Some insurers have designed annuity riders that could potentially be classified as long-term care insurance and that contain benefit eligibility provisions that could be characterized as "post-issue" underwriting. Both issues are discussed below. For your convenience, a copy of such rider is attached.

<u>Issue 1. Does this rider meet the definition of LTC?</u>

The rider provides guaranteed lifetime income withdrawals. The contract specifies the amount that can be withdrawn each year and guarantees that in the event the account value becomes exhausted, the insurer will provide the same amount for the lifetime of the annuitant. Enhanced Income Benefit provides that the withdrawal amount can be increased under special circumstances.

These special circumstances are as follows:

{Any of the lives on which Lifetime Income Withdrawals are based are confined to a Qualified Care Facility.}

{Any of the lives on which Lifetime Income Withdrawals are based cannot independently perform without substantial assistance at least {two} of the six Activities of Daily Living ("ADLs"), where the ADLs are defined to be: 1) Bathing; 2) Dressing; 3) Eating; 4) Toileting; 5) Transferring; and 6) Continence.}

{Any of the lives on which Lifetime Income Withdrawals are based are confined to a Qualified Care Facility OR any of the lives on which Lifetime Income Withdrawals are based cannot independently perform without substantial assistance at least {two} of the six Activities of Daily Living ("ADLs"), where the ADLs are defined to be: 1) Bathing; 2) Dressing; 3) Eating; 4) Toileting; 5) Transferring; and 6) Continence.}

Based on the Statement of Variability, the withdrawal amount can be increased as much as tenfold, and the enhanced benefit could be in effect for the lifetime of the annuitant.

Let me illustrate this with an example. Suppose that the contract value is $100,000 when the lifetime withdrawal is elected, and that the contract allows withdrawal of $5,000 each year. In the absence of any interest credits, the contract value would be depleted in 20 years. In reality, some interest credits would be expected, and depending on their level contract value may be depleted at some point or not.

Suppose that at some point, the annuitant becomes eligible for the Enhanced Income Benefit and that the contract provides for a threefold increase in benefits for a period of up to six years. The annuitant is now allowed to withdraw $15,000 annually for a period of six years. Should he survive beyond the six years, he would be allowed to withdraw $5,000 a year for the rest of his life.

The enhanced benefits in the rider are conditioned on the loss of functional capacity, but an argument could be made that no payment is provided, merely a higher withdrawal amount is permitted.

On the other hand, should the contract value be depleted, benefit payments might be made that would not have been paid in the absence of the benefit. For example, if the enhanced benefit period is the lifetime of the annuitant, once the account value is depleted the higher enhanced benefit payments would be made as long as the annuitant lives.

In the most extreme case, under the scenario described above, the maximum enhanced benefit would allow annual withdrawal of $50,000 (tenfold increase) for a lifetime of the annuitant (with $50,000 being paid by the insurer should contract value be exhausted).

Issue 2. Can benefit eligibility be conditioned on meeting certain criteria at issue?

Enhanced Income Benefit contains the following benefit eligibility condition:

{None of the lives on which Lifetime Income Withdrawals are based are confined to a Qualified Care Facility.}

{All of the lives on which Lifetime Income Withdrawals are based can independently perform without substantial assistance all six of the six Activities of Daily Living ("ADLs"), where the ADLs are defined to be: 1) Bathing; 2) Dressing; 3) Eating; 4) Toileting; 5) Transferring; and 6) Continence.}

{None of the lives on which Lifetime Income Withdrawals are based are confined to a Qualified Care Facility AND all of the lives on which Lifetime Income Withdrawals are based can independently perform without substantial assistance all six of the six Activities of Daily Living ("ADLs"), where the ADLs are defined to be: 1) Bathing; 2) Dressing; 3) Eating; 4) Toileting; 5) Transferring; and 6) Continence.}

These conditions are in the contract itself. These are not underwriting criteria. That is, the contract would be issued without verifying these, and they could presumably be used at the time of claim to deny the eligibility.

It would appear more appropriate to include these as underwriting questions. Coverage would be denied to some. Any eligibility disputes would be based on fraudulent responses. We have suggested this to the filer, and we have received the following response:

We do not view the Enhanced Income Benefit Initial Condition as underwriting criteria similar to life insurance. Not satisfying the condition doesn't increase charges or result in refusal to issue the contract. It's merely a condition precedent to receiving an enhanced withdrawal benefit.

This is correct in the sense that the rider charge is the same. But it is a little bit like a life insurance policy where the benefit is $10,000 if you are a smoker at issue and $100,000 if you are a nonsmoker at issue, but the determination of the smoking status at issue is done at the time of death.

Question: Is this provision unfair? Who'd have the burden of proof? Would the company be required to prove that the annuitant was not able to perform certain ADLs at issuance of the policy?