

will operate and which will be reasonably designed to provide that the requirements set forth in the application are met. The directors or trustees will make and approve such changes that they deem necessary to ensure that such procedures are followed. In addition, the directors or trustees will determine, no less frequently than annually, that the Joint Accounts have been operated in accordance with the proposed procedures, and will permit a Fund to continue to participate therein only if it determines that there is a reasonable likelihood that the Fund and its shareholders will benefit from the Fund's continued participation.

13. Investments held in a Joint Account generally will not be sold prior to maturity except: (a) If CSAM believes that the investment no longer presents minimal credit risk; (b) if, as a result of a credit downgrading or otherwise, the investment no longer satisfies the investment criteria of all Funds participating in the investment; or (c) if the counterparty defaults. A Fund may, however, sell its fractional portion of an investment in a Joint Account prior to the maturity of the investment in such Joint Account if the cost of such transaction will be borne solely by the selling Fund and the transaction will not adversely affect the other Funds participating in that Joint Account. In no case will an early termination by less than all participating Funds be permitted if it will reduce the principal amount or yield received by other Funds participating in a particular Joint Account or otherwise adversely affect the other participating Funds. Each Fund participating in such Joint Account will be deemed to have consented to such sale and partition of the investment in such Joint Account.

14. Repurchase Agreements held through a Joint Account with a remaining maturity of more than seven days, as calculated pursuant to rule 2a-7 under the Act, will be considered illiquid and will be subject to the restriction that a Fund may not invest more than 10%, in the case of a money market fund, or 15%, in the case of a non-money market fund (or such other percentages as set forth by the Commission from time to time) if its net assets in illiquid securities, and any similar restriction set forth in the Fund's investment restrictions and policies, if CSAM cannot sell the instrument, or the Fund's fractional interest in such instrument, pursuant to the preceding condition.

For the Commission, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 00-11681 Filed 5-9-00; 8:45 am]

**BILLING CODE 8010-01-M**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-24440; File No. 812-12000]

### New York Life Insurance and Annuity Corporation, et al., Notice of Application

May 3, 2000.

**AGENCY:** Securities and Exchange Commission ("SEC" or "Commission").

**ACTION:** Notice of Application for an order under Section 6(c) of the Investment Company Act of 1940 ("1940 Act"), as amended granting exemptions from the provisions of Sections 2(a)(32), 22(c), and 27(i)(2)(A) of the 1940 Act and Rule 22c-1 thereunder to permit the recapture of credits applied to premium payments made under certain deferred variable annuity policies and certificates.

**SUMMARY OF APPLICATION:** Applicants seek an order under Section 6(c) of the 1940 Act, to permit, under specified circumstances, the recapture of credits applied to premium payments made under: (i) Certain deferred variable annuity policies and certificates that NYLIAC will issue through SA III (the policies and certificates, including certain certificate data pages and endorsements, are referred to as "Mainstay Policies" or "LifeStages Policies," collectively, the "SA III Policies"), and (ii) policies and certificates, including certain certificate data pages and endorsements, the NYLIAC may issue in the future through SA III or any Future Account (collectively, the "Accounts") which policies and certificates, including certain certificate data pages and endorsements, are substantially similar to the SA III Policies in all material respects (the "Future Policies" together with the SA III Policies, "Policies"). Applicants also request that the order being sought extend to any National Association of Securities Dealers, Inc. ("NASD") member broker-dealer controlling or controlled by, or under common control with NYLIAC, whether existing or created in the future, that serves as a distributor or principal underwriter of the Policies offered through the Accounts (collectively, "NYLIAC Broker-Dealers").

**APPLICANTS:** New York Life Insurance and Annuity Corporation ("NYLIAC") and its NYLIAC Variable Annuity Separate Account—III ("SA III"), any other separate accounts of NYLIAC ("Future Accounts") that support in the future variable annuity policies and certificates that are substantially similar in all material respects to the SA III policies, and NYLife Distributors, Inc. ("NYLIFE Distributors") (collectively referred to herein as "Applicants").

**FILING DATES:** The Application was filed with the Commission on February 24, 2000, and amended and restated on May 3, 2000.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the Application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m., on May 26, 2000, and should be accompanied by proof of service on Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, DC 20549-0609. Applicants, c/o Linda M. Reimer, Esq., New York Life Insurance and Annuity Corporation, 51 Madison Avenue, New York, New York 10010.

