

II. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of Section 6(b)(5).⁹ In particular, the Commission believes the proposal is consistent with the Section 6(b)(5) requirement that the rules of an exchange be designed to promote just and equitable principles of trade and not to permit unfair discrimination between customers, issuers, brokers, and dealers.

The Commission believes that allowing inter-currency spread orders to attain spread priority is appropriate for several reasons. First, because the FCO market is dominated by institutional and corporate investors, the preemption of public customer limit orders (a concern of the Commission in the context of equity and index options), is unlikely. In this regard, the Commission notes that the proposed changes are applicable solely to the FCO market, which is dominated by institutions and sophisticated corporate investors. This is in part due to the complex nature of the instruments and the tremendous size of the underlying currency markets.

Second, because inter-currency spreads are currently executed as contingency orders, and therefore more susceptible to non-execution, the Commission believes granting priority to such orders will facilitate their execution and, therefore, may lead to more efficient quotes and tighter spreads.

Third, the priority principles applicable to inter-currency spreads mirror the priority rules currently in place for regular FCO spread orders. As a result, an inter-currency spread may be executed at a total net credit/debit with one other participant, provided at least one leg of the spread is executed at a better price than the established bid or offer for that contract and that no option leg is executed at a price outside of the established bid or offer for that option contract. Accordingly, the Commission believes that this change will allow institutional and corporate investors to better utilize sophisticated trading techniques involving FCOs for hedging and risk management purposes without altering the existing priority principles.

Finally, because the proposed definition limits an inter-currency spread to a maximum of two foreign currencies, the Commission notes that

the logistical problems and confusion attendant to the execution of orders involving three or more foreign currencies will be avoided.

It therefore is ordered, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-Phlx-94-23) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,

Deputy Secretary.

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[Rel. No. IC-20875; File No. 812-9142]

First SunAmerica Life Insurance Company, et al.

February 1, 1995.

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

ACTION: Notice of application for an order under the Investment Company Act of 1940 ("1940 Act").

APPLICANTS: First SunAmerica Life Insurance Company ("First SunAmerica"), FS Variable Annuity Account Two ("Separate Account"), and Vista Broker-Dealer Services, Inc. ("Vista").

RELEVANT 1940 ACT SECTIONS: Order requested under Section 6(c) of the 1940 Act for exemptions from Sections 26(a) and 27(c)(2) thereof.

SUMMARY OF APPLICATION: Applicants seek an order to permit the deduction of mortality, expense risk, and distribution expense charges from the assets of the Separate Account under certain variable annuity contracts ("Contracts") funded through the Separate Account and under materially similar contracts ("future contracts") funded in the future through the Separate Account, and from the assets of any other separate account ("future separate accounts") established in the future by First SunAmerica in connection with the issuance of contracts that are materially similar to the Contracts.¹

FILING DATE: The Application was filed on August 3, 1994, and amended on November 22, 1994, and December 20, 1994.

¹⁰ 15 U.S.C. 78s(b)(2) (1982).

¹¹ 17 CFR 200.30-3(a)(12) (1994).

¹ Applicants have agreed to amend this application during the notice period to reflect that the future contracts and contracts issued by future separate accounts relying on the exemptive relief requested here shall be materially similar to the Contracts.

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 on the application by writing to the Secretary of the Commission and serving the Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the SEC by 5:30 p.m. on February 27, 1995, and should be accompanied by proof of service on the 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 may request notification of a hearing by writing to the Secretary of the Commission.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicants c/o Mark J. Mackey, Esq., Routier, Mackey and Johnson, P.C., 1700 K Street, NW., Suite 1003, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Patrice M. Pitts, Attorney, or Wendy Finck Friedlander, Deputy Chief, Office of Insurance Products, Division of Investment Management, at (202) 942-0670.

SUPPLEMENTARY INFORMATION: Following is a summary of the application. The complete application is available for a fee from the Public Reference Branch of the Commission.

Applicants' Representations

1. First SunAmerica is a stock life insurance company organized under the laws of the State of New York. On May 24, 1994, First SunAmerica established the Separate Account to fund variable annuity contracts. The Separate Account is registered under the 1940 Act as a unit investment trust. The Separate Account and each of its portfolios are administered and accounted for as part of the general business for First SunAmerica, but the income, gains and losses of each portfolio are credited to or charged against the assets held in that portfolio in accordance with the terms of the Contracts, without regard to other income, gains and losses of any other portfolio or arising out of any other business First SunAmerica may conduct.

2. Vista is a broker-dealer registered under the Securities Exchange Act of 1934, and is the distributor for the Contracts.

3. The Contracts provide for accumulation of contract values and payments of annuity benefits on a fixed and variable basis. The Contracts are

⁹ 15 U.S.C. 78f(b)(5) (1982).

available for retirement plans that do not qualify for the special federal tax advantages available under the Internal Revenue Code ("non-qualified plans") and for retirement plans that do qualify for the federal tax advantages available under the Internal Revenue Code ("qualified plans"). Purchase payments under the Contracts may be made to the general account of First SunAmerica under the Contract's fixed account option ("Fixed Account"), to the Separate Account, or allocated among them. The minimum initial purchase payment for a Contract is \$5,000 for non-qualified plans (\$2,000 for qualified plans). Additional purchase payments may be made in amounts of at least \$250 (\$100 in the case of an automatic payment plan).

4. Initially, the Contracts will be funded through six portfolios of the Separate Account. Each portfolio invests in assets in the shares of one of six available series of Mutual Fund Variable Annuity Trust ("Trust"): the Growth and Income Portfolio; the Capital Growth Portfolio; the International Equity Portfolio; the Assist Allocation Portfolio; the U.S. Treasury Income Portfolio; and the Money Market Portfolio. The Trust is register under the 1940 Act as a diversified, open-end, management investment company. Additional underlying funds may become available in the future.

5. If the Contract owner dies during the accumulation period, a death benefit will be payable to the beneficiary upon receipt by First SunAmerica of due proof of death. The death benefit is reduced by the premium tax incurred by First SunAmerica, if any. If the Contract owner is younger than age 70 at the date of Contract issue, the death benefit is equal to the greatest of: (i) The total dollar amount of purchase payments made prior to the death of the Contract owner, reduced by any partial withdrawals and partial annuitizations; (ii) the Contract value at the end of the valuation period during which due proof of death (and an election of the type of payment to the beneficiary) is received by First SunAmerica; or (iii) the Contract value at that anniversary of the Contract issue date preceding the date of death—increased by any purchase payments made and reduced by any partial withdrawals and partial annuitizations since that anniversary—which yields the greatest result. If the Contract owner was at least age 70 on the Contract issue date, the death benefit will equal (ii) above.

6. An annual contract administration charge of \$30 is charged against each Contract. The amount of this charge is guaranteed and cannot be increased.

This charge reimburses First SunAmerica for expenses incurred in establishing and maintaining records relating to a Contract. The contract administration charge will be assessed on each anniversary of the Contract date that occurs on or prior to the annuity date. In the event that a total surrender of Contract value is made, the charge will be assessed as of the date of surrender without proration. This charge is not assessed during the annuity period. The contract administration charge is at cost with no margin included for profit.

7. During the accumulation period, amounts allocated to the Separate Account may be transferred among the portfolios and/or the Fixed Account. Both before and after the annuity date, Contract values may be transferred from the Separate Account to the Fixed Account. The first fifteen transactions effecting such transfers in any Contract year are permitted without the imposition of a transfer fee. A transfer fee of \$25 is assessed on the sixteenth and each subsequent transaction within the Contract year. This fee will be deducted from Contract values that remain in the portfolio (or, where applicable, the Fixed Account) from which the transfer was made. If such remaining Contract value is insufficient to pay the transfer fee, then the fee will be deducted from transferred Contract values. The transfer is at cost with no anticipation of profit.

8. Although there is a free withdrawal amount that applies to the first withdrawal during a contract year after the first, a contingent deferred sales charge (the "Withdrawal Charge") may be imposed upon certain withdrawals. Withdrawal Charges will vary in amount depending upon the contribution year of the purchase payment at the time of withdrawal. The Withdrawal Charge is deducted from remaining Contract value so that the actual reduction in Contract value as a result of the withdrawal will be greater than the withdrawal amount requested and paid. So that all withdrawals are allocated to purchase payments to which the lowest Withdrawal Charge (if any) applies, withdrawals will be allocated first to investment income, if any, which generally may be withdrawn free of Withdrawal Charge, and then to purchase payments on a first-in, first-out basis.

9. Earnings in a Contract owner's account, and purchase payments no longer subject to the Withdrawal Charge, may be withdrawn at any time free of the Withdrawal Charge. There also may be a free withdrawal amount for the first withdrawal during a

Contract year after the first Contract year. The additional free withdrawal amount is equal to 10% of purchase payments made more than one year before the date of withdrawal that remain subject to the Withdrawal Charge and that have not previously been withdrawn, less earnings in the Contract owner's account.

10. Any amounts withdrawn that exceed the limits described about may be subject to a Withdrawal Charge in accordance with the table shown below.

WITHDRAWAL CHARGE TABLE

Contribution year ²	Applicable withdrawal charge percentage
Zero	6
First	6
Second	5
Third	4
Fourth	3
Fifth	2
Sixth	1
Seventh and later	0

² Applicants represent that, with respect to a given purchase payment, a contribution year is a year starting from the date of the purchase payment in one calendar year and ending on the anniversary of such date in the succeeding calendar years. The contribution year in which a purchase payment is made is "contribution year zero," and subsequent contribution years are successively numbered.

The Withdrawal Charge may be reduced or waived in certain circumstances, as described in the prospectus for the Contracts.

11. First SunAmerica deducts a distribution expense charge from each portfolio of the Separate Account during each valuation period that is equal, on an annual basis, to 0.15% of the net asset value of each portfolio. This charge is designed to compensate First SunAmerica for assuming the risk that the cost of distributing the Contracts will exceed the revenues from the Withdrawal Charge. In no event will this charge be increased. The distribution expense charge is assessed during both the accumulation period and the annuity period; it is not applied to Contract values allocated to the Fixed Account.

12. Annuity payments will not be affected by the mortality experience (death rate) of (i) persons receiving such payments or (ii) the general population. The annuity rates may not be changed under the Contract. First SunAmerica deducts a mortality risk charge from the Separate Account for assuming the risks that: (i) The life expectancy of an annuitant will be greater than that assumed in the guaranteed annuity purchase rates; (ii) the Withdrawal

Charge may be waived in the event of the death of the owner; and (iii) the death benefit must be provided before the annuity date. The charge is deducted from each portfolio of the Separate Account during each valuation period at an annual rate of 0.90% of the net asset value of each portfolio. If the mortality risk charge is insufficient to cover the actual costs of assuming the mortality risks, First SunAmerica will bear the loss; if the charge proves more than sufficient, the excess will be a gain to First SunAmerica. To the extent First SunAmerica realizes any gain, those amounts may be used at its discretion—including to offset losses experienced when the mortality risk charge is insufficient. The mortality risk charge may not be increased under the Contract.

13. First SunAmerica bears the risk that the contract administration charge will be insufficient to cover the cost of administering the Contracts. For assuming this expense risk, First SunAmerica deducts an expense risk charge from the Separate Account during each valuation period at an annual rate of 0.35% of the net asset value of each portfolio. If the expense risk charge is insufficient to cover the actual cost of administering the Contracts, First SunAmerica will bear the loss; if the charge is more than sufficient, the excess will be a gain to First SunAmerica. To the extent First SunAmerica realizes any gain, those amounts may be used at its discretion—including to offset losses when the expense risk charge is insufficient. The expense risk charge may not be increased under the Contract.

14. Applicants represent that the aggregate amount of any Withdrawal Charges imposed and distribution expense charges paid will never exceed 9% of purchase payments previously made, and that First SunAmerica will monitor each owner's account for the purpose of ensuring that this limitation is not exceeded. Applicants undertake to include in the prospectus forming part of the registration statement for the Contracts statements describing the purpose of the distribution expense charge, and statements that the staff of the Commission deems such charge to constitute a deferred sales charge. Applicants undertake to abide by the representations and undertaking set forth in this paragraph relating to the distribution expense charge in connection with any future contracts, as well as materially similar contracts funded through future separate accounts, relying on the requested order.

Applicants' Legal Analysis

1. Applicants hereby request that the Commission, under Section 6(c) of the 1940 Act, grant exemptions from Section 26(a)(2) and 27(a)(2) thereof to the extent necessary to permit the deduction of mortality and expense risk charges and a distribution expense charge: (i) From the Separate Account under the Contracts and under any future contracts; and (ii) from the assets of any future separate accounts which offer contracts materially similar to the Contracts.

2. Pursuant to Section 6(c) of the Act, the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of the 1940 Act or from any rule or regulation thereunder, if and to the extent that such exemption is 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.

3. Sections 26(a)(2) and 27(c)(2) of the 1940 Act require, among other things, that all payments received under a periodic payment plan certificate sold by a registered unit investment trust, any depositor thereof or underwriter thereof, be held by a qualified bank as trustee or custodian, under arrangements which prohibit any payment to the depositor or principal underwriter except for the payment of a fee, not exceeding such reasonable amount as the Commission may prescribe, for bookkeeping and other administrative services.

4. Applicants believe that extending the requested relief to the future contracts, as well as to materially similar contracts funded through future separate accounts, is 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. Applicants submit that such an order would promote competitiveness in the variable annuity contract market by eliminating the need for First SunAmerica to file redundant exemptive applications, thereby reducing First SunAmerica's administrative expenses and maximizing the efficient use of First SunAmerica's resources. The delay and expense involved in having to seek exemptive relief repeatedly would impair the First SunAmerica's ability effectively to take advantage of business opportunities as they arise. Applicants further submit that the requested relief

is consistent with the purposes of the 1940 Act and the protection of investors for the same reasons. Applicants submit that if First SunAmerica were required repeatedly to seek exemptive relief with respect to the issues addressed in this application, investors would not receive any benefit or additional protection thereby.

5. Applicants assert that the aggregate of the mortality and expense risk charges, 1.25%, is reasonable in relation to the risks assumed by First SunAmerica under the Contracts and reasonable in amount, as determined by industry practice with respect to comparable annuity products. Applicants state that these determinations are based on their analysis of publicly available information about similar industry practices, taking into consideration such factors as current charge levels and benefits provided, the existence of expense charge guarantees, and guaranteed annuity rates. First SunAmerica undertakes to maintain at its home office, and make available to the Commission upon request, a memorandum detailing the methodology used in making these determinations.

6. Similarly, before relying on any exemptive relief granted herein with respect to any future contracts or any materially similar contracts funded through future separate accounts, Applicants will determine that the mortality and expense risk charges under any such contracts will be reasonable in relation to the risks assumed by First SunAmerica and reasonable in amount, as determined by industry practice with respect to comparable annuity products. First SunAmerica will maintain at its home office, and make available to the Commission upon request, a memorandum detailing the methodology used in making these determinations.

7. First SunAmerica submits that there is a reasonable likelihood that the Separate Account's distribution financing arrangement will benefit the Separate Account and its investors. First SunAmerica represents that it will maintain and make available to the Commission upon request a memorandum setting forth the basis for such conclusion. Similarly, before relying on any exemptive relief granted herein with respect to any future contracts or to any materially similar contracts issued by future separate accounts, Applicants will determine that there is a reasonable likelihood that the distribution financing arrangement will benefit the Separate Account (or

future separate accounts) and its (or their) investors. First SunAmerica will maintain and make available to the Commission upon request a memorandum setting forth the basis for such determination.

8. First SunAmerica further represents that the assets of the Separate Account and any future separate accounts that rely on the requested order will be invested only in management investment companies that undertake, in the event they should adopt a plan for financing distribution expenses pursuant to Rule 12b-1 under the 1940 Act, to have such plan formulated and approved by their board of directors, the majority of whom are not "interested persons" of the management investment company within the meaning of Section 2(a)(19) of the 1940 Act.

Conclusion

Applicants submit that for the reasons and upon the facts set forth above, the exemptions from Sections 26(a)(2) and 27(c)(2) of the 1940 Act to the extent necessary to permit the deduction of mortality, expense risk, and distribution expense charges from the assets of the Separate Account under the Contracts and under any future contracts, and from the assets of any future separate accounts offering contracts which are materially similar to the Contracts, meet the statutory standards of Section 6(c) of the 1940 Act. Accordingly, the Applicants assert that the requested exemptions 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.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95-2975 Filed 2-6-95; 8:45 am]

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[Rel. No. IC-20873; No. 812-8854]

Golden American Life Insurance Company, et al.

January 31, 1995.

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

ACTION: Notice of Application for an Order under the Investment Company Act of 1940 ("1940 Act").

APPLICANTS: Golden American Life Insurance Company ("Golden American"), Separate Account A of Golden American ("Account A"), Any Other Separate Account Established By

Golden American In The Future To Support Variable Life Insurance Contracts Issued by Golden American ("Future Accounts"), and Directed Services, Inc. ("DSI").

RELEVANT 1940 ACT SECTIONS: Order requested under section 6(c) granting exemptions from the provisions of Sections 26(a)(2)(C), 27(c)(1) and 27(c)(2) of the 1940 Act and from paragraphs (b)(1), (b)(12)(i), (b)(13)(iv) and (c)(4)(v) of Rule 6e-2 and of Rule 6e-3(T), and from Rule 22c-1 thereunder.

SUMMARY OF APPLICATION: Applicant request an order that would permit them to deduct a charge from premium payments to compensate Golden American for its increased federal tax burden resulting from the application of Section 848 of the Internal Revenue Code of 1986, as amended, to the receipt of such payments under certain variable life insurance contracts. Applicants also propose to deduct the charge on a deferred basis from contract cash value, with the balance of any unrecovered amount being deducted upon surrender.

FILING DATE: The application was filed on February 23, 1994.

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 February 27, 1995, 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 requestor's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Applicants: c/o Golden American, 280 Park Avenue, New York, New York 10017.

FOR FURTHER INFORMATION CONTACT: Yvonne M. Hunold, Senior Counsel, or Wendy F. Friedlander, Deputy Chief, at (202) 942-0670, Office of Insurance Products (Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application; the complete application is available for a fee from the Commission's Public Reference Branch.

Applicant's Representations

1. Golden American is a stock life insurance company and an indirect subsidiary of Bankers Trust Company ("Bankers").

2. Account A is a separate account established by Golden American and registered under the 1940 Act as a unit investment trust. Each of Account A's 10 divisions invests in a corresponding portfolio of The GCG Trust ("GCG Trust"), a registered open-end management company. Account A is, and any Future Account will be, used to fund certain variable life insurance contracts issued by Golden American, including the GoldenSelect VLI and GoldenSelect VL10 Contracts ("Contracts"). A registration statement to register the Contracts under the Securities Act of 1933 has been filed with the Commission. Applicants state that the Contracts will be issued in reliance on the applicable provisions of either Rule 6e-2 or Rule 6e-3(T).

3. DSI, the principal underwriter for the Contracts, is an indirect wholly-owned subsidiary of Bankers and an affiliate of Golden American. DSI is a registered broker-dealer under the Securities Exchange Act of 1934 and a member of the National Association of Securities Dealers, Inc.

4. Applicants propose to deduct a charge to reimburse Golden American for the increase in its federal income taxes resulting from the application of Section 848 of the Internal Revenue Code of 1986 ("Code"), as amended, to the receipt of premium payments under the Contracts. The charge will be reasonably related to Golden American's increased federal tax burden. The charge will be deducted either from (a) premiums received, or (b) Contract cash value on a deferred basis in a series of equal periodic installments, with the balance of any unrecovered amount to be deducted upon early surrender of a Contract. The deduction will be the same notwithstanding the manner in which it is deducted.

5. The Omnibus Budget Reconciliation Act of 1990 ("OBRA 1990"), amending Section 848 of the Code, requires life insurance companies of capitalize and amortize over ten years certain general expenses for the current year. Prior law allowed these expenses to be deducted in full from the current year's gross income. Section 848, as amended, effectively accelerates the realization of income from specified contracts and, consequently, the payment of taxes on that income. Taking into account the time value of money, Section 848 increases the insurance company's tax burden because the