



September 5, 2008

Florence E. Harmon  
Acting Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549-1090

**RE: File No. S7-18-08**

Dear Ms. Harmon:

NAVA, Inc., the Association for Insured Retirement Solutions, respectfully submits this letter of comment on the proposed changes relating to the use of security ratings by nationally recognized statistical rating organizations (“NRSROs”) in its rules and forms, published by the Securities and Exchange Commission (“SEC”) on July 1, 2008 (the “Proposal”).<sup>1</sup>

NAVA is a not-for-profit organization dedicated to the growth and understanding of annuity and variable life insurance products. NAVA represents all segments of the annuity and variable life industry with over 300 member organizations, including insurance companies, banks, investment management firms, distribution firms, and industry service providers.

### **Background**

The Proposal is the third of three rulemaking initiatives proposed by the SEC relating to security ratings by nationally recognized statistical rating organizations (“NRSROs”). In an effort to reduce “undue reliance” on NRSRO security ratings, the Proposal would, among other things, revise the eligibility criteria for registration statements on Form S-3 under the Securities Act of 1933, as amended (the “Securities Act”) by eliminating the investment grade transaction requirement. That requirement currently permits issuers to register primary offerings of non-convertible securities if they are rated investment grade by at least one NRSRO.

Under the Proposal, Form S-3 would instead be available for the registration of primary offerings of non-convertible securities if the issuer has issued (as of a date within 60 days

---

<sup>1</sup> Security Ratings, Securities Act Release No. 8940 (July 1, 2008) (the “Release”).

prior to the filing of the registration statement) for cash more than \$1 billion in non-convertible securities, other than common stock, through registered primary offerings over the prior three years (“\$1 billion threshold”). Issuers who are currently relying on the investment grade transaction requirement but who cannot meet the \$1 billion threshold would be required under the Proposal to register on Form S-1, the “long-form” or “catch-all” form under the Securities Act, instead of the shorter Form S-3 registration statement.

### **Potential Impact of Proposal on Annuity Issuers**

NAVA and its members are concerned about the potential adverse impact the Proposal may have on issuers of annuity contracts with market value adjustment (“MVA”) features (“MVA contracts”),<sup>2</sup> which the Release does not appear to have considered.

MVA features are designed to avoid the problem of “disintermediation,” which occurs when investors make a premature withdrawal of their money from a fixed interest rate option at a time when market interest rates have increased. MVA contracts typically guarantee specific rates of interest for one or more “guaranteed periods,” but upon a premature withdrawal (before the end of the guaranteed period), the insurance company, pursuant to a formula set forth in the MVA contract, adjusts the proceeds paid — upward when market rates have decreased, and downward when rates have increased. This MVA adjustment corresponds at least partially to the gain or loss, respectively, the insurer may realize when the portfolio securities supporting the investment are liquidated “prematurely” to cover the proceeds paid to the contract owner.

Where appropriate, insurers have registered interests in MVA contracts under the Securities Act and many have done so on Form S-3 in reliance on the investment grade transaction requirement pursuant to General Instruction I.B.2 of that Form.<sup>3</sup> Form S-3 allows eligible issuers to incorporate by reference into the prospectus periodic reports filed under the Securities and Exchange Act of 1934, as amended (the “Exchange Act”). As the Release notes, the ability to conduct primary offerings on short form registration statements confers significant advantages in terms of cost savings and capital formation.<sup>4</sup>

The availability of Form S-3 for MVA contracts has been beneficial to investors and insurers alike inasmuch as it has allowed insurers to provide, and investors to receive, streamlined disclosure of key information concerning the MVA contracts. The availability of Form S-3 for MVA contracts has been particularly helpful in facilitating

---

<sup>2</sup> MVA contracts can be issued on a “standalone” basis as a fixed annuity with an MVA feature, or in “combination” with variable annuity contracts as a fixed account option with an MVA feature.

<sup>3</sup> Insurance companies also register parent guarantees of these MVA interests on Forms S-3 or F-3 and several insurance companies have initiated the registration of stand-alone guaranteed minimum withdrawal benefits under the Securities Act. The analysis set out in this letter would apply equally to those registrations as well.

<sup>4</sup> Release, *supra* note 1, page 53 at fn 127.

clarity and comprehension with respect to MVA contracts offered in “combination” with variable annuity contracts registered on Form N-4. These benefits result from the fact that the disclosure requirements of Form S-3, including the forward incorporation by reference of Exchange Act reports, are easier to harmonize with those of Form N-4 than is the case with Form S-1.

This option and the corresponding benefits would no longer be available under the Proposal for insurers that cannot meet the proposed \$1 billion threshold. As a result, insurers would face significant costs and burdens associated with registering their MVA contracts on Form S-1 with no additional, much less commensurate, benefit to investors.

### **Discussion**

The SEC’s concerns giving rise to the Proposal, namely, recent turmoil in the credit markets, particularly in the structured finance market, and possible undue reliance on security ratings would appear to be largely, if not entirely, *inapplicable* to the offer and sale of MVA contracts.

Unlike asset-backed and other types of non-convertible securities, which are generally purchased on the basis of interest rates and security ratings, MVA contracts are purchased on the basis of their annuity features and guarantees. In addition, unlike issuers of other types of non-convertible securities that the Proposal is intended to reach, insurance companies issuing MVA contracts are subject to significant state insurance regulation. As the SEC has observed:

State insurance regulators require insurance companies to maintain certain levels of capital, surplus, and risk-based capital; restrict the investments in insurers’ general accounts; limit the amount of risk that may be assumed by insurers; and impose requirements with regard to valuation of insurers’ investments. Insurance companies are required to file annual reports on their financial condition with state insurance regulators. In addition, insurance companies are subject to periodic examination of their financial condition by state insurance regulators. State insurance regulators also preside over the conservation or liquidation of companies with inadequate solvency.<sup>5</sup>

Furthermore, due to transfer restrictions and other limitations, there is no secondary trading market for MVA contracts. As a result, the application of the proposed \$1 billion

---

<sup>5</sup>*Indexed Annuities and Certain Other Insurance Contracts*, Release No. 33-8933, 48 (June 25, 2008) (proposing Rule 151A under the Securities Act and Rule 12h-7 under the Exchange Act) (footnotes omitted) (“Indexed Annuity Release”).

threshold would not represent nor result in a “wide following” in the marketplace for MVA contracts.<sup>6</sup>

### **Recommendations**

In light of the foregoing, we respectfully recommend that the Proposal be modified to conditionally exempt issuers of MVA contracts as well as other insurance contracts<sup>7</sup> from the \$1 billion threshold requirement for eligibility to use Form S-3 to register primary offerings of non-convertible debt securities, *provided* such issuers are subject to state insurance regulation of its financial condition and there is no trading market for such securities. This recommendation is consistent with the conditional exemption for certain insurance contracts from Exchange Act reporting proposed in the SEC’s Indexed Annuity Release.

In the alternative, we respectfully recommend that the Proposal be modified to allow issuers of insurance contracts to count gross sales of variable annuity and variable life insurance contracts towards the \$1 billion threshold. This recommendation is consistent with the greater “notoriety” that one would expect an issuer of such a large amount of non-equity securities would have, though, as noted above we do not believe the threshold furthers any public interest given the absence of any trading market for insurance contracts generally.

Furthermore, we respectfully recommend that the Proposal, if adopted without change, apply prospectively such that all MVA contracts previously registered on Form S-3 be allowed to remain registered thereon regardless of whether the issuing insurance company can meet the proposed \$1 billion threshold.<sup>8</sup> We also request that the effective date of such a final rule be at least 180 days after publication in the Federal Register to allow issuers sufficient time to prepare to file contracts on forms other than S-3.

In any event, we respectfully submit that the public interest would be well-served if action on the Proposal and Form S-3, as it affects MVA contracts, were taken in coordination with any action taken with respect to the proposed exemption from Exchange Act reporting set out in the Indexed Annuity Release.

---

Again, we appreciate the opportunity to comment. If we can answer any questions or be of further assistance, please contact me at (703) 707-8830, extension 20, Richard Choi of Jordan Burt LLP at (202) 965-8127, or Karen Alvarado of AEGON Insurance Group at

---

<sup>6</sup> The SEC has acknowledged the general absence of any trading interest in insurance contracts in the Indexed Annuity Release, *supra* note 5, at p. 57.

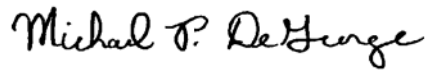
<sup>7</sup> See *supra* note 3.

<sup>8</sup> We would expect that MVA contracts filed on Form S-3 before adoption of a final rule, but not yet approved, would be “grandfathered” and not be required to be refiled.

Florence E. Harmon  
September 5, 2008  
Page 5 of 5

(319) 355-8327. Mr. Choi and Ms. Alvarado are co-chairs of NAVA's Regulatory Affairs Committee.

Sincerely,

A handwritten signature in black ink that reads "Michael P. DeGeorge". The signature is written in a cursive, flowing style.

Michael P. DeGeorge  
General Counsel