**FOR FURTHER INFORMATION CONTACT:** Ronald A. Holinsky, Attorney, or Susan M. Olson, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 942-0670.

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee from the Public Reference Branch of the SEC, 450 Fifth Street, N.W., Washington, D.C. 20549-0102 (tel. (202) 942-8090).

### Applicant's Representations

1. NYLIAC is a stock life insurance company organized under the laws of the State of Delaware. NYLIAC is licensed to sell life, accident and health insurance and annuities in the District of Columbia and all states. NYLIAC serves as depositor for SA III, which was established in 1994 pursuant to authority granted under a resolution of NYLIAC's Board of Directors. NYLIAC

also serves as depositor for several existing Future Accounts, one or more of which may support obligations under Future Policies. NYLIAC may establish additional Future Accounts for which it will serve as depositor.

2. NYLIFE Distributors is the principal underwriter of SA III. NYLIFE Distributors is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934, as amended, and is a member of the NASD. The SA III Policies are distributed by NYLIFE Distributors and sold by registered representatives of NYLIFE Securities, Inc., and registered representatives of unaffiliated broker-dealers that have entered into selling agreements with NYLIAC and NYLIFE Distributors. The SA III Policies also are distributed and sold by banking and financial institutions that have entered into selling agreements with NYLIAC or NYLIFE Distributors. NYLIFE Securities, Inc. and NYLIFE Distributors are wholly-owned subsidiaries of NYLIFE, LLC, which is a wholly-owned subsidiary of New York Life Insurance Company. NYLIFE Distributors may enter into similar arrangements for Future Policies. NYLIFE Distributors may act as principal underwriter for Future Accounts and distributor for Future Policies. A successor entity also may act as principal underwriter for any of the Accounts and distributor for any of the Policies.

3. SA III is a segregated asset account of NYLIAC. SA III is registered with the Commission as a unit investment trust under the 1940 Act. SA III will fund the variable benefits available under the SA III Policies. Units of interest in SA III under the SA III Policies it funds will be registered under the Securities Act of 1933 ("1933 Act"). NYLIAC may issue Future Policies through SA III or through Future Accounts. That portion of assets of SA III that is equal to the reserves and other SA III Policy liabilities with respect to SA III is not chargeable with liabilities arising out of any other business of NYLIAC. Any income, gains or losses, realized or unrealized, from assets allocated to SA III are, in accordance with the SA III Policies, credited to or charged against SA III, without regard to other income, gains or losses of NYLIAC. The same will be true of any Future Account.

4. Future Policies funded by SA III or any Future Accounts will be substantially similar to the SA III Policies in all material respects. Certain anticipated differences between SA III Policies and Future Policies are summarized below. SA III Policies will be sold by registered representatives of NYLIFE Securities, Inc., and unaffiliated

broker-dealers that have entered into selling agreements with NYLIAC or NYLIFE Distributors. SA III Policies also will be sold by banking and financial institutions that have entered into selling agreements with NYLIAC and NYLIFE Distributors. NYLIAC may issue SA III Policies as individual or group flexible premium tax deferred variable annuity policies. NYLIAC may issue SA III Policies in connection with retirement plans that qualify for favorable federal income tax treatment under Sections 403, 408, or 457 of the Internal Revenue Code of 1986, as amended ("Code"). NYLIAC also may issue SA III Policies on a non-tax qualified basis. SA III Policies may be used for other purposes in the future, or offered only as qualified policies or non-qualified policies.

5. The minimum initial and subsequent premium payment for a non-qualified policy is \$5,000 for Mainstay Policies and \$2,000 for LifeStages Policies. The minimum initial and subsequent premium for a qualified policy is \$2,000 for both the Mainstay and LifeStages Policies. The maximum aggregate premium payments without prior approval of NYLIAC is \$1,000,000. The maximum age of any annuitant as of issue date is 80. NYLIAC does not accept subsequent premium payments after the annuity date unless otherwise agreed to.

6. An owner can allocate premium payments or account value to one or more investment divisions of SA III, each of which will invest in a corresponding portfolio of a mutual fund. In addition, SA III Policies will permit premium payments to be allocated to fixed interest options funded through the fixed account ("Fixed Account") which provides a guarantee of the premium payment allocated thereto and interest for specified periods. Policy owners may receive annuity payments after annuitization on a fixed basis.

7. SA III currently consists of 26 investment divisions, all of which will be available under the SA III Policies. However, a policy owner may not allocate money to more than 18 variable investment divisions at any given time. Each investment division will invest in shares of a corresponding portfolio of an open-end, diversified series management investment company registered under the 1940 Act and whose shares are offered under the 1933 Act (each a "Fund" and collectively, "Funds"). The Funds currently available under the SA III Policies are managed by various entities affiliated and unaffiliated with NYLIAC. The investment divisions and the fixed interest options will comprise the initial

"Allocation Alternatives" under the SA III Policies.

8. NYLIAC, at a later date, may determine to create additional investment divisions of SA III to invest in any additional portfolios of the Funds, or other portfolios or investments as may now or in the future be available. Similarly, investment divisions of SA III may be combined or eliminated from time to time. Future Policies may offer Funds managed by the same as well as other investment advisers.

9. SA III Policies provide for various withdrawal options, annuity benefits and payout annuity option; transfer privileges among Allocation Alternatives; dollar cost averaging; death benefits; and other features. Mainstay Policies have the following charges: (i) A surrender charge as a percentage of premium payments declining from 8% in years one, two, three and four to 0% in year nine and thereafter, with a specified free withdrawal amount; and (ii) separate account annual expenses at the annual rate of 1.6% assessed against the net assets of each investment division. Also, each year during the accumulation phase and on full surrender, an annual policy service charge of \$30 is deducted proportionately from each Allocation Alternative. The annual maintenance fee will be waived if the Policy owner's account value is \$100,000 or greater on the date this fee is due. The Funds each impose investment management fees and charges for other expenses. LifeStages Policies have the same charges as listed above except that under LifeStages Policies, the surrender charge as a percentage of premium payments declines from 8% in years one, two and three to 0% in year nine and thereafter.

10. Mainstay Policies have the following death benefit. If the policyholder or annuitant dies prior to the annuity commencement date, the designated beneficiary will receive, upon the receipt of proof of death, the greatest of: (1) The accumulation value, less any outstanding loan balance, less Credits (as defined below) applied within the 12 months immediately preceding death; (ii) the sum of all premium payments made, less any outstanding loan balance, partial withdrawals, and surrender charges on those partial withdrawals; or (iii) the reset value plus any additional premium payments made since the most recent reset anniversary, less any outstanding loan balance, proportional withdrawals made since the most recent reset anniversary, any surrender charges applicable to such proportional

withdrawals, and Credits applied within the 12 months immediately preceding death.

11. NYLIAC will apply a premium credit ("Credit") to the account of an SA III Policy owner whenever the owner makes a premium payment. The amount of the Credit will equal a percentage ("Credit Rate") of the premium payment according to the premium credit schedule then in effect. The Credit Rate applicable to a premium payment will depend on the total amount of premiums received under a Policy ("Total Accumulated Premiums"). In addition, if NYLIAC receives more than one premium payment within 180 days of the policy date (as defined in the Policy), NYLIAC will adjust the Credits applied to such payments using the Credit Rate applicable to the later payment(s) made during that period. NYLIAC will apply any additional Credit amounts resulting from such adjustments as of the date it receives the later premium payment(s).

NYLIAC proposes to use the following premium credit schedule for initial premium payments under the SA III Policies:

Total accumulated premiums at least	But less than—	Credit rate <sup>1</sup>
Minimum .....	\$50,000	3.0
\$50,000 .....	100,000	3.25
100,000 .....	500,000	4.5
500,000 .....	1,000,000	4.5
1,000,000 .....	2,500,000	4.5
2,500,000 .....	5,000,000	5.0
5,000,000 .....	Unlimited	5.0

<sup>1</sup>Credit rate as a percentage of premium payment.

NYLIAC may apply Credits for subsequent premium payments under SA III Policies using the same or a different credit schedule. In addition, NYLIAC may apply Credits for initial and subsequent premium payments under Future Policies using the same or a different premium credit schedule. The Credit Rate under future premium credit schedules will range between 2.0% to 6.0%. NYLIAC will notify Policy owners of any change in the premium credit schedule prior to implementing such change. NYLIAC currently does not expect to change the premium credit schedule more often than five times a year. Any change in the premium credit schedule will apply to all premium payments received after the schedule becomes effective.

12. NYLIAC will determine the premium breakpoint and credit percentages of future premium credit schedules based on several factors, including product expense levels, policy experience, and competitive

position. NYLIAC expects to incur certain expenses, such as those related to policy issue, maintenance and servicing, that will affect the profitability of the policy. As premiums paid under a policy increase, these expenses should have less of an unfavorable impact on profitability. NYLIAC generally expects to be able to apply larger Credits on larger policies. Accordingly, depending on future expense levels, NYLIAC may change future premium amount breakpoints or credit percentages to maintain a consistent level of profitability. In addition, NYLIAC expects different size policies to reflect different persistency or mortality experience that will affect the profitability of the policies. Poor persistency or high mortality experience will adversely affect profitability. NYLIAC generally expects to be able to afford to apply a larger Credit on policies with higher persistency or lower mortality experience. Accordingly, depending on whether future persistency or mortality experience is favorable or unfavorable, NYLIAC may change future premium amount breakpoints or credit percentages to maintain a consistent level of profitability. Finally, NYLIAC will monitor changes in the marketplace for policies with credit or similar features, and may change future premium amount breakpoints or credit percentages to maintain a competitive position in the marketplace.

13. NYLIAC will allocate Credits among the Allocation Alternatives in the same proportion as the corresponding premium payments are allocated by the owner. NYLIAC will fund Credits from its general account assets. The Credits are vested when applied, except under the following circumstances: (i) NYLIAC will recapture all Credits if the owner returns a SA III Policy to NYLIAC for a refund during the 10-day (or longer, if required) "free-look" period; and (ii) the amount of any death benefit will not include any Credit applied to an owner's account within 12 months of the date of death.

14. Applicants seek exemption pursuant to Section 6(c) of the 1940 Act from Sections 2(a)(32), 22(c), and 27(i)(2)(A) of the 1940 Act, and Rule 22c-1 thereunder, to the extent deemed necessary to permit NYLIAC to issue policies that provide for Credits upon the receipt of premium payments, and to recapture Credits in the following instances: (i) If the Policy owner returns the Policy to NYLIAC for a refund during the 10-day (or longer, if required) "free-look" period; and (ii) the amount

of any death benefit will not include any Credit applied to an owner's account within 12 months of the date of death.

**Applicants' Legal Analysis**

1. Section 6(c) of the 1940 Act authorizes the Commission to exempt any person, security, or transaction, or any class or classes of persons, securities or transactions from the provisions of the 1940 Act and the rules promulgated thereunder if and to the extent that such exemption is necessary or appropriate in the public interest and consist with the provisions of investors and the purposes fairly intended by the policy and provisions of the 1940 Act. Applicants request that the Commission, pursuant to Section 6(c) of the 1940 Act grant the exemptions requested below with respect to SA III Policies, and any Future Policies funded by SA III or Future Accounts, that are issued by NYLIAC and underwritten or distributed by NYLIFE Distributors or any other NYLIAC Broker-Dealers. Applicants undertake that Future Policies funded by SA III or any Future Account will be substantially similar in all material respects to the SA III Policies. Applicants believe that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

2. Applicants represent that it is not administratively feasible to track the Credit amount in the Accounts after the Credit is applied. Accordingly, the asset-based charges applicable to the Accounts will be assessed against the entire amounts held in the respective Accounts, including the Credit amount, during the period when the owner's interest in the Credit is not completely vested. As a result, during such periods, the aggregate asset-based charges assessed against an owner's annuity account value will be higher than those that would be charged if the owner's annuity account value did not include the Credit.

3. Subsection (i) of Section 27 of the 1940 Act provides that Section 27 does not apply to any registered separate account funding variable insurance policies, or to the sponsoring insurance company and principal underwriter of such account, except as provided in paragraph (2) of that subsection. Paragraph (2) provides that it shall be unlawful for such a separate account or sponsoring insurance company to sell a policy funded by the registered separate account unless "(A) such contract is a redeemable security." Section 2(a)(32) of the 1940 Act defines "redeemable

security" as any security, other than short-term paper, under the terms of which the holder, upon presentation to the issuer, is entitled to receive approximately his or her proportionate shares of the issuer's current net assets, or the cash equivalent thereof.

4. Applicants submit that the Credit recapture provisions summarized herein would not deprive a Policy owner of his or her proportionate share of the issuer's current net assets. An owner's interest in the amount of the Credit applied to his or her annuity account value upon receipt of an initial premium payment is not vested until the applicable free-look period has expired without return of the Policy. Similarly, an owner's interest in the amount of any Credits applied upon receipt of premium payments made during the 12 months prior to the date of death also is not vested. Until or unless the amount of any Credit is vested, NYLIAC retains the right and interest in the Credit amount, although not in any earnings attributable to that amount. Thus, Applicants argue that, when NYLIAC recaptures any Credit, it is simply retrieving its own assets, and because an owner's interest in the Credit is not vested, the owner has not been deprived of a proportionate share of the applicable Account's assets.

5. In addition, with respect to Credit recaptures upon the exercise of the free-look privilege, Applicants state that it would be patently unfair to allow an owner exercising that privilege to retain a Credit amount under a Policy that has been returned for a refund after a period of only a few days. Applicants state that if NYLIAC could not recapture the Credit, individuals could purchase a Policy with no intention of retaining it, and simply return it for a quick profit.

6. Furthermore, Applicants state that the recapture of Credits relating to premium payments made within 12 months of death is designed to provide NYLIAC with a measure of protection against "anti-selection." Applicants state that the risk here is that, rather than spreading premium payments over a number of years, an owner will make very large payments shortly before death, thereby leaving NYLIAC less time to recover the cost of the Credits applied, to its financial detriment. NYLIAC intends to recover the costs of the Credits applied through a portion of the early surrender charge and the separate account charge imposed under the Policies. NYLIAC may use any excess to recover distribution costs relating to the Policy and as a source of profit. The amounts recaptured equal the Credits provided by NYLIAC from

its own general account assets, and any gain would remain as part of the Policy's value.

7. Applicants represent that the Credit will be attractive to and in the interest of investors because it will permit owners to put an amount greater than their premium payments to work for them in the selected Allocation Alternatives. Also, owners will retain any earnings attributable to the Credit and, unless any of the contingencies summarized above apply, the principal amount of the Credit.

8. Applicants submit that the provisions for recapture of any Credits under the SA III Policies do not, and any such Future Policy provisions will not, violate Sections 2(a)(32) and 27(i)(2)(A) of the 1940 Act. Nevertheless, to avoid any uncertainties, Applicants request an exemption from Sections 2(a)(32) and 27(i)(2)(A), to the extent deemed necessary, to permit the recapture of any Credit under the circumstances described herein with respect to SA III Policies and any Future Policies, without the loss of the relief from Section 27 provided by Section 27(i).

9. Section 22(c) of the 1940 Act authorizes the Commission to make rules and regulations applicable to registered investment companies and to principal underwriters of, and dealers in, the redeemable securities of any registered investment company, whether or not members of any securities association, to the same extent, covering the same subject matter, and for the accomplishment of the same ends as are prescribed in Section 22(a) of the 1940 Act in respect of the rules which may be made by a registered securities association governing its members. Rule 22c-1 thereunder prohibits a registered investment company issuing a redeemable security, a person designated in such issuer's prospectus as authorized to consummate transactions in such security, and a principal underwriter of, or dealer in, such security, from selling, redeeming, or repurchasing any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

10. Arguably, NYLIAC's recapture of the Credit might be viewed as resulting in the redemption of redeemable securities for a price other than one based on the current net asset value of the Accounts. Applicants contend, however, that the recapture of the Credit

is not violative of Section 22(c) and Rule 22c-1. Applicants argue that the recapture of the Credit does not involve either of the evils that Rule 22c-1 was intended to eliminate or reduce as far as reasonable practicable, namely: (i) The dilution of the value of outstanding redeemable securities of registered investment companies through their sale at a price below net asset value or their redemption or repurchase at a price above it, and (ii) other unfair results, including speculative trading practices. To effect a recapture of the Credit, NYLIAC will redeem interests in an owner's annuity account at a price determined on the basis of the current net asset value of the respective Accounts. The amount recaptured will equal the amount of the Credit that NYLIAC paid out of its general account assets. Although owners will be entitled to retain any investment gain attributable to the Credit, the amount of such gain will be determined on the basis of the current net asset value of the respective Accounts. Thus, Applicants assert that no dilution will occur upon the recapture of a Credit. Applicants also submit that the second harm that Rule 22c-1 was designed to address, namely, speculative trading practices calculated to take advantage of backward pricing, will not occur as a result of the recapture of the Credit. However, to avoid any uncertainty as to full compliance with the 1940 Act, Applicants request an exemption from the provisions of Section 22(c) and Rule 22c-1 to the extent deemed necessary to permit them to recapture the Credit under the SA III Policies and Future Policies.

## Conclusion

Applicants submit, based on the grounds summarized above, that their exemptive request meets the standards set out in Section 6(c) of the 1940 Act, namely, that the exemptions requested are necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act, and that, therefore, the Commission should grant the requested order.

For the Commission, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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