

DATES: We will consider comments received on or before March 15, 2004.

ADDRESSES: Send or deliver written comments to:

Leah M. Meisel, Deputy Associate Director for Talent and Capacity Policy, U.S. Office of Personnel Management, 1900 E Street, NW, Room 6551, Washington, DC 20415 and

Joseph F. Lackey, OPM Desk Officer, Office of Information & Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW, Room 10235, Washington, DC 20503.

Office of Personnel Management.

Kay Coles James,

Director.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-26349; File No. 812-13004]

Nationwide Life Insurance Company, et al.

February 9, 2004.

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 prior orders 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.

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

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 (the "Original Order"). See Nationwide Life Insurance Company, *et al.*, Investment Company Act Release No. 24256 (File No. 812-11824). On February 20, 2003, the Commission issued an amended order

pursuant to section 6(c) of the 1940 Act permitting Nationwide to recapture credits under circumstances not contemplated in the Original Order (the "Amended Order"). See Nationwide Life Insurance Company, *et al.*, Investment Company Act Release No. 25938 (File No. 812-12885). Applicants seek an amendment to the Amended 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 either the Original Order or the Amended Order. Applicants also request the relief under the order to extend to any current or future separate accounts of Nationwide 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 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.

FILING DATE: The application was filed on August 15, 2003. Amended applications were filed on November 5, 2003, and on January 9, 2004.

HEARING OF 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 to the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 10, 2004, 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.

ADDRESSES: 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, Columbus, 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 (File No. 811-3330) and supports several different variable annuity contracts that are 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 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 (the "Original Contracts"). On February 20, 2003, the Commission issued the Amended Order pursuant to section 6(c) of the 1940 Act permitting Nationwide to recapture credits under circumstances not contemplated in the Original Order.

4. Nationwide intends to offer a 5% credit option as part of some of its variable annuity contracts. The related contract features are as follows: a. The contract 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).

b. The contract assesses a Variable Account Charge equal to an annualized rate of 1.55% of the daily net assets of the variable account.

c. The standard Contingent Deferred Sales Charge ("CDSC") schedule under the contract is as follows:

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

d. The contract permits a certain amount of CDSC-free withdrawals each year. This annual "free-out" amount is equal to 15% of purchase payments that are subject to CDSC. Additionally, no CDSC is assessed: Upon the annuitant's death, upon annuitization of the contract, when distributions are necessary in order to meet minimum distribution requirements under the Internal Revenue Code of 1986, 26 U.S.C. *et seq.*, (the "Code"), and under

an age-based "free-withdrawal" program that allows contract owners to take systematic withdrawals of certain contract value percentages at specified ages without incurring a CDSC. Finally, the contract includes a Long-Term Care/ Nursing Home Waiver at no additional charge that allows a contract owner to withdraw value from the contract free of CDSC under certain circumstances.

e. The contract provides for a death benefit to be paid to a beneficiary upon the death of the annuitant.

f. The contract 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 rider options available under the contract include:

i. 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	0	1	2	3	4
CDSC Percentage	7	6	5	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.

ii. 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. The charge associated with the No CDSC Option will be assessed for the life of the contract.

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

iv. Beneficiary Protector Option II.

v. Capital Preservation Plus Option.

vi. 3% Extra Value Option.

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

vii. 4% Extra Value Option. Nationwide offers 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 is funded from Nationwide's general account and is credited proportionately among the investment options chosen by the contract owner. The charge for this rider is an annualized rate of 0.25% of the daily net assets of the variable account for the first 8 contract years only.

viii. 5% Extra Value Option. In addition to the 3% Extra Value Option and the 4% Extra Value Option, Nationwide intends to offer a 5% Extra Value Option whereby Nationwide applies a credit equal to 5% 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 8 contract years only.

5. Applicants' request for relief concerns the recapture of the 5% Extra Value Option Credits as follows:

a. The 5% credits will be fully vested except during the contractual free-look period and when certain surrenders of contract value are made. Nationwide intends to recapture 5% credits under the following circumstances:

i. If the contract owner cancels the contract pursuant to the contractual free look privilege, Nationwide will recapture all of the credits applied to the contract under that option. 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. If the contract owner surrenders the entire contract or takes a partial surrender of the contract after the free look period but prior to the end of the 7th contract year that is subject to a CDSC, or would be subject to a CDSC under the CDSC schedule standard to that contract, Nationwide will recapture a portion of the credits applied to the contract under that option. Accordingly, any amount withdrawn pursuant to the contractual free withdrawal privilege is not subject to recapture. CDSC is calculated in the same manner as it is calculated in Nationwide's other contracts that offer similar credits.

b. Recapture in connection with the 5% Extra Value Option will depend on how many years have passed since the credit was applied to the contract. When a contract owner who elected the 5% Extra Value Option withdraws value from the contract that is or would be subject to a CDSC under the standard CDSC schedule applicable to that

contract, Nationwide will recapture the following credit amounts:

Number of completed years from date of credit	0	1	2	3	4	5	6	7	8
Amount of credit recaptured	5	4.75	4	4	4	4	4	0	0

The recaptured amount will be taken proportionately from each investment option as allocated at the time of the withdrawal.

c. 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.

d. All credits applied under the 5% Extra Value Option are considered earnings, not purchase payments.

e. At the end of the 7th contract year, credits are fully vested and are no longer subject to recapture.

f. The charge associated with the 5% Extra Value Option will no longer be assessed after the end of the 8th contract year. 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. The charge for that option will no longer be assessed in the daily sub-account valuation for the contract.

6. Applicants seek an amendment to the Amended 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 VA-II and Other Separate Accounts that provide for the recapture of:

a. all of the 5% credit in the event that the contract owner cancels the contract pursuant to the contractual free look provisions;

b. part or all of the 5% credit in the event that the contract owner takes a full surrender of the contract prior to the end of the 7th contract year; and

c. part or all of the 5% credit associated with partial surrenders taken from the contract prior to the end of the 7th contract year that are or would be subject to a CDSC under the standard CDSC schedule applicable to the contract, as discussed herein.

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 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 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 represent that it is not administratively feasible to track the credit amounts in VA-II after the credits are applied. Accordingly, the asset-based charge associated with the 5%

Extra Value Option will be assessed against the entire amounts held in VA-II for 8 contract years.

3. 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.

4. 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 or her interest in the credit has not vested.

5. 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.

Applicants represent that 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.

6. Applicants assert that the 5% Extra Value Option will be attractive to and in the interest of investors because it will permit owners to have an additional 5% 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 the application are satisfied. Finally, Applicants assert that the 5% Extra Value Option will be particularly attractive to and in the interest of long-term investors due to the elimination of the charge after 8 contract years. Applicants assert that the elimination of the 5% Extra Value Option charge will allow prospective purchasers to assess the value of the 5% Extra Value Option, and elect or decline it, based on their particular circumstances, preferences and expectations.

7. Applicants submit that the provisions for recapture of the credit under the contracts do not violate sections 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 under the circumstances described herein with respect to the 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).

8. 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.

9. It could be argued that Nationwide's recapture of the 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 the credit 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.

10. Applicants submit that the recapture of 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 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.

11. 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.

12. 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 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.

13. Section 6(c) of the 1940 Act provides:

The Commission, by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person, security, or transactions, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, if an 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 this title.

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.

14. 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.

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