prescribe, distribute long-term capital gains more often than once every twelve months. Rule 19b–1(a) permits a registered investment company, with respect to any one taxable year, to make one capital gains distribution, as defined in section 852(b)(3)(C) of the Code. Rule 19b–1(a) also permits a supplemental distribution to be made pursuant to section 855 of the Code not exceeding 10% of the total amount distributed for the year. Rule 19b–1(f) permits one additional long-term capital gains distribution to be made to avoid the excise tax under section 4982 of the Code.

2. Applicant asserts that the limitation on the number of net long-term capital gains distributions in rule 19b–1 in effect prohibits applicant from including available net long-term capital gains in certain of its quarterly distributions. As a result, applicant must fund these quarterly distributions with returns of capital (to the extent net investment income and realized short-term capital gains are insufficient to cover a quarterly distribution). Applicant further asserts that, in order to distribute all of its long-term capital gains within the limits on the number of long-term capital gains distributions in rule 19b–1, applicant may be required to make certain of its quarterly distributions in excess of the fixed percentage called for by its policy. Alternatively, applicant states that it may be forced to retain long-term capital gains and pay the applicable taxes.

3. Applicant asserts that the application of rule 19b–1 to its Quarterly Distribution Policy may cause anomalous results and create pressure to limit the realization of long-term capital gains based on considerations unrelated to investment goals. Applicant requests relief to permit it to make up to five distributions of long-term capital gains in any one taxable year, provided applicant maintains in effect a distribution policy calling for quarterly distributions of a fixed percentage of applicant's net asset value. Applicant represents that a fifth distribution will be made only if necessary to avoid the excise tax under Section 4982 of the Code.

4. Applicant believes that the concerns underlying section 19(b) and rule 19b–1 are not present in applicant's situation. One of these concerns is that shareholders might not be able to distinguish frequent distributions of capital gains and dividends from investment income. Applicant states that the Quarterly Distribution Policy has been fully and repeatedly described in applicant's communications to its shareholders, including annual reports and its prospectus. In addition, a statement showing the amount and source of distributions received during the year is included with applicant's IRS Form 1099–DIV report sent to each shareholder who received distributions during the year (including shareholders who sold shares during the year). Applicant believes that its shareholders fully understand that their distributions are not tied to applicant's net investment income and realized capital gains and do not represent yield or investment return.

5. Another concern underlying section 19(b) and rule 19b–1 is that frequent capital gains distributions could facilitate improper sales practices, including in particular, the practice of urging an investor to purchase fund shares on the basis of an upcoming distribution (''selling the dividend''), when the distribution would result in an immediate corresponding reduction in net asset value and would be, in effect, a return of the investor's capital. Applicant believes that this concern does not apply to closed-end investment companies, such as applicant, which do not continuously distribute shares.

6. Applicant states that increased administrative costs also are a concern underlying section 19(b) and rule 19b–1. Applicant asserts that it will continue to make quarterly distributions regardless of whether capital gains are included in any particular distribution.

7. Section 6(c) of the Act provides that the SEC may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provisions of the Act, if and to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. For the reasons stated above, applicant believes that the requested exemption meets the standards set forth in section 6(c).

Applicant's Condition

Applicant agrees that the order granting the requested relief shall terminate upon the effective date of a registration statement under the Securities Act of 1933 for any future public offering by applicant of its shares other than: (i) A non-transferable rights offering to shareholders of applicant, provided that such offering does not include solicitation by brokers or the payment of any commissions or underwriting fee; and (ii) an offering in connection with a merger, consolidation, acquisition, or reorganization; unless applicant has received from the staff of the Commission written assurance that the order will remain in effect.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–21566 Filed 8–13–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–22783; File No. 812–10680]

Mutual Fund Variable Annuity Trust, et al.

August 7, 1997.

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

ACTION: Notice of application for an order of exemption under the Investment Company Act of 1940 (the ''1940 Act'').

APPLICANTS: Mutual Fund Variable Annuity Trust (the ''Trust''), The Chase Manhattan Bank (the ''Adviser'') and certain life insurance companies and their separate accounts that do now or may in the future purchase shares of capital stock (''Shares'') in the Trust.

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

SUMMARY OF APPLICATION: Applicants seek an order of exemption to the extent necessary to permit Shares of the Trust to be sold to and held by: (i) Variable annuity and variable life insurance separate accounts (''Separate Accounts'') of both affiliated and unaffiliated life insurance companies (''Participating Insurance Companies''), and (ii) certain qualified pension and retirement plans outside of the separate account context.

FILING DATE: The application was filed on May 22, 1997.

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. September 2, 1997, and must 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 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.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, c/o Simpson Thacher & Bartlett, 425 Lexington Avenue, New York, New York 10017, Attention: Robert M. Kaner, Esq.

FOR FURTHER INFORMATION CONTACT: Lorna MacLeod, Staff Attorney, or Mark C. Amorosi, 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 Public Reference Branch of the Commission.

Applicants' Representations

1. The Trust is a Massachusetts business trust organized on April 14, 1994, and is registered under the 1940 Act as an open-end, management investment company. The Trust currently consists of, and offers Shares in, six separate investment portfolios, each of which has its own investment objective and policies, and may in the future issue shares of additional portfolios and/or multiple classes of Shares of each portfolio (such existing and future portfolios and/or classes of shares of each are referred to collectively as the ''Portfolios'').

2. The Trust has retained the Adviser as an investment adviser of each of the Portfolios. The Adviser is a bank chartered under the laws of New York and is a wholly-owned subsidiary of The Chase Manhattan Corporation, a bank holding company. The adviser serves as the overall investment manager of and maintains responsibility for investment decisions of the Portfolios, subject to the general direction and supervision of the Board of Trustees of the Trust (the ''Board of Trustees''). The Adviser has entered into investment subadvisory agreements with two sub-advisers that make investment decisions for their respective Portfolios on a day-to-day basis (the ''Sub-Advisers''). Chase Asset Management, Inc. (''CAM''), a Delaware corporation and a wholly-owned subsidiary of the Adviser, is the Sub-Adviser to each of the Portfolios other than the International Equity Portfolio. Chase Asset Management (London) Limited (''CAM London''), an indirect wholly-owned subsidiary of the Adviser, is the Sub-Adviser to the International Equity Portfolio. CAM and CAM London are registered as investment advisers under the Investment Advisers Act of 1940.

3. Shares of the Trust are currently offered only to the Variable Annuity Account Two, a separate account of Anchor National Life Insurance Company (''Anchor National''), and FS Variable Annuity Account Two, a separate account of First SunAmerica Life Insurance Company (''First SunAmerica''). Variable Annuity Account Two and FS Variable Annuity Account Two are registered as unit investment trusts under the 1940 Act.

4. The Trust may determine to offer Shares of its Portfolios to Separate Accounts of additional insurance companies, including insurance companies that are not affiliated with Anchor National or First SunAmerica 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, and flexible premium variable life insurance contracts (collectively referred to herein as ''Contracts''). Participating Insurance Companies will establish their own Separate Accounts and design their own Contracts.

5. The Trust also may offer Shares to the trustees (or custodians) of certain qualified pension and retirement plans (the ''Plans''). Neither the Advisor nor the Sub-Adviser will act as an investment adviser to any of the Plans which will purchase Shares of the Trust.

6. The Trust's role with respect to the Separate Accounts and the Plans will be limited to that of offering its Shares to the Separate Accounts and the Plans and fulfilling any conditions the Commission may impose upon granting the order requested in the application.

Applicants' Legal Analysis

1. In connection with the funding of scheduled premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a unit investment trust, Rule 6e–2(b)(15) under the 1940 Act provides partial exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. The exemptions granted 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 if the scheduled premium variable life insurance separate account owns shares of a management investment company that also offers its shares to a variable annuity separate account of the same insurance company or an affiliated insurance company. The use of a common management investment company as the underlying investment medium for both variable annuity and variable life insurance separate accounts of the same life insurance company or of any affiliated life insurance company is referred to herein as ''mixed funding.''

2. In addition, the relief granted by Rule 6e–2(b)(15) is not available if the scheduled premium variable life insurance separate account owns shares of an underlying management investment company that also offers its shares to separate accounts funding variable contracts of one or more unaffiliated life insurance companies. The use of a common management company as the underlying investment medium for variable annuity and/or variable life insurance separate accounts of one insurance company and separate accounts funding variable contracts of one or more unaffiliated life insurance companies is referred to herein as ''shared funding.''

3. The relief granted by Rule 6e–2(b)(15) also is not available if the scheduled premium variable life insurance separate account owns shares of an underlying management company that also offers its shares to Plans.

4. 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–2(T)(b)(15) under the 1940 Act provides partial exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. The exemptions granted 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). Therefore, Rule 6e–3(T)(b)(15) grants the exemptions if the underlying fund engages in mixed funding, but not if it engages in shared funding or sells its shares to Plans.

5. Applicants state that the current tax law permits the Trust to increase its asset base through the sale of Shares to Plans. Section 817(h) of the Internal Revenue Code of 1986, as amended (the ''Code'') imposes certain diversification requirements on the underlying assets of the Contracts invested in the Trust. The Code provides that such Contracts shall not be treated as an annuity contract or life insurance contract for any period in which the underlying assets are not adequately diversified as prescribed by Treasury regulations. To meet the diversification requirements, all of the beneficial interests in the investment company must be held by the segregated asset accounts of one or more insurance companies. Treas. Reg. § 1.817–5. The regulations do, however, contain certain exceptions to this requirement, one of which allows shares in an investment company to be held by the trustee of a 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 contracts. Treas. Reg. § 1–817–5(f)(3)(iii).

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

7. Accordingly, Applicants hereby request an order of the Commission exempting the variable life insurance Separate Accounts of Participating Insurance Companies (and, to the extent necessary, any principal underwriter and depositor of such a Separate Account) and the other Applicants from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act, and Rules 6e–2(b)(15) and 6e–3(T) thereunder (and any permanent rule comparable to Rule 6e–3(T)), to the extent necessary to permit Shares of the Trust to be offered and sold to, and held by: (i) Both variable annuity Separate Accounts and variable life insurance Separate Accounts of the same life insurance company or of affiliated life insurance companies (*i.e.*, mixed funding); (ii) Separate Accounts of unaffiliated life insurance companies (including both variable annuity Separate Accounts and variable life insurance Separate Accounts) (*i.e.*, shared funding); and (iii) trustees of Plans.

Disqualification

8. Section 9(a)(3) of the 1940 Act provides that it is unlawful for any company to serve as investment adviser or principal underwriter of any registered open-end investment company if an affiliated person of that company is subject to a disqualification enumerated in Section 9(a) (1) or (2). Rule 6e–2(b)(15) (i) and (ii) and Rule 6e–3(T)(b)(15) (i) and (ii) provide partial exemptions from Section 9(a), subject to the limitations discussed above on mixed and shared funding. These rules provide: (i) That the eligibility restrictions of Section 9(a) shall not apply to persons who are officers, directors or employees of the life insurer or its affiliates who do not participate directly in the management or administration of the underlying fund; and (ii) that an insurer shall be ineligible to serve as an investment adviser or principal underwriter of the underlying fund only if an affiliated person of the life insurer who is disqualified by Section 9(a) participates in the management or administration of the fund.

9. 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 when the life insurer serves as investment adviser to or principal underwriter for the underlying fund. Applicants state that it is not necessary for the protection of investors or the purposes fairly intended by the policy and provisions of the 1940 Act to apply the provisions of Section 9(a) to many individuals in a typical insurance company complex, most of whom will have no involvement in matters pertaining to underlying investment companies.

10. Applicants submit that there is no regulatory purpose in denying the partial exemptions because of mixed and shared funding and sales to Plans. Applicants further assert that sales to those entities do not change the fact that the purposes of the 1940 Act are not advanced by applying the prohibitions of Section 9(a) to persons in a life insurance complex who have no involvement in the underlying fund.

Pass-Through Voting

11. Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) assume the existence of a pass-through voting requirement with respect to management investment company shares held by a separate account. Applicants state that pass-through voting privileges will be provided with respect to all Contract owners so long as the Commission interprets the 1940 Act to require pass-through voting privileges for Contract owners.

12. 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. Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(15)(b)(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 adviser, when required to do so by an insurance regulatory authority and subject to certain requirements. Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii)(B) provide that the insurance company may disregard voting instructions of contract owners if the contract owners initiate any change in such insurance company's investment policies, principal underwriter, or any investment adviser (provided that disregarding such voting instructions is reasonable and complies with the other provisions of Rules 6e–2 and 6e–3(T)).

13. Applicants state that Rule 6e–2 recognizes that a variable life insurance contract has important elements unique to insurance contracts, and is subject to extensive state regulation of insurance. applicants assert 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 advisers, or principal underwriters. The Commission also expressly 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 Commission, therefore, deemed such exemptions necessary to ''assure the solvency of the life insurer and performance of its contractual obligations 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.'' Applicants state that in this respect, flexible premium variable life insurance contracts are identical to scheduled premium variable life insurance contracts; therefore, Applicants assert that the corresponding provisions of Rule 6e–3(T) undoubtedly were adopted in recognition of the same factors.

14. Applicants further represent that the offer and sale of Shares of the Trust

to Plans will not have any impact on the relief requested in this regard. Shares of the Trust sold to Plans would be held by the trustees of the Plans as required by Section 403(a) of the Employee Retirement Income Security Act of 1974, as amended (''ERISA''), or applicable provisions of the Code. Section 403(a) of ERISA also provides that trustee(s) must have exclusive authority and discretion to manage and control the Plan investments with two exceptions: (a) When the Plan expressly provides that the trustee(s) is (are) subject to the direction of a named fiduciary who is not a trustee, in which case the trustee(s) is (are) subject to proper directions made in accordance with the terms of the Plan and not contrary to ERISA; and (b) when the authority to manage, acquire or dispose of assets of the Plan is delegated to one or more investment managers pursuant to Section 402(c)(3) of ERISA. Unless one of the two exceptions stated in Section 403(a) applies, Plan trustees have the exclusive authority and responsibility for voting proxies. Where a named fiduciary appoints an investment manager, the investment manager has the responsibility to vote the shares held unless the right to vote such shares is reserved to the trustees or to the named fiduciary. In any event, ERISA permits but does not require pass-through voting to the participants in Plans. Accordingly, unlike the case with insurance company separate accounts, the issue of the resolution of material irreconcilable conflicts with respect to voting is not present with respect to plans because they are not entitled to pass-through voting privileges.

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

Conflicts of Interest

16. Applicants submit that no increased conflicts of interest would be presented by the granting of the requested relief. Applicants assert 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 note 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. The fact that different insurers may be domiciled in different states does not create a significantly different or enlarged problem.

17. Applicants submit 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. Affiliated insurers may be domiciled in different states and be subject to differing state law requirements. Applicants state that affiliation does not reduce the potential, if any exists, for differences in state regulatory requirements. In any event, the conditions proposed in the application, which are adapted from the conditions included in Rule 6e–3(T)(b)(15), are designed to safeguard against, and provide procedures for resolving, any adverse effects that differences among state regulatory requirements may produce. If a particular state insurance regulatory 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 Trust.

