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(vii) Any additional charge assessed specifically for any incidental insurance benefits which do not vary in relation to the performance of the separate account;

(viii) Any additional charge, in the nature of an interest or service charge or administrative fee, assessed when payments are made more frequently than annually;

(ix) For a participating variable life insurance contract, a deduction for dividends to be paid or credited in accordance with the dividend scale in effect on the issue date of the contract assuming a gross annual investment return for the separate account which funds such contract of 4 percent after deduction for any Federal income taxes, which deduction may be determined pursuant to either of the following methods, provided that the same method must be applied with respect to each payment under the contract:

(A) The actuarial level annual equivalent of dividends to be paid or credited over the period described in paragraph (b)(13)(i) of this section, based upon the mortality, interest and lapse assumptions used in computing the dividend scale for such contract multiplied by the fraction of the contract year for which the payment is made; or

(B) That portion of the dividend to be paid for the contract year which does not depend on the making of additional payments.

(5) *Assumed investment rate* is the rate of investment return specified in the contract which would be required to be credited to a variable life insurance contract, after deduction of charges for Federal income taxes, investment management fees, portfolio transaction expenses and mortality and expense guarantees, to maintain the variable death benefit equal at all times to the amount of death benefit, other than incidental insurance benefits, which would be payable pursuant to the variable life insurance contract if the death benefit did not vary according to the investment experience of the separate account.

(6) *Variable death benefit* is the amount of death benefit, other than incidental insurance benefits, payable under a variable life insurance contract

which varies to reflect the investment performance of the separate account, and which would be payable in the absence of the minimum death benefit.

(7) *Payment*, as used in paragraphs (b)(13)(i), (b)(13)(ii) and (b)(13)(v)(A) of this section and in sections 27(a)(2) and 27(h)(2) solely with respect to variable life insurance contracts, means the gross premium payment made less any portion of such gross premium charged for or attributable to the items specified in paragraphs (c)(4)(vi), (vii) and (viii) of this section. "Payment," as used in any other section of the Rule, means the gross premiums paid or payable for the variable life insurance contract.

(Secs. 6(c) and 38(a) of the Act (15 U.S.C. 80a-6(c) and 80a-37(a), respectively))

[41 FR 47027, Oct. 27, 1976; 41 FR 52668, Dec. 1, 1976, as amended at 49 FR 1477, Jan. 12, 1984; 67 FR 43536, June 28, 2002]

§ 270.6e-3(T) Temporary exemptions for flexible premium variable life insurance separate accounts.

(a) A separate account, and its investment adviser, principal underwriter and depositor, shall, except as provided in paragraph (b) of this Rule, comply with all provisions of the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) and the rules under it that apply to a registered investment company issuing periodic payment play certificates if:

(1) It is a separate account within the meaning of section 2(a)(37) of the Act (15 U.S.C. 80a-2(a)(37)) and is established and maintained by a life insurance company pursuant to the insurance laws or code of (i) any state or territory of the United States or the District of Columbia, or (ii) Canada or any province thereof, if it complies with Rule 7d-1 (17 CFR 270.7d-1) under the Act (the "life insurer");

(2) The assets of the separate account are derived solely from (i) the sale of flexible premium variable life insurance contracts ("flexible contracts") as defined in paragraph (c)(1) of this Rule, (ii) the sale of scheduled premium variable life insurance contracts ("scheduled contracts") as defined in paragraph (c)(1) of Rule 6e-2 (17 CFR 270.6e-2) under the Act, (iii) funds corresponding to dividend accumulations

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with respect to such contracts, and (iv) advances made by the life insurer in connection with the operation of such separate account;

(3) The separate account is not used for variable annuity contracts or other contract liabilities not involving life contingencies;

(4) The separate account is legally segregated, and that part of its assets with a value approximately equal to the reserves and other contract liabilities for such separate account are not chargeable with liabilities arising from any other business of the life insurer;

(5) The value of the assets of the separate account, each time adjustments in the reserves are made, is at least equal to the reserves and other contract liabilities of the separate account, and at all other times approximately equals or exceeds the reserves and liabilities; and

(6) The investment adviser of the separate account is registered under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.).

(b) A separate account that meets the requirements of paragraph (a) of this Rule, and its investment adviser, principal underwriter and depositor shall be exempt with respect to flexible contracts funded by the separate account from the following provisions of the Act:

(1) Section 2(a)(35) (15 U.S.C. 80a-2(a)(35)), *Provided, however*, That the term "sales load," as used in the Act and rules under it, shall have the meaning set forth in paragraph (c)(4) of this Rule. *And provided further*, That in connection with any sales load deducted pursuant to paragraph (d)(1) of this Rule, the separate account and other persons shall be exempt from sections 2(a)(32) (15 U.S.C. 80a-2(a)(32)), 12(b) (15 U.S.C. 80a-12(b)), 22(c) (15 U.S.C. 80a-22(c)), 26(a) (15 U.S.C. 80a-26(a)), 27(c)(1) (15 U.S.C. 80a-27(c)(1)), 27(c)(2) (15 U.S.C. 80a-27(c)(2)), and 27(d) (15 U.S.C. 80a-27(d)), and Rules 12b-1 (17 CFR 270.12b-1) and 22c-1 (17 CFR 270.22c-1).

(2) Section 7 (15 U.S.C. 80a-7).

(3) Section 8 (15 U.S.C. 80a-8), to the extent that:

(i) For purposes of paragraph (a) of section 8, the separate account filed with the Commission a notification on

Form N-6EI-1 (17 CFR 274.301) which identifies the separate account; and

(ii) For purposes of paragraph (b) of section 8, the separate account shall file with the Commission the form designated by the Commission within ninety days after filing the notification on Form N-6EI-1, *Provided, however*, That if the fiscal year of the separate account end within this ninety day period, the form may be filed within ninety days after the end of such fiscal year.

(4) Section 9 (15 U.S.C. 80a-9), to the extent that:

(i) The eligibility restrictions of section 9(a) shall not apply to persons who are officers, directors or employees of the life insurer or its affiliates and who do not participate directly in the management or administration of the separate account or in the sale of flexible contracts; and

(ii) A life insurer shall be ineligible under paragraph (3) of section 9(a) to serve as investment adviser, depositor of or principal underwriter for the separate account only if an affiliated person of such life insurer, ineligible by reason of paragraphs (1) or (2) of section 9(a), participates directly in the management or administration of the separate account or in the sale of flexible contracts.

