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**VIA ELECTRONIC DELIVERY**

Florence E. Harmon  
Acting Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Re: **Comments on Proposed Revisions to Forms S-3 and F-3  
Regarding Issuances of Non-Convertible Investment Grade Securities  
File Number S7-18-08; Release No. 33-8940**

Dear Ms. Harmon:

We are submitting this letter at the request of several of our insurance company clients that issue non-convertible investment grade insurance contracts registered on Form S-3 or F-3. We are pleased to have the opportunity to offer our thoughts in response to the requests for comments by the Securities and Exchange Commission (the "**SEC**" or the "**Commission**") in Release No. 33-8940 (July 1, 2008) (the "**Proposing Release**") with respect to the Commission's proposal to modify the eligibility requirements of Forms S-3 and F-3 to eliminate the applicable provisions permitting primary issuances of non-convertible investment grade securities (the "**Investment Grade Transactional Provision**") for both issuers of asset-backed securities and issuers of traditional debt instruments and other non-convertible securities. While we understand the Commission's desire to promptly address recent concerns regarding the use of security ratings by issuers of asset-backed securities, we are concerned that the broad scope of the current proposal will unduly burden other issuers, particularly insurance companies, that routinely rely upon the Investment Grade Transactional Provision, but whose registered securities do not raise the same policy concerns as asset-backed securities.

**I. Background on Registered Insurance Contracts**

Certain types of insurance contracts may be deemed to be securities under the Securities Act of 1933, as amended (the "**Securities Act**") and required to register with the Commission. As insurance company issuers are in the business of issuing insurance contracts (and not simply issuing securities periodically to raise money for specific purposes), these offerings are made on

a continuous basis (until such time as the insurance company determines to cease sales, which typically occurs many years after registration). Commonly registered insurance contracts include variable annuity and variable life insurance contracts ("**Variable Contracts**"), which provide for values that vary directly with the investment performance of the underlying funding vehicle to which the contract owner's payments are applied. Under a Variable Contract, cash value is invested in the insurer's separate account, which typically offers the contract owner a number of mutual fund investment options. Variable Contracts are securities required to be registered under the Securities Act (unless exempt from registration). The underlying separate account<sup>1</sup> is generally registered as a unit investment trust under the Investment Company Act of 1940, as amended (the "**Investment Company Act**").

Insurance companies also issue various fixed annuity and life insurance contracts. Under a typical fixed deferred annuity or life insurance contract, an insurance company guarantees a specified rate of return to contract owners. Alternatively, some fixed deferred annuity or life insurance contracts credit interest above a guaranteed minimum rate based in part on the movement of one or more financial indices, such as the Standard & Poor's 500 Index ("**equity-indexed contracts**"). Fixed deferred annuity or life insurance contracts (as well as Variable Contracts) usually have a "surrender" period, during which a contract owner who withdraws more than a specified amount (*e.g.*, 10%) is assessed a surrender charge. The surrender charge is intended to recover the up-front costs that the insurance company assumes in selling the contract, such as the commission paid to the sales agent.

Some fixed annuity and life insurance contracts, including some equity-indexed contracts, have market value adjustment ("**MVA**") features. Under an MVA contract, if a contract owner makes a withdrawal at a time when interest rates are higher than at the time the contract was issued, the contract owner receives less than he or she otherwise would without the MVA. Conversely, if interest rates at the time of withdrawal are lower than at the time the contract was issued, the contract owner receives more than he or she otherwise would without the MVA. Contracts that impose an MVA that may invade principal generally have been registered as securities under the Securities Act. These MVAs may be issued on a stand-alone basis or as an investment option in Variable Contracts.

In addition to the above, stand-alone guaranteed living benefits (such as stand-alone guaranteed minimum withdrawal benefits ("**GMWBs**")) are relatively new products for which some companies have recently initiated registration under the Securities Act. These products were developed based on popular types of riders that are offered in connection with many variable annuity contracts registered on Form N-4. Unlike such riders, however, stand-alone guaranteed living benefits do not relate to the contract value inside of a variable annuity, but

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<sup>1</sup> Section 2(a)(14) of the Securities Act defines "separate account" to mean "an account established and maintained by an insurance company pursuant to the laws of any State or territory of the United States, the District of Columbia, or of Canada or any province thereof, under which income, gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company."

instead relate to the value of the contract owner's investments in a separate and distinct account, such as a mutual fund account, brokerage account, or investment advisory account. It is expected that other types of stand-alone guaranteed living benefits may be developed in the future.

In general, stand-alone GMWBs guarantee regular income payments for the life of a contract owner to the extent that the value of the contract owner's guaranteed investment in the relevant account is not sufficient to provide such payments. Stand-alone GMWBs typically have two phases: an accumulation phase and a payout phase. During the accumulation phase, the contract owner's account usually must be allocated in accordance with restrictions imposed by the insurance company, and withdrawals beyond a specified amount can jeopardize the guarantee. If the contract owner's account value reduces to a specified level – which is usually set at zero – then the payout phase begins. For the remaining life of the contract owner, the insurance company makes income payments that are calculated based on the amount originally invested in the mutual fund, brokerage, or investment advisory account by the contract owner, subject to modifications arising from withdrawals and other factors.

There is no registration form specifically designed for such fixed annuity and life insurance contracts or stand-alone guaranteed living benefits (referred to collectively as “**Non-Variable Insurance Contracts**”). Accordingly, such Non-Variable Insurance Contracts, to the extent registered, would need to be registered under the Securities Act on one of the “catch-all” forms for registration under the Securities Act – Forms S-1, S-3, F-1, or F-3. Specific forms, however, do exist for registering Variable Contracts under the Securities Act. The integrated forms for registration of Variable Contracts (*i.e.*, Forms N-3, N-4, and N-6) register not only the Variable Contract under the Securities Act, but also constitute the registration statement for the separate accounts through which the contracts are issued under the Investment Company Act. Forms N-3, N-4, and N-6, however, can only be used to register Variable Contracts and the separate accounts through which they are issued. Accordingly, because Non-Variable Insurance Contracts are not supported by a separate account, as insurance company general account products, they cannot be registered on Form N-3, N-4, or N-6, as those forms are currently drafted.

Pursuant to Section 15(d) of the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”), registration of a security on one of the “catch-all” forms obligates the issuer to comply with the periodic reporting requirements of Section 13 of the Exchange Act, including the filing of annual reports on Form 10-K, quarterly reports on Form 10-Q, as well as various other periodic filings. Accordingly, an insurance company registering a Non-Variable Insurance Contract would be subject to Exchange Act reporting, while an insurance company registering a Variable Contract would not.

In addition, some insurance companies have obtained full and unconditional guarantees from their parent companies on their Non-Variable Insurance Contracts. These guarantees are registered on the same registration statement and thus the same form as the Non-Variable Insurance Contracts. These insurance company subsidiaries typically rely on Rule 12h-5 under the Exchange Act, which grants an exemption from Exchange Act reporting obligations for

subsidiary issuers of a guaranteed security. For purposes of the modifications we are requesting in this comment letter on the Commission's proposed changes to Forms S-3 and F-3, references to Non-Variable Insurance Contracts also include any parent guarantees of such contracts registered in the same registration statement on Form S-3 or F-3.<sup>2</sup> Such parent guarantees serve only to benefit investors in such Non-Variable Insurance Contracts, and we believe not including such parent guarantees in any relief provided for Non-Variable Insurance Contracts would force insurance company issuers to choose between eliminating such guarantees or instead subjecting themselves to the increased requirements of filing on Form S-1 or F-1.

## **II. Overview of Comments**

We strongly urge the Commission to reconsider the broad scope of its present proposal, and to narrow its focus to permit insurance companies, as highly regulated entities under state law, to continue to rely upon the Investment Grade Transactional Provision as it currently stands insofar as to register Non-Variable Insurance Contracts.<sup>3</sup> A number of insurance companies routinely rely on the subject provision for issuances of Non-Variable Insurance Contracts,<sup>4</sup> yet would be unable to satisfy the proposed replacement provision, which requires \$1 billion of publicly issued non-convertible securities other than common equity. We believe the extensive regulatory oversight to which insurance companies and their life insurance and annuity products are subject, as well as the greater level of investor protection thereby provided to purchasers of Non-Variable Insurance Contracts, mitigate many of the policy reasons behind elimination of the Investment Grade Transactional Provision.

We would also urge the Commission to consider permitting each insurance company to aggregate Non-Variable Insurance Contracts registered on Form S-1, S-3, F-1, or F-3 with Variable Contracts supported by separate accounts of the insurance company and registered on Form N-3, N-4, or N-6 when determining whether that insurance company satisfies the proposed \$1 billion threshold for publicly issued non-convertible securities other than common equity. Specifically, this approach would recognize the reality that separate accounts are merely creatures of specific state laws and are a part of the insurance company depositor. For example,

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<sup>2</sup> SEC Proposed Rule 12h-7 under the Exchange Act defines the types of securities that we refer to herein as Non-Variable Insurance Contracts (including guarantees thereof) as follows:

The securities do not constitute an equity interest in the issuer and are either subject to regulation under the insurance laws of the domiciliary state of the issuer or are guarantees of securities that are subject to regulation under the insurance laws of that jurisdiction.

See Indexed Annuities and Certain Other Insurance Contracts, Rel. No. 34-58022 (June 25, 2008), File No. S7-14-08 (the "*Indexed Annuity Release*"). Other types of Non-Variable Insurance Contracts not described herein that meet this definition may be registered or developed in the future.

<sup>3</sup> While this letter focuses on insurance product offerings, we believe that many of the arguments and policy reasons that would support relief for such products would similarly apply to offerings of other non-convertible securities by insurance companies. We would also urge extending any relief granted for Non-Variable Insurance Contracts to those instruments as well.

<sup>4</sup> To date, we are not aware of any insurance company that has attempted to obtain an investment grade rating on a stand-alone GMWB contract as a basis for registering on Form S-3 or F-3.

the assets and liabilities of such separate accounts, while segregated, also appear in the general account financial statements of their respective insurance company sponsors.

In the event the Commission determines to maintain the broad scope of the current proposal, we would request that the Commission apply any adopted changes to Forms S-3 and F-3 prospectively only to registration statements for new offerings of Non-Variable Insurance Contracts. Otherwise, a number of issuers engaged in continuous offerings of investment grade Non-Variable Insurance Contracts would potentially be required to file post-effective amendments to switch to Form S-1 or F-1, likely resulting in substantial disruptions within the marketplace for such Non-Variable Insurance Contracts.

### **III. Exclusion of Insurance Companies From Revisions to Forms S-3 and F-3**

In its Proposing Release, the Commission notes its concern that investors may be placing undue reliance upon security ratings issued by national recognized statistical rating organizations (“*NRSROs*”). In the context of asset-backed securities, where complex analyses must be performed with respect to the assets underlying such securities in order to prepare a security rating, this concern appears well placed. Certainly, recent market events have highlighted the risks posed by relying too heavily upon NRSROs to appropriately evaluate the investment structures underlying such asset-backed securities. In view of these concerns, the Commission’s proposal to limit acquisitions of such asset-backed securities to investors satisfying heightened eligibility criteria seems appropriate, given that large sophisticated investors are better able to evaluate the relative quality of the assets underlying asset-backed securities without over reliance on security ratings issued by NRSROs. Regardless of whether asset-backed securities are rated, they remain complex investments.

In contrast to asset-backed securities, the process for rating the Non-Variable Insurance Contracts centers primarily on the ability of the issuer to pay its obligations when due. We believe this is consistent with the prior structure of Form S-9, which was replaced by Form S-3 and focused on the underlying quality of the issuer, instead of the security, to determine form eligibility.<sup>5</sup> While NRSROs provide helpful guidance in rating the relative ability of an issuer to repay its obligations under Non-Variable Insurance Contracts, average investors also are better able to evaluate the underlying ability of a single issuer to meet its obligations under such instruments when that ability is not primarily dependent upon payments received on various underlying assets held by the issuer. Notably, the Commission has not proposed imposing investor qualifications on issuances of securities other than asset-backed securities, suggesting that it does not believe that non-asset-based instruments require the same level of investor sophistication to evaluate.

In addition, insurance companies are subject to extensive state regulation – both at the company level and with respect to the insurance contracts they issue, including Non-Variable

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<sup>5</sup> Proposing Release at 19-20.

Insurance Contracts registered on Form S-3 or F-3.<sup>6</sup> All insurance contracts must be filed with and approved by state insurance departments to ensure that their terms comply with state law. Applicable regulatory requirements mandate specific investment requirements with respect to reserves maintained in connection with an issuer's contractual obligations and its overall solvency, and also impose liquidity and other financial requirements not applicable to issuers of asset-backed securities or other traditional debt instruments. Insurance companies also must submit to periodic examinations by the insurance authorities in every state in which its contracts are sold. These regulatory requirements provide a greater level of investor protection to purchasers of Non-Variable Insurance Contracts than purchasers of other investment grade debt products, including asset-backed securities.

Given this greater level of investor protection, and the significant level of regulatory oversight already imposed on issuers of Non-Variable Insurance Contracts, we believe that the policy rationale for eliminating the Investment Grade Transactional Provision from Forms S-3 and F-3 does not apply in the context of Non-Variable Insurance Contracts. We believe that the Commission can achieve its goal of addressing the recent concerns regarding security ratings and asset-backed securities without eliminating the Investment Grade Transactional Provision applicable to offerings of Non-Variable Insurance Contracts. By eliminating the Investment Grade Transactional Provision entirely for all offerings, the Commission will cause undue hardship to a significant number of insurance companies that presently rely upon that provision to issue investment grade Non-Variable Insurance Contracts on Form S-3 or F-3. Elimination of the Investment Grade Transactional Provision would impose Form S-1 or F-1 disclosure and updating requirements on such issuers in a number of cases, as insurance companies that issue such Non-Variable Insurance Contracts generally are neither publicly traded nor issue a sufficient number of such Non-Variable Insurance Contracts to satisfy the proposed \$1 billion threshold for publicly issued non-convertible securities other than common equity.

We instead believe it would be appropriate to limit the use of the Investment Grade Transactional Provision to qualifying entities such as insurance companies, where other regulatory schemes provide an additional layer of investor protection. Notably, the term "insurance company" is already defined in Section 2(a)(13) of the Securities Act<sup>7</sup> and the Commission has proposed a rule that defines the type of securities referred to herein as Non-Variable Insurance Contracts.<sup>8</sup> We believe limiting reliance on the Investment Grade Transactional Provision to insurance companies, as defined in Section 2(a)(13), with regard to Non-Variable Insurance Contracts would acknowledge the substantial regulation to which these

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<sup>6</sup> The Commission recently recognized the extensive state regulation applicable to insurance companies in connection with its proposal to exempt certain insurance companies from Exchange Act reporting. Indexed Annuity Release at 48.

<sup>7</sup> Section 2(a)(13) under the Securities Act defines "insurance company" to mean "a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner, or a similar official or agency, of a State or territory or the District of Columbia; or any receiver or similar official or any liquidating agent for such company, in his capacity as such."

<sup>8</sup> See *supra* n. 2 for the proposed definition.

entities are subject without detracting from the regulatory and policy reasons behind the Commission's proposal to eliminate the Investment Grade Transactional Provision with respect to issuers of asset-backed securities and other investment grade debt instruments.

#### **IV. Aggregation of Insurance Contracts for Form S-3 and F-3 Eligibility**

If the Commission adopts the proposal to eliminate the Investment Grade Transactional Provision in its entirety, a number of insurance companies would likely be unable to satisfy either the public float or the proposed publicly issued non-convertible securities thresholds and thus would no longer be permitted to register Non-Variable Insurance Contracts on Form S-3 or F-3. As a practical matter, this result would force such issuers to shift to Form S-1 or F-1, thereby imposing numerous additional burdens on such issuers as a result of the lack of forward incorporation by reference and the updating requirements set forth in Section 10(a)(3) under the Securities Act. If Variable Contracts issued by an insurance company and supported by its separate accounts were included when determining whether the insurance company satisfied the proposed non-convertible securities threshold, many insurance companies would be eligible to register Non-Variable Insurance Contracts on Form S-3 or F-3.

Variable Contracts are unique instruments that are neither traditional debt nor common equity. The federal securities laws, in effect, provide the separate account supporting a Variable Contract with a legal existence independent of that of its insurance company. Thus, for Investment Company Act purposes, the separate account is treated as the investment company and owner of its assets, and the insurer is treated as the sponsor or "depositor" of the separate account. For purposes of both the Securities Act and the Investment Company Act, a separate account, as a separate entity, is generally treated as the issuer of the Variable Contract. As the depositor, under the Securities Act, the insurance company establishing the separate account is viewed as a co-issuer or guarantor of the Variable Contracts issued through the separate account. The insurance company, however, remains responsible and liable for payment of all amounts due under the Variable Contract – amounts that often exceed the assets of the separate account in light of various provided guarantees, such as death benefits, minimum withdrawal benefits, and annuity benefits. Consistent with this analytical framework, both the separate account and the insurer sign the Securities Act registration statement for the Variable Contracts, and financial statements for each are included in the registration statement.

In light of the fact that separate accounts are financial divisions of an insurance company providing for the segregation of assets and liabilities, as well as the fact that the insurance company remains liable for all amounts due under Variable Contracts, we believe that Variable Contracts should be counted as non-convertible securities issued by the insurance company for purposes of the \$1 billion threshold. Thus, we would urge the Commission to clarify that an insurance company (as defined in Section 2(a)(13) of the Securities Act) can include gross issuances of Variable Contracts (*i.e.*, total purchase payments received from investors without reduction for any subsequent redemptions) supported by its separate accounts (as defined in Section 2(a)(14) under the Securities Act) when determining whether each insurance company satisfies the eligibility requirements for use of Forms S-3 and F-3.

We believe that permitting such inclusion of Variable Contracts would allow insurance companies to continue to utilize Form S-3 or F-3 for the issuance of Non-Variable Insurance Contracts, without otherwise lessening the regulatory and policy purpose behind the Commission's proposal to eliminate the Investment Grade Transactional Provision from Forms S-3 and F-3. Failing to accommodate the realities of Variable Contracts would result in substantial additional burdens for many non-public insurance companies that otherwise would fail to independently satisfy the \$1 billion threshold for publicly issued non-convertible securities other than common equity. We believe these additional burdens would unfairly punish such insurance companies solely as a result of the unique nature of Variable Contracts, for what we believe would be no reasonable regulatory or policy purpose.<sup>9</sup>

**V. Prospective Application of Any Proposed Revisions to Forms S-3 and F-3**

At present, there are several effective registration statements on Forms S-3 and F-3 filed by active issuers of Non-Variable Insurance Contracts. As noted above, Non-Variable Insurance Contracts are generally sold to investors on a continuous basis. In view of the foregoing, to the extent the Commission adopts the proposed revisions to Forms S-3 and F-3, including the elimination of the Investment Grade Transactional Provision, we would urge the Commission to "grandfather" current offerings of Non-Variable Insurance Contracts and all future filings related thereto. This approach would maintain the integrity of the Commission's stated policy rationale for such revisions to Form S-3 and F-3, without unfairly burdening existing issuers of registered Non-Variable Insurance Contracts.

More specifically, we request that the Commission clearly indicate in its adopting release that any revisions to Form S-3 or F-3 would not apply to existing effective registration statements on Form S-3 or F-3 and any post-effective amendments thereto, as well as any new registration statements: (1) that are filed solely for the purpose of complying with Rule 415(a)(5) under the Securities Act; (2) that relate back to a prior offering as permitted by Rule 429 under the Securities Act; (3) that have been filed with the Commission at the time of effectiveness of any changes to Forms S-3 and F-3; or (4) that are filed by any successor issuer that assumes the assets and liabilities of the registrant pursuant to a merger, reorganization, or other business combination.

If the Commission is unwilling to extend such ongoing relief to existing continuous offerings, we would request, at a minimum, that existing offerings on Form S-3 or F-3 be allowed additional time to convert to Form S-1 or F-1. We recommend that any required conversion occur no earlier than 180 days after effectiveness or the next otherwise required post-effective amendment or new registration statement filing, whichever is later. If such revisions were to apply immediately, issuers of Non-Variable Insurance Contracts presently utilizing Form

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<sup>9</sup> We assume that any interpretation permitting inclusion of Variable Contracts in meeting the \$1 billion threshold for purposes of determining eligibility to use Form S-3 or F-3 would likewise apply to the determination of whether an issuer meets the definition of a "well-known seasoned issuer," as defined in Rule 405 under the Securities Act.



S-3 or F-3 may need to immediately cease sales and file post-effective amendments to switch their respective registration statements to Form S-1 or F-1.

Also, with regard to wholly owned subsidiaries of reporting companies that provide reduced disclosure in their periodic reports on Forms 10-K and 10-Q filed under the Exchange Act (as permitted by General Instruction I to Form 10-K and General Instruction H to Form 10-Q), we would ask the Commission to clarify that such companies may similarly provide the same reduced level of disclosure if required to convert from Forms S-3 and F-3. The policy reasons supporting reduced disclosure for such issuers under the Exchange Act would appear to be equally present in connection with prospectus disclosure.

**VI. Conclusion**

We appreciate the opportunity to comment on the Commission's proposals included in the Proposing Release and respectfully ask that the Commission address the requests and provide the clarifications noted above. If you have any questions or if additional information would be helpful, please contact Steve Roth at 202.383.0158 ([steve.roth@sutherland.com](mailto:steve.roth@sutherland.com)), Mary Thornton at 202.383.0698 ([mary.thornton@sutherland.com](mailto:mary.thornton@sutherland.com)), or John Mahon at 202.383.0515 ([john.mahon@sutherland.com](mailto:john.mahon@sutherland.com)).

Respectfully Submitted,

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