

prospectus containing the disclosure contemplated by condition 2 below, by the initial shareholder(s) before shares of such Portfolio are offered to the public (or to Owners through a sub-account of a registered separate account).

2. Each Portfolio relying on the requested order will disclose in its prospectus the existence, substance and effect of any order granted pursuant to the application. In addition, each Portfolio relying on the requested order will hold itself out to the public as employing the Manager/Sub-Adviser Structure described in the application. Such Portfolio's prospectus will prominently disclose that the Manager has ultimate responsibility (subject to oversight by the Board) to oversee the Sub-Advisers and recommend their hiring, termination and replacement.

3. The Manager will provide general management and administrative services to each Portfolio, including overall supervisory responsibility for the general management and investment of each Portfolio's securities and other assets, and, subject to review and approval by the applicable Board, will: (i) Set each Portfolio's overall investment strategies; (ii) evaluate, select and recommend Sub-Advisers to manage all or a part of a Portfolio's assets; (iii) when appropriate, allocate and reallocate a Portfolio's assets among multiple Sub-Advisers; (iv) monitor and evaluate the investment performance of Sub-Advisers; and (v) implement procedures reasonably designed to ensure Sub-Advisers comply with the relevant Portfolio's investment objectives, policies and restrictions.

4. At all times, a majority of the Board of a Portfolio will be Independent Directors, and the nomination of new or additional Independent Directors will be at the discretion of the then existing Independent Directors.

5. Neither the Manager nor any Portfolio will enter into a Sub-Advisory Agreement with any Affiliated Sub-Adviser without such Sub-Advisory Agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Portfolio (or, if the Portfolio serves as a funding medium for any sub-account of a registered separate account, then pursuant to voting instructions of the Owners who have allocated assets to that sub-account).

6. When a Sub-Adviser change is proposed for a Portfolio with an Affiliated Sub-Adviser, the Board, including a majority of the Independent Directors, will make a separate finding, reflected in the minutes of the meeting of the Board, that such change is in the

best interests of the applicable Portfolio and its shareholders (or, if the Portfolio serves as a funding medium for any sub-account of a registered separate account, in the best interests of the Portfolio and the Owners who have allocated assets to the sub-account) and does not involve a conflict of interest from which the Manager of the Affiliated Sub-Adviser derives an inappropriate advantage.

7. No director or officer of a Portfolio or director or officer of the Manager will own directly or indirectly (other than through a polled investment vehicle that is not controlled by the director or officer) any interest in Sub-Adviser except (i) for the ownership of interests in the Manager or any entity that controls, is controlled by, or is under common control with the Manager; or (ii) for ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly-traded company that is either a Sub-Adviser or an entity that controls, is controlled by, or is under common control with a Sub-Adviser.

8. Within 90 days of the hiring of any new Sub-Adviser, the Manager will furnish the shareholders (or, if the Portfolio serves as a funding medium for a sub-account of a registered separate account, the Owners who have allocated assets to that sub-account) of the applicable Portfolio all the information about the new Sub-Adviser that would have been included in a proxy statement. To meet this obligation, the Manager will provide the shareholders (or if the Portfolio serves as a funding medium for any sub-account of a registered separate account, the Owners) of the applicable Portfolio with an information statement meeting the requirements of Regulation 14C and Schedule 14C under the Securities Exchange Act of 1934, as amended, as well as the requirements of Item 22 of Schedule 14A under that Act.

For the Commission, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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**BILLING CODE 8010-01-M**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. IC-25913; File No. 812-12885]**

**Nationwide Life Insurance Company, et al.**

January 24, 2003.

**AGENCY:** The Securities and Exchange Commission (the "Commission").

**ACTION:** Notice of Application for an order pursuant to section 6(c) of the Investment Company Act of 1940 (the "1940 Act") to amend a prior order of the Commission under section 6(c) of the 1940 Act which granted exemptions from the provisions of Sections 2(a)(32), 22(c), and 27(i)(2)(A) of the 1940 Act and Rule 22c-1 thereunder to permit the recapture of credits applied to purchase payments made under certain deferred variable annuity contracts.