(5) Section 13(a) (15 U.S.C. 80a-13(a)), to the extent that:

(i) An insurance regulatory authority may require pursuant to insurance law or regulation that the separate account make (or refrain from making) certain investments which would result in changes in the sub-classification or investment policies of the separate account;

(ii) Changes in the investment policy of the separate account initiated by its contractholders or board of directors may be disapproved by the life insurer, if the disapproval is reasonable and is based on a good faith determination by the life insurer that:

(A) The change would violate state law; or

(B) The change would not be consistent with the investment objectives of the separate account or would result in the purchase of securities for the separate account which vary from the

general quality and nature of investments and investment techniques used by other separate accounts of the life insurer or of an affiliated life insurance company with similar investment objectives;

(iii) Any action described in paragraph (b)(5)(i) or (ii) of this Rule and the reasons for it shall be disclosed in the next communication to contractholders, but in no case, later than twelve months from the date of such action.

(6) Section 14(a) (15 U.S.C. 80a-14(a)), *Provided*, That until the separate account has total assets of at least \$100,000, the life insurer shall have (i) a combined capital and surplus, if a stock company, or (ii) an unassigned surplus, if a mutual company, of not less than \$1,000,000 as set forth in the balance sheet of such life insurer contained in the registration statement for flexible contracts filed under the Securities Act of 1933 (15 U.S.C. 77a et seq.) (the "1933 Act").

(7)(i) Section 15(a) (15 U.S.C. 80a-15(a)), to the extent it requires that the initial written contract with the investment adviser shall have been approved by the vote of a majority of the outstanding voting securities of the registered investment company, *Provided*, That:

(A) The investment adviser is selected and a written contract is entered into before the effective date of the 1933 Act registration statement for flexible contracts, and that the terms of the contract are fully disclosed in the registration statement, and

(B) A written contract is submitted to a vote of contractholders at their first meeting and within one year after the effective date of the 1933 Act registration statement, unless the Commission upon written request and for good cause shown extends the time for the holding of such meeting;

(ii) Sections 15 (a), (b) and (c), to the extent that:

(A) An insurance regulatory authority may disapprove pursuant to insurance law or regulation any contract between the separate account and an investment adviser or principal underwriter;

(B) Changes in the principal underwriter for the separate account initi-

ated by contractholders or the board of directors of the separate account may be disapproved by the life insurer, *Provided*, That such disapproval is reasonable;

(C) Changes in the investment adviser of the separate account initiated by contractholders or the board of directors of the separate account may be disapproved by the life insurer, *Provided*, That such disapproval is reasonable and is based on a good faith determination by the life insurer that:

(1) The proposed investment advisory fee will exceed the maximum rate specified in any flexible contract that may be charged against the assets of the separate account for such services; or

(2) The proposed investment adviser may be expected to employ investment techniques which vary from the general techniques used by the current investment adviser to the separate account, or advise the purchase or sale of securities which would not be consistent with the investment objectives of the separate account, or which would vary from the quality and nature of investments made by other separate accounts with similar investment objectives of the life insurer or an affiliated life insurance company;

(D) Any action described in paragraph (b)(7)(ii) (A), (B) or (C) of this Rule and the reasons for it shall be disclosed in the next communication to contractholders, but in no case, later than twelve months from the date of such action.

(8) Section 16(a) (15 U.S.C. 80a-16(a)), to the extent that:

(i) Directors of the separate account serving before the first meeting of the account's contractholders are exempt from the requirement of section 16(a) that they be elected by the holders of outstanding voting securities of the account at an annual or special meeting called for that purpose, *Provided*, That:

(A) Such persons were appointed directors of the account by the life insurer before the effective date of the 1933 Act registration statement for flexible contracts and are identified in the registration statement (or are replacements appointed by the life insurer for any such persons who have become unable to serve as directors), and

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(B) An election of directors for the account is held at the first meeting of contractholders and within one year after the effective date of the 1933 Act registration statement for flexible contracts, unless the time for holding the meeting is extended by the Commission upon written request and for good cause shown;

(ii) A member of the board of directors of the separate account may be disapproved or removed by an insurance regulatory authority if the person is not eligible to be a director of the separate account under the law of the life insurer's domicile.

(9) Section 17(f) (15 U.S.C. 80a-17(f)), to the extent that the securities and similar investments of a separate account organized as a management investment company may be maintained in the custody of the life insurer or of an affiliated life insurance company, *Provided, That:*

(i) The securities and similar investments allocated to the separate account are clearly identified as owned by the account, and the securities and similar investments are kept in the vault of an insurance company which meets the qualifications in paragraph (b)(9)(i) of this Rule, and whose safekeeping function is supervised by the insurance regulatory authorities of the jurisdiction in which the securities and similar investments will be held;

(ii) The insurance company maintaining such investments must file with an insurance regulatory authority of a state or territory of the United States or the District of Columbia an annual statement of its financial condition in the form prescribed by the National Association of Insurance Commissioners, must be subject to supervision and inspection by such authority and must be examined periodically as to its financial condition and other affairs by such authority, must hold the securities and similar investments of the separate account in its vault, which vault must be equivalent to that of a bank which is a member of the Federal Reserve System, and must have a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of not less than \$1,000,000 as set forth in its most

recent annual statement filed with such authority;

(iii) Access to such securities and similar investments shall be limited to employees of the Commission, representatives of insurance regulatory authorities, independent public accountants retained by the separate account (or on its behalf by the life insurer), accountants for the life insurer, and to no more than 20 persons authorized by a resolution of the board of directors of the separate account, which persons shall be directors of the separate account, officers and responsible employees of the life insurer or officers and responsible employees of the affiliated life insurance company in whose vault the investments are kept (if applicable), and access to such securities and similar investments shall be had only by two or more such persons jointly, at least one of whom shall be a director of the separate account or officer of the life insurer;

