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March 28, 2011

**VIA ELECTRONIC DELIVERY**

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

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 Nos. 33-9186; 34-63874**

Dear Ms. Murphy:

We are submitting this comment letter on behalf of several of our insurance company clients that issue non-convertible investment grade insurance contracts or investment grade guarantees of insurance contracts registered on Form S-3 or F-3. The release referenced above (the "Proposing Release") was proposed by the Securities and Exchange Commission (the "Commission") to address the requirement in Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") for the Commission to "remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness as each respective agency shall determine as appropriate for such regulations." Our clients assert that the existence of the additional substantive regulatory regime under state insurance law provides an alternative standard of creditworthiness appropriate for insurance company eligibility to use Forms S-3 and F-3 for various fixed annuity and life insurance contracts (and guarantees thereon) ("Non-Variable Insurance Contracts").[1]

The Commission previously proposed modifications to the eligibility requirements of Forms S-3 and F-3 to eliminate the applicable provisions permitting primary issuances of non-convertible

[1] Non-Variable Insurance Contracts are discussed in greater detail in Appendix A.

investment grade securities (the "Investment Grade Transactional Provision").[2] We previously submitted three comment letters on behalf of our clients regarding the Commission's proposed modifications and requested an accommodation for Non-Variable Insurance Contracts, based on the existence of this additional substantive regulatory regime.[3] The Proposing Release maintains the same replacement provision that the Commission previously proposed, which requires $1 billion of publicly issued non-convertible securities other than common equity.

We appreciate the Commission considering our prior comment letters and specifically requesting public comments in the Proposing Release on the impact of the Commission's proposal to modify the eligibility requirements of Forms S-3 and F-3 on insurance company issuers. As noted in our prior comment letters, our clients continue to remain concerned that the alternative standard proposed by the Commission will unduly burden insurance company issuers. A number of insurance companies routinely rely on the Investment Grade Transactional Provision for issuances of Non-Variable Insurance Contracts, yet would be unable to satisfy the proposed replacement provision. Our clients strongly urge the Commission to permit insurance companies, as highly regulated entities under state insurance law, to use Forms S-3 and F-3 to register Non-Variable Insurance Contracts. 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, provides an alternative standard of creditworthiness more than appropriate to justify such treatment.

**PROPOSAL:** **Permit Insurance Companies To Use Forms S-3 and F-3 To Register Non-Variable Insurance Contracts**

***Additional Substantive Regulatory Regime***

Insurance companies are subject to extensive state regulation by state insurance departments of both their respective states of domicile, as well as the states in which they conduct business. This regulation applies both at the company level and with respect to the insurance contracts they issue, including Non-Variable Insurance Contracts registered on Form S-3 or F-3. The

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[2] *See* Security Ratings, Rel. Nos. 33-8940, 34-58071 (July 1, 2008), File No. S7-18-08 (proposing to replace rule and form requirements that rely on security ratings, such as Forms S-3 and F-3 eligibility criteria, with alternative requirements); References to Ratings of Nationally Recognized Statistical Rating Organizations, Rel. Nos. 33-9069; 34-60790; IA-2932; IC-28940; File Nos. S7-17-08, S7-18-08, S7-19-08 (Oct. 5, 2009), File Nos. S7-17-08, S7-18-08, S7-19-08 (reopening the comment period for Rel. No. 33-8940).

[3] *See* Letters to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, from Sutherland Asbill & Brennan LLP Commenting on Proposed Revisions to Forms S-3 and F-3 Regarding Issuances of Non-Convertible Investment Grade Securities, File Number S7-18-08 (Jan. 21, 2011 and Dec. 8, 2009); Letter to Florence E. Harmon, Acting Secretary, U.S. Securities and Exchange Commission, from Sutherland Asbill & Brennan LLP Commenting on Proposed Revisions to Forms S-3 and F-3 Regarding Issuances of Non-Convertible Investment Grade Securities, File Number S7-18-08 (Sept. 5, 2008). This letter incorporates our prior comment letters, which contain an in-depth discussion of the issues facing our clients with regard to registration of Non-Variable Insurance Contracts, as well as the impact and undue burdens of not being able to use Forms S-3 and F-3 for our clients.

overriding purpose of all these state insurance regulatory measures is to ensure that the companies are financially secure enough to meet their contractual obligations.

