

Empresa Nacional de Electricidad S.A. ("Endesa"), notwithstanding that it owns less than 25% of its voting securities.

FILING DATE: The application was filed on April 28, 1994 and amended on July 8, 1994 and October 6, 1994.

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 SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on March 23, 1995, and should be accompanied by proof of service on applicant, 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 such notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street NW., Washington, DC 20549. Applicant, Santo Domingo 789, Santiago, Chile.

FOR FURTHER INFORMATION CONTACT: Fran Pollack-Matz, Senior Attorney, at (202) 942-0570, or Barry Miller, Senior Special Counsel, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

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.

Applicant's Representations

1. Applicant is a Chilean holding company primarily engaged through its majority-owned subsidiaries and related companies in the utility business. Applicant is not registered under the Investment Company Act by virtue of its reliance on rule 3a-1.¹

2. Endesa is a Chilean electric generation company. Applicant owns directly and indirectly approximately 17% of Endesa and is Endesa's largest shareholder. Four of the five remaining

largest shareholders of Endesa are entities comparable to United States pension funds. Under Chilean law, the amount one of these entities can invest in a company similar to Endesa is the lesser of 7% of its assets or 7% of Endesa's equity. The fifth large shareholder of Endesa is a company owning approximately 3.4% of Endesa's shareholder equity. Applicant, therefore, owns more than twice as many shares as the next largest shareholder.

3. Three of Endesa's nine member board are Enersis officers or directors. Enersis's equity ownership gives it the power to elect two of Endesa's directors; a third Enersis official on Endesa's board publicly campaigned for the position. These persons also hold the positions of Enersis's Chairman of the Board, its Chief Executive Officer, and its Director of Planning and Development. Applicant's Chief Executive Officer is the Chairman of the board of Endesa. The Chairman is entitled to cast a second vote in the event of a tie of Endesa's board of directors, thereby giving Enersis an additional vote.

4. Enersis, previously a government-owned utility, was privatized in 1987 and restructured to become a holding company. Since its privatization, all of Enersis's stock acquisitions have been of utility businesses. Enersis's strategy has been to concentrate its activities on its core utility business and to take stock positions in other entities only under circumstances where it is the dominant shareholder or where it and Endesa together are the dominant shareholders of the entity whose stock is being acquired.

5. Jose Yuraszcek, Enersis's Chief Executive Officer, became Endesa's Chairman in April 1992. He is commonly referred to as the "Electricity Czar" in Chile and is identified by the public as personifying Endesa.² Mr. Yuraszcek is also Chairman of Endesa's subsidiary formed to build, own, and manage Endesa's major power plant development.

6. Endesa's Director of Planning and Development was assigned to Endesa at Enersis's direction and the planning and development staffs of Enersis and Endesa have collaborated on various projects.

Applicant's Legal Analysis

1. Section 2(a)(9) defines "control" as "the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official

position with such company." Section 2(a)(9) also creates a presumption that owners of more than 25% of a company's voting securities control such company, and the owners of 25% or less of a company's voting securities do not control such company. A securityholder may obtain an SEC order rebutting either presumption by producing evidence to the contrary.

2. Applicant seeks an order of the SEC declaring that it controls Endesa, notwithstanding the presumption under the Act that ownership of less than 25% of a company's voting securities is insufficient to establish control.³

3. Applicant argues that the facts set forth in the application are sufficient to support a finding that applicant controls Endesa. Applicant holds the largest share of Endesa's voting securities and has significant representation on Endesa's board of directors.

By the Commission.
Margaret H. McFarland,
Deputy Secretary.
 [FR Doc. 95-5334 Filed 3-3-95; 8:45 am]
 BILLING CODE 8010-01-M

[Release No. IC-20926; File No. 812-9230]

The Equitable Life Assurance Society of the United States, et al.

February 27, 1995.

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

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

APPLICANTS: The Equitable Life Assurance Society of the United States ("Equitable"), Separate Account No. 45 of Equitable (the "Account"), any other separate account established by Equitable in the future to support certain deferred variable annuity contracts and certificates issued by equitable ("Other Account"), and Equitable Capital Securities Corporation ("ECCS").

RELEVANT 1940 ACT SECTIONS: Order requested under Section 6(c) of the 1940 Act for exemptions from Sections 2(a)(35), 26(a)(2)(C) and 27(c)(2) thereof.

SUMMARY OF APPLICATION: Applicants seek an order to permit the deduction of: (i) a mortality and expense risk charge from the assets of the Account in

³ Any order concerning the application will be limited to determining whether Enersis controls Endesa under section 2(a)(9). Enersis is not seeking any determination as to whether it "primarily" controls Endesa for purposes of rule 3a-1 or whether applicant falls within the definition of investment company under the Act.

¹ Rule 3a-1 provides that an issuer meeting the statutory definition of an investment company is not an investment company if: (a) no more than 45% of the value of its total assets (exclusive of government securities and cash items) consists of securities other than government securities, securities issued by employee securities companies, securities of certain majority-owned subsidiaries, and securities issued by companies under the primary control of the issuer that are not investment companies; and (b) no more than 45% of its income after taxes (over the last four fiscal quarters combined) is received from such securities.

² "Electricity Czar," *Que Pasa*, May 1992.

connection with the offering of certain deferred variable annuity contracts and certificates (collectively, the "Account Contracts") issued by Equitable through the Account; (ii) a guaranteed minimum death benefit charge from a contract owner's account value; and (iii) a contribution-based distribution fee from a contract owner's account value. Applicants also seek an order to permit the deduction of a mortality and expense risk charge, guaranteed minimum death benefit charge and contribution-based distribution fee from the assets of, and account values held in, the Account and of any Other Account in connection with the offering in the future of deferred variable annuity contracts (the "Other Contracts") which are substantially similar in all material respect to the Account Contracts and are issued by Equitable through the Account or any Other Account.

FILING DATE: The Application was filed on September 16, 1994, and amended and restated on January 6, 1995.

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 Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on March 24, 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 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, D.C. 20549. Applicants, 787 Seventh Avenue, Area 36-K, New York, NY 10019.

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: The 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. Equitable is a stock life insurance company organized under the laws of the State of New York. Equitable serves as depositor of the Account. Equitable may establish one or more Other

Accounts in the future, for which it will serve as depositor.

2. The Account was established on August 15, 1994, as a segregated asset account of Equitable. Any income, gains or losses, realized or unrealized, from assets allocated to the Account are credited to or charged against the Account without regard to other income, gains or losses of Equitable. The Account is registered with the Commission as a unit investment trust series investment company under the 1940 Act. The Account will fund the variable benefits available under the Account Contracts. Units of interest in the Account under the Account Contracts will be registered under the Securities Act of 1933. In the future, Equitable may issue Other Contracts through the Account or Other Accounts.

3. The Account Contracts consist of a basic form of group annuity contract (the "Group Contract"), a basic form of certificate ("Certificate") issued under the Group Contract, and forms of Certificate endorsements ("Endorsements") to be used for specific benefits under the Certificates. Certificates may be issued as individual contracts in certain states.

4. The Account Contracts will be offered in the tax-qualified retirement plan ("Plan") market and in non-qualified ("NQ") markets. The Account Contracts initially will be offered in the rollover individual retirement annuity ("IRA") Plan market and in NQ markets. In both the IRA Plan and NQ markets, the initial contribution must be at least \$10,000; under IRA Certificates, that initial payment may come in the form of a minimum rollover contribution or direct transfer from another individual retirement arrangement. In both IRA Plan and NQ markets, additional contributions must be at least \$1,000.

5. Different minimum contribution amounts may be established for other Plan markets. Lower minimum amounts may be established for automatic investment programs. Maximum limitations on contributions also may be imposed. Contributions under the Certificates may be accumulated before annuitization, and annuity payments may be received after annuitization, on a variable basis. Annuity payments also may be received on a fixed basis.