**SUMMARY OF APPLICATION:** On January 19, 2000 the Commission issued an order pursuant to section 6(c) of the 1940 Act granting exemptions from sections 2(a)(32), 22(c) and 27(i)(2)(A) of the 1940 Act and Rule 22c-1 thereunder to permit the recapture of credits applied to purchase payments made under certain variable annuity contracts issued by Nationwide Life Insure Company (the "Original Order". See Nationwide Life Insurance Company, *et al.*, Investment Company Act Release No. 24256 (File No. 812-11824). Applicants seek an amendment to the Original Order pursuant to section 6(c) of the 1940 Act granting exemptions from the provisions of sections 2(a)(32), 22(c) and 27(i)(2)(A) of the 1940 Act and Rule 22c-1 thereunder to permit the recapture of credits applied to purchase payments made under certain variable annuity contracts under circumstances not contemplated under the Original Order. Applicants also request the relief under the order to extend to any current or current separate accounts of Nationwide Life Insurance Company which may in the future offer or support contracts that are substantially similar in all material respects to the contracts described in the Application (the "Other Separate Accounts") and to any other NASD registered broker/dealers under common control with Nationwide Life Insurance Company 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 describe in this Application.

**APPLICANTS:** Nationwide Life Insurance Company ("Nationwide"); Nationwide Variable Account-II ("VA-II"); and Nationwide Investment Services Corporation ("NISC") (all collectively, the "Applicants").

**FILING DATE:** The Application was filed on September 23, 2002. Amended Applications were filed on January 14, 2003 and January 24, 2003.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be

issued unless the Commission orders a hearing. Interested persons may request a hearing by writing the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing request should be received by the Commission by 5:30 p.m. on February 14, 2003, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

**ADDRESS:** Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants, c/o Nationwide Life Insurance Company, One Nationwide Plaza 01-09-V3, Columbia, Ohio 43215, Attn: Jamie Casto, Esq.

**FOR FURTHER INFORMATION CONTACT:** Rebecca A. Marquigny, Senior Counsel, or Zandra Bailes, Branch Chief, at (202) 942-0670, Office of Insurance Products, Division of Investment Management.

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application is available for a fee from the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549-0102 (telephone (202) 942-8090).

**Applicants' Representations**

1. Nationwide is a stock life insurance company organized under the laws of the State of Ohio. Nationwide offers traditional group and individual life insurance products as well as group and individual variable and fixed annuity contracts. Nationwide is wholly owned by Nationwide Financial Services, Inc. ("NFS"). NFS, a Delaware Corporation, is a publicly traded holding company with two classes of common stock outstanding, each with different voting rights. This enables Nationwide Corporation (the holder of all the outstanding Class B Common Stock) to control NFS. Nationwide Corporation stock is held by Nationwide Mutual Insurance Company (95.24%) and Nationwide Mutual Fire Insurance Company (4.76%), the ultimate controllers of Nationwide.

2. On October 7, 1981, the Nationwide Spectrum Variable Account was established under Ohio law by Nationwide for the purpose of funding variable annuity contracts. On April 1, 1987, the Board of Directors for Nationwide changed the name of the Nationwide Spectrum Variable Account to Nationwide Variable Account-II. VA-

II is registered as a unit investment trust (1940 Act No. 811-3330) and supports several different variable annuity contracts that are (or will be) registered separately on Form N-4.

3. On January 19, 2000, the Commission issued the Original Order pursuant to Section 6(c) of the 1940 Act granting exemptions from Section 2(a)(32), 22(c) and 27(i)(2)(A) of the 1940 Act and Rule 22c-1 thereunder to permit the recapture of credits applied to purchase payments made under certain variable annuity contracts (the "Original Contracts").

4. Recapture of Credits under the Original Order. Nationwide currently offers an optional benefit (for a charge equal to an annualized rate of 0.45% of the daily net assets of the variable account for the first 7 contract years) that allows for the investment of 103% of all purchase payments made during the first twelve months of the contract. The investment in excess of the remitted purchase payment (3% in connection with the Original Contracts) is referred to as the "Credit."

During the first 7 contract years, the Credit is fully vested except during the contractual free-look period and when certain withdrawals are taken from the contract.

If the contract owner cancels the contract pursuant to the contractual free-look privilege, Nationwide recaptures the Credit. For those jurisdictions that allow a return of contract value upon exercise of the free-look provision, the contract owner will also forfeit any amounts deducted from the contract as an Extra Value Option charge.

If, after the free-look period and before the end of the 7th contract year, the contract owner withdraws value from the contract that is subject to a Contingent Deferred Sales Charge ("CDSC"), Nationwide recaptures a portion of the Credit. The CDSC schedule is as follows:

Number of completed years from date of purchase payment	CDSC percentage
0 .....	7
1 .....	7
2 .....	6
3 .....	5
4 .....	4
5 .....	3
6 .....	2
7 .....	0

Nationwide does not recapture any Credit if the withdrawal is a free withdrawal (a withdrawal not subject to the CDSC) as described in the contract.

Thus, the percentage of the Credit that Nationwide recaptures is determined by the percentage of withdrawn purchase payments that are subject to CDSC. The recaptured amount is taken proportionately from each investment option as allocated at the time of the withdrawal.

