

Title 23. Public Utilities and Regulated Industries
Chapter I. State Insurance Department, Department of Commerce
Subchapter B. Life, Health, and Accident
Part 128. Life Insurance and Annuities Replacement

Codification Notes. This part as promulgated prior to codification into the Code of Arkansas Rules provided as follows:

"Section 2. Authority

This rule is issued based upon the authority granted the commissioner under Ark. Code Ann. §§ 23-66- 207, 23-61-108, and the Arkansas Administrative Procedures Act, §§ 25-15-201, et seq."

"Section 10. Severability

If any section or portion of a section of this rule, or its applicability to any person or circumstances, is held invalid by a court, the remainder of this rule, or the applicability of its provisions to other persons, shall not be affected.

Section 11. Effective Date

This rule shall be effective January 1, 2010."

Subpart 1. Generally

23 CAR § 128-101. Purpose and scope.

(a) The purpose of this part is to:

(1) Regulate the activities of insurers and producers with respect to the replacement of existing life insurance and annuities; and

(2)(A) Protect the interests of life insurance and annuity purchasers by establishing minimum standards of conduct to be observed in replacement or financed purchase transactions.

(B) It will:

- (i) Ensure that purchasers receive information with which a decision can be made in his or her own best interest;
- (ii) Reduce the opportunity for misrepresentation and incomplete disclosure; and
- (iii) Establish penalties for failure to comply with requirements of this part.

(b) Unless otherwise specifically included, this part shall not apply to transactions involving:

- (1) Credit life insurance;
- (2)(A) Group life insurance or group annuities where there is no direct solicitation of individuals by an insurance producer.

(B) Direct solicitation shall not include any group meeting held by an insurance producer solely for the purpose of educating or enrolling individuals or, when initiated by an individual member of the group, assisting with the selection of investment options offered by a single insurer in connection with enrolling that individual.

(C) Group life insurance or group annuity certificates marketed through direct response solicitation shall be subject to the provisions of 23 CAR § 128-107;

- (3) Group life insurance and annuities used to fund prearranged funeral contracts;
- (4) An application to the existing insurer that issued the existing policy or contract when a contractual change or a conversion privilege is being exercised, when the existing policy or contract is being replaced by the same insurer pursuant to a program filed with and approved by the Insurance Commissioner, or when a term conversion privilege is exercised among corporate affiliates;
- (5) Proposed life insurance that is to replace life insurance under a binding or conditional receipt issued by the same company;
- (6)(A) Policies or contracts used to fund:

(i) An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);

(ii) A plan described by Sections 401(a), 401(k), or 403(b) of the Internal Revenue Code, where the plan, for purposes of ERISA, is established or maintained by an employer;

(iii) A governmental or church plan defined in Section 414, a governmental or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under Section 457 of the Internal Revenue Code; or

(iv) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor.

(B)(i) Notwithstanding subdivision (b)(6)(A) of this section, this part shall apply to policies or contracts used to fund any plan or arrangement that is funded solely by contributions an employee elects to make, whether on a pretax or after-tax basis, and where the insurer has been notified that plan participants may choose from among two (2) or more insurers and there is a direct solicitation of an individual employee by an insurance producer for the purchase of a contract or policy.

(ii) As used in this subsection, "direct solicitation" shall not include any group meeting held by an insurance producer solely for the purpose of educating individuals about the plan or arrangement or enrolling individuals in the plan or arrangement or, when initiated by an individual employee, assisting with the selection of investment options offered by a single insurer in connection with enrolling that individual employee;

(7) Where new coverage is provided under a life insurance policy or contract and the cost is borne wholly by the insured's employer or by an association of which the insured is a member;

(8) Existing life insurance that is a nonconvertible term life insurance policy that will expire in five (5) years or less and cannot be renewed;

(9)(A) Immediate annuities that are purchased with proceeds from an existing annuity contract.

(B) Immediate annuities purchased with proceeds from an existing life insurance policy are not exempted from the requirements of this part; or

(10) Structured settlements.

(c)(1) Registered contracts shall be exempt from the requirements of 23 CAR § 128-105(a)(2) and 23 CAR § 128-106(2) with respect to the provision of illustrations or policy summaries.

(2) However, premium or contract contribution amounts and identification of the appropriate prospectus or offering circular shall be required instead.

(d) Compliance with requirements of this rule shall be deemed to be compliance with Arkansas Code § 23-66-307(b).

Authority. Arkansas Code §§ 23-61-108, 23-66-207.

Codification Notes. The Employee Retirement and Income Security Act (ERISA) is codified generally at 29 U.S.C. § 1001 et seq.

Section 401(a) of the Internal Revenue Code is codified at 26 U.S.C. § 401(a).

Section 401(k) of the Internal Revenue Code is codified at 26 U.S.C. § 401(k).

Section 403(b) of the Internal Revenue Code is codified at 26 U.S.C. § 403(b).

Section 414 of the Internal Revenue Code is codified at 26 U.S.C. § 414.

Section 457 of the Internal Revenue Code is codified at 26 U.S.C. § 457.

23 CAR § 128-102. Definitions.

As used in this part:

(1) "Direct-response solicitation" means a solicitation through a sponsoring or endorsing entity or individually solely through:

- (A) Mail;
- (B) Telephone;
- (C) The internet; or
- (D) Other mass communication media;

(2) "Existing insurer" means the insurance company whose policy or contract is or will be changed or affected in a manner described within the definition of "replacement";

(3) "Existing policy or contract" means an individual life insurance policy (policy) or annuity contract (contract) in force, including a policy under a binding or conditional receipt or a policy or contract that is within an unconditional refund period;

(4)(A) "Financed purchase" means the purchase of a new policy involving the actual or intended use of funds obtained by the withdrawal or surrender of, or by borrowing from values of an existing policy to pay all or part of any premium due on the new policy.

(B) For purposes of a regulatory review of an individual transaction only, if a withdrawal, surrender, or borrowing involving the policy values of an existing policy is used to pay premiums on a new policy owned by the same policyholder and issued by the same company within four (4) months before or thirteen (13) months after the effective date of the new policy, it will be deemed prima facie evidence of the policyholder's intent to finance the purchase of the new policy with existing policy values.

(C) This prima facie standard is not intended to increase or decrease the monitoring obligations contained in 23 CAR § 128-104(1)(E);

(5) "Illustration" means a presentation or depiction that includes nonguaranteed elements of a life insurance policy or annuity contract over a period of years and that is one (1) of the three (3) types defined below:

(A) "Basic illustration" means a ledger or proposal used in the sale of a life insurance policy or annuity contract that shows both guaranteed and nonguaranteed elements;

(B) "Supplemental illustration" means an illustration:

(i) Furnished in addition to a basic illustration that meets the applicable requirements of this part; and

(ii) That may be presented in a format differing from the basic illustration, but may only depict a scale of nonguaranteed elements that is permitted in a basic illustration; or

(C) "In-force illustration" means an illustration furnished at any time after the policy or contract that it depicts has been in force for one (1) year or more;

(6) "Policy summary", for the purposes of this part:

(A) For policies or contracts other than universal life policies, means a written statement regarding a policy or contract which shall contain, to the extent applicable, but need not be limited to, the following information:

- (i) Current death benefit;
- (ii) Annual contract premium;
- (iii) Current cash surrender value;
- (iv) Current dividend;
- (v) Application of current dividend; and
- (vi) Amount of outstanding loan; and

(B) For universal life policies, means a written statement that shall contain at least the following information:

- (i) The beginning and end date of the current report period;
- (ii) The policy value at the end of the previous report period and at the end of the current report period;
- (iii) The total amounts that have been credited or debited to the policy value during the current report period, identifying each by type (e.g., interest, mortality, expense, and riders);
- (iv) The current death benefit at the end of the current report period on each life covered by the policy;
- (v) The net cash surrender value of the policy as of the end of the current report period; and

(vi) The amount of outstanding loans, if any, as of the end of the current report period;

(7) "Producer", for the purpose of this part, shall be defined to include:

(A) Agents;

(B) Brokers; and

(C) Producers;

(8) "Registered contract" means a variable annuity contract or variable life insurance policy subject to the prospectus delivery requirements of the Securities Act of 1933;

(9) "Replacement" means a transaction in which a new policy or contract is to be purchased, and it is known or should be known to the proposing producer, or to the proposing insurer if there is no producer, that by reason of the transaction, an existing policy or contract has been or is to be:

(A) Lapsed, forfeited, surrendered or partially surrendered, assigned to the replacing insurer, or otherwise terminated;

(B) Converted to reduced paid-up insurance, continued as extended term insurance, or otherwise reduced in value by the use of nonforfeiture benefits or other policy values;

(C) Amended so as to effect either a reduction in benefits or in the term for which coverage would otherwise remain in force or for which benefits would be paid;

(D) Reissued with any reduction in cash value; or

(E) Used in a financed purchase;

(10) "Replacing insurer" means the insurance company that issues or proposes to issue a new policy or contract that replaces an existing policy or contract or is a financed purchase; and

(11) "Sales material" means a sales illustration and any other written, printed, or electronically presented information created, completed, or provided by the company or producer and used in the presentation to the policy or contract owner related to the policy or contract purchased.

Authority. Arkansas Code §§ 23-61-108, 23-66-207.

Codification Notes. The Securities Act of 1933 is codified generally at 15 U.S.C. § 77a et seq.

23 CAR § 128-103. Duties of producers.

(a)(1) A producer who initiates an application shall submit to the insurer, with or as part of the application, a statement signed by both the applicant and the producer as to whether the applicant has existing policies or contracts.

(2) If the answer is “no”, the producer’s duties with respect to replacement are complete.

(b)(1) If the applicant answered “yes” to the question regarding existing coverage referred to in subsection (a) of this section, the producer shall present and read to the applicant, not later than at the time of taking the application, a notice regarding replacements in the form as described in Appendix A or other substantially similar form approved by the Insurance Commissioner.

(2) However, no approval shall be required when amendments to the notice are limited to the omission of references not applicable to the product being sold or replaced.

(3) The notice shall be signed by both the applicant and the producer attesting that the notice has been read aloud by the producer or that the applicant did not wish the notice to be read aloud (in which case the producer need not have read the notice aloud) and left with the applicant.

(c)(1) The notice shall list all life insurance policies or annuities proposed to be replaced, properly identified by:

- (A) Name of insurer;
- (B) The insured or annuitant; and
- (C) Policy or contract number, if available.

(2) The notice shall include a statement as to whether each policy or contract will be replaced or whether a policy will be used as a source of financing for the new policy or contract.

(3) If a policy or contract number has not been issued by the existing insurer, alternative identification, such as an application or receipt number, shall be listed.

(d)(1) In connection with a replacement transaction the producer shall leave with the applicant at the time an application for a new policy or contract is completed the original or a copy of all sales material.

(2) With respect to electronically presented sales material, it shall be provided to the policy or contract owner in printed form no later than at the time of policy or contract delivery.

(e) In connection with any replacement of life insurance or annuities, a replacement memorandum must be completed and signed by both parties.

(f) Except as provided in 23 CAR § 128-105(c), in connection with a replacement transaction the producer shall submit to the insurer to which an application for a policy or contract is presented:

(1) A copy of each document required by this section;

(2) A statement identifying any preprinted or electronically presented company approved sales materials used; and

(3) Copies of any individualized sales materials, including any illustrations related to the specific policy or contract purchased.

Authority. Arkansas Code §§ 23-61-108, 23-66-207.

23 CAR § 128-104. Duties of insurers that use producers.

Each insurer shall:

(1) Maintain a system of supervision and control to ensure compliance with the requirements of this part that shall include at least the following:

(A) Inform its producers of the requirements of this part and incorporate the requirements of this part into all relevant producer training manuals prepared by the insurer;

(B) Provide to each producer a written statement of the company's position with respect to the acceptability of replacements, providing guidance to its producer as to the appropriateness of these transactions;

(C) A system to review the appropriateness of each replacement transaction that the producer does not indicate is in accord with subdivision (1)(B) of this section, above;

(D) Procedures to confirm that the requirements of this part have been met; and

(E)(i) Procedures to detect transactions that are replacements of existing policies or contracts by the existing insurer, but that have not been reported as such by the applicant or producer.

(ii) Compliance with this part may include, but shall not be limited to:

(a) Systematic customer surveys;

(b) Interviews;

(c) Confirmation letters; or

(d) Programs of internal monitoring;

(2)(A) Have the capacity to monitor each producer's life insurance policy and annuity contract replacements for that insurer, and shall, upon request, make such records available to the State Insurance Department.

(B) The capacity to monitor shall include the ability to produce records for each producer's:

(i) Life replacements, including financed purchases, as a percentage of the producer's total annual sales for life insurance;

(ii) Number of lapses of policies by the producer as a percentage of the producer's total annual sales for life insurance;

(iii) Annuity contract replacements as a percentage of the producer's total annual annuity contract sales;

(iv) Number of transactions that are unreported replacements of existing policies or contracts by the existing insurer detected by the company's monitoring system as required by subdivision (1)(E) of this section; and

(v) Replacements, indexed by replacing producer and existing insurer;

(3) Require with or as a part of each application for life insurance or an annuity a signed statement by both the applicant and the producer as to whether the applicant has existing policies or contracts;

(4) Require, with each application for life insurance or an annuity that indicates an existing policy or contract, a completed notice regarding replacements as contained in Appendix A must be executed;

(5) When the applicant has existing policies or contracts, each insurer shall be able to produce copies of any sales material required by 23 CAR § 128-103(f), the basic illustration and any supplemental illustrations related to the specific policy or contract that is purchased, and the producer's and applicant's signed statements with respect to financing and replacement for at least five (5) years after the termination or expiration of the proposed policy or contract;

(6) Ascertain that the sales material and illustrations required by 23 CAR § 128-103(f):

(A) Meet the requirements of this part; and

(B) Are complete and accurate for the proposed policy or contract;

(7) If an application does not meet the requirements of this part, notify the producer and applicant and fulfill the outstanding requirements; and

(8) Maintain records in paper, photograph, microprocess, magnetic, mechanical, or electronic media or by any process that accurately reproduces the actual document.

Authority. Arkansas Code §§ 23-61-108, 23-66-207.

23 CAR § 128-105. Duties of replacing insurers that use producers.

(a) Where a replacement is involved in the transaction, the replacing insurer shall:

(1) Verify that the required forms are received and are in compliance with this part;

(2) Notify any other existing insurer that may be affected by the proposed replacement within five (5) business days of receipt of a completed application indicating replacement or when the replacement is identified if not indicated on the application, and mail a copy of the available illustration or policy summary for the proposed policy or available disclosure document for the proposed contract within five (5) business days of a request from an existing insurer;

(3) Be able to produce copies of the notification regarding replacement required in 23 CAR § 128-103(b), indexed by producer, for at least five (5) years or until the next regular examination by the State Insurance Department of a company's state of domicile, whichever is later; and

(4)(A) Provide to the policy or contract owner notice of the right to return the policy or contract within thirty (30) days of the delivery of the contract and receive an unconditional full refund of all premiums or considerations paid on it, including any policy fees or charges or, in the case of a variable or market value adjustment policy or contract, a payment of the cash surrender value provided under the policy or contract plus the fees and other charges deducted from the gross premiums or considerations or imposed under such policy or contract.

(B) Such notice may be included in Appendix A or Appendix C.

(C) In addition, a completed replacement memorandum shall be executed.

(b)(1) In transactions where the replacing insurer and the existing insurer are the same or subsidiaries or affiliates under common ownership or control, allow credit for the period of time that has elapsed under the replaced policy's or contract's incontestability and suicide period up to the face amount of the existing policy or contract.

(2) With regard to financed purchases, the credit may be limited to the amount by which the face amount of the existing policy is reduced by the use of existing policy values to fund the new policy or contract.

(c) If an insurer prohibits the use of sales material other than that approved by the company, as an alternative to the requirements made of an insurer pursuant to 23 CAR § 128-103(f), the insurer may:

(1) Require with each application a statement signed by the producer that:

(A) Represents that the producer used only company-approved sales material; and

(B) States that copies of all sales material were left with the applicant in accordance with 23 CAR § 128-103(d);

(2) Within ten (10) days of the issuance of the policy or contract:

(A) Notify the applicant by sending a letter or by verbal communication with the applicant, by a person whose duties are separate from the marketing area of the insurer, that the producer has represented that copies of all sales material have been left with the applicant in accordance with 23 CAR § 128-103(d);

(B) Provide the applicant with a toll-free number to contact company personnel involved in the compliance function if such is not the case; and

(C) Stress the importance of retaining copies of the sales material for future reference; and

(3) Be able to produce a copy of the letter or other verification in the policy file for at least five (5) years after the termination or expiration of the policy or contract.

Authority. Arkansas Code §§ 23-61-108, 23-66-207.

23 CAR § 128-106. Duties of the existing insurer.

Where a replacement is involved in the transaction, the existing insurer shall:

(1) Retain and be able to produce all replacement notifications received, indexed by replacing insurer, for at least five (5) years or until the conclusion of the next regular examination conducted by the insurance department of its state of domicile, whichever is later;

(2)(A) Send a letter to the policy or contract owner stating the right to receive information regarding the existing policy or contract values, including, if available, an

in-force illustration or policy summary if an in-force illustration cannot be produced within five (5) business days of receipt of a notice that an existing policy or contract is being replaced.

(B) The information shall be provided within five (5) business days of receipt of the request from the policy or contract owner; and

(3)(A) Upon receipt of a request to borrow, surrender, or withdraw any policy values, send a notice, advising the policy owner that the release of policy values may affect the guaranteed elements, nonguaranteed elements, face amount, or surrender value of the policy from which the values are released.

(B) The notice shall be sent separate from the check if the check is sent to anyone other than the policy owner.

(C) In the case of consecutive automatic premium loans, the insurer is only required to send the notice at the time of the first loan.

Authority. Arkansas Code §§ 23-61-108, 23-66-207.

23 CAR § 128-107. Duties of insurers with respect to direct-response solicitations.

(a)(1) In the case of an application that is initiated as a result of a direct-response solicitation, the insurer shall require, with or as part of each completed application for a policy or contract, a statement asking whether the applicant, by applying for the proposed policy or contract, intends to replace, discontinue, or change an existing policy or contract.

(2) If the applicant indicates a replacement or change is not intended or if the applicant fails to respond to the statement, the insurer shall send the applicant, with the policy or contract, a notice regarding replacement in Appendix B, or other substantially similar form approved by the Insurance Commissioner.

(b) If the insurer has proposed the replacement or if the applicant indicates a replacement is intended and the insurer continues with the replacement, the insurer shall:

(1)(A) Provide to applicants or prospective applicants with the policy or contract a notice, as described in Appendix C, or other substantially similar form approved by the commissioner.

(B) In these instances the insurer may delete the references to the producer, including the producer's signature, and references not applicable to the product being sold or replaced, without having to obtain approval of the form from the commissioner.

(C) The insurer's obligation to obtain the applicant's signature shall be satisfied if it can demonstrate that it has made a diligent effort to secure a signed copy of the notice referred to in this subdivision (b)(1).

(D) The requirement to make a diligent effort shall be deemed satisfied if the insurer includes in the mailing a self-addressed postage prepaid envelope with instructions for the return of the signed notice referred to in this section;

(2) Comply with the requirements of 23 CAR § 128-105(a)(2), if the applicant furnishes the names of the existing insurers, and the requirements of 23 CAR § 128-105(a)(3), (a)(4), and (b); and

(3) Complete a replacement memorandum.

Authority. Arkansas Code §§ 23-61-108, 23-66-207.

23 CAR § 128-108. Violations and penalties.

(a)(1) Any failure to comply with this part shall be considered a violation of Arkansas Code § 23-66-206(2).

(2) Examples of violations include:

(A) Any deceptive or misleading information set forth in sales material;

(B) Failing to ask the applicant in completing the application the pertinent questions regarding the possibility of financing or replacement;

(C) The intentional incorrect recording of an answer;

(D) Advising an applicant to respond negatively to any question regarding replacement in order to prevent notice to the existing insurer; or

(E) Advising a policy or contract owner to write directly to the company in such a way as to attempt to obscure the identity of the replacing producer or company.

(b)(1) Policy and contract owners have the right to replace existing life insurance policies or annuity contracts after indicating in or as a part of applications for new coverage that replacement is not their intention.

(2) However, patterns of such action by policy or contract owners of the same producer shall be deemed prima facie evidence of the producer's knowledge that replacement was intended in connection with the identified transactions, and these patterns of action shall be deemed prima facie evidence of the producer's intent to violate this part.

(c) Where it is determined that the requirements of this part have not been met the replacing insurer shall provide to the policy owner an in-force illustration if available or policy summary for the replacement policy or available disclosure document for the replacement contract, the appropriate notice regarding replacements in Appendix A or Appendix C, and a completed replacement memorandum.

(d)(1) Violations of this part shall subject the violators to penalties that may include:

(A) The revocation or suspension of a producer's or company's license;

(B) Monetary fines; and

(C) The forfeiture of any commissions or compensation paid to a producer as a result of the transaction in connection with which the violations occurred.

(2) In addition, where the Insurance Commissioner has determined that the violations were material to the sale, the insurer may be required to make restitution, restore policy or contract values, and pay interest at six percent (6%) on the amount refunded in cash.

Authority. Arkansas Code §§ 23-61-108, 23-66-207.

Appendix A. Notice - Replacement of Life Insurance or Annuities for Producers

Link:

<https://CodeOfARRules.arkansas.gov/docs/CARCodeAppendices/Appendices/204/23CARpt.128AppendixA.pdf>

Appendix B. Notice Regarding Replacement - Replacing Your Life Insurance Policy or Annuity?

Link:

<https://CodeOfARRules.arkansas.gov/docs/CARCodeAppendices/Appendices/205/23CARpt.128AppendixB.pdf>

Appendix C. Notice - Replacement of Life Insurance or Annuities for Direct Response Insurers

Link:

<https://CodeOfARRules.arkansas.gov/docs/CARCodeAppendices/Appendices/206/23CARpt.128AppendixC.pdf>