(iv) The requirement in paragraph (b)(9)(i) of this Rule that the securities and similar investments of the separate account be maintained in the vault of a qualified insurance company shall not apply to securities deposited with insurance regulatory authorities or deposited in accordance with any rule under section 17(f), or to securities on loan which are collateralized to the extent of their full market value, or to securities hypothecated, pledged, or placed in escrow for the account of such separate account in connection with a loan or other transaction authorized by specific resolution of the board of directors of the separate account, or to securities in transit in connection with the sale, exchange, redemption, maturity or conversion, the exercise of warrants or rights, assents to changes in terms of the securities, or to other transactions necessary or appropriate in the ordinary course of business relating to the management of securities;

(v) Each person when depositing such securities or similar investments in or withdrawing them from the depository or when ordering their withdrawal and delivery from the custody of the life insurer or affiliated life insurance company, shall sign a notation showing (A)

the date and time of the deposit, withdrawal or order, (B) the title and amount of the securities or other investments deposited, withdrawn or ordered to be withdrawn, and an identification thereof by certificate numbers or otherwise, (C) the manner of acquisition of the securities or similar investments deposited or the purpose for which they have been withdrawn, or ordered to be withdrawn, and (D) if withdrawn and delivered to another person, the name of such person. The notation shall be sent promptly to an officer or director of the separate account or the life insurer designated by the board of directors of the separate account who is not himself permitted to have access to the securities or investments under paragraph (b)(9)(iii) of this Rule. The notation shall be on serially numbered forms and shall be kept for at least one year;

(vi) The securities and similar investments shall be verified by complete examination by an independent public accountant retained by the separate account (or on its behalf by the life insurer) at least three times each fiscal year, at least two of which shall be chosen by the accountant without prior notice to the separate account. A certificate of the accountant stating that he has made an examination of such securities and investments and describing the nature and extent of the examination shall be sent to the Commission by the accountant promptly after each examination;

(vii) Securities and similar investments of a separate account maintained with a bank or other company whose functions and physical facilities are supervised by federal or state authorities under any arrangement whereby the directors, officers, employees or agents of the separate account or the life insurer are authorized or permitted to withdraw such investments upon their mere receipt are deemed to be in the custody of the life insurer and shall be exempt from the requirements of section 17(f) so long as the arrangement complies with all provisions of this paragraph (b)(9), except that such securities will be maintained in the vault of a bank or other company rather than the vault of an insurance company.

(10) Section 18(i) (15 U.S.C. 80a-18(i)), to the extent that:

(i) For the purposes of any section of the Act which provides for the vote of securityholders on matters relating to the investment company:

(A) Flexible contractholders shall have one vote for each \$100 of cash value funded by the separate account, with fractional votes allocated for amounts less than \$100;

(B) The life insurer shall have one vote for each \$100 of assets of the separate account not otherwise attributable to contractholders under paragraph (b)(10)(i)(A) of this Rule, with fractional votes allocated for amounts less than \$100, *Provided*, That after the commencement of sales of flexible contracts, the life insurer shall cast its votes for and against each matter which may be voted upon by contractholders in the same proportion as the votes cast by contractholders; and

(C) The number of votes to be allocated shall be determined as of a record date not more than 90 days before any meeting at which such vote is held, *Provided*, That if a quorum is not present at the meeting, the meeting may be adjourned for up to 60 days without fixing a new record date;

(ii) The requirement of this section that every share of stock issued by a registered management investment company (except a common-law trust of the character described in section 16(c) (15 U.S.C. 80a-16(c))) shall be a voting stock and have equal voting rights with every other outstanding voting stock shall not be deemed to be violated by actions specifically permitted by any provisions of this Rule.

(11) Section 19 (15 U.S.C. 80a-19), to the extent that the provisions of this section shall not apply to any dividend or similar distribution paid or payable under provisions of participating flexible contracts.

(12) Sections 22(c), 22(d) (15 U.S.C. 80a-22(d)), 22(e) (15 U.S.C. 80a-22(e)), and 27(c)(1) and Rule 22c-1 to the extent:

(i) The cash value of each flexible contract shall be computed in accordance with Rule 22c-1(b) under the Act; *Provided, however*, That where actual computation is not necessary for the operation of a particular contract, then

the cash value of that contract must only be capable of computation; *And provided further*, That to the extent the calculation of the cash value reflects deductions for the cost of insurance and other insurance benefits or administrative expenses and fees or sales loads, such deductions need only be made at such times as specified in the contract or as necessary for compliance with insurance laws and regulations; and

(ii) The death benefit, unless required by insurance laws and regulations, shall be computed on any day that the investment experience of the separate account would affect the death benefit under the terms of the contract provided that such terms are reasonable, fair, and nondiscriminatory;

(iii) Necessary to comply with this Rule or with insurance laws and regulations and established administrative procedures of the life insurer for issuance, increases in or additions of insurance benefits, transfer and redemption of flexible contracts, including, but not limited to, premium rate structure and premium processing, insurance underwriting standards, and the particular benefit afforded by the contract, *Provided, however*, That any procedure or action shall be reasonable, fair and not discriminatory to the interests of the affected contract-holders and to all other holders of contracts of the same class or series funded by the separate account, *And provided further*, That any such action shall be disclosed in the form filed by the separate account with the Commission under paragraph (b)(3)(ii) of this Rule.

(13) Section 27 (15 U.S.C. 80a-27), to the following extent:

(i) Section 27(a)(1) (15 U.S.C. 80a-27(a)(1)), 27(h)(1) (15 U.S.C. 80a-27(h)(1)), and 27(h)(4) (15 U.S.C. 80a-27(h)(4)), to the extent that sales load, as defined in paragraph (c)(4) of this Rule, deducted does not exceed that permitted by either paragraph (b)(13)(i)(A) or (b)(13)(i)(B) of this section:

(A) 9 per centum of the sum of the guideline annual premiums that would be paid during the period equal to the lesser of 20 years or the anticipated life expectancy of the insured named in the contract based on the 1980 Commis-

sioners Standard Ordinary Mortality Table, *Provided*, That this paragraph (b)(13)(i)(A) shall not prohibit deduction of sales load, in any manner permitted by this Rule, from payments made in excess of the sum of the guideline annual premiums that would be paid during the lesser of 20 years or the anticipated life expectancy of the insured based on the 1980 Commissioners Standard Ordinary Mortality Table; or

(B) 9 per centum of payments made thereon; *Provided*, That the separate account elects by written notice to the Commission to be governed (with respect to each class of flexible contract offered) by either paragraph (b)(13)(i)(A) or (B); *Provided, however*, That for each class of flexible contract that requires more than four guideline annual premiums within the first two contract periods following issuance of the contract or of an increase in or addition of insurance benefits (within the meaning of paragraph (d)(2) of this section), the separate account must elect to be governed by paragraph (b)(13)(i)(B) of this section.