No recapture takes place after the end of the 7th contract year; if the contract is annuitized; if a death benefit becomes payable; if distributions are required in order to meet minimum distribution requirements under the Internal Revenue Code of 1986, as amended (the "Code"); if free withdrawals are being taken pursuant to an aged-based systematic withdrawal program; or in connection with any other type of withdrawal not otherwise subject to a CDSC.

5. The Original Order does not contemplate the following recapture procedures, which Nationwide intends to include in 4 new annuity contracts that will be registered with the Commission (the "New Contracts"):

a. Recapture of larger Credits over a longer period of time. In one of the New Contracts, Nationwide intends to offer a 3% Credit option and a 4% Credit option while imposing an 8 year CDSC schedule with a maximum CDSC of 8%. In another one of the New Contracts, Nationwide intends to offer a 3% Credit option and a 4% Credit option while imposing a 7 year CDSC schedule with a maximum CDSC of 7%. In the other 2 New Contracts, Nationwide intends to offer only the 3% Credit option while imposing a 7 year CDSC schedule with a maximum CDSC of 7%. Each of the 7 year CDSC schedules described above is the same schedule that was contemplated in the Original Order.

b. Recapture of Credits for 7 contract years for all of the New Contracts. Three of the 4 New Contracts have CDSC-reducing options that the contract owner can purchase: one option reduces the standard CDSC schedule to 4 years and the other option eliminates CDSC completely. For all of the New Contracts, Nationwide intends to recapture Credits for 7 contract years, even if the contract owner elected a CDSC-reducing option.

c. Recapture of Purchase Payment Credits. Purchase Payment Credits are credits that Nationwide applies to contracts when purchase payments reach certain aggregate amounts. Nationwide applies Purchase Payment Credits to every contract that meets the purchase payment thresholds (except for those contracts where the contract owner elected the No CDSC Option). Nationwide intends to recapture Purchase Payment Credits only upon a

contract owner's cancellation of the contract pursuant to the contractual free-look provisions.

6. The New Contracts generally. The New Contracts are flexible purchase payment deferred annuity contracts that will be sold to individuals as: (i) Non-qualified contracts which are governed for tax purposes by section 72 of the Code; (ii) Individual Retirement Annuities ("IRAs"), Roth IRAs, SEP IRAs or Simple IRAs which are governed by section 408 of the Code; (iii) Non-ERISA Tax Sheltered Annuities which are governed by section 403(b) of the Code; or (iv) Investment-Only Contracts, sold to qualified plans governed by section 401(a) of the Code. Contract owners may allocate their investments in the contract to variable investment options (underlying mutual funds), fixed investment options (including a fixed account Guaranteed Term Options or "GTOs"), or a combination of fixed and variable investment options. The contracts also provide for certain services such as asset rebalancing, dollar cost averaging, and systematic withdrawals. If the annuitant dies before the annuitization date, Nationwide will pay a death benefit to the beneficiary. After two years from the date a New Contract is issued, a contract owner may elect to begin receiving annuity payments.

7. Purchase Payment Credits. Nationwide intends to apply Purchase Payment Credits to the New Contracts when total cumulative purchase payments reach retain aggregate levels. When cumulative purchase payments (minus surrenders) reach \$500,000, Nationwide will apply to the contract Purchase Payment Credits equal to 0.50% of total purchase payments up to \$999,999. When cumulative purchase payments (minus surrenders) reach \$1 million, Nationwide will apply to the contract Purchase Payment Credits equal to 1.00% of total purchase payments (reduced by any previous Purchase Payment Credits applied), and on all purchase payments thereafter. Purchase Payment Credits are considered earnings, not purchase payments.

Purchase Payment Credits will be fully vested except during the contractual free-look period. If the contract owner cancels the contract pursuant to the contractual free-look provisions, Nationwide intends to recapture any Purchase Payment Credits applied.

8. Individual Characteristics of the New Contracts. Each of the 4 New Contracts is distinct and will be referred

to as "Contract A," "Contract B," "Contract C," and "Contract D."

a. Contract A. Contract A requires an initial purchase payment of \$5,000 for non-qualified contracts and \$3,000 for the remaining contract types (e.g., IRAs, etc.). If the contract owner elects to make subsequent purchase payments, they must be at least \$500 each (\$50 each if submitted via automatic electronic transfer).

i. Contract A assesses a Variable Account Charge equal to an annualized rate of 1.15% of the daily net assets of the variable account and an annual Contract Maintenance charge of \$30 that is waived when the contract value reaches \$50,000 on any contract anniversary.

ii. Contract A assesses a CDSC when certain amounts are withdrawn from the contract. The CDSC schedule is as follows:

Number of completed years from date of purchase payment	CDSC percentage
0 .....	7
1 .....	7
2 .....	6
3 .....	5
4 .....	4
5 .....	3
6 .....	2
7 .....	0

Under Contract A, a certain amount of CDSC-free withdrawals is permitted each year. This annual "free-out" amount is equal to 10% of purchase payments that are subject to CDSC. Contract A also provides for the waiver of CDSC: upon the annuitant's death, upon annuitization of the contract, when distributions are necessary in order to meet minimum distribution requirements under the Code, and under an age-based "free-withdrawal" program that allows contract owners to take systematic withdrawals of certain contract value percentages as specified ages without incurring a CDSC. Contract A includes a Long-Term Care/Nursing Home Waiver at no additional charge. The Long-Term Care/Nursing Home allows a contract owner to withdraw value from the contract free of CDSC if: (1) The third contract anniversary has passed and the contract owner has been confined to a long-term care facility or hospital for a continuous 90-day period that began after the contract issue date; or (2) the contract owner has been diagnosed by a physician to have a terminal illness.

iii. Contract A may be modified or augmented by a number of "rider options" that enable owners to elect

certain contract features or benefits that fit their particular needs. The election of a rider option will result in a charge in addition to the basic Variable Account Charge. Rider options must be chosen at the time of application and once elected, a rider may not be revoked. The rider options available under Contract A include:

- Four year CDSC Option. The Four Year CDSC Option reduces the standard 7 year CDSC period to 4 years as follows:

Numbers of completed years from date of purchase payment	CDSC percentage
0 .....	7
1 .....	6
2 .....	5
3 .....	4
4 .....	0

An annualized charge of 0.25% of the daily net assets of the variable account is assessed for the election of this rider option. Election of the Four Year CDSC Option increases the minimum initial purchase payment to \$10,000. The charge associated with this option will be assessed for the life of the contract.

- No CDSC Option. The No CDSC Option eliminates the assessment of CDSC upon withdrawal of value from the contract. An annualized charge of 0.30% of the daily net assets of the variable account is assessed for the election of this rider option. Election of the No CDSC Option: increases the minimum initial purchase payment to \$10,000; eliminates the fixed account as an investment option under the contract; eliminates Enhanced Rate Dollar Cost Averaging as a contract owner service; and disqualifies the contract from receiving Purchase Payment Credits. The charge associated with the No CDSC Option will be assessed for the life of the contract.

- 3% Extra Value Option. Nationwide intends to offer a 3% Extra Value Option whereby Nationwide applies a Credit equal to 3% of all purchase payments made during the first 12 months of the contract. The Credit will be funded from Nationwide's general account and will be credited proportionately among the investment options chosen by the contract owner. The charge for this rider will be an annualized rate of 0.45% of the daily net assets of the variable account for the first 7 contract years only.

- One-Year Enhanced Death Benefit.
- Greater of One-Year or 5% Enhanced Death Benefit.
- Beneficiary Protector II Option.

b. Contract B. Contract B requires an initial purchase payment of \$5,000 for non-qualified contracts and \$3,000 for the remaining contract types (e.g., IRAs, etc.). If the contract owner elects to make subsequent purchase payments, they must be at least \$500 each (\$50 each if submitted via automatic electronic transfer).

i. Contract B assesses a Variable Account Charge equal to an annualized rate of 1.10% of the daily net assets of the variable account and an annual Contract Maintenance Charge of \$30 that is waived when the contract values reaches \$50,000 on any contract anniversary.

ii. Contract B assesses a CDSC when certain amounts are withdrawn from the contract. The CDSC schedule is as follows:

Number of completed years from date of purchase payment	CDSC percentage
0	7
1	7
2	6
3	5
4	4
5	3
6	2
7	0

Under Contract B, a certain amount of CDSC-free withdrawals is permitted each year. This annual "free-out" amount is equal to 10% of purchase payments that are subject to CDSC. Contract B also provides for the waiver of CDSC: upon the annuitant's death, upon annuitization of the contract, when distributions are necessary in order to meet minimum distribution requirements under the Code, and under an age-based "free-withdrawal" program that allows contract owners to take systematic withdrawals of certain contract value percentages as specified ages without incurring a CDSC. Contract B includes a Long-Term Care/Nursing Home Waiver at no additional charge. The Long-Term Care/Nursing Home allows a contract owner to withdraw value from the contract free of CDSC if: (1) The third contract anniversary has passed and the contract owner has been confined to a long-term care facility or hospital for a continuous 90-day period that began after the contract issue date; or (2) the contract owner has been diagnosed by a physician to have a terminal illness.

iii. Contract B also offers rider options that will result in a charge in addition to the basic Variable Account Charge. Rider options must be chosen at the time of application and once elected, a

rider option may not be revoked. The rider options available under Contract B include:

- 3% Extra Value Option. Nationwide intends to offer a 3% Extra Value Option whereby Nationwide applies a Credit equal to 3% of all purchase payments made during the first 12 months of the contract. The Credit will be funded from Nationwide's general account and will be credited proportionately among the investment options chosen by the contract owner. The charge for this rider will be an annualized rate of 0.45% of the daily net assets of the variable account for the first 7 contract years only.

