

requirement in the Phlx's rules should facilitate compliance by providing Exchange members with ready reference to the requirement and deter future violations.

Proposed Phlx Rule 623 appears in the registration rules<sup>7</sup> and would require all Exchange members and clerks to be fingerprinted, pursuant to Rule 17f-2.<sup>8</sup> Because Commission provisions spell out who must be fingerprinted as well as the exemptions from this requirement, the Exchange did not recopy those provisions into its rules. Instead, the proposed Exchange rule serves as a reminder and provides a citation to the detailed requirement. The Exchange notes that its proposal is similar to the rules of other exchanges.<sup>9</sup>

Phlx Rule 623 also would expressly apply to applicants for Exchange membership. Because the Commission requires an employee to be fingerprinted prior to commencing the duties requiring fingerprinting, fingerprinting usually occurs at the application stage. Therefore, potential Phlx members are currently fingerprinted as part of the application process. Specifically, once an applicant has filed an application with the Exchange's Office of the Secretary pursuant to Phlx By-Law Article XII, Section 12-4, clearance procedures are conducted to verify personal data and financial viability. Fingerprints are taken by the Exchange's Security Department, which processes them for submission to the Federal Bureau of Investigations ("FBI"); returned fingerprint reports are forwarded to the member organizations for record retention in accordance with Rule 17f-2(d).<sup>10</sup>

Generally, Phlx Rules 900-942 govern membership and admission to membership; Phlx Regulation 2 (Order and Decorum Regulations administered pursuant to Phlx Rule 60) governs access to the trading floor by applicants. Pursuant to proposed Phlx Rule 623, the member organization is responsible for ensuring that the fingerprinting requirement is met prior to the applicant or employee performing the functions listed in Rule 17f-2.<sup>11</sup> Thus, in lieu of citing applicants themselves, the member organization sponsoring the applicant for membership would be cited for violations for the proposed requirement.

<sup>7</sup> See, e.g., Phlx Rule 600, Addresses of Members, and Phlx Rule 604, Registration and Termination of Registered Representatives.

<sup>8</sup> 17 CFR 240.17f-2.

<sup>9</sup> See, e.g., New York Stock Exchange Rule 35, Supplementary Material. 60.

<sup>10</sup> 17 CFR 240.17f-2(d).

<sup>11</sup> 17 CFR 240.17f-2.

Additionally, the fingerprint requirement also would be incorporated as a Floor Procedure Advice, such that a minor rule plan citation could be issued.<sup>12</sup> For example, if, during the course of an examination,<sup>13</sup> staff discovers that an Exchange member or non-exempt employee had not been fingerprinted, a citation could be immediately issued. The issuance of a citation should alleviate situations where fingerprint maintenance is a recurring problem, because violations by a member or participant organization would result in escalating fines, and, eventually, disciplinary action by the Exchange's Business Conduct Committee ("BCC"). The Exchange believes this type of violation is appropriate for the minor rule plan because it is objective and, thus, violations are readily subject to verification.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act<sup>14</sup> in general, and in particular, with Section 6(b)(5),<sup>15</sup> in that it is designed to protect investors and the public interest by facilitating compliance with Commission fingerprinting requirements.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe the proposed rule change will impose any inappropriate burden on competition.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has neither solicited nor received written comments on the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or

<sup>12</sup> The Phlx's minor rule violation enforcement and reporting plan ("minor rule plan"), codified in Phlx Rule 970, contains floor procedure advice with accompanying fine schedules. Rule 19d-1(c)(2), 17 CFR 240.19d-1(c)(2), authorizes national securities exchanges to adopt minor rule violation plans for summary discipline and abbreviated reporting; Rule 19d-1(c)(1), 17 CFR 240.19d-1(c)(1), requires prompt filing with the Commission of any final disciplinary actions. However, minor rule violations not exceeding \$2,500 are deemed not final, thereby permitting periodic, as opposed to immediate reporting.

<sup>13</sup> The Exchange reviews for compliance with Rule 17f-2, 17 CFR 240.17f-2, during the course of examinations of both member and participant organizations.

<sup>14</sup> 15 U.S.C. 78f(b).

<sup>15</sup> 15 U.S.C. 78f(b)(5).

within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Philadelphia Stock Exchange. All submissions should refer to File No. SR-Phlx-95-49 and should be submitted by September 12, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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**[Investment Company Act Release No. 21282; 812-9572; International Series Release No. 839]**

## **CITIC Pacific Limited; Notice of Application**

August 15, 1995.

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

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

**APPLICANT:** CITIC Pacific Limited.

<sup>16</sup> 17 CFR 200.30-3(a)(12).

**RELEVANT ACT SECTION:** Order requested under section 3(b)(2) of the Act.

**SUMMARY OF APPLICATION:** Applicant seeks an order declaring that it is engaged primarily in a business other than that of investing, reinvesting, owning, holding, or trading in securities.

**FILING DATES:** The application was filed on April 14, 1995, and amended on July 31, 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 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 September 11, 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, Level 35, Two Pacific Place, 88 Queensway, Hong Kong.

**FOR FURTHER INFORMATION CONTACT:** Mary Kay Frech, Senior Attorney, at (202) 942-0579, or C. David Messman, Branch Chief, 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 incorporated in Hong Kong and its shares are listed on the Hong Kong Stock Exchange. As of December 31, 1994, applicant had market capitalization of approximately US\$4.8 billion, making it the fourteenth largest company listed on the Hong Kong Stock Exchange.

2. Applicant's largest shareholder is China International Trust & Investment Corporation Hong Kong (Holdings) Limited ("CITIC HK"), which indirectly owns approximately 43% of applicant's shares. CITIC HK is wholly-owned by China International Trust & Investment Corporation ("CITIC"), a state-owned enterprise in the People's Republic of China ("PRC"), which is one of the primary investment vehicles of the PRC government. CITIC is a ministry-level

organization under the direct oversight of the State Council of the PRC.

3. Applicant came into its current configuration in March, 1990 when CITIC HK bought 49% of applicant's (then named Tyfull Company Limited) shares. In August 1991, Tyfull Company Limited changed its name to CITIC Pacific Limited. CITIC HK plays an influential role in the management and policies of applicant through a management contract and a number of common directors and senior officers.

4. Applicant's long-term objective is to develop as a large diversified business with an emphasis on trade and infrastructure projects similar to the traditional diversified companies based in Hong Kong known as "hongs." Applicant's principal operations are in Hong Kong, Macau, and Mainland China. Applicant is treated as a foreign entity for purposes of most Chinese regulatory schemes and is subject to restrictions on foreign investment and private ownership in certain sectors.

5. Applicant's consolidated total assets increased from HK\$1,525 million as of December 31, 1990 to HK\$34,240 million as of December 31, 1994 (on the basis of audited accounts).<sup>1</sup> Applicant's growth has occurred primarily through the acquisition of new businesses financed in large part by the issuance of new shares. Applicant has been actively involved in the business affairs of its affiliated companies and has made significant contributions to these companies at both an operational and strategic level.

6. Applicant conducts its diversified business operations either directly or through wholly-owned or majority-owned subsidiaries. Applicant, through wholly-owned subsidiaries, owns 100% of the shares of Dah Chong Hong, one of the largest Hong Kong based traders and distributors. Dah Chong Hong has substantial operations in Hong Kong and Mainland China and business in Japan, Canada, and Singapore. Dah Chong Hong's business includes distribution and servicing of vehicles, and import and distribution of numerous items, including a wide range of foods, building materials, electric appliances, and audio-visual equipment. Applicant nominates the board of directors of Dah Chong Hong and is actively involved in all major decisions regarding its business.

7. Applicant owns majority interests in Jiangsu Ligang Electric Power (Jiangsu Province) and Zhengzhou Xinli Electric Power (Henan Province). Each of these entities is a Chinese joint

venture company established to construct and operate a power station. The partners in these projects are Chinese government-owned entities. Under the relevant joint venture agreements, applicant has primary responsibility for the design and construction of these power stations, and for their operation and maintenance as well as financing. In addition, applicant recently has acquired a 50% interest in a power plant project in Kai Feng, Henan Province, China.

8. Applicant has a 55% controlling interest in four large manufacturing operations in Mainland China that focus generally upon items related to infrastructure development, including steel, telephone wires and cables, stainless steel pipe, and small and medium range motors.

9. Applicant has 50% interests in two major real estate development projects in Hong Kong. Applicant acts as co-developer and plays an active role in these projects, which include shopping and office space, and residential, hotel, and school facilities.

10. Applicant has majority interests in several tunnel development projects and completed tunnel and bridge operating companies. Applicant controls a 50% interest in Western Harbour Tunnel Company Limited ("WHTCL"), the leader of the consortium that will build the Western Harbour Crossing in Hong Kong. An executive director of applicant currently serves as chairman of the board of WHTCL and two other officers of applicant also serve on the board. Applicant also owns a 50% interest in Shanghai CITIC Tunnel Development Co. Ltd., a joint venture with Shanghai Huangpu River Tunnel Construction Co. Applicant provides advanced management skills to this project, and is an active participant in all stages of the project, including design and planning, construction, operation and maintenance.

11. In addition, applicant, through a wholly-owned subsidiary, is a 45% joint venture participant in Shanghai Huang Pu River Tunnel and Bridges Development Company Ltd. ("Huang Pu Tunnel & Bridges"), which was granted a 20-year franchise commencing January 1, 1995, for the operation, management, and maintenance of a tunnel and two bridges in Shanghai, China. The other 55% interest in the joint venture company is owned by two PRC companies connected to the Shanghai government. Applicant has contractual rights to participate in control of the joint venture and appoints three of the seven members of the board of directors. These directors actively are engaged in

<sup>1</sup> As of the date of the application, there were approximately HK\$7.73 to each US\$1.

the management and development of Huang Pu Tunnel & Bridges.

12. Applicant also holds a number of its businesses in the form of strategic alliances through shareholdings in companies in which applicant holds less than 50% of the equity share capital, many of which are controlled companies within the meaning of section 2(a)(9) of the Act. Applicant is the largest single shareholder of Dragonair, a major regional airline that serves 14 cities in Mainland China and 6 other cities in Asia from its base in Hong Kong. Applicant, directly and indirectly, owns 46.2% of Dragonair's voting securities and has an economic interest in an additional 3.75%, for a total economic interest of 49.95%. Applicant has a controlling influence over the company's management through its control of five of eleven seats on the board of directors of Dragonair, and has played a key role in negotiating and obtaining new routes in Mainland China for Dragonair. Dragonair's operations are subject to air transport service agreements between the United Kingdom and other countries that effectively prohibit any non-British company from owning and controlling a 50% or greater interest in an airline company in Hong Kong. This restriction is expected to change once Hong Kong reverts to Chinese sovereignty in 1997.

#### Applicant's Legal Analysis

1. Applicant would like to offer its securities (or depository receipts representing securities) in the United States, in private placements, offerings to qualified institutional buyers, or possibly a public offering. Applicant seeks an order to clarify that it will not be subject to regulation as an investment company in the United States.

2. Under section 3(a)(3), an issuer is an investment company if it "is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 percent of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis." Section 3(a) defines "investment securities" to include all securities except Government securities, securities issued by employees' securities companies, and securities issued by majority-owned subsidiaries of the owner which are not investment companies.

3. Applicant states that it is engaged primarily in the business of trade and infrastructure development through active participation in all of its majority-owned subsidiaries and controlled

companies and is not in the business of investing, reinvesting, or trading in securities. Although applicant owns investment securities within the meaning of section 3(a)(3) of the Act, and these investment securities exceed 40 percent of the value of its total assets on an unconsolidated basis, applicant currently is eligible to rely on rule 3a-1 to exempt it from the definition of investment company. Applicant is concerned, however, that a small change in asset values could deprive applicant of the protection of rule 3a-1.

4. Rule 3a-1 provides a safe harbor for an issuer that derives no more than 45% of the value of its total assets (excluding government securities and cash items), and no more than 45% of its net income after taxes, from securities other than government securities, securities issued by employees' securities companies, securities issued by majority-owned subsidiaries of the issuer which are not investment companies, and securities issued by the companies which are controlled primarily by such issuer and (a) through which the issuer engages in a business other than that of investing, reinvesting, owning, holding or trading in securities, and (b) which are not investment companies. As of December 31, 1994, approximately 43.77% of applicant's total assets were composed of interests in non-investment company businesses where applicant held 25% or less of the business or where applicant held more than 25% of the business, but another shareholder held a larger control position (thus putting in question whether applicant has the "primary control" required by rule 3a-1). These assets accounted for approximately 32.21% of applicant's total investment income (on a dividend basis) for the four fiscal quarters concluded December 31, 1994.

5. Section 3(b)(1) of the Act provides that notwithstanding section 3(a)(3), any issuer engaged primarily, directly or through a wholly-owned subsidiary or subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities, in not an investment company. Applicant does not fall within this exception because not of its businesses are conducted, not directly or through wholly-owned subsidiaries, but through majority-owned subsidiaries, controlled companies, and other companies.

6. Section 3(b)(2) provides that notwithstanding section 3(a)(3), the Commission may issue an order declaring an issuer to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities

either directly, through majority-owned subsidiaries, or through controlled companies conducting similar types of businesses. To clarify its status under the Act, applicant requests an order exempting it from regulation as an investment company under section 3(b)(2).

7. In determining whether a company is "primarily engaged" in a non-investment company business under section 3(b)(2), the Commission considers the following factors: (a) The company's historical development; (b) its public representations of policy; (c) the activity of its officers and directors; (d) the nature of its present assets, and (e) the sources of its present income.<sup>2</sup>

8. Applicant states that it was not established, nor has it developed, as an investment company. At the time of the acquisition of applicant by CITIC HK in 1990, applicant was a small company, listed on the Hong Kong Stock Exchange, having relatively few assets. Since that time, it has grown to become a diversified company, on the model of the traditional Chinese "hongs," principally by acquisitions of business interests from its largest shareholder, CITIC HK. It is now actively engaged in trade and distribution, consumer credit, aviation, real estate, telecommunications, tunnels and transportation-related facilities, power generation, manufacturing, and environmental projects. Applicant's strategy has been to enter a new line of business by taking a minority position in a consortium led by an experienced industry leader, then, once its has gained sufficient expertise, to assume a controlling or majority position. Applicant asserts that many of its holdings in China are less than majority-owned because of the government limitations on ownership by foreign investors. In addition, the holding structure of applicant's businesses in Hong Kong and Macau also have been largely shaped by local regulatory and business factors. Applicant states that it maintains long-term, substantial positions in even its minority-held companies, and has not looked to asset sales as an important source of revenue.

9. Applicant has never held itself out as an investment company within the meaning of the Act, and has never been a registered investment company (or subject to any analogous regulatory scheme in another jurisdiction). Applicant has consistently held itself out to its shareholders and the public as a company actively engaged in the businesses of trade, distribution,

<sup>2</sup> *Tonapah Mining Company of Nevada*, 26 S.E.C. 426, 427 (1947).

consumer credit, aviation, telecommunications, power generation, environment, roads and tunnels, industrial manufacturing, and real property. In various circulars issued to shareholders, applicant has stated that it expects growth in earnings from its operating businesses.

10. Applicant's principal officers and directors are actively engaged in the management and development of applicant's businesses. In many of these companies, applicant's officers play a leading role in management's strategic decision making or in other essential operational functions, such as identifying expansion opportunities or leading financing efforts. Applicant's top officers have extensive backgrounds in banking, shipping, heavy industry, power generation, property development, law, government, accounting, and finance. None of applicant's principal officers has experience as an investment manager or adviser, and none of them holds himself out as an expert in these areas. No principal officer of applicant devotes any of his time to investment management, apart from cash management. Applicant estimates that approximately 80% of management's time is devoted to considering issues related to operating its various businesses, and the remainder of management's time is devoted to the pursuit of new business opportunities, maintaining relations with joint venture and consortium partners, obtaining financing, and administrative matters.

11. As of December 31, 1994, applicant's majority-owned subsidiaries<sup>3</sup> accounted for 44.46% of applicant's assets for the prior 12 months. As of December 31, 1994, Dragonair, a company controlled by applicant,<sup>4</sup> accounted for 6.91% of applicant's assets.

12. Applicant also presumptively controls companies other than Dragonair that are involved in the development of core infrastructure. Applicant asserts that it need not establish that such companies and Dragonair conduct "similar types of

business" within the meaning of section 3(b)(2) in order to obtain exemptive relief, however. Section 3(b)(2) requires similarity of businesses only among those controlled companies which must be added to arrive at a determination of the primary business engagement of the controlling company.<sup>5</sup> In applicant's case, only Dragonair need be added to applicant's majority-owned subsidiaries to demonstrate that applicant is primarily engaged in trade and infrastructure (aviation) businesses through majority-owned subsidiaries and controlled companies.

13. Accordingly, 51.37% of applicant's assets as of December 31, 1994, valued in accordance with section 2(a)(41) of the Act, were comprised of its majority-owned subsidiaries and Dragonair.

14. Applicant's income derives from dividends paid out of operating returns from the companies through which it does business. As of December 31, 1994, 67.80% of applicant's income for the prior twelve months was produced by its majority-owned subsidiaries and Dragonair.

15. Applicant asserts that its historical development, its public representations of policy, the activities of its officers and directors, the nature of its assets, and the nature of its income demonstrates that applicant is not engaged primarily in the business of investing in securities. Applicant submits that it is primarily engaged, through controlled companies and majority-owned subsidiaries, in trade, distribution, transportation, power, and other infrastructure industries in the China region.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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[Rel. No. IC-21283; No. 812-9376]

**First Variable Life Insurance Company, et al.**

August 15, 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:** First Variable Life Insurance Company ("First Variable"), First Variable Annuity Fund E

("Separate Account"), and First Variable Capital Services, Inc. ("Capital Services").

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

**SUMMARY OF APPLICATION:** Applicants seek an order to permit the deduction of a mortality and expense risk charge from the assets of the Separate Account or any other separate account ("Other Accounts") established by First Variable to support certain variable annuity contracts ("Contracts") as well as other variable annuity contracts that are substantially similar in all material respects to the Contracts ("Future Contracts"). This order will supersede prior orders issued by the Commission permitting Applicants to issue variable annuity contracts that provide for the deduction of mortality and expense risk charges from the Separate Account.

**FILING DATE:** Applicants filed their application on December 19, 1994, and filed amended applications on May 22, 1995, July 21, 1995, and August 15, 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 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 September 11, 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 SEC.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 5th Street, N.W., Washington, D.C. 20549.

Applicants, Arnold Bergman, First Variable Life Insurance Company, 600 Atlantic Avenue, 28th Floor, Boston, Massachusetts 02210.

**FOR FURTHER INFORMATION CONTACT:** Pamela K. Ellis, Senior Counsel, or Wendy Finck Friedlander, Deputy Chief at (202) 942-0670, Office of Insurance Products (Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** Following is a summary of the application; the complete application is available for a fee from the SEC's Public Reference Branch.

<sup>3</sup> Section 2(a)(24) of the Act defines a "majority-owned subsidiary" of a person as 11a company 50 per centum or more of the outstanding voting securities of which are owned by such person, or by a company which \* \* \* is a majority-owned subsidiary of such person."

<sup>4</sup> "Control" is defined in section 2(a)(9) of the Act to mean "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 within such company. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25% of the voting securities of a company shall be presumed to control such company."

<sup>5</sup> *In the Matter of American Manufacturing Company, Inc.*, 41 S.E.C. 415, 419 (Mar. 11, 1963).