

Form 1, the Commission would not be able to determine whether the respondent met the criteria for registration or exemption set forth in Sections 6 and 19 of the Act. Without the amendments and periodic updates of information submitted pursuant to Rule 6a-2, the Commission would have substantial difficulty determining whether a national securities exchange or exempt exchange was continuing to operate in compliance with the Act.

The respondents to the collection of information are entities that seek registration as a national securities exchange or that seek exemption from registration based on limited trading volume. After the initial filing of Form 1, both registered and exempt exchanges are subject to ongoing informational requirements.

Initial filings on Form 1 by new exchanges are made on a one-time basis. The Commission estimates that it will receive approximately three initial Form 1 filings per year and that each respondent would incur an average burden of 47 hours to file an initial Form 1 at an average cost per response of approximately \$4,517. Therefore, the Commission estimates that the annual burden for all respondents to file the initial Form 1 would be 141 hours (one response/respondent  $\times$  three respondents  $\times$  47 hours/response) and \$13,551 (one response/respondent  $\times$  three respondents  $\times$  \$4,517/response).

There currently are nine entities registered as national securities exchanges and two exempt exchanges. The Commission estimates that each registered or exempt exchange file one amendment or periodic update to Form 1 per year, incurring an average burden of 25 hours to comply with Rule 6a-2. The Commission estimates that the annual burden for all respondents to file amendments and periodic updates to the Form 1 pursuant to Rule 6a-2 is 275 hours (11 respondents  $\times$  25 hours/response  $\times$  one response/respondent per year) and \$25,630 (11 respondents  $\times$  \$2,330/response  $\times$  one response/respondent per year).

Compliance with Rules 6a-1 and 6a-2 and Form 1 is mandatory for entities seeking to register as a national securities exchange or seeking an exemption from registration based on limited trading volume. Information received in response to Rules 6a-1 and 6a-2 and Form 1 shall not be kept confidential; the information collected is public information. As set forth in Rule 17a-1 under the Act,<sup>3</sup> a national securities exchange generally is required

to retain records of the collection of information for at least five years.

Section 6 of the Act<sup>4</sup> sets out a framework for the registration and regulation of national securities exchanges. Under Commission Rule 6a-3,<sup>5</sup> one of the rules that implements section 6, a national securities exchange (or an exchange exempted from registration based on limited trading volume) must provide certain supplemental information to the Commission, including any material (including notices, circulars, bulletins, lists, and periodicals) issued or made generally available to members of, or participants or subscribers to, the exchange. Rule 6a-3 also requires the exchanges to file monthly reports that set forth the volume and aggregate dollar amount of securities sold on the exchange each month. The information required to be filed with the Commission pursuant to Rule 6a-3 is designed to enable the Commission to carry out its statutorily mandated oversight functions and to ensure that registered and exempt exchanges continue to be in compliance with the Act.

The respondents to the collection of information are national securities exchanges and exchanges that are exempt from registration based on limited trading volume.

The Commission estimates that each respondent make approximately 25 such filings on an annual basis at an average cost of approximately \$21 per response. Currently, 11 respondents (nine national securities exchanges and two exempt exchanges) are subject to the collection of information requirements of Rule 6a-3. The Commission estimates that the total burden for all respondents is 137.5 hours (25 filings/respondent per year  $\times$  0.5 hours/filing  $\times$  11 respondents) and \$5,775 (\$21/response  $\times$  25 responses/respondent per year  $\times$  11 respondents) per year.

Compliance with Rule 6a-3 is mandatory for registered and exempt exchanges. Information received in response to Rule 6a-3 shall not be kept confidential; the information collected is public information. As set forth in Rule 17a-1 under the Act,<sup>6</sup> a national securities exchange is required to retain records of the collection of information for at least five years.

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.

Written comments regarding the above information should be directed to the following persons: (a) Dest Officer for the 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 (b) 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 the Office of Management and budget within 30 days of this notice.

Dated: June 12, 2001.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. IC-25004; File No. 812-12418]**

### **First Allmerica Financial Life Insurance Company, et al.**

June 14, 2001.

**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 (the "1940 Act") granting exemptions from the provisions of sections 2(a)(32), 22(c), and 27(i)(2)(A) of the 1940 Act and Rule 22c-1 thereunder to permit the recapture of credits applied to contributions made under certain deferred variable annuity contracts.

**SUMMARY OF APPLICATION:** Applicants seek an order under section 6(c) of the 1940 Act to the extent necessary to permit, under specified circumstances, the recapture of certain credits applied to contributions made under deferred variable annuity contracts and certificates (the "Contracts") that First Allmerica will issue through the Separate Accounts (defined below), as well as other contracts that First Allmerica may issue in the future through the Separate Accounts or any other future separate account of First Allmerica ("Other Separate Account"), which contracts are substantially similar in all material respects to the Contracts (the "Future Contracts"). Applicants also request that the order being sought extend to any other National Association of Securities Dealers, Inc., ("NASD") member broker-dealer controlling or controlled by, or under common control with, First Allmerica,

<sup>4</sup> 15 U.S.C. 78f.

<sup>5</sup> 17 CFR 240.6a-3.

<sup>6</sup> 17 CFR 240.17a-1.

<sup>3</sup> 17 CFR 240.17a-1.

whether existing or created in the future, that serves as a distributor or principal underwriter for the Contracts or Future Contracts offered through the Separate Accounts or any Other Separate Account ("First Allmerica Broker-Dealer(s)").

**APPLICANTS:** First Allmerica Financial Life Insurance Company ("First Allmerica") Separate Account VA-K of First Allmerica, Separate Account VA-P of First Allmerica, Separate Account KG of First Allmerica, and Allmerica Select Separate Account of First Allmerica (together with the other Applicant separate accounts, the "Separate Accounts"), and Allmerica Investment, Inc., (Collectively "Applicants").

**FILING DATE:** The application was filed on January 24, 2001 and an amended and stated application was filed on June 14, 2001.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the applicants will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, in person or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on July 6, 2001, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer'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, at (202) 942-0675, or Keith Carpenter, Branch Chief, and (202) 942-0679, Office of Insurance Products, Division of Investment Management.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants, c/o First Allmerica Financial Life Insurance Company, 440 Lincoln Street, Worcester, Massachusetts, 01653, Attn: Sheila B. St. Hilaire, Esq.

**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 (tel. (202) 942-8090).

#### Applicants' Representations

1. First Allmerica is a stock life insurance company organized under the laws of Massachusetts in 1844. Effective October 16, 1995, First Allmerica

converted from a mutual life insurance company known as State Mutual Life Assurance Company Of America to a stock life insurance company and adopted in present name. First Allmerica is a wholly owned subsidiary of Allmerica Financial Corporation ("AFC"). First Allmerica is licensed to do business in all states, but currently sells variable annuity contracts only in New York and Hawaii.

2. Each of the Separate Accounts is a segregated asset account of First Allmerica. Each of the Separate Accounts is registered with the Commission as a unit investment trust under the 1940 Act (Separate Account VA-K, see File No. 811-8114; Allmerica Select Separate Account, see File No. 811-8116; Separate Account VA-P, see File No. 811-8872; and Separate Account KG, see File No. 811-7769). First Allmerica serves as depositor of each of the Separate Accounts. First Allmerica may in the future establish one or more Other Separate Accounts for which it will serve as depositor.

3. Units of interest in the Separate Accounts under the Contracts will be registered under the Securities Act of 1933 (the "1933 Act"). In that regard, the Separate Accounts have filed Form N-4 Registration Statements under the 1933 Act relating to the Contracts. Allmerica Select Separate Account filed a Form N-4 Registration Statement on January 19, 2001 under the 1933 Act relating to the Contracts, Separate Account VA-K filed a Form N-4 Registration Statement on January 24, 2001, Separate Account VA-P Filed a Form N-4 Registration Statement on January 19, 2001, and Separate Account KG filed a Form N-4 Registration Statement on January 24, 2001. Registrants filed Pre-Effective Amendments to their registration statements on May 18, 2001. First Allmerica may in the future issue Future Contracts through the Separate Accounts and through Other Separate Accounts. The assets of the Separate Accounts are not chargeable with liabilities arising out of any other business of First Allmerica. Any income, gains or losses, realized or unrealized, from assets allocated to the Separate Accounts are, in accordance with the respective Contracts, credited to or charged against the Separate Accounts, without regard to other income, gains or losses of First Allmerica.

4. Allmerica Investments, Inc., ("Allmerica Investments") is an indirect wholly-owned subsidiary of First Allmerica and will be the principal underwriter of the Separate Accounts and distributor of the Contracts funded

through Allmerica Select Separate Account ("Select Contracts"), Separate Account, VA-K ("VA-K Contracts"), Separate Account VA-P ("VA-P Contracts") and Separate Account KG ("KG Contracts") (collectively, the "Contracts"), Allmerica Investments is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934 (the "1934 Act") and is a member of the NASD. The Contracts will be offered through registered representatives of Allmerica Investments, or through unaffiliated broker-dealers, which are registered under the 1934 Act and members of the NASD, that have selling agreements with Allmerica Investments. Allmerica Investments, or any successor entity, may act as principal underwriter for any Other Separate Account and distributor for any Future Contracts issued by First America. A successor entity also may act as principal underwriter for the Separate Accounts.

5. The Select Contracts, VA-K Contracts, VA-P Contracts, and KG Contracts are substantially similar in all material respects. They differ principally in the mix of mutual funds underlying each of the Separate Accounts, in the distribution channels used in the offering of the Contracts, and in the amount of the Credit (5% for the Select Contracts and 4% for the VA-K Contracts, KG Contracts and VA-P Contracts). There are minor differences in some contract features. Contracts may be issued as individual retirement annuities ("IRAs," either "Traditional IRAs" or "Roth IRAs"), in connection with certain types of qualified or non-qualified plans, or as non-qualified annuities for after-tax contributions only. In some situations, the Contracts may be issued on a group basis, rather than as an individual contract. Each of the group contracts consists of (i) a basic form of group annuity contract (the "Group Contract") issued to an employer or to a bank, trust company or other institution whose sole responsibility will be to serve as party to the Group Contract, (ii) a basic form of certificate issued under and reflecting the terms of the Group Contract, and (iii) forms of certificate endorsements to be used for specific forms of benefits under the certificates.

6. Payments may be made to the Contract at any time prior to the Annuity Date, subject to certain minimums. Currently, the initial payment must be at least \$5,000 (\$2,000 for IRAs), with lower minimum payments under salary deduction or monthly automatic payment plans, and for certain employer sponsored retirement plans. The minimum

subsequent payment is \$50 (\$100 for KG Contracts). The Contracts permit the owner to allocate contributions to a fixed interest account ("Fixed Account") of First Allmerica's general account, to accumulate interest at a fixed, guaranteed rate. First Allmerica's general account assets support the guarantee of principal and interest.

7. Separate Account VA-K of First Allmerica will offer thirty-six Sub-accounts under the separate Account VA-K Contracts. These Sub-Accounts will invest in a corresponding investment portfolio of the Delaware Group Premium Fund, of the Pioneer Variable Contracts Trust, of the AIM Variable Insurance funds, of The Alger American Fund, of the Alliance Variable Products Series Fund, Inc., and of the Franklin Templeton Insurance Products Trust. Allmerica Select Separate Account is currently comprised of forty Sub-Accounts, which will invest in a corresponding investment portfolio of the Allmerica Investment Trust, of the AIM Variable Insurance Funds, of the Alliance Variable Products Series Fund, Inc., of the Deutsche Asset Management VIT Funds, of the Eaton Vance Variable Trust, of the Fidelity Variable Insurance Products Fund, of the Fidelity Variable Insurance Products Fund II, of the Fidelity Variable Insurance Products Fund III, of the Franklin Templeton Variable Insurance Products Trust, of the INVESCO Variable Investment Funds, Inc., of the Janus Aspen Series, of the Pioneer Variable Contracts Trust, of the Scudder Variable Series II, and of the T. Rowe Price International Series, Inc. Separate Account KG is currently comprised of forty Sub-Accounts, which will invest in a corresponding investment series of the Kemper Variable Series, of the Scudder Variable Series I and Scudder Variable Series II, of The Alger American Fund, of the Dreyfus Investment Portfolios, of The Dreyfus Socially Responsible Growth Fund, Inc., and of the Credit Suisse Warburg Pincus Trust. Separate Account VA-P currently consists of thirty investment portfolios, which will invest in a corresponding investment portfolio of the Pioneer Variable Contracts Trust, of the AIM Variable Insurance Funds, of the Alliance Variable Products Series Fund, Inc., of the Delaware Group Premium Fund, of the Franklin Templeton Variable Insurance Products Trust, and of the Van Kampen Life Investment Trust. These Sub-Accounts are also made available to investors under other variable annuity contracts offered by First Allmerica.

8. The Separate Accounts and Fixed Account of First Allmerica will

comprise the initial investment options under the Contracts. First Allmerica in the future may determine to create additional Sub-Accounts of the Separate Accounts to invest in additional portfolios, other underlying portfolios or other investments in the future. Sub-Accounts may be combined or eliminated from time to time.

9. The Contracts provide for various withdrawal options, annuity benefits and payout annuity options, as well as transfer privileges among Sub-Accounts, dollar cost averaging, death benefits, optional annuitization riders, and other features. The Contracts have charges consisting of: (i) A withdrawal charge as a percentage of contributions declining from 8.5% in years one through four to 0% after year nine, with a 15% "free withdrawal" amount in certain situations; (ii) asset-based charges at the annual rates of 1.40% for mortality and expense risks and 0.15% for administration expenses assessed against the net assets of each Sub-Account; and (iii) an annual contract fee of \$30 for Contracts with an Accumulated Value of less than \$75,000. The underlying Funds each impose investment management fees and charges for other expenses.

10. Each time First Allmerica receives a contribution from an owner, it will allocate to the owner's contract value a credit ("Credit") of a percentage of the amount of the contribution (5% for the Select Contracts and 4% for the VA-K Contracts, VA-P Contracts, and KG Contracts). First Allmerica will allocate Credits among the investment options in the same proportion as the corresponding contributions are allocated by the owner. First Allmerica will fund the Credits from its general assets. First Allmerica will recapture Credits from an owner only if the owner returns the Contract to First Allmerica for a refund during the "free look" period, which varies by state.

11. Applicants seek an exemption pursuant to section 6(c) of the 1940 Act from sections 2(a)(32), 22(c), and 27(i)(2)(A) of the 1940 Act and Rule 22c-1 thereunder to the extent deemed necessary to permit First Allmerica to recapture Credits when an owner returns a Contract for a refund during the "free look" period, in which case first Allmerica will recover the amount of any Credit applicable to such contribution.

#### Applicants' Legal Analysis

1. section 6(c) of the 1940 Act authorizes the commission to exempt any person, security or transaction, or any class or classes of persons, securities or transactions from the

provisions of the 1940 Act and the rules promulgated 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. Applicants request that the commission, pursuant to section 6(c) of the 1940 Act, grant the exemptions summarized above with respect to the Contracts and any Future Contracts funded by the Separate Accounts or Other Separate Accounts, that are issued by First Allmerica and underwritten or distributed by Allmerica Investments or Allmerica Broker-Dealers. Applicants undertake that Future Contracts funded by the Separate Accounts or any Other Separate Account will be substantially similar in all material respects to the Contracts. 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 1940 Act.

2. Applicants represent that it is not administratively feasible to track the Credit amount in any of the Separate Accounts after the Credit is applied. Accordingly, the asset-based charges applicable to the Separate Accounts will be assessed against the entire amounts held in the respective Separate Accounts, including the Credit amount, during the "free look" period. As a result, during each period, the aggregate asset based charges against an owner's annuity account value will be higher than those that would be charged if the owner's annuity account value did not include the Credit.

3. Subsection (i) of section 27 provides that section 27 does not apply to any registered separate account funding variable insurance contracts, or to the sponsoring insurance company and principal underwriter of such account, except as provided in paragraph (2) of the subsection. Paragraph (2) provides that it shall be unlawful for any registered separate account funding variable insurance contracts or a sponsoring insurance company of such account to sell a contract funded by the registered separate account unless, among other things, such contract is a redeemable security. Section 2(a)(32) defines "redeemable security" as any security, other than short-term paper, under the terms of which the holder, upon presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.

4. Applicants submit that the recapture of the Credit if an owner

returns the Contract during the free look period would not deprive an owner of his or her proportionate share of the issuer's current net assets. Applicants state that an owner's interest in the amount of the Credit allocated to his or her annuity account value upon receipt of an initial contribution is not vested until the applicable free-look period has expired without return of the Contract. Until or unless the amount of any Credit is vested, Applicants submit that First Allmerica retains the right and interest in the Credit amount, although not in the earnings attributable to that amount. Applicants argue that when First Allmerica recaptures any Credit it is simply retrieving its own assets, and because an owner's interest in the Credit is not vested, the owner has not been deprived of a proportionate share of the applicable Separate Account's assets, *i.e.*, a share of the applicable Separate Account's assets proportionate to the owner's annuity account value (including the Credit).

5. In addition, Applicants state that it would be patently unfair to allow an owner exercising the free-look privilege to retain a Credit amount under a Contract that has been returned for a refund after a period of only a few days. Applicants state that if First Allmerica could not recapture the Credit, individuals could purchase a Contract with no intention of retaining it, and simply return the Contract for a quick profit.

6. Applicants represent that the Credit will be attractive to and in the interest of investors because it will permit owners to put their contributions and the amount of the credit to work for them in the selected Sub-Accounts. In addition, the owner will retain any earnings attributable to the Credit, and the principal amount of the Credit will be retained under the conditions set forth in the application.

7. Applicants submit that the provisions for recapture of any Credit if an owner returns a Contract or any Future Contract during the free look period under the Contracts will not violate sections 2(a)(32) and 27(i)(2)(A) of the 1940 Act. Nevertheless, to avoid any uncertainties, Applicants request an exemption from those Sections, to the extent deemed necessary, to permit the recapture of any Credit if an owner returns a Contract or any Future Contract during the free look period without the loss of the relief from section 27 provided by section 27(i).

8. Section 22(c) of the 1940 Act authorizes the Commission to make rules and regulations applicable to registered investment companies and to principal underwriters of, and dealers

in, the redeemable securities of any registered investment company, whether or not members of any securities association, to the same extent, covering the same subject matter, and for the accomplishment of the same ends as are prescribed in section 22(a) in respect of the rules which may be made by a registered securities association governing its members. Rule 22c-1 thereunder prohibits a registered investment company issuing any redeemable security, a person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and a principal underwriter of, or dealer in, such security, from selling, redeeming, or repurchasing any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

9. Arguably, First Allmerica's recapture of the Credit may be viewed as resulting in the redemption of redeemable securities for a price other than one based on the current net asset value of the Separate Accounts. Applicants contend, however, that recapture of the Credit does not violate section 22(c) and Rule 22c-1.

Applicants argue that the recapture does not involve either of the evils that Rule 22c-1 was intended to eliminate or reduce, namely: (i) The dilution of the value of outstanding redeemable securities of registered investment companies through their sale at a price below net asset value or their redemption or repurchase at a price above it, and (ii) other unfair results including speculative trading practices. See Adoption of Rule 22c-1 under the 1940 Act, Investment Company Release No. 5519 (Oct. 16, 1968). To effect a recapture of a Credit, First Allmerica will redeem interests in an owner's Contract at a price determined on the basis of current net asset value of the respective Sub-Accounts. The amount recaptured will equal the amount of the Credit that First Allmerica paid out of its general account assets. Although owners will be entitled to retain any investment gain attributable to the Credit, the amount of such gain will be determined on the basis of the current net asset value of the respective Sub-Accounts. Thus, no dilution will occur upon the recapture of the Credit.

Applicants also submit that the second harm that Rule 22c-1 was designed to address, namely, speculative trading practices calculated to take advantage of backward pricing, will not occur as a

result of the recapture of the Credit. However, to avoid any uncertainty as to full compliance with the 1940 Act, Applicants request an exemption from the provisions of section 22(c) and Rule 22c-1 to the extent deemed necessary to permit them to recapture the Credit, as described herein, under the Contracts and Future Contracts.

### Conclusion

Applicants submit that their request for an order is appropriate in the public interest. Applicants state that such an order would promote competitiveness in the variable annuity market by eliminating the need to file redundant exemptive applications, thereby reducing administrative expenses and maximizing the efficient use of Applicants' resources. Applicants argue that investors would not receive any benefit or additional protection by requiring Applicants to repeatedly seek exemptive relief that would present no issue under the 1940 Act that has not already been addressed in their application described herein. Applicants submit that having them file additional applications would impair their ability effectively to take advantage of business opportunities as they arise. Further, Applicants state that if they were required repeatedly to seek exemptive relief with respect to the same issues addressed in the application described herein, investors would not receive any benefit or additional protection thereby.

Applicants submit, based on the grounds summarized above, that their exemptive request meets the standards set out in section 6(c) of the 1940 Act, namely, that the exemptions requested are 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, and that, therefore, the Commission should grant the requested order.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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