SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–27112; File No. 812–13229]

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

October 5, 2005.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'').

ACTION: Notice of Application for an order pursuant to Section 26(c) of the Investment Company Act of 1940, as amended, approving certain substitutions of securities.

Applicants: New York Life Insurance and Annuity Corporation (''NYLIAC'') and its NYLIAC Variable Annuity Separate Account—III (''SA–III,'' together, the ''Applicants'').

Summary of Application: Applicants request an order of the SEC, pursuant to Section 26(c) of the Act, approving the substitutions (the ''Substitutions'') by SA–III of its subaccounts' shares of the AmSouth Enhanced Market Fund, AmSouth International Equity Fund, AmSouth Large Cap Fund, and AmSouth Mid Cap Fund (the ''Replaced Funds''), each separate portfolios of the Variable Insurance Funds, with shares of certain series of the MainStay VP S&P 500 Index Portfolio, MainStay VP International Equity Portfolio, MainStay VP Value Portfolio (''MainStay Replacing Funds''), and Fidelity® VIP Mid Cap Portfolio (''VIP Fund,'' together with the MainStay Replacing Funds, the ''Replacing Funds''). The MainStay Replacing Funds are separate portfolios of the MainStay VP Series Fund, Inc. (the ''MainStay VP Fund''). The Fidelity® VIP Mid Cap Portfolio is a portfolio of the Variable Insurance Products Fund.

Filing Date: The Application was filed on August 12, 2005 and amended and restated on October 3, 2005 (''Application'').

Hearing or Notification of Hearing: An order granting the Application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the Secretary of the SEC and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on October 28, 2005, 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 requester'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 Secretary of the SEC.

ADDRESSES: Secretary, SEC, 100 F Street, NE., Washington, DC 20549. Applicants, c/o New York Life Insurance and Annuity Corporation, 1 Rockwood Road, Sleepy Hollow, NY 10591, Attn: Judy Bartlett, Esq. Copy to Foley & Lardner, LLP, 3000 K Street, NW., Suite 500, Washington, DC 20007, Attn: Richard T. Choi and Chip Lunde.

FOR FURTHER INFORMATION CONTACT: Patrick F. Scott, Esq., Senior Counsel, or Zandra Y. Bailes, Esq., Branch Chief, Office of Insurance Products, Division of Investment Management (tel. (202) 551–6795).

SUPPLEMENTARY INFORMATION: The following is a summary of the Application. The complete Application may be obtained for a fee from the SEC's Public Reference Branch, 100 F Street, NE., Room 1580, Washington, DC 20549 (tel. (202) 551–8090).

Applicants' Representations

1. NYLIAC is a Delaware stock life insurance company that is wholly-owned by New York Life Insurance Company, a New York mutual life insurance company. NYLIAC is licensed to sell life, accident and health insurance and annuities in the District of Columbia and all States.

2. SA–III is a segregated asset account of NYLIAC established pursuant to a resolution of its Board of Directors on November 30, 1994 under Delaware law to fund variable annuity policies issued by NYLIAC. SA–III is registered under the Act as a unit investment trust. The variable annuity policies funded by SA–III that are affected by the Application are the AmSouth Premium Plus Variable Annuity and the AmSouth Premium Plus II Variable Annuity (each, a ''Policy''; together, the ''Policies''), interests under which are registered on Form N–4 under the 1933 Act (File No. 333–30706).

3. Purchase payments under the Policies are allocated to one or more subaccounts (''Subaccounts'') of SA–III. Income, gains, and losses, whether or not realized, from assets allocated to SA–III are, as provided in the Policies, credited to or charged against the Separate Account without regard to other income, gains or losses of NYLIAC. The assets maintained in SA–III will not be charged with any liabilities arising out of any other business conducted by NYLIAC. Nevertheless, all of the obligations of NYLIAC arising under the Policies, including its commitment to make cash value payments, annuity payments, or death benefit payments, are general corporate obligations of NYLIAC. Accordingly, all of the assets of NYLIAC are available to meet its obligations under its Policies. SA–III meets the definition of ''separate account'' contained in Section 2(a)(37) of the Act.

4. Each Policy permits its owner to allocate the Policy's accumulated value among numerous available Subaccounts, each of which invests in a different investment portfolio of an underlying mutual fund. Each Policy has 20 different Subaccounts (and corresponding investment portfolios) that are currently available for this purpose.

