§ 4231. Policyholder's participation in surplus of life insurance companies. (a) (1) Except as herein otherwise provided, every domestic life insurance company shall ascertain and distribute annually, and not otherwise, the proportion of any surplus accruing upon every participating insurance policy and annuity or pure endowment contract entitled as hereinafter provided to share therein, issued on or after the first day of January, nineteen hundred seven.

(2) Upon the thirty-first day of December of each year, or as soon thereafter as practicable, every such company shall ascertain the surplus earned by it during such year.

(3) After setting aside from such surplus such sums as may be required for the payment of authorized dividends upon the capital stock, if any, such sums as may properly be held for account of outstanding deferred dividend policies, if any, and such sums as may be deemed advisable for the accumulation of a surplus not in excess of the maximum prescribed in this chapter, every such company shall thereupon apportion the remainder of such earnings, if any, derived from participating policies and contracts, equitably to all policies or contracts entitled to share therein during the full dividend year adopted by the company for such purpose. Such apportionment shall not after the first policy year be made contingent upon the payment of the whole or any part of the premium for any subsequent policy year.

(4) No dividend shall be apportioned or distributed for the first policy or contract year unless, upon reasonable assumptions as to expenses, mortality, policy and contract claims, investment income and lapses, it was actually earned for such year; nor shall any such company defer the apportionment and distribution of dividends beyond the calendar year following that in which they were earned, except that any such company which in good faith apportions and distributes its divisible surplus (except on policies issued on a deferred dividend basis prior to the first day of January, nineteen hundred seven, and continued as such thereafter) on an annual basis as dividends to all classes of policies and contracts entitled to share therein, may apportion and distribute all or any part of its accumulated surplus, in excess of its required minimum surplus, as a part of its dividends apportioned and distributed on an annual basis, or, with the approval of the superintendent, at reasonable intervals with respect to any policy

or contract or on its termination by death, maturity or surrender, as additional or extra dividends in an amount deemed by him not inequitable in proportion to the annual dividends paid in preceding years on such policies or contracts. When this apportionment and distribution at reasonable intervals, for a class of industrial life insurance policies, takes the form of an equitable addition to the death benefit, the superintendent need not require any addition to the cash surrender values of the policies, anything in this chapter to the contrary notwithstanding.

(5) Dividends apportioned as aforesaid in the case of a policy or contract, other than an industrial life insurance policy, issued on or after the first day of January, nineteen hundred seven, shall, unless otherwise provided in the policy or contract, be payable at the option of the company, either upon the anniversary of the policy or contract next after each thirty-first day of December, or upon the anniversary of the policy or contract next following each thirtieth day of April; and in every case after the first policy or contract year shall be payable upon the sole condition that premium or stipulated payments of the policy or contract year current upon said respective dates shall have been completed.

(b) (1) Except as hereinafter provided, the dividend so apportioned in the case of any participating policy or contract issued on or after the first day of January, nineteen hundred seven, shall, at the option of the person entitled to elect such option, be either:

(A) payable in cash except that cash payment will not be required for a policy or contract qualified for special tax treatment under subsection (b) of section four hundred three of the Internal Revenue Code to the extent that such payment would prevent such qualification or for a policy or contract with respect to which the superintendent has determined that cash payment of dividends would be inappropriate, or

(B) applicable to the payment of any premium or premiums upon said policy or contract, or

(C) applicable to the purchase of a paid-up addition thereto, or

(D) permitted to accumulate to the credit of the policy or contract, at such rate of interest as shall be allowed by the company, and, with such interest shall be payable upon the maturity of the policy or contract, or shall be withdrawable in cash on any anniversary of the

date of issue thereof.

(2) Where subparagraph (A) of paragraph one hereof has been selected and payment cannot be effected by the company, the funds shall be applied under option subparagraph (C) or (D) of such paragraph, as determined by the company.

(3) Such company shall, unless an election has previously been made, require such person to elect the manner in which such dividends shall be applied, as above provided, by mailing a written notice of the amount of the said dividends and the options available as aforesaid in a sealed envelope in the manner required by paragraph one of subsection (b) of section three thousand two hundred eleven of this chapter.

(4) In case the person entitled to elect such option shall fail to notify the company in writing of his election within three months after the date of the mailing of said notice, the dividends shall, except as otherwise herein provided, be applied by the company pursuant to the option specified in subparagraph (C) of paragraph one hereof.

(5) In the case of any extended term or reduced paid-up insurance, the dividends so apportioned shall be applicable as provided in the policy with the approval of the superintendent.

(6) In the case of any individual term policy and of every individual participating annuity, other than an annuity described in paragraph eight of this subsection, or pure endowment contract, the dividends so apportioned shall be applicable, at the election of the holder of such policy or contract, in accordance with the options specified in subparagraph (A) or (B) of paragraph one of this subsection or if the policy or contract so provides, subparagraph (D) of paragraph one of this subsection. In the case of any such term policy or annuity or pure endowment contract, the requirement as to notice of election hereinbefore specified shall be applicable, but the option which shall be applied in case the holder of such contract fails to make such election shall be determined by the company with the approval of the superintendent.

(7) In the case of any participating group policy of life insurance or any participating group or blanket policy of accident and health insurance, or of any participating group annuity contract, other than an annuity described in paragraph eight of this subsection, the dividend so apportioned shall, at the option of the policyholder or holder of the

master contract, be applied pursuant to subparagraph (A) or (B) of paragraph one of this subsection. Any dividend so apportioned on any such participating group insurance policy, or any rate reduction made or continued on any non-participating group insurance policy for the first or any subsequent year of insurance under any such policy issued to an employer, may be applied to reduce the employer's part of the cost of such policy, except that the excess, if any, of the employees' aggregate contribution under the policy over the net cost of the insurance shall be applied by the employer for the sole benefit of the employees.

(8) In the case of any individual or group participating immediate annuity and of any individual or group participating deferred annuity in which each consideration paid into the annuity purchases guaranteed paid-up annuity benefits determined at the time the consideration is paid, the dividend so apportioned shall be applicable, at the election of the holder of the individual contract or group certificate, in accordance with the options specified in subparagraph (A), (B) or (C) of paragraph one of this subsection or if the contract or certificate so provides, subparagraph (D) of paragraph one of this subsection.

(c) (1) In the case of participating industrial life insurance policies, the provisions of subsection (b) hereof specifying the options available to the policyholder with respect to the mode of application or payment of such dividends, and requiring notice of such options, and specifying the option effective in the absence of election, shall not be applicable.

(2) The dividends apportioned on such policies pursuant to this section shall be distributed annually except as provided in subsection (a) hereof in such manner as may be determined by the company, with the approval of the superintendent. Such dividends shall be paid or applied upon the first day of January of each year upon the sole condition that the premium payments for the next preceding calendar year have been completed, except that the company may, at its option, exclude the premium payments within the period of grace as a condition for payment or application of such dividends.

(3) Participating endowment policies which, by their terms, mature in twenty or more years and which are for amounts of less than one thousand dollars and which are subject to the provisions of section three thousand two hundred three of this chapter, may be issued without

including the provisions of subsection (b) hereof specifying the option available to the policyholder with respect to the mode of application or payment of such dividend, and requiring notice of such option and specifying the option effective in the absence of application, and if so issued the dividend shall be paid in cash.

(d) In addition to all other grounds provided in or pursuant to this chapter for the refusal to issue or renew a license to do business in this state and for the revocation of an existing license to do business in this state, no foreign or alien life insurance company shall be or continue to be authorized to do business in this state, unless it shall provide in every participating life insurance policy and in every participating annuity or pure endowment contract issued or delivered by it in this state that the proportion of the divisible surplus accruing upon such policy or contract shall be ascertained and distributed annually and not otherwise, except as otherwise provided in this section for domestic life insurance companies.

(e) (1) Any domestic mutual life insurance company may issue on a non-participating basis, subject to the other requirements of this chapter, any policies and contracts described in paragraph two of subsection (g) of this section and deferred annuity contracts providing a period of deferment of annuity payments not in excess of one year. No domestic mutual life insurance company shall issue non-participating policies or contracts, other than those specified in the preceding sentence, unless it has a special revocable permit from the superintendent to do so. Any such company may apply to the superintendent for such a permit. Such application shall be in the form prescribed by the superintendent and contain or be accompanied by a statement showing the manner in which any general outlays of the company are to be apportioned to participating and non-participating business and such other information as the superintendent may require for the purpose of determining whether its methods of operation are fair and equitable to its participating and non-participating policyholders. Such company shall keep separate books and records of its participating and non-participating business. The superintendent may prescribe the form in which such books and records shall be kept.

(2) Within the meaning of this subsection any domestic stock life insurance company shall be deemed to be a domestic mutual life insurance

company if and after ninety-five percent or more of its outstanding capital stock is, pursuant to section seven thousand three hundred two of this chapter or any former insurance law, held in trust for the exclusive benefit of the holders of the policies and contracts of such insurance company.

(3) Foreign or alien mutual life insurance companies authorized to do business in this state may deliver or issue for delivery in this state non-participating policies and contracts of the same kinds and subject to the same requirements provided for domestic mutual life insurers in paragraph one of this subsection.

(f) (1) No domestic stock life insurance company shall deliver or issue for delivery in this state both participating and non-participating policies or contracts and no foreign or alien stock life insurance company shall deliver or issue for delivery in this state any participating policy or contract unless it has a special permit from the superintendent to do so.

(2) Any such company authorized to do business in this state may apply to the superintendent for such a permit. Such application shall be in the form prescribed by and contain information the superintendent requires. Such application shall contain or be accompanied by:

(A) If such applicant has done any participating business prior to the making of such application, a statement showing the profits and losses, expense limits and expenses with reference to its participating and its non-participating business, if any, and the manner in which any general outlays of the company have been and are being apportioned to each of such kinds of business, and such other information as the superintendent may require for the purpose of determining whether its method of operation is fair and equitable to its participating policyholders.

(B) An agreement by such company, evidenced by a resolution of its board of directors or other appropriate body having power to bind such corporation and its shareholders, to the effect that, so long as any outstanding participating policies or contracts of such company are held by persons resident in the state of New York, no profits on participating policies and contracts in excess of the larger of ten percent of such profits, or fifty cents per year per thousand dollars of participating life insurance other than group term insurance in force at the end of the year, shall inure to the benefit of the stockholders; and

that the profits on its participating policies and annuity contracts shall be ascertained by allocating to such policies and annuity contracts specific items of gain, expense or loss attributable to such policies and contracts and an equitable proportion of the general gains or outlays of the company.

(3) (A) Upon the filing of such application and accompanying documents, the superintendent may, in his discretion, issue a revocable permit to such company authorizing it to issue participating policies and contracts in this state.

(B) If the superintendent finds, after notice and hearing, that any such company has failed to comply with the agreement specified in subparagraph (B) of paragraph two hereof, he may, in his discretion, revoke the permit of such company to do a participating business in this state, and he may, in addition thereto, in the case of a domestic stock life insurance company, order such company to cease issuing any new participating policies elsewhere in the continental United States, and in the case of a foreign or alien company, order such company to cease issuing any new policies in this state.

(C) Any violation of such an order shall constitute a violation of this chapter.

(4) (A) In every annual statement made by any such company to the superintendent after the issuance of such permit, and so long as its agreement pursuant to subparagraph (B) of paragraph two hereof is in force, such company shall exhibit the amount of participating policyholders' surplus.

(B) Such participating policyholders' surplus shall be used only for the payment or apportionment of dividends to participating policyholders at least to the extent hereinbefore required, or for the purpose of making up any loss on the participating policies of such company.

(C) Nothing herein contained shall be deemed to give any class of policyholders priority with respect to the assets of any such company in liquidation.

(5) This subsection shall not apply to any foreign or alien stock life insurance company if and after ninety-five percent or more of its outstanding capital stock is wholly owned by a non-profit corporation, or by any other person or persons, who or which holds such stock in trust for the exclusive benefit of the holders of the policies and

contracts of such insurance company; but no such insurance company shall be authorized to do business in this state if it thereafter issues any new non-participating policies or contracts, except as provided in subsection (g) hereof.

(g) (1) The inclusion in any life or accident and health insurance policy, or in any annuity or pure endowment contract, or in any funding agreement, of any provision to the effect that the owner thereof shall participate in the surplus of the company issuing such policy or contract, shall be deemed to make such policy or contract a participating one, with the following exceptions:

(A) Both participating and non-participating policies or contracts or agreements may provide that in addition to any rate of interest guaranteed by the issuing company to be paid on deferred payments of the proceeds thereof, additional interest may be paid thereon at such rate as the company may annually declare.

(B) Any policy or contract subject to section four thousand two hundred twenty-one or section four thousand two hundred twenty-three of this article may provide that, in addition to any minimum benefits guaranteed in the contract, additional amounts may be credited to the policy or contract in accordance with section four thousand two hundred thirty-two of this article or section four thousand five hundred eighteen of this chapter. The inclusion of any such provision in any non-participating policy or contract shall not be deemed to make the policy or contract participating and the crediting of such additional amounts in accordance with the preceding provisions to any participating policy or contract shall not be deemed to be a distribution of surplus under subsections (a) and (b) of this section.

(C) Any policy of insurance or contract of annuity providing for readjustment of the rate of premium, consideration, or deposit under the provisions of paragraph two of subsection (c) of section four thousand two hundred sixteen, or of paragraphs one and two of subsection (j) of section four thousand two hundred thirty-five, or of subsection (d) of section four thousand two hundred thirty-eight of this article shall not, solely because of such rate readjustment provision, be deemed participating.

(D) Any individual life policy issued or delivered in this state may provide for prospective readjustment of the rate of premium, but the

readjustment may not cause the readjusted premium to exceed the maximum guaranteed premium rate stated in the policy. The readjustment shall be determined upon reasonable assumptions as to expenses, mortality, policy and contract claims, taxes, investment income and lapses. The readjustment shall be on a basis equitable to all policy and contract holders and shall be based on written criteria approved by the board of directors of the company or a committee thereof. The rate readjustment provision shall not be deemed to make the policy participating.

(E) Readjustments in the rate of premium or stipulated contribution or consideration or deposit for any insurance policy or annuity or pure endowment contract or funding agreement, issued or delivered by a domestic life insurer within or without this state, shall be determined on the basis which is equitable to all policy or contract holders and shall be based on written criteria approved by the board of directors of the company or a committee thereof. The readjustment shall be determined upon reasonable assumptions as to expenses, mortality, policy and contract claims, taxes, investment income and lapses. Such a readjustment shall not be deemed to be a distribution of surplus under subsections (a) and (b) of this section.

(2) This section shall not require the apportionment or distribution of dividends on any deferred annuity contract for the period following the period of deferment of annuity payments, in accordance with the provisions of such contract, nor on extended term insurance, or pure endowment, which takes effect in the case of default in the payment of a premium or payment on any policy or contract, nor on any dividend additions nor on any contract or agreement of reinsurance, nor on any group annuity contract providing deferred annuities for a class or classes of participants in a pension or profit sharing plan qualified under subsection (a) of section four hundred one of the United States internal revenue code (or comparable law of any other jurisdiction) who have terminated their participation under such plan, or with respect to which class or classes further contributions have been discontinued under the plan and notice of such discontinuance has been given to the commissioner of internal revenue (or regulatory authority of such other jurisdiction).