6. Under an Endorsement, the Certificates permit contributions to be allocated to guarantee periods expiring on specified dates. The guarantee periods will be funded through a "non-unitized" separate account established by Equitable; assets in such "non-unitized" separate account will be subject to the claims of Equitable's general creditors. Each guarantee period

will provide a guarantee of the contribution allocated thereto and interest, which guarantee is supported by Equitable's general accounts assets, including those allocated to the "non-unitized" separate account. An upward or downward adjustment—a "market value adjustment ("MVA")"—will be made to the Annuity Account Value¹ in a guarantee period upon a withdrawal, surrender or transfer from a guarantee period before its expiration. Death benefit amounts based on Annuity Account Value in a guarantee period only will reflect any upward MVA.

7. Under an Endorsement, the Certificates may include a life contingent annuity option funded through Equitable's general account. The life contingent annuity provides guaranteed periodic fixed annuity benefits, generally commencing at later ages, for the life of the annuitant or a survivor annuitant. This form of benefit will be offered for use in conjunction with certain reallocations and withdrawal arrangements to be made available by Equitable.

8. The Account currently is subdivided into nine subaccounts ("Investment Funds"), each of which will be available under the Certificates. Each Investment Fund will invest in the shares of a corresponding portfolio ("Portfolio") of The Hudson River Trust (the "Trust"). The Trust is an open-end, diversified "series" management investment company, registered under the 1940 Act.

9. In the future, Equitable may create additional Investment Funds of the Account to invest in any additional Portfolios, or other such underlying portfolios or other investments as may now or in the future be available. Investment Funds also may be combined or eliminated from time to time.

10. ECSC is an indirect wholly-owned subsidiary of Equitable, and will be the principal underwriter of the Account and the distributor of the Account Contracts. ECSC is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934 (the "1934 Act"), and is a member of the National Association of Securities Dealers, Inc. (the "NASD"). The Certificates will be offered through representatives of ECSC and its affiliates, as well as through unaffiliated broker-dealers who have entered into agreements with ECSC. All of such

¹ A contract owner's "Annuity Account Value" is the sum of the amounts held for the owner in the "Investment Options" under the Account Contracts. The "Investment Options" include the variable investment options and each guarantee period account available through the Account Contracts.

affiliates and unaffiliated broker-dealers will be registered broker-dealers under the 1934 Act and NASD members.

11. ECSC or any successor entity may act as principal underwriter for any Other Account and as distributor for any Other Contracts. A successor entity also may act as principal underwriter for the Account.

12. The charges and fees described below are the maximum that may be imposed under the Certificates. The amount of the applicable charges and fees, as set forth in the Certificates and relevant offering prospectuses, may not be increased during the life of the Certificate without the owner's consent. Equitable may reserve the right to impose transfer charges not otherwise applicable when the Certificate is issued, subject to the maximum amounts described below.

13. Equitable proposes to deduct a daily asset charge from the Account for assuming mortality and expense risks. Equitable assumes a mortality risk by its contractual obligation to continue to make annuity payments for the entire life of the annuitant under annuity options involving life contingencies, regardless of the annuitant's own longevity or an improvement in life expectancy generally. Equitable assumes the risk that annuitants as a group will live longer than Equitable's annuity tables predict, which would require Equitable to pay out more in annuity income than it planned.

14. Equitable will assume an expense risk under the Certificates to the extent that the administrative charges applicable under the Certificates—including the annual contract fee, the asset-based administrative charge, the withdrawal processing charge, and the transfer charges—may be insufficient to cover actual administrative expenses.

15. As compensation for assuming mortality and expense risks, Equitable will assess a daily charge, equal on an annual basis to 0.90% of the assets of each Investment Fund of the Account. Approximately 0.60% of the charge is for assumption of mortality risks, and approximately 0.30% is for assumption of expense risks. (Equitable reserves the right to revise the percentages so allocated.)

16. The Certificates provide for a death benefit which is the sum of (a) the Annuity Account Value or, if greater, the "guaranteed minimum death benefit," and (b) the death benefit provided in an Endorsement (including a "Market Value Adjustment Terms Endorsement" proposed to offered by Equitable).

17. On the Contract Date,² the guaranteed minimum death benefit applicable to Certificates issued in all states except New York will equal the portion of the initial contribution allocated to the Account. Thereafter (except as adjusted at the end of the seventh Contract year), the guaranteed minimum death benefit will equal (i) the prior guaranteed minimum death benefit, (ii) plus any subsequent contributions to and transfers into the Account, (iii) less any transfers out of, and any withdrawals from, the Account, (iv) plus interest credited on each Processing Date.³ At the end of the seventh Contract year, the guaranteed minimum death benefit will be set at the then current guaranteed minimum death benefit or, if greater, the current Annuity Account Value in the Account.

18. Interest for the guaranteed minimum death benefit calculation under NQ Certificates will be credited at rates determined by the annuitant's "issue age" (the annuitant's age at issue of the Certificate)—6% for issue ages 0 through 69, 3% for issue ages 70 through 74, and 0% for issue ages 75 and older. For amounts in the money market Investment Fund, the rate will be based on the lesser of those guaranteed minimum death benefit interest rates and the actual rate of return.

19. Under IRA Certificates, interest will be credited at the applicable effective annual guaranteed minimum death benefit interest rate for an "attained age" (the owner's age at issue of the Certificate plus the number of Contract years that have elapsed since the Contract Date)—6% for attained ages 0 through 70, and 0% for attained ages 71 through 85. For amounts in the money market Investment Fund, the rate will be based on the lesser of those guaranteed minimum death benefit interest rates and the actual rate of return.

20. For Certificates sold in New York, the guaranteed minimum death benefit is calculated on a basis different from that for Certificates sold in all other states, but will not be less than (i) the initial and any subsequent contributions and transfers into the Account, (ii) less any transfers out of, and any withdrawals from, the Account, (iii) plus interest credited on each Processing Date in the same manner as

²The "Contract Date" is the date on which an annuitant is enrolled under a Group Contract, or the effective date of an individual contract form of Account Contract in states requiring individual contracts.

³The "Processing Date" is each anniversary of the Contract Date, but may occur quarterly.

under Certificates sold in all other states.

21. Equitable will impose a charge for providing the guaranteed minimum death benefit and assuming related mortality risks. The charge will not be asset-based, but will be based on the amount of the guaranteed minimum death benefit, and will compensate Equitable for the risk that the annuitant may die at a time when the cash value of the Account is less than the amount of the guaranteed minimum death benefit. Because the Certificates do not impose any withdrawal charge on the payment of a death benefit, Equitable assumes the risk that the owner will die at a time when the withdrawal charge would otherwise have been applicable. Equitable also will assume the risk that, at the time of death, the Annuity Account Value will not have increased by at least the amount of interest credited to contributions in determining the amount of the guaranteed minimum death benefit.

22. The maximum guaranteed minimum death benefit charge is 0.35% of the amount of the guaranteed minimum death benefit as of each Processing Date. The applicable charge will be deducted from the Annuity Account Value held in the Investment Funds on each Processing Date, and will be the same for all Certificates.

23. No sales charges will be deducted at the time contributions are applied under a Certificate. A distribution fee, or sales load, equal to a maximum of 1.00% of the amount of each contribution made, and not withdrawn, may be deducted from the Annuity Account Value held in the Investment Funds annually on each of the seven Processing Dates following the receipt by Equitable of each contribution. The distribution fee, if any, will be deducted from the Investment Funds on a pro-rata basis, unless the Certificate owner specifies otherwise. If, at any time before the seventh Processing Date, the Certificate owner surrenders the Certificate for its cash value (*i.e.*, the Annuity Account Value less any applicable charges) or annuitizes, the Certificate is terminated, or a death benefit is payable, no further distribution fee deductions will be made. If a partial withdrawal is taken before the seventh Processing Date, the distribution fee will be applied only to the remaining amount of the contribution. The distribution fee and the withdrawal charge (described below) combined will never exceed the amount of the maximum withdrawal charge. Any amounts realized from the distribution fee will be used to defray a portion of the sales expenses.

24. Depending upon the distribution channels used and other factors affecting marketing costs, Equitable may offer Certificates at distribution fee levels below 1.00%, or without a distribution fee. In addition, Equitable may increase the number of Processing Dates over which the distribution fee may be imposed.

25. A withdrawal charge will be imposed upon a surrender of a Certificate, upon annuitization, or upon any partial withdrawal. The charge will apply to amounts in excess of a "free corridor amount" and will be deducted from the Annuity Account Value held in the Investment Funds from which the withdrawal is made. The withdrawal charge is a percentage of each contribution received by Equitable, and depends on the Contract year in which the Certificate is surrendered, or a partial withdrawal is taken. The maximum withdrawal charge during the first Contract year—*i.e.*, when Equitable receives the contribution—is 7% and declines by 1% each Contract year thereafter to zero in the eighth and subsequent Contract years.

26. A "free corridor amount" equal to 15% of the Annuity Account Value under a Certificate at the beginning of the Contract year, less prior withdrawals made in that Contract year, may be withdrawn during that Contract year without being subject to the withdrawal charge. The "free corridor amount" is not applicable upon the surrender of a Certificate.

27. When computing the withdrawal charge, amounts shall be considered withdrawn on a "first-in, first-out" basis. The withdrawal charge is not applicable upon the payment of any death benefit. The amounts obtained from the withdrawal charge, together with the distribution fee, will be used to help defray expenses incurred in the sale of Certificates. The withdrawal charges will not exceed the percentages discussed above. Based on marketing considerations, Equitable may reduce the percentages charged or increase the number of Contract years over which the charges are imposed. During the life of the Certificate, the schedule of withdrawal charges shown in a Certificate will not be increased, nor will the charge period be abbreviated.

28. The administrative charges which may be assessed under the Certificates include: a maximum annual contract fee, equal to the greater of 0.15% of the amount of each contribution made and \$30 per Contract Year, which is incurred by the Certificate owner at the beginning of each Contract Year and deducted annually on each Processing Date; and a daily asset-based

administrative charge, at a maximum annual rate of 0.25%, assessed against the Investment Funds. Unless the Certificate owner directs otherwise, the annual contract fee will be deducted pro-rata from amounts held in the Investment Funds. The annual contract fee may be inapplicable if the total contributions received under a Certificate exceed specified amounts.

29. The administrative charges also include a charge, equal to the lesser of \$25 or 2% of the amount withdrawn, for processing each partial withdrawal (other than withdrawals under certain flexible payment distribution options) after the first in a Contract year. This charge will be deducted pro-rata from the Investment Funds from which each withdrawal is made. This charge does not apply upon the surrender of a Certificate.

30. The Certificates provide for five free transfers during a Contract year. For each additional transfer in excess of the free transfers, Equitable may charge \$25 at the time the transfer is processed. The charge will be deducted pro-rata from the Investment Funds from which the transfer is made. Equitable also may deduct a \$25 transfer charge for a direct transfer to a third party of amounts under the Certificate, or for an exchange for the contract of another insurance carrier.

31. Equitable expects that, over the period that the Certificates are in force, the revenues from the administrative charges—including the annual contract fee, the daily asset-based administrative charge, the withdrawal processing charge, and the transfer charges—will not exceed its total expected costs of administering the Certificates, on average, excluding costs that are properly categorized as distribution expenses. Applicants represent that these administrative charges will be deducted in reliance upon and in compliance with Rule 26a-1 under the 1940 Act.

32. Unless the Certificate owner specifies otherwise, charges for premium taxes generally are deducted from the Annuity Account Value in the Investment Funds upon annuitization. Under Certificates sold in certain states, however, a deduction for premium taxes is made from the Annuity Account Value in the Investment Funds at the time the contribution is received. Whether premium taxes are applicable depends on the owner's current place of residence; such taxes generally range from 0% to 5% of contributions or the amount annuitized, as appropriate. Equitable represents that the amount that it will recover for premium taxes

will not exceed the amount of premium taxes required to be paid.⁴

33. Applicants represent that if the mortality and expense risk charge and the guaranteed minimum death benefit charge are insufficient to cover the expenses and costs assumed, the loss will be borne by Equitable; if the amounts deducted prove more than sufficient, the excess will be profit to Equitable. Equitable expects to earn a profit over the expected life of the Certificates from the mortality and expense risk and the guaranteed minimum death benefit charges. If the distribution fee and withdrawal charge are insufficient to cover the actual costs of distribution, the expenses will be paid from Equitable's general account assets, which will include any profit derived from the mortality and expense risk and the guaranteed minimum death benefit charges.

Applicants' Legal Analysis

1. Applicants request that the Commission, pursuant to Section 6(c) of the 1940 Act, grant exemptions from Sections 2(a)(35), 26(a)(2)(C) and 27(c)(2) thereof to the extent necessary to permit the assessment of a mortality and expense risk charge, a guaranteed minimum death benefit charge, and a distribution fee under the Account Contracts and Other Contracts.

2. Section 6(c) of the 1940 Act provides, in relevant part, that the Commission may issue an order exempting any person, security or transaction, or any class or classes thereof, from any provisions of the 1940 Act as may be 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. Applicants believe that the terms of the relief requested with respect to any Other Contracts funded by the Account or any Other Account are consistent with the standards set forth in Section 6(c) of the 1940 Act. Applicants undertake that the Other Contracts funded by the Account or any Other Account will be substantially similar in all material respects to the Account Contracts. Applicants state that without the requested relief Applicants would have to request and obtain exemptive relief in connection with Other Contracts and/or Other Accounts. Any such additional request for exemption would present no issues under the 1940 Act that have not already been addressed in this Application.

⁴ Equitable represents that, to the extent necessary, it will assess charges for premium taxes in reliance upon Rule 26a-2(d) under the 1940 Act.

4. Applicants submit that the requested relief is appropriate in the public interest because it would promote competitiveness in the variable annuity contract market by eliminating the need for Equitable to file redundant exemptive applications, thereby reducing its administrative expenses and maximizing the efficient use of its resources. The delay and expense involved in having to repeatedly seek exemptive relief would impair Equitable's ability to effectively take advantage of business opportunities as they arise.

5. Applicants submit that the reasons cited above also explain why the requested relief is consistent with the purposes of the 1940 Act and the protection of investors. In this regard, Applicants submit that investors would not receive any benefit or additional protection if Equitable were required repeatedly to seek exemptive relief with respect to the same issues addressed in this Application. Indeed, investors might be disadvantaged as a result of Equitable's increased overhead expenses.

6. Section 2(a)(35) defines "sales load" as the difference between the price of a security to the public and that portion of the proceeds from its sale which is received and invested by the issuer, less any portion of such difference deducted for trustee's or custodian's fees, insurance premiums, issue taxes, or administrative expenses or fees which are not properly chargeable to sales or promotional activities.

7. The literal wording of Section 2(a)(35) contemplates a front-end sales charge. Although Rule 6c-8 permits the deduction of a contingent deferred sales load, such as the withdrawal charge provided for in the Certificates, that rule is not available for the periodic deduction of a contribution-based deferred distribution fee. Applicants, therefore, request an exemption from Section 2(a)(35) to the extent necessary to permit the assessment of a contribution-based deferred distribution fee under the Accounts.

8. Sections 26(a)(2)(C) 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 therefor, 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.

9. Applicants submit that because the distribution fee is designed to compensate for sales related expenses, not bookkeeping or other administrative services, it could be argued that Section 26(a)(2)(C) precludes the deduction of the distribution fee from the Annuity Account Value in the Account.

Applicants also submit that Section 27(c)(2) may be construed to prohibit a registered investment company or a depositor or underwriter for such a company from selling any periodic payment plan certificate (such as the Certificates) unless the proceeds of all the payments under such a certificate are held by a trustee or custodian under an agreement containing the substance of the provisions of Section 26(a)(2). For this reason, Applicants state that it could be argued that the Account, by virtue of the deduction of the distribution fee, does not meet the requirements of Section 26(a)(2)(C) and, therefore, the sale of the Certificates violates Section 27(c)(2). Accordingly, Applicants request exemption from Sections 2(a)(35), 26(a)(2)(C) and 27(c)(2) to the extent necessary to permit the deduction of the distribution fee in the manner described in this Application.

10. Applicants submit that the imposition of a sales load in the form of a contribution-based charge that is deducted over an extended period is more favorable to Certificate owners than the deduction of the equivalent charge as a front-end sales load (as contemplated by Section 2(a)(35)). In this regard, Applicants note that the full amount of a contribution is available for investment in the Account, thereby providing each Certificate owner with more investment dollars than if an equivalent front-end sales charge were deducted from the contribution.

11. Applicants also state that deferring a sales charge can benefit Certificate owners by permitting them to receive any positive investment experience on the portion of the charge that is deferred. Applicants further state that, because the distribution fee is not deducted from death benefit proceeds, deducting the distribution fee over time, rather than at issue of the Certificate, can favorably affect the amount of the death benefit payable if death occurs during the first seven Contract years. Applicants also state that the total amount charged to a Certificate owner when the distribution fee is deducted over time is no greater than the amount that would be charged if the distribution fee were deducted from the contribution as a front-end sales load.

12. Applicants state that the Commission previously has promulgated regulations permitting the deduction of sales charges from cash value, but only in connection with variable life insurance policies pursuant to Rule 6e-3(T) under the 1940 Act. Applicants submit that the reasoning that justifies the exemptions provided by that rule in connection with variable life insurance policies also justifies exemptive relief in this instance.

13. Applicants represent that the distribution fee may not exceed 7% of the contribution made, and the total sales load will never be more than the maximum withdrawal charge of 7%. In this regard, Applicants assert that if a Certificate owner does not withdraw a contribution in the seven-year period after the contribution is made, no withdrawal charge will be applicable, but the 1% maximum distribution fee will be imposed on each Processing Date, for a maximum total of 7% of the contribution made. Applicants further assert that if a partial withdrawal of a contribution is made during that seven-year period, the amount withdrawn will be subject to a withdrawal charge, but will no longer be part of the contribution base upon which the distribution fee is assessed on a Processing Date. That is, the amount withdrawn would not be subject to any further distribution fee, and the balance of the contribution would not be subject to a withdrawal charge, but would be charged a distribution fee on the Processing Date. Accordingly, Applicants represent that, as the withdrawal charge is reduced 1% in each of the years following the year in which the contribution is made, and the distribution fee only applies to the remaining amount of a contribution after a withdrawal, the sum of the distribution fee and the withdrawal charge (as applicable) will never exceed 7% of the contribution made. Applicants also represent that the sum of the distribution fee and the withdrawal charge (as applicable) always will be lower than the 9% maximum permitted by Rule 6c-8 and the provisions of Section 27(a)(1) of the 1940 Act regarding maximum sales loads for variable insurance products or periodic payments plan certificates.

14. Applicants assert that the maximum guaranteed minimum death benefit charge is reasonable in relation to the risk assumed by Equitable under the Certificates. In arriving at this determination, Equitable states that it conducted a large number of trials at different issue ages to determine the expected cost of the guaranteed minimum death benefit. By analyzing

the results of a statistically valid number of such simulations, Equitable was able to determine actuarially the level cost of providing the benefit. Based on this analysis, Equitable determined that the 0.35% charge was a reasonable charge for providing the guaranteed minimum death benefit under the Certificates. Equitable undertakes to maintain at its home office a memorandum, available to the Commission upon request, setting forth in detail the methodology used in making that determination.

15. Applicants represent that the aggregate mortality and expense risk and guaranteed minimum death benefit charges under the Certificates are reasonable in relation to the risks by Equitable under the Certificates, and reasonable in amount as determined by industry practice for comparable contracts. Applicants represent that they have reviewed publicly available information regarding the aggregate level of the mortality and expense risk and guaranteed minimum death benefit charges under comparable variable annuity contracts currently being offered in the insurance industry, taking into consideration such factors as current charge levels, the manner in which charges are imposed, the presence of charge level or annuity rate guarantees, and the markets in which the Certificate will be offered. Applicants will maintain and make available to the Commission upon request a memorandum outlining the methodology underlying the foregoing representations.

16. Equitable will assess a mortality and expense risk charge not to exceed an annual rate of 0.90%, and a maximum annual charge of 0.35% of the guaranteed minimum death benefit. Assuming a hypothetical gross investment return in the Account of 5.0%, the 0.35% maximum guaranteed minimum death benefit charge would, if expressed as a daily charge against Account assets, add approximately 0.35% to the 0.90% mortality and expense risk charge, for a total charge, on an annual basis, of approximately 1.25% of the assets in the Investment Funds.

17. For higher hypothetical gross returns, the guaranteed minimum death benefit charge, when expressed as an asset-based charge, would be less; for lower hypothetical gross returns, it would be more. Applicants assert that this is because the charge base—which is essentially contributions plus interest—is a relative constant in dollar amount compared to the fluctuating values of an Investment Fund. Thus, as a percentage of the assets of an

Investment Fund, which (assets) change with investment performance, positive performance results in a reduction of the guaranteed minimum death benefit charge when expressed as an asset-based charge; negative performance will result in an increase in the guaranteed minimum death charge when expressed as an asset-based charge.

18. Applicants acknowledge that the withdrawal charge and distribution fee, as applicable, may be insufficient to cover all costs relating to the distribution of the Certificates. Applicants further acknowledge that if a profit is realized from the mortality and expense risk and guaranteed minimum death benefit charges, all or a portion of such profit may be offset by distribution expenses not reimbursed by the withdrawal charge and distribution fee. In such circumstances, a portion of such charges might be viewed as providing for costs relating to distribution of the Certificates.

19. Notwithstanding the foregoing, Equitable has concluded that there is a reasonable likelihood that the proposed distribution financing arrangements made with respect to the Certificates will benefit the Account and Certificate owners and annuitants. Equitable represents that it will maintain at its principal office, and make available on request to the Commission, a memorandum setting forth the basis for such conclusion.

20. Equitable represents that the Account will invest only in an underlying mutual fund which has undertaken to have a board of directors, a majority of the members of which are not "interested persons" of such fund within the meaning of Section 2(a)(19) of the Act, formulate and approve any plan to finance distribution expenses in accordance with Rule 12b-1 under the 1940 Act.

Conclusion

Applicants submit that for the reasons and based upon the facts set forth above, the requested exemptions from Sections 2(a)(35), 26(a)(2)(C) and 27(c)(2) of the 1940 Act to permit the assessment of a mortality and expense risk charge, a guaranteed minimum death benefit charge, and a distribution fee under the Account Contracts and Other Contracts meet the statutory standards of Section 6(c) of the 1940 Act. Accordingly, 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. 95-5335 Filed 3-3-95; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-20922; 812-8846]

Prudential Securities Incorporated, et al.; Notice of Application

February 27, 1995.

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

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

APPLICANTS: Prudential Securities Incorporated (the "Sponsor"); and National Municipal Trust, Prudential Unit Trusts, National Equity Trust, and Government Securities Equity Trust (the "Trusts").

RELEVANT ACT SECTIONS: Order requested pursuant to section 6(c) for exemptions from sections 2(a)(32), 2(a)(35), 22(c), 22(d), and 26(a)(2)(C) of the Act and rule 22c-1 thereunder, and pursuant to section 11(a) to amend a prior order (the "Prior Order") granting relief from section 11(c).¹

SUMMARY OF APPLICATION: Applicants seek to impose sales charges on a deferred basis and waive the deferred sales charge in certain cases, exchange Trust units having deferred sales charges, and exchange units of a terminating series of a Trust for units of the next available series of that Trust.

FILING DATES: The application was filed on February 22, 1994 and amended on July 21, 1994, January 19, 1995, and February 21, 1995.

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 SEC's Secretary 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 March 24, 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 writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of the date of a hearing may request

¹ Prudential-Bache Securities, Inc., Investment Company Act Release Nos. 14943 (Feb. 18, 1986) (notice) and 14989 (March 13, 1986) (order).