18. 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 under certain circumstances. Applicants assert that this right does not raise any issues different from those raised by the authority of state insurance administrators over separate accounts. Applicants submit 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 adviser initiated by contract owners. 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.

19. A particular insurer's disregard of voting instructions, nevertheless, could conflict with the majority of contract owner voting instructions. The insurer's action possibly could be different from 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. If the insurer's judgment represents a minority position or would preclude a majority vote, then the insurer may be required, at the Trust's election, to withdraw its Separate Account's investment in the Trust, with the result that no charge or penalty would be imposed as a result of such withdrawal.

20. Applicants submit that investment by the Plans in any of the Portfolios will similarly present no conflict. The likelihood that voting instructions of insurance company Separate Account holders will ever be disregarded or the possible withdrawal referred to immediately above is extremely remote and this possibility will be known, through prospectus disclosure, to any Plan choosing to invest in the Trust. Moreover, Applicants state that even if a material irreconcilable conflict involving Plans were to arise, the Plans may simply redeem their shares and make alternative investments.

21. Applicants also submit that there is no reason why the investment policies of the Portfolios would or should be materially different from what these policies would or should be if the Portfolios funded only variable annuity contracts or variable life insurance contracts, whether flexible premium or scheduled premium contracts. Each type of insurance product is designed as a long-term investment program. Similarly, the investment objectives of Plans—as long-term investments—coincides with that of the Contracts and should not increase the potential for conflicts. Applicants represent that each Portfolio will be managed to attempt to achieve the investment objective of the Portfolio and not to favor or disfavor any particular Participating Insurance Company or type of insurance product.

22. Applicants note that no one investment strategy can be identified as appropriate to a particular insurance product or to a Plan. Each pool of variable annuity and variable life insurance contract owners is composed of individuals of diverse financial status, age, insurance and investment goals. A fund supporting even one type of insurance product must accommodate these diverse factors in order to attract and retain purchasers. Applicants submit that permitting mixed and shared funding will provide economic support for the continuation of the Trust. In addition, permitting mixed and shared funding also will facilitate the establishment of additional Portfolios serving diverse goals.

23. As noted above, Section 817(h) of the Code imposes certain diversification standards on the underlying assets of

variable annuity contracts and variable life insurance contracts held in the portfolios of management investment companies. Treasury Regulation 1.817–5(f)(3)(iii), which established diversification requirements for such portfolios, specifically permits ''qualified pension or retirement plans'' and insurance company separate accounts to share the same underlying investment company. Therefore, neither the Code, nor the Treasury Regulations, nor the revenue rulings thereunder, recognize or proscribe any inherent conflicts of interests if Plans, variable annuity separate accounts, and variable life insurance separate accounts all invest in the same management investment company.

24. While there may be differences in the manner in which distributions are taxed for variable annuity contracts, variable life insurance contracts and Plans, Applicants assert that the tax consequences do not raise any conflicts of interest. When distributions are to be made, and the Separate Account or the Plan cannot net purchase payments to make the distributions, the Separate Account or the Plan will redeem Shares of the Trust at their net asset value. The Plan will then make distributions in accordance with the terms of the Plan and the Participating Insurance Company will make distributions in accordance with the terms of the Contract.

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

26. Applicants assert that the ability of the Portfolios to sell their respective shares directly to qualified plans does not create a ''senior security,'' as that term is defined in Section 18(g) of the 1940 Act, with respect to any Contract owner as opposed to a participant under a Plan. As noted above, regardless of the rights and benefits of participants under the Plans or Contract owners under the Contracts, the Plans and the Separate Accounts have rights only with respect to their respective Shares of the Trust. They can only redeem such Shares at their net asset value. No shareholder of any of the Portfolios has any preference over any other shareholder with respect to distribution of assets or payment of dividends.