5. Each Policy permits its owner to transfer the Policy's accumulated value from one Subaccount to another Subaccount of SA–III at any time, subject to certain potential restrictions. NYLIAC reserves the right to charge up to $30 per transfer for each transfer in excess of 12 in any one policy year.

6. NYLIAC reserves the right to make certain changes, including the right to substitute, for the shares held in any Subaccount, the shares of another underlying mutual fund, as stated in the prospectus for the Policies contained in the registration statement.

7. Each of the Replaced Funds is managed by AmSouth Asset Management, Inc. (''AAMI''). AAMI is a separate, wholly-owned subsidiary of AmSouth Bank (''AmSouth Bank''), which is owned by AmSouth Bancorporation. As discussed below, AmSouth Bancorporation recently informed NYLIAC that it has agreed to sell its mutual fund management business to Pioneer Investment Management, Inc., and that it plans to liquidate the Replaced Funds no later than October 31, 2005. OakBrook Investments, LLC (''OakBrook'') serves as the investment sub-adviser of the AmSouth Enhanced Market Fund and the AmSouth Mid Cap Fund. OakBrook is 49% owned by AmSouth Bank. Dimensional Fund Advisors (''Dimensional'') serves as the investment sub-adviser of the AmSouth International Equity Fund.

8. Each of the MainStay Replacing Funds is managed by New York Life Investment Management LLC (''NYLIM''). NYLIM is a subsidiary of New York Life Insurance Company (''New York Life''). MacKay Shields LLC (''MacKay Shields'') serves as the investment sub-adviser of the MainStay VP Value and MainStay VP International Equity Portfolios. MacKay Shields is a wholly-owned but autonomously managed subsidiary of New York Life. MacKay Shields became a Delaware limited liability company in 1999. As of December 31, 2004, MacKay

Shields managed approximately $39,208 million in assets. The Fidelity® VIP Mid Cap Portfolio is managed by Fidelity Management and Research Company (''FMR''). FMR Co. Inc. (''FMRC'') serves as sub-adviser to the Fidelity VIP Mid Cap Portfolio. FMRC has day-to-day responsibility for choosing investments for the Portfolio. The following affiliates of FMR and FMRC assist with foreign investments of the Fidelity® VIP Mid Cap Portfolio: Fidelity Management & Research (U.K.) Inc., Fidelity Management & Research (Far East) Inc., Fidelity Investments Japan Limited, Fidelity International Investment Advisors, Fidelity International Investment Advisors (U.K.) Limited. Neither FMR nor any of the Fidelity® VIP Mid Cap Portfolio's sub-advisers is affiliated with NYLIAC. No Replaced Fund or Replacing Fund is operated by its investment manager or adviser under a ''manager of managers'' exemption from certain requirements of Section 15 of the Act.

9. AmSouth Bancorporation recently informed NYLIAC that it is selling its mutual fund management business to Pioneer Investment Management, Inc., and intends to liquidate the Replaced Funds and terminate their operations, and that the Board of Directors of the Variable Insurance Funds has approved a plan of liquidation.

10. In addition, Applicants contend, the Replaced Funds have not achieved the success in NYLIAC's products that has been hoped for. Since NYLIAC first made the Replaced Funds available with its products, they have together garnered only approximately $36,981,551 of accumulated value under the Policies as of July 31, 2005. The Policies are the only variable contracts that offer the Replaced Funds as underlying investment options. Partly as a result of the Replaced Funds' small asset size, the Replaced Funds have experienced higher operating expenses relative to the Replacing Funds.

11. Against the foregoing background, Applicants state, NYLIAC has determined that its resources would be better spent, and the interests of Policy owners better served, if it terminates its relationship with the Replaced Funds, via the Substitutions described herein. In selecting Replacing Funds for the affected Policy owners, Applicants concluded that the assets in question could be most efficiently and effectively managed as part of the Replacing Funds. Applicants evaluated the investment options available in other variable contracts issued by SA–III and believe that the Replacing Funds are the best choices based on their investment programs and their expense levels.

12. In addition, in view of the foregoing considerations, NYLIAC ceased offering new Policies effective September 16, 2005.

13. Applicants submit that the investment characteristics of each Replacing Fund are substantially similar to those of the corresponding Replaced Fund. The investment objectives of each Replacing Fund and corresponding Replaced Fund, as described in their prospectuses, are as follows:

AmSouth Large Cap	MainStay VP Value
Long term capital appreciation by investing in equity securities of large-cap U.S. companies.	Maximum long-term total return from a combination of capital growth and income.
AmSouth Enhanced Market	MainStay VP S&P 500 Index
Long-term capital growth by investing primarily in a diversified portfolio of common stocks that are representative of the U.S. stock market.	Investment results that correspond to the total return performance (and reflect reinvestment of dividends) of publicly traded common stocks represented by the S&P 500® Index.
AmSouth Mid Cap	Fidelity® VIP Mid Cap
Capital appreciation by investing in equity securities of mid-cap companies.	Long-term growth of capital.
AmSouth International Equity	MainStay VP International Equity
Capital appreciation by investing in equity securities of large foreign companies.	Long-term growth of capital by investing in a portfolio consisting primarily of non-U.S. equity securities. Current income is a secondary objective.

14. Applicants represents in the Application that the principal investment strategies of each Replacing Fund and corresponding Replaced Fund are as follows:

AmSouth Large Cap	MainStay VP Value
Under normal market conditions, the Fund will invest at least 80% of its assets in equity securities of U.S. companies having $1 billion or more in market capitalization, and will primarily invest in companies that AAMI believes have the potential to provide capital appreciation. AAMI seeks to diversify the Fund's portfolio within industries that AAMI believes to be among the fastest growing segments of the U.S. economy. A portion of the Fund's assets may be invested in preferred stocks or bonds convertible into common stocks.	The Portfolio normally invests at least 65% of its total assets in common stocks that MacKay Shields believes were ''undervalued'' (selling below their value) when purchased; typically pay dividends, although there may be non-dividend paying stocks if they meet the ''undervalued'' criteria; and are listed on a national securities exchange or are traded in the over-the-counter market. The Portfolio normally invests in U.S. common stocks that: • MacKay Shields believes are ''undervalued'' (selling below their value) when purchased, • Typically pay dividends, although there may be non-dividend paying stocks if they meet the ''undervalued'' criterion, and • Are listed on a national securities exchange or are traded in the over-the-counter market.

AmSouth Enhanced Market	MainStay VP S&P 500 Index
Under normal market conditions, the Fund will invest primarily in a broadly diversified portfolio of securities represented in the S&P 500® Index, overweighting relative to their index weights those that OakBrook believes to be undervalued compared to others in the S&P 500® Index. The Fund seeks to maintain risk characteristics similar to those of the S&P 500® Index. OakBrook's stock selection process utilizes computer-aided quantitative analysis. OakBrook's computer models use many types of data, but emphasize technical data such as price and volume information. Applying these models to stocks within the S&P 500® Index, OakBrook attempts to generate more capital growth than that of the S&P 500® Index.	The Portfolio normally invests at least 80% of its total assets in stocks in the S&P 500® Index in the same proportion, to the extent feasible, as they are represented in the S&P 500® Index. NYLIM uses statistical techniques to determine which stocks are to be purchased or sold to replicate the S&P 500® Index to the extent feasible. From time to time, adjustments may be made in the Portfolio's holdings because of changes in the composition of the S&P 500® Index. The correlation between the performance of the Portfolio and the S&P 500® Index is expected to be at least 0.95, before fees and expenses, on an annual basis. A correlation of 1.00 would indicate perfect correlation, which would be achieved when the net asset value of the Portfolio, including the value of its dividend and capital gains distributions, increases or decreases in exact proportion to changes in the S&P 500® Index. The Portfolio's investments also include S&P 500® Index futures that are used for cash management purposes.
AmSouth Mid Cap Fund	Fidelity® VIP Mid Cap
Under normal market conditions, the Fund will invest at least 80% of its assets in a broadly diversified portfolio of securities issued by medium capitalization companies drawn from the Standard & Poor's Mid Cap 400® Index (''S&P Mid Cap 400® Index''), overweighting relative to their index weights those that OakBrook believes to be undervalued compared to others in the S&P Mid Cap 400® Index. The Fund seeks to maintain risk characteristics similar to those of the S&P Mid Cap 400® Index.	The Portfolio's principal investment strategies include: • Normally investing primarily in common stocks. • Normally investing at least 80% of assets in securities of companies with medium market capitalizations (which, for purposes of this fund, are those companies with market capitalizations similar to companies in the Russell Midcap® Index or the Standard & Poor's® MidCap 400 Index (S&P® MidCap 400)). • Potentially investing in companies with smaller or larger market capitalizations. • Investing in domestic and foreign issuers. • Investing in either ''growth'' stocks or ''value'' stocks or both. • Using fundamental analysis of each issuer's financial condition and industry position and market and economic conditions to select investments.
OakBrook's stock selection process utilizes computer-aided quantitative analysis. Stringent risk controls at the style, industry and individual stock levels help ensure the Fund maintains risk characteristics similar to those of the S&P Mid Cap 400® Index. OakBrook's computer models use many types of data, but emphasize technical data such as price and volume information. Applying these models to securities comprising the S&P Mid Cap 400® Index, OakBrook hopes to generate more capital growth than that of the S&P Mid Cap 400® Index.	
AmSouth International Equity Fund	MainStay VP International Equity
Under normal market conditions, the Fund will invest at least 80% of its assets in equity securities of large foreign companies. The Fund intends to invest primarily in companies in economically developed countries whose stocks Dimensional believes are undervalued at the time of investment. While Dimensional may consider other factors, Dimensional generally determines that a stock is undervalued if it has a high book value in relation to its market value.	The Portfolio normally invests at least 80% of its assets in equity securities, and invests primarily in a diversified portfolio of equity securities of issuers, wherever organized, who do business mainly outside the United States. Investments will be made in a variety of countries, with a minimum of five countries other than the United States. This includes countries with established economies as well as emerging market countries that MacKay Shields believes present favorable opportunities. The Portfolio's subadvisor seeks to identify investment opportunities by pursuing a bottom up, stock selection investment discipline. Proprietary, quantitative and qualitative tools are used to identify attractive companies. In-depth, original, fundamental research is performed on identified companies to assess their business and investment prospects. In conducting the research, particular attention is paid to the generation and utilization of cash flows, the returns on invested capital and the overall track record of management in creating shareholder value. Portfolios are constructed by combining securities with low correlation. Quantitative tools are used for risk control at the portfolio level. Country allocations in the Portfolio are a result of the bottom up, stock selection process. To reduce risk, an attempt is made at the portfolio level to stay within a reasonable range of the key constituents of the benchmark, unless the stock selection process strongly argues against it.

	The Portfolio may buy and sell currency on a spot basis and enter into foreign currency forward contracts for hedging purposes. In addition, the Portfolio may buy or sell foreign currency options, securities and securities index options and enter into swap agreements and futures contracts and related options. These techniques may be used for any legally permissible purpose, including to increase the Portfolio's return. The subadvisor may sell a security if it no longer believes the security will contribute to meeting the objective of the Portfolio. In considering whether to sell a security, the subadvisor may evaluate, among other things, the condition of foreign economies and meaningful changes in the issuer's financial condition and competitiveness.

15. With respect to the principal investment risks of each Replacing Fund compared to each and corresponding Replaced Fund, Applicants submit that they are substantially similar, and that they are as follows:

AmSouth Large Cap	MainStay VP Value
Investment risk, market risk (including those particular to large cap growth stocks), interest rate risk, credit risk, and active trading risk.	Changing economic, stock market, industry and company conditions, the risks inherent in management's ability to anticipate such changes that can adversely affect the value of the Portfolio's holdings, and the risks associated with value stocks. The Portfolio also may experience high portfolio turnover.
AmSouth Enhanced Market	MainStay VP S&P 500 Index
Investment risk, market risk (including those particular to large capitalization companies represented in the S&P 500 Index, growth stocks and value stocks), interest rate risk, credit risk, derivatives risk and active trading risk.	Changing economic, stock market, industry and company conditions which can adversely affect the value of the Portfolio's holdings, risks associated with the value of the S&P 500® Index, and the potential inability to mirror the S&P 500® Index. In addition, the Portfolio is subject to the risks associated with derivatives instruments.
AmSouth Mid Cap	Fidelity® VIP Mid Cap
Investment risk, market risk (including those particular to growth stocks, value stocks and mid cap companies), interest rate risk credit risk, derivatives risk and active trading risk.	Stock market volatility, foreign exposure, issuer-specific changes, and mid cap investing.
AmSouth International Equity	MainStay VP International Equity
Investment risk, market risk, credit risk, derivatives risk and active trading risk. The Fund also is subject to foreign securities risk.	Changing economic, stock market, industry and company conditions and the risks inherent in management's ability to anticipate such changes that can adversely affect the value of the Portfolio's holdings. The Portfolio also is subject to foreign securities risk and emerging markets risk. In addition, the Portfolio is subject to the risks associated with derivatives instruments. The Portfolio also may experience high portfolio turnover.

16. The table below compares fees and expenses of each Replaced Fund and each corresponding Replacing Fund as of December 31, 2004. As the table shows, the total expenses of each Replaced Fund are higher than the total expenses of the corresponding Replacing Fund.

	Replaced funds AmSouth Large Cap (percent)	Replacing funds MainStay VP Value (percent)	
		Initial Class	Service Class
Management Fee	0.70	0.36	0.36
Shareholder Service Fee	0.25	None	None
Rule 12b–1 Fee	None	None	0.25
Other Expenses	0.70	0.29	0.29
Gross Operating Expenses	1.65	0.65	0.90
Net (After Waiver) Expenses	1.05	0.65	0.90
	AmSouth Enhanced Market	MainStay VP S&P 500 Index	
		Initial Class	Service Class
Management Fee	0.45	0.10	0.10
Shareholder Service Fee	0.25	None	None
Rule 12b–1 Fee	None	None	0.25
Other Expenses	0.93	0.29	0.29
Gross Operating Expenses	1.63	0.39	0.64
Net (After Waiver) Expenses	1.01	0.39	0.64
	AmSouth Mid Cap	Fidelity® VIP Mid Cap Service Class 2	

	Replaced funds AmSouth Large Cap (percent)	Replacing funds MainStay VP Value (percent)	
		Initial Class	Service Class
Management Fee	0.90	0.57	
Shareholder Service Fee	0.25	None	
Rule 12b–1 Fee	None	0.25	
Other Expenses	1.08	0.14	
Gross Operating Expenses	2.23	0.96	
Net (After Waiver) Expenses	1.25	0.96	
	AmSouth International Equity	MainStay VP International Equity	
		Initial Class	Service Class
Management Fee	1.00	0.60	0.60
Shareholder Service Fee	0.25	None	None
Rule 12b–1 Fee	None	None	0.25
Other Expenses	0.79	0.39	0.39
Gross Operating Expenses	2.04	0.99	1.24
Net (After Waiver) Expenses	1.43	0.99	1.24

In each case, the class of Replaced Funds available under the Policies impose an asset-based shareholder service fee equal to 0.25% per annum of the Fund's average daily net assets. In each case, the service class of the MainStay Replacing Funds that will be available under the Policies issued on or after June 2, 2003, and the service class 2 of the Fidelity® VIP Mid Cap Portfolio, impose an asset-based sales charge pursuant to Rule 12b–1 under the Act (''Rule 12b–1 fee'') equal to 0.25% per annum of the Fund's average daily net assets. In each case, the initial class of the MainStay Replacing Funds that will be available under Policies issued prior to June 2, 2003, do not impose any Rule 12b–1 fee.

17. The Application indicates that, the net assets of each Fund as of July 31, 2005 were as follows (in thousands):

Replaced fund	Replacing fund
AmSouth Enhanced Market Fund—$7,744	MainStay VP S&P 500 Index Portfolio—$1,457,870
AmSouth International Equity Fund—$13,546	MainStay VP International Equity Portfolio—$282,428
AmSouth Large Cap Fund—$8,852	MainStay VP Value Portfolio—$630,226
AmSouth Mid Cap Fund—$6,839	Fidelity® VIP Mid Cap Portfolio—$4,964,945

Applicants state that, the table above demonstrates that each Replacing Fund has a significantly greater asset size than the Replaced Fund to which it corresponds, and that the principal potential advantages of size in the circumstances presented here would be economies of scale and ease of diversification.

18. Each Substitution will take place at the applicable Funds' relative per share net asset values determined on the date of the Substitution in accordance with Section 22 of the Act and Rule 22c–1 thereunder. Accordingly, Applicants state, the Substitutions will have no financial impact on any Policy owner. Each Substitution will be effected by having each Subaccount that invests in a Replaced Fund redeem its shares of the Replaced Fund at the net asset value calculated on the date of the Substitution and purchase shares of the appropriate class of the appropriate Replacing Fund at the net asset value calculated on the same date. Proceeds of AmSouth Large Cap Fund, AmSouth Enhanced Market Fund and AmSouth International Equity Fund shares applicable to Policies purchased prior to June 2, 2003 will be used to purchase initial class shares of the MainStay VP S&P 500 Index Portfolio, MainStay VP International Equity Portfolio and MainStay VP Value Portfolio, respectively. Proceeds of AmSouth Large Cap Fund, AmSouth Enhanced Market Fund and AmSouth International Equity Fund shares applicable to Policies purchased on or after June 2, 2003 will be used to purchase service class shares of the MainStay VP S&P 500 Index Portfolio, MainStay VP International Equity Portfolio and MainStay VP Value Portfolio, respectively. Proceeds of AmSouth Mid Cap Fund shares will be used to purchase service class 2 shares of the Fidelity® VIP Mid Cap Portfolio.

19. To the extent that NYLIAC imposes any limit on the number of subaccounts that may be used over the life of a Policy, no Substitution will be counted as giving rise to use of a new Subaccount for such purpose.

20. The Applicants state that, NYLIAC will pay all expenses and transaction costs of the Substitutions, including all legal, accounting, and brokerage expenses relating to the Substitutions, the below described disclosure documents, and the Application. No costs will be borne directly or indirectly by Policy owners. Affected Policy owners will not incur any fees or charges as a result of the Substitutions. Nor will their rights or the obligations of NYLIAC under the Policies be altered in any way. The Substitutions will not cause the fees and charges under the Policies currently being paid by Policy owners to be greater after the Substitutions than before the Substitutions.

21. The prospectuses for all of the Policies have disclosed that the issuing insurance company has the right to substitute any other mutual fund shares for the shares in which a Subaccount is investing at any time.

22. Applicants state that, the Substitutions requested in the Application were described in supplements to the applicable prospectuses for the Policies filed with the Commission or in other supplemental disclosure documents (collectively, ''Supplements'') and mailed to all affected Policy owners. Each Supplement gave the relevant Policy owners notice of the Substitution that would affect their Policies and described the reasons for engaging in that Substitution. The Supplements also informed existing Policy owners with values allocated to a Subaccount

investing in a Replaced Fund that no additional amounts may be allocated to the Subaccounts that invest in that Fund on or after the date of Substitution. In addition, the Supplements informed these affected Policy owners that they will have an opportunity to reallocate their accumulated value:

- Prior to a Substitution, from the Subaccount investing in the Replaced Fund to one or more Subaccounts investing in other Funds available under the applicable Policy or the fixed account without the imposition of any transfer charge or limitation (except potentially harmful transfers) [1] and without diminishing the number of free transfers that otherwise may be made in a given Policy year, or
- For 30 days after a Substitution, from a Subaccount investing in the Replacing Fund to one or more Subaccounts investing in other Funds available under the applicable Policy or the fixed account without the imposition of any transfer charge or limitation (except potentially harmful transfers) and without diminishing the number of free transfers that otherwise may be made in a given Policy year.

23. Applicants aver that each affected Policy owner was provided with a prospectus for each relevant Replacing Fund, which accompanied the Supplement discussed above. Within five days after a Substitution, NYLIAC will send to its affected Policy owners written confirmation that the Substitutions have occurred. The confirmations will also identify the shares of the Replaced Funds that have been eliminated and the shares of the Replacing Funds that have been substituted. That confirmation will reiterate the free transfer rights disclosed in the Supplements that such owners will have previously received.

Applicants' Legal Analysis

1. Section 26(c) of the Act makes it unlawful for any depositor or trustee of a registered unit investment trust holding the security of a single issuer to substitute another security for such security unless the Commission approves the substitution. Section 26(c) of the Act provides the Commission will issue an order approving such a substitution if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

2. Section 26(c) of the Act (then denominated as Section 26(b)) was enacted as part of the Investment Company Act Amendments of 1970. Section 26(a)(4)(B) of the Act had theretofore required only that the trust instrument of a unit investment trust require that the sponsor or trustee notify the trust's shareholders within five days after a substitution of underlying securities. The legislative history of Section 26(c) describes its underlying purpose as follows:

> The proposed amendment recognizes that in the case of a unit investment trust holding the securities of a single issuer notification to shareholders does not provide adequate protection since the only relief available to the shareholders, if dissatisfied, would be to redeem their shares. A shareholder who redeems and reinvests the proceeds in another unit investment trust or in an open-end company would under most circumstances be subject to a new sales load. The proposed amendment would close this gap in shareholder protection by providing for Commission approval of the substitution. The Commission would be required to issue an order approving the substitution if it finds the substitution consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. The legislative history makes it clear that the purpose of Section 26(c) is to protect the expectation of investors in a unit investment trust that the unit investment trust will accumulate shares of a particular issuer by preventing unscrutinized substitutions, which might, in effect, force shareholders dissatisfied with the substituted security to redeem their shares, thereby possibly incurring either a loss of the sales load deducted from initial premium payments, an additional sales load upon reinvestment of the redemption proceeds, or both. Moreover, a Policy owner forced to redeem may suffer adverse tax consequences. Section 26(c) affords this protection to investors by preventing a depositor or trustee of a unit investment trust that holds shares of one issuer from substituting for those shares the shares of another issuer, unless the Commission approves that substitution.

4. Applicants assert that the purposes, terms, and conditions of the Substitutions are consistent with the principles and purposes of Section 26(c) and do not entail any of the abuses that Section 26(c) is designed to prevent. The Substitutions are necessary and appropriate because, for the reasons discussed above, continuing to use the Replaced Funds as a funding medium for the Policies is no longer consistent with, or possible under, the business plan that Applicants are now pursuing in order to enhance the success of the Policies and the benefits to Policy owners. Moreover, as also noted above, each Policy has reserved to the issuing insurance company the right to make such substitutions, and each such company has specifically disclosed this reserved right in the prospectuses for its Policies.

5. Applicants contend that the Substitutions will not result in the type of costly forced redemption that Section 26(c) was intended to guard against and, for the following reasons, are consistent with the protection of investors and the purposes fairly intended by the Act.

6. The MainStay VP Value Portfolio is an appropriate Fund to which to move the accumulated values of Policy owners with values allocated to the AmSouth Large Cap Fund, because its investment program, like that of the AmSouth Large Cap Fund, involves seeking long-term total return. The MainStay VP S&P 500 Index Portfolio is an appropriate Fund to which to move the accumulated values of Policy owners with values allocated to the AmSouth Enhanced Market Fund, because its investment program, like that of the AmSouth Enhanced Market Fund, involves investing in a diversified selection of common stocks represented by the S&P 500 Index. The Fidelity® VIP Mid Cap Portfolio is an appropriate Fund to which to move the accumulated values of Policy owners with values allocated to the AmSouth Mid Cap Fund, because its investment objective, like that of the AmSouth Mid Cap Fund, involves growth of capital by investing, primarily, in companies with market capitalizations that, at the time of investment, are similar to the companies in the S&P MidCap 400® Index. The MainStay VP International Equity Portfolio is an appropriate Fund to which to move the accumulated values of Policy owners with values allocated to the AmSouth International Equity Fund, because its investment program, like that of the AmSouth International Equity Fund, involves seeking growth of capital by investing in a portfolio consisting primarily of non-US equity securities.

7. The costs of the Substitutions (including brokerage, legal, accounting, and other expenses) will be borne by NYLIAC and will not be borne by Policy owners. No charges will be assessed to the Policy owners to effect the Substitutions. It is expected that each Substitution will be effected by redeeming shares of the Replaced Fund for cash and using the cash to purchase shares of the corresponding Replacing Fund.

[1] The exception for potentially harmful transfers refers to NYLIAC's procedures designed to limit potentially harmful transfers such as market timing as described under "Limits on Transfers" in the prospectus contained in the Policy Registration Statement.

8. For each fiscal period (not to exceed a fiscal quarter) during the 24 months following the date of the Substitutions, NYLIAC will, as a condition of any Commission order approving the Substitutions, for each Policy outstanding on the date of the Substitution, adjust the Policy values to the extent necessary to effectively reimburse Policy owners invested in a MainStay Replacing Fund for their proportionate share of any amount by which the annual rate of the MainStay Replacing Fund's total operating expenses (after any expense waivers or reimbursements) for that fiscal period, as a percentage of the Fund's average daily net assets, plus the annual rate of any asset-based charges (excluding any such charges that are for premium taxes, or for Policy riders added after December 31, 2004) deducted under the terms of the owner's Policy for that fiscal period, exceed the sum of:

(a) The annualized rate of the corresponding Replaced Fund's total operating expenses, as a percentage of such Replaced Fund's average daily net assets, for the twelve months ended December 31, 2004; plus

(b) The annual rate of any asset-based charges (excluding any such charges that are for premium taxes), deducted under that Policy for such twelve months.

9. NYLIAC represents that the substitution and the selection of the Fidelity ® VIP Mid Cap Portfolio was not motivated by any financial consideration paid or to be paid to NYLIAC or its affiliates by the Fidelity ® VIP Mid Cap Portfolio, its advisor or underwriter, or their respective affiliates. In connection with assets held under Policies affected by the Substitutions, NYLIAC will not receive, for 36 months following the Substitution, any direct or indirect benefits from the Fidelity ® VIP Mid Cap Portfolio, or its advisor or underwriter (or their affiliates), at a rate higher than that which they had received from the AmSouth Mid Cap Fund, its advisor or underwriter (or their affiliates), including without limitation Rule 12b–1, shareholder service, administration, or other service fees, or revenue sharing or other arrangements.

10. All affected Policy owners will be given notice of the Substitutions prior to the Substitutions, and will have an opportunity to make the following transfers of their accumulated value without the imposition of any charge or limitation (except potentially harmful transfers, as described above) and without diminishing the number of charge-free transfers that otherwise may be made in a Policy year:

- Transfers of accumulated value from a Subaccount investing in a Replaced Fund to one or more Subaccounts investing in other Funds available under the applicable Policy or the fixed account, from the date of notice until the date of Substitution, and
- Transfers of accumulated value from a Subaccount investing in a Replacing Fund as a result of a Substitution to one or more Subaccounts investing in other Funds available under the applicable Policy or the fixed account, for 30 days after a Substitution.

11. Within five days after each substitution, NYLIAC will send to the affected Policy owners written confirmation that the Substitutions have occurred and identify the shares of the Replaced Funds that have been eliminated and the shares of the Replacing Funds that have been substituted.

12. The Substitutions will in no way alter the insurance benefits to Policy owners or the contractual obligations of NYLIAC. The Substitutions will in no way alter the tax treatment of owners in connection with their Policies, and no tax liability will arise for Policy owners as a result of the Substitutions.

Conclusion

Applicants request an order of the Commission pursuant to Section 26(c) of the Act approving the proposed Substitutions under the terms and subject to the conditions set forth herein. Section 26(c), in pertinent part, provides that the Commission shall issue an order approving a substitution of securities if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. For the reasons and upon the facts set forth above, Applicants respectfully submit that the Substitutions meet the standards set forth in Section 26(c) and that the approval requested therefore, should be granted.

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

J. Lynn Taylor,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. IA–2439]

Approval of Investment Adviser Registration Depository Filing Fees

AGENCY: Securities and Exchange Commission.

ACTION: Order.

SUMMARY: The Securities and Exchange Commission (Commission or SEC) is waiving for one year Investment Adviser Registration Depository (IARD) annual filing fees for all advisers.

EFFECTIVE DATE: October 7, 2005.

FOR FURTHER INFORMATION CONTACT: Jennifer L. Sawin, Assistant Director, at (202) 551–6787, or *Iarules@sec.gov,* Office of Investment Adviser Regulation, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0506.

Discussion

Section 203A(d) of the Investment Advisers Act of 1940 (Advisers Act) authorizes us to require investment advisers to file applications and other documents through an entity designated by the Commission, and to pay reasonable costs associated with such filings.[1] In 2000, we designated the NASD as the IARD system operator and approved filing fees,[2] and later required advisers registered or registering with us to file Form ADV through the IARD.[3] Approximately 9,000 advisers now use the IARD to register with us and make State notice filings electronically through the Internet.

IARD filing fee revenues from advisers registering or registered with the SEC (SEC-associated IARD revenues) have exceeded projections made in 2000 when the current fee schedule was approved. Pursuant to that schedule, filing fees vary according to the adviser's assets under management. The number of SEC-registered advisers has grown from an estimated 8,100 in 2000 to approximately 9,000 today. More significantly, advisers' managed assets have increased, which has moved many investment advisers to higher fee

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[1] *See* 15 U.S.C. 80b–3a(d).

[2] Designation of NASD Regulation, Inc., to Establish and Maintain the Investment Adviser Registration Depository; Approval of IARD Fees, Investment Advisers Act Release No. 1888 (July 28, 2000) [65 FR 47807 (Aug. 3, 2000)]. Following a corporate restructuring in 2002, the name of the IARD system operator was changed to ''NASD.''

[3] Electronic Filing by Investment Advisers; Amendments to Form ADV, Investment Advisers Act Release No. 1897 (Sept. 22, 2000) [65 FR 57438 (Sept. 22, 2000)].