Important state protections include the following:

- In order to be "accredited" with the National Association of Insurance Commissioners ("NAIC"), states must have adopted specific laws and regulations, including laws on liabilities and reserves, capital and surplus requirements, valuations of investments and investment regulations, holding company systems, exam authority, and guaranty funds and receivership. The insurance department must have the regulatory authority to monitor the financial solvency of its domestic insurers. All fifty states and the District of Columbia are currently accredited.
- The state insurance regulatory framework requires companies to maintain sufficient levels of reserves to meet liabilities. The largest liabilities on insurance companies' statutory balance sheets are generally those to meet policyholder obligations. These liabilities must be calculated in accordance with statutory accounting practices, which have standardized methodologies and assumptions. Insurance companies must also have a qualified actuary certify annually that their reserves make adequate provision for the company's obligations to policyholders.
- State insurance regulations also require companies to maintain sufficient levels of capital and surplus. The NAIC has developed, and all states have adopted, standardized risk-based capital ("RBC") formulas, which establish minimum amounts of capital needed based on an insurer's size and risk characteristics (such as asset risk, credit risk, and interest rate risk). The formula and factors that make it up are transparent and provide very little opportunity for discretion. If an insurance company meets the required level, no corrective action must be taken. If, however, the insurance company falls to lower levels of RBC, various remedial actions apply. For small decreases in RBC below the required level, remedial actions may include preparation of a report to the insurance regulator in its state of domicile outlining a comprehensive financial plan that identifies the conditions that contributed to the company's financial condition and lays out proposals to correct the financial problems. If levels continue to decrease, the state insurance regulator eventually has the option, and ultimately the requirement, to take control of the company. RBC is monitored annually by state insurance regulators. We discuss RBC in much greater detail in Appendix B.
- To protect company solvency and assure sufficient liquidity as well as safety, insurance regulators strictly regulate investments made by insurance companies. Generally, premiums received must be invested conservatively, primarily in bonds, treasuries, and other fixed-income securities with a high credit rating. Generally, downgrades in ratings of securities held by the general account result in an automatic increase in required RBC.
- State insurance regulation contains provisions aimed at protecting an insurance company's financial condition from the unregulated activities of any holding company. These regulations require separation of the activities and operations of the holding company from the business of the insurance company subsidiary. For example, there are

limits on affiliate transactions, limits on annual dividends, and advance approval required for changes in control.

- Insurance companies are subject to periodic examinations by state insurance regulators in their state of domicile and states in which they conduct business, including review of their books, records, and operations. Most states require each insurer to be examined at least every three to five years.
- Insurance companies generally must file annual reports with their respective insurance regulators regarding their operations and financial condition. Those reports include audited statutory financial statements that are generally required to be in the form adopted by the NAIC. That form requires, among other things, a report of an independent certified public accountant; the insurance company's balance sheet reporting admitted assets, liabilities, capital, and surplus; statement of operations; statement of cash flows; statement of changes in capital and surplus; and notes to financial statements.
- Policyholders generally stand ahead of all other creditors in liquidation proceedings (including owners of debt instruments issued by an insurance company), under insurance laws and regulations.
- Generally, policyholders are protected by guaranty associations which will pay claims subject to certain limitations in the event an insolvent company's assets are exhausted.
- All insurance contracts must be filed with and approved by state insurance departments to ensure that their terms comply with state law. There are many other substantive requirements applicable to insurance companies, the insurance contracts they issue, and the distribution of those insurance contracts, such as suitability requirements, disclosure requirements, "free look" periods (where owners may rescind a purchase within a specified amount of time), advertising standards, agent licensing and training, and nonforfeiture provisions (which provide a minimum floor below which contract values cannot fall) applicable to certain insurance products.

