Office of Personnel Management.
Lorraine A. Green,
Deputy Director.
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SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–22456; File No. 812–9096]

The Palladian Trust, et al.

January 9, 1997.

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

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

APPLICANTS: The Palladian Trust (the ''Trust'') and Palladian Advisors, Inc. (''PAI'').

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

SUMMARY OF APPLICATION: Applicants seek an order to the extend necessary to permit shares of the Trust to be sold and held by: (1) separate accounts (the ''Separate Accounts'') funding variable annuity and variable life insurance contracts issued by both affiliated and unaffiliated life insurance companies (the ''Participating Insurance Companies''); (2) qualified pension and retirement plans; and (3) investment advisers to the Trust.

FILING DATE: The application was filed on July 1, 1994, and amended on October 26, 1994, June 20, 1996, and December 23, 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 on this application by writing to the Secretary of the SEC and serving Applicants with a copy of the request, in person or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on February 3, 1997, and accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the interest, the reason for the request and the issues contested. Persons may request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, c/o Shea & Gardner, 1800 Massachusetts Avenue, N.W., Washington, D.C. 20036, Attention: Christopher E. Palmer, Esq.

FOR FURTHER INFORMATION CONTACT: Megan L. Dunphy, Attorney, or Patrice M. Pitts, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 942–0670.

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

Applicant's Representations

1. The Trust is an open-end, management investment company organized as a Massachusetts business trust. It currently offers shares of capital stock (''shares'') in five separate investment portfolios (the ''Portfolios''), each of which has its own investment objective: The Value Portfolio, The Growth Portfolio, The International Growth Portfolio, the Global Strategic Income Portfolio, and the Global Interactive/Telecomm Portfolio. Additional portfolios may be added in the future.

2. PAI is a corporation organized under the laws of Delaware, and is registered as an investment adviser under the Investment Advisers Act of 1940. PAI serves as overall investment manager of the Portfolios. The Trust retains other investment advisers (the ''Portfolio Managers'') to handle the day-to-day investment management of the Portfolios.

3. The Trust currently sells shares of the Portfolio to First ING of New York Separate Account A1, a separate account of First ING Life Insurance Company of New York, an affiliate of Security Life of Denver Insurance Company (collectively, ''Security Life''). The Trust intends to offer shares of the Portfolios to Separate Accounts of other Participating Insurance Companies, including insurance companies that are not affiliated with Security Life, to serve as investment vehicles for various types of insurance products, including variable annuity contracts, single premium variable life insurance contracts, scheduled premium variable life insurance contracts, and flexible premium variable life insurance contracts (collectively, the ''Contracts'').

4. The Trust also intends to offer its shares to qualified pension or retirement plans (''Plans'') described in Treasury Regulation § 1.817–6(f)(3)(iii).

5. Each Portfolio Manager has agreed that it or an affiliate (either directly or through a qualified pension or retirement plan) will invest $1 million in the shares of the Portfolio(s) it manages. Each Portfolio Manager purchasing Portfolio shares has agreed that all such shares will be automatically redeemed if and when the Portfolio Manager's advisory agreement with the Trust terminates.

6. PAI will not act as an investment adviser to any Plan which purchases shares of the Trust. While a Portfolio Manager may serve as investment adviser to one or more Plans which invest in the Trust, none of the assets of any Plan advisory account actually managed by such Portfolio Manager will be invested in the Trust. Nor may such Portfolio Manager advise any Plan to invest in the Trust. Plans advised by a Portfolio Manager may independently choose to invest in the Trust.

Applicant's Legal Analysis

1. Applicants request that the Commission issue an order under Section 6(c) of the 1940 Act granting exemptions from Sections 9(a), 13(a), 15(a) and 15(b) thereof, and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder to the extent necessary to permit ''mixed'' and ''shared'' funding, as defined below.

2. Section 6(c) authorizes the Commission, by order upon application, to conditionally or unconditionally exempt any person, security, or transaction, or class or classes of persons, securities, or transactions, from any provision of the 1940 Act, or the rules or regulations thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

3. 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 (''UIT''), Rule 6e–2(b)(15) provides partial exemptions from Sections 9(2), 13(a), 15(a) and 15(b) of the 1940 Act. The exemptions granted to a separate account by Rule 6e–2(b)(15) are available only where all of the assets of the separate account consist of the shares of one or more registered management investment companies which offer shares ''exclusively to variable life insurance separate accounts of the life insurer, or of any affiliated life insurance company.'' [1] Therefore, the relief grant by Rule 6e–2(b)(15) is

