

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

Margaret H. McFarland,  
Deputy Secretary.

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[Rel. No. IC-21586; File No. 812-9386]

**Massachusetts Mutual Life Insurance Company, et al.**

December 7, 1995.

**AGENCY:** U.S. Securities and Exchange Commission ("Commission").

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

**APPLICANTS:** Massachusetts Mutual Life Insurance Company ("MassMutual"), Massachusetts Mutual Variable Life Separate Account I ("Separate Account") and MML Investors Services, Inc. ("MMLISI").

**RELEVANT 1940 ACT SECTIONS:** Order requested pursuant to Section 6(c) of the 1940 Act for exemptions from Sections 27(a)(3) and 27(c)(2) of the 1940 Act and Rules 6e-3(T)(b)(13)(ii) and 6e-3(T)(c)(4)(v) thereunder.

**SUMMARY OF THE APPLICATION:**

Applicants seek an order: (1) to permit them to deduct from premium payments received in connection with certain flexible premium variable life insurance policies ("Policies") issued by MassMutual and any other flexible premium variable life insurance policies ("Other Policies") issued by MassMutual in the future and made available through the Separate Account or any other separate account established in the future by MassMutual to support flexible premium variable life insurance contracts ("Future Accounts"), an amount less than or approximately equal to the amount by which MassMutual's federal tax liabilities will be increased as a result of its receipt of those premium payments; and (2) to permit the deduction from premium payments in amounts less than or equal to the minimum planned premium under the Policies of a sales load that is greater than the sales load previously deducted from premium payments in amounts exceeding the minimum planned premium.

**FILING DATES:** The application was filed on December 23, 1994, and amended on June 28, 1995, and September 12, 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

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 January 2, 1996, 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 Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Applicants, Thomas F. English, Esq., Massachusetts Mutual Life Insurance Company, 1295 State Street, Springfield, Massachusetts 01111.

**FOR FURTHER INFORMATION CONTACT:** Joyce Merrick Pickholz, Senior Counsel, 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 Commission's Public Reference Branch.

Applicants' Representations

1. MassMutual is a mutual life insurance company organized under Massachusetts law.

2. The Separate Account was established as a separate investment account of MassMutual for the purpose of investing net premium payments received under variable life insurance contracts. It is registered under the 1940 Act as a unit investment trust.

3. MMLISI serves as the principal underwriter for the Policies. MMLISI is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934, and is a member of the National Association of Securities Dealers, Inc. MMLISI may serve as principal underwriter for Other Policies issued by MassMutual in the future.

4. The Policies are flexible premium variable life insurance policies available on a "Case" or on an individual basis. Insureds purchasing a Policy on a "Case basis" share a common employment or other institutional relationship. All Policies in any Case are aggregated for purposes of determining issue dates, policy dates, underwriting requirements and sales load percentages. Individual insureds with Case Policies may exercise all rights and privileges under the Policy through their employer or other sponsoring entity acting as Case administrator. After termination of the

employment or other relationship, an individual Policy owner may exercise such rights and privileges directly. The minimum Case premium is \$250,000 of first year annualized premiums for all Policies in a Case.

5. The sales load component of the premium deduction is based on the aggregate initial premiums paid for all Policies in a Case ("Initial Case Premium"). For Policies issued in a Case with an Initial Case Premium of at least \$1,000,000, the sales load remains level over the life of the Policies. For Policies issued in a Case with an Initial Case Premium of less than \$1,000,000, the sales load applied to any premium payment not exceeding the minimum planned Policy premium amount will be set at one level for the first five Policy years, and then reset at a lower, level amount after the fifth Policy year. During the first five Policy years, premiums are tracked on an annual cumulative basis for each Policy, and the sales load will be assessed at a higher level for premium payments made at or below the specified minimum planned Policy premium.

6. No surrender charge is imposed under the Policies.

7. MassMutual deducts a state premium tax charge from each premium payment made under the Policies. The level of such charge varies from state to state. Currently, state premium tax rates range from 2% to 3.5%.

8. MassMutual proposes to deduct from premium payments a charge for the federal tax burden imposed by deferred acquisition costs ("DAC tax") in the amount of 1% of premium payments. This amount is, at most, approximately equal to or less than the increase in MassMutual's federal income tax obligations based upon premiums received under the Policies.

9. In the Omnibus Budget Reconciliation Act of 1990 ("OBRA"), Congress amended Section 848 of the Internal Revenue Code of 1986 (the "Code"). In relevant part, Section 848 requires insurance companies to capitalize and amortize over a period of ten years certain general expenses for the current year. Under prior law, those expenses would have been deductible in full from an insurance company's gross income in the current tax year.