These regulatory requirements provide a much greater level of investor protection to purchasers of Non-Variable Insurance Contracts than purchasers of other securities.

***Commission Recognition of State Insurance Regulation***

The Commission itself has recognized the important safeguards provided by state insurance departments, which may make federal regulation, in certain respects, duplicative of state regulation. In 2009, the Commission adopted Rule 12h-7 under Securities Exchange Act of 1934 (the "Exchange Act").[4] That Rule exempts securities that do not constitute an equity interest in the insurance company from the periodic reporting requirements of the Exchange Act as long as those securities and their issuers satisfy the conditions of Rule 12h-7. As the Commission recognized in its release adopting Rule 12h-7, state insurance regulation is:

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[4] Indexed Annuities and Certain Other Insurance Contracts, Rel. Nos. 33-8996, 34-59221 (Jan. 8, 2009).

> focused on insurance company solvency and the adequacy of insurers' reserves, with the ultimate purpose of ensuring that insurance companies are financially secure enough to meet their financial obligations. State insurance regulators require insurance companies to maintain certain levels of capital, surplus, and risk-based capital, limit the amount of risk that may be assumed by insurers, and impose requirements with regard to valuation of insurer's 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 regulators . . . . State insurance regulation, like Exchange Act reporting, relates to an entity's financial condition. We are of the view that, in appropriate circumstances, it may be unnecessary for both to apply in the same situation, which may result in duplicative regulation that is burdensome.[5]

The Commission explained that a "key basis for the exemption is that investors are already entitled to the financial condition protections of state law and that, under our federal system of regulation, Exchange Act reporting may be unnecessary."[6] Given that the Commission has recognized the important protections provided by state insurance regulation in the context of Exchange Act reporting requirements, the Commission should recognize those same protections in the context of the ability to use Forms S-3 and F-3 under the circumstances discussed herein.

***Policy Arguments***

Given this greater level of investor protection, and the significant level of regulatory oversight already imposed on issuers of Non-Variable Insurance Contracts, any policy rationale for eliminating the ability of such issuers to rely on Forms S-3 and F-3 should not apply in the context of Non-Variable Insurance Contracts. The Commission would cause undue hardship to a 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 ability to use Forms S-3 or F-3 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.

Our clients instead believe it would be appropriate to allow the use of Forms S-3 and F-3 for insurance companies, where another regulatory scheme provides an additional and substantial (and in many ways duplicative) layer of investor protection which serves as an alternative standard of creditworthiness. Allowing use of these forms by insurance companies, as defined in

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[5] *Id.* (citations omitted).

[6] *Id.*

Section 2(a)(13) of the Securities Act of 1933 (the "Securities Act"),[7] with regard to Non-Variable Insurance Contracts would acknowledge the substantial regulation to which these entities are subject without detracting from the regulatory and policy reasons behind the mandate of the Dodd-Frank Act to eliminate the Investment Grade Transactional Provision.

Our clients also submit that it would be appropriate to allow the use of Forms S-3 and F-3 for insurance companies that rely on Rule 12h-5 under the Exchange Act. Certain insurance companies that issue and register Non-Variable Insurance Contracts are able to suspend Exchange Act reporting obligations based on the existence of a full and unconditional guarantee of those Non-Variable Insurance Contracts by the parent company, which may be an insurance company or an insurance holding company. Both the underlying Non-Variable Insurance Contract and the guarantee thereon (which is also part of the defined term "Non-Variable Insurance Contract" used herein) are registered on the same registration form. Currently, insurance companies relying on Rule 12h-5 must rely on the parent guarantor to satisfy the registrant and transaction requirements in order to use Form S-3 or F-3. Accordingly, it is the guarantee that must be rated as investment grade, instead of the underlying insurance contract (when an investment grade rating is the basis for form eligibility). Given the significant protections provided by insurance regulation on the insurance company registrant (who is the primary obligor on the underlying Non-Variable Insurance Contract), our clients submit that, even if the guarantee is issued by a parent entity that is not an insurance company, both the insurance company subsidiary and the parent guarantor should be able to register the underlying Non-Variable Insurance Contracts and the related guarantee on Form S-3 or F-3.