- Spousal Protection Annuity Option.
- One-Year Enhanced Death Benefit.
- Greater of One-Year or 5% Enhanced Death Benefit.
- One-Month Enhanced Death Benefit.
- Beneficiary Protector II Option.

c. Contract C. Contract C requires an initial purchase payment of \$5,000 for non-qualified contracts and \$3,000 for the remaining contract types (e.g., IRAs, etc.). If the contract owner elects to make subsequent purchase payments, they must be at least \$500 each (\$50 each if submitted via automatic electronic transfer).

i. Contract C assesses a Variable Account Charge equal to an annualized rate of 1.15% of the daily net assets of the variable account and an annual Contract Maintenance Charge of \$30 that is waived when the contract value reaches \$50,000 on any contract anniversary.

ii. Contract C assesses a CDSC when certain amounts are withdrawn from the contract. The CDSC schedule is as follows:

Number of completed years from date of purchase payment	CDSC percentage
0	7
1	7
2	6
3	5
4	4
5	3
6	2
7	0

Under Contract C, a certain amount of CDSC-free withdrawals is permitted each year. This annual "free-out" amount is equal to 10% of purchase payments that are subject to CDSC. Contract C also provides for the waiver of CDSC: upon the annuitant's death, upon annuitization of the contract, when distributions are necessary in order to meet minimum distribution

requirements under the Code, and under an age-based "free-withdrawal" program that allows contract owners to take systematic withdrawals of certain contract value percentages as specified ages without incurring a CDSC. Contract C includes a Long-term Care/Nursing Home Waiver at no additional charge. The Long-Term Care/Nursing Home allows a contract owner to withdraw value from the contract free of CDSC if: (1) The third contract anniversary has passed and the contract owner has been confined to a long-term care facility or hospital for a continuous 90-day period that began after the contract issue date; or (2) the contract owner has been diagnosed by a physician to have a terminal illness.

iii. Contract C also offers rider options that will result in a charge in addition to the basic Variable Account Charge. Rider options must be chosen at the time of application and once elected, a rider option may not be revoked. The rider options available under Contract C include:

- Four Year CDSC Option. The Four Year CDSC Option reduces the standard 7 year CDSC period to 4 years as follows:

Number of completed years from date of purchase payment	CDSC percentage
0	7
1	6
2	5
3	4
4	0

An annualized charge of 0.25% of the daily net assets of the variable account is assessed for the election of this rider option. Election of the Four Year CDSC Option increases the minimum initial purchase payment to \$10,000. The charge associated with this option will be assessed for the life of the contract.

- No CDSC Option. The No CDSC Option eliminates the assessment of CDSC upon withdrawal of value from the contract. An annualized charge of 0.30% of the daily net assets of the variable account is assessed for the election of this rider option. Election of the No CDSC Option: increases the minimum initial purchase payment to \$10,000; eliminates the fixed account as an investment option under the contract; eliminates Enhanced Rate Dollar Cost Averaging as a contract owner service; and disqualifies the contract from receiving Purchase Payment Credits. The charge associated with the No CDSC Option will be assessed for the life of the contract.

- 3% Extra Value Option. Nationwide intends to offer a 3% Extra Value Option whereby Nationwide applies a Credit equal to 3% of all purchase payments made during the first 12 months of the contract. The Credit will be funded from Nationwide's general account and will be credited proportionately among the investment options chosen by the contract owner. The charge for this rider will be an annualized rate of 0.30% of the daily net assets of the variable account for the first 7 contract years only.

- 4% Extra Value Option. Nationwide intends to offer a 4% Extra Value Option whereby Nationwide applies a Credit equal to 4% of all purchase payments made during the first 12 months of the contract. The Credit will be funded from Nationwide's general account and will be credited proportionately among the investment options chosen by the contract owner. The charge for this rider will be an annualized rate of 0.40% of the daily net assets of the variable account for the first 7 contract years only.