(ii) Sections 27(a)(3) (15 U.S.C. 80a-27(a)(3)) and 27(h)(3) (15 U.S.C. 80a-27(h)(3)), *Provided*, That the proportionate amount of sales load deducted from any payment shall not exceed the proportionate amount deducted from any prior payment unless an increase is caused by reductions in the annual cost of insurance, or a reduction in the sales load deducted from amounts transferred to a flexible contract from another plan of insurance;

(iii) Sections 27(c)(2), 26(a)(1) (15 U.S.C. 80a-26(a)(1)), and 26(a)(2) (15 U.S.C. 80a-26(a)(2)), to the extent necessary to permit the actions described in paragraphs (A) through (F) of this section, *Provided*, That the life insurer complies with all other applicable provisions of section 26 as if it were a trustee, depositor or custodian for the separate account; files with the insurance regulatory authority of a state or territory of the United States or of the District of Columbia an annual statement of its financial condition in the form prescribed by the National Association of Insurance Commissioners, which most recent statement indicates

that it has a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of not less than \$1,000,000; and is examined from time to time by the insurance regulatory authority of such state, territory or District of Columbia as to its financial condition and other affairs and is subject to supervision and inspection with respect to its separate account operations.

(A) Payment of a fee to the life insurer, or to any affiliated person or agent of the insurer, for bookkeeping or other administrative services provided to the separate account, or for administrative services or expenses incurred in underwriting, issuing, and maintaining flexible contracts, *Provided*, That the fee is not greater than the expenses, without profit:

(1) Actually paid by the life insurer for the services provided; and

(2) Increased by the value of any services provided directly by the life insurer, as determined in accordance with generally accepted accounting principles consistently applied.

The standard set forth in this paragraph shall be applied as follows: if the separate account reserves the right to increase the fee, the fee shall not exceed the cost of the services to be provided for one year; or if the fee is guaranteed not to increase for a specified period of time, the fee shall not exceed the average expected cost of the services to be provided during the period of the guarantee;

(B) The holding of the assets of the separate account by the life insurer without a trust indenture or other such instrument;

(C) When the separate account is organized as a unit investment trust, the holding of the securities of any registered management investment company which offers its shares to the separate account in uncertificated form;

(D) When the separate account is organized as a management investment company, the holding of its assets in any manner permitted by paragraph (b)(9) of this Rule or by section 17(f) or the rules under it;

(E) The deduction of premium or other taxes imposed by any state or other governmental entity, the cost of insurance, charges assessed for inci-

dental insurance benefits or if the insured does not meet standard underwriting requirements, and, if the separate account is organized as a management investment company, an investment advisory fee;

(F) The deduction of a charge for mortality, expense, and any guaranteed death benefit risks assumed by the life insurer under the flexible contracts (collectively, a "risk charge"), *Provided*, That the registration statement under the 1933 Act for flexible contracts includes:

(1) A representation that this paragraph is being relied upon;

(2) A representation that the level of the risk charge either is:

(i) Within the range of industry practice for comparable flexible or scheduled contracts, or

(ii) Reasonable in relation to the risks assumed by the life insurer under the contracts;

(3) A brief description of the methodology used to support the representation made in response to paragraph (b)(13)(iii)(F)(2) of this Rule and an undertaking to keep and make available to the Commission upon request the documents used to support that representation;

(4) A representation that either:

(i) The proceeds from explicit sales loads will be sufficient to cover the expected costs of distributing the flexible contracts; or

(ii)(A) The life insurer has concluded that there is a reasonable likelihood that the distribution financing arrangement of the separate account will benefit the separate account and contractholders and will keep and make available to the Commission on request a memorandum setting forth the basis for this representation; and

(B) If the separate account is organized as a management investment company, a representation that the account will have a board of directors, a majority of whom are not interested persons of the separate account, formulate and approve any plan under Rule 12b-1 to finance distribution expenses. If the separate account is organized as a unit investment trust, a representation that the account will invest only in management investment companies which have undertaken to have a board

of directors, a majority of whom are not interested persons of the company, formulate and approve any plan under Rule 12b-1 to finance distribution expenses.

Notwithstanding the provisions of this paragraph (b)(13)(iii)(F), no risk charge may be deducted in reliance thereupon if the registration statement or amendment thereto which initially sets forth the deduction of such charge or its increase becomes effective by lapse of time pursuant to section 8(a) of the 1933 Act or Rule 485 (17 CFR 230.485) thereunder. Such charge shall be disclosed in the prospectus and shall not be less than fifty per centum of the maximum charge for risk assumption as disclosed in the prospectus and as provided for in the contract. Any separate account organized under the Act as a management investment company and deducting a risk charge pursuant to this section shall be exempt from section 12(b) and Rule 12b-1 thereunder to the extent that monies derived from the risk charge may be used to finance distribution of the flexible contracts;

(iv) Sections 27(c)(1) and 27(d), and sections 2(a)(32) and 22(c) and Rule 22c-1 thereunder, to the extent that:

(A) Such sections require that the flexible contract be redeemable or provide for a refund in cash, *Provided*, That the contract provides for election by the contractholder of a cash surrender value or certain non-forfeiture and settlement options which are required or permitted by the insurance law or regulation of the jurisdiction in which the contract is offered, *And provided further*, That unless required by the insurance law or regulation of the jurisdiction in which the contract is offered or unless elected by the contractholder, the contract shall not provide for the automatic imposition of any option, including, but not limited to, an automatic premium loan, which would involve the accrual or payment of an interest or similar charge.

(B) Notwithstanding the provisions of paragraph (b)(13)(iv)(A) of this Rule, if the amounts available under the contract to pay the charges due under the contract on any contract processing day are less than such charges due, the contract may provide that the cash surrender value (and any excess paid

for sales loading not used to keep the contract in force pursuant to paragraph (b)(13)(iv)(B)(2) of this Rule) shall be applied to purchase a non-forfeiture option specified by the life insurer in such contract, *Provided*, That the contract also provides that:

(1) Contract processing days occur not less frequently than monthly, and

(2) the amount of any excess paid for sales loading (as provided in paragraph (b)(13)(v)(A) of this Rule) shall first be applied to keep the contract in force, *Provided, however*, That if the contractholder subsequently makes a payment, the life insurer may recover such excess loading;

(C) Subject to other provisions of this Rule, sales loads and administrative expenses or fees may be deducted upon redemption.

(v) Section 27(d), *Provided*, That the flexible contract gives the holder thereof the right to:

(A) Surrender the contract at any time during the first 24 months after issuance and receive in cash an amount not less than the sum of the present value of his contract which is the cash surrender value next computed after receipt by the life insurer of the request for surrender in proper form, plus, an amount which is a refund of any excess paid for sales loading prior to or in connection with the surrender. The amount of sales loading to be refunded shall be equal to that part of the sales loading in excess of (1) the sum of 30 per centum of payments in aggregate amount less than or equal to one guideline annual premium, plus 10 per centum of payments in aggregate amount greater than one guideline annual premium but not more than two guideline annual premiums, and (2) 9 per centum of each payment made in excess of two guideline annual premiums;

(B) Convert the contract at any time during the first 24 months after issuance, so long as the contract is in force, to a life insurance policy on the life of the insured under a plan of insurance (other than a plan involving a flexible contract as defined in paragraph (c)(1) of this Rule or a scheduled contract as defined in paragraph (c)(1) of Rule 6e-2) specified in the contract,

issued by the life insurer or by an affiliated life insurance company, which provides for (1) at the election of the contractholder, either the same death benefit or the same net amount at risk as the flexible contract at the time of conversion and (2) premiums (or cost of insurance or other charges, “charges”) if such plan of insurance provides for flexible premiums) which are based on the same issue age and risk classification of the insured as the flexible contract. The conversion shall be subject to an equitable adjustment in payments and cash values to reflect variances, if any, in the payments (or charges), dividends, and cash values under the flexible contract and the new policy. The method of computing such adjustment shall be filed with the Commission as an exhibit to the form required under paragraph (b)(3)(ii) of this Rule;

(vi) A depositor or principal underwriter for a flexible contract sold subject to section 27(d) or section 27(f), or both, shall be exempt from the requirements of Rule 27d-1 (17 CFR 270.27d-1) if an insurance company undertakes in writing to guarantee the performance of all obligations of such depositor or principal underwriter under sections 27(d) and 27(f) to refund charges, and such insurance company, depositor and principal underwriter comply with all provisions of Rule 27d-2 (17 CFR 270.27d-2);

(vii) Section 27(e) [15 U.S.C. 80a-27(e)] and Rule 27e-1 (17 CFR 270.27e-1) thereunder, to the extent that the separate account and the depositor and principal underwriter therefor, when such persons are subject to paragraph (b)(13)(v)(A) of this Rule, are required to provide a notice of right of surrender and refund to holders of flexible contracts, if the life insurer or a duly authorized agent provides a notice of surrender and refund rights on a written document containing information comparable to that required by Form N-27I-1 (17 CFR 274.301) to the holder of any flexible contract under which a refund may be available, *Provided*, That such notice shall be sent by first class mail or personal delivery to the contractholder:

(A) Upon issuance of the flexible contract, which notice may be sent to-

gether with the issued contract and an illustration, in a form appropriate for inclusion in the prospectus for the flexible contract, of guideline annual premiums, death benefits and cash surrender values applicable to the age, sex and underwriting classification of the insured; and

(B) On any contract processing day, prior to the expiration of the surrender and refund right provided in paragraph (b)(13)(v)(A) of this Rule, on which the amounts available under the contract on such day to pay the charges authorized by the contract are less than the amount necessary to keep the contract in force until the next following contract processing day. This notice may be sent together with any notice required by applicable state authority to be sent in these circumstances; *Provided, however*, That the right of surrender and refund provided by paragraph (b)(13)(v)(A) of this Rule shall not expire until not less than 15 days after the mailing or receipt, if personally delivered, of the last notice referred to in this paragraph (b)(13)(vii)(B) of this section;

(viii) Section 27(f) and Rule 27f-1 thereunder (17 CFR 270.27f-1), *Provided*, That:

(A) The contractholder may elect to return the contract within 45 days of the date of the execution of the application for insurance, or within 10 days after receipt of the issued contract by the contractholder, or within 10 days after mailing or personal delivery of the notice of the right of withdrawal referred to in paragraph (b)(13)(viii)(C) of this Rule, whichever is later, and receive a refund equal to the sum of (1) the difference between the payments made, including any contract fees or other charges, and the amounts allocated to the separate account under the contract, (2) the value of the amounts allocated to the separate account under the contract on the date the returned contract is received by the insurer or its agent, and (3) any contract fees and other changes imposed on the amounts allocated to such separate account, *Provided, however*, That if state law or the contract so require, the redeeming contractholder shall receive a refund of all payments made for such contract;

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(B) A refund in accordance with paragraph (b)(13)(viii)(A) of this Rule to redeeming contractholders will not in any way affect the interests in the separate account or the benefits of other flexible or scheduled contractholders;

(C) Notice of such withdrawal right and a statement of contract fees and other charges on a written document containing information comparable to that required by Form N-271-2 (17 CFR 274.303) is sent by first class mail or personal delivery to the contractholder, which notice and statement may be accompanied by the flexible contract, and an illustration, in a form appropriate for inclusion in the prospectus for the flexible contract, of guideline annual premiums (or, if the contract is subject to paragraph (b)(13)(i)(B), payments), death benefits and cash surrender values applicable to the age, sex and underwriting classification of the insured;

(D) The contractholder, in conjunction with the notice of withdrawal right referred to in paragraph (b)(13)(viii)(C) of this section, is provided with a form of request for refund of the amount computed in accordance with paragraph (b)(13)(viii)(A), which form shall set forth:

(1) Instructions as to the manner in which a refund may be obtained, including the address to which the request form should be mailed; and

(2) Spaces necessary to indicate the date of such request, the contract number and the signature of the contractholder; and

(E) Within 7 days from the receipt of such duly executed timely request for refund, the life insurer will refund in cash to the contractholder the amount computed in accordance with paragraph (b)(13)(viii)(A) of this Rule; and

(ix) Solely for purposes of paragraphs (b)(13)(v) and (b)(13)(viii) of this Rule, the postmark date on the envelope containing the flexible contract shall determine whether such contract has been submitted for surrender, conversion, or withdrawal within the designated period.

(14) Section 32(a)(2) (15 U.S.C. 80a-31(a)(2)), *Provided*, That:

(i) The independent public accountant is selected before the effective date of the 1933 Act registration statement

for flexible contracts, and the identity of the accountant is disclosed in the registration statement, and

(ii) The selection of the accountant is submitted for ratification or rejection to flexible contractholders at their first meeting and within one year after the effective date of the 1933 Act registration statement for flexible contracts, unless the time for holding the meeting is extended by order of the Commission.

(15) If the separate account is organized as a unit investment trust, all the assets of which consist of the shares of one or more registered management investment companies which offer their shares exclusively to separate accounts of the life insurer, or of any affiliated life insurance company, offering either scheduled contracts or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company, or which offer their shares to any such life insurance company in consideration solely for advances made by the life insurer in connection with the operation of the separate account; *Provided*, That: the board of directors of each investment company, constituted with a majority of disinterested directors, will monitor such company for the existence of any material irreconcilable conflict between the interests of variable annuity contractholders and scheduled or flexible contractholders investing in such company; the life insurer agrees that it will be responsible for reporting any potential or existing conflicts to the directors; and if a conflict arises, the life insurer will, at its own cost, remedy such conflict up to and including establishing a new registered management investment company and segregating the assets underlying the variable annuity contracts and the scheduled or flexible contracts; *Then*:

(i) The eligibility restrictions of section 9(a) shall not apply to those persons who are officers, directors or employees of the life insurer or its affiliates who do not participate directly in the management or administration of any registered management investment company described in this paragraph (b)(15);

(ii) The life insurer shall be ineligible under paragraph (3) of section 9(a) to serve as investment adviser or principal underwriter for any registered management investment company described in this paragraph (b)(15) only if an affiliated person of such life insurer, ineligible by reason of paragraphs (1) or (2) of section 9(a), participates in the management or administration of such company;

(iii) For purposes of any section of the Act which provides for the vote of securityholders on matters relating to the separate account or the underlying registered investment company, the voting provisions of paragraph (b)(10)(i) and (ii) of this Rule apply, *Provided*, That:

(A) The life insurer may vote shares of the registered management investment companies held by the separate account without regard to instructions from contractholders of the separate account if such instructions would require such shares to be voted:

(1) To cause such companies to make (or refrain from making) certain investments which would result in changes in the sub-classification or investment objectives of such companies or to approve or disapprove any contract between such companies and an investment adviser when required to do so by an insurance regulatory authority subject to the provisions of paragraphs (b)(5)(i) and (b)(7)(ii)(A) of this Rule; or

(2) In favor of changes in investment objectives, investment adviser or principal underwriter for such companies subject to the provisions of paragraphs (b)(5)(ii) and (b)(7)(ii) (B) and (C) of this Rule;

(B) Any action taken in accordance with paragraph (b)(15)(iii)(A)(1) or (2) of this section and the reasons therefor shall be disclosed in the next report contractholders made under section 30(e) (15 U.S.C. 80a-29(e)) and § 270.30e-2;

(iv) Any registered management investment company established by the life insurer and described in this paragraph (b)(15) shall be exempt from section 14(a), *Provided*, That until the company has total assets of at least \$100,000, the life insurer shall have at least the minimum net worth pre-

scribed in paragraph (b)(6) of this Rule; and

(v) Any registered management investment company established by the life insurer and described in this paragraph (b)(15) shall be exempt from sections 15(a), 16(a), and 32(a)(2), to the extent prescribed by paragraphs (b)(7)(i), (b)(8)(i), and (b)(14) of this Rule, *Provided*, That the company complies with the conditions set forth in those paragraphs as if it were a separate account.

(c) When used in this Rule:

(1) *Flexible premium variable life insurance contract* means a contract of life insurance, subject to regulation under the insurance laws or code of every jurisdiction in which it is offered, funded by a separate account of a life insurer, which contract provides for:

(i) Payments which are not fixed by the life insurer as to both timing and amount: *Provided, however*, That the life insurer may fix the timing and minimum amount of payments for the first two contract periods following issuance of the contract or of an increase in or addition of insurance benefits (within the meaning of paragraph (d)(2) of this section), and may prescribe a reasonable minimum amount for any additional payment;

(ii) A death benefit the amount or duration of which may vary to reflect the investment experience of the separate account;

(iii) A cash value which varies to reflect the investment experience of the separate account; and

(iv) There is a reasonable expectation that subsequent payments will be made.

(2) *Incidental insurance benefits* means insurance benefits provided pursuant to the flexible contract, other than any guaranteed and variable death benefit, which do not have discrete cash values that may vary in amount in accordance with the investment experience of the separate account, and include, but are not limited to, accidental death and dismemberment benefits, disability income benefits, guaranteed insurability options, and family income or fixed benefit term riders.

(3) *Guaranteed death benefit* is any amount guaranteed by the life insurer to be paid pursuant to a flexible contract in the event of the death of the

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insured without regard to the investment experience of the separate account, if there are no outstanding loans or partial surrenders, but does not include any incidental insurance benefits.

