need to accumulate a Creation Unit to tender for redemption. In addition, applicants believe that CB™ shares will provide a relatively low-cost market-basket security that, unlike open-end index funds, can be treated at negotiated prices throughout the business day. Finally, CB™ shares will broaden the trading, investing and hedging opportunities available to investors with respect to a significant segment of the international and domestic securities markets.

2. Applicants state that they will take such steps as may be necessary to avoid confusion in the public's eye between the Fund and a conventional ''open-end investment company'' or ''mutual fund.'' In addition, applicants state that brokers will deliver a prospectus to each investor in connection with the secondary market purchasers by investors of CB™ Shares on the NYSE. Thus, applicants believe that the requested relief meets the section 6(c) standards.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. The Fund will not be advertised or marketed as an open-end investment company, *i.e.*, as a mutual fund, which offers redeemable securities. The Fund prospectus will prominently disclose that the CB™ Shares are *not* redeemable units of shares and will disclose that the owners of the CB™ Shares may acquire and tender those shares for redemption to the Fund in Creation Unit aggregations only. Any advertising material where features of obtaining, buying, or selling Creation Units are described or where there is reference to redeemability will prominently disclose that owners of CB™ Shares may acquire and tender those shares for redemption to the Fund in Creation Unit aggregations only.

2. The Fund will provide copies of its annual and semiannual shareholder reports to beneficial owners of the CB™ Shares.

3. Applicants will not seek to have the Fund's registration statement declared effective until the SEC has approved such proposed rule change pursuant to rule 19b–4 under the Securities Exchange Act of 1934 as may be necessary to enable a national securities exchange to list the CB™ Shares.

4. In addition, as long as the Fund operates in reliance on the requested order, the CB™ Shares will be listed on a national securities exchange.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 96–3043 Filed 2–9–96; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–21734; No. 812–9856]

The Evergreen Variable Trust, et al.

February 5, 1996.

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

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

APPLICANTS: The Evergreen Variable Trust (''Trust'') and Evergreen Asset Management Corporation (''Evergreen Asset'').

RELEVANT 1940 ACT SECTIONS: Order requested under Section 6(c) of the 1940 Act for exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act and sub-paragraph (b)(15) of Rules 6e–2 and 6e–3(T) thereunder.

SUMMARY OF APPLICATION: Applicants seek an order to the extent necessary to permit shares of the Trust and shares of any other investment company that is designed to fund variable insurance products and for which Evergreen Asset or its affiliates may serve as investment adviser, administrator, manager, principal underwriter or sponsor (collectively with the Trust, ''Funds'') to be sold to and held by: (1) variable annuity and variable life insurance separate accounts of both affiliated and unaffiliated life insurance companies; and (2) qualified pension and retirement plans outside the separate account context.

FILING DATE: The application was filed on November 14, 1995. An amended application was filed on January 29, 1996.

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 should be received by the SEC by 5:30 p.m. on March 1, 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 requester'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, SEC, 450 5th Street, N.W., Washington, D.C. 20549. Applicants: c/o Joseph J. McBrien, Esq., Evergreen Asset Management Corp., 2500 Westchester Avenue, Purchase, New York 10577.

FOR FURTHER INFORMATION CONTACT: Yvonne M. Hunold, Assistant Special Counsel, or Patrice M. Pitts, Special Counsel, Office of Insurance Products (Division of Investment Management), at (202) 942–0670.

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

Applicants' Representations

1. The Trust is an open-end, management investment company organized as a Massachusetts Business Trust. The Trust currently consists of three separately managed series (collectively, ''Portfolios''). Additional series may be offered in the future (''Future Portfolios'').

2. Evergreen Asset serves as investment adviser to the Trust and is a registered investment adviser under the Investment Advisers Act of 1940. Evergreen Asset is a wholly-owned subsidiary of First Union National Bank of North Carolina, a national bank, which is, in turn, a wholly-owned subsidiary of First Union Corporation, a bank holding company.

3. Applicants state that shares of the Trust currently are proposed to be offered only to variable annuity separate accounts, registered with the Commission under the 1940 Act as unit investment trusts, established by The Nationwide Life Insurance Company (''Nationwide'').

4. Applicants state further that shares of the funds will be offered in the future to insurance company separate accounts [1] that fund variable annuity and variable life insurance established by Nationwide and its affiliate insurance companies and by unaffiliated insurance companies (collectively, ''Participating Insurance Companies'') that fund variable annuity and variable life insurance contracts (including single premium, scheduled premium, modified single premium and flexible premium) (collectively, ''Variable Contracts''). Each Participating Insurance Company will enter into a fund participation agreement (''Participation Agreement'')

[1] Applicants represent that these separate accounts will be either registered as investment companies under the 1940 Act or exempt from registration under the 1940 Act pursuant to Section 3(c)(1).

with the Trust on behalf of the Fund in which the Participating Insurance Company invests. Applicants state that the Participating Insurance Companies will rely on Rules 6e–2 or 6e–3(T) and may rely on individual exemptive orders.

5. In connection with any Variable Contract issued by a Participating Insurance Company, the application states that each such company will have the legal obligation of satisfying all applicable requirements under federal securities laws. Applicants further state that the role of the Funds under this arrangement, insofar as the federal securities laws are applicable, will consist of offering shares to the separate accounts of Participating Insurance Companies and fulfilling any conditions that the Commission may impose upon granting the order requested in the application.

6. Applicants also states that shares of the Funds also may be offered directly to qualified pension and retirement plans (''Plans'') outside of the separate account context.

7. Applicants state that applicable tax law permits the Funds to increase their asset base through the sale of Fund shares to Plans without endangering the tax status of Variable Contracts issued by Participating Insurance Companies. The Plans may choose any of the Funds as the sole investment option under the Plan or as one of several investment options. Participants may be given an investment choice depending upon the Plan. Shares of any of the Funds sold to Plans will be held by the trustees of the Plans as mandated by Section 403(a) of the Employee Retirement Income Security Act (''ERISA''). Evergreen Asset currently has no plans to offer investment advisory services to Plans that will purchase shares of the Funds or to participants in such Plans (''Plan Participants''). Applicants note that, pursuant to ERISA, pass-through voting is not required to be provided to Plan Participants.

Applicants' Legal Analysis

1. Applicants requests an order that would exempt variable life insurance separate accounts of Participating Insurance Companies (and any principal underwriters and depositors of such separate accounts), from Sections 9(a), 13(a), 15(a) and 15(b) and the 1940 Act, and paragraph (b)(15) of Rules 6e–2 and 6e–3(T) thereunder, to the extent necessary to permit shares of the Funds to be sold to, and held by: (a) variable annuity and variable life separate accounts of both affiliated and unaffiliated life insurance companies; and (b) qualified pension and retirement plans outside of the separate accounts context.

Mixed and Shared Funding and Sales to Plans

2. In connection with the funding of scheduled premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a unit investment trust (''Separate Account-UIT''), Rule 6e–2(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. The relief provided by Rule 6e–2(b)(15) extends to a separate account's investment adviser, principal underwriter, and sponsor or depositor. The exemptions granted by Rule 6e–2(b)(15) are available, however, only where the management investment company underlying the Separate Account-UIT offers its shares ''exclusively to variable life insurance separate accounts of the life insurer, or of any affiliated life insurance company.''

3. The use of a common management investment company as the underlying investment medium for both variable annuity and variable life insurance separate accounts of a single insurance company (or of two or more affiliated insurance companies) is referred to as ''mixed funding.'' The use of a common management investment company as the underlying investment medium for variable annuity and/or variable life insurance separate accounts of unaffiliated insurance companies is referred to as ''shared funding.'' ''Mixed and shared funding'' denotes the use of a common management investment company to fund the variable annuity and variable life insurance separate accounts of affiliated and unaffiliated insurance companies. The relief granted by Rule 6e–2(b)(15), thus, is not available with respect to a scheduled premium variable life insurance separate account that owns shares of an underlying fund that also offers its shares to a variable annuity separate account of the same company or of any other affiliated or unaffiliated life insurance company.[2] Rule 6e–2(b)(15), therefore, precludes mixed and shared funding.

4. In connection with flexible premium variable life insurance contracts issued through a Separate Account-UIT Rule 6e–3(T)(b)(15) provides partial exemptions from Sections 9(a), 15(a) and 15(b) of the 1940 Act. The exemptive relief extends to a separate account's investment adviser, principal underwriter, and sponsor or depositor. The exemptions granted to a separate account by Rule 6e–3(T)(b)(15) are available only where all the assets of the separate account consist of shares of one or more registered management investment companies which offer their shares ''exclusively to separate accounts of the life insurer, or of any affiliated life insurance company, offering either scheduled contracts or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance * * *.'' Rule 6e–3(T) thus permits mixed funding with respect to a flexible premium variable life insurance separate account, subject to certain conditions, but precludes shares funding.

5. Applicants state that various factors have kept certain insurance companies from offering variable annuity and variable life insurance contracts. According to Applicants, these factors include: the cost of organizing and operating an investment funding medium; the lack of expertise with respect to investment management; the lack of name recognition by the public of certain insurers as investment professionals. Applicants argue that use of the Funds as common investment media for the Variable Contracts would east these concerns. Participating Insurance Companies would benefit not only from the investment and administrative expertise of the Funds' investment advisers, but also from the cost efficiencies and investment flexibility afforded by a large pool of funds. Applicants state that making the Funds available for mixed and shared funding may encourage more insurance companies to offer variable contracts such as the Variable Contracts which may, in turn, increase competition with respect to both the design and pricing of variable contracts. Applicants submit that this can be expected to result in greater product variation and lower charges. Applicants thus argue that Variable Contract owners would benefit because mixed and shared funding will eliminate a significant portion of the costs of establishing and administering separate funds. Moreover, Applicants assert that sales of shares of the Funds to Plans should increase the amount of assets available for investment by the Funds. This should, in turn, promote

[2] Applicants note that amendments to Rule 6E–2 have been proposed by the Commission and, if adopted, would permit shares of one underlying fund to be sold to separate accounts of the insurer, or any affiliated life insurance company offering variable annuity contracts or scheduled premium or flexible premium variable life insurance. *See* Release No. IC–14421 (Mar. 15, 1985). The proposed amendment, however, would not permit shares of one underlying fund to be sold to separate accounts of unaffiliated companies.

economies of scale, permit increased safety of investment through greater diversification, and make the addition of new portfolios more feasible.

6. Applicants state that, because relief under paragraph (b)(15) of Rules 6e–2 and 6e–3(T) is available only where shares are offered exclusively to separate accounts of insurance companies, additional exemptive relief is necessary if shares of the Funds also are to be sold to Plans. Applicants assert that the relief granted by paragraph (b)(15) of Rules 6e–2 and 6e–3(T) should not be affected by the proposed sale of fund shares to Plans because such sales may allow for the development of larger pools of assets resulting in the potential for greater investment and diversification opportunities, and for decreased expenses at higher asset levels resulting in greater cost efficiencies. Applicants further assert that they are not aware of any stated rationale for the exclusion of separate accounts and investment companies engaged in shared funding from the exemptive relief provided under paragraph (b)(15) of Rules 6e–2 and 6e–3(T), or for the exclusion of separate accounts and investment companies engaged in mixed funding from the exemptive relief provided under rule 6e–2(b)(15). Similarly, Applicants are not aware of any stated rationale for excluding Participating Insurance Companies from the exemptive relief requested because the Funds also may sell their respective shares to qualified pension and retirement plans.

7. Applicants state that current tax law permits funds to increase their asset base through the sale of Fund shares to plans. Applicants state that Section 817(h) of the Internal Revenue Code of 1986, as amended (''Code''), imposes certain diversification requirements on the underlying assets of Variable Contracts invested in the Funds. The Code provides that such Variable Contracts shall not be treated as an annuity contract or life insurance contract for any period in which the underlying assets are not adequately diversified, as prescribed by Treasury Department regulations; to meet the diversification requirements, all of the beneficial interests in the investment company must be held by the segregated asset accounts of one or more insurance companies, subject to certain exceptions. Treas. Reg. § 1.817–5 (1989). For example, shares in an investment company may be held by the trustee of a qualified pension or retirement plan without adversely affecting the ability of shares in the same investment company also to be held by the separate accounts of insurance companies in connection with the variable contracts. Treas. Reg. § 1.817–5(b)(3)(iii).

8. Applicants state that the promulgation of rules 6e–2 and 6e–3(T) under the 1940 Act preceded the issuance of these Treasury regulations, and that the sale of shares of the same investment company to both separate accounts and Plans could not have been envisioned at the time of the adoption of Rules 6e–2(b)(15) and 6e–3(T)(b)(15).

9. Applicants therefore request relief from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act, and paragraph (b)(15) of Rules 6e–2 and 6e–3(T) thereunder to the extent necessary to permit shares of the Funds to be offered and sold now and in the future to separate accounts of Participating Insurance Companies in connection with both mixed and shared funding, and to be sold directly to Plans. Relief is requested for a class or classes of persons and transactions consisting of Participating Insurance Companies and their scheduled premium variable life insurance separate accounts and flexible premium variable life insurance separate accounts (and, to the extent necessary, any investment adviser, principal underwriter and depositor of such separate accounts) investing in any of the Funds.

Disqualification

10. Section 9(a) of the 1940 Act makes it unlawful for any company to serve as an investment adviser to, or principal underwriter for, any registered open-end investment company if an affiliated person of that company is subject to a disqualification specified in Sections 9(a)(1) or 9(a)(2).

11. Rules 6e–2(b) and 6e–3(T)(b)(15) provide exemptions from Section 9(a) under certain circumstances, subject to the limitations on mixed and shared funding. The relief provided by subparagraphs (b)(15)(i) of Rules 6e–2 and 6e–3(T) permits a person disqualified under Section 9(a) to serve as an officer, director, or employee of the life insurer, or any of its affiliates, so long as that person does not participate directly in the management or administration of the underlying fund. The relief provided by subparagraph (b)(15)(ii) of Rules 6e–2 and 6e–3(T) permits the life insurer to serve as the underlying fund's investment adviser or principal underwriter, provided that none of the insurer's personnel who are ineligible pursuant to Section 9(a) are participating in the management or administration of the fund.

12. Applicants state that the partial relief from Section 9(a) found in subparagraph (b)(15) of Rules 6e–2 and 6e–3(T), in effect, limits the monitoring necessary to ensure compliance with Section 9 to that which is appropriate in light of the policy and purposes of the Section. Applicants state that those 1940 Act rules recognize that it is not necessary for the protection of investors or for the purposes fairly intended by the policy and provisions of the 1940 Act to apply the provisions of Section 9(a) to the many individuals in an insurance company complex, most of whom will have no involvement in matters pertaining to investment companies within that organization. Applicants note that the Participating Insurance Companies are not expected to play any role in the management or administration of the Funds. Therefore, Applicants assert, applying the restrictions of Section 9(a) serves no regulatory purpose. The application states that the relief requested should not be affected by the proposed sale of shares of the Funds to the Plans. Plans are not investment companies and are not, therefore, subject to Section 9(a).

Pass-Through Voting

13. Sections 13(a), 15(a) and 15(b) of the 1940 Act require ''pass-through'' voting with respect to underlying investment company shares held by a separate account. Subparagraph (b)(15)(iii) of Rules 6e–2 and 6e–3(T) assumes the existence of a pass-through voting requirement with respect to management investment company shares held by a separate account. Applicants represent that the participating Insurance Companies will provide pass-through voting privileges to all Variable Contract owners so long as the Commission interprets the 1940 Act to require such privileges, and that Participating Insurance Companies will vote all shares as to which no response from Variable Contract owners is timely received, as well as shares owned by them, in the same proportion as shares for which voting instructions are received.

14. Subparagraph (b)(15)(iii) of Rules 6e–2 and 6e–3(T) provides partial exemptions from the pass-through voting requirement with respect to several significant matters, assuming observance of the limitations on mixed and shared funding. Subparagraph (b)(15)(iii)(A) of Rules 6e–2 and 6e–3(T) provides that the insurance company may disregard voting instructions of its contract owners with respect to the subclassification or investment objectives of a fund or any contract between a fund and its investment advisor, when required to do so by an insurance regulatory authority.

15. Subparagraph (b)(15)(iii)(B) of Rule 6e–2 and subparagraph

(b)(15)(iii)(A)(2) of Rule 6e–3(T) provides that the insurance company may disregard voting instructions of its contract owners if the contract owners initiate any change in the company's investment objectives, principal underwriter or investment adviser, provided that disregarding such voting instructions is reasonable and subject to the other provisions of paragraph (b(5)(iii) and (b)(7)(ii) (B) and (C) of each rule.

16. Applicants represent that the Funds' sale of shares to Plans does not affect the relief requested in this regard. As previously noted, shares of the Funds sold to Plans would be held by the trustees of such Plans as required by Section 403(a) of ERISA. Section 403(a) also provides that the trustee(s) must have exclusive authority and discretion to manage and control the Plan with two exceptions: (a) when the Plan expressly provides that the trustee(s) are subject to the direction of the named fiduciary who is not a trustee, in which case the trustee(s) is (are) subject to proper directions made in accordance with the terms of the Plan and not contrary to ERISA; and (b) when the authority to manage, acquire or dispose of assets of the Plan is delegated to one or more investment managers pursuant to Section 402(c)(3) of ERISA.

17. Unless one of the two exceptions stated in Section 403(a) applies, Plan trustees have the exclusive authority and responsibility for voting proxies. Where a named fiduciary appoints an investment manager, the investment manager has the responsibility to vote the shares held unless the right to vote such shares is reserved to the trustees or to the named fiduciary. In any event, there is no pass-through voting to the participants in such Plans. In addition, Applicants represent that there is no contractual or other relationship between the Participating Insurance Companies and any Plans which, for example, would affect the solvency of the insurer or the performance of its contractual obligations, or would be expected to increase the risks undertaken by the insurer. Accordingly, Applicants assert that, unlike the case with insurance company separate accounts, the issue of the resolution of material irreconcilable conflicts with respect to voting is not present with Plans are not entitled to pass-through voting privileges.

Applicants further assert that investment in the Funds by Plans will not create any of the voting complications occasioned by mixed and shared funding because Plan investor voting rights cannot be frustrated by veto rights of insurers or state regulators.

18. Applicants state that some Plans may provide participants with the right to give voting instructions. Applicants submit that there is no reason to believe that participants in Plans generally, or those in a particular Plan, either as a single group or in combination with other Plans, would vote in a manner that would disadvantage Variable Contract owners. Accordingly, Applicants assert that the purchase of Fund shares by Plans that provide voting rights to participants does not present any complications not otherwise occasioned by mixed and shared funding.

Conflicts of Interest

19. Applicants state that no increased conflicts of interest would be present by the granting of the requested relief. Applicants assert that shared funding does not present any issues that do not already exist where a single insurance company is licensed to do business in several, or all, states. Applicants note that where insurers are domiciled in different states, it is possible that the state insurance regulatory body in a state in which one insurance company is domiciled could require action that is inconsistent with the requirements of insurance regulators in one or more other states in which other insurance companies are domiciled. Applicants submit that this possibility is no different and no greater than exists where a single insurer and its affiliates offer their insurance products in several states.

20. Applicants further submit that affiliation does not reduce the potential, if any exists, for differences among state regulatory requirements. In any event, the conditions (adapted from the conditions included in Rule 6e–3(T)(b)(15)) discussed below are designed to safeguard against any adverse effects that these differences may produce. If a particular state insurance regulator's decision conflicts with the decisions of a majority of other state regulators, the affected insurer may be required to withdraw its separate account's investment in the relevant Funds.

21. Applicants also argue that affiliation does not eliminate the potential, if any, for divergent judgments as to when a Participating Insurance Company could disregard Variable Contract owner voting instructions. Potential disagreement is limited by the requirement that the Participating Insurance Company's disregard of voting instructions be both reasonable and based on specific good faith determinations. However, if a Participating Insurance Company's decision to disregard Variable Contract owner instructions represents a minority position or would preclude a majority vote approving a particular change, such Participating Insurance Company may be required, at the election of the relevant Fund, to withdraw its investment in that Fund. No charge or penalty will be imposed as a result of such withdrawal.

22. Applicants state that there is no reason why the investment policies of a Fund with mixed funding would or should be materially different from what those policies would or should be if such investment company or series thereof funded only variable annuity or variable life insurance contracts. Applicants therefore argue that there is no reason to believe that conflicts of interest would result from mixed funding. Moreover, Applicants represent that the Funds will not be managed to favor or disfavor any particular insurance company or type of Variable Contract.

23. Applicants note that Section 817(h) imposes certain diversification standards on the underlying assets of variable annuity contracts and variable life insurance contracts held in the portfolios of management investment companies. Treasury Regulation 1.817–5(f)(3)(iii), which established diversification requirements for such portfolios, specifically permits ''qualified pension of retirement plans'' and insurance company separate accounts to share the same underlying investment company. Therefore, Applicants have concluded that neither the Code, nor the Treasury regulations, nor the revenue rulings thereunder, present any inherent conflicts of interest if Plans, variable annuity separate accounts and variable life insurance separate accounts all invest in the same management investment company.

24. Applicants state that while there are differences in the manner in which distributions are taxed for variable annuity contracts, variable life insurance contracts and Plans, these tax consequences do not raise any conflicts of interest. When distributions are to be made, and the separate account of the Participating Insurance Company or the Plan is unable to net purchase payments to make the distributions, the separate account or the Plan will redeem shares of the Funds at their respective net asset value. The Plan will then make distributions in accordance with the terms of the Plan. A Participating Insurance Company will surrender values from the separate account into the general account to make

distributions in accordance with the terms of the Variable Contract.

25. Applicants state that they do not see any greater potential for material irreconcilable conflicts arising between the interests of Plan Participants and owners of the Variable Contracts issued by the separate accounts of Participating Insurance Companies from possible future changes in the federal tax laws than that which already exists between variable annuity contract owners and variable life insurance contract owners.

26. With respect to voting rights, Applicants state that it is possible to provide an equitable means of giving such voting rights to Variable Contract owners and to Plans. Applicants represent that a Fund will inform each shareholder, including each separate account and Plan, of information necessary for the shareholder meeting, including their respective share ownership in the respective Funds. A Participating Insurance Company will then solicit voting instructions in accordance with the ''pass-through'' voting requirements of Rules 6e-2 and 6e–3(T).

27. Applicants argue that the ability of the Funds to sell their respective shares directly to Plans does not create a ''senior security,'' as such term is defined under Section 18(g) of the 1940 Act, with respect to any Variable Contract owner as opposed to a participant under a Plan. Regardless of the rights and benefits of participants and Variable Contract owners under their respective Plans and Variable Contracts, Plans and separate accounts of Participating Insurance Companies have rights only with respect to their respective shares of the Funds. Such shares may be redeemed only at net asset value. No shareholder of the Funds has any preference over any other shareholder with respect to distribution of assets or payment of dividends.

28. Applicants state that there are no conflicts between Variable Contract owners and Plan Participants with respect to the state insurance commissioner's veto powers (direct with respect to variable life insurance and indirect with respect to variable annuities) over investment objectives. The basic premise of corporate democracy and shareholder voting is that not all shareholders may agree with a particular proposal. The state insurance commissioners have been given the veto power in recognition of the fact that insurance companies can not simply redeem their separate accounts out of one fund and invest those assets in another fund. Generally, to accomplish such redemptions and transfers, complex and time consuming transactions must be undertaken. Conversely, trustees of (or participants in) Plans can redeem shares of the Funds held by them and reinvest in another Fund without the same regulatory impediments or, as is the case with most Plans, even hold cash or other liquid assets pending suitable alternative investment. Based on the foregoing, Applicants represent that even should there arise issues where the interests of Variable Contract owners and the interests of the Plans conflict, the issues can be almost immediately resolved in that trustees of the Plans can, independently, redeem shares out of the Funds.

29. Applicants have concluded that the addition of Plans as eligible shareholders should not increase the risk of material irreconcilable conflicts among shareholders. However, Applicants assert further that, even if a material irreconcilable conflict involving Plans arose, the trustees of (or participants in) the Plans, unlike the separate accounts, can redeem their shares and make alternative investments. Applicants thus submit that allowing Plans to invest directly in shares of the Funds should not increase the opportunity for conflicts of interest.

30. Further, Applicants state that, regardless of the types of Fund shareholders, Evergreen Asset is legally obligated to manage the Funds in accordance with each Fund's investment objectives, policies and restrictions as well as any guidelines established by the relevant Board of Directors or Trustees of the Funds. Applicants assert that Evergreen Asset works with a pool of money without consideration for the identity of shareholders, and, thus, manage the Funds in the same manner as any other mutual fund.

31. Applicants believe that there is no significant legal impediment to permitting mixed and shared funding. Additionally, Applicants note the previous issuance of orders permitting mixed and shared funding where shares of a fund were sold directly to qualified plans, such as the Plans. Applicants note further that there is ample precedent for extending exemptive relief to members of a class or classes or persons, not currently identified, that may be similarly situated in the future. Such class relief has been granted in various contexts and from a wide variety of the 1940 Act's provisions including class exemption in the context of mixed and shared funding.

Applicants' Conditions

The Applicants have consented to the following conditions if the order requested in the application is granted:

1. A majority of the Board of Trustees or Board of Directors (each a ''Board'') of each Fund shall consist of persons who are not ''interested persons'' of the Funds, as defined by Section 2(a)(19) of the 1940 Act and Rules thereunder and as modified by any applicable orders of the Commission, except that, if this condition is not met by reason of death, disqualification, or bona fide resignation of any Director or Trustee, then the operation of this condition shall be suspended: (i) for a period of 45 days, if the vacancy or vacancies may be filed by the appropriate Board; (ii) for a period of 60 days, if a vote of shareholders is required to fill the vacancy or vacancies; or (iii) for such longer period as the Commission may prescribe by order upon application.

2. Each Board will monitor its respective Funds for the existence of any material irreconcilable conflict among the interests of the Variable Contract owners of all the separate accounts of Participating Insurance Companies and of Plan Participants investing in the respective Funds, and determine what action, if any, should be taken in response to such conflicts. A material irreconcilable conflict may arise for a variety of reasons, including (a) an action by any state insurance regulatory authority; (b) a change in applicable federal or state insurance, tax, or securities laws or regulations, or a public ruling, private letter ruling, no-action or interpretive letter, or any similar action by insurance, tax, or securities regulatory authorities; (c) an administrative or judicial decision in any relevant proceeding; (d) the manner in which the investments of the Funds are managed; (e) a difference in voting instructions given by owners of variable annuity and variable life insurance contracts; (f) a decision by a Participating Insurance Company to disregard voting instructions of Variable Contract owners; or (g) if applicable, a decision by a Plan to disregard the voting instructions of Plan Participations.

3. Participating Insurance Companies, Evergreen Asset (or any other investment manager of a Fund), and any Plan that executes a Participation Agreement upon becoming an owner of 10% of more of the assets of a Fund (collectively, ''Participants'') shall report any potential or existing conflicts to the relevant Board. Participants will be responsible for assisting the appropriate Board in carrying out its

responsibilities under these conditions by providing the Board with all information reasonably necessary for it to consider any issues raised. This responsibility includes, but is not limited to, an obligation by Evergreen Asset and each Participating Insurance Company to inform the Board whenever it has determined to disregard Variable Contract holders' voting instructions and, if pass-through voting is a applicable, an obligation by Evergreen Asset and a Plan to inform the Board whenever it has determined to disregard Plan Participants voting instructions. The responsibility to report such information and conflicts and the assist the Board will be a contractual obligation of the Participants investing in the Funds under their agreements governing participation in the Funds, and such agreements shall provide that these responsibilities will be carried out with a view only to the interests of the Variable Contract owners and, if applicable, Plan Participants.

4. If it is determined by a majority of the Board of a Fund, or by a majority of its disinterested members, that a material irreconcilable conflict exists, the Participants shall, at their expense and to the extent reasonably practicable (as determined by a majority of disinterested trustees or members of the Board), take whatever steps are necessary to remedy or eliminate the irreconcilable material conflict, up to and including: (a) withdrawing the assets allocable to some or all of the separate accounts from a Fund or its portfolio and reinvesting such assets in a different investment medium (including another series of a Fund or another Fund); (b) in the case of Participating Insurance Companies, submitting the question as to whether such segregation should be implemented to a vote of all affected Variable Contract owners and, as appropriate, segregating the assets of any appropriate group (i.e., variable annuity or variable life insurance contract owners of one or more Participating insurance Companies) that votes in favor of such segregation, or offering to the affected Variable Contract owners the option of making such a change; and (c) establishing a new registered management investment company or managed separate account. If a material irreconcilable conflict arises because of a Participating Insurance Company's decision to disregard contractowner voting instructions, and that decision represents a minority position or would preclude a majority vote, such Participating Insurance Company may be required, at the election of the relevant Fund, to withdraw its separate account's investment in the Fund, and no charge or penalty will be imposed as a result of such withdrawal. If a material irreconcilable conflict arises because of a Plan's decision to disregard Plan Participant voting instructions, if applicable, and that decision represents a minority position or would preclude a majority vote, the Plan may be required, at the election of the Fund, to withdraw its investment in the Fund, and no charge or penalty will be imposed as a result of such withdrawal.

The responsibility to take remedial action in the event of a Board determination that an irreconcilable material conflict exists, and to bear the cost of such remedial action, shall be a contractual obligation of the Participants under their agreements governing participating in the Funds, and these responsibilities shall be carried out with a view only to the interests of the Variable Contract owners and, as applicable, Plan Participants.

For purposes of this Condition ''4.,'' a majority of disinterstated members of the applicable Board shall determine whether any proposed action adequately remedies any irreconcilable material conflict, but in no event will the relevant Fund or Evergreen Asset (or any other investment adviser to the Funds) be required to establish a new funding medium for any Variable Contract. Further, no Participating Insurance Company shall be required by this Condition ''4.'' to establish a new funding medium for any Variable Contract if an offer to do so has been declined by a vote of a majority of Variable Contract owners materially affected by the irreconcilable material conflict. No Participating Plan shall be required by this Condition ''4.'' to establish a new funding medium for such Plan if (a) a majority of Plan Participants materially and adversely affected by the irreconcilable material conflict vote to decline such offer, or (b) pursuant to governing plan documents and applicable law, the Participating Plan makes such decision without Plan Participant vote.

5. The Board's determination of the existence of an irreconcilable material conflict and its implications shall be made known promptly in writing to the Participants.

6. Participating Insurance Companies will provide pass-through voting privileges to all Variable Contract owners so long as the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for Variable Contract owners. Accordingly, such Participating Insurance Companies, where applicable, will vote shares of the Fund held in in its separate accounts in a manner consistent with voting instructions timely received from Variable Contract owners.

Also, each Participating Insurance Company will vote shares of a Fund held in its separate accounts for which no timely voting instructions from contractowners are received, as well as shares it owns, in the same proportion as those shares for which voting instructions are received. Participating Insurance Companies will be responsible for assuring that each of their separate accounts investing in a Fund calculates voting privileges in a manner consistent with all other Participating Insurance Companies. The obligation to vote a Fund's shares and calculate voting privileges in a manner consistent with all other separate accounts will be a contractual obligation of all Participating Insurance Companies under the agreements governing participation in the Funds.

7. All reports received by the Board of potential or existing conflicts, and all Board action with regard to (a) determining the existence of a conflict; (b) notifying Participants of a conflict; and (c) determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the appropriate Board or other appropriate records. Such minutes or other records shall be made available to the Commission upon request.

8. Each Fund will notify all Participating Insurance Companies that separate account prospectus disclosure regarding potential risks of mixed and shared funding may be appropriate. Each Fund shall disclose in its prospectus that: (a) Its shares may be offered to insurance company separate accounts that fund both variable annuity and variable life insurance contracts, as well as to qualified pension and retirement plans; (b) differences in tax treatment or other considerations may cause the interests of various Variable Contract owners participating in the Funds and the interests of Plans investing in the Funds to conflict; and (c) each Fund's Board will monitor the Funds for any material conflicts and determine what action, if any, should be taken.

9. Each Fund will comply with all provisions of the 1940 Act requiring voting by shareholders (for these purposes, the persons having a voting interest in the shares of the Funds). In particular, each Fund will either provide for annual meetings (except to the extent that the Commission may interpret Section 16 of the 1940 Act not

to require such meetings) or comply with Section 16(c) of the 1940 Act (although none of the Funds shall be one of the trusts described in Section 16(c) of the 1940 Act), as well as with Section 16(a) and, if applicable, Section 16(b) of the 1940 Act. Further, each Fund will act in accordance with the Commission's interpretation of the requirements of Section 16(a) with respect to periodic elections of directors (or trustees) and with whatever rules the Commission may promulgate with respect thereto.

10. If and to the extent Rule 6e–2 or Rule 6e–3(T) is amended, or Rule 6e–3 is adopted, to provide exemptive relief from any provision of the 1940 Act or the rules thereunder with respect to mixed and shared funding on terms and conditions materially different from any exemptions granted in the order requested, then the Funds and/or the Participants, as appropriate, shall take such steps as may be necessary to comply with Rule 6e–2 or Rule 6e–3(T), as amended, and Rule 6e–3, as adopted, to the extent such rules are applicable.

11. No less than annually, the Participants shall submit to each Board such reports, materials or data as each Board may reasonably request so that such Boards may fully carry out the obligations imposed upon them by the conditions stated in the application. Such reports, materials, and data shall be submitted more frequently if deemed appropriate by the Boards. The obligations of the Participants to provide these reports, materials, and data upon reasonable request of a Board shall be a contractual obligation of all Participants under their agreements governing their participation in the Funds.

12. If a Plan or Plan Participant should become an owner of 10% or more of the assets of a Fund, such Plan will execute a Fund participation agreement with the applicable Fund, including the conditions set forth herein to the extent applicable. A Plan or Plan Participant will execute an application containing an acknowledgment of this condition upon such Plan's initial purchase of the shares of any Fund.

Conclusion

For the reasons stated above, Applicants assert that the requested exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act and Rules 6e–2 and 6e–3(T) thereunder are 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. 96–3044 Filed 2–9–96; 8:45 am]

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[Rel. No. IC–21737; Int'l Series Release No. 929; 812–9234]

The Foreign Fund, Inc., et al.; Notice of Application

February 6, 1996.

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

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

APPLICANTS: The Foreign Fund, Inc. (the ''Fund''), BZW Barclays Global Funds Advisors (the ''Adviser''), and Fund Distributor, Inc. (the ''Distributor'').

RELEVANT ACT SECTIONS: Order requested under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 thereunder and under sections 6(c) and 17(b) of the Act for an exemption from section 17(a) of the Act.

SUMMARY OF APPLICATION: Applicants request an order permitting the Fund to issue securities of limited redeemability that are intended to trade on the American Stock Exchange (the ''AMEX'') at negotiated prices. The order also would permit certain transactions between the Fund and affiliated persons and permit the Fund to make payment for redeemed securities more than seven days from the date such securities are tendered in certain circumstances.

FILING DATE: The application was filed on August 19, 1994 and amended on December 23, 1994, May 19, 1995, and January 17, 1996. Applicants have agreed to file an additional amendment, the substance of which is incorporated herein, during the notice period.

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 4, 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 SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, 400 Bellevue Parkway, Wilmington, Delaware 19809.

FOR FURTHER INFORMATION CONTACT: James M. Curtis, Senior Counsel, at (202) 942–0563, or Robert A. Robertson, 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 at the SEC's Public Reference Branch.

Applicants' Representations

1. The Fund is an open-end management investment company that initially will consist of seventeen series (the ''Index Series''). Each Index Series will invest in a portfolio of equity securities consisting of some or all of the component securities of a specified foreign securities index (the ''Portfolio Securities''). Applicants have selected the indices compiled by Morgan Stanley Capital International (the ''MSCI Indices'') as the indices for the seventeen Index Series. The seventeen Index Series will represent, respectively, the MSCI Indices for Australia, Austria, Belgium, Canada, France, Germany, Hong Kong, Italy, Japan, Malaysia, Mexico, the Netherlands, Singapore, Spain, Sweden, Switzerland, and the United Kingdom.

2. The Fund will be managed and advised by the Adviser. PFPC Inc. is expected to provide certain administrative services to each Index Series. The principal underwriter and distributor of the Fund's shares will be the Distributor.

3. The Fund may impose a sales commission on all cash sales orders received during the initial subscription period of an Index Series. Applicants expect that pursuant to a plan adopted by the board of directors of the Fund for each Index Series under rule 12b–1 under the Act, each Index Series will pay fees to the Distributor, calculated daily and payable monthly, on an annualized basis, of a specified percentage of the average daily net assets of the Index Series (subject to the maximum of .25% per annum thereof). Such monies may be used to cover the expenses of the Distributor primarily intended to result in the sale of shares of each Index Series. The Adviser and PFPC Inc. also will receive fees for their services.