- One-Year Enhanced Death Benefit.

d. Contract D. Contract D requires an initial purchase payment of \$15,000. If the contract owner elects to make subsequent purchase payments, they must be at least \$1,000 each (\$150 each if submitted via automatic electronic transfer).

i. Contract D assesses a Variable Account Charge equal to an annualized rate of 1.55% of the daily net assets of the variable account.

ii. Contract D assesses a CDSC when certain amounts are withdrawn from the contract. The CDSC schedule is as follows:

Number of completed years from date of purchase payment	CDSC percentage
0	8
1	7
2	6
3	5
4	4
5	3
6	2
7	1
8	0

Under Contract D, a certain amount of CDSC-free withdrawals is permitted each year. This annual "free-out" amount is equal to 15% of purchase payments that are subject to CDSC. Contract D also provides for the waiver of CDSC: upon the annuitant's death, upon annuitization of the contract, when distributions are necessary in order to meet minimum distribution

requirements under the Code, and under an age-based "free-withdrawal" program that allows contract owners to take systematic withdrawals of certain contract value percentages as specified ages without incurring a CDSC. Contract D includes a Long-Term Care/Nursing Home Waiver at no additional charge. The Long-Term Care/Nursing Home allows a contract owner to withdraw value from the contract free of CDSC if: (1) The third contract anniversary has passed and the contract owner has been confined to a long-term care facility or hospital for a continuous 90-day period that began after the contract issue date; or (2) the contract owner has been diagnosed by physician to have a terminal illness.

iii. Contract D also offers rider options that will result in a charge in addition to the basic Variable Account Charge. Rider options must be chosen at the time of application and once elected, a rider option may not be revoked. The rider options available under Contract D include:

- Four Year CDSC Option. The Four Year CDSC Option reduces the standard 8 year CDSC period to 4 years as follows:

Number of completed years from date of purchase payment	CDSC percentage
0	7
1	6
2	5
3	4
4	0

An annualized charge of 0.20% of the daily net assets of the variable account is assessed for the election of this rider option. The charge associated with this option will be assessed for the life of the contract.

- No CDSC Option. The No CDSC Option eliminates the assessment of CDSC upon withdrawal of value from the contract. An annualized charge of 0.25% of the daily net assets of the variable account is assessed for the election of this rider option. Election of the No CDSC Option: eliminates the fixed account as an investment option under the contract; eliminates enhanced Rate Dollar Cost Averaging as a contract owner service; and disqualifies the contract from receiving Purchase Payment Credits. The charge associated with the No CDSC Option will be assessed for the life of the contract.

- 3% Extra Value Option. Nationwide intends to offer a 3% Extra Value Option whereby Nationwide applies a Credit equal to 3% of all purchase payments made during the first 12

months of the contract. The Credit will be funded from Nationwide's general account and will be credited proportionately among the investment options chosen by the contract owner. The charge for this rider will be an annualized rate of 0.10% of the daily net assets of the variable account for the first 8 contract years only.

- 4% Extra Value Option. Nationwide intends to offer a 4% Extra Value Option whereby Nationwide applies a Credit equal to 4% of all purchase payments made during the first 12 months of the contract. The Credit will be funded from Nationwide's general account and will be credited proportionately among the investment options chosen by the contract owner. The charge for this rider will be an annualized rate of 0.25% of the daily net assets of the variable account for the first 8 contract years only.

- Greater of One-Year or 5% Enhanced Death Benefit.

- Beneficiary Protector II Option.

9. Credits under the New Contracts.

a. Credits applied to the New Contracts will be fully vested except during the contractual free-look period and when certain surrenders of contract value are made.

i. Similar to the Original Contracts, if the contract owner exercises the contractual free-look privilege, Nationwide will recapture the Credit. For those jurisdictions that allow a return of contract value upon exercise of the free-look provision, the contract owner will also forfeit any amounts deducted from the contract as an Extra Value Option charge.

ii. After the contractual free-look period and before the end of the 7th contract year, certain withdrawals from contract value will subject the Credit to recapture. Prior to the end of the 7th contract year, if the contract owner withdraws value from the contract that is or would be subject to a CDSC under the standard CDSC schedule applicable to the contract, then Nationwide may recapture a portion of the Credit. Accordingly, any amount withdrawn pursuant to the contractual free withdrawal privilege is not subject to recapture. CDSC in the New Contracts is calculated in the same manner that CDSC is calculated in the Original Contracts. Thus, the percentage of the Credit to be recaptured will be determined by the percentage of total purchase payments reflected in the amount withdrawn that is or would be subject to CDSC under the standard CDSC schedule applicable to the contract. The recaptured amount will be taken proportionately from each

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.

Applicants argue that when Nationwide recaptures a Credit, it is merely retrieving its own assets and the contract owner is not deprived of his or her proportionate share of separate account assets because his/her interest in the Credit has not vested.

6. Furthermore, Applicants state that permitting a contract owner to retain the Credit upon cancellation of the contract pursuant to the contractual free-look privilege would be unfair and would encourage individuals to purchase a contract with the intention of retaining the credited amount for an unjustified profit at Nationwide's expense.

Furthermore, the recapture of the Credit is designed to protect Nationwide when a contract owner takes partial or full surrender of the contract shortly after the Credit is applied, leaving Nationwide insufficient time to recover the cost of the Credit.

7. Applicants assert that the Extra Value Option will be attractive to and in the interest of investors because it will permit owners to have an additional 3% or 4% of purchase payments remitted during the first twelve months invested in selected investment options from the date the purchase payment is received. Also, any earnings attributable to the Credit will be retained by the contract owner in addition to the principal amount of the Credit, provided the contingencies set forth in this Application are satisfied. Finally, Applicants believe that the Extra Value Option will be particularly attractive to and in the interest of long-term investors due to the elimination of the charge after 7 contract years for Contracts A, B, and C, and after 8 contract years for Contract D. Applicants assert that the elimination of the Extra Value Option charge will allow prospective purchasers to assess the value of the Extra Value Option, and elect or decline it, based on their particular circumstances, preferences and expectations.

8. Applicants submit that recapturing the Purchase Payment 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 Purchase Payment Credit allocated to his or her contract value is not entirely vested until the end of the contractual free-look period. Until the Purchase Payment Credit is vested, Applicants submit that Nationwide retains the right and interest in the Purchase Payment Credit, although not in any earnings attributable to the Purchase Payment Credit. Applicants argue that when Nationwide recaptures a Purchase Payment Credit, it is merely retrieving

its own assets, and the contract owner is not deprived of his or her proportionate share of separate account assets because his/her interest in the Purchase Payment Credit has not vested.

9. Furthermore, Applicants state that permitting a contract owner to retain the Purchase Payment Credit upon cancellation of the contract pursuant to the contractual free-look privilege would be unfair and would encourage individuals to purchase a contract with the intention of retaining the credited amount for an unjustified profit at Nationwide's expense.

10. Applicants assert that Purchase Payment Credits recognize the efficiencies associated with issuing and administering contracts with higher aggregate purchase payments, and are thus attractive to, and in the best interest of, certain purchasers.

11. Applicants submit that the provisions for recapture of the Credit and the Purchase Payment Credit under the contracts do not violate section 2(a)(32) and 27(i)(2)(A) of the 1940 Act. Nevertheless, to avoid any possible uncertainties, Applicants request an exemption from those sections, to the extent deemed necessary to permit the recapture of any Credit or Purchase Payment Credit under the circumstances described herein with respect to the New Contracts and any future contracts issued in conjunction with VA-II or any Other Separate Accounts without loss of the relief from section 27 provided by section 27(i).

12. Section 22(c) of the 1940 Act authorizes the Commission to make rules and regulations applicable to registered investment companies and to principal underwriters of, and dealers in, the redeemable securities of any registered investment company to accomplish the same purposes as contemplated by section 22(a). Rule 22c-1 thereunder prohibits a registered investment company issuing any redeemable security, a person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and a principal underwriter of, or dealer in, such security, from selling, redeeming, or repurchasing any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

13. It could be argued that Nationwide's recapture of the Credit and/or the Purchase Payment Credit constitutes a redemption of securities for a price other than one based on the current net asset value of the separate

accounts. Applicants contend, however, that recapture of these credits does not violate section 22(c) and Rule 22c-1. Applicants argue that such recapture does not involve either of the evils or harmful events that Rule 22c-1 was intended to eliminate or reduce, namely: (1) The dilution of the value of outstanding redeemable securities of registered investment companies through their sale at a price below net asset value or their redemption or repurchase at a price above it, and (2) other unfair results including speculative trading practices. These evils were the result of backward pricing, the practice of pricing a mutual fund share based on the per share net asset value determined as of the close of the market on the previous day. Backward pricing diluted the value of outstanding mutual fund shares by allowing investors to take advantage of increases or decreases in net asset value that were not yet reflected in the mutual fund share price. Applicants submit that the recapture of Credits and Purchase Payment Credits described herein does not pose such a threat of dilution. To recapture any credit, Nationwide will redeem contract owners' interests in the sub-accounts at a price determined on the basis of current sub-account accumulation unit values. In no event will the amount recaptured be more than the amount of the Credit or Purchase Payment Credit that Nationwide paid out of its general account. Although Contract owners will be entitled to retain any investment gain attributable to a credit, the amount of such gain will be determined on the basis of the current net asset value of the respective sub-account. Thus, no dilution will occur upon the recapture of the Credit or Purchase Payment Credit.

14. Applicants also submit that the second harm that Rule 22c-1 was designed to address, namely, speculative trading practices calculated to take advantage of backward pricing, will not occur as a result of the recapture of the Credit or Purchase Payment Credit.

15. To avoid any uncertainty as to full compliance with the 1940 Act, Applicants request an exemption from the provisions of section 22(c) and Rule 22c-1 to the extent deemed necessary to permit them to recapture the Credit and the Purchase Payment Credit under the contracts and any future contracts (that are substantially similar in all material respects to the contracts described herein) issued in conjunction with VA-II or any Other Separate Accounts.

## Conclusion

Applicants submit that their request for an amended Order is appropriate in the public interest. Applicants state that such an amended Order would promote competitiveness in the variable annuity market by eliminating the need to file redundant exemptive applications, thereby reducing administrative expenses and maximizing the efficient use of Applicants' resources. Applicants argue that investors would not receive any benefit or additional protection by requiring Applicants to repeatedly seek exemptive relief that would present no issue under the 1940 Act that has not already been addressed in the Application described herein. Applicants submit that filing additional applications would impair their ability to effectively take advantage of business opportunities as they arise. Furthermore, Applicants state that if they were repeatedly required to seek exemptive relief with respect to the same issues addressed in the Application described herein, investors would not receive any benefit or additional protection thereby.

Applicants further submit, based on the grounds summarized above, that their exemptive request meets the standards set out in section 6(c) of the 1940 Act, namely, that the exemptions requested are 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, and that, therefore, the Commission should grant the requested amended Order.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03-2168 Filed 1-29-03; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47240; File No. SR-NASD-2002-113]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval of Proposed Rule Change Relating to the Implementation of a Fingerprinting Program for Nasdaq Employees and Independent Contractors

January 23, 2003.

On August 16, 2002, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary, The Nasdaq Stock Market,

Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to establish a program for conducting fingerprint-based background checks of Nasdaq employees and independent contractors. On September 10, 2002, Nasdaq submitted an amendment to the proposed rule change.<sup>3</sup> The proposed rule change, as amended, was published for comment in the **Federal Register** on December 16, 2002.<sup>4</sup> The Commission received no comments on the proposal.

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder,<sup>5</sup> and, in particular, the requirements of section 15A of the Act<sup>6</sup> and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with sections 15A(b)(2) and 15A(b)(6) of the Act.<sup>7</sup> Section 15A(b)(2)<sup>8</sup> requires that the Association have the capacity to enforce compliance by its members and persons associated with its members with the federal securities laws and the rules of the Association. Section 15A(b)(6)<sup>9</sup> requires, among other things, that the NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The Commission believes that the proposed rule change, as amended, promotes the objectives of these sections of the Act. The Commission notes that Nasdaq is an important component of the National Market System and that a serious disruption in the operation of Nasdaq systems could have a significant deleterious impact on the U.S. and global financial markets. The proposed rule change will promote the objectives of the Act by establishing procedures

<sup>1</sup> 17 CFR 240.19b-4.

<sup>2</sup> See September 9, 2002 letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission ("Amendment No. 1").

<sup>3</sup> See Securities Exchange Act Release No. 46974 (December 9, 2002), 67 FR 77119 ("Notice").

<sup>4</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>5</sup> 15 U.S.C. 78o-3.

<sup>6</sup> 15 U.S.C. 78o-3(b)(2) and 15 U.S.C. 78o-3(b)(6).

<sup>7</sup> 15 U.S.C. 78o-3(b)(2).

<sup>8</sup> 15 U.S.C. 78o-3(b)(6).

that should help prevent a serious disruption to Nasdaq systems. Specifically, the proposal should provide Nasdaq with an effective tool for identifying and excluding individuals whose prior criminal activities may pose a threat to the security of Nasdaq operations.<sup>10</sup>

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>11</sup> that the proposed rule change, as amended, (File No. SR-NASD-2002-113) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03-2169 Filed 1-29-03; 8:45 am]

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## DEPARTMENT OF STATE

[Public Notice 4255]

### Culturally Significant Objects Imported for Exhibition Determinations: "Ernst Ludwig Kirchner: 1880-1938"

**AGENCY:** Department of State.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236 of October 19, 1999, as amended, I hereby determine that the object to be included in the exhibition "Ernst Ludwig Kirchner: 1880-1938," imported from abroad for temporary exhibition within the United States, is of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owners. I also determine that the exhibition or display of the exhibit objects at the National Gallery of Art, Washington, DC from on or about March 2, 2003 to on or about June 1, 2003, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** For further information, including a list of

<sup>10</sup> As explicitly stated in the proposed rule language in the Notice, such identification and exclusion of individuals will be carried out by Nasdaq only when permitted by applicable law.

<sup>11</sup> 15 U.S.C. 78s(b)(2).

<sup>12</sup> 17 CFR 200.30-3(a)(12).