27. Applicants assert that there are no conflicts between the Contract owners of the separate accounts and the participants under the Plans with respect to state insurance commissioners' veto powers over investment objectives. A basic premise of shareholder voting is that not all shareholders may agree with a particular proposal. The state insurance commissioners have been given the veto power in recognition of the fact that insurance companies cannot simply redeem their separate accounts out of one fund and invest in another. Time-consuming, complex transactions must be undertaken to accomplish such redemptions and transfers. Applicants submit that, on the other hand, trustees of Plans can make the decision quickly and implement the redemption of their Shares from a Portfolio and reinvest in another funding vehicle without the same regulatory impediments or, as is the case with most Plans, even hold cash pending suitable reinvestment. Based on the foregoing, Applicants maintain that even if there should arise issues where the interests of Contract owners and the interests of participants in Plans are in conflict, the issues can be resolved almost immediately because the trustees of the Plans can, on their own, redeem the Shares out of the Portfolio.

28. Applicants state that various factors have kept more insurance companies from offering variable annuity and variable life insurance contracts than currently offer such contracts. According to the Applicants, these factors include the cost of organizing and operating a fund 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 submit that the use of the Trust as a common investment medium for variable Contracts would reduce or eliminate these concerns. Applicants argue, in addition, that mixed and shared funding should provide several benefits to Contract owners by eliminating a significant portion of the costs of establishing and administering separate funds. Participating Insurance Companies will benefit not only from the investment and administrative expertise of the Adviser and the Sub-Advisers, but also from the cost efficiencies and investment flexibility afforded by a larger pool of assets. Mixed and shared funding also would permit a greater amount of assets available for investment by the Trust, thereby promoting economies of scale, by permitting increased safety through greater diversification, and by making the addition of new Portfolios more feasible. Applicants assert that, therefore, making the Trust available for mixed and shared funding will encourage more insurance companies to offer variable Contracts, and this should result in increased competition with respect to both variable Contract design and pricing, which can be expected to result in more product variation and lower charges to investors. Applicants further note that the sale of Shares of the Trust to Plans also can be expected to increase the amount of assets available for investment by the Trust and thus promote economies of scale and greater diversification.

29. Applicants assert that there is no significant legal impediment to permitting mixed and shared funding. 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, and sales to Plans, will have any adverse federal income tax consequences.

Applicants' Conditions

Applicants have consented to the following conditions if the order requested in the Application is granted.

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

2. The Board of Trustees will monitor the Trust for the existence of any material irreconcilable conflict between the interests of the Contract owners of all Separate Accounts investing in the Trust and of the Plan participants investing in the Trust. A material irreconcilable conflict may arise for a variety of reasons, including: (a) An action by any state insurance regulatory

authority; (b) a change in applicable federal or state insurance, tax, or securities laws or regulations, or a public ruling, private letter ruling, no-action or interpretive letter, or any similar action by insurance, tax, or securities regulatory authorities; (c) an administrative or judicial decision in any relevant proceeding; (d) the manner in which the investments of any Portfolio are being managed; (e) a difference in voting instructions given by variable annuity Contract owners, variable life insurance Contract owners and trustees of Plans; (f) a decision by an insurer to disregard the voting instructions of Contract owners; or (g) if applicable, a decision by a Plan to disregard voting instructions of Plan participants.

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

4. If it is determined by a majority of the Board of Trustees, or by a majority of the disinterested Trustees, that a material irreconcilable conflict exists, the relevant Participating Insurance Companies and Plans will, at their own expense and to the extent reasonably practicable (as determined by a majority of the disinterested Trustees), take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict, which steps could include: (a) Withdrawing the assets allocable to some or all of the Separate Accounts from the Trust or any Portfolio and reinvesting such assets in a different investment medium, including another Portfolio of the Trust, 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; and (b) 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 and that decision represents a minority position or would preclude a majority vote, then that insurer may be required, at the Trust's election, to withdraw the insurer's Separate Account investment in the Trust or relevant Portfolio(s) and no charge or penalty will be imposed as a result of such withdrawal. If a material irreconcilable conflict arises because of a Plan's decision to disregard Plan participant voting instructions, if applicable, and that decision represents a minority position or would preclude a majority vote, the Plan may be required, at the Trust's election, to withdraw its investment in the Trust or relevant Portfolio(s) 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 determination by the Board of Trustees of a material irreconcilable conflict and to bear the cost of such remedial action will be a contractual obligation of all Participating Insurance Companies and Plans under their agreements governing participating in the Trust, and these responsibilities will be carried out with a view only to the interests of Contract owners and Plan participants.

5. For purposes of Condition 4, a majority of the disinterested Trustees will determine whether or not any proposed action adequately remedies any material irreconcilable conflict, but in no event will the Trust or the Adviser be required to establish a new funding medium for any Contract. No Participating Insurance Company shall be required by Condition 4 to establish a new funding medium for any Contract if any offer to do so has been declined by vote of a majority of the Contract owners materially and adversely affected by the material irreconcilable conflict. Further, no Plan shall be required by Condition 4 to establish a new funding medium for such Plan if (a) a majority of Plan participants materially and adversely affected by the irreconcilable material conflict vote to decline such offer, or (b) pursuant to governing Plan documents and applicable law, the Plan makes such decision without Plan participant vote.

6. The determination of the Board of Trustees of the existence of a material irreconcilable conflict and its implications will be made known in writing promptly to all Participants.

7. Participating Insurance Companies will provide pass-through voting privileges to all Contract owners so long as the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for Contract owners. Accordingly, Participating Insurance Companies will vote Shares of the Trust held in their Separate Accounts in a manner consistent with voting instructions timely-received from Contract owners. Each Participating Insurance Company will also vote shares of the Trust held in its Separate Accounts for which no voting instructions from Contract owners are timely-received, as well as Shares of the Trust which the Participating Insurance Company itself owns, in the same proportion as those Shares of the Trust for which voting instructions from Contract owners are timely-received. Participating Insurance Companies will be responsible for assuring that each of their Separate Accounts participating in the Trust calculates voting privileges in a manner consistent with other Participating Insurance Companies. The obligation to calculate voting privileges in a manner consistent with all other Separate Accounts investing in the Trust will be a contractual obligation of all Participating Insurance Companies under their agreements governing their participation in the Trust. Each Plan will vote as required by applicable law and governing Plan documents.

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

9. The Trust will notify all Participating Insurance Companies that separate account disclosure in their respective Separate Account prospectuses may be appropriate to advise accounts regarding the potential risks of mixed and shared funding. The Trust shall disclose in its prospectus that: (a) The Trust is intended to be a funding vehicle for variable annuity and variable life insurance contracts offered by various insurance companies and for Plans; (b) due to differences of tax treatment and other considerations, the interests of various Contract owners participating in the Trust and the interests of Plans investing in the Trust may conflict; and (c) the Board of Trustees 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.

10. The Trust will comply with all provisions of the 1940 Act that require voting by shareholders (which, for these purposes, will be the persons having a voting interest in the Shares of the Trust), and, in particular, the Trust will either provide for annual shareholder meetings (except insofar as the Commission may interpret Section 16 of the 1940 Act not to require such meetings) or comply with Section 16(c) of the 1940 Act (although the Trust is not one of the 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, the Trust will act in accordance with the Commission's interpretation of the requirements of Section 16(a) with respect to periodic elections of Trustees and with whatever rules the Commission may promulgate with respect thereto.

11. If and to the extent that Rule 6e–2 or 6e–3(T) under the 1940 Act is amended, or proposed Rule 6e–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 the application, then the Trust and/or Participating Insurance Companies, as appropriate, shall take such steps as may be necessary to comply with such Rules 6e–2 and 6e–3(T), as amended, or proposed Rule 6e–3 as adopted, to the extent that such Rules are applicable.

12. The Participants, at least annually, will submit to the Board of Trustees such reports, materials, or data as the Board of Trustees may reasonably request so that the Board of Trustees may fully carry out the obligations imposed upon it by the conditions contained in the application. Such reports, materials, and data will be submitted more frequently if deemed appropriate by the Board of Trustees. The obligations of the Participants to provide these reports, materials, and data to the Board of Trustees, when the Board of Trustees so reasonably requests, shall be a contractual obligation of all Participants under their agreements governing participation in the Trust.

13. If a Plan should ever become a holder of ten percent or more of the assets of the Trust, such Plan will execute a participation agreement with the Trust. A Plan will execute an application containing an acknowledgment of this condition upon such Plan's initial purchase of the Shares of the Trust.

Conclusion

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

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–38907; File No. SR–NASD–97–34]

Order of Granting Approval; Notice of Filing and Order Granting Accelerated Approval

August 6, 1997.

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 3 and 4 to Proposed Rule Change Relating to Miscellaneous Amendments to Arbitration Procedures and Clarifications of the Code of Arbitration Procedure.

I. Introduction

On May 5, 1997,[1] the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') submitted to the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] a proposed rule change to amend and clarify its arbitration procedures.

Notice of the proposed rule change, together with the substance of the proposal, was published for comment in Securities Exchange Act Release No. 38692 (May 29, 1997), 62 FR 30920 (June 5, 1997). No comments were received on the proposal. The NASD subsequently filed Amendment Nos. 3 and 4 on July 15, 1997[4] and July 25, 1997, respectively.[5]

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[1] The NASD filed Amendment Nos. 1 and 2 with the Commission on May 13, 1997, and May 22, 1997, respectively, the substance of which was incorporated into the notice. See letters from Elliott R. Curzon, Assistant General Counsel, NASDR, to Katherine A. England, Assistant Director, Market Regulation, Commission, dated May 8, 1997 (''Amendment No. 1'') and May 20, 1997 (''Amendment No. 2).

[2] 15 U.S.C. 78s(b)(1).

[3] 17 CFR 240.19b–4.

[4] Amendment No. 3 amends Rule 10330 to state that the Director will serve a copy of the award by using any method available and convenient to the parties and the Director, and that is reasonably expected to cause the award to be delivered to all parties, or their counsel, on the same day. Methods available include, but are not limited to, registered or certified mail, hand delivery, and facsimile or other electronic means. Amendment No. 3 also amends the purpose section of the proposed rule change to state that it is important to permit service by means other than registered mail or personal service, because the Office is frequently asked to provide arbitration awards by facsimile, and could be asked to provide service by other alternative means. In addition, Amendment No. 3 states that it is important that all parties be served with arbitration awards at approximately the same time so that there is no confusion about when the time to seek review of an award begins to run, and parties all have approximately the same amount of time to prepare for and seek review of an award. Also, Amendment No. 3 states that parties should not be required to accept service of awards through means that are inconvenient or unavailable to them, nor should the Office be required to serve an award in a manner that is not readily available. See letter from Elliott R. Curzon, Assistant General Counsel, NASD Regulation, to Katherine A. England, Assistant Director, Market Regulation, Commission, dated July 14, 1997 (''Amendment No. 3'').

[5] Amendment No. 4 states that NASDR's Office of Dispute Resolution intends to modify its case tracking system to add a status code that will show when a claim, defense, or proceeding has been dismissed with prejudice and whether the dismissal was a sanction for failing to comply with an order. In order to allow for sufficient time to implement this change to the system, NASDR will make the proposed rule changes in this rule filing effective within forty-five days following Commission approval. See letter from Elliott Curzon, Assistant General Counsel, to Katherine A. England, Assistant Director, Market Regulation, Commission, dated July 23, 1997 (''Amendment No. 4'').