(4) *Sales load* charged during a contract period is the excess of any payments made during the period over the sum of the following:

(i) The amount of the change (whether it is an increase or decrease) in the cash value for the period that is not attributable to net investment earnings or to dividends for a participating flexible contract for the period;

(ii) The cost of insurance for the period based on:

(A) For a flexible contract subject to paragraph (b)(13)(i)(A) of this section, the 1980 Commissioners Standard Ordinary Mortality Table and net interest at the annual effective rate specified for purposes of paragraph (c)(8)(i)(B) of this Rule; or

(B) For a flexible contract subject to paragraph (b)(13)(i)(B) of this section, either the 1980 Commissioners Standard Ordinary Mortality Table or the 1958 Commissioners Ordinary Mortality Table (whichever relates to rates guaranteed by the contract) and the assumed investment rate specified in the contract, *Provided, however*, That the 1958 Commissioners Ordinary Mortality Table may only be used for those contracts issued before 1990, or such earlier mandatory date for implementation of the 1980 Commissioners Standard Ordinary Mortality Table under the applicable Standard Nonforfeiture Law for life insurance;

(iii) A reasonable charge necessary to cover the risk assumed by the life insurer that the variable death benefit will be less than any guaranteed death benefit;

(iv) Any administrative expenses or fees which are deducted pursuant to paragraph (b)(13)(iii)(A) of this Rule;

(v) A deduction for and approximately equal to state premium taxes;

(vi) Any additional charge assessed if the insured does not meet standard underwriting requirements, including, but not limited to, any additional cost of insurance charge for a contract purchased on a simplified underwriting or guaranteed issue basis;

(vii) Any additional charge assessed specifically for any incidental insurance benefits;

(viii) Any additional charge, the nature of an interest charge, assessed when payments are made more frequently than annually, but only to the extent that such payments are made to fulfill a minimum payment requirement imposed pursuant to paragraph (c)(1)(i) of this Rule;

(ix) Any amounts redeemed by the contractholder or paid out to the beneficiary upon the death of the insured which are not attributable to net investment earnings for the period; and

(x) For a participating flexible contract, a deduction for dividends to be paid or credited in accordance with the dividend scale in effect on the issue date of the contract assuming a net annual investment return for the separate account which funds the contract of 5 per centum. The deduction may be determined by either of the following methods, but the same method must be used for each contract period:

(A) The actuarial level annual equivalent of dividends to be paid or credited over the contract periods described in paragraph (b)(13)(i) of this Rule, based upon the mortality, interest and lapse assumptions used in computing the dividend scale for the contract (and, if the contract is subject to paragraph (b)(13)(i)(A) of this section, the assumption that the guideline annual premium will be paid in each contract period) multiplied by the fraction of the contract year represented by the contract period; or

(B) That portion of the dividend to be paid for the contract year which does not depend on the making of payments in addition to those made during the period.

(5) *Contract period* means the period from a contract issue or anniversary date to the earlier of the next following anniversary date (or, if later, the last day of any grace period commencing before such next following anniversary date) or the termination date of the contract.

(6) *Variable death benefit* is the amount of death benefit, other than incidental insurance benefits, payable under a flexible contract which varies to reflect the investment experience of

the separate account and which would be payable in the absence of any guaranteed death benefit.

(7) *Payment*, as used in paragraphs (b)(13)(i), (b)(13)(ii), and (b)(13)(v)(A) of this Rule and in sections 27(a)(2) and 27(h)(2) solely with respect to flexible contracts, means for a contract period the gross premiums paid less any portion of such gross premiums charged for the items specified in paragraphs (c)(4)(vi), (c)(4)(vii), and (c)(4)(viii) of this Rule. "Payment," as used in any other section of this Rule, means the gross premiums paid or payable for the flexible contract, *Except*, That "Payment" shall not include any amount deducted by the life insurer to recover excess sales loading previously applied to keep the contract in force pursuant to paragraph (b)(13)(iv)(B)(2) of this Rule.

(8)(i) *Guideline annual premium* means the level annual amount that would be payable through the maturity date specified in paragraph (c)(8)(ii)(B) of this Rule for the future benefits under the contract if, subject to the provisions of paragraph (c)(8)(ii) of this Rule:

(A) The payments were fixed by the life insurer as to both timing and amount, and

(B) The payments were based on the 1980 Commissioners Standard Ordinary Mortality Table, net investment earnings at the greater of an annual effective rate of 5 per centum or rate or rates guaranteed at issuance of the flexible contract, the sales load under the contract, and the fees and charges associated with the contract specified in paragraphs (c)(4)(iii), (c)(4)(iv), (c)(4)(v), (c)(4)(vi), (c)(4)(vii), (c)(4)(viii) (for the first two contract periods as permitted by paragraphs (c)(1)(i), and (c)(4)(x) of this Rule.

(ii) In computing the future benefits under the flexible contract for determining the guideline annual premium:

(A) The excess of the amount payable by reason of the death of the insured (determined without regard to any incidental insurance benefits) over the cash value of the contract shall be deemed to be not greater than such excess at the time the contract was issued,

(B) The maturity date shall be the latest maturity date permitted under the contract but not less than 20 years after the date of issue or (if earlier) age 95, and

(C) The amount of any endowment benefit (or sum of endowment benefits) shall be deemed not to exceed the least amount payable by reason of the death of the insured (determined without regard to any incidental insurance benefits) at any time under the contract.

(9) *Cash value* means the amount that would be available in cash upon voluntary termination of a contract by its owner before it becomes payable by death or maturity, without regard to any charges that may be assessed upon such termination and before deduction of any outstanding contract loan.

(10) *Cash surrender value* means the amount available in cash upon voluntary termination of a contract by its owner before it becomes payable by death or maturity, after any charges assessed in connection with the termination have been deducted and before deduction of any outstanding contract loan.

(11) *Net investment earnings* means investment earnings in the separate account after deduction of any asset charges, including but not limited to, such charges for income tax; brokerage and other investment expenses; mortality, expense, and guaranteed death benefit risks; and an investment advisory fee, but not including deductions for sales load. However, "net investment earnings" as used in paragraph (c)(4)(i) of this Rule shall not include any amount deducted pursuant to paragraphs (ii) through (viii) of paragraph (c)(4).

(12) *Contract processing day* means any day on which charges under the contract are deducted from the separate account.

(d) The following computational rules shall be used in applying this Rule:

(1) Paragraphs (b)(13)(i) and (b)(13)(ii) of this Rule shall be deemed to be satisfied with respect to any flexible contract under which sales load is deducted other than from payments prior to the allocation of net payments to the separate account if:

(i) From issuance of the contract through each contract period, the aggregate amount of sales load deducted is not more than the aggregate amount of sales load that could be deducted under an otherwise identical flexible contract that deducted sales load only from payments prior to their allocation to the separate account; and

(ii)(A) The amount of sales load deducted pursuant to any method permitted under this paragraph (other than asset-based sales loads) does not exceed the proportionate amount of sales load deducted prior thereto pursuant to the same method, unless an increase in such proportionate amount is caused by reductions in the annual cost of insurance, or a reduction in the sales load deducted from amounts transferred to a flexible contract from another plan of insurance; or

(B) For asset-based sales load structures, the percentage of assets taken as sales load does not exceed any of the percentages previously taken pursuant to the same method, unless an increase in such percentage is caused by a reduction in the percentage taken on amounts transferred to a flexible contract from another plan of insurance.

(2)(i) Solely with respect to increases in or additions of insurance benefits requested by a contractholder after issuance of a flexible contract, the contract shall be deemed to satisfy paragraphs (b)(13)(i)(A), (b)(13)(ii), (b)(13)(v), (b)(13)(viii), and (d)(1)(ii) of this Rule, *Provided*, That from issuance of the contract through each contract period the aggregate amount of sales load imposed is not more than the aggregate amount of sales load that would be permissible under the base test contract, as defined in paragraph (d)(2)(iii)(B) of this Rule, and the incremental test contract, as defined in paragraph (d)(2)(iii)(C) of this Rule.

(ii) The following procedures shall be used in applying paragraph (d)(2)(i) of this section:

(A) Payments for the actual contract, as defined in paragraph (d)(2)(iii)(A) of this Rule, and the base and incremental test contracts shall, for purposes of demonstrating compliance with the sales load provisions of this Rule, be deemed paid in the following proportionate amounts: level

annual payments for the base test contract equal to the guideline annual premium for the contract, commencing upon issuance; level annual payments for the incremental test contract equal to the difference between the guideline annual premium for the actual contract after the increase in or addition of insurance benefits and before such increase or addition, commencing upon such increase or addition; and level annual payments for the actual contract equal to the guideline annual premium for such contract, commencing upon issuance and adjusted for such increase or addition as of the date of such increase or addition, *Provided* that the guideline annual premium used is that defined in paragraph (c)(8) of this section;

(B) To the extent that the increases in, or additions of, insurance benefits are funded out of cash value, such cash value shall be proportionately allocated between the base test contract and incremental test contract according to the ratio of their respective guideline annual payments, as described in (d)(2)(ii)(A); and

(C) It is assumed that no redemptions are made under the actual and test contracts.

(D) An incremental test contract may deduct, in any manner permitted by this Rule, not more than 50 per centum of the sales load which would otherwise be permitted under the base test contract, and not be subject to the surrender, conversion, and withdrawal provisions set forth in paragraphs (b)(13)(v) (A) and (B) and (b)(13)(viii) of this Rule, *Provided, however*, That the increased or added benefit will be subject to the surrender, conversion, and withdrawal provisions referenced above if more than such 50 per centum of sales load is assessed.

(iii) For purposes of this paragraph (d)(2):

(A) *Actual contract* shall mean the flexible contract issued to the contractholder, and adjusted for the increase in or addition of insurance benefits, as of the date of the increase or addition;

(B) *Base test contract* shall mean the actual contract had the increase or addition not occurred;

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(C) *Incremental test contract* shall mean a flexible contract that, (1) is issued on the date of the increase or addition, and (2) provides insurance benefits identical to the incremental change in insurance benefits under the actual contract upon such increase or addition; and

(D) Any change in insurance benefits which would occur automatically under a contract, with or without the opportunity for contractholder disapproval, or any change in death benefit operation shall not be considered an “increase in or addition of insurance benefits requested by a contractholder” for purposes of imposing additional sales load.

[52 FR 11208, Apr. 8, 1987, as amended at 59 FR 43467, Aug. 24, 1994; 67 FR 43536, June 28, 2002]

§ 270.7d-1 Specification of conditions and arrangements for Canadian management investment companies requesting order permitting registration.

(a) A management investment company organized under the laws of Canada or any province thereof may obtain an order pursuant to section 7(d) permitting its registration under the act and the public offering of its securities, if otherwise appropriate, upon the filing of an application complying with paragraph (b) of this section. All such applications will be considered by the Commission pursuant to the procedure set forth in § 270.0-5 and other applicable rules. Conditions and arrangements proposed by investment companies organized under the laws of other countries will be considered by the Commission in the light of the special circumstances and local laws involved in each case.

(b) An application filed pursuant to this section shall contain, inter alia, the following undertakings and agreements of the applicant:

(1) Applicant will cause each present and future officer, director, investment adviser, principal underwriter and custodian of the applicant to enter into an agreement, to be filed by applicant with the Commission upon the filing of its registration statement or upon the assumption of such office by such person which will provide, among other

things, that each such person agrees (i) to comply with the applicant’s Letters Patent (Charter) and By Laws, the act and the rules thereunder, and the undertakings and agreements contained in said application insofar as applicable to such person; (ii) to do nothing inconsistent with the applicant’s undertakings and agreements required by this section; (iii) that the undertakings enumerated as paragraphs (b)(1)(i) and (ii) of this section constitute representations and inducements to the Commission to issue its order in the premises and continue the same in effect, as the case may be; (iv) that each such agreement constitutes a contract between such person and the applicant and its shareholders with the intent that applicant’s shareholders shall be beneficiaries of and shall have the status of parties to such agreement so as to enable them to maintain actions at law or in equity within the United States and Canada for any violation thereof. In addition the agreement of each officer and director will contain provisions similar to those contained in paragraph (b)(6) of this section.

(2) That every agreement and undertaking of the applicant, its officers, directors, investment adviser, principal underwriter and custodian required by this section (i) constitute inducements to the Commission for the issuance and continuance in effect of, and conditions to, the Commission’s order to be entered under this section; (ii) constitute a contract among applicant and applicant’s shareholders with the same intent as set forth in paragraph (b)(1)(iv) of this section; and (iii) failure by the applicant or any of the above enumerated persons to comply with any such agreement and undertaking, unless permitted by the Commission, shall constitute a violation of the order entered under this section.

(3) That the Commission, in its discretion, may revoke its order permitting registration of the applicant and the public offering of its securities if it shall find after notice and opportunity for hearing that there shall have been a violation of such order or the act and may determine whether distribution of applicant’s assets is necessary or appropriate in the interests of investors and may so direct.