E. Description of Matching Program

OPM provides a monthly electronic finder file to SSA containing data on those individuals for whom OPM requests post 1956 military service benefit information. These elements will be matched against SSA records. SSA furnishes OPM by electronic reply file benefit information on these individuals, including the amount of the SSA benefit attributable to the post 1956 military service (which constitutes the CSRS or FERS annuity reduction amount).

F. Privacy Safeguards and Security

The personal privacy of the individuals whose names are included in the tapes is protected by strict adherence to the provisions of the Privacy Act of 1974 and OMB's ''Guidance Interpreting the Provisions of Public Law 100–503, the Computer Matching and Privacy Protection Act of 1988''. Access to the records used in the data exchange is restricted to only those authorized employees and officials who need it to perform their official duties. Records matched or created will be stored in an area that is physically safe from access by unauthorized personnel during duty hours as well as nonduty hours or when not in use. Records used in this exchange and any records created by this exchange will be processed under the immediate supervision and control of authorized personnel in a manner which will protect the confidentiality of the records.

Both OPM and SSA have the right to make onsite inspections or make other provisions to ensure that adequate safeguards are being maintained by the other agency.

F. Inclusive Dates of the Matching Program

This computer matching program is subject to review by the Congress and OMB. OPM's report to these parties must be received at least 40 days prior to the initiation of any matching activity. If no objections are raised by either Congress or OMB, and the mandatory 30 day public notice period for comment for this **Federal Register** notice expires, with no significant receipt of adverse public comments resulting in a contrary determination, then this computer matching program becomes effective. By agreement between OPM and SSA, the matching program will be in effect and continue for 18 months with an option to renew for 12 additional months under the terms set forth in 5 U.S.C. 552a(o)(2)(D).

[FR Doc. 00–31149 Filed 12–6–00; 8:45 am]

BILLING CODE 6325–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–24778; File No. 812–12194]

Advantus Series Fund, Inc., et al.

November 30, 2000.

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

ACTION: Notice of application for an order under Section 6(c) of the Investment Company Act of 1940, as amended (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.

APPLICANTS: Advantus Series Fund, Inc. (''Advantus Fund''), an open-end, management investment company, and Advantus Capital Management, Inc. (''Advantus Capital''), the investment adviser of Advantus Fund.

SUMMARY OF APPLICATION: Applicants seek an order granting 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, to the extent necessary to permit shares of any current or future series of the Advantus Fund and of any future open-end investment companies for which Advantus Capital or any affiliated person of Advantus Capital serves as investment adviser, manager, principal underwriter, or sponsor (collectively, ''the Future Funds,'' collectively with Advantus Fund, the ''Funds'' or individually a ''Fund'') to be sold to and held by (a) separate accounts funding variable annuity and variable life insurance contracts issued by both affiliated and unaffiliated life insurance companies (the separate accounts, hereinafter ''Separate Accounts,'' and the life insurance companies, hereinafter ''Participating Life Insurance Companies''), and (b) qualified plans outside of the separate account context (including, without limitation, those trusts, plans, accounts, contracts or annuities described in Sections 401(a), 403(a), 403(b), 408(a), 408(b), 414(d), 457(b), 408(k), or 501(c)(18) of the Internal Revenue Code of 1986, as amended (the ''Code'')), and any other trust, plan, account, contract or annuity that is determined to be within the scope of Treasury Regulation 1.817.5(f)(3)(iii) (''Qualified Plans'' or ''Plans''). Applicants request that the exemptive relief being requested apply to any series of shares of the Funds that may be created in the future. The only registered open-end management investment company that currently intends to rely on the requested order is Advantus Fund.

Filing Date: The application was filed on July 31, 2000, and amended and restated on November 15, 2000 and November 28, 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 must be received by the Commission by 5:30 p.m. on December 26, 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.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Applicants, Minnesota Life Insurance Company, c/o Donald F. Gruber, Esq., Assistant General Counsel, 400 Robert Street North, St. Paul, Minnesota 55101–2098.

FOR FURTHER INFORMATION CONTACT: Ann L. Vlcek, Senior Counsel, or Lorna J. MacLeod, Branch Chief, Office of Insurance Products, Division of Investment Management at (202) 942–0670.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee from the SEC's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549–0102 (202–942–8090).

Applicants' Representations

1. Advantus Fund is a no-load, open-end, management investment company registered under the 1940 Act. Advantus Fund is organized as a Minnesota corporation established under Minnesota law on February 21, 1985. Prior to a change in Advantus Fund's name in 1997, Advantus Fund was known as the MIMLIC Series Fund, Inc.

2. Advantus Fund is a series company, consisting of nineteen separate portfolios, each with its own investment objectives (each a ''Portfolio''). Each Portfolio issues a

separate series of Advantus Fund's common stock. The investment advisor of Advantus Fund is Advantus Capital, a Minnesota corporation. Prior to May 1, 1997, Advantus Fund obtained advisory services from MIMLIC Asset Management Company, formerly the parent company of Advantus Capital.

3. Advantus Capital commenced its business in June 1994, and provides investment advisory services to eleven other Advantus funds and various private accounts. Advantus Capital was incorporated in Minnesota in June 1994, and is a wholly owned subsidiary of Minnesota Life Insurance Company (''Minnesota Life''), a Minnesota corporation that formerly was known as The Minnesota Mutual Life Insurance Company.

4. Shares of Advantus Fund are currently offered to a number of Separate Accounts of Minnesota Life to fund benefits under variable annuity and variable life insurance contracts issued by it and the Separate Accounts. Five of those Separate accounts are registered as unit investment trusts under the 1940 Act. Shares of Advantus Fund currently are not sold directly to the public. Shares of the Funds may, in the future, be sold to other separate accounts or to other issuers of variable annuity and variable life insurance contracts. The Separate Accounts referred to above invest in shares of the relevant Portfolios in accordance with allocation instructions received from the variable annuity contract owners or variable life insurance policy owners of Minnesota Life.

5. Advantus Fund intends to offer shares of its existing Portfolios and future investment portfolios to Separate Accounts of Participating Insurance Companies (defined below), in order to serve as the investment vehicle for various types of insurance products which may include variable annuity contracts, single premium variable life insurance contracts, scheduled premium variable life insurance contracts, modified single premium variable life insurance policies, and flexible premium variable life insurance contracts (collectively referred to herein as ''variable contracts'').[1] Participating Insurance Companies will be those insurance companies that purchase shares of the Funds, or of any of their Portfolios or future Portfolios, for such purposes. The Funds also may offer shares of their existing Portfolios and future investment portfolios directly to Qualified Plans outside of the separate account context.

6. The Participating Insurance Companies will establish their own Separate Accounts and design their own variable contracts. Each participating Insurance Company will have the legal obligation of satisfying all requirements applicable to such insurance company under the Federal securities laws. It is anticipated that Participating Insurance Companies, in connection with variable life insurance contracts, may rely on individual exemptive orders as well. The role of each of the Funds, so far as the Federal securities law are applicable, will be limited to that of offering its Portfolio shares, as described below, to Separate Accounts of various insurance companies and to Qualified Plans, and fulfilling any conditions the Commission may impose upon granting the order requested herein.

7. The Separate Accounts of the Participating Insurance Companies will invest in shares of the Funds in accordance with allocation instructions received from the contract owners of the variable contracts (collectively, the ''contract owners''). Additional information regarding Advantus Fund is contained in its prospectus and statement of additional information, copies of which are included in Advantus Fund's registration statement under the Securities Act of 1933, as amended, and the 1940 Act (File Nos. 2–96990 and 811–4279), which is incorporated herein by reference.

8. As noted above, the Funds may also sell their shares directly to Qualified Plans. As described below, changes in the tax law have created an opportunity for a Fund to increase its asset base through the sale of its shares to such Qualified Plans.

9. Section 817(h) of the Code imposes certain diversification standards on the underlying assets of variable contracts held in segregated asset accounts. The Code provides that a variable contract shall not be treated as an annuity or life insurance contract for any period (and any subsequent period) for which the investments, in accordance with regulations prescribed by the Treasury Department, are not adequately diversified. The Treasury Department has issued regulations (Treas. Reg. 1.817—5) (the ''Treasury Regulations'') which establish diversification requirements for the investment portfolios underlying variable contracts. The Treasury Regulations provide that, in order to rely on certain look-through provisions of 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. The Treasury Regulations, however, also contain certain exceptions to this requirement, one of which allows shares in the investment company to be held by the trustee of a qualified pension or retirement plan without adversely affecting the ability of shares in the same investment company also to be held by insurance company separate accounts (Treas. Reg. 1.817–5(f)(3)(iii).

10. The promulgation of Rules 6e–2(b)(15) and 63–3(T)(b)(15) under the 1940 Act preceded the issuance of the Treasury Regulations which made it possible for shares of an investment company to be held by the trustee of a Qualified Plan without adversely affecting the ability of shares in the same investment company also to be held by the separate accounts of insurance companies in connection with their variable contracts. Applicants submit that the sale of shares of the same investment company to Separate Accounts and to Qualified Plans would not have been envisioned at the time of the adoption of Rules 6e–2(b)(15) and 6e–3(T)(b)(15) given the then-current tax law.

11. Applicants submit further that the relief requested in the order should not be affected by the proposed sale of shares of the Funds to Qualified Plans and, in fact, may allow for the development of larger pools of assets resulting in greater cost efficiencies. Accordingly, Applicants are requesting relief from Sections 9(a), 13(a), 15(a) and 15(b) and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder, to the extent necessary to permit shares of the Funds to be offered and sold to, and held by, Qualified Plans as well as insurance company separate accounts.

Applicants' Legal Analysis

1. In connection with the funding of variable life insurance contracts issued through a separate account registered under the 1940 Act as a unit investment trust, Rule 6e–2(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a), and 15(b). Section 9(a) provides that it is unlawful for any company to serve as an investment advisor or principal underwriter of any registered open-end investment company if an affiliated person of that company is subject to a disqualification enumerated in Sections 9(a)(1) or (2), Rules 6e–2(b)(15)(i) and (ii) provide partial exemptions from Section 9(a). Rule 6e–2(b)(15)(iii) provides a partial exemption from Sections 13(a), 15(a), and 15(b), to the extent those sections have been deemed by the Commission to require ''pass-through'' voting with

[1] Applicants state that some Separate Accounts to which the Fund may offer its shares may be exempt from registration under the 1940 Act.

respect to an underlying fund's shares. The exemptions granted to a separate account[2] 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'' (emphasis supplied). Therefore, the relief granted by Rule 6e–2(b)(15) is not available with respect to a variable life insurance separate account that owns shares of a management company that also offers its shares (a) to a variable annuity separate account of any insurance company (*i.e.,* to engage in ''mixed funding''), (b) to a variable life insurance or variable annuity separate account of any unaffiliated life insurance company (*i.e.,* to engage in ''shared funding''), or (c) directly to Qualified Plans.

2. Applicants submit that the relief granted by Rule 6e–2(b)(15) is in no way affected by the sale of Fund shares in connection with mixed or shared funding or by direct sales to Qualified Plans. Applicants, therefore, are seeking an order to permit the Participating Insurance Companies to rely on the relief granted in Rule 6e–2(b)(15). Applicants submit that, if the Funds were to sell their shares only to Qualified Plans, that no exemptive relief would be necessary. None of the relief provided for in Rule 6e–2(b)(15) relates to qualified pension and retirement plans or to a registered investment company's ability to sell its shares to such plans. It is only because the Separate Accounts investing in the Funds are themselves investment companies which desire to rely upon Rule 6e–2 that the Applicants are seeking the order. Accordingly, an order is requested exempting variable life insurance Separate Accounts (and, to the extent necessary, any principal underwriter and depositor of such an account) from Sections 9(a), 13(a), 15(a), and 15(b), and Rule 6e–2(b)(15) thereunder, to the extent necessary to permit the sale of Funds shares to (a) variable annuity Separate Accounts and variable life insurance Separate Accounts of the same life insurance company or of affiliated life insurance companies; (b) Separate Accounts of unaffiliated life insurance companies; and (c) Qualified Plans.

[2] Applicants state that the exemptions provided by Rule 6e–2 also are available to the investments advisor, principal underwriter, and sponsor or depositor of the separate account.

3. In connection with flexible premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a unit investment trust, Rule 6e–3(T)(b)(15) provides partial exemptions from Sections 13(a), 15(a), and 15(b) to the extent that those sections have been deemed by the Commission to require ''pass-through'' voting with respect to an underlying fund's shares. In addition, Rule 6e–3(T)(b)(15) provides a partial exemption from Section 9(a) to the extent that such section would render a company ineligible to serve an investment advisor or principal underwriter of any registered open-end management investment company, where an officer, director, employee or affiliated person of such company is subject to a disqualification enumerated in Section 9(a), but the individual subject to such disqualification does not participate directly in the management or administration of the underlying registered management investment company. The exemptions granted to a separate account by Rule 6e–3(T)(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 (premium variable life insurance) contracts or flexible (premium variable life insurance) 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'' (emphasis supplied). Applicants note that, therefore, Rule 6e–3(T) permits mixed funding with respect to a flexible premium variable life insurance separate account, subject to certain conditions, but does not permit shared funding or sales to Qualified Plans.

4. Applicants submit that the relief granted by Rule 6e–3(T)(b)(15) is in no way affected by the purchase of shares of the Funds by Qualified Plans. However, in that the relief under Rule 6e–3(T)(b)(15) is available only where shares are offered exclusively to separate accounts, Applicants believe that additional exemptive relief is necessary if the shares of the Funds are also to be sold to Qualified Plans. Applicants, therefore, are seeking the order to permit the Participating Insurance Companies to rely on the relief granted in Rule 6e–3(T)(b)(15).

5. Accordingly, Applicants are requesting the order granting flexible premium variable life insurance Separate Accounts of Participating Insurance Companies (and, to the extent necessary, any principal underwriter and depositor of such an account) and the Applicants from Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act, and Rule 6e–3(T)(b)(15) thereunder, to the extent necessary to permit the sale of Fund shares to (a) variable annuity Separate Accounts and variable life insurance Separate Accounts of the same life insurance company or of affiliated life insurance companies; (b) Separate Accounts of affiliated life insurance companies; and (c) Qualified Plans.

6. Applicants state that, consistent with the Commission's authority under Section 6(c) of the 1940 Act to grant exemptive orders to a class or classes or persons and transactions, their application requests relief for the class consisting of insurers and Separate Accounts' investing in the Funds (and principal underwriters and depositors of such accounts). Applicants maintain that there is ample precedent, in a variety of contexts, for granting exemptive relief not only to the applicants in a given case, but also to members of the class not currently identified that may be similarly situated in the future. The Applicants state that the Commission has granted class exemptions in the context of mixed and shared funding similar to the class relief requested herein where the underlying mutual fund used for funding variable contracts also would be sold to qualified pension and retirement plans.

7. Section 6(c) of the 1940 Act provides, in part, that the Commission, by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any 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.

8. Applicants represent that they are not aware of any stated rationale for excluding Participating Insurance Companies and Separate Accounts from the exemptive relief requested herein because the Funds also may sell their shares to Qualified Plans. Applicants maintain that, if the Funds were to sell their shares only to Qualified Plans, no exemptive relief would be necessary. Applicants state that the relief provided under Rules 6e–2(b)(15) and 6e–3(T)(b)(15) does not relate to qualified pension and retirement plans or to a registered investment company's ability

to sell its shares to such plans. Applicants note that exemptive relief is requested in this 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 their shares to Qualified Plans.

9. Applicants submit that the same policies and considerations that led the Commission to grant such exemptions to other applicants are present here. Moreover, for the reasons stated below, Applicants submit that the exemptions requested are appropriate and in the public interest, consistent with the protection of investors, and consistent with the purposes fairly intended by the policy and provisions of the 1940 Act. Applicants, therefore, request that the Commission issue an order under Section 6(c) of the 1940 Act granting the exemptions requested.

10. Section 9(a) provides that it is unlawful for any company to serve as investment advisor 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). Rules 6e–2(b)(15)(i) and (ii) and Rules 6e–3(T)(b)(15)(i) and (ii) provide exemptions from Section 9(a) under certain circumstances, subject to the limitations discussed above on mixed and shared funding imposed by the 1940 Act and the rules thereunder. These exemptions limit the application of the eligibility restrictions to affiliated individuals or companies that directly participate in the management of the underlying management company.

11. Rules 6e–2(b)(15)(i) and 6e–3(T)(b)(15)(i) provide, in effect, that the fact that an individual disqualified under Section 9(a)(1) or Section 9(a)(2) is an officer, director, or employee of an insurance company, or any of its affiliates, would not, by virtue of Section 9(a)(3), disqualify the insurance company or any of its affiliates from serving in any capacity with respect to an underlying investment company, provided that the disqualified individual did not participate directly in the management or administration of the underlying investment company.

12. Similarly, Rules 6e–2(b)(15)(ii) and 6e–3(T)(b)(15)(ii) provide, in effect, that the fact that any company disqualified under Section 9(a)(1) or Section 9(a)(2) is affiliated with the insurance company would not, by virtue of Section 9(a)(3), disqualify the insurance company from serving in any capacity with respect to an underlying investment company, provided that the disqualified company did not participate directly in the management or administration of the investment company.

13. Applicants state that the partial relief granted in Rules 6e–2(b)(15) and 6e– 3(T)(b)(15) from the requirements of Section 9, 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 maintain that these 1940 Act rules recognize that it is not necessary to apply the provisions of Section 9(a) to individuals in a large insurance company complex, most of whom will have no involvement in matters pertaining to investment companies in that organization. Applicants also state that these 1940 Act rules further recognize that it is also unnecessary to apply Section 9(a) to individuals in various unaffiliated insurance companies (or affiliated companies of Participating Insurance Companies) that may utilize the Funds as funding media for variable contracts. Applicants submit that there is no regulatory purpose in extending the Section 9(a) monitoring requirements because of mixed or shared funding. Applicants represent that the Participating Insurance Companies are not expected to play any role in the management or administration of the Funds, and that those individuals who participate in the management or administration of Advantus Fund and, it is expected, of any Future Fund, will remain the same regardless of which Separate Accounts or insurance companies use such Funds. Applicants submit that applying the monitoring requirements of Section 9(a) because of investment by Separate Accounts of other insurers would be unjustified and would not serve any regulatory purpose. Applicants also state that the increased monitoring costs would reduce the net rates of return realized by contract owners.

14. With respect to Qualified Plans, Applicants submit that the relief requested herein from Section 9(a) in no way will be affected by the proposed additional use of the shares of the Funds in connection with Qualified Plans. Applicants maintain that the insulation of the Funds from those individuals who are disqualified under 1940 Act remains in place. Applicants state that, 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 from Section 9(a), with respect to Qualified Plans, is necessary.

15. Applicants state 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 represent that pass-through voting privileges will be provided by Participating Insurance Companies with respect to all variable contract owners so long as the Commission interprets the 1940 Act to require pass-through voting privileges for variable contract owners.

16. 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 discussed above on mixed and shared funding are observed.

17. Applicants furthermore state that Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(b)(15)(iii)(A) 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 advisor, 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 Rule 6e–2 and 6e–3(T)).

18. Applicants state that Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii)(A)(*2*) provide that, with respect to registered management investment companies whose shares are held by a separate account of an insurance company, the insurance company may disregard voting instructions of contract owners if the contract owners initiate any change in such investment company's investment policies, principal underwriter, or any investment advisor (provided that disregarding such voting instructions is reasonable and subject to the other provisions of paragraphs (b)(5)(ii), (b)(7)(ii)(B), and (b)(7)(ii)(C) of Rules 6e–2 and 6e–3(T)).

19. Applicants note that, in the case of such a change in the investment company's investment policies, the insurance company, in order to disregard contract owner voting instructions, must make a good-faith determination that such a change either would: (a) Violate state law, or (b) result in investments that either (i) would not be consistent with the investment objectives of the separate account or (ii) 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. Applicants state that voting instructions with respect to a change in an investment advisor or principal underwriter may be disregarded only if

the insurance company makes a good-faith determination that: (a) The advisor's fee would exceed the maximum rate that may be charged against the separate account's assets; (b) the proposed advisor may be expected to employ investment techniques that vary from the general techniques used by the current advisor; or (c) the proposed advisor may be expected to manage the investment company's investments in a manner that would be inconsistent with the investment company's investment objectives or in a manner that would result in investments that vary from certain standards.

20. Applicants state that Rule 6e–2 recognizes that a variable life insurance contract, as an insurance contract, has important elements unique to insurance contracts and is subject to extensive state regulation of insurance. Applicants believe that, in adopting Rule 6e–2(b)(15)(iii), the Commission expressly recognized that state insurance regulators have authority, pursuant to state insurance laws or regulations, to disapprove or require changes in investment policies, investment advisors, or principal underwriters. Applicants maintain that the Commission also expressly has recognized that state insurance regulators have authority to require an insurer to draw from its general account to cover costs imposed upon the insurer by a change approved by contract owners over the insurer's objection. The Applicants note that the Commission, therefore, deemed such exemptions necessary ''to ensure the solvency of the life insurer and performance of its contractual obligation by enabling an insurance regulatory authority or the life insurer to act when certain proposals reasonably could be expected to increase the risks undertaken by the life insurer.'' [3] Applicants state that, in this respect, flexible premium variable life insurance contracts are identical to scheduled premium variable life insurance contracts. Applicants therefore maintain that the corresponding provisions of Rule 6e–3(T) (which apply to flexible premium insurance contracts and which permit mixed funding) undoubtedly were adopted in recognition of the same considerations as the Commission applied in adopting Rule 6e–2.

21. Applicants believe that these considerations are no less important or necessary when an insurance company funds its separate accounts in connection with mixed and shared funding. Applicants not that such mixed and shared funding does not compromise the goals of the insurance regulatory authorities or of the Commission. Applicants state that, while the Commission may have wished to reserve wide latitude with respect to the once unfamiliar variable annuity product, that product is now familiar and there appears to be no reason for the maintenance of prohibitions against mixed and shared funding arrangements. Applicants further state that, indeed, by permitting such arrangements, the Commission eliminates needless duplication of start-up and administrative expenses and potentially increases an investment company's assets, thereby making effective portfolio management strategies that are easier to implement and promoting other economies of scale.

22. Applicants maintain that their proposal also to sell shares of the Funds to Qualified Plans will not have any impact on the relief requested in this regard. Applicants represent that shares of the Funds would be held by the trustees of Qualified Plans as mandated by Section 403(a) of ERISA. Applicants note that Section 403(a) also provides that the trustee(s) of a qualified pension or retirement plan 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 subject to the direction of a named fiduciary who is not a trustee, in which case the trustee is 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 mangers pursuant to Section 402(c)(3) of ERISA. Applicants state that, unless one of the two exceptions stated in Section 403(a) applies, qualified pension and retirement plan trustees have the exclusive authority and responsibility for voting proxies. Applicants further state that, when a named fiduciary appoints an investment manger, the investment manager has the responsibility to vote the shares held by the plan unless the right to vote such shares is reserved to the trustees or the named fiduciary and that, in any event, there is no pass-through voting to the participants in such qualified pension and retirement plans.

23. Accordingly, since Qualified Plan participants are not entitled to pass-through voting privileges, Applicants submit 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 respect to Qualified Plans.

24. Applicants state that the prohibitions on mixed and shared funding might reflect concern regarding possible different investment motivations among investors. Applicants note that when Rule 6e–2 was adopted, variable annuity separate accounts could invest in mutual funds whose shares also were offered to the general public. Applicants maintain that, at the time of the adoption of Rule 6e–2, the Commissions staff therefore contemplated underlying funds with public shareholders, as well as with variable life insurance separate account shareholders. Applicants state that the Commission staff may have been concerned with the potentially different investment motivations of public shareholders and variable life insurance contract owners, and that there also may have been some concern with respect to the problems of permitting a state insurance regulatory authority to affect the operations of a publicly-available mutual fund and to affect the investment decisions of public shareholders. Applicants maintain that, for reasons unrelated to the 1940 Act, however, Internal Revenue Service Revenue Ruling 81–225 (September 25, 1981) effectively deprived variable annuities funded by publicly-available mutual funds of their tax-benefited status. The Tax Reform Act of 1984 codified the prohibition against the use of publicly-available mutual funds as an investment medium for variable contracts (including variable life contracts). Applicants state that Section 817(h) of the Code of 1986, in effect, requires that the investment made by variable annuity and variable life insurance separate accounts be ''adequately diversified.'' If a separate account is organized as a unit investment trust that invests in a single fund or series, then the separate account will not be diversified. Applicants note that, in this situation, however, Section 817(h) of the Code, in effect, provides that the diversification test will be applied at the underlying fund level, rather than at the separate account level, but only if ''all of the beneficial interests'' in the underlying fund ''are held by one or more insurance companies (or affiliated companies) in their general account or in segregated asset accounts * * *.'' Applicants state that, accordingly, a unit investment trust separate account that invests solely in a publicly-available mutual fund will not be adequately diversified. In addition, Applicants state that any

[3] Investment Company Act Release No. 9104 (December 30, 1975) (proposing Rule 6e–2 under the 1940 Act).

underlying mutual fund, including any fund that sells shares to separate accounts, in effect, would be precluded from selling its shares to the public. Applicants conclude that, consequently, there will be no public shareholders of the Funds.

25. Applicants state that the rights of an insurance company or of a state insurance regulator to disregard the voting instructions of contract owners are not inconsistent with either mixed funding of different insurance products or shared funding by unaffiliated insurers.

26. Applicants state that the Commission's primary concern with respect to mixed and shared funding issues is that of potential conflicts of interest. Applicants submit that, as discussed below, no increased conflicts of interest would be present if the Commission grants the requested relief.

27. Applicants submit that shared funding by unaffiliated insurance companies does not present any issues that do not already exist where a single insurance company is licensed to do business in several or all states. Applicants state 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. Applicants maintain that the fact that different insurers may be domiciled in different states does not create a significantly different or enlarged problem.

28. Applicants state that shared funding by unaffiliated insurers, in this respect, is no different than the use of the same investment company as the funding vehicle for affiliated insurers, which Rules 6e–2(b)(15) and 6e–3(T)(b)(15) permit. Applicants note that affiliated insurers may be domiciled in different states and be subject to differing state law requirements, and that affiliation does not reduce the potential, if any exists, for differences in state regulatory requirements. Applicants submit that, in any event, the conditions discussed below (which, according to the Applicants, are adapted from the conditions included in Rule 6e–3(T)(b)(15) and are virtually identical to the conditions imposed in connection with other mixed and shared funding orders) are designed to safeguard against, and provide procedures for resolving, any adverse effects that differences among state regulatory requirements may produce. Applicants state that, if a particular state insurance regulator's decision conflicts with the majority of other state regulators, then the affected insurer will be required to withdraw its separate account's investment in the affected fund. Applicants represent that this requirement will be provided for in agreements that will be entered into by Participating Insurance Companies with respect to their participation in the Funds.

29. Applicants maintain that Rules 6e–2(b)(15) and 6e–3(T)(b)(15) give the insurance company the right to disregard the voting instructions of the contract owners, and that this right does not raise any issues different from those raised by the authority of state insurance administrators over separate accounts. Applicants state that, under Rules 6e–2(b)(15) and 6e–3(T)(b)(15), an insurer can disregard contract owner voting instructions only with respect to certain specified items. Applicants further state that affiliation does not eliminate the potential, if any exists, for divergent judgments as to the advisability or legality of a change in investment policies, principal underwriter, or investment advisor initiated by contract owners. According to the Applicants, the potential for disagreement is limited by the requirements in Rules 6e–2 and 6e–3(T) that the insurance company's disregard of voting instructions be reasonable and based on specific good-faith determinations.

30. Applicants note that, nevertheless, a particular insurer's disregard of voting instructions could conflict with the majority of contract owner voting instructions. Applicants state that the insurer's action possibly could be different than the determination of all or some of the other insurers (including affiliated insurers) that the voting instructions of contract owners should prevail, and either could preclude a majority vote approving the change or could represent a minority view. Applicants further state that, if the insurer's judgment represents a minority position or would preclude a majority vote, then the insurer may be required, at the affected Fund's election, to withdraw its Separate Account's investment in the Fund and no charge or penalty will be imposed as a result of such withdrawal. Applicants represent that this requirement will be provided for in the agreements entered into with respect to participation by insurance companies in the Funds.

31. Applicants submit that there is no reason why the investment policies of the Funds would or should be materially different from what these policies would or should be if the Funds funded only variable annuity contracts or variable life insurance policies, whether flexible premium or scheduled premium policies. Applicants note that each type of insurance product is designed as a long-term investment program.

32. Applicants represent that each Portfolio will be managed to attempt to achieve the investment objective or objectives of such Portfolio, and not to favor or disfavor any particular Participating Insurance Company or type of insurance product. Applicants state that there is no reason to believe that different features of various types of contracts, including the ''minimum death benefit'' guarantee under certain variable life insurance and variable annuity contracts,will lead to different investment policies for different types of variable contracts. First, Applicants state that minimum death benefit guarantees generally are specifically provided for by particular charges, and always are supported by general account reserves as required by state insurance law. Second, Applicants state that certain variable annuity contracts also have minimum death benefit guarantees and that, to the extent that the degree of risk may differ as between variable annuity contracts and variable life insurance policies, the differing insurance charges imposed, in effect, adjust any such differences and equalize the insurers' exposure in either case. Third, Applicants note that the sale, persistency, and ultimate success of all variable insurance products depend, at least in part, on satisfactory investment performance, which provides an incentive for the insurer to optimize investment performance. Fourth, Applicants maintain that, under existing statutes and regulations, an insurance company and its affiliates can offer a variety of variable annuity and life insurance contracts, some with death benefit guarantees of different types and significance (and different degrees of risk for the insurer), some without death benefit guarantees, all funded by a single mutual fund.

33. Applicants assert that, furthermore, no one investment strategy can be identified as appropriate to a particular insurance product. According to the Applicants, each pool of variable annuity and variable life insurance contract owners is composed of individuals of diverse financial status, age, insurance, and investment goals. Applicants state that a fund supporting even one type of insurance product must accommodate these diverse factors in order to attract and retain purchasers. Applicants maintain that permitting mixed and shared funding will provide economic justification for the continuation of Advantus Fund and, it is expected, of any Future Fund. Applicants state that, in addition,

permitting mixed and shared funding also will facilitate the establishment of additional portfolios serving diverse goals, and that the broader base of contract owners can be expected to provide economic justification for the creation of additional portfolios with a greater variety of investment objectives and policies.

34. In connection with the proposed sale of shares of the Funds to Qualified Plans, Applicants submit that either there are no conflicts of interest or there exists the ability by the affected parties to resolve any such conflicts without harm to the contract owners in the Separate Accounts or to the participants under the Qualified Plans. Section 817(h) of the Code is the culmination of a series of Revenue Rulings aimed at the investment control of variable contract owners. Section 817 is the only section in the Code where separate accounts are discussed, and 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. Applicants state that Treasury Regulation 1.817–5(f)(3)(iii), which establishes the diversification requirements for such portfolios, specifically permits, among other things, interests held by Trustees of a ''qualified pension or retirement plan'' and separate accounts to share the same underlying management investment company. Applicants, therefore, conclude that neither the Code nor the Treasury Regulations or Revenue Rulings thereunder present any inherent conflicts of interest if Qualified Plans, variable annuity Separate Accounts, and variable life insurance Separate Accounts all invest in the same management investment company.

35. Applicants maintain that, while there are differences in the manner in which distributions are taxed for variable annuity contracts, variable life insurance contracts, and Qualified Plans, the tax consequences of distributions from variable contracts and Qualified Plans do not raise any conflicts of interest with respect to the use of the Funds. Applicants state that, when distributions are to be made, and the Separate Account or the Qualified Plan cannot net purchase payments to make the distributions, the Separate Account or the Qualified Plan will redeem shares of the affected Fund at its net asset value. Applicants represent that the Qualified Plan then will make distributions in accordance with the terms of the Qualified Plan, and that 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.

36. Applicants state that, with respect to voting rights, it is possible to provide an equitable means of giving such voting rights to separate account contract owners and to Qualified Plans. Applicants further state that the transfer agent for each fund will inform each Participating Insurance Company of its share ownership in each Separate Account, as well as inform the trustees of Qualified Plans of their holdings. According to the Applicants, the Participating Insurance Company then will solicit voting instructions in accordance with Rules 6e–2 and 6e–3(T).

37. Applicants submit that the ability of the Funds to sell their shares directly to Qualified Plans does not create a ''senior security'' with respect to any variable annuity or variable life contract owner as opposed to a participant under a Qualified Plan. Applicants note that the term ''senior security'' is defined under Section 18(g) of the 1940 Act to include ''any stock of a class having priority over any other class as to distribution of assets or payment of dividends.'' Applicants state that, regardless of the rights and benefits of participants under the Qualified Plans or contract owners under variable contracts, the Qualified Plans and the Separate Accounts, respectively, have rights only with respect to their respective shares of the Funds. Applicants state that the Qualified Plans and the Separate Accounts can redeem such shares of the Funds only at the net asset value of the shares, and that no shareholder of a Fund will have any preference over any other shareholder of such Fund with respect to distribution of assets or payment of dividends.

38. Applicants maintain that there are no conflicts between the contract owners of the Separate Accounts and the participants under the Qualified Plans with respect to the state insurance commissioners veto powers (direct with respect to variable life and indirect with respect to variable annuities) over investment objectives. Applicants state that the basic premise of shareholder voting is that not all share holders agree with a particular proposal. According to the Applicants, this does not mean that there are any inherent conflicts of interest between shareholders. Applicants state that the state insurance commissioners have been given the veto power in recognition of the fact that insurance companies cannot comply redeem their separate accounts out of one fund and invest in another. Applicants note that time-consuming, complex transactions must be undertaken to accomplish such redemptions and transfers. Applicants state that, on the other hand, the trustees of Qualified Plans can quickly make the decisions and implement the redemption of their plans' shares from the Funds and reinvest in another funding vehicle without the same regulatory impediments or, as is the case with most Qualified Plans, even hold cash pending suitable investment. Based on the foregoing, Applicants have concluded that, even if there should arise issues where the interests of Qualified Plans are in conflict, these issues can be resolved almost immediately in that the trustees of the Qualified Plans can, on their own, redeem the shares out of the Funds.

39. Applicants submit that, regardless of the type of shareholder in a Fund, the responsible advisor will continue to manage a Portfolio's investments solely and exclusively in accordance with each such Portfolio's investment objectives and restrictions as well as with any guidelines established by the Board of that Fund. Applicants note that individual Portfolio manager work with a pool of money and do not take into account the identity of the shareholders. Applicants represent that Advantus Fund thus is, and any Future Fund will be, managed in the same manner as any other mutual fund. Applicants state that, if shareholders are not pleased with a mutual fund's investment results, or the manner in which the mutual fund is being operated, these shareholders may redeem their shares. Applicants note that, since Advantus Fund is, and any Future Fund is expected to be, sold without the imposition of any sales load, such redemption is to net asset value without the imposition of any other charge or fee. According to the Applicants, it is the duty of the management of a mutual fund, including its board of directors or trustees, as the case may be, to keep shareholders informed through updated prospectuses and annual and semi-annual reports. Applicants state that these periodic communications to shareholders function as these communications are intended. Applicants represent that Qualified Plans, as well as contract owners, thus will be given up-to-date information necessary for them to make informed investment decisions.

40. Applicants state that the difference between a Qualified Plan shareholder and a contract owner whose variable contract invests in a Fund is that the Qualified Plan shareholder immediately can redeem its shares in the fund and reinvest the proceeds of

such a redemption, while the contract owner either must wait for the Participating Insurance Company to find another suitable investment medium or must exchange contracts, both of which strategies require multiple steps and some period of time.

41. Applicants maintain that various factors have kept more insurance companies from offering variable annuity and variable life insurance contracts than currently offer such contracts. Applicants state that 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 name recognition by the public of certain insurers as investment experts with whom the public feels comfortable entrusting their investment dollars. Applicants note that, for example, 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. Applicants state that use of the Funds as common investment media for variable contracts, as well as for Qualified Plans, would reduce or eliminate these concerns. Applicants further state that mixed and shared funding also should provide several benefits to variable contract owners by eliminating a significant portion of the costs of establishing and administering separate funds. Also, Applicants maintain that Participating Insurance Companies and Qualified Plans will benefit not only from the investment and administrative expertise of the responsible advisors and their affiliates, but also from the cost efficiencies and investment flexibility afforded by a large pool of funds. According to the Applicants, mixed and shared funding, including the sale of shares of a Fund to Qualified Plans, also would permit a greater amount of assets available for investment by such Fund, thereby promoting economies of scale, permitting increased safety through greater diversification, and making the addition of new Portfolios to a Fund more feasible. Therefore, Applicants believe that making the Funds available for mixed and shared funding will encourage more insurance companies to offer variable contracts, and that this should result in increased competition with respect to both variable contract design and pricing, which in turn can be expected to result in more product variation and lower charges.

42. Accordingly, Applicants submit that the relief requested herein is fully consistent with the policy and purpose of the 1940 Act. In connection with the proposed sale of shares of the Funds to Qualified Plans in particular, Applicants further submit that the intended use of the Funds with Qualified Plans is not that dissimilar from the intended use of the Funds with variable contracts, in that Qualified Plans, like variable contracts, are generally long-term retirement vehicles. Applicants further submit that the sale of shares of the Funds to Qualified Plans does not increase the risk of material irreconcilable conflicts to such Funds or to the participating Separate Accounts.

43. Applicants see no significant legal impediment to permitting mixed and shared funding. Applicants note that separate accounts organized as unit investment trusts historically have been employed to accumulate shares of mutual funds which have not been affiliated with the depositor or sponsor of the separate account. Applicants do not believe that mixed and shared funding will have any adverse Federal income tax consequences.

44. Applicants submit that the Commission has issued numerous orders permitting mixed and shared funding, including ones where shares of the underlying mutual fund used for funding variable contracts also would be sold to qualified pension and retirement plans. Therefore, Applicants maintain that, as the Commission has tacitly acknowledged, granting the exemptions requested herein is in the public interest and, as discussed above, will not compromise the regulatory purposes of Sections 9(a), 13(a), 15(a), or 15(b) or Rules 6e–2 or 6e–3(T).

Applicants' Conditions

Applicants consent to the following conditions:

1. A majority of each Fund's Board shall consist of persons who are not ''interested persons'' of the Fund, 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 director or directors, then the operation of this condition shall be suspended: (a) For a period of 45 days if the vacancy or vacancies may be filed 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. The Board of each Fund will monitor that Fund for the existence of any material irreconcilable conflict between and among the interests of the contract owners of all Separate Accounts and the participants of all Qualified Plans investing in that Fund. 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 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 series are being managed; (e) a difference in voting instructions given by variable annuity contract owners, variable life insurance contract owners and trustees of 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 Qualified Plan to disregard the voting instructions of its participants.

3. In the event that a Qualified Plan ever should become an owner of 10 percent or more of the assets of a Fund, such Qualified Plan will execute a fund participation agreement with the Fund, including agreement to comply with the conditions set forth herein to the extent applicable. A Qualified Plan shareholder will execute an application with each Fund that contains an acknowledgment of this condition at the time of the Qualified Plan's initial purchase of shares of such Fund.

4. Participating Insurance Companies, the responsible advisors, and any Qualified Plan that executes a fund participation agreement upon becoming an owner of 10% or more of the assets of a Fund (collectively, the ''Participants'') will report any potential or existing conflicts to the respective responsible Board(s). Participants will be responsible for assisting the Boards in carrying out the responsibilities of the Boards under these conditions by providing the Boards with all information reasonably necessary for the Boards to consider any issues raised. This includes, but is not limited to, an obligation by each Participating Insurance Company to inform the respective responsible Board(s) whenever contract owner voting instructions are disregarded. The responsibility to report such information and conflicts to and to assist the Boards will be a contractual obligation of all Participating Insurance Companies and Qualified Plans investing in a Fund under their agreements governing participation in

the Fund and these responsibilities will be carried out with a view only to the interests of the contract owners and, if applicable, Qualified Plan participants.

5. If it is determined by a majority of a Board, or a majority of the disinterested, directors or trustees, as appropriate, of a Board, that a material irreconcilable conflict exists, then the relevant Participating Insurance Companies and Qualified Plans, at their expense and to their expense and to the extent reasonably practicable (as determined by a majority of the disinterested directors or trustees, as the case may be), shall take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict, up to and including: (a) Withdrawing the assets allocable to some or all of the Separate Accounts from the affected Fund or any Portfolio and reinvesting such assets in a different investment medium, including another Portfolio of such Fund, or submitting the question as to whether such segregation 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; (b) withdrawing the assets allocable to some or all of the Qualified Plans from the affected Fund or any Portfolio and reinvesting such assets in a different investment medium, including another Portfolio of the Fund; and (c) establishing a new registered management investment company or managed separate account. If a material irreconcilable conflict arises because of a decision by a Participating Insurance Company to disregard contract owner voting instructions, or, if applicable, a decision by a trustee of a Qualified Plan to disregard Qualified Plan participant voting instructions, and that decision represents a minority position or would preclude a majority vote, then the insurer or Qualified Plan may be required, at the affected Fund's election, to withdraw the insurer's Separate Account's investment in the Fund or the Qualified Plan's investment in the Fund and no charge or penalty will be imposed as a result of such withdrawal. The responsibility to take remedial action in the event of a Board determination 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 all Qualified Plans under their agreements governing participation in the Funds and these responsibilities will be carried out with a view only to the interests of contract owners and participants in the Qualified Plans, as applicable.

For purposes of this Condition 5, a majority of the disinterested members of the Board shall determine whether or not any proposed action adequately remedies any material irreconcilable conflict, but, in no event, will a Fund or its advisor be required to establish a new funding medium for any variable contract. No Participating Insurance Company shall be required by this Condition 5 to establish a new funding medium for any variable contract if any materially and offer to do so has been declined by vote of a majority of the contract owners adversely affected by the material irreconcilable conflict. Further, no Qualified Plan will be required by this Condition 5 to establish a new funding medium for the Plan if: (a) a majority of Plan participants materially and adversely affected by the irreconcilable material conflict vote to decline that offer, or (b) pursuant to documents governing the Qualified Plan, the Plan makes that decision without a Plan participant vote.

6. A Board's determination of the existence of a material irreconcilable 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 variable contact owners so long as the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for variable contract owners. Accordingly, Participating Insurance Companies will vote shares of the Funds held in their Separate Accounts in a manner consistent with voting instructions timely-received from contract owners. Each Participating Company will vote shares of a Fund held in the Participating Insurance Company's Separate Accounts for which no voting instructions from contract owners are timely-received, as well as shares of a Fund which the Participating Insurance Company itself owns, in the same proportions as those shares of the Fund for which voting instructions from contract owners are timely-received. Participating Insurance Companies shall be responsible for assuring that each of their Separate Accounts participating in the Funds calculates voting privileges in a manner consistent with other Participants. The obligation to calculate voting privileges in a manner consistent with all other Separate Accounts investing in the Funds shall be a contractual obligation of all Participating Insurance Companies under their agreements governing participation in the Funds. Trustees of Qualified Plans will vote shares held by Qualified Plans in accordance with the terms of those Qualified Plans.

8. Each Fund will comply with all provisions of the 1940 Act requiring voting by shareholders (which for these purposes, shall be persons having a voting interest in their respective Portfolios), and, in particular, each Fund will either provide for annual meetings (except to the extent that the Commission may interpret Section 16 of the 1940 Act not to require such meetings) or comply with Section 16(c) of the 1940 Act (although the Fund is not one of the trusts described in the Section 16(c) of the 1940 Act), as well as with Section 16(a) of the 1940 Act and, if and when applicable, Section 16(b) of the 1940 Act. Further, each Fund will act in accordance with the Commission's interpretation of the requirements of Section 16(a) with respect to periodic elections of directors and with whatever rules the Commission may promulgate with respect thereto.

9. Each Fund shall disclose in its prospectus that (a) the Fund is intended to be a funding vehicle for all types of variable annuity and variable life insurance contracts offered by various insurance companies and certain qualified pension and retirement plans, (b) material irreconcilable conflicts possibly may arise due to differences of tax treatments and other considerations, and (c) the Fund's Board will monitor events in order 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. Each Fund will notify all Participating Insurance Companies that Separate Account prospectus disclosure regarding potential risks of mixed and shared funding may be appropriate.

10. If, and to the extent that, Rule 6e–2 or Rule 6e–3(T) under the 1940 Act are amended, or Rule 63–3 under the 1940 Act is adopted, to provide exemptive relief from any provision of the 1940 Act, or the rules promulgated thereunder, with respect to mixed or shared funding, on terms and conditions materially different from any exemptions granted in the order requested in this application, then the Funds and/or the Participants, as appropriate, shall take such steps as may be necessary to comply with Rules 6e–2, 6e–3(T), or Rule 6e–3, as such rules are applicable.

11. The Participants, at least annually, shall submit to each Fund's Board such reports, materials, or data as the Board reasonably may request so that the directors or trustees, as appropriate, of the Fund may fully carry out the obligations imposed upon the Board by the conditions contained in this application and said reports, materials, and data shall be submitted more frequently if deemed appropriate by the Board. The obligations of the Participating Insurance Companies and Qualified Plans to provide these reports, materials, and data to a Fund's Board, when the Board so reasonably requests, shall be a contractual obligation of all Participating Insurance Companies and Qualified Plans under their agreements governing participation in the Funds.

12. 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.

Conclusion

For the reasons summarized above, Applicants assert 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 1940 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. 34–43643; File No. SR–Amex–00–59]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval to Proposed Rule Change by the American Stock Exchange LLC To Extend for an Additional 90 Days Its Pilot Program Relating to Facilitation Cross Transactions

November 29, 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 November 29, 2000, the American Stock Exchange LLC (''Amex'' or ''Exchange'') field with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. For the reasons discussed below, the Commission is granting accelerated approval of the proposed rule change.

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

The Amex proposes to extend for an additional 90 days its pilot program relating to facilitation cross transactions, described in detail in Part II.A. below. The text of the proposed rule change is available at the Office of the Secretary, Amex, and at the Commission.

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 III 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 Exchange proposes to extend for an additional 90 days its pilot program relating to member firm facilitation cross transactions approved by the Commission on June 2, 2000.[3] Revised Commentary .02(d) to Amex Rule 950(d) establishes a pilot program to allow facilitation cross transactions inequity options.[4] The pilot program entities a floor broker to, under certain conditions, cross a specified percentage of a customer order with a member firm's proprietary account before market makers in the crowd can participate in the transaction. The provision generally applies to orders of 400 contracts or more. However, the Exchange is permitted to establish smaller eligible order sizes, on a class basis, provided that the eligible order size is not for fewer than 50 contracts.

Under the current program, when a trade takes place at the market provided by the crowd, all public customer orders on the specialist's book or represented in the trading crowed at the time the market was established must be satisfied first. Following satisfaction of any customer orders on the specialist's book, the floor broker is entitled to facilitate up to 20% of the contracts remaining in the customer order. When a floor broker proposes to execute a facilitation cross at a price between the best bid and offer provided by the crowd in response to his initial request for market—and the crowd then wants to part or all of the order at the improved price—the floor broker is entitled to priority over the crowd to facilitate up to 40% of the contracts. If the floor broker has proposed the cross at a price between the best bid and offer provided by the crowd in response to his initial request for a market, and the trading crowd subsequently improves the floor broker's price, and the facilitation cross is executed at that improved price, the floor broker would only be entitled to priority to facilitate up to 20% of the contracts.

The program also provides that if the facilitation transaction takes place at the specialist's quoted bid or offer, any participation allocated to the specialist pursuant to Amex trading floor practices would apply only to the number of contracts remaining after all public customer orders have been filled and the member firm's crossing rights have been exercised.[5] However, in no case could the total number of contracts guaranteed to the member firm and the specialist exceed 40% of the facilitation transaction.

In the almost six months since the pilot program began, the Exchange has found it to be generally successful. The Exchange seeks to extend the pilot

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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. 42894 (June 2, 2000), 65 FR 36850 (June 12, 2000). The pilot program was subsequently extended for an additional 90 days, ending November 29, 2000. *See* Securities Exchange Act Release No. 43229 (August 30, 2000), 65 FR 54572 (September 8, 2000).

[4] Facilitation cross transactions occur when a floor broker representing the order of a public customer of a member firm crosses that order with a contra side order from the firm's proprietary account.

[5] Amex trading floor practices provided specialists with a greater than equal participation in trades that take place at a price at which the specialist is on parity with registered options traders in the crowd. These practices are subject to a separate filing that seeks to codify specialist allocation practices. See Securities Exchange Act Release No. 42964 (June 20, 2000), 65 FR 39972 (June 28, 2000)