The Commission asked for comment on whether additional conditions should be imposed if insurance companies were permitted to register Non-Variable Insurance Contracts on Forms S-3 and F-3. We believe that the definition of "insurance company" and the definition of "Non-Variable Insurance Contract" in our proposed Form instructions below impose sufficient conditions on the use of the Forms, and that no additional conditions are necessary. Further, our clients do not see any benefit or purpose to conditioning eligibility on the issuer's parent being eligible to register a primary offering on Form S-3 or F-3.

The Commission also inquired whether permitting insurance companies to register Non-Variable Insurance Contracts on Forms S-3 and F-3 would permit additional insurers to use those forms, even though such insurers previously were not able to qualify for their use, and whether any such expansion was appropriate. The standard being proposed may in fact result in issuers of insurance contracts who do not currently use Form S-3 or F-3 being able to more readily use those Forms. However, this would not encompass all insurance companies, but a much more limited universe of insurers – only those insurance companies that are reporting companies under

[7] 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."

the Exchange Act. Further, these companies may in fact have been eligible to use Form S-3 or F-3 in the future if the existing Investment Grade Transactional Provision remained in effect. Most if not all of these companies have investment grade ratings for their general account and their claims-paying ability. In our experience, the rating for the company tends to carry over to the Non-Variable Insurance Contract being issued if the insurance company undertakes the expense and effort to obtain a rating on the security itself. Accordingly, we would not view our proposed change as necessarily expanding the universe of insurance companies that could, in the future, have registered Non-Variable Insurance Contracts on current Form S-3 or F-3. Regardless, the protections offered by insurance regulation with regard to the financial stability of insurance companies make such a possible expansion appropriate and justifiable under Dodd-Frank's mandate.

***Proposed Amendments to Forms S-3 and F-3***

Our clients propose that Form S-3 be amended to revise the Transactional Requirements in General Instructions I.B.2 as follows:

> 2. *Primary Offerings of Non-Variable Insurance Contracts.*
>
> Non-variable insurance contracts to be offered for cash by or on behalf of an insurance company registrant and/or such insurance company registrant's parent guarantor. "Non-variable insurance contracts" are securities that do not constitute an equity interest in the issuer and are either subject to regulation under state insurance law or are guarantees of securities that are subject to regulation under state insurance law, other than variable annuity and variable life insurance contracts (and guarantees thereon) registered on Form N-3, N-4, N-6, or S-6.

Similarly, our clients propose that Form F-3 be amended to revise the Transactional Requirements in General Instructions I.B.2 as follows:

> 2. *Primary Offerings of Non-Variable Insurance Contracts.*
>
> Non-variable insurance contracts to be offered for cash by or on behalf of an insurance company registrant and/or such insurance company registrant's parent guarantor. "Non-variable insurance contracts" are securities that do not constitute an equity interest in the issuer and are either subject to regulation under state insurance law or are guarantees of securities that are subject to regulation under state insurance law, other than variable annuity and variable life insurance contracts (and guarantees thereon) registered on Form N-3, N-4, N-6, or S-6. For the registrant's fiscal years ending before December 15, 2011, in the case of securities registered pursuant to this paragraph, the financial statements included in this registration statement may comply with Item 17 or 18 of Form 20-F. For the registrant's fiscal years ending on or after December 15, 2011, in the case of securities registered pursuant to this paragraph, the financial statements included in this registration statement must comply with Item 18 of Form 20-F.

***Alternative Suggestions***

Although our clients believe strongly that the extensive state regulatory regime is more than adequate to provide an alternative standard of creditworthiness to satisfy the Commission's obligations under Dodd-Frank, to the extent the Commission, for whatever reason, determines not to adopt our proposal to permit insurance companies to register Non-Variable Insurance Contracts on Form S-3 or F-3, we set forth some additional suggestions for the Commission's consideration in Appendix B.

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We appreciate the opportunity to comment on the Proposing Release and respectfully ask that the Commission adopt amendments to permit insurance companies (and, where applicable, their parent guarantors) to register Non-Variable Insurance Contracts on Forms S-3 and F-3. The extensive state regulatory regime provides an appropriate alternative standard of creditworthiness to support use of Forms S-3 and F-3 by insurance companies (and, where applicable, their parent guarantors) registering Non-Variable Insurance Contracts and fully satisfies the Commission's obligations under Dodd-Frank. If you have any questions or if additional information would be helpful, please contact Steve Roth at 202.383.0158 (steve.roth@sutherland.com) or Mary Payne at 202.383.0698 (mary.payne@sutherland.com).

Respectfully Submitted,

SUTHERLAND ASBILL & BRENNAN LLP

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**APPENDIX A**
**Non-Variable Insurance Contracts**

Certain types of insurance contracts may be deemed to be securities under 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 initial registration).

Insurance companies issue various types of fixed annuity and life insurance contracts – some of which are registered and some of which are not registered in reliance on the Section 3(a)(8) of the Securities Act. These contracts may be issued on a stand-alone basis or as an investment option in a variable contract. Under a typical fixed deferred annuity or life insurance contract, an insurance company guarantees a specified minimum rate of return to contract owners, generally with the potential for additional interest as declared by the company. Alternatively, some fixed deferred annuity or life insurance contracts credit a minimum interest rate plus interest based in part on the movement of one or more financial or other indices, such as the Standard & Poor's 500 Index, and some products provide participation in an index with no guaranteed interest ("indexed contracts"). Most indexed contracts have not been registered as securities under the Securities Act, although a few have been registered based on their specific designs. Deferred annuity or life insurance 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 help 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 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 unlimited MVA generally have been registered as securities under the Securities Act.

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 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.

Fixed annuity and life insurance contracts (including indexed contracts) and stand-alone guaranteed living benefits deemed to be securities under the Securities Act are referred to collectively as "Non-Variable Insurance Contracts" herein. In addition, some insurance companies have obtained full and unconditional guarantees from their parent company on their Non-Variable Insurance Contracts to take advantage of the suspension of Exchange Act reporting pursuant to Rule 12h-5 under the Exchange Act. These guarantees are registered on the same registration statement and thus the same form as the Non-Variable Insurance Contracts. 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. 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.

Other types of Non-Variable Insurance Contracts not described herein that meet this definition may be registered or developed in the future.

## APPENDIX B
## Alternative Proposals

Although our clients submit strongly that the extensive state regulatory regime is more than adequate to provide an alternative standard of creditworthiness to satisfy the Commission's obligations under Dodd-Frank, to the extent the Commission, for whatever reason, determines not to adopt the proposal to permit insurance companies to register Non-Variable Insurance Contracts on Form S-3 or F-3, we have a few additional suggestions for the Commission's consideration:

**Alternative 1:** **Permit Insurance Companies With A Certain Level RBC To Use Forms S-3 And F-3 To Register Non-Variable Insurance Contracts**

To the extent the Commission determines that an additional alternative standard of creditworthiness beyond the extensive state regulatory regime is needed to permit insurance companies to register Non-Variable Insurance Contracts on Form S-3 or F-3, our clients would suggest that the Commission adopt a requirement based on RBC levels. More specifically, the Commission could adopt amendments that only permit insurance companies with RBC at a specified level to register Non-Variable Insurance Contracts on Forms S-3 and F-3. This approach would take advantage of the extensive capital adequacy requirements applicable to insurance companies that already exist, based on the fact that these standards are substantially consistent among jurisdictions, are transparent as to the factors affecting their calculation, and are substantively monitored by state insurance regulators in the relevant jurisdictions.

***Risk-Based Capital Requirements***

Capital adequacy of insurance companies generally is assessed by insurance regulators with reference to risk-based capital or "RBC" standards. RBC is a method developed by the NAIC to measure the minimum amount of capital that an insurance company needs to support its overall business operations. RBC is used to set capital requirements considering the size and degree of risk taken by the insurer. Most U.S. insurance jurisdictions have adopted laws, regulations, or other guidance that is substantially similar to the NAIC's Risk Based Capital (RBC) for Insurers Model Act (the "Model Act").

The following is an overview of the operation of RBC:

- Insurance companies calculate and report RBC amounts annually based on financial statements prepared in accordance with statutory accounting standards, rather than financial statements prepared in accordance with generally accepted accounting principles. Insurance companies must submit a report with their RBC level to the relevant insurance jurisdictions on or before March 1st of each year.
- RBC is uniquely tailored to focus on the material risks applicable to life insurance companies. For example, interest rate risk is included in the RBC formula because it is a material risk affecting many life insurance products. Investment and other asset risks, such as credit risk and concentration risk, are also included in the RBC formula. Specifically, RBC factors in: 1) the risk of default of assets for affiliated investments; 2)

the potential for default of principal and interest or fluctuation in fair value of assets; 3) the surplus needed to provide for excess claims; 4) the risk of losses due to changes in interest rate levels; and 5) business risk based on premium income, annuity considerations, and separate account liabilities. Therefore, RBC is a comprehensive look at the risk profile of an insurer and its products.[8]

- Under the Model Act, there are several levels of RBC, all of which are derived from the Authorized Control Level RBC. The levels of RBC are as follows:

> ✓ **<u>Authorized Control Level RBC</u>** = the number determined under the RBC formula in accordance with the Model Act or similar state law or regulation
>
> ✓ **<u>Company Action Level RBC</u>** = 200% of Authorized Control Level RBC
>
> ✓ **<u>Regulatory Action Level RBC</u>** = 150% of Authorized Control Level RBC
>
> ✓ **<u>Mandatory Control Level RBC</u>** = 70% of Authorized Control Level RBC

- Various remedial and corrective requirements are triggered at each decreasing level of RBC:

    1) **<u>Above Company Action Level RBC</u>:** In general, as long as an insurance company maintains Total Adjusted Capital (as defined in the Model Act) at a level not less than the Company Action Level RBC (or, in certain cases where a company has a negative trend, a slightly higher level), it will avoid the need to take any remedial actions.

    2) **<u>Below Company Action Level RBC, but above the Regulatory Action Level RBC</u>:** If an insurance company does not meet the Company Action Level RBC, but is above the Regulatory Action Level RBC, the insurer must prepare a report to the insurance regulator in its state of domicile outlining a comprehensive financial plan that identifies the conditions that contributed to the company's financial condition and lays out proposals to correct the financial problems (an "Action Plan").

    3) **<u>Below Regulatory Action Level RBC, but above Authorized Control Level RBC</u>:** At levels below the Regulatory Action Level RBC, but above the Authorized Control Level RBC, an insurance company must file an Action Plan, and the state insurance commissioner is required to perform any examination or analysis of the insurer's business and operations that he or she deems necessary. The state insurance commissioner may also issue an order specifying corrective actions that the insurance company must take to address its financial problems.

    4) **<u>Below Authorized Control Level RBC, but above Mandatory Control Level RBC</u>:** At levels below the Authorized Control Level RBC, but above the Mandatory Control Level RBC, the state insurance regulator is authorized (but not

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[8] For an overview of how RBC is calculated, see the NAIC Capital Adequacy Task Force's Risk-Based Capital General Overview (July 15, 2009) at http://www.naic.org/documents/committees_e_capad_RBCoverview.pdf.

required) to take control of the insurer, in addition to the other remedial actions discussed above.

