

CMC for, or portion of the advisory fee under the existing advisory agreement attributable to, managing the assets of each Investing Portfolio that can be expected to be invested in the Money Market Portfolio. Before approving any investment advisory contract under section 15, the Board of the Investing Portfolio, including a majority of the trustees who are not "interested persons," as defined in section 2(a)(19) of the 1940 Act, shall consider to what extent, if any, the advisory fees charged to the Investing Portfolio by AAL CMC should be reduced to account for reduced services provided to the Investing Portfolio by AAL CMC as a result of Uninvested Cash being invested in the Money Market Portfolio. The minute books of the Investing Portfolio will record fully the Board's consideration in approving the advisory contract, including the considerations referred to above.

3. Each of the Investing Portfolios will invest Uninvested Cash in, and hold shares of, the Money Market Portfolio only to the extent that the Investing Portfolio's aggregate investment in the Money Market Portfolio does not exceed 25 percent of the Investing Portfolio's total assets. For purposes of this limitation, each Investing Portfolio or series thereof will be treated as a separate investment company.

4. Investment in shares of the Money Market Portfolio will be in accordance with each Investing Portfolio's respective investment restrictions and policies as set forth in its prospectus and statement of additional information.

5. Each Investing Portfolio and the Money Market Portfolio will be advised by AAL CMC or a person controlling, controlled by, or under common control with AAL CMC.

6. The Money Market Portfolio will not acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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**BILLING CODE 8010-01-M**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-25256; File No. 812-12526]

### Kemper Investors Life Insurance Company, et al.

November 7, 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) and 27(i)(2)(A) of the 1940 Act and Rule 22c-11 thereunder.

*Applicants:* Kemper Investors Life Insurance Company ("KILICO"), Zurich Kemper Life Insurance Company of New York ("ZKLICONY"), KILICO Variable Annuity Separate Account (the "Separate Account"), and Investors Brokerage Services, Inc. ("IBS") (collectively "Applicants"). KILICO and ZKLICONY are also referred to in this Application as the "Insurance Company Applicants."

*Summary of Application:* Applicants seek an order under section 6(c) of the 1940 Act to the extent necessary to permit the recapture, under specified circumstances, of certain credits applied to purchase payment made under the deferred variable annuity contract described herein that KILICO will issue through the Separate Account (the "Contract(s)"), as well as other contracts that the Insurance Company Applicants may issue in the future through the Separate Account or future separate accounts of the Insurance Company Applicants ("Other Accounts") that are substantially similar in all material respects to the Contract ("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, KILICO, whether existing or created in the future, that serves as distributor or principal underwriter for the Contract or Future Contracts ("Affiliated Broker-Dealers") and any successors in interest to Applicants.

*Filing Date:* The Application was filed on May 21, 2001, and amended and restated on October 11, 2001, and amended on November 2, 2001.

*Hearing or Notification of Hearing:* An order granting the Application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, in person or by

mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 3, 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 SEC.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants, c/o Kemper Investors Life Insurance Company, 1600 McConnor Parkway, Schaumburg, Illinois 60196, Attn: Debra P. Rezabek, Esq.; Zurich Kemper Life Insurance Company of New York, 515 Madison Avenue, Suite 2302, New York, NY 10022, Attn: Debra P. Rezabek, Esq.; copies to Christopher S. Petito, Esq., Jorden Burt LLP, 1025 Thomas Jefferson Street, NW., Suite 400 East, Washington, DC 20007-0805.

**FOR FURTHER INFORMATION CONTACT:** Alison Toledo, Senior Counsel, or Lorna MacLeod, Branch Chief, Division of Investment Management, Office of Insurance Products, 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

KILICO was organized under the laws of the State of Illinois in 1947 as a stock life insurance company. KILICO offers annuity and life insurance products and is admitted to do business in the District of Columbia and all states except New York. KILICO is a wholly-owned subsidiary of Kemper Corporation, a non-operating holding company. Kemper Corporation is a wholly-owned subsidiary of Zurich Group Holding ("ZGH"), a Swiss holding company, formerly known as Zurich Financial Services. ZGH is wholly-owned by Zurich Financial Services ("ZFS"), a new Swiss holding company. ZFS was formerly Zurich Allied AG, which was merged with Allied Zurich p.l.c. in October 2000.