10. The amount of deductions that would have to be capitalized and amortized over ten years is based upon "net premiums" received in connection with certain types of insurance contracts ("specified contracts"). More specifically, an amount of expenses equal to a percentage of the current year's net premiums (*i.e.*, gross premiums minus return premiums and

reinsurance premiums) must be capitalized and amortized for each specified contract. The amount of general deductions that must be capitalized varies, depending upon the type of contract to which the premiums received relate, according to a schedule set forth in Section 848. The Policies fall into the category of individual life insurance contracts under Section 848 for which 7.7% of net premiums received must be capitalized and amortized.

11. The impact of the DAC tax on MassMutual may be quantified as follows. For each \$10,000 of premiums received by MassMutual under the Policies in a given year, MassMutual must capitalize \$770 (*i.e.*, 7.7% of \$10,000); \$38.50 (one-half year's portion of the ten-year amortization) of this amount may be deducted in the current year. The remaining \$731.50 (*i.e.*, \$770 minus \$38.50) is subject to taxation at the corporate tax rate of 35 percent. As a result, MassMutual would owe approximately \$256.03 more in taxes for the current year than before the OBRA tax changes. However, this current tax increase will be offset partially by deductions allowed during the next ten years as a result of amortizing the remainder of the \$770—\$77 in each of the following nine years, and \$38.50 in year ten. When estimating the economic impact of the tax increase, the benefit to MassMutual of being able to deduct \$77.00 per year for each of the subsequent nine years and \$38.50 for the tenth year must be discounted, so that only the present value of those deductions would be subtracted from the \$256.03.

12. To the extent that capital must be used by MassMutual to satisfy its increased federal tax burden under Section 848, such capital used to satisfy this increased federal tax burden under Section 848 is, in essence, MassMutual's after tax rate of return—*i.e.*, the return MassMutual seeks on invested capital—of at least 8 percent. Accordingly, in the business judgment of MassMutual, a discount rate of at least 8% is appropriate for use in calculating the present value of MassMutual's future tax deductions resulting from the amortization described above. To the extent that the 8% discount rate is lower than MassMutual's actual after tax rate of return, Applicants submit that a measure of comfort is provided that the calculation of MassMutual's increased tax burden attributable to the receipt of premiums will continue to be reasonable over time, even if the corporate tax rate applicable to MassMutual is reduced, or its after tax rate of return is lowered.

13. MassMutual considered a number of factors in determining the expected after tax rate of return used in arriving at this discount rate. For example, MassMutual identified the level of investment return that can be expected to be earned over the long term on various types of fixed income securities, including the expected yield on 30-year U.S. Treasury bonds and high-grade corporate bonds, and adjusted these rates in an amount considered appropriate to compensate it for the risks associated with allocating capital to a line of business, especially a newer line of business without a performance history. MassMutual also considered whether this expected after tax rate of return is within the normal range in the life insurance industry.

14. Assuming a corporate tax rate of 35 percent, and applying a discount rate of 8 percent, the present value of the increased deductions allowable in the following ten years is \$174.60. Because this amount partially offsets the increased tax burden, Section 848 imposes an increased tax burden on MassMutual with a present value equal to \$81.43 (*i.e.*, \$256.03 minus \$174.60) for each \$10,000 of net premiums received.

15. Because state premium taxes are deductible in computing federal income taxes, MassMutual does not incur incremental income tax when it passes on state premium taxes to Policy owners. In contrast, federal income taxes are *not* deductible in computing MassMutual's federal income taxes. To offset fully the impact of Section 848, MassMutual must impose an additional charge that would make it whole not only for the \$81.43 additional tax burden attributable to Section 848, but also for the tax on the additional \$81.43 itself. This additional charge may be determined by dividing \$81.43 by the complement of the 35% federal corporate income tax rate (*i.e.*, 65%), resulting in an additional charge of \$125.28 for (*i.e.*, 1.25% of) each \$10,000 of net premiums.

16. Based on prior experience, MassMutual believes that it is reasonable to expect that virtually all future deductions will be fully taken. MassMutual submits that a charge of 1% will reimburse it for the impact of Section 848 on its federal tax liabilities. Applicants represent that a 1% charge is reasonably related to MassMutual's increased federal tax burden under Section 848, taking into account the benefit to MassMutual of the amortization permitted by Section 848 and the use by MassMutual of a discount rate of 8% in computing the

future deductions resulting from such amortization.

