that his information not be released to the public by writing a letter asking that it remain confidential under one of the exemptions described in FOIA (see 5 U.S.C. 552). The SEC determines whether the investor's claim of an exemption if valid when someone requests the investor's information under FOIA. The SEC often makes it files available to other governmental agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by investors will be made available to such agencies where appropriate. Whether or not the SEC makes its files available to other governmental agencies is, in general, all confidential matter between the SEC and such other governmental agencies. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

General comments regarding the above information should be directed to the following persons: (i) Desk Officer for Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503; and (ii) Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: October 20, 2000.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–27718 Filed 10–27–00; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–24696; File No. 812–12060]

The Wachovia Variable Insurance Funds, et al.

October 25, 2000.

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

ACTION: Notice of application for an Order under section 6(c) of the Investment Company Act of 1940 (''Act'') for exemption from the provisions of sections 9(a), 13(a), 15(a), and 15(b) of the Act and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder.

Applicants: The Wachovia Variable Insurance Funds (''Trust'') and Wachovia Bank, N.A., on behalf of Wachovia Asset Management (''Wachovia''), a business unit of Wachovia Bank, N.A.

Summary of Application: Applicants seek an order to permit shares of the Trust and shares of any other investment company or series thereof that is designed to fund insurance products and for which Wachovia, or any of its affiliates, may serve in the future as investment adviser, administrator, manager, principal underwriter or sponsor (''Future Trusts'', together with Trust, ''Trusts'') to be sold to and held by (a) variable annuity and variable life insurance separate accounts of both affiliated and unaffiliated life insurance companies, (b) qualified pension and retirement plans outside of the separate account context, and (c) separate accounts that are not registered under the Act pursuant to exemptions from registration under Section 3(c) of the Act.

Filing Date: The application was filed on April 6, 2000, and amended and restated on September 14, 2000.

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 Commission by 5:30 p.m. on November 14, 2000, 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 who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

FOR FURTHER INFORMATION CONTACT: Mark Cowan, Senior Counsel, or Keith Carpenter, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 942–0670.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Applicants, R. Edward Bowling, Wachovia Bank, N.A., 100 North Main Street, Winston-Salem, NC 27101.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee from the Public Reference Branch of the Commission, 450 Fifth Street, NW., Washington, DC 20549 (tel. (202) 942–8090).

Applicants' Representations

1. The Trust is a Massachusetts business trust and is registered under the Act as an open-end management investment company. The Trust currently consists of three separately managed series (''Funds''). Additional series could be added to the Trust in the future. Each Fund has its own investment objective and policies.

2. Wachovia, a business unit of Wachovia Bank, N.A., is the investment adviser for the Trust. As a ''bank'' within the meaning of section 202(a)(2)(A) of the Investment Advisers Act of 1940 (''Advisers Act''), Wachovia Bank, N.A. is excluded from the definition of an investment adviser in section 202(a)(11) of the Advisers Act and, accordingly, is exempt from the registration requirements of section 203 of the Act.

3. Upon the granting of the exemptive relief requested by this application, the Trust intends to offer its shares representing interests in each Fund, and any other series established by the Trust (''Future Funds'') (Funds, together with Future Funds, ''Funds'' or each a ''Fund'') to separate accounts of both affiliated and unaffiliated insurance companies to serve as the investment vehicle for variable annuity contracts and variable life insurance contracts (''Variable Contracts''). In addition, Applicants propose that the Trust offer and sell shares representing interests in the Funds directly to qualified pension and retirement plans (''Qualified Plans'' or ''Plans'') outside of the separate account context. Separate accounts owning shares of the Funds and their insurance company depositors are referred to herein as ''Participating Separate Accounts'' and ''Participating Insurance Companies,'' respectively.

4. Participating Insurance Companies will establish their own Participating Separate Accounts and design their own Variable Contracts. Each Participating Insurance Company will enter into a participation agreement with the Trust on behalf of its Participating Separate Account, and will have the legal obligation of satisfying all applicable requirements under state and federal law. The role of the Trust, so far as the federal securities laws are applicable, will be limited to that of offering its shares to separate accounts of various insurance companies and fulfilling any conditions the Commission may impose upon granting the Order requested herein.

5. The Plans will be pension or retirement plans intended to qualify under sections 401(a) and 501(c) of the Internal Revenue Code of 1986, as

amended (''Code''). Many of the Plans will include a cash or deferred arrangement (permitting salary reduction contributions) intended to qualify under section 401(k) of the Code. The Plans will also be subject to, and will be designed to comply with, the provisions of the Employee Retirement Income Security Act of 1974 (''ERISA'') applicable to either defined benefit or to defined contribution profit-sharing plans, specifically ''Title I—Protection of Employee Benefit Rights.'' The Plans therefore will be subject to regulatory provisions under the Code and ERISA regarding, for example, reporting and disclosure, participation and vesting, funding, fiduciary, responsibility, and enforcement.

Applicants' Legal Analysis

1. Applicants request an order pursuant to section 6(c) of the Act exempting them from sections 9(a), 13(a), 15(a), and 15(b) of the Act, and Rules 6e–2(b)(15) and 6e–3T(b)(15) thereunder, to the extent necessary to permit shares of the Trusts to be offered and sold to, and held by: (a) Both variable annuity and variable life insurance separate accounts of the same life insurance company or of any affiliated life insurance company (''mixed funding''); (b) separate accounts of unaffiliated life insurance companies (including both variable annuity separate accounts and variable life insurance separate accounts) (''shared funding''); (c) trustees of Qualified Plans; and (d) separate accounts that are not registered under the Act pursuant to exemptions from registration under section 3(c) of the Act.

2. In connection with the funding of scheduled premium variable life insurance contracts issued through a separate account registered under the Act as a unit investment trust (''UIT''), Rule 6e–2(b)(15) provides partial exemptions from the following sections of the Act: (a) section 9(a), which makes it unlawful for any company to serve as an investment adviser or principal underwriter of any UIT, if an affiliated person of that company is subject to a disqualification enumerated in section 9(a)(1) or (2); and (b), sections 13(a), 15(a) and 15(b) of the Act to the extent that those sections have been deemed by the Commission to require ''pass-through'' voting with respect to an underlying investment company's shares. 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 their shares ''exclusively to variable life insurance separate accounts of the life insurer, or of any affiliated life insurance company.'' Therefore, the relief granted by Rule 6e–2(b)(15) is not available with respect to a scheduled premium variable life insurance separate account that owns shares of an investment company that also offers its shares to a variable annuity separate account or a flexible premium variable life insurance account of the same company or of any affiliated or unaffiliated insurance company. In addition, the relief granted by Rule 6e–2(b)(15) is not available if the scheduled premium variable life insurance separate account owns shares of an underlying investment company that also offers its shares to separate accounts funding variable contracts of one or more unaffiliated life insurance companies. Moreover, because the relief under Rule 6e–2(b)(15) is available only where shares are offered exclusively to separate accounts, additional exemptive relief is necessary if the shares of the Funds are also to be sold to Qualified Plans.

3. In connection with flexible premium variable life insurance contracts issued through a separate account registered under the Act as a UIT, Rule 6e–3(T)(b)(15) provides partial exemptions from sections 9(a) and from 13(a), 15(a) and 15(b) of the Act to the extent that those sections have been deemed by the Commission to require ''pass-through'' voting with respect to an underlying investment company's shares. The exemptions granted to a separate account by Rule 6e–3T(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 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 company.'' Therefore, Rule 6e–3(T) permits mixed funding for flexible premium variable life insurance separate accounts.

However, Rule 6e–3(T) does not permit shared funding, because the relief granted by Rule 6e–3(T)(b)(15) is not available with respect to a flexible premium variable life insurance separate account that owns shares of an investment company that also offers its shares to separate accounts (including flexible premium variable life insurance separate accounts) of unaffiliated life insurance companies. Moreover, because the relief under Rule 6e–3(T) is available only where shares are offered exclusively to separate accounts, additional exemptive relief is necessary if the shares of the Trust are also to be sold to Qualified Plans.

4. Due to changes in the federal tax law subsequent to the adoption of Rules 6e–2(b)(15) and 6e–3T(b)(15), the Trust is afforded an opportunity to increase its asset base by selling shares to Qualified Plans. Section 817(h) of the Code imposes certain diversification standards on the assets underlying Variable Contracts held in the Funds. The Code provides that Variable Contracts will not be treated as annuity contracts or life insurance contracts for any period (and any subsequent period) for which the investments are not, in accordance with regulations issued by the Treasury Department, adequately diversified. On March 2, 1989, the Treasury Department issued Regulations (Treas. Reg. § 1.817–5), which established diversification requirements for the investment portfolios underlying Variable Contracts. The Regulations generally provide that, in order to meet the diversification requirements, all of the beneficial interests in the underlying investment company must be held by the segregated asset accounts of one or more insurance companies. However, the Regulations also contain certain exceptions to this requirement, one of which allows trustees of a Qualified Plan to hold shares of an investment company without adversely affecting the status of the investment company as an adequately diversified underlying investment for Variable Contracts issued through separate accounts of insurance companies. (Treas. Reg. § 1.817–5(f)(3)(iii).) As a result of this exception to the general diversification requirements, Qualified Plans may select the Trust as an investment option without endangering the tax status of Variable Contracts issued through Participating Insurance Companies.

5. Qualified Plans may choose the Trust (or any series thereof) as their sole investment or as one of several investments. Plan participants may or may not be given an investment choice depending on the Plan itself. Shares of the Funds sold to such Qualified Plans would be held by the trustee(s) of the Plans as mandated by section 403(a) of ERISA. As described elsewhere herein, there will be no pass-through voting to the participants in such Qualified Plans, as it is not required to be provided to such participants pursuant to ERISA.

6. The promulgation of Rules 6e–2(b)(15) and 6e–3(T)(b)(15) preceded the issuance of the Treasury Regulations that made it possible for shares of an

investment company to be held by trustees of a Qualified Plan without adversely affecting the ability of separate accounts of insurance companies to hold shares of the same investment company in connection with their variable annuity and variable life contracts. Thus, the sale of shares of the same investment company to both separate accounts and Qualified 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. Accordingly, an Order of the Commission is hereby requested exempting flexible premium variable life insurance separate accounts (and, to the extent necessary, any investment adviser or sub-adviser, principal underwriter and depositor of such an account) from sections 9(a), 13(a), 15(a), and 15(b) of the Act, and Rule 6e–3(T)(b)(15) (and any comparable permanent rule) thereunder, to the extent necessary to permit shares of the Funds to be offered and sold to variable annuity and variable life insurance separate accounts of both affiliated and unaffiliated life insurance companies, to Qualified Plans, and to separate accounts that are not registered under the Act pursuant to exemptions from registration under section 3(c) of the Act.

8. Consistent with the Commission's authority under section 6(c) of the Act to grant exemptive orders to a class or classes of persons and transactions, this application requests relief for the class consisting of insurers and separate accounts investing in the Funds (and, to the extent necessary, investment advisers, sub-advisers, principal underwriters and depositors of such accounts). The Commission staff will have an opportunity to review compliance by the Participating Insurance Companies with the conditions of the requested Order at the time each Participating Separate Account files its registration statement.

9. Section 6(c) authorizes the Commission to exempt any person, security or transaction, or any class or classes of persons, securities or transactions from any provisions of the Act and 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 Act. Applicants are not aware of any stated rationale for the exclusion of separate accounts and investment companies, or series thereof, engaged in shared funding from the exemptive relief provided under Rules 6e–2(b)(15) and 6e–3(T)(b)(15) or for the exclusion of separate accounts and investment companies, or series thereof, engaged in mixed funding from the exemptive relief provided under Rule 6e–2(b)(15). Indeed, the Commission's proposed amendments to Rule 6e–2 would eliminate the exclusion of mixed funding from the relief provided under Rule 6e–2(b)(15) and, as noted above, numerous exemptions permitting both mixed and shared funding have been granted since the adoption of Rules 6e–2 and 6e–3.

10. Similarly, Applicants are not aware of any stated rationale for excluding Participating Insurance Companies from the exemptive relief requested because the Funds may also sell their shares to Qualified Plans. In fact, Applicants assert that the proposed sale of shares of the Funds 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 cost efficiencies. If the Funds were to sell shares only to Qualified Plans, no exemptive relief would be necessary. The relief provided under Rules 6e–2(b)(15) and 6e–3(T)(b)(15) does not relate to Qualified Plans or to a registered investment company's ability to sell its shares to such Plans. Exemptive relief is requested in the application only because the separate accounts investing in the Funds are themselves investment companies seeking relief under Rules 6e–2 and 6e–3(T) and do not wish to be denied such relief if the Funds sell shares to Qualified Plans. As noted above, the Commission has granted numerous exemptions permitting extended mixed and shared funding. Moreover, for the reasons stated below, applicants believe that the requested exemptions 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 Act.

11. Section 9(a) of the Act provides that it is unlawful for any company to serve as investment adviser or principal underwriter of 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). However, Rules 6e–2(b)(15)(i) and (ii) and 6e–3(T)(b)(15)(i) and (ii) provide partial exemptions from Section 9(a) under certain circumstances, subject to the limitations discussed above on mixed and shared funding. These exemptions limit the disqualification to affiliated individuals or companies that directly participate in the management or administration of the underlying investment company or series thereof.

12. Rules 6e–2(b)(15)(i) and 6e–3(T)(b)(15)(i) allow an individual disqualified under section 9(a)(1) or (2) to be an officer, director, or employee of an insurance company, or any of its affiliates that serves in any capacity with respect to an underlying investment company, so long as the disqualified individual does not participate directly in the management or administration of the underlying investment company. Similarly, Rules 6e–2(b)(15)(ii) and 6e–3(T)(b)(15)(ii) permit an insurance company disqualified under section 9(a) of the Act to serve in any capacity with respect to an underlying investment company, provided that the affiliated person, ineligible under section 9(a)(1) or (2) of the Act, does not participate directly in the management or administration of the investment company.

13. The partial relief granted in Rules 6e–2(b)(15) and 6e–3(T)(b)(15) from requirements of section 9 of the Act, in effect, limits the amount of monitoring of an insurer's personnel that would otherwise be necessary to ensure compliance with section 9 to that which is appropriate in light of the policy and purposes of section 9. The exemptions contained in Rules 6e–2(b)(15) and 6e–3(T)(b)(15) recognize that it is not necessary for the protection of investors or the purposes fairly intended by the policy and provisions of the Act to apply section 9(a) to the many individuals who may be involved in a large insurance company but would have no connection with the investment company, or any series thereof, funding the separate accounts. Applicants believe that it is unnecessary to limit the applicability of the rules merely because shares of the Trust may be sold in connection with mixed and shared funding. The Participating Insurance Companies will not be involved in the management or administration of the Trust or the Funds. Therefore, applying the restrictions of section 9(a) serves no regulatory purpose. Indeed, applying such restrictions would increase the monitoring costs incurred by the Participating Insurance Companies and, therefore, would reduce the net rates of return realized by Variable Contract owners.

14. Moreover, the appropriateness of the relief requested herein will not be affected by the proposed sale of shares of the Trust to Qualified Plans. The insulation of the Trust from those individuals who are disqualified under the Act remains in place. Applying the requirements of section 9(a) because of investment by Qualified Plans would be

unjustified and would not serve any regulatory purpose. Since the Qualified Plans are not investment companies and will not be deemed to be affiliated solely by virtue of their shareholdings, no additional relief is necessary.

15. Rules 6e–2(b)(15) and 6e–3(T)(b)(15) under the Act give the Participating Insurance Companies the right to disregard voting instructions of contract owners. Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(b)(15)(iii)(A) each provide that the 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 (subject to the provisions of paragraphs (b)(5)(i) and (b)(7)(ii)(A) of Rules 6e–2 and 6e–3(T) under the Act). Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii)(A)(*2*) each provide that the insurance company may disregard voting instructions of contract owners if the contract owners initiate any change in the underlying investment company's investment policies, principal underwriter, or any investment adviser (subject to the provisions of paragraphs (b)(5)(ii), (b)(7)(ii)(B), and (b)(7)(ii)(C) of Rules 6e–2 and 6e–3(T) under the Act). These rights do not raise any issues different from those raised by the authority of state insurance administrators over separate accounts. Under Rules 6e–2(b)(15) and 6e–3(T)(b)(15), an insurer can disregard voting instructions of contract owners only with respect to certain specified items.

16. The potential for disagreement among Participating Separate Accounts is limited by the requirements in Rules 6e–2 and 6e–3 that a Participating Insurance Company's disregard of voting instructions be reasonable and based on specific good faith determinations. Voting instructions with respect to a change in investment policies may be disregarded only if such disapproval is reasonable and the insurance company makes a good faith determination that such change would: (a) Violate state law; (b) result in investments that were not consistent with the investment objectives of the separate account; or (c) result in investments that would vary from the general quality and nature of investments and investment techniques used by other separate accounts of the company or of an affiliated life insurance company with similar investment objectives. Voting instructions with respect to a change in the principal underwriter may be disapproved if such disapproval is reasonable. Voting instructions with respect to a change in an investment adviser may be disregarded only if such disapproval is reasonable and the insurance company makes a good faith determination that: (a) The adviser's fee would exceed the maximum rate that may be charged against the separate account's assets; (b) the proposed adviser may be expected to employ investment techniques that vary from the general techniques used by the current adviser; or (c) the proposed adviser may be expected to manage the investment company's investments in a manner that would be inconsistent with its investment objectives or in a manner that would result in investments that vary from certain standards.

17. In addition, the sale of shares of the Funds to Qualified Plans will not have any impact on the relief requested in this regard. Shares of the Funds sold to Qualified Plans will be held by the trustees of the Plans as mandated by section 403(a) of ERISA. Section 403(a) provides that the trustee(s) must have exclusive authority and discretion to manage and control a 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 name 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 the named fiduciary. Accordingly, 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 respect to Qualified Plans since such Plans are not entitled to pass-through voting privileges.

18. Even if a Qualified Plan were to hold a controlling interest in the Trust, Applicants do not believe that such control would disadvantage other investors in the Trust to any greater extent than is the case when any institutional shareholder holds a majority of the voting securities of any open-end management investment company. In this regard, Applicants submit that investment in the Funds by a Qualified Plan will not create any of the voting complications occasioned by mixed and shared funding. Unlike mixed or shared funding, Plan investor voting rights cannot be frustrated by veto rights of insurers or state regulators.

19. Applicants generally expect many Qualified Plans to have their trustee(s) or other fiduciaries exercise voting rights attributable to investment securities held by the Qualified Plan in their discretion. Some of the Qualified Plans, however, may provide for the trustee(s), an investment adviser(s) or another named fiduciary to exercise voting rights in accordance with instructions from participants.[1]

20. Where a Qualified Plan does not provide participants with the right to give voting instructions, Applicants submit that there is no potential for material irreconcilable conflicts of interest between or among contract owners and Plan investors with respect to voting of the Funds' shares.

21. Where a Plan provides participants with the right to give voting instructions, Applicants see no reason to believe that participants in Qualified Plans generally or those in a particular Plan, either as a single group or in combination with participants in other Qualified Plans, would vote in a manner that would disadvantage contract owners. The purchase of shares of the Funds by Qualified Plans that provide voting rights does not present any complications not otherwise occasioned by mixed and shared funding.

22. As demonstrated below, no increased conflicts of interest would be present if the Commission grants the exemptive relief sought hereby.

23. 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. For example, when different Participating Insurance Companies are domiciled in different states, it is possible that the state insurance regulatory body in a state in which one Participating 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 Participating Insurance Companies are domiciled.

[1] Although section 403(a) of ERISA provides plan trustees with complete discretion to manage and control their plan, including exercising any voting rights attributable to investment securities held by the plan, nothing therein prohibits the trustees from obligating themselves to solicit and follow voting instructions from plan participants. However, it is not generally a common practice for plan trustees to undertake such obligations, even for 401(k) plans.

That possibility, however, is no different and no greater than that which exists when a single insurer and its affiliates offer their insurance products in several states, as currently is permitted.

24. Affiliations among insurers do not reduce the potential, if any exists, for differences in state regulatory requirements. In any event, the conditions discussed below (which are adapted from the conditions included in Rule 6e–3(T)(b)(15)) are designed to safeguard against any adverse effects that differences among state regulatory requirements may produce. For example, if a particular state insurance regulator's decision conflicts with the majority of other state regulators, the affected insurer may be required to withdraw its Participating Separate Account's investment in the Trust.

25. Similarly, affiliation does not eliminate the potential, if any exists, for divergent judgments as to when a Participating Insurance Company could disregard contract owner voting instructions. The potential for disagreement is limited by the requirement that disregarding voting instructions be reasonable and based on specified good faith determinations. However, if a Participating Insurance Company's decision to disregard Contract owner voting 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 Trust, to withdraw its separate account's investment in the Trust and no charge or penalty will be imposed as a result of such withdrawal.

26. There is no reason why the investment policies of the Trust, were it to engage in mixed funding, would or should materially differ from what those policies would or should be if the Trust supported only variable annuity or only variable life insurance contracts. Hence, there is no reason to believe that conflicts of interest would result from mixed funding. Moreover, the Trust will not be managed to favor or disfavor any particular insurer or any type of contract.

27. No one investment strategy can be identified as appropriate to a particular insurance product or to a Plan. Each pool of variable annuity and variable life insurance contract owners is composed of individuals of diverse financial status, age, insurance and investment goals. Those diversities are of greater significance than any differences in insurance products. An investment company supporting even one type of insurance product must accommodate those diverse factors.

28. The sale of shares of the Funds to Qualified Plans should not increase the potential for material irreconcilable conflicts of interest between or among different types of investors. There should be very little potential for such conflicts beyond that which would otherwise exist between variable annuity and variable life insurance contract owners.

29. Section 817(h) of the Code imposes certain diversification standards on the assets underlying Variable Contracts held in the portfolios of management investment companies. Treasury Regulation 1.817–5(f)(3)(iii), which establishes diversification requirements for such portfolios, specifically permits, among other things, ''qualified pension or retirement plans'' and separate accounts to share the same underlying management investment company. Therefore, neither the Code, the Treasury regulations nor the revenue rulings thereunder recognize or proscribe any inherent conflicts of interest if Qualified Plans, variable annuity separate accounts and variable life separate accounts all invest in the same management investment company.

30. While there are differences in the manner in which distributions from Variable Contracts and Qualified Plans are taxed, the tax consequences do not raise any conflicts of interest. When distributions are to be made, and the Participating Separate Account or a Qualified Plan cannot net purchase payments to make the distribution, the Separate Account or the Plan will redeem shares of the Trust at their net asset value in conformity with Rule 22c–1 under the Act to provide proceeds to meet distribution needs. The Qualified Plan will then make distributions in accordance with the terms of the Plan. The life 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.

31. It is possible to provide an equitable means of giving voting rights to Participating Separate Account contract owners and to Qualified Plans. The transfer agent for the Trust will inform each Participating Insurance Company of each Participating Separate Account's share ownership in the Trust, as well as inform the trustees of Qualified Plans of their holdings. The Participating Insurance Company then will solicit voting instructions in accordance with Rules 6e–2 and 6e–3(T), as applicable, and its participation agreement with the Trust. Shares held by Qualified Plans will be voted in accordance with applicable law. The voting rights provided to Qualified Plans with respect to shares of the Trust would be no different from the voting rights that are provided to Qualified Plans with respect to shares of funds sold to the general public.

32. The ability of the Trust to sell its shares directly to Qualified Plans does not create a ''senior security,'' as such term is defined under section 18(g) of the Act, with respect to any contract owner as opposed to a Qualified Plan participant. As noted above, regardless of the rights and benefits of Qualified Plan participants or contract owners, the Qualified Plans and the Participating Separate Accounts only have rights with respect to their respective shares of the Trust. They can only redeem such shares at their net asset value. No shareholder of any of the Trust has any preference over any other shareholder with respect to distribution of assets or payment of dividends.

33. There are no conflicts between the contract owners of Participating Separate Accounts and Qualified Plan participants with respect to the state insurance commissioners' veto powers (direct with respect to variable life and indirect with respect to variable annuity) over investment objectives. The basic premise of shareholder voting is that shareholders may not all agree with a particular proposal. While the interests and opinions of shareholders may differ, however, this does not mean that there are any inherent conflicts of interest between or among such shareholders. State insurance commissioners have been given the veto power in recognition of the fact that insurance companies usually cannot simply redeem their separate accounts out of one fund and invest in another. Generally, time-consuming, complex transactions must be undertaken to accomplish such redemptions and transfers. Trustees of Qualified Plans, on the other hand, can make the decision quickly and redeem their shares of the Trust and reinvest in another funding vehicle without the same regulatory impediments faced by separate accounts or, as is the case with most Plans, even hold cash pending suitable investment. Based on the foregoing, even if there should arise issues where the interests of contract owners and the interests of Qualified Plans are in conflict, the issues can be almost immediately resolved because the trustees of the Qualified Plans can, on their own, redeem the shares out of the Trust.

34. There does not appear to be any greater potential for material irreconcilable conflicts arising between the interests of Qualified Plan

participants and contract owners of Participating Insurance Companies from possible future changes in the federal tax laws than that which already exists between variable annuity and variable life insurance contract owners.

35. Applicants recognize that the foregoing is not an all inclusive list, but rather is representative of issues which they believe are relevant to this application. Applicants believe that the discussion contained herein demonstrates that the sale of shares of the Funds to Qualified Plans and Variable Contracts does not increase the risk of material irreconcilable conflicts of interest. Furthermore, the use of the Trust with respect to variable life insurance contracts and Qualified Plans is not substantially different from the Trust's current use, in that variable insurance contracts and Qualified Plans, like variable annuity contracts, are generally long-term retirement vehicles.

36. Various factors have prevented more insurance companies from offering variable annuity and variable life insurance contracts than currently do so. These factors include the costs of organizing and operating a funding medium, the lack of expertise with respect to investment management (principally with respect to stock and money market investments) and the lack of public name recognition as investment professionals. In particular, some smaller life insurance companies may not find it economically feasible, or within their investment or administrative expertise, to enter the Variable Contract business on their own.

37. Use of the Funds as common investment media for Variable Contracts would ameliorate these concerns. Participating Insurance Companies would benefit not only from the investment advisory and administrative expertise of Wachovia and its affiliates, but also from the cost efficiencies and investment flexibility afforded by a large pool of funds. Therefore, making the Funds available for mixed and shared funding will encourage more insurance companies to offer Variable Contracts. This should result in increased competition with respect to both Variable Contract design and pricing, which can be expected to result in more product variation and lower charges. Contract owners would benefit because mixed and shared funding should eliminate a significant portion of the costs of establishing and administering separate funds.

38. Moreover, sale of the shares of the Funds to Qualified Plans should further increase the amount of assets available for investment by the Funds. This, in turn, should inure to the benefit of contract owners by promoting economies of scale, by permitting greater safety through greater diversification, and by making the addition of new series to the Trust more feasible.

39. Regardless of the type of shareholder in the Funds, Wachovia is or would be contractually or otherwise obligated to manage each Fund solely and exclusively in accordance with that series' investment objectives, policies and restrictions as well as any guidelines established by the board of trustees of the Trust.

Applicants' Conditions

Applicants consent to the following conditions:

1. A majority of the Board of Trustees of each Trust (''Board'') will consist of persons who are not ''interested persons'' of the Trust, as defined by section 2(a)(19) of the 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 Trustees, 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 Board; (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. Each Board will monitor its respective Trust for the existence of any material irreconcilable conflict between the interests of the contract owners of all Participating Separate Accounts and of the participants in Qualified Plans investing in such Trust 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 investment of such Trust are being managed; (e) a difference in voting instructions given by variable annuity contract owners and variable life insurance contract owners and trustees of the Qualified plans; (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 the voting instructions of its participants.

3. Participating Insurance Companies, Wachovia or an affiliate, or any other investment adviser of the Trusts, and any Qualified Plans that execute a fund participation agreement upon becoming an owner of 10% or more of the assets of any Fund (''Participants'') will report any potential or existing conflicts to the relevant Board. Participants will be responsible for assisting the relevant Board in carrying out its responsibilities under these conditions by providing the relevant Board with all information reasonably necessary for the Board to consider any issues raised. This responsibility includes, but is not limited to, an obligation of each Participating Insurance Company to inform the relevant Board whenever it has determined to disregard contract owner voting instructions and, when pass-through voting is applicable, an obligation of each Plan to inform the Board whenever it has determined to disregard voting instructions from Plan participants. The responsibilities to report such information and conflicts and to assist the Board will be contractual obligations of all Participating Insurance Companies and Plans under their participation agreements with the Trusts, and such agreements shall provide, in the case of Participating Insurance Companies, that these responsibilities will be carried out with a view only to the interests of contract owners, and in the case of Qualified Plans, that these responsibilities will be carried out with a view only to the interest of Plan participants.

4. If it is determined by a majority of a Board, or by a majority of its disinterested Trustees, that a material irreconcilable conflict exists, the relevant Participating Insurance Companies and Plans will, at their expense and to the extent reasonably practicable (as determined by a majority of the disinterested Trustees), take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict, which steps could include: (a) withdrawing the assets allocable to some or all of the Participating Separate Accounts form the relevant Fund and reinvesting such assets in a different investment medium, which may include another Fund, or submitting the question of whether such reinvestment should be implemented to a vote of all affected 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 contract owners the option of making such a change; and (b) 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 contract owners' voting instructions and that decision represents a minority position or would preclude a majority vote, then that insurer may be required, at the relevant Trust's election, to withdraw its separate account's investment in such 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 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 relevant Trust's election, to withdraw its investment in such Trust and no charge or penalty will be imposed as a result of such withdrawal. To the extent permitted by applicable law, the responsibility of taking remedial action in the event of a Board determination of material irreconcilable conflict and bearing the cost of such remedial action will be a contractual obligation of all Participating Insurance Companies and Qualified Plans under their agreements governing participation in the Trust and these responsibilities will be carried out with a view only to the interests of contract owners and Plan participants, respectively.

For purposes of this Condition 4, a majority of the disinterested Trustees of a Board will determine whether or not any proposed action adequately remedies any material irreconcilable conflict, but in no event will the Trust, Wachovia, or Wachovia's affiliate, as relevant, be required to establish a new funding medium for any Variable Contract. 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 vote of a majority of contract owners materially and adversely affected by the material irreconcilable conflict. Further, no Qualified Plan will be required by this Condition 4 to establish a new funding medium for the Plan if (a) an offer to do so has been declined by vote of a majority of Plan participants materially and adversely affected by the material irreconcilable conflict or (b) pursuant to governing Plan documents and applicable law, the Plan makes such decision without a vote of its participants.

5. Any Board's determination of the existence of a material irreconcilable conflict and its implications will be made known promptly and in writing to all Participants.

6. As to Variable Contracts issued by Participating Separate Accounts registered under the Act, Participating Insurance Companies will provide pass-through voting privileges to all contract owners so long as the Commission interprets the Act to require pass-through voting for contract owners. However, as to Variable Contracts issued by unregistered Participating Separate Accounts, pass-through voting privileges will be extended to contract owners to the extent granted by the issuing insurance company. Accordingly, the Participating Insurance Companies will vote shares of the applicable Fund held in their Participating Separate Accounts in a manner consistent with voting instructions timely received from contract owners. Participating Insurance Companies will be responsible for assuring that each of their Participating Separate Accounts calculates voting privileges in a manner consistent with all other Participating Insurance Companies. The obligation to calculate voting privileges in a manner consistent with all other Participating Separate Accounts will be contractual obligation of all Participating Insurance Companies under their participation agreements with the Trusts. Each Participating Insurance Company will vote shares for which it has not received timely voting instructions, as well as shares attributable to it, in the same proportion as it votes shares for which it has received instructions.

7. Each Qualified Plan will vote as required by applicable law and governing Plan documents.

8. All reports of potential or existing conflicts received by a Board, 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, and such minutes or other records shall be made available to the Commission upon request.

9. The Trusts will notify all Participants that disclosure in separate account prospectuses or any Qualified Plan prospectuses or other Plan disclosure documents regarding potential risks of mixed and shared funding may be appropriate. Each 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 for Plans; (b) due to differences of tax treatment and other considerations, the interests of various contract owners participating in the Trust and the interest of Qualified Plans investing in the Trust may conflict; and (c) the Board will monitor the Trust for the existence of any material conflicts and determine what action, if any, should be taken.

10. The Trusts will comply with all provisions of the Act requiring voting by shareholders (which, for these purposes, shall be the persons having a voting interest in shares of the Trusts), and, in particular, each Trust will either provide for annual meetings (except to the extent that the Commission may interpret Section 16 of the Act not to require such meetings) or comply with section 16(c) of the Act (although the Trusts are not within the trusts described in section 16(c)) as well as with Section 16(a), and, if applicable, section 16(b) of the Act. Further, each Trust 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.

11. If and to the extent that Rules 6e–2 and 6e–3(T) are amended (or if Rule 6e–3 under the Act is adopted) to provide exemptive relief from any provision of the Act or the rules thereunder with respect to mixed or shared funding on terms and conditions materially different from any exemptions granted in the order requested by Applicants, then the Trusts and/or Participating Insurance Companies, as appropriate, shall take such steps as may be necessary to comply with Rules 6e–2 and 6e–3(T), as amended, or Rule 6e–3, as adopted, to the extent applicable.

12. No less than annually, the Participants shall submit to each Board such reports, materials, or data as the Board may reasonably 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 a Board when it so reasonably requests shall be a contractual obligation of all Participants under their participation agreements with the Trusts.

13. In the event that a Qualified Plan should ever become an owner of 10% or more of the assets of a Fund, such Qualified Plan will execute a participation agreement with the relevant Trust including the conditions set forth herein, to the extent applicable. A Qualified Plan will execute an application containing an acknowledgment of this condition at the time of its initial purchase of shares of the relevant Fund.

Conclusion

For the reasons summarized above, Applicants submit that the requested exemptions are necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43477); File No. SR–Phlx–00–84]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Amending PHLX Rule 237 to Extend the Pilot Program for eVWAP until November 30, 2001

October 23, 2000.

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 September 1, 2000, the Philadelphia Stock Exchange, Inc. (''PHLX'' or ''Exchange''), filed a proposed rule change with the Securities and Exchange Commission (''SEC'' or ''Commission''). The proposed rule change is described in Items I, II, and III below, which Items have been prepared by Exchange. On October 18, 2000, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Exchange filed the proposed rule change, as amended, pursuant to Section 19(b)(3)(A) of the Act,[4] and Rule 19b–4(f)(6) thereunder,[5] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange proposes to extend the pilot program for the Volume Weighted Average Price Trading System (''eVWAP'' or ''System'') until November 30, 2001.

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 Exchange 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 Exchange 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The eVWAP is a pre-opening order matching session for the electronic execution of large-sized stock orders at the volume weighted average price. The Exchange received Commission approval to operate eVWAP as a one year pilot on March 24, 1999.[6] The System became operational on August 27, 1999. As a condition to the pilot program, the Commission requested that the Exchange prepare a comprehensive report pertaining to the operation and effectiveness of the eVWAP.[7]

The Exchange now proposes to extend the current pilot program until November 30, 2001. Extension of the pilot program for another year will allow the Exchange and the Commission additional time to assess the effectiveness of the System and its impact on investors and the market as a whole.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act [8] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change, as amended, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

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

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

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act [9] and Rule 19b–4(f)(6) [10] thereunder because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which the proposed rule change was filed, or such shorter time as the Commission may designate. At any time within 60 days

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

[2] 17 CFR 240.19b–4.

[3] *See* October 18, 2000 letter from Linda Christie, Exchange, to Heidi Pilpel, Special Counsel, Division of Market Regulation, SEC (''Amendment No. 1''). In Amendment No. 1, the Exchange requested that the proposed rule change be filed under Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder. 15 U.S.C. 78s(b)(3)(A) and 17 CFR 240.19b–4(f)(6). The Exchange also requested that the Commission treat the original proposed rule change as the 5 day prefiling notice required under Rule 19b–4(f)(6); and requested that the Commission waive the 30-day period before the proposal becomes effective to permit the proposed rule change to become immediately effective.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

[6] *See* Securities Exchange Act Release No. 41210 (March 24, 1999), 64 FR 15857 (April 1, 1999), (SR–Phlx–96–14).

[7] The Commission requested that the Exchange provide a report that: (i) addresses the overall reliability of the System and identifies any System outages or other technical problems; (ii) provides a summary of the Exchange's surveillance efforts; (iii) discusses the strategies employed by the users and committers and evaluates whether the system is useful to market participants; (iv) provides feedback from Exchange members and non-members regarding their experience with the system; and (v) measures the system's impact and effect on the primary market of eligible securities. The Exchange submitted its report in September 2000, which report identified no significant problems with the operation of the System.

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).