2. ZKLICONY is a stock life insurance company organized under the laws of the State of New York in 1999. ZKLICONY offers a broad line of individual life insurance and annuity products. ZKLICONY is a wholly-owned subsidiary of KILICO, which in turn is a wholly-owned subsidiary of the Kemper Corporation. ZKLICONY may in

the future issue Future Contracts through Other Accounts.

3. KILICO established the Separate Account on May 29, 1981, pursuant to Illinois law. It is a separate investment account (segregated asset account) of KILICO used to fund the Contract and other variable annuity contracts issued by KILICO. The Separate Account and its component "Subaccounts" are registered with the Commission as a single unit investment trust under the 1940 Act. The Separate Account will fund the variable benefits available under the Contract. The offering of the Contract will be registered under the Securities Act of 1933 (the "1933 Act").

4. IBS is the principal underwriter of the Contracts. IBS is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934 and is a member of the NASD. The Contracts are sold by licensed insurance agents (where the Contracts may be lawfully sold) who are registered representatives of broker-dealers which are registered under the Securities Exchange Act of 1934 and are members of the NASD. IBS is a wholly-owned subsidiary of KILICO, which enters into selling group agreements with affiliated and unaffiliated broker-dealers.

5. The minimum initial purchase payment is \$10,000. The minimum subsequent purchase payment for non-qualified Contracts is generally \$500, however, if the owner authorizes automatic periodic payments the minimum subsequent payment is \$100. The minimum subsequent purchase payment for qualified Contracts is \$50. KILICO's prior approval is required for cumulative purchase payments of over \$1,000,000.

6. If elected by an owner, KILICO will credit an extra amount to the Contract equal to 2% of each purchase payment made in the first Contract year and 2% of the owner's non-loaned Contract value on every fifth Contract anniversary (the "Value Credit(s)"). KILICO will allocate each Value Credit pro rata among the investment options according to the owner's allocation instructions. KILICO will fund Value Credits from its general account assets. In order for the owner to elect to receive a Value Credit, the Contract must be issued prior to the owner's 81st birthday. If an owner elects to receive the Value Credit, KILICO will assess a Value Credit Rider Charge of .40% during each of the first fifteen Contract years. In addition, withdrawal charges will be higher and will apply longer than they would if an owner does not elect the Value Credit.

7. The Value Credit is not part of the amount an owner will receive if he or

she exercises the Contract's free look provision. In addition, Value Credits applied within one year prior to a total withdrawal (surrender of the Contract) made after the tenth Contract year are deducted from the amount payable to the owner. With limited exceptions, if an owner makes a partial withdrawal within one year following receipt of a Value Credit after the tenth Contract year, except as part of the Contract's systematic withdrawal program, KILICO will reduce the Value Credit in the same proportion as the partial withdrawal bears to the Contract value and deduct it from the remaining value of the Contract. Regardless of whether or not the Value Credit is vested, all gains or losses attributable to that Value Credit are part of the owner's Contract value and are immediately vested.

8. The free look period is the period during which an owner may return a Contract after it has been delivered and receive a refund. The length of the free look period will vary according to state law but will be at least ten days. Depending on the laws of the state in which the Contract is issued, the amount of the refund will be equal to (i) The value of the Contract, (ii) the purchase payment(s), or (iii) the greater of the previous two values. The Value Credit, if any, will not be part of the amount an owner will receive if the free look provision is exercised. Unless the law requires that the full amount of the purchase payment(s) be refunded, the owner bears the investment risk from the time of purchase until he or she returns the Contract, and the refund amount may be more or less than the purchase payment(s) the owner made.

9. A Contract owner may make withdrawals from his or her Contract at any time before annuitization. The minimum withdrawal amount is \$500 or the amount remaining in the applicable investment option, if less than \$500. If an owner elects the Value Credit, any withdrawal made within one year of receiving a Value Credit after the tenth Contract year will result in a recapture by KILICO of all or part of that Value Credit (but no recapture will be made of any prior Value Credits).

10. In the case of a surrender of the Contract during or after the tenth Contract year, KILICO will recapture the entire amount of the Value Credit made within one year of the surrender. No recapture of Value Credits would occur other than during the free look period or in Contract years 11, 16, 21 and every fifth Contract year thereafter.

11. In the case of a partial withdrawal, KILICO will reduce the Value Credit by the same proportion that the amount of the partial withdrawal bears to the

Contract value immediately prior to the partial withdrawal. KILICO will deduct the amount of the Value Credit recaptured upon partial withdrawal from the remaining Contract value.

12. Neither death benefit payments, nor any partial withdrawal or surrender arising under the following circumstances will result in the recapture of a Value Credit in whole or in part:

- After the owner has been confined in a skilled health care facility for at least 45 consecutive days and is confined at the time of the withdrawal request.
- Within 45 days following the owner's discharge from a skilled health care facility after a confinement of at least 45 days.
- If the owner becomes disabled after the Contract is issued and before age 65.

13. Withdrawals may be subject to a withdrawal charge depending on the contribution year in which the withdrawal is made and whether the owner has elected the Value Credit. The following table shows the amount and duration of the withdrawal charge:

Contribution year	Withdrawal charge If no value credit elected (in percent)	Withdrawal charge If value credit elected (in percent)
Less than one	7	8.5
One but less than two .....	6	8.5
Two but less than three ....	5	8.5
Three but less than four .....	5	8.5
Four but less than five .....	4	7.5
Five but less than six .....	3	6.5
Six but less than seven ..	2	5.5
Seven but less than eight ....	0	3.5
Eight but less than nine .....	0	1.5
9+ .....	0	0

14. In calculating the withdrawal charge, KILICO treats withdrawals as coming from earnings (if any) first, and then from the oldest purchase payments first (i.e., first-in, first-out). KILICO will charge all amounts withdrawn and any applicable withdrawal charge against purchase payments in the chronological order in which KILICO received them beginning with the initial purchase payment. Each Contract Year, an owner may make a partial or total withdrawal from the Contract without incurring a withdrawal charge up to the greatest of:

- Purchase payments that are no longer subject to withdrawal charges,

minus withdrawals attributable to those purchase payments;

- Contract value, minus any purchase payments paid within the prior seven years (nine years for Contracts with the Value Credit rider), plus any withdrawals from purchase payments subject to withdrawal charges, including any withdrawal charge); or

- 10% of purchase payments that are subject to withdrawal charges, minus any purchase payments subject to a withdrawal charge previously withdrawn, including any withdrawal charges.

Any amount withdrawn that is not subject to a withdrawal charge will be considered a "partial free withdrawal."

15. Owners of the Contracts may allocate their purchase payments among 43 investment options—41 Subaccounts of the Separate Account, the fixed investment option, or the market value adjustment option. Each Subaccount will invest in shares of a corresponding portfolio of Scudder Variable Series I, Scudder Variable Series II, The Alger American Fund, Dreyfus Investment Portfolios, Dreyfus Socially Responsible Growth Fund, Inc., Credit Suisse Warburg Pincus Trust, and INVESCO Variable Investment Funds, Inc.

16. KILICO may in the future decide to create additional Subaccounts to invest in any additional underlying funds as may now or in the future be available. KILICO also may decide to combine or eliminate Subaccounts or transfer assets to and from Subaccounts. Similarly, the Insurance Company Applicants may offer different underlying investment options thorough the Other Accounts and add to, combine or eliminate the Subaccounts investing in those investment options from time to time.

17. The Contract provides for various death benefits, annuity benefits and annuity payout options, as well as transfer privileges among Subaccounts, dollar cost averaging, and other features. The Contract contains the following charges (in addition to the withdrawal charges and the Value Credit Rider charge described above): (i) A \$30 annual records maintenance charge; (ii) a mortality and expense risk charge of 1.30%; (iii) an administrative expense charge of 0.15%; (iv) a transfer fee of \$10 for each transfer after the first 12 transfers made during a contract year (which currently is intended to be waived); (v) a maximum charge of 0.45% for a guaranteed retirement income benefit (if elected); (vi) a charge of either 0.25% (attained ages 0–80) or 0.85% (attained ages 81 and higher) for an earning enhanced death benefit (if elected); and (vii) any applicable state

premium tax. All of such fees and charges are described in greater detail in the Form N–4 Registration Statement for the Contract and the Separate Account.

18. Applicants seek exemption pursuant to section 6(c) form sections 2(a)(32) and 27(i)(2)(A) of the 1940 Act and Rule 22–1 thereunder to the extent deemed necessary to permit the Insurance Company Applicants to recapture part or all of the Value Credits, as described above in the following instances: (i) When an owner exercises the Contract's free look provision; and (ii) when an owner makes a partial withdrawal or a surrender in Contract year ten or subsequent Contract years within one year of receiving a Value Credit. Applicants also request that the order being sought extend to any Affiliated Broker-Dealer that serves as a distributor or principal underwriter for the Contract or Future Contracts funded by the Separate Account or Other Accounts, and to any successors in interest to Applicants. Undertake that Future Contracts will be substantially similar in all material respects to the Contracts.

#### 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 requested below with respect to the Contracts and any Future Contract funded by the Separate Account or Other Accounts that are issued by the Insurance Company Applicants and underwritten or distributed by IBS or Affiliated Broker-Dealers. Applicants undertake that Future Contracts funded by the Separate Account or any Other Account, in the future, will be substantially similar in all material respects to the Contracts. Applicants believe that the requested exemption 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.

Subsection (i) of section 27 of the 1940 Act 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 such a separate account or sponsoring insurance company to sell a contract funded by the registered separate account unless 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 the 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.

3. Applicants submit that the recapture of the Value Credit in the circumstances set forth in this Application would not deprive an owner of his or her proportionate share of the issuer's current net assets. An owner's interest in the Value Credit allocated to his or her annuity account during or after year ten is not vested until one year after that Value Credit is so allocated. Unless and until any Value Credit amount is vested, the issuing Insurance Company Applicant retains the right and interest in the Value Credit, although not in the earnings attributable to that amount. Thus, Applicants urges that when the issuing Insurance Company Applicant recaptures any Value Credit, it is merely retrieving its own assets, and the owner has not been deprived of a proportionate share of the applicable Account's assets because his or her interest in the Value Credit amount has not vested.

4. In addition, Applicants state that permitting an owner to retain a Value Credit under a Contract upon the exercise of the free look provision would not only be unfair, but would also encourage individuals to purchase a Contract with no intention of keeping it, and return it for a quick profit. Furthermore, Applicants state that the recapture of Value Credits within one year after its receipt during or after Applicants year ten is designed to provide the Insurance Company Applicants with a measure of protection against a Contract owner surrendering or making a partial withdrawal shortly after a Value credit is made thereby leaving the Insurance Company Applicants from its general account assets within a year prior to the withdrawal, and any gain on that Value Credit would remain a part of the owner's Contract value.

5. Applicants represent that it is not administratively feasible to track the Value Credit in the Separate Account or Other Account once it has been declared. Accordingly, the asset-based

charges applicable to the Separate Account or Other Account will be assessed against the entire amount held in the Separate Account or Other Account, including the Value Credit, during the free look period and the recapture periods. As a result, during such periods, the aggregate asset-based charges assessed against an owner's Contract value will be higher than if no Value Credit had been added. The Insurance Company Applicants nonetheless represent that the Contract's fees and charges, in the aggregate, are, or will be, reasonable within the meaning of section 26(e) of the 1940 Act.

6. Applicants represent that the Value Credit will be attractive to and in the interest of investors because it will permit owners to put 102% of their purchase payments in the first Contract year to work for them in the selected Subaccounts and to receive an additional 2% credit on all Contract value (even earnings) on every fifth contract anniversary thereafter. In addition, the owner will retain any earnings attributable to the Value Credits recaptured, as well as the principal of the Value credit once vested.

7. Applicants submit that the provisions for recapture of any Value Credit under the Contracts do not, and any Future Contract provisions will not, violate sections 2(a)(32) and 27(i)(2)(A) of the 1940 Act. Sections 26(e) and 27(i) were added to the 1940 Act to implement the purposes of the National Securities Markets Improvement Act of 1996 and Congressional intent. The application of Value Credits under the Contracts should not raise any questions about the Insurance Company Applicants' compliance with the provisions of section 27(i). However, to avoid any uncertainty as to full compliance with the 1940 Act, Applicants request an exemption from sections 2(a)(32) and 27(i)(2)(A), to the extent deemed necessary, to permit the recapture of any Value Credit under the circumstances described in the Application with respect to Contracts and Future Contracts, without the loss of relief from section 27 provided by section 27(i).

8. Rule 22c-1 under the 1940 Act 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. It is possible that someone might view the Insurance Company Applicants' recapture of the Value Credit as resulting in the redemption of redeemable securities for a price other than one based on the current net asset value of the Account. Applicants contend, however, that the recapture of the Value Credit does not violate Rule 22c-1. The recapture of all or part of the Value Credit does not involve either of the evils that Rule 22c-1 was intended to eliminate or reduce as far as reasonably practicable, 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 repurchase at a price above it, and (ii) other unfair results, including speculative trading practices. To effect a recapture of a Value Credit, the issuing Insurance Company Applicant will redeem interests in a Contract at a price determined on the basis of the current accumulation unit value(s) of the Subaccount(s) to which the owner's Contract value is allocated. The amount recaptured will equal the amount of the Value Credit that the issuing Insurance Company Applicant paid out of its general account assets. Although the owner will retain any investment gain attributable to the Value Credit or bear any loss attributable to that Value Credit, the amount of that gain or loss will be determined on the basis of the current accumulation unit values of the applicable Subaccounts. Thus, no dilution will occur upon the recapture of the Value 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 Value Credit. Because neither of the harms that Rule 22c-1 was meant to address is found in the recapture of the Value Credit, Rule 22c-1 should not apply to any Value Credit. However, to avoid any uncertainty as to full compliance with the 1940 Act, Applicants request an exemption from the provisions Rule 22c-1 to the extent deemed necessary to permit them to recapture the Value Credit under the Contracts and Future Contracts.

#### Conclusion

Applicants submit that their request for an order that applies to the Separate Account and any Other Accounts established by the Insurance Company Applicants, in connection with the

recapture of Value Credits applied under the Contract and Future Contracts, is appropriate in the public interest. 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. 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 this Application. Having Applicants file additional applications would impair Applicants' ability to take advantage of business opportunities as they arise. Further, if Applicants were required repeatedly to seek exemptive relief with respect to the same issues addressee in this Application, investors would not receive any benefit or additional protection thereby.

Applicants submit, for the reasons 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.*

[FR Doc. 01-28485 Filed 11-13-01; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45039; File No. SR-NSCC-2001-16]

### Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fee Schedules

November 7, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup>, notice is hereby given that on October 1, 2001, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") the

<sup>1</sup> 15 U.S.C. 78s(b)(1).