17. Applicants also represent that the charge to be deducted under Other Policies by MassMutual pursuant to the relief requested will be reasonably related to MassMutual's increased federal tax burden under Section 848, taking into account the benefit to MassMutual of the amortization permitted by Section 848, and the use by MassMutual of an appropriate discount rate (*i.e.*, a rate not less than MassMutual's expected after tax rate of return) in computing the cost of the increased tax burden and the present value of the future deductions resulting from such amortization.

#### Applicants' Legal Analysis

1. Section 6(c) of the 1940 Act, in relevant part, authorizes the Commission, by order upon application to exempt any person or transaction or class of persons or transactions from the provisions of the 1940 Act or rules thereunder, if and to the extent that the 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.

2. Applicants request an order of the Commission pursuant to Section 6(c) of the 1940 Act exempting them from the provisions of Section 27(c)(2) of the 1940 Act and Rule 6e-3(T)(c)(4)(v) thereunder to permit deductions from premium payments received in connection with the Policies and Other Policies an amount that is reasonable in relation to MassMutual's federal income tax burden related to the receipt of such premiums. Applicants further request an exemption from Rule 6e-3(T)(c)(4)(v) of the 1940 Act to permit the proposed deductions to be treated as other than sales load.

3. Applicants also request that the Commission grant an order exempting them from the "stair step" provisions of Section 27(a)(3) of the 1940 Act and Rule 6e-3(T)(b)(13)(ii) thereunder in connection with the sale of units of interest in the Separate Account under the Policies.

#### Section 27(c)(2) and Rule 6e-3(T)(c)(4)—DAC Tax Exemption

1. The Separate Account is, and the Future Accounts will be, regulated under the 1940 Act as if they were the issuers of periodic payment plan certificates. Accordingly, the Separate Account, the Future Accounts, MassMutual (as the depositor for the Separate Account) and MMLISI (as principal underwriter of the Policies)

are deemed to be subject to Section 27 of the 1940 Act.

2. Section 27(c)(2) of the 1940 Act prohibits the sale of periodic payment plan certificates unless the proceeds of all payments (except such amounts as are deducted for sales load) are held under an indenture or agreement containing in substance the provisions required by Section 26(a) (2) and (3) of the 1940 Act. Sections 27(a)(1) and 27(h)(1) of the 1940 Act limit sales loads on periodic payment plan certificates to 9% of total payments to be made.

3. Rule 6e-3(T) provides a broad range of exemptive relief for the offering of flexible premium variable life insurance policies such as the Policies and the Other Policies. Paragraph (b)(13)(iii) of Rule 6e-3(T) provides relief from 27(c)(2) of the 1940 Act to the extent necessary to permit "[t]he deduction of premium or other taxes imposed by any state or other governmental entity." Applicants submit that the exemptive relief needed to permit the deduction of a DAC tax charge is provided without regard to whether the taxes are imposed by states or other governmental entities. However, Applicants acknowledge the argument that, although it increases an insurance company's tax liability because of the type of premium payments received, Section 848 of the Code does not purport to impose a tax on life insurance companies. Accordingly, Applicants request an exemption from Section 27(c)(2) to address any concern that the proposed DAC tax charge might not be deemed to be entitled to the exemptive relief from that Section provided by Rule 6e-3(T)(b)(13)(iii).

4. Rule 6e-3(T)(c)(4) defines "sales load" as the excess of premium payments over certain itemized charges and deductions. A deduction for an insurer's DAC tax expense as described above does not fall squarely into any of those itemized charges or deductions. Arguably, then, such a deduction may be treated as "sales load" under a literal reading of Rule 6e-3(T)(c)(4). Applicants request an exemption from Rule 6e-3(T)(c)(4)(v) to permit the proposed DAC tax charge to be assessed without treating the charge as a deduction to cover sales and distribution expenses.

5. Applicants submit that there is no public policy reason for treating as deductions made to pay costs attributable to federal taxes (e.g., the proposed DAC tax charge) as sales load. Applicants also assert that language in the releases in which the Commission adopted and amended Rule 6e-3(T) does not suggest that such a result was

intended, despite the literal wording of paragraph (c)(4) of the Rule.

6. Applicants assert that the public policy that underlies Section 27(a)(1) of the 1940 Act is to prevent excessive sales loads from being charged in connection with the sale of periodic payment plan certificates. Applicants submit that the treatment of a DAC tax charge as sales load would not further this legislative purpose. Applicants state that the Commission has concurred with this conclusion by excluding deductions for state premium taxes from the definition of "sales load" in paragraph (c)(4) of Rule 6e-3(T).

