.9711(a) of this subchapter (relating to Free Look Period) prior to the adoption of this subchapter or whether the insurer begins providing the 15-day free look period in accordance with §3.9711(a) of this subchapter."

Also, as a result of a comment, proposed §3.9709 is revised to delete the language in §3.9709(a)(13) “that is reasonably intelligible to the average consumer.” Two commenters stated that this language is subjective and not defined, and that proposed §3.9709(b) includes a requirement that the disclosure document be written in language understandable by the typical person to which the disclosure is directed. The Department agrees with the commenter, and §3.9709(a)(13) as adopted reads in pertinent part: “information about the current guaranteed rate for new contracts that contains a clear notice that the rate is subject to change.”

Proposed §3.9709(a) has been revised to clarify that elements (1) - (13) are only necessary “if applicable.” This change is another response to a previously discussed comment in which the commenter recommends that private placement contracts involving accredited investors be exempt from the entire subchapter. In response to this comment, the Department has instead clarified that a document that contains the required elements of §3.9709 for a disclosure document provide the minimum amount of information necessary to the prospective applicant. Therefore, the typical prospectus or other similar documents that are commonly provided to a private placement contract applicant would be sufficient. Adding the language “if applicable” clarifies that a disclosure document does not need to address issues that are not relevant to the particular annuity product being sold. Section 3.9709(a) as adopted reads: “At a minimum, the following information, if applicable, must be included in the disclosure document required to be provided under this subchapter: . . .”

Finally, as a result of a multiple comments pertaining to the buyer's guide for variable annuities, proposed §3.9710 is revised. Two commenters suggested that until the NAIC has adopted a buyer's guide for variable annuities that no buyer's guide be distributed. One commenter suggested that until the NAIC Buyer's Guide for Variable Annuities has been published, the Department require the Security and Exchange Commission's document "Variable Annuities: What You Should Know." The revised §3.9710 requires no buyer's guide for variable annuities for the first year the rule is effective, and then if there is not yet a NAIC buyer's guide for variable annuities, the Security and Exchange Commission's document "Variable Annuities: What You Should Know" must be provided. The requirement in proposed §3.9710 that the NAIC buyer's guide for fixed annuities is required for prospective buyers of equity-indexed annuities if there is not yet a NAIC buyer's guide specific to equity-index annuities remains unchanged in the adoption.

The Department has also made changes for purposes of clarification to §§3.9709(c), 3.9711(b), and 3.9711(e).

The Department has changed proposed §3.9709(c), relating to the identification of the documents that satisfy the requirements of §3.9709 for disclosure documents, to clarify the Department's intent that subsection (c) does not limit the Commissioner's ability to enforce not only subsection (c) but the other provisions of the section as well. Therefore, the word "other" is added in the sentence in §3.9709(c), that reads: "This subsection does not limit the commissioner's ability to enforce the *other* provisions of this section or require the use of a FINRA-approved disclosure document."

The Department has changed proposed §3.9711(b), related to the required notice of the free look period, to clarify the Department's intent that the required notice must prominently disclose the information concerning the 15-day free look period. Therefore, the phrase "information concerning" is added in the sentence in §3.9711(b), that reads: "The notice must prominently disclose *information concerning* the 15-day free look period."

The Department has changed proposed §3.9711(e), related to the free look periods applicability to accredited investors, to clarify the Department's intent that the refund and free look period requirements do not apply to only subsection (e) but to other provisions of the section as well. Therefore, the word "subsection" is replaced with the word "section." The revised §3.9711(e) reads: "The refund and free look period requirements in this *section* do not apply if the prospective owner is an accredited investor, as defined in Regulation D as adopted by the United States Securities and Exchange Commission.

The Department has also made minor editorial changes to §3.9706(a) and §3.3709(a)(1) to: (i) correct the improper use of internal references; and (ii) correct improper punctuation.

Section 3.9706(a) is revised to correct the reference to "chapter" to "subchapter." The intent of defining the term "guaranteed element" is to define the term for usage only in the subchapter and not for the entire chapter. Therefore, the subsection as adopted reads in pertinent part: "For the purposes of this *subchapter* "guaranteed element

means...” This correction also makes §3.9706(a) internally consistent with the parallel provision in §3.9706(b).

Section 3.9709(a)(1) is revised to correctly punctuate the series of three elements of information with semi-colons because one of the elements contains a comma.

The following is a section-by-section summary of the new sections and the reasons for their adoption.

**§3.9701. Purpose.** The rules are necessary to provide standards for the disclosure of certain minimum information about annuity contracts and to assist purchasers of annuity contracts to understand basic features of annuity contracts. Section 3.9701 sets forth this purpose.

**§3.9702. Applicability and Scope.** Section 3.9702 is necessary to specify the types of annuity contracts and certificates that are subject to the new rules. Section 3.9702(a) specifies that the subchapter applies to all group and individual annuity contracts and certificates, except as provided in §3.9702(b). Section 3.9702(b) specifies that except as provided in §3.9702(c), the subchapter does not apply to certain annuity products. Section 3.9702(b)(1) specifies that the subchapter does not apply to immediate and deferred annuities that contain no non-guaranteed elements. Section 3.9702(b)(2) specifies that the subchapter does not apply to annuities used to fund: (i) an employee pension plan subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.); (ii) a plan described by the Internal Revenue Code of 1986 §§401(a), 401(k), or 403(b), in which the plan, for purposes of the

Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.), is established or maintained by an employer; (iii) a governmental or church plan as defined by the Internal Revenue Code of 1986 §414, or a deferred compensation plan of a state or local government or a tax-exempt organization under the Internal Revenue Code of 1986 §457; (iv) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor; or (v) prepaid funeral benefits, as defined by the Finance Code Chapter 154. Section 3.9702(b)(3) specifies that the subchapter does not apply to a structured settlement annuity. Section 3.9702(b)(4) specifies that the subchapter does not apply to a charitable gift annuity qualified under the Insurance Code Chapter 102. Section 3.9702(b)(5) specifies that the subchapter does not apply to a funding agreement. Section 3.9702(c) provides that notwithstanding the exemptions specified in §3.9702(b), the subchapter applies to an annuity used to fund a plan or arrangement that is funded solely by contributions an employee elects to make, whether on a pre-tax or after-tax basis, under certain specified conditions. These conditions are (i) if the insurer has been notified that plan participants may choose from among two or more fixed annuity providers and (ii) there is a direct solicitation of an individual employee by an agent for the purchase of an annuity contract. As used in the subsection, "direct solicitation" does not include a meeting held by an agent solely for the purpose of educating or enrolling employees in the plan or arrangement.

**§3.9703. Effective Date.** Section 3.9703 provides that the rules apply only to annuity transactions subject to regulation under the subchapter that occur on or after six

months after the effective date of the rule as adopted. This delayed effective date is necessary because of cost and compliance concerns of insurers.

**§3.9704. Definitions.** Section 3.9704 defines the words and terms used in the rules. It provides that these terms have the same meaning as provided in the Insurance Code Chapter 102. The section defines the terms *agent*, *buyer's guide*, *contract owner*, *disclosure document*, *funding agreement*, *generic name*, and *structured settlement annuity*.

**§3.9705. Determinable Elements.** Section 3.9705(a) specifies that for the purpose of the subchapter, the term *determinable elements* means elements derived from processes or methods that are guaranteed at issue and are not subject to company discretion, but for which the values or amounts cannot be determined until some point after issue. The subsection specifies that the term includes: (i) premiums; (ii) credited interest rates, including any bonus; (iii) benefits; (iv) values; (v) non-interest based credits; (vi) charges; and (vii) elements of formulas used to determine any element described by paragraphs (1) - (6) of the subsection. This definition and examples are necessary to ensure proper compliance with the subchapter. The definition and examples are used in defining the terms *guaranteed element* and *non-guaranteed element* that are defined in §3.3906. Section 3.9705(b) specifies that determinable elements may be described as guaranteed but not determined at issue, and that an element is considered determinable if the element was computed from only underlying determinable elements, or from both determinable and guaranteed elements.

**§3.9706. Guaranteed and Non-guaranteed Elements.** Section 3.9706(a) specifies that for the purposes of the subchapter, *guaranteed element* means an element listed in subsection (a)(1) - (7) of §3.9705 that is guaranteed and determined at issue. The subsection specifies that an element is considered guaranteed if all of the underlying elements used in its computation are guaranteed. Section 3.9706(b) specifies that for the purposes of the subchapter, "non-guaranteed element" means an element listed in subsection (a)(1) - (7) of §3.9705 that is subject to the insurer's discretion and is not guaranteed at issue, and that an element is considered non-guaranteed if any underlying elements used in its computation is non-guaranteed.

**§3.9707. Effect on Other Law.** Section 3.9707 provides that compliance with the subchapter is not a defense in any action brought by or for the Department alleging a violation of the Insurance Code, or, except for this subchapter regulating annuity disclosures, any rule adopted pursuant to the Insurance Code.

**§3.9708. Required Consumer Notices.** To achieve the purpose of the rules, it is necessary for the Department to mandate certain consumer notices and the minimum requirements for these notices. Section 3.9708(a) specifies that if an application for an annuity contract or certificate is taken in a face-to-face meeting, the applicant must be given at or before the time of application both a disclosure document and the appropriate buyer's guide specified in §3.9710 of the subchapter. Section 3.9708(b) specifies that if the application is taken by means other than in a face-to-face meeting the applicant must be sent not later than the fifth business day after the date on which the completed application is received by the insurer both a disclosure document and the

appropriate buyer's guide specified in §3.9710 of the subchapter. Section 3.9708(c) specifies that if the insurer receives the application as a result of a direct solicitation through the mail, the insurer providing the appropriate buyer's guide and a disclosure document in a mailing inviting prospective applicants to apply for an annuity contract or certificate satisfies the requirement in §3.9708(b) that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application. Section 3.9708(d) specifies that if the application is received through the Internet, and if the insurer takes reasonable steps to ensure that the appropriate buyer's guide and a disclosure document are available for viewing and printing on the insurer's website which are opened or acknowledged by the prospective applicant, the provided buyer's guide and disclosure document are deemed to satisfy the requirement that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application. Section 3.9708(e) specifies that a solicitation for an annuity contract that is provided in a manner other than a face-to-face meeting must include a statement that the proposed applicant may contact the insurer for a free annuity buyer's guide. Section 3.9708(f) specifies that applications for private placement contracts do not require a buyer's guide as described in §3.9710. Section 3.9708(g) specifies that §3.9708 applies whether or not a free look period is provided under §3.9711.

**§3.9709. Disclosure Document.** Section 3.9709 specifies the minimum requirements for the disclosure document required under the subchapter. Section 3.9709(a) specifies that the following minimum information, if applicable, must be

included in the required disclosure document: (i) the generic name of the contract; the insurer product name, if different from the generic name; the product's form number; and a statement of the fact that the contract is an annuity; (ii) the insurer's name and address; (iii) a description of the contract and the benefits provided under the contract that emphasizes the long-term nature of the contract and the inclusion of examples of the long-term nature as appropriate; (iv) the guaranteed, non-guaranteed, and determinable elements of the contract, any limitations of those elements, and an explanation of how those elements operate; (v) an explanation of the initial crediting rate, specifying any bonus or introductory portion, the duration of the initial crediting rate, and the fact that rates may change from time to time and are not guaranteed; (vi) periodic income options, both on a guaranteed and non-guaranteed basis; (vii) any value reductions caused by withdrawals from or surrender of the contract; (viii) how values in the contract can be accessed; (ix) the death benefit, if available, and how the death benefit is computed; (x) a summary of the federal tax status of the contract and any penalties applicable on withdrawal of values from the contract; (xi) the impact of any rider, such as a long-term care rider; (xii) a list of the specific dollar amount or percentage charges and fees, with an explanation of how those charges and fees apply; and (xiii) information about the current guaranteed rate for new contracts that contains a clear notice that the rate is subject to change.

Section 3.9709(b) requires an insurer to define terms used in the disclosure document in language that facilitates the understanding by a typical person within the segment of the public to which the disclosure document is directed. This provision is

intended to require insurers to craft disclosures relevant to the intended market for the particular product discussed in the disclosure. For example, a product intended for senior citizens or retirees may have a disclosure document printed in larger font to facilitate easier reading.

Section 3.9709(c) specifies that a disclosure document that complies with the Financial Industry Regulatory Authority (FINRA) Conduct Rules and the United States Securities and Exchange Commission prospectus requirements satisfies the requirements of the section for disclosure documents. Section 3.9709(c) further specifies that the subsection does not limit the commissioner's ability to enforce the other provisions of the section or require the use of a FINRA-approved disclosure document. Additionally, under §3.9709(c), a safe harbor is provided for an annuity contract that is regulated by, and complies with, the FINRA Conduct Rules and the SEC prospectus requirements pertaining to disclosure.

**§3.9710. Buyer's Guide.** Section 3.9710 provides that for the purposes of the subchapter, an appropriate buyer's guide is the latest version of the buyer's guide adopted by the NAIC that applies to the particular type of annuity (such as fixed deferred annuity, equity-indexed annuity, or variable annuity) that is the subject of the transaction. The section specifies that if the NAIC has not adopted a buyer's guide for variable annuities, then no buyer's guide is required until one year after the date on which this subchapter becomes effective. If the NAIC has not adopted a buyer's guide for variable annuities within one year after the date on which this subchapter becomes effective, then for purposes of this subchapter the appropriate buyer's guide is the latest

version of the SEC's Office of Investor Education and Advocacy "Variable Annuities: What You Should Know", SEC Pub. 011.

**§3.9711. Free Look Period.** To achieve the purposes of the rules, it is necessary for the Department to mandate a free look period in certain circumstances. Section 3.9711 is necessary to specify the provisions relating to the free look period required in certain circumstances. Section 3.9711(a) specifies that if the required buyer's guide and the disclosure document are not provided at or before the time of application, a free look period of at least 15 calendar days must be provided during which the applicant may return the contract without penalty. Section 3.9711(b) requires that notice of the free look period required under the section be provided to consumers in a notice that is included on or attached to the cover page of the delivered annuity contract, and that the notice must prominently disclose information concerning the 15-day free look period. Section 3.9711(c) specifies that the free look period begins the date the consumer receives the contract and runs concurrently with any other free look period required under the Texas Administrative Code, the Texas Insurance Code, or another law of this state. Section 3.9711(d) specifies that an unconditional refund without penalty for purposes of the section for variable or modified guaranteed annuity contracts means a refund equal to the cash surrender value provided in the annuity contract, plus any fees or charges deducted from the premiums or imposed under the contract. Section 3.9711(e) specifies that the refund and free look period requirements in the section do not apply if the prospective owner is an accredited investor, as defined in Regulation D as adopted by the United States Securities and Exchange Commission.

This exemption is consistent with the Department's determination that accredited investors are more sophisticated purchasers and therefore do not need every protection designed for more unsophisticated consumers.

**§3.9712. Report to Contract Owners.** Section 3.9712 specifies the provisions relating to the report to contract owners. Section 3.9712(a) requires, for annuities in the payout period with changes in non-guaranteed elements and for the accumulation period of a deferred annuity, the insurer to provide each contract owner with a report, at least annually, on the status of the contract. Section 3.9712(b) specifies the minimum information that must be included in the report.

### 3. HOW THE SECTIONS WILL FUNCTION.

Section 3.9701 specifies the purpose of the subchapter.

Section 3.9702 specifies the applicability and scope of the subchapter. It also specifies the types of annuity contracts to which the new rules apply and do not apply.

Under §3.9703, the rules apply only to annuity transactions subject to regulation under the subchapter that occur on or after six months after the effective date of the rule as adopted.

Section 3.9704 specifies that the words and terms defined in the Insurance Code Chapter 102 have the same meaning when used in the subchapter. The section defines the terms *agent*, *buyer's guide*, *contract owner*, *disclosure document*, *funding agreement*, *generic name*, and *structured settlement annuity*.

Section 3.9705 defines and provides examples of the term *determinable elements*.

Section 3.9706 defines the terms *guaranteed element* and *non-guaranteed element*.

Section 3.9707 specifies that compliance with the subchapter is not a defense in any action brought by or for the Department alleging a violation of the Insurance Code, or, except for this subchapter regulating annuity disclosures, any rule adopted pursuant to the Insurance Code.

Section 3.9708 specifies certain consumer notices required under the subchapter. Section 3.9708(a) specifies that if an application for an annuity contract or certificate is taken in a face-to-face meeting, the applicant must be given at or before the time of application both a disclosure document and the appropriate buyer's guide specified in §3.9710 of the subchapter. Section 3.9708(b) specifies that if the application is taken by means other than in a face-to-face meeting the applicant must be sent not later than the fifth business day after the date on which the completed application is received by the insurer both a disclosure document and the appropriate buyer's guide specified in §3.9710 of the subchapter. Section 3.9708(c) specifies that if the insurer receives the application as a result of a direct solicitation through the mail, the insurer providing the appropriate buyer's guide and a disclosure document in a mailing inviting prospective applicants to apply for an annuity contract or certificate is considered to satisfy the requirement in §3.9708(b) that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the

date of receipt of the application. Section 3.9708(d) specifies that if the application is received through the Internet, and if the insurer takes reasonable steps to ensure that the appropriate buyer's guide and a disclosure document are available for viewing and printing on the insurer's website which are opened or acknowledged by the prospective applicant, the provided buyer's guide and disclosure document are deemed to satisfy the requirement that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application.

Section 3.9708(e) specifies that a solicitation for an annuity contract that is provided in a manner other than a face-to-face meeting must include a statement that the proposed applicant may contact the insurer for a free annuity buyer's guide. Section 3.9708(f) specifies that applications for private placement contracts do not require a buyer's guide as described in §3.9710. Section 3.9708(g) specifies that §3.9708 applies regardless of whether an insurer is providing a 15-day free look period like that required in §3.9711(a) prior to the adoption of these rules or whether the insurer begins providing the 15-day free look period in accordance with §3.9711(a).

Section 3.9709 specifies the minimum requirements for the disclosure document required under the subchapter. Section 3.9709(a) specifies the minimum information that must be included in the required disclosure document, if applicable. Under §3.9709(b), an insurer is required to define terms used in the disclosure document in language that facilitates the understanding by a typical person within the segment of the public to which the disclosure document is directed. Section 3.9709(c) further specifies that the subsection does not limit the commissioner's ability to enforce the other

provisions of the section or require the use of a FINRA-approved disclosure document. Additionally, a safe harbor is provided from the provisions of the rules for an annuity contract that is regulated by, and complies with, the FINRA Conduct Rules and the SEC prospectus requirements pertaining to disclosure.

Section 3.9710 specifies that for the purposes of the subchapter, an appropriate buyer's guide is the latest version of the buyer's guide adopted by the NAIC that applies to the particular type of annuity (such as fixed deferred annuity, equity-indexed annuity, or variable annuity) that is the subject of the transaction. If the NAIC has not adopted a buyer's guide for equity-indexed annuities, then the appropriate buyer's guide is the Buyer's Guide to Fixed Deferred Annuities that has been most recently adopted by the NAIC. The section specifies that if the NAIC has not adopted a buyer's guide for variable annuities, then no buyer's guide is required until one year after the date on which the subchapter becomes effective. If the NAIC has not adopted a buyer's guide for variable annuities within one year after the date on which the subchapter becomes effective, then for purposes of the subchapter the appropriate buyer's guide is the latest version of the SEC's Office of Investor Education and Advocacy "Variable Annuities: What You Should Know," SEC Pub. 011.

Section 3.9711 specifies the provisions relating to the free look period required in certain circumstances. Under §3.9711(a), if the required buyer's guide and the disclosure document are not provided at or before the time of application, then a free look period of at least 15 calendar days must be provided during which the applicant may return the contract without penalty. Under §3.9711(b), insurers are required to

provide the notice of the free look period to consumers in a notice that is included on or attached to the cover page of the delivered annuity contract and are required to prominently disclose information concerning the 15-day free look period in the notice.

Section 3.9711(c) specifies that the free look period begins the date the consumer receives the contract and runs concurrently with any other free look period required under the Texas Administrative Code, the Texas Insurance Code, or another law of this state. Section 3.9711(d) specifies that an unconditional refund without penalty for purposes of the section for variable or modified guaranteed annuity contracts means a refund equal to the cash surrender value provided in the annuity contract, plus any fees or charges deducted from the premiums or imposed under the contract. Section 3.9711(e) specifies that the refund and free look period requirements in the section do not apply if the prospective owner is an accredited investor, as defined in Regulation D as adopted by the United States Securities and Exchange Commission.

Under §3.9712, for annuities in the payout period with changes in non-guaranteed elements and for the accumulation period of a deferred annuity, the insurer is required to provide each contract owner with a report on the status of the contract. The report, which must be provided at least annually, must include certain specified information, including (i) the beginning and ending dates of the current reporting period; (ii) the accumulation and cash surrender value, if any, at the end of the previous reporting period; and the current reporting period; (iii) the total amounts, if any, that have been credited, charged to the contract or certificate value, or paid during the

current reporting period; and (iv) the amount of any outstanding loans as of the end of the current reporting period.

#### 4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

##### §3.9702. Applicability and Scope.

**Comment:** Commenters requested that §3.9702(b)(1) be revised to read “immediate and deferred annuities that contain *no non-guaranteed elements*”. A commenter noted that the proposed language of “immediate and deferred annuities that contain *only guaranteed elements*” could include annuities that have no non-guaranteed elements but do contain determinable elements.

**Agency Response:** The Department agrees with the commenters and has revised proposed §3.9702 as the commenters suggested. Excluding from applicability annuities that contain determinable elements was not the intent of the proposed rules. Therefore, the Department has §3.9702(b)(1) as adopted to read “immediate and deferred annuities that contain no non-guaranteed elements”.

**Comment:** A commenter suggests a new provision be added to proposed §3.9702 to provide that private placement contracts to accredited investors be excluded from the rule’s applicability. The commenter’s reasons are: (i) private placement contracts involving accredited investors are exempt from Securities Exchange Commission (SEC) registration; and (ii) the use of a prospectus is not required under securities rules. According to the commenter, the Department should exclude exempt insurers from providing a disclosure notice and a buyer’s guide to accredited investors

who are presumed to be financially sophisticated as recognized by the SEC. The term “accredited investor” is defined by federal securities law, and for a natural person requires exceeding either a net worth or income requirement.

**Agency Response:** The Department understands that investors in private placement contracts may not require the same degree of consumer protection as other annuity buyers. For example, the rules in §3.9711 requiring the free look period create an exception for accredited investors. However, the Department declines to exclude private placement contracts from the applicability of the entire rule for the following reasons: (i) accredited investors are presumed to have a higher degree of investor sophistication, and do not need the buyers guide; (ii) even accredited investors considering the purchase of a private placement annuity contract can benefit from the additional information required in §3.3709 which requires certain disclosures related to the annuity product being considered for purchase; (iii) the extra costs in distributing a disclosure does not outweigh the potential benefits of the disclosures; and these disclosure requirements can be satisfied by the usual prospectus and disclosures that prospective private placement annuity buyers are already given. Therefore, insurers offering private market annuity products can provide the required disclosures without undue hardship. However, in response to the comment and in lieu of revising proposed §3.9702 as requested by the commenter, the Department is revising proposed §3.9708 and §3.39709. Section 3.9708 is revised in this adoption to add new (f), which amends the buyer’s guide requirement to create an exception for private placement contracts. Additionally, §3.9709(a) is revised to clarify that elements (1) - (13) are only necessary

“if applicable.” These two revisions respond in part to the commenter’s concerns but also balance the consumer protection interests of accredited investors while still ensuring that those investors are provided sufficient information to make a fully informed investment decision.

### **§3.9703. Effective date.**

**Comment:** One commenter requests that the Department consider a later effective date of six months from the date the rules are adopted. The commenter’s reasons are: (i) other states currently exclude variable annuities from their annuity disclosure rules; (ii) insurers will need time to comply with the new regulations; and (iii) insurers need the time to update computer systems and training manuals, develop and/or update application forms and disclosure documents, as well as conduct agent training to ensure compliance with the new rules.

**Agency Response:** The Department appreciates the cost and compliance concerns of insurers and has made the requested change in §3.9703 as adopted: “This subchapter shall apply only to annuity transactions subject to regulation under this subchapter that occur on or after *the date that is six months after the effective date of this subchapter.*”

### **§3.9708. Required Consumer Notice.**

**Comment:** Two commenters state that the language “in order to satisfy” in §3.9708(d) implies that the delivery of consumer notices via the Internet would be a mandatory requirement if an application is received online. According to one

commenter, requiring insurers to provide these disclosure agreements and acknowledgement through the Internet would require program changes. The commenters suggest that the language allow for the delivery of the consumer notice via the Internet as an option that replaces a hard copy mail delivered notice rather than a mandatory requirement.

**Agency Response:** The Department agrees with the commenters and has revised §3.9708(d) to incorporate the commenters' suggested change. Section 3.9708(d) as adopted is revised to read: "If the application is received through the Internet, and if the insurer takes reasonable steps to ensure that the appropriate buyer's guide and a disclosure document are available for viewing and printing on the insurer's website which are opened or acknowledged by the prospective applicant, the provided buyer's guide and disclosure document shall be deemed to satisfy the requirement that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application."

### **§3.9709. Disclosure Document.**

**Comment:** Two commenters suggest that the language "that is reasonably intelligible to the average consumer" in §3.9709(a)(13) be deleted. The commenters assert the following reasons for the requested change: (i) the language is not in the NAIC model act; (ii) the language was not in House Bill (HB) 1293, as enacted by the 81st Legislature, Regular Session, which was vetoed; (iii) the language is a subjective standard that is not clearly defined; and (iv) §3.9709(b) provides a clear standard

without that language that is applicable to the entire disclosure document. Additionally, one commenter asked that if this language is not deleted, that the Department clarify the language for compliance purposes.

**Agency Response:** The Department agrees with the commenters and has revised proposed §3.9709(a)(13) to delete the language as the commenters suggested.

**Comment:** One commenter suggests a new §3.9709(b) to require that the disclosure document in proposed §3.9709 be required to score no less readable than an eighth grade score on the Flesch-Kincaid readability test. According to the commenter, adopting readability standards for disclosure documents would strengthen the rules. The commenter expresses concern that not having readable buying guides and disclosure notices would diminish important consumer protections for complex insurance products.

**Agency Response:** The Department understands the expressed concern but declines to make the requested change. The Department's reasons are the following. First, the rule already includes a requirement in §3.9709(b) that an insurer must define terms used in the disclosure document in language that facilitates the understanding by a typical person within the segment of the public to which the disclosure document is directed. The Department acknowledges that some annuity products on the market may be intended to be sold only to sophisticated investors who may benefit from a notice appropriate to their level of financial expertise. Second, it is the Department's position that the readability language requirements in the rule are sufficient to ensure that the disclosure documents will be readable by intended consumers. Third, the

Department's position is that uniformity of disclosure documents across states is an important objective. A Flesch-Kincaid readability test requirement is not consistent with that objective because it could necessitate the revision of already established out-of-state disclosure notices for products sold in Texas, thereby increasing the costs to insurers that would likely be passed on to consumers.

### **§3.9710. Buyers Guide.**

**Comment:** Two commenters recommend that until the National Association of Insurance Commissioners (NAIC) produces a buyer's guide specific to variable annuities, no buyer's guide should be distributed. A commenter asserts that providing the fixed deferred annuity buyer's guide as required in §3.9710 could be confusing to prospective buyers of variable annuities. Further, one commenter states that the prospectus that the SEC already requires for most variable annuities contains pertinent information about that type of annuity. Another commenter suggests that during the interim period in which no NAIC Buyer's Guide for Variable Annuities has been published, that the Department require the SEC's document titled "Variable Annuities: What You Should Know" as an appropriate buyer's guide for the purposes of §3.9708.

**Agency Response:** The Department agrees that a specific NAIC buyer's guide to variable annuities would be the preferred mandatory buyer's guide. Though the Department prefers that insurers provide the NAIC's annuity buyer's guides, the specific buyer's guide for both equity-indexed and variable annuities have not yet been adopted by the NAIC. The proposed §3.9710 requirement that the NAIC's Buyer's Guide to

Fixed Deferred Annuities be provided for equity-indexed and variable annuities represents the purposeful intent of the Department to ensure that alternative information be provided for the benefit of prospective consumers if NAIC buyer's guides that apply to the particular type of annuity that is the subject of the transaction are not available. Therefore, in response to the comments, the Department has revised §3.9710 in this adoption to require no buyer's guide for variable annuity sales for the first year after these rules become effective.

Under the rules as adopted, thereafter, if the NAIC has not yet adopted a buyer's guide specific to variable annuities, then the appropriate buyer's guide will be the most recently published SEC "Variable Annuities: What You Should Know", SEC Pub. 011. This revision is made because the Department has determined that this pamphlet provides useful information to prospective variable annuity customers. The one-year delay is necessary to provide the NAIC Working Group additional time to adopt a buyer's guide for variable annuities. However, the Department does not control the NAIC's development or adoption of the buyer's guides, and therefore the Department cannot guarantee that a specific buyer's guide for variable annuities will be adopted during the next year. Therefore, §3.9710 as adopted specifies that the appropriate buyer's guide for variable annuities is the SEC's pamphlet, in the event that a variable annuity specific guide is not adopted by the NAIC within one year after the date that the rules become effective. Additionally, proposed §3.9710 is revised as adopted to clarify that if the NAIC has not adopted a buyer's guide for equity-indexed annuities, the

appropriate buyer's guide is the Buyer's Guide to Fixed Deferred Annuities that has been most recently adopted by the NAIC.

### **§3.9711. Free Look.**

**Comment:** One commenter expresses concern that proposed §3.9711(a) may harm consumers by providing a safe harbor for insurers to effectively ignore the proposed consumer notice and buyer's guide rule provisions in those instances in which a company currently provides a 15-day free look period, i.e., before these rule requirements are adopted. The commenter recommends deleting "If the buyer's guide and disclosure document required by this subchapter are not provided at or before the time of application".

**Agency Response:** The Department understands the concern of the commenter and has made a clarifying change in the proposal. The Department, however, does not agree with deleting the language suggested by the commenter because such a change would result in these rules providing a blanket free look period for applicable annuities, regardless of whether the required consumer notices are provided. This deletion is not consistent with the intent of the rule to create a self-help consumer remedy when the required consumer notices are not timely provided. It is the Department's opinion that regardless of whether this recommended deletion is made, the Department would have the regulatory authority to enforce all of the requirements in these rules, including §3.9708 relating to required consumer notices. However, in lieu of revising proposed §3.9711(a), as requested by the commenter, the Department has

revised proposed §3.9708, relating to required consumer notices, to add a new subsection (g) to clarify that insurers have a duty to provide consumer notices, and that a 15-day free look is an additional remedy for annuity buyers but not a safe harbor creating immunity from Department regulatory action. Section 3.9708(g) as adopted reads: “(g) This section applies regardless of whether an insurer is providing a 15-day free look period like that required in §3.9711(a) of this subchapter (relating to Free Look Period) prior to the adoption of this subchapter or whether the insurer begins providing the 15-day free look period in accordance with §3.9711(a) of this subchapter.

**Comment:** A commenter urges that the Department remove proposed §3.9711(e), which provides that the refund and free look period requirements of the subsection do not apply if the prospective owner is an accredited investor, as defined in Regulation D as adopted by the SEC. The commenter states that accredited investors should also be given the opportunity of a free look period.

**Agency Response:** The Department declines to make the requested change for the following reasons. The Department is of the opinion that accredited investors are more sophisticated purchasers and therefore do not need every protection designed for more unsophisticated consumers. The Department’s understanding is that a natural person who may qualify as an accredited investor under federal securities regulations must affirmatively represent to an insurer that they meet the definition in the SEC’s Regulation D if they wish to be treated as an accredited investor. A natural person that potentially meets the federal regulatory definition of an accredited investor can choose between being treated as a non-accredited investor natural person for purposes of the

rule, or can voluntarily opt into the market available to accredited investors under the SEC's Regulation D. Therefore, an individual who is a potential accredited investor may benefit from the free look option provided by §3.9711 at their own initiative by declining to self-identify as an accredited investor.

## **5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.**

For, with changes: American Association of Retired Persons (AARP), American Council of Life Insurers (ACLI), Office of Public Insurance Counsel (OPIC), and Texas Association of Life and Health Insurers (TALHI).

Against: None.

**6. STATUTORY AUTHORITY.** The new subchapter is adopted under the Insurance Code §§1108.002, 31.002, 101.051(b)(1), (b)(3), and (b)(5)(A), 1152.002, 1114.007, 1114.001, and 36.001. Section 1108.002 specifies that for the purpose of regulation under the Insurance Code, an annuity contract is considered an insurance policy or contract if the annuity contract is issued by a life, health, or accident insurance company, including a mutual company or fraternal benefit society or issued under an annuity or benefit plan used by an employer or individual. Section 31.002 specifies that in addition to other required duties, the Department shall regulate the business of insurance in this state; administer the workers' compensation system of this state as provided by the Labor Code Title 5; and ensure that the Insurance Code and other laws regarding insurance and insurance companies are executed. Section 101.051(b)(1)

specifies that the making or proposing to make, as an insurer, an insurance contract constitutes the business of insurance in this state. Section 101.051(b)(3) specifies that taking or receiving an insurance application constitutes the business of insurance in this state. Section 101.051(b)(5)(A) specifies that issuing or delivering a contract to a resident of this state constitutes the business of insurance. Section 1152.005 specifies that the Commissioner may adopt rules that are fair, reasonable, and appropriate to augment and implement the Insurance Code Chapter 1152, relating to separate accounts and variable annuity contracts, including rules establishing agent licensing, standard policy provisions, and disclosure.

Section 1114.007 specifies that the Commissioner may adopt reasonable rules in the manner prescribed by Subchapter A, Chapter 36, to accomplish and enforce the purpose of Chapter 1114. Section 1114.001 states that the purpose of Chapter 1114 is to regulate the activities of insurers and agents with respect to the replacement of existing life insurance and annuities; protect the interests of purchasers of life insurance or annuities by establishing minimum standards of conduct to be observed in certain transactions; ensure that purchasers receive information with which a decision in the purchaser's best interest may be made; reduce the opportunity for misrepresentation and incomplete disclosure; and establish penalties for failure to comply with the requirements adopted under Chapter 1114. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

## 7. TEXT.

### **SUBCHAPTER PP. Annuity Disclosures 28 TAC §§3.9701 - 3.9712**

**§3.9701. Purpose.** The purpose of this subchapter is to:

- (1) provide standards for the disclosure of certain minimum information about annuity contracts; and
- (2) assist purchasers of annuity contracts to understand certain basic features of annuity contracts.

### **§3.9702. Applicability and Scope.**

(a) This subchapter applies to all group and individual annuity contracts and certificates except as provided by subsection (b) of this section.

(b) This subchapter does not apply to the following annuity products except as provided in subsection (c) of this section:

(1) immediate and deferred annuities that contain [~~only guaranteed~~] no non-guaranteed elements;

(2) annuities used to fund:

(A) an employee pension plan subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.);

(B) a plan described by the Internal Revenue Code of 1986 §§401(a), 401(k), or 403(b), in which the plan, for purposes of the Employee Retirement

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Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.), is established or maintained by an employer;

(C) a governmental or church plan as defined by the Internal Revenue Code of 1986 §414, or a deferred compensation plan of a state or local government or a tax-exempt organization under the Internal Revenue Code of 1986 §457;

(D) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor; or

(E) prepaid funeral benefits, as defined by the Finance Code Chapter 154;

(3) a structured settlement annuity;

(4) a charitable gift annuity qualified under the Insurance Code Chapter 102; or

(5) a funding agreement.

(c) Notwithstanding the exemptions specified in subsection (b) of this section, this subchapter applies to an annuity used to fund a plan or arrangement that is funded solely by contributions an employee elects to make, whether on a pre-tax or after-tax basis, if the insurer has been notified that plan participants may choose from among two or more fixed annuity providers and there is a direct solicitation of an individual employee by an agent for the purchase of an annuity contract. As used in this subsection, "direct solicitation" does not include a meeting held by an agent solely for the purpose of educating or enrolling employees in the plan or arrangement.

**§3.9703. Effective Date.** This subchapter shall apply only to annuity transactions subject to regulation under this subchapter that occur on or after the date that is six months after the effective date of this subchapter.

**§3.9704. Definitions.**

(a) Words and terms defined in the Insurance Code Chapter 102 shall have the same meaning when used in this subchapter.

(b) The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Agent--An individual who holds a license under the Insurance Code Chapter 4054 and who sells, solicits, or negotiates annuities in this state.

(2) Buyer's guide--A document specified as a buyer's guide and adopted by the National Association of Insurance Commissioners (NAIC) to be used in implementation of the NAIC Annuity Disclosure Model Regulation.

(3) Contract owner--The owner named in the annuity contract or, in the case of a group annuity contract, the certificate holder.

(4) Disclosure document--A document intended for consumers that provides information regarding the features and restrictions of a specific annuity product and that satisfies the requirements of §3.9709 of this subchapter (relating to Disclosure Document).

(5) Funding agreement--An agreement for an insurer to accept and accumulate funds and to make one or more payments at future dates in amounts that are not based on mortality or morbidity contingencies.

(6) Generic name--A short title descriptive of the annuity contract being illustrated or for which an applicant is applying, such as "single premium deferred annuity."

(7) Structured settlement annuity--A "qualified funding asset," as defined by the Internal Revenue Code of 1986 §130(d), or an annuity that would be a qualified funding asset but for the fact that the annuity is not owned by an assignee under a qualified assignment.

### **§3.9705. Determinable Elements.**

(a) For the purposes of this subchapter, "determinable elements" means elements derived from processes or methods that are guaranteed at issue and are not subject to company discretion, but for which the values or amounts cannot be determined until some point after issue. The term includes:

- (1) premiums;
- (2) credited interest rates, including any bonus;
- (3) benefits;
- (4) values;
- (5) non-interest based credits;
- (6) charges; and

(7) elements of formulas used to determine any element described by paragraphs (1) - (6) of this subsection.

(b) Determinable elements may be described as guaranteed but not determined at issue. An element is considered determinable if the element was computed from only underlying determinable elements, or from both determinable and guaranteed elements.

### **§3.9706. Guaranteed and Non-guaranteed Elements.**

(a) For the purposes of this subchapter, "guaranteed element" means an element listed in subsection (a)(1) - (7) of §3.9705 of this subchapter (relating to Determinable Elements) that is guaranteed and determined at issue. An element is considered guaranteed if all of the underlying elements used in its computation are guaranteed.

(b) For the purposes of this subchapter, "non-guaranteed element" means an element listed in subsections (a)(1) - (7) of §3.9705 of this subchapter that is subject to the insurer's discretion and is not guaranteed at issue. An element is considered non-guaranteed if any underlying element used in its computation is non-guaranteed.

**§3.9707. Effect on Other Law.** Compliance with this subchapter is not a defense in any action brought by or for the department alleging a violation of the Insurance Code, or, except for this subchapter, any rule adopted pursuant to the Insurance Code.

**§3.9708. Required Consumer Notices.**

(a) If an application for an annuity contract or certificate is taken in a face-to-face meeting, the applicant shall be given at or before the time of application both a disclosure document and the appropriate buyer's guide specified in §3.9710 of this subchapter (relating to Buyer's Guide).

(b) If the application is taken by means other than in a face-to-face meeting the applicant shall be sent not later than the fifth business day after the date on which the completed application is received by the insurer both a disclosure document and the appropriate buyer's guide specified in §3.9710 of this subchapter.

(c) If the insurer receives the application as a result of a direct solicitation through the mail, the insurer's providing the appropriate buyer's guide and a disclosure document in a mailing inviting prospective applicants to apply for an annuity contract or certificate satisfies the requirement in subsection (b) of this section that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application.

(d) If the application is received through the Internet, and if the insurer takes reasonable steps to ensure that the appropriate buyer's guide and a disclosure document are available for viewing and printing on the insurer's website which are opened or acknowledged by the prospective applicant, the provided buyer's guide and disclosure document shall be deemed to satisfy the requirement that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application.

(e) A solicitation for an annuity contract that is provided in a manner other than a face-to-face meeting must include a statement that the proposed applicant may contact the insurer for a free annuity buyer's guide.

(f) Insurers receiving an application for private placement contracts as defined by the Insurance Code §1152.110(a) are not required to provide the buyer's guide specified in §3.9710 of this subchapter.

(g) This section applies regardless of whether an insurer is providing a 15-day free look period like that required in §3.9711(a) of this subchapter (relating to Free Look Period) prior to the adoption of this subchapter or whether the insurer begins providing the 15-day free look period in accordance with §3.9711(a) of this subchapter.

### **§3.9709. Disclosure Document.**

(a) At a minimum, the following information, if applicable, must be included in the disclosure document required to be provided under this subchapter:

(1) the generic name of the contract; the insurer product name, if different from the generic name; the product's form number; and a statement of the fact that the contract is an annuity;

(2) the insurer's name and address;

(3) a description of the contract and the benefits provided under the contract; the description must emphasize the long-term nature of the contract and include examples of the long-term nature as appropriate;

(4) the guaranteed, non-guaranteed, and determinable elements of the contract, any limitations of those elements, and an explanation of how those elements operate;

(5) an explanation of the initial crediting rate, specifying any bonus or introductory portion, the duration of the initial crediting rate, and the fact that rates may change from time to time and are not guaranteed;

(6) periodic income options, both on a guaranteed and non-guaranteed basis;

(7) any value reductions caused by withdrawals from or surrender of the contract;

(8) how values in the contract can be accessed;

(9) the death benefit, if available, and how the death benefit is computed;

(10) a summary of:

(A) the federal tax status of the contract; and

(B) any penalties applicable on withdrawal of values from the contract;

(11) the impact of any rider, such as a long-term care rider;

(12) a list of the specific dollar amount or percentage charges and fees, with an explanation of how those charges and fees apply; and

(13) information about the current guaranteed rate for new contracts that contains a clear notice that the rate is subject to change.

(b) An insurer shall define terms used in the disclosure document in language that facilitates the understanding by a typical person within the segment of the public to which the disclosure document is directed.

(c) A disclosure document that complies with the Financial Industry Regulatory Authority (FINRA) Conduct Rules and the United States Securities and Exchange Commission (SEC) prospectus requirements satisfies the requirements of this section for disclosure documents. This subsection does not limit the commissioner's ability to enforce the other provisions of this section or require the use of a FINRA-approved disclosure document. This subsection provides a safe harbor under this subchapter for an annuity contract that is regulated by, and complies with, the FINRA Conduct Rules and the SEC prospectus requirements pertaining to disclosure.

**§3.9710. Buyer's Guide.** For the purposes of this subchapter, an appropriate buyer's guide is the latest version of the buyer's guide adopted by the NAIC that applies to the particular type of annuity (such as fixed deferred annuity, equity-indexed annuity, or variable annuity) that is the subject of the transaction. If the NAIC has not adopted a buyer's guide for equity-indexed annuities, then the appropriate buyer's guide is the Buyer's Guide to Fixed Deferred Annuities that has been most recently adopted by the NAIC. If the NAIC has not adopted a buyer's guide for variable annuities, then no buyer's guide is required until one year after the date on which this subchapter becomes effective. If the NAIC has not adopted a buyer's guide for variable annuities within one year after the date on which this subchapter becomes effective, then for purposes of

this subchapter the appropriate buyer's guide is the latest version of the SEC's Office of Investor Education and Advocacy "Variable Annuities: What You Should Know", SEC Pub. 011.

### **§3.9711. Free Look Period.**

(a) If the buyer's guide and the disclosure document required by this subchapter are not provided at or before the time of application, a free look period of at least 15 calendar days must be provided during which the applicant may return the contract without penalty.

(b) Notice of the free look period required under this section must be provided to consumers in a notice that is included on or attached to the cover page of the delivered annuity contract. The notice must prominently disclose information concerning the 15-day free look period.

(c) The free look period shall begin on the date the consumer receives the annuity contract and shall run concurrently with any other free look period required under the Texas Administrative Code, the Texas Insurance Code, or another law of this state.

(d) An unconditional refund without penalty for purposes of this section for variable or modified guaranteed annuity contracts shall mean a refund equal to the cash surrender value provided in the annuity contract, plus any fees or charges deducted from the premiums or imposed under the contract.

(e) The refund and free look period requirements in this section do not apply if the prospective owner is an accredited investor, as defined in Regulation D as adopted by the United States Securities and Exchange Commission.

### **§3.9712. Report to Contract Owners.**

(a) For annuities in the payout period with changes in non-guaranteed elements and for the accumulation period of a deferred annuity, the insurer shall provide each contract owner with a report, at least annually, on the status of the contract.

(b) The report must contain at least the following information:

- (1) the beginning and ending dates of the current reporting period;
- (2) the accumulation and cash surrender value, if any, at the end of:
  - (A) the previous reporting period; and
  - (B) the current reporting period;
- (3) the total amounts, if any, that have been credited, charged to the contract or certificate value, or paid during the current reporting period; and
- (4) the amount of any outstanding loans as of the end of the current reporting period.

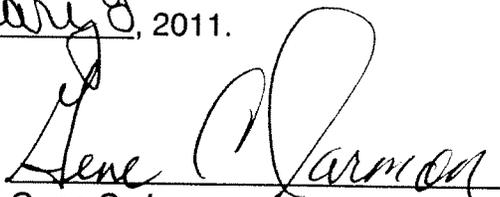
**CERTIFICATION.** This agency hereby certifies that the adopted sections have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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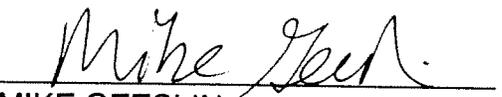
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Issued at Austin, Texas, on February 8, 2011.

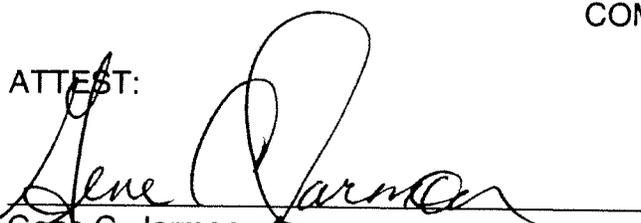
  
Gene C. Jarmon  
General Counsel and Chief Clerk  
Texas Department of Insurance

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that new Subchapter PP, §§3.9701 – 3.9712 specified herein, concerning disclosures pertaining to annuities, is adopted.

AND IT IS SO ORDERED.

  
MIKE GEESLIN  
COMMISSIONER OF INSURANCE

ATTEST:

  
Gene C. Jarmon  
General Counsel and Chief Clerk

COMMISSIONER'S ORDER NO. 11-0120  
FEB 08 2011