

New Year, New Disclosures

December 31, 2014

On December 29, the Florida Department of Financial Services (FDFS) published Proposed Rule 69B-215.090 (the "Proposed Surrender Disclosure Rule") setting forth the disclosures required when a surrender of any cash value life insurance policy "is recommended by an insurance agent and the proceeds will not be used to fund or purchase another life insurance or annuity policy." The Proposed Surrender Disclosure Rule appears to incorporate industry comments provided during and subsequent to a rule development workshop held by the FDFS on September 26, 2014, which discussed possible language for the Proposed Surrender Disclosure Rule. First, the Proposed Surrender Disclosure Rule addresses the timing for the required disclosure, which must be given "before the surrender check is negotiated or cashed." Thus, an insurer may provide the disclosure simultaneously with the surrender check. Second, the Proposed Surrender Disclosure Rule clarifies that the guaranteed minimum interest rate to use is the rate at the time of surrender. Additionally, it sets forth specific language to use for disclosing the surrender's tax consequences, requiring a "statement in bold print that states there may be a taxable amount being reported to the Internal Revenue Service as a result of the transaction and the owner should contact their tax advisor for more information." However, the Proposed Surrender Disclosure Rule does not exempt surrenders of variable products and does not provide that compliance with federal securities disclosure requirements constitutes compliance with the Rule. And, the FDFS did not address how the Rule would apply if the consumer requested payment by electronic transfer. In particular, the proposed required disclosures must include:

(a) description of the policy or annuity to be surrendered, including:

1. If the contract is a life insurance policy or annuity contract;
2. The name of the insured or annuitant;
3. The policy or contract number;
4. The surrender date;
5. The insurance company name, address, and telephone number.

(b) The exact amount being deducted from any accumulation or cash value available as the surrender charge. (c) The guaranteed minimum interest rate percentage at the

time of surrender. (d) A statement in bold print that states there may be a taxable amount being reported to the Internal Revenue Service as a result of the transaction and the owner should contact their tax advisor for more information. (e) The amount of any actual forfeited death benefit. (f) The actual value of any other investment performance guarantees being forfeited.

If an agent prepares the disclosure, the "surrender date" is deemed to be the date the disclosure is prepared and must be "after the contract's last anniversary up to the final surrender date of the contract by the insurer." Agents must also disclose the source and date of any number used to calculate the amount provided to the consumer. The required disclosure and Proposed Surrender Disclosure Rule raise several issues, including:

- Is the "exact amount being deducted" limited to amounts deducted "as the surrender charge" or does it include other amounts that may reduce the contract value paid, such as a market value adjustment, bonus recapture, or other accrued fees and expenses under the insurance contract, such as rider fees?
- What does "[t]he amount of any actual forfeited death benefit" mean?
- What is meant by "[t]he actual value of any other investment performance guarantees being forfeited" and what assumptions must the insurer make in calculating "actual value" mean?
- Should the disclosure be provided by an insurer even if the insurer does not know if an insurance agent recommended a surrender?
- Whether the Proposed Rule's effective date will be delayed to allow insurance companies time to update their systems.

In its notice, the FDFS asserted that it determined the Proposed Surrender Disclosure Rule will not likely increase directly or indirectly regulatory costs in excess of \$200,000 in the aggregate within one year after implementation. Therefore, the Rule won't require legislative ratification. The notice states that "[a]ny person who wishes to provide information regarding a statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative" must do so in writing no later than January 19, 2015. If requested in writing by January 19, 2015, the FDFS will hold a hearing regarding the Proposed Surrender Disclosure Rule on January 22, 2015 in Room 116, Larson Building, Tallahassee, Fla. at 3:00 p.m. Carlton Fields will continue to monitor developments regarding the Proposed Surrender Disclosure Rule, and plans to attend any scheduled hearing.

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