[1] The exemptions provided by Rule 6e–2 also are available to the investment adviser, principal underwriter, and sponsor or depositor of the separate account

not available with respect to a scheduled premium variable life insurance separate account that owns shares of a management company that also offers its shares to a variable annuity separate account of the same insurance company or any affiliated insurance company. The use of a common management investment company as the underlying investment medium for both variable annuity and variable life insurance separate accounts of the same life insurance company (or of any affiliated life insurance company) is referred to as ''mixed funding.'' The use of a common management company as the underlying investment medium for variable annuity and/or variable life insurance separate accounts of more than one unaffiliated insurance company is referred to as ''shared funding.'' The relief granted by Rule 6e–2(b)(15) is not available to a scheduled premium variable life insurance separate account that owns shares of an underlying management investment company (''underlying fund'') which offers its shares to Plans or to its investment advisers.

4. In connection with flexible premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a UIT, Rule 6e–3(T)(b)(15) provides partial exemptions from Section 9(a), 13(a), 15(a), and 15(b) of the 1940 Act. The exemptions granted to a separate account by Rule 6e–3(T)(b)(15) are available only to separate accounts owning shares of underlying funds which offer shares ''exclusively to separate accounts of the life insurer, or of any affiliated life insurance company, offering either scheduled 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 company.'' Thus, Rule 6e–3(T) permits mixed funding, but does not permit shared funding.

5. Current tax law permits the Trust to increase its asset base through the sale of shares to Plans. Section 817(h) of the Internal Revenue Code of 1986, as amended (the ''Code''), imposes certain diversification standards on the underlying assets of variable insurance contracts. Treasury regulations provide that, to meet the diversification requirements, all of the beneficial interests in an underlying fund must be held by the segregated asset accounts of one or more insurance companies. Treas. Reg. § 1.817–5 (1989). The regulations do contain certain exceptions to this requirement, however, one of which permits the trustee(s) of a qualified pension or retirement plan to hold shares of an underlying fund, the shares of which are held by the separate accounts of insurance companies, without adversely affecting the status of the underlying fund as an adequately diversified underlying investment vehicle for variable insurance contracts issued through such separate accounts. Treas. Reg. § 1.817–5(f)(3)(iii).

6. Applicants state that the promulgation of Rules 6e–2 and 6e–3(T) under the 1940 Act preceded the issuance of these Treasury regulations. Applicants assert that, given the then-current tax law, the sale of shares of the same underlying fund to separate accounts and to Plans could not have been envisioned at the time of the adoption of Rules 6e–2(b)(15) and 6e–3(T)(b)(15).

7. Section 9(a) of the 1940 Act provides that it is unlawful for any company to serve as 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 enumerated in Section 9(a) (1) or (2). Rules 6e–2(b)(15) and 6e–3(T)(b)(15) provide exemptions from section 9(a) under certain circumstances, subject to the limitations on mixed and shared funding. These exemptions limit the application of the eligibility restrictions to affiliated individuals or companies that directly participate in the management of the underlying fund.

8. Applicants state that the partial relief from Section 9(a) provided by Rules 6e–2(b)(15) and 6e–3(T)(b)(15), in effect, limits the amount of monitoring necessary to ensure compliance with Section 9 to that which is appropriate in light of the policy and purposes of Section 9. Applicants state that those Rules recognize that it is not necessary for the protection of investors or 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 a large insurance company complex, most of whom will have no involvement in matters pertaining to investment companies within that organization. Applicants assert, therefore, that applying the restrictions of Section 9(a) to individuals in various unaffiliated insurance companies (or affiliated companies of Participating Insurance Companies) serves no regulatory purpose.

9. Applicants state that the relief requested should not be affected by the proposed sale of shares of the Trust to the Plans because the Plans are not investment companies and will not be deemed affiliates by virtue of their shareholdings. Applicants further state that no regulatory purpose is served by extending the Section 9(a) monitoring requirements in the context of the Trust selling its shares to Portfolio Managers. Rules 6e–2 and 6e–3(T) provide relief from the eligibility restrictions of Section 9(a) only for officers, directors of employees of Participating Insurance Companies or their affiliates. Applicants note that Portfolio Managers are not likely to be employees of the Participating Insurance Companies or their affiliates, and if they were, the Section 9(a) eligibility restrictions would apply to those who participate directly in the management of administration of the Trust. Applicants also maintain that the monitoring requirements should not extend to all officers, directors and employees of the Participating Insurance Companies and their affiliates simply because the Trust sells certain shares to the Portfolio Managers. This monitoring would not benefit Contract owners and Plan participants and would only increase costs, thereby reducing net rates of return.

10. Applicants submit that Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) assume the existence of a ''pass-through voting'' requirement with respect to management investment company shares held by a separate account. Applicants state that Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) provide exemptions from the pass-through voting requirement with respect to several significant matters, assuming the limitations on mixed and shared funding imposed by the 1940 Act and the rules thereunder are observed. More specifically, Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(b)(15)(iii)(A)(*1*) provide that an insurance company may disregard the voting instructions of its contract owners with respect to the investments of an underlying fund, or any contract between a fund and its investment adviser, when required to do so by an insurance regulatory authority and subject to certain requirements. In addition, Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii)(a)(*2*) provide that an insurance company may disregard the voting instructions of its contract owners if the contract owners initiate any change in the company's investment policies, principal underwriter, or any investment adviser, provided that disregarding such voting instructions is reasonable and complies with the other provisions of Rules 6e–2 and 6e–3(T). Applicants note that Rules 6e–2 and 6e–3(T) both require

that disregard of voting instructions by an insurance company be reasonable and based on specific good faith determinations. If a decision of a Participating Insurance Company to disregard the instructions of Contract owners represents a minority position or would preclude a majority vote approving a particular change, however, such Participating Insurance Company may be required, at the election of the Trust, to withdraw the investment of its Separate Account in the Trust. No charge or penalty will be imposed as a result of such withdrawal.

11. Applicants further represent that the sale of Trust shares to Plans would not affect the circumstances and conditions under which any veto right would be exercised by a Participating Insurance Company. Shares of the Trust sold to Plans would be held by the trustees of such Plans as required by Section 403(a) of the Employee Retirement Income Security Act of 1974 (''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) is (are) subject to the direction of a 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. 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, ERISA does not require pass-through voting to the participants in Plans. Accordingly, Applicants note 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.

12. Applicants note, however, that some Plans do provide participants with the right to give voting instructions. Applicants submit that there is no reason to believe that Plan participants generally, or participants of a particular Plan, either as a single group or in combination with other Plans, would vote in a manner that would disadvantage Contract owners. Therefore, the purchase of Trust shares by Plans that provide voting rights to their participants does not present any complications not otherwise occasioned by mixed and shared funding.

13. Applicants state that no increased conflicts of interest would be presented by the granting of the requested relief. Applicants submit 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 states. In this regard, Applicants not that a particular state insurance regulatory body could require action that is inconsistent with the requirements of other states in which the insurance company offers its policies. Accordingly, Applicants submit that the fact that different insurers may be domiciled in different states does not create a significantly different or enlarged problem.

14. Applicants state that there is no reason why the investment policies of the Trust providing mixed funding would or should be materially different from what those policies would or should be if the Trust funded only variable annuity or variable life insurance contracts whether flexible premium or scheduled premium contracts. In this regard, Applicants note that each type of variable insurance product is designed as a long-term investment program, and that Plans also have long-term investment horizons. Moreover, Applicants submit that each Portfolio of the Trust will be managed to attempt to achieve the investment objective of the Portfolio, and not to favor or disfavor any particular Participating Insurance Company or type of variable insurance product.

15. Applicants note that no single investment strategy can be identified as appropriate to a particular variable insurance product. Each pool of variable annuity and variable life insurance contract owners is composed of individuals of diverse financial status, age, insurance, and investment goals. An underlying fund supporting even one type of variable insurance product must accommodate these diverse factors in order to attract and retain purchasers.

16. Applicants further 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 or retirement plans'' and investment 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 account and variable life insurance Separate Accounts all invest in the same management investment company.

17. Applicants note 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 or the Plan is unable to net purchase payments to make the distributions, the Separate Account or the Plan will redeem shares of the Trust at their respective net asset value. The Plan will then make distributions in accordance with the terms of the Plan, and a Participating Insurance Company will make distributions in accordance with the terms of the Contract.

18. With respect to voting rights, Applicants state that it is possible to provide an equitable means of giving such voting rights to Contract owners and to Plans. Applicants represent that the Portfolios will inform each shareholder, including each Separate Account and Plan, of its respective share of ownership in the respective Portfolio. Each Participating Insurance Company will then solicit voting instructions in accordance with the ''pass-through'' voting requirement.

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

20. Finally, Applicants state that there are no conflicts between Contract owners and participants under the Plans with respect to the state insurance commissioners' veto powers over investment objectives. The basis premise of 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 cannot simply redeem shares of one underlying fund held by their Separate Accounts and invest the proceeds in another underlying fund. Complex and time-consuming transactions must be undertaken to accomplish such redemptions and transfers. Conversely, trustees of Plans can decide to and actually redeem shares of an investment vehicle, and reinvest the proceeds in another investment vehicle without the same regulatory impediments; most Plans may even hold cash pending suitable investment. Based on the foregoing, Applicants represent that should issues arise where the interests of Contract owners and the interests of Plans conflict, the issues can be resolved almost immediately because trustees of the Plans can redeem shares out of the Trust independently.

21. Applicants assert that the requested relief is appropriate and in the public interest because the relief will promote competitiveness in the variable insurance product market. Applicants submit that various factors have kept more insurance companies from offering variable annuity and variable life insurance contracts that currently offers such contracts. These factors include: the cost of organizing and operating an investment funding medium; the lack of expertise with respect to investment management (particularly with respect to stock and money market investments); and the lack of name recognition by the public of certain insurers as investment professionals. Applicants argue that use of the Trust as a common investment medium for the Contracts would alleviate these concerns because Participating Insurance Companies would benefit not only from the investment and administrative expertise of PAI and the Portfolio Managers, but also from the cost efficiencies and investment flexibility afforded by a large pool of assets. Applicants state that making the Trust available for mixed and shared funding may encourage more insurance companies to offer variable contracts such as the Contracts and, accordingly, may increase competition with respect to both the design and the pricing of variable contracts; this can be expected to result in greater product variation and lower charges. Applicants submit that mixed and shared funding will benefit Contract owners by eliminating a significant portion of the costs of establishing and administering separate funds. Moreover, Applicants assert that sales of shares of the Trust to Plans should increase the amount of assets available for investment by the Trust. This should, in turn, promote economies of scale, permit increased safety of investments through greater diversification, and make the addition of new portfolios more feasible.

Applicant's Conditions

Applicants have consented to the following conditions:

1. A majority of the Board of Trustees or Directors of the Trust (the ''Board'') shall consist of persons who are not ''interested persons'' of the Trust, as defined by Section 2(a)(19) of the 1940 Act and the rules thereunder and as modified by any applicable orders of the Commission, except that, if this condition is not met by reason of the death, disqualification, or bona fide resignation of any trustee or director, then the operation of this condition shall be suspended: (a) for a period of 45 days, if the vacancy or vacancies may be filled by the remaining trustees; (b) for a period of 60 days, if a vote of shareholders is required to fill the vacancy or vacancies; or (c) for such longer period as the Commission may prescribe by order upon application.

2. The Board will monitor the Trust for the existence of any material irreconcilable conflict among the interests of the Contract owners of all of the Separate Accounts investing in the Trust and of the Plan participant investing in the Trust. 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 insurances, tax, or securities laws or regulations, or a public ruling, private letter ruling, no-action or interpretative 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 any Portfolio are being managed; (e) a difference in voting instructions given by owners of variable annuity contracts and those given by owners of variable life insurance contracts; (f) a decision by a Participating Insurance Company to disregard the voting instructions of Contract owners; or (g) if applicable, a decision by a Plan to disregard voting instructions of Plan participants.

3. The Participating Insurance Companies, PAI (or any other investment adviser of the Portfolios), and any Plan that executes a fund participation agreement upon becoming an owner of 10% or more of the assets of a Trust (collectively, ''Participants'') will report any potential or existing conflicts to the Board. Participants will be responsible for assisting the Board in carrying out its responsibilities under these conditions by providing the Board with all information reasonable necessary for the Board to consider any issues raised. This responsibility includes, but is not limited to, an obligation by each Participating Insurance Company to inform the Board whenever Contract owner voting instructions are disregarded and, if pass-through voting is applicable, an obligation by PAI and each Plan to inform the Board whenever it is determined to disregard Plan participant voting instructions. The responsibility to report such information and conflicts to and to assist the Board will be a contractual obligation of all Participating Insurance Companies and Plans investing in the Trust under their agreements governing participating in the Trust, and such agreements shall provide that these responsibilities will be carried out with a view only to the interests of Contract owners or, as appropriate, Plan participants.

4. If the Board or a majority of its disinterested members determines that a material irreconcilable conflict exists, the relevant Participating Insurance Companies and Plans shall, at their expense and to the extent reasonably practicable (as determined by a majority of the disinterested members), take any steps necessary to remedy or eliminate the material irreconcilable conflict, including: (a) withdrawing the assets allocate to some or all of the Separate Accounts from the Trust or any Portfolio and reinvesting such assets in a different investment medium including another Portfolio of the Trust; (b) submitting the question of whether such segregation should be implemented to a vote of all affected variable insurance contract owners and, as appropriate, segregating the assets of any appropriate group (i.e., variable annuity Contract owners 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 arise because of a Participating Insurance Company's decision to disregard Contract Owner voting instructions, and that decision represents a minority position or would preclude a majority vote, the insurer may be required, at the Trust's election, to withdraw its

Separate Account's investment in the Trust, 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 voting instructions, if applicable, and that decision represents a minority position or would preclude a majority vote, the Plan may be required, at the Trust's election, to withdraw its investment in the Trust 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 of a material irreconcilable conflict and to bear the cost of such remedial action shall be a contractual obligation of all Participating Insurance Companies and Plans under their agreements governing their participation in the Trust. The responsibility to take such remedial action shall be carried out with a view only to the interests of Contract owners and Participants in the Plan.

5. For purposes of condition 4, a majority of the disinterested trustees will determine whether any proposed action adequately remedies any material irreconcilable conflict, but in no event will the Trust or PAI (or any other investment adviser of the Portfolios) be required to establish a new funding medium for any Contract. Further, no Participating Insurance Company shall be required by condition 4 to establish a new funding medium for any Contract if any offer to do so has been declined by a vote of a majority of the Contract owners materially affected by the material irreconcilable conflict. Further, no Plan shall be required by condition 4 to establish a new funding medium for such Plan if (a) a majority of Plan participants materially and adversely affected by the material irreconcilable conflict vote to decline such offer, or (b) pursuant to governing Plan documents and applicable law, the Plan makes such decision without a vote by Plan participants.

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

7. Participating Insurance Companies will provide pass-through voting privileges to all Contract owners so long as the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for variable contract owners. Accordingly, the Participating Insurance Companies will vote shares of the Trust held in their Separate Accounts in a manner consistent with voting instructions timely received from Contract owners. Each Participating Insurance Company also will vote shares of the Trust held in the Participating Insurance Company's Separate Account(s) for which no voting instructions from the Contract owners are timely 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 the Trust calculates voting privileges in a manner consistent with other Participating Insurance Companies. The obligation to 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 their participation in the Trust. Each Plan will vote as required by applicable law and governing Plan documents.

8. As long as the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for variable contract owners, each Portfolio Manager will vote its shares of the Portfolio in the same proportion as all contract owners having voting rights with respect to that Portfolio; provided, however, that the Portfolio Manager shall vote its shares in such other manner as may be required by the Commission or its staff.

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

10. The Trust will notify all Participating Insurance Companies that Separate Account prospectus disclosure regarding potential risks of mixed and shared funding may be appropriate. The Trust will disclose in its prospectus that: (a) the Trust is intended to be a funding vehicle for variable annuity and variable life insurance contracts offered by various insurance companies and certain qualified pension and retirement plans; (b) because of differences in tax treatment and other considerations, the interests of Contract owners investing in the Trust and the interests of Plans investing in the Trust may conflict; and (c) the Board will monitor events to identify the existence of any material irreconcilable conflicts and to determine what action, if any, should be taken in response to any such conflict.

11. The Trust will comply with all provisions of the 1940 Act requiring voting by shareholders (which, for these purposes, will be the persons having a voting interest in the shares of the Trust) and, in particular, the Trust 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 the Trust is not one of the trust 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, the Trust will act in accordance with the Commission's interpretation of the requirements of Section 16(a) with respect to periodic elections of directors and with whatever rules the Commission may promulgate with respect thereto.

12. If and to the extent that Rules 6e–2 and 6e–3(T) are amended (or if Rule 6e–3 under the 1940 Act 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 by Applicants, then the Trust and/or the Participating Insurance Companies, as appropriate, will take such steps as may be necessary to comply with Rules 6e–2 and 6e–3(T), as amended, and Rule 6e–3, as adopted, to the extent such rules are applicable.

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

14. If a Plan becomes an owner of 10% or more of the assets of a Trust, such Plan will execute a participation agreement with the Trust. A Plan will execute an application containing an acknowledgement of this condition upon such Plan's initial purchase of the shares of any Portfolio.

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(b)(15) and 6e–3(T)(b)(15) 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.

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[Release No. 34–38142; International Series Release No. 1043; File No. SR–Amex–96–50]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by American Stock Exchange, Inc., Relating to the Listing and Trading of Index Warrants Based on the BEMI South Africa Index

January 8, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 30, 1996, the American Stock Exchange, Inc. (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Amex. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex, pursuant to Rule 19b–4 of the Act proposes to approve for listing and trading under Section 106 (Currency and Index Warrants) of the Amex *Company Guide* index warrants based on the BEMI South Africa Index (''Index''), a market capitalization-weighted broad-based index developed by ING Barings Securities Limited comprised of 30 South African companies representing five different industry groups.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Under Section 106 of the Amex *Comany Guide*, the Exchange may approve for listing index warrants based on foreign and domestic market indices. The Amex has received approval to trade a number of index warrant products pursuant to Section 106.[3] The Amex represents that the listing and trading of warrants on the Index will comply in all respects to Exchange Rules 1100 through 1110 for the trading of stock index and currency warrants.

Warrant issues on the Index will conform to the listing guidelines under Section 106, which provide, among other things, that: (1) the issuer shall have tangible net worth in excess of $250,000,000 and otherwise substantially exceed earnings requirements in Section 101(A) of the *Comany Guide* or meet the alternative guideline in paragraph (a); (2) the term of the warrants shall be for a period ranging from one to three years from date of issuance; and (3) the minimum public distribution of such issues shall be 1,000,000 warrants, together with a minimum of 400 public holders, and have an aggregate market value of $4,000,000.

Index warrants will be direct obligations of their issuer subject to cash-settlement during their term, and either exercisable throughout their life (*i.e.*, American style) or exercisable only on their expiration date (*i.e.*, European style). Upon exercise, or at the warrant expiration date if not exercisable prior to such date), the holder of a warrant structured as a ''put'' would receive payment in U.S. dollars to the extent that the Index has declined below a pre-stated cash settlement value. Conversely, holders of a warrant structured as a ''call'' would, upon exercise or at expiration, receive payment in U.S. dollars to the extent that the Index has increased above the pre-stated cash settlement value. If ''out-of-the-money'' at the time of expiration, the warrants would expire worthless.

The procedures for determining the cash settlement value for the warrants have not yet been determined by ING Barings. Once those procedures have been determined by ING Barings, they will be fully set forth in the prospectus and in the Information Circular distributed by the Exchange to its membership prior to the commencement of trading the warrant.

The Amex has adopted suitability standards applicable to recommendations to purchasers of Index warrants and transactions in customer accounts. Amex Rule 411, Commentary .02 recommends that index warrants under Section 106 of the *Company Guide* be sold only to investors whose accounts have been approved for options trading pursuant to Rule 921. The requirements under Rule 923 (Suitability) shall apply to recommendations in index warrants both with respect to customer accounts that have been approved for options trading and customer accounts that have not been so approved. Amex Rule 421, Commentary .02 requires a Senior Registered Options Principal or a Registered Options Principal to approve and initial a discretionary order in Index warrants on the day the order is entered. In addition, the Amex, prior to the commencement of trading of Index warrants, will distribute a circular to its membership calling attention to specific risks associated with warrants on the Index.

The Amex is proposing to list index warrants based on the Index, an internationally-recognized capitalization-weighed index representing a broad-based portfolio of 30 large, actively traded stocks from South Africa.[4] The total market capitalization of the Index was $118.6 billion on September 30, 1996. The total available market capitalization[5] of the Index was $32.1 billion on September 30, 1996. The median available capitalization of the companies in the Index on that date was $737 million and

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 36070 (August 9, 1995), 60 FR 42205 (August 14, 1995) (approval for index warrants on the Deutscher Aktienindex); Securities Exchange Act Release No. 33036 (October 8, 1993), 58 FR 53588 (October 15, 1993) (approval for index warrants on the Amex Hong Kong 30 Index); and Securities Exchange Act Release No. 31016 (August 11, 1992), 57 FR 37012 (August 17, 1992) (approval for index warrants on the Japan Index).

[4] The list of the component securities and their respective weights in the Index were attached to the proposed rule filing as Exhibit A, and are available for examination at the Amex or at the Commission as specified in Item IV.

[5] A company's ''available capitalization'' is defined as the lower of (i) the company's ''free float'' or (ii) the legally available capitalization of the company. A company's ''free float'' is defined as the percentage of shares which could reasonably be expected to trade on the open market. Generally, government holdings, corporate cross-ownership and other strategic holdings are not considered freely floating.