5) **Below Mandatory Control Level RBC:** Finally, if an insurance company falls below the Mandatory Control Level RBC, the state insurance regulator is required to take control of the company.

***Policy Arguments***

Because insurance companies must already calculate and report RBC annually under existing insurance requirements, the existing RBC standard provides an appropriate basis for the Commission to gauge the creditworthiness of an insurance company issuing Non-Variable Insurance Contracts. Compared to the Investment Grade Transactional Provision, our clients would assert that the RBC standard is a more reliable and objective test for reliance on Forms S-3 and F-3. In particular and as discussed above, RBC is largely a formulaic assessment of the unique risk profile of each insurance company. It is based on a formula and factors that are substantially consistent among insurance jurisdictions and are publicly available (providing transparency as to their calculation). This contrasts with investment grade ratings, which vary from rating organization to rating organization and are based on factors that are not disclosed or otherwise publicly available and could change at any time without warning. Moreover, the existence of extensive oversight by insurance regulators and the host of remedies relating to RBC levels under the insurance regulatory regime support the use of RBC standards as a replacement for credit ratings under these registration forms with regard to Non-Variable Insurance Contracts.

Because the Company Action Level RBC is the minimum level of Total Adjusted Capital that an insurance company must maintain to avoid any remedial action, our clients suggest that any such eligibility standard for Forms S-3 and F-3 be an amount significantly higher than that level of RBC. Most insurance companies seeking to maintain appropriate financial strength to consistently offer products would strive to maintain a cushion above Company Action Level RBC at 200% or more. Thus, our clients suggest as an alternative standard that an insurance company be permitted to register Non-Variable Insurance Contracts on Form S-3 or F-3 as long as that insurance company maintains Total Adjusted Capital at a level not less than 200% of the Company Action Level RBC (or double what is generally necessary to avoid any remedial action, as noted above).[9] Because RBC is calculated and reported annually, we suggest that the eligibility instruction reference the RBC for the most recently ended fiscal year. To the extent that RBC for the most recently ended fiscal year has not yet been filed with the relevant insurance jurisdictions (which would generally be the case in January and February), insurers should have the ability to continue to rely on the prior year's RBC.

As under our primary proposal above, this RBC standard may in fact result in issuers of insurance contracts who do not currently use Form S-3 or F-3 being able to use those Forms. However, this would encompass only those insurance companies that are reporting companies

[9] This level can also be expressed as 400% of Authorized Control Level RBC, which is the level at which an insurance commissioner would have the permissive ability to take control of an insurance company.

under the Exchange Act. Moreover, RBC provides an appropriate standard of creditworthiness under Dodd-Frank's mandate.

***Proposed Amendments to Forms S-3 and F-3***

Insofar as the Commission determines to adopt an alternative standard of creditworthiness for insurance companies beyond the existence of state insurance regulation, our clients suggest that Form S-3 be amended to include as a Transaction Requirement in General Instructions I.B. the following or similar language:

> *Primary Offerings of Non-Variable Insurance Contracts by Certain Insurance Companies.*
>
> Non-variable insurance contracts to be offered for cash by or on behalf of an insurance company registrant that has the amount of capital and surplus as shall be necessary to maintain a Total Adjusted Capital at a level not less than 200% of the Company Action Level RBC for that insurance company registrant, calculated as of the end of the most recent fiscal year (or, if Company Action Level RBC for the most recently ended fiscal year has not yet been filed with the insurance company's state of domicile, as of the end of the prior fiscal year) and/or such insurance company registrant's parent guarantor. As used in this section, "non-variable insurance contracts" are securities that do not constitute an equity interest in the issuer and are either subject to regulation under state insurance law or are guarantees of securities that are subject to regulation under state insurance law, other than variable annuity and variable life insurance contracts (and guarantees thereon) registered on Form N-3, N-4, N-6, or S-6; and "Total Adjusted Capital" and "Company Action Level RBC" shall be as defined in the Risk Based Capital (RBC) for Insurers Model Act adopted by the National Association of Insurance Commissioners or any similar law or regulation applicable in the insurance company's state of domicile.

Similarly, insofar as the Commission determines to adopt an alternative standard of creditworthiness for insurance companies beyond the existence of state insurance regulation, our clients suggest that Form F-3 be amended to include as a Transaction Requirement in General Instructions I.B. the following or similar language:

> *Primary Offerings of Non-Variable Insurance Contracts by Certain Insurance Companies.*
>
> Non-variable insurance contracts to be offered for cash by or on behalf of an insurance company registrant that has the amount of capital and surplus as shall be necessary to maintain a Total Adjusted Capital at a level not less than 200% of the Company Action Level RBC for that insurance company registrant, calculated as of the end of the most recent fiscal year (or, if Company Action Level RBC for the most recently ended fiscal year has not yet been filed with the insurance company's state of domicile, as of the end of the prior fiscal year) and/or such insurance company registrant's parent guarantor. As used in this section, "non-

variable insurance contracts" are securities that do not constitute an equity interest in the issuer and are either subject to regulation under state insurance law or are guarantees of securities that are subject to regulation under state insurance law, other than variable annuity and variable life insurance contracts (and guarantees thereon) registered on Form N-3, N-4, N-6, or S-6; and "Total Adjusted Capital" and "Company Action Level RBC" shall be as defined in the Risk Based Capital (RBC) for Insurers Model Act adopted by the National Association of Insurance Commissioners or any similar regulation applicable in the insurance company's state of domicile. For the registrant's fiscal years ending before December 15, 2011, in the case of securities registered pursuant to this paragraph, the financial statements included in this registration statement may comply with Item 17 or 18 of Form 20-F. For the registrant's fiscal years ending on or after December 15, 2011, in the case of securities registered pursuant to this paragraph, the financial statements included in this registration statement must comply with Item 18 of Form 20-F.

**Alternative 2:** **Reduce the Proposed Threshold and Allow Insurance Companies to Aggregate Variable Contracts and Non-Variable Insurance Contracts**

If the Commission declines to adopt an insurance company-specific Form instruction and determines to only adopt the standard in the Proposing Release requiring a threshold amount of publicly issued non-convertible securities other than common equity in order to rely on Form S-3 or F-3, our clients would urge the Commission to:

1) reduce the proposed threshold amount from $1 billion to $500 million and allow companies to count all outstanding publicly issued non-convertible securities other than common equity (instead of limiting the threshold to securities issued in the past three years),
2) permit an insurance company to include variable life insurance and variable annuity contracts supported by separate accounts of the insurance company and registered on Form N-3, N-4, N-6, or S-6 when determining whether that insurance company satisfies the threshold for publicly issued non-convertible securities other than common equity, and
3) permit a registrant to aggregate all publicly issued non-convertible securities other than common equity issued by it and its affiliates that are under common control with the registrant, particularly if the Commission adopts the $1 billion threshold as proposed.[10]

[10] For additional information and support for these suggestions, please see Section IV of Letter to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, from Sutherland Asbill & Brennan LLP Commenting on Proposed Revisions to Forms S-3 and F-3 Regarding Issuances of Non-Convertible Investment Grade Securities, File Number S7-18-08 (Dec. 8, 2009).

**Alternative 3:** **Grandfather Existing Registration Offerings**

In the event the Commission determines to maintain the broad scope of the current proposal and does not adopt any of the prior suggestions, our clients 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. More specifically, to the extent the Commission adopts the proposed revisions to Forms S-3 and F-3, and does not adopt an insurance company-specific Form instruction, our clients 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.[11]

[11] If the Commission is unwilling to extend such ongoing relief to existing continuous offerings, our clients 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. Our clients recommend that any required conversion occur no earlier than one year 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 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. Furthermore, this additional time would be needed for any foreign private issuer or subsidiary thereof that may be required to convert its financial statements to comply with the more extensive GAAP reconciliation required by Item 18 of Form 20-F.