7. Applicants assert that, in evaluating whether it is consistent with the purposes and policies of the 1940 Act for deductions made to pay federal taxes to be excluded from sales load, it is helpful to examine the definition of "sales load" in Section 2(a)(35) of the 1940 Act. Section 2(a)(35) of the 1940 Act defines "sales load" as the difference between the price of a security offered to the public and that portion of the proceeds from its sale which is received and invested or held for investment by the issuer (or in the case of a unit investment trust, by the depositor or trustee), 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. Applicants note that both Section 2(a)(35) and Rule 6e-3(T)(c)(4) define "sales load" derivatively.

8. Applicants further assert that Section 2(a)(35) excludes from the definition of "sales load" under the 1940 Act deductions from payments for "issue taxes." Applicants submit that issue taxes incurred as a result of selling an investment company security would be similar to premium taxes incurred as a result of the sale of a variable life insurance policy. This suggests that it is consistent with the 1940 Act's policies to exclude from the definition of "sales load" in Rule 6e-3(T) deductions made to pay federal tax obligations incurred as a result of receipt of premiums.

9. Applicants submit that the reference in Section 2(a)(35) to administrative expenses or fees that are "not properly chargeable to sales or promotional activities" suggests that the only deductions intended to fall within the definition of "sales load" are those that are properly chargeable to such activities. Because the proposed deductions will be used to compensate MassMutual for its increased federal tax burdens attributable to the receipt of premiums, and are not properly chargeable to sales or promotional

activities, Applicants assert that the language in Section 2(a)(35) indicates that treating the proposed DAC tax charge as other than sales load is consistent with the policies of the 1940 Act.

10. Finally, Applicants state that the limitation to state premium taxes of the premium tax exclusion from the definition of "sales load" in Rule 6e-3(T)(c)(4)(v) probably is an historical accident. When Rule 6e-3(T) was adopted and later amended, the federal government did not impose taxes based upon receipt of premiums. Applicants note that nothing in the Commission releases dealing with Rule 6e-3(T) suggests that the exclusion of premium tax deductions from the definition of sales load was based on the type of governmental entity imposing such taxes.

11. Applicants assert that the requested relief with respect to the Policies or Other Policies issued through the Separate Account or Future Accounts is appropriate in the public interest because it would promote competitiveness in the variable life insurance market by eliminating the need for MassMutual to file redundant exemptive applications, thereby reducing administrative expenses and maximizing the efficient use of its resources. The delay and expense involved in having to seek exemptive relief repeatedly would impair MassMutual's ability to take advantage effectively of business opportunities as they arise. In addition, Applicants state that the requested relief is consistent with the purposes of the 1940 Act and the protection of investors for the same reasons. If Mass Mutual was required to seek exemptive relief repeatedly with respect to the same issues addressed in this request for relief, investors would not receive any benefit or additional protection thereby and might be disadvantaged as a result of MassMutual's increased overhead expenses.

#### Conditions for Relief

1. Applicants represent that MassMutual will monitor the reasonableness of the 1% charge.

2. Applicants represent that the registration statement for each Policy or Other Policy under which the 1% charge is deducted will: (i) disclose the charge; (ii) explain the purpose of the charge; and (iii) state that the charge is reasonable in relation to MassMutual's increased federal tax burden as a result of applying Section 848 of the Code.

3. Applicants represent that the registration statement for each Policy or Other Policy under which the 1%

charge is deducted will contain as an exhibit an actuarial opinion as to: (i) the reasonableness of the charge in relation to MassMutual's increased federal tax burden resulting from the application of Section 848 of the Code; (ii) the reasonableness of the expected after tax rate of return that is used in calculating the charge; and (iii) the appropriateness of the factors used to determine MassMutual's expected after tax rate of return.

*Section 27(a)(3) and Rule 6e-3(T)(b)(13)(ii)—“Stair Step” Exemption*

1. Section 27(a)(3) of the 1940 Act provides that the amount of sales load which may be deducted from any of the first twelve monthly payments on a periodic payment plan certificate may not exceed proportionately the amount deducted from any other such payment, and that the sales load deducted from any subsequent payment may not exceed proportionately the amount deducted from any other subsequent payment.

2. Rule 6e-3(T)(b)(13)(ii) provides an exemption from Section 27(a)(3), provided that the proportionate amount of sales load deducted from any payment does not exceed the proportionate amount deducted from any prior payment, unless an increase is caused by reductions in the annual cost of insurance or in sales load for amounts transferred to a variable life insurance policy from another plan of insurance.

3. Under MassMutual's proposed sales load structure for Policies issued in a Case with an Initial Case Premium of less than \$1,000,000, during the first five Policy years, MassMutual assesses a front-end sales load of 15% of premium payments made which are less than or equal to the minimum planned Policy premium, and 6% of premium payments made which exceed the minimum planned Policy premium. After the fifth Policy Year, the sales load percentages for these Policies will decrease to 6% on all premium payments. Thus, if during the first four years of a Policy for which the Initial Case Premium paid was less than \$1,000,000, a Policy owner makes a premium payment which exceeds the minimum planned Policy premium, the percentage of sales load deducted (in the next Policy Year) from that portion of any premium payment which is less than or equal to the minimum planned Policy premium would exceed that deducted from the prior premium payment. Applicants request an exemption from the requirements of Section 27(a)(3) of the 1940 Act and Rule 6e-3(T)(b)(13)(ii) thereunder because the sales load structure under

the Policies appears to violate the “stair-step” provisions articulated in Section 27(a)(3) of the 1940 Act. Moreover, Applicants note, the exemption from Section 27(a)(3) provided by Rule 6e-3(T)(b)(13)(ii) does not appear to cover the case at hand.

4. Applicants represent that MassMutual has designed the Policies so that they comply with Rule 6e-3(T)'s sales load limitations and are “refund proof”: i.e., sales load deductions from premium payments will not exceed the sales load limitations specified in Rule 6e-3(T)(b)(13)(i)(A) and will never require the repayment of any sales charges pursuant to Rule 6e-3(T)(b)(13)(v)(A).

5. Applicants further represent that MassMutual has designed the sales load structure under the Policies to give Policy owners significant flexibility with respect to the timing and amount of premium payments, while permitting MassMutual to deduct only those charges deemed necessary to defray distribution expenses and support the benefits under the Policies.

6. Applicants represent that the proposed sales load design provides a significant benefit to Policy owners by passing through to them a portion of MassMutual's savings resulting from the lower distribution costs associated with Policies having an Initial Case Premium of \$1,000,000 or less and for which premium payments are made during the first five Policy Years which exceed the minimum planned Policy premium set for that Policy year. Applicants submit that it would not be in the interest of Policy owners to require the imposition of a sales charge on premium payments in excess of the minimum planned Policy premium, or subsequent premium payments that are higher than Applicants deem necessary.

7. Applicants assert that Section 27(a)(3) was designed to address abuses involving periodic payment plans under which large amounts of front-end sales load are deducted so early in life of the plan that an investor redeeming in the early periods would recoup little of his or her investment. MassMutual anticipates that: (i) a substantial number of the Policies will be sold in connection with rollover transactions effectuated pursuant to Section 1035 of the Code; and (ii) under such a scenario, there will be a higher occurrence of premium payments made in the first Policy year which exceed the minimum planned premium payment by Policy owners purchasing Policies having an Initial Case Premium of less than \$1,000,000. For these reasons, Applicants submit that the proposed sales load structure would not present

the type of abuse that Section 27(a)(3) was designed to prevent.

8. Moreover, Applicants assert that, to the extent that owners of Policies with an Initial Case Premium of less than \$1,000,000 make premium payments during the first Policy year which exceed the minimum planned Policy premium, MassMutual's proposed sales load structure will cause a greater proportion of the Policies' sales charges to be deducted later than they otherwise might have been deducted. In this regard, Applicants note that MassMutual could have decided to assess a sales load of 30% on premium payments less than or equal to the minimum planned Policy premium made during the first Policy year, and 7.89% on premium payments made thereafter. Applicants submit that, by spreading sales charges more evenly over the life of a Policy, MassMutual's sales load structure furthers the purposes of Section 27(a)(3) of the 1940 Act.

**Conclusion**

Applicants submit that, for the reasons and upon the facts set forth above, the requested exemptions would be appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the 1940 Act.

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

Margaret H. McFarland,  
*Deputy Secretary.*

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[File No. 1-9973]

**Issuer Delisting; Notice of Application To Withdraw From Listing and Registration; (The Middleby Corporation, Common Stock, \$0.01 Par Value)**

December 7, 1995.

The Middleby Corporation (“Company”) has filed an application with the Securities and Exchange Commission (“Commission”), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (“Act”) and Rule 12d2-2(d) promulgated thereunder, to withdraw the above specified security (“Security”) from listing and registration on the American Stock Exchange, Inc. (“Amex”).

The reasons alleged in the application for withdrawing the Security from listing and registration include the following: