

Subsidiaries”) organized exclusively for the purpose of acquiring, financing, and holding the securities of one or more existing or future Nonutility Subsidiaries. The Intermediate Subsidiaries would be organized for the purpose of acquiring, holding and/or financing the acquisition of the securities of or other interest in one or more EWGs, FUCOs, and Rule 58 Companies. Intermediate Subsidiaries may also provide management, administrative, project development, and operating services to Nonutility Subsidiaries.

Intermediate Subsidiaries may engage in development activities (“Development Activities”) and administrative activities (“Administrative Activities”) relating to the permitted businesses of the Nonutility Subsidiaries. Development Activities will be limited to due diligence and design review; market studies; preliminary engineering; site inspection; preparation of bid proposals, including, in connection with, posting of bid bonds; application for required permits and/or regulatory approvals; acquisition of site options and options on other necessary rights; negotiation and execution of contractual commitments with owners of existing facilities, equipment vendors, construction firms, power purchasers, thermal “hosts,” fuel suppliers and other project contractors; negotiation of financing commitments with lenders and other third-party investors; and such other preliminary activities as may be required in connection with the purchase, acquisition, financing or construction of facilities or the acquisition of securities of or interests in new businesses. Administrative Activities will include ongoing personnel, accounting, engineering, legal, financial, and other support activities necessary to manage Emera’s investments in Nonutility Subsidiaries.

Applicants state restructuring could also involve the acquisition of one or more new special-purpose subsidiaries (“SPSs”). The SPS would acquire and hold direct or indirect interests in any or all of the Emera System’s existing or future authorized nonutility businesses.

Applicants may transfer existing Subsidiaries, or portions of existing businesses, among the Emera associates and/or the reincorporation of existing Subsidiaries in a different jurisdiction.

Emera does not seek authorization to acquire an interest in any nonassociate company as part of the authority requested and states that the reorganization will not result in the entry by the Emera System into a new, unauthorized line of business.

#### *VII. Request To Invest in Rule 58 Companies After the Merger*

Applicants state Emera’s post-merger investment in Canadian energy-related and gas related companies will be aggregated with its post-merger investment in Rule 58 Companies for purposes of calculating the 15% limit of consolidated capitalization limit under rule 58(a)(1)(ii).<sup>9</sup>

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 01-14025 Filed 6-4-01; 8:45 am]

**BILLING CODE 8010-01-M**

### **SECURITIES AND EXCHANGE COMMISSION**

[Rel. No. IC-24995; File No. 812-12226]

#### **Sun Life Assurance Company of Canada (U.S.), et al.**

May 30, 2001.

**AGENCY:** Securities and Exchange Commission (the “Commission”).

**ACTION:** Notice of application for an order pursuant to section 11(a) of the Investment Company Act of 1940 (the “Act”) approving the terms of an offer of exchange and for an order pursuant to section 6(c) of the Act granting exemptions from sections 2(a)(32), 22(c) and 27(i)(2)(A) of the Act and Rule 22c-1 thereunder to permit the recapture of certain bonus credits.

*Applicants:* Sun Life Assurance Company of Canada (U.S.) (“Sun Life”), Sun Life Assurance Company of Canada (U.S.) Variable Account F (“Variable Account”), and Clarendon Insurance Agency, Inc. (“Clarendon”).

*Summary of Application:* Applicants seek an order approving the terms of a proposed offer of exchange of MFS Regatta Choice, a new variable annuity contract issued by Sun Life and made available through the Variable Account (the “New Contract”), for MFS Regatta Gold, an outstanding annuity contract issued by Sun Life and made available through the Variable Account (the “Old Contract,” collectively with the New Contract, the “Contracts”). Applicants also seek an order to permit the recapture, from any New Contract returned to Sun Life during the free look

<sup>9</sup> Emera conducts various businesses in Canada that would qualify as “energy-related” or “gas-related” companies under rule 58, but for the fact that the revenues from these companies are from Canada. Emera requests that investment in these companies be excluded from the investment limit under rule 58 of the Act.

period, of a 2% bonus payment credited on amounts transferred to the New Contract under the proposed offer of exchange.

*Filing Date:* The application was filed on August 16, 2000, and Amendment No. 1 was filed on May 30, 2001.

*Hearing or Notification of Hearing:* An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on June 25, 2001, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester’s interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants: Sun Life Assurance Company of Canada (U.S.), One Copley Place, Boston, Massachusetts 02116.

**FOR FURTHER INFORMATION CONTACT:** Kenneth C. Fang, Attorney, or Keith E. Carpenter, Branch Chief, at (202) 942-0670, Office of Insurance Products, Division of Investment Management.

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

#### **Applicants’ Representations**

##### *Applicants*

1. Sun Life is a stock life insurance company incorporated under the laws of Delaware on January 12, 1970. Sun Life does business in 49 states of the United States, the District of Columbia and Puerto Rico. Sun Life is an indirect wholly-owned subsidiary of Sun Life Assurance Company of Canada (“Sun Life (Canada)”). Sun Life (Canada) completed its demutualization on March 22, 2000. As a result of the demutualization, a new holding company, Sun Life Financial Services of Canada Inc. (“Sun Life Financial”), is now the ultimate parent of Sun Life (Canada) and Sun Life. Sun Life Financial, a corporation organized in Canada, is a reporting company under the Securities Exchange Act of 1934 with common shares listed on the

Toronto, New York, London and Manila stock exchanges.

The Variable Account is the separate account in which Sun Life sets aside and invests assets attributable to the Contracts. The Variable Account is organized and registered under the Act as a unit investment trust (File No. 811-05846).

3. Clarendon is registered with the Commission as a broker-dealer and is a member of the National Association of Securities Dealers, Inc. Clarendon is the principal underwriter for the Contracts and acts as general distributor of certain other of Sun Life's variable insurance products. Clarendon is a wholly-owned subsidiary of Sun Life.

#### *Reasons for Exchange Offer*

4. Applicants assert that, during recent years, the variable annuity marketplace has become increasingly competitive. Many of the purchasers of variable annuity contracts in the 1980s and early 1990s are at, or close to, the expiration of their deferred sales charge period, and the contract values of many contracts are no longer subject to a deferred sales charge. Holders of such contracts have become "prime targets" for competitors' variable annuity sales efforts. In response to these forces, the market has seen the continuous introduction of innovative products with attractive features to catch the eye of existing and prospective variable annuity purchasers. Sun Life has experienced the effects of its competitors' offers, which often include "bonus offers," through the loss of a substantial portion of its Old Contract business.

5. Applicants state that Sun Life's competitors are permitted to make attractive offers to Sun Life's Old Contract owners because, among other reasons, offers of exchange to contract owners of unaffiliated insurance companies are not prohibited by Section 11 of the Act (nor subject to the requirements of Rule 11a-2 thereunder) by virtue of a Commission staff non-action position granted to *Alexander Hamilton Funds* (pub. avail. July 20, 1994). Applicants state that the *Alexander Hamilton* letter stands for the proposition that, except for limited exceptions, exchange offers between unaffiliated investment companies are not prohibited under Section 11. Consistent with Section 11(a), therefore, a fund may impose a contingent deferred sales charge on shares purchased by investors with proceeds of shares exchanged from an unaffiliated fund.

6. Applicants assert that, but for the affiliated nature of the exchange, Sun

Life would be able to offer a bonus program to its existing Old Contract owners that is similar to its competitors' programs. However, unlike its competitors who may make bonus offers to Old Contract owners, Sun Life is constrained from making a similar offer without first obtaining Commission approval of the terms of the exchange.

7. Applicants state that, in response to this competitive situation, Sun Life has developed an attractive offer ("Exchange Offer") that would give eligible owners of the Old Contract the opportunity to exchange their contracts for a New Contract. On the day the exchange is effected (the "Exchange Date"), eligible owners would also receive a 2% bonus based on the total accumulation value ("Account Value") of each Old Contract surrendered in exchange for a New Contract ("2% Bonus"). Withdrawals made after the free look period under the New Contract has expired would be governed by the terms of the New Contract, including application of the withdrawal charge (referred to in this application as the "contingent deferred sales charge" or "CDSC"). If a Contract owner exercises his or her right to cancel the New Contract during the free look period, the 2% Bonus will be returned to Sun Life and the Old Contract will be reinstated with an Account Value that reflects the investment experience while the New Contract was held. Applicants state that the terms of the Exchange Offer, which will be communicated to eligible Contract owners in a notification of the Exchange Offer (the "Offering Letter"), are designed to respond to the business practicalities of Sun Life's competitive situation and to assure that persisting Contract owners who accept the Exchange Offer receive an immediate and enduring economic benefit.

#### *The New Contract*

8. The MFS Regatta Choice Contract is offered pursuant to a registration statement under the Securities Act of 1933 (the "1933 Act") filed on February 22, 2000, and last amended on April 23, 2001 (File No. 333-30844). Applicants state that the MFS Regatta Choice Contract was designed to enhance the MFS Regatta Gold Contract, adding four new optional enhanced death benefit features incorporated in 10 optional riders and other enhancements. The MFS Regatta Choice Contract is offered as individual and group flexible payment variable annuity contracts for use in connection with retirement and deferred compensation plans. It permits Account Value to be accumulated on a variable, fixed, or combination of variable and fixed basis. It requires a

minimum initial purchase payment of \$10,000.

9. Account Values of the New contract currently may be allocated to sub-accounts of the Variable Account that each invest in one of 29 different investment company portfolios ("Underlying Funds")—29 mutual funds sponsored by MFS/Sun Life Series Trust.

10. Values may also be accumulated on a guaranteed basis by allocation to Sun Life's general account (the "Fixed Account"). Contract owners may select one or more "Guarantee Periods" from those available guaranteed interest rates for the duration of the particular Guarantee Period(s) selected by the Contract owner. Sun Life guarantees that it will credit interest at a minimum rate of 3% per year, compounded annually, to amounts allocated to the Fixed Account. Sun Life may credit interest at a rate in excess of the minimum rate; however, it is not obligated to do so. The Guarantee Periods are offered pursuant to a registration statement under the 1933 Act filed on June 12, 2000 (File No. 333-39034).

11. All cash withdrawals of any guarantee amount from the Fixed Account, except those effective within 30 days prior to the expiration date of the Applicable guarantee Period or the withdrawal of interest credited during the current Contract year, are subject to a market value adjustment ("MVA"). The MVA reflects the relationship between the current rate for the guarantee amount being withdrawn and the guaranteed interest rate applicable to the amount being withdrawn. It also reflects the time remaining in the applicable Guarantee Period. Generally, if the guaranteed interest rate is lower than the applicable current rate, then application of the MVA will result in a lower payment upon withdrawal. Conversely, if the guaranteed interest rate is higher than the applicable current rate, the application of the MVA will result in a higher payment upon withdrawal.

12. Account Value may be transferred among the sub-accounts of the Variable Account without charge, although Sun Life reserves the right to limit the number of transfers to 12 in a Contract year and to charge up to \$15 per transfer. Transfers to and from the Fixed Account are permitted, subject to certain restrictions described in the prospectus for the New Contract.

13. Contract owners may enroll in an optional Dollar Cost Averaging program (the "DCA Program") by allocating a minimum of \$1,000 of their purchase payment into the DCA Program and pre-

authorizing transfers to any of the sub-accounts at regular time intervals.

14. Contract owners may also enroll in one of three asset allocation models, each of which represents a combination of sub-accounts with a different level of risk. Contract owners who elect an asset allocation model will have their investment options automatically reallocated on a quarterly basis, or as determined by the terms of the asset allocation program. The former MFS asset allocation model, which was available under the Old Contract but discontinued in May 1998, will be made available under New Contracts to owners of Old Contracts who are currently participating in that model.

15. Contract owners with an Account Value of \$10,000 or more may participate in the Systematic Withdrawal Program. Under the Systematic Withdrawal Program, a Contract owner may elect to receive automatic withdrawals from his or her Account Value, the amount and frequency of which is determined by the Contract owner. An MVA may apply to withdrawals under the Systematic Withdrawal Program.

16. Contract owners may enroll in the Portfolio Rebalancing Program, whereby funds are transferred among the sub-accounts in order to maintain the percentage allocation the Contract owner has selected. The transfers may occur on a quarterly, semi-annual or annual basis.

17. Contract owners may enroll in the Secured Future Program, under which purchase payments are divided between the Fixed Account and the sub-accounts. For the Fixed Account portion, a portion of the purchase payment is allocated to a Guarantee Period of the Contract owner's choosing, so that at the end of the Guarantee Period, the Fixed Account allocation (including interest) will equal the entire amount of the original purchase payment. The remainder of the original purchase payment will be invested in the sub-accounts of the Contract owner's choosing. At the end of the Guarantee Period, the Contract owner will be guaranteed the amount of the original purchase payment, in addition to the investment performance of the subaccounts.

18. Account Value under the New Contract may be accessed at any time prior to the annuity commencement date by means of partial surrenders or full surrender. The annual withdrawal amount, which is not subject to the CDSC, is referred to herein as the "free withdrawal amount." During the first Contract year, the New Contract permits a free withdrawal amount of up to 15%

of purchase payments made during that Contract year. After the first Contract anniversary, the free withdrawal amount is equal to the amount of all purchase payments made before the last seven years that have not been withdrawn, plus the greater of: (a) All earnings minus any previous withdrawals taken during the life of the Contract, or (b) 15% of the amount of all purchase payments made during the last seven years, including the current Contract year, minus any free withdrawals taken during the current Account year. Any unused "free withdrawal amount" is not cumulative if it was based upon 15% of all purchase payments made during the last seven Contract years, but is cumulative if it was based on all earnings minus previous withdrawals.

19. The New Contract provides for a basic death benefit and 10 optional death benefit riders, each of which provides an enhanced death benefit. An optional death benefit election must be made, if at all, before the date Sun Life accepted the Contract owner's first purchase payment (the "Contract Date") and the Contract owner's 80th birthday and may not be changed after the New Contract is issued. Contract owners pay an additional charge during the accumulation phase for each optional death benefit rider elected. The "Maximum Anniversary Account Value ("MAV") Rider" enhances the death benefit by providing the greater of (a) any of the basic death benefits, or (b) the highest Account Value on any Account anniversary before the Contract owner's 81st birthday, adjusted for subsequent purchase payments, partial withdrawals and charges between that Account anniversary and the death benefit date. The "5% Premium Roll-Up ("5% Roll-Up") Rider" enhances the death benefit by providing the greater of (a) any of the basic death benefits, or (b) total purchase payments plus interest accruals, adjusted for partial withdrawals. The "Earnings Enhancement ("EEB") Rider" enhances the death benefit in one of two ways depending on the Contract owner's age on the Contract Date. If the Contract owner was 69 or younger on the Contract Date, the enhanced death benefit is (a) the greatest of any of the basic death benefit amounts, plus (b) 40% of the difference between Account Value and net purchase payments, capped at 40% of net purchase payments made prior to death, calculated as of the death benefit date. If the Contract owner was between 70 and 79 on the Contract Date, the enhanced death benefit is (a) the

greatest of any of the basic death benefit amounts, plus (b) 25% of the difference between Account Value and net purchase payments, capped at 25% of net purchase payments made prior to death, calculated as of the death benefit date. Net purchase payments under the EEB Rider will be adjusted for all partial withdrawals. The "Earnings Enhancement Plus ("EEB Plus") Rider" enhances the death benefit in one of two ways depending on the Contract owner's age on the Contract Date. If the Contract owner was 69 or younger on the Contract Date, the enhanced death benefit is (a) the greatest of any of the basic death benefit amounts, plus (b) 40% of the difference between Account Value and net purchase payments, up to a cap of 100% of net purchase payments made prior to death, calculated as of the death benefit date. After the 7th Contract year, the cap is 100% of the difference between net purchase payments and any purchase payments made within the 12 months prior to death. If the Contract owner was between 70 and 79 on the Contract Date, the enhanced death benefit is (a) the greatest of any of the basic death benefit amounts, plus (b) 25% of the difference between Account Value and net purchase payments, up to a cap of 40% of net purchase payments made prior to death, calculated as of the death benefit date. After the 7th Contract year, the cap is 40% of the difference between net purchase payments and any purchase payments made within the 12 months prior to death. The MAV Rider, the 5% Roll-Up Rider and the EEB Rider may be combined. The EEB Plus, EEB Plus MAV and EEB Plus 5% Roll-Up Riders are designed to be "comprehensive" riders and may not be combined with each other or with any of the other death benefit riders. The New Contract prospectus describes how the death benefit will be calculated if a Contract owner elects more than one optional death benefit rider.

20. The New Contract contains four annuity payment options. Annuity options are available on a fixed or variable basis, or a combination thereof.

21. The New Contract assesses a CDSC against partial or full surrenders in excess of the free withdrawal amount. The length of time from receipt of a purchase payment to the time of surrender determines the percentage of the CDSC. During the first seven years from each purchase payment, a CDSC will be assessed against the surrender of purchase payments that is a percentage of the amount surrendered (not to exceed the aggregate amount of the purchase payments made). The CDSC

ranges from 7% in year 1 to 0% in year 7 and after.

22. In certain states, the New Contract provides for a waiver of the CDSC if the Contract owner is confined to an eligible nursing home and has been there for at least the preceding 180 days, or shorter period in some states, and at least one year has passed since the Contract Date. Additionally, Sun Life does not impose the CDSC on amounts applied to provide an annuity, amounts Sun Life pays as a death benefit, except under the cash surrender method, or amounts transferred among the sub-accounts, between the sub-accounts and the Fixed Account, or within the Fixed Account.

23. During the life of the New Contract, Sun Life deducts a mortality and expense risk charge from the value of the assets of the Variable Account at an effective annual rate of 1.00% (if initial purchase payment was less than \$1 million) and 0.85% (if initial purchase payment was \$1 million or more). If a Contract owner annuitizes his New Contract prior to the eighth Contract year, Sun Life will deduct an additional 0.25% during the income phase.

24. During the accumulation phase, Sun Life deducts an account fee on each Contract anniversary. During Contract years one through five, the account fee is \$35. After Contract year five, Sun Life may change the account fee each year, but it will never exceed \$50. Sun Life deducts the account fee pro rata from each sub-account and each Guarantee Period based on the allocation of Account Value on a Contract owner's Contract anniversary. Sun Life will not charge the account fee if a Contract owner's Account Value has been allocated only to the Fixed Account during the applicable Contract year or if Account Value is \$75,000 or more on a Contract anniversary. During the income phase, Sun Life deducts an annual account fee of \$35 in equal amounts from each variable annuity payment made during the year. No fee is deducted from fixed annuity payments.

25. Sun Life deducts from the assets of the Variable Account an administrative expense charge at an annual effective rate equal to 0.15% during both the accumulation phase and the income phase.

26. Charges for the optional death benefit riders under the New Contract will vary based on the particular death benefit rider elected. The charge (as a percentage of daily Account Value) for various death benefit riders are as follows: 0.15% for the MAV, 5% Roll-Up and EEB Riders; 0.25% for the EEB Plus Rider and the combination EEB and MAV, EEB and 5% Roll-Up, and

MAV and 5% Roll-Up Riders; and 0.40% for the combination EEB and MAV and 5% Roll-Up, EEB Plus MAV, and EEB Plus 5% Roll-Up Riders.

27. Charges are deducted from purchase payments under the New Contract for premium tax, if applicable, imposed by a state or other governmental entity. Certain states impose a premium tax, currently ranging up to 3.5%. Sun Life pays premium taxes at the time imposed under applicable state law and recovers premium taxes upon full surrender, when a death benefit is paid or at annuitization.

#### *The Old Contract*

28. The MFS Regatta Gold Contract is offered pursuant to a registration statement under the 1933 Act (File No. 33-41628). The Old Contract is offered as a flexible payment group and individual tax-deferred variable annuity contract. It permits Account Value to be accumulated on a variable, fixed or combination variable and fixed basis. The minimum initial purchase payment is \$5,000 (\$10,000 in California, Texas and Maryland since October 1999).

29. Account Values of the New Contract currently may be allocated to the same 29 sub-accounts of the Variable Account available under the New Contract, each of which invests in an Underlying Fund of the MFS/Sun Life Series Trust.

30. Contract owners may participate in the DCA Program, Asset Allocation Program, Systematic Withdrawal Program, Interest Out Program, Portfolio Rebalancing Program and Secured Future Program. Under the Interest Out Program, the Contract owner may opt to be paid or reinvest the interest credited to all Guarantee Periods that the Contract owner has chosen. The withdrawals under both the Systematic Withdrawal Program and the Interest Out Program are subject to surrender charges.

31. Account Values may also be allocated to the one or more Fixed Account Guarantee Periods made available from time to time. Sun Life may change the guaranteed interest rates it offers from time to time, but no guaranteed interest rate will ever be less than 3% per year (4% per year for Contracts issued before November 1993), compounded annually. Early withