

investment option as allocated at the time of the withdrawal.

b. Similar to the Original Contracts, under the New Contracts, Nationwide will not recapture Credits: (i) Upon annuitization of the contract; (ii) when a death benefit becomes payable; (iii) if distributions are taken in order to meet minimum distribution requirements under the Code; and (iv) if free withdrawals are taken pursuant to an age-based systematic withdrawal program.

c. Similar to the Original Contracts, all Credits applied to the New Contracts are considered earnings, not purchase payments.

d. Similar to the Original Contracts, under the New Contracts, at the end of the 7th contract year, Credits are fully vested and are no longer subject to recapture.

e. Similar to the Original Contracts, under the New Contracts, the charge associated with the Extra Value Option will no longer be assessed after the end of the 7th contract year for Contracts A, B, and C, and after the end of the 8th contract year for Contract D. To remove the rider option charge, Nationwide will replace the class of sub-account units corresponding to total variable account charges that include the rider option charge with another class of sub-account units associated with total variable account charges without the rider option charge. The latter class of units will have a greater individual unit value than the original class. Therefore, a reduction in the number of units is necessary to ensure that the contract value remains the same as it was prior to the removal of the charge.

From the date of the removal forward, the variable account value will be calculated using the class of sub-account unit values that do not reflect the rider option charge. Thus, the charge for that option is no longer assessed in the daily sub-account valuation for the contract.

10. Applicants seek an amendment to the Order, pursuant to section 6(c) of the 1940 Act, for exemption from sections 2(a)(32), 22(c) and 27(i)(2)(A) of the 1940 Act and Rule 22c-1 thereunder to the extent necessary to permit Nationwide to issue contracts from the Nationwide Variable Account-II and the Other Separate Accounts that:

a. provide for the recapture of Purchase Payment Credits upon a contract owner's cancellation of the contract pursuant to the contractual free-look provisions; and

b. provide for the recapture of 3% and 4% Credits for 7 contract years, regardless of whether the contract owner elects a CDSC-reducing option.

Applicants' Legal Analysis

1. Section 6(c) of the 1940 Act authorizes the Commission to exempt any person, security or transaction, or any class or classes of persons, securities or transactions from the provisions of the 1940 Act and the rules promulgated thereunder if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act. Applicants request that the Commission issue an order pursuant to section 6(c) of the 1940 Act granting the exemptions outlined herein with respect to the New Contracts funded by VA-II that are issued by Nationwide and underwritten or distributed by NISC. Applicants also request the relief under the order to extend to any of the Other Separate Accounts of Nationwide and to any other NASD registered broker/dealers under common control with Nationwide which may in the future serve as general distributor-principal underwriter of VA-II or Other Separate Accounts that offer or support variable annuity contracts that are substantially similar in all material respects to those described in the Application. Applicants represent that any such future contracts funded by VA-II or Other Separate Accounts will be substantially similar in all material respects to the New Contracts described herein. Applicants believe that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

2. Applicants represents that the charges associated with the respective Extra Value Options are consistent with the requirements of section 26(e)(A)(2) of the 1940 Act. Section 26(e)(A)(2) provides that it is unlawful for registered separate accounts or sponsoring insurance companies to sell any variable insurance contract "unless the fees and charges deducted under the contract, in the aggregate, are reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the insurance company." Because the Credits associated with the Extra Value Options will be funded from Nationwide's general account, the Credits create an expense for Nationwide. In addition, the risk of not recovering that expense is substantial in light of the fact that under several different contingencies, the Credit will be fully or partially vested, and thus may be withdrawn from the contract, long before the expense

associated with furnishing the Credit has been recouped. Accordingly, Applicants represent that the charges associated with the Extra Value Options, in addition to the basic Variable Account Charge applicable to each contract, are reasonable and therefore consistent with the requirements of section 26(e)(2)(A) of the 1940 Act. A similar representation will be made in the registration statements for the contracts, as required under section 26(e)(2)(A). Applicants also submit that the risk of not recovering the expense associated with rider options is substantially diminished if the contract value, including the Credit, is not surrendered or otherwise distributed prior to the end of the 7th contract year. Thus, the elimination of the rider option charge is entirely warranted and will benefit contract owners.

3. Applicants represent that it is not administratively feasible to track the Credit amounts in VA-II after the Credits are applied. Accordingly, the asset-based charges associated with the Extra Value Options will be assessed against the entire amounts held in VA-II for 7 contract years for Contracts A, B, and C, and for 8 contract years for Contract D.

4. Subsection (i) of section 27 provides that section 27 does not apply to any registered separate account funding variable insurance contracts, or to the sponsoring insurance company and principal underwriter of such account, except as provided in paragraph (2) of the subsection. Paragraph (2) provides that it shall be unlawful for any registered separate account funding variable insurance contracts or a sponsoring insurance company of such account to sell a contract funded by the registered separate account unless, among other things, such contract is a redeemable security. Section 2(a)(32) defines "redeemable security" as any security, other than short-term paper, under the terms of which the holder, upon presentation to the issuer, is entitled to receive approximately his or her proportionate share of the issuer's current net assets, or the cash equivalent thereof.

5. Applicants submit that recapturing the Credit will not deprive an owner of his or her proportionate share of VA-II's current net assets. Applicants state that an owner's interest in the Credit allocated to his or her contract value is not entirely vested until the end of the 7th contract year. Until the Credit is vested, Applicants submit that Nationwide retains the right and interest in the Credit, although not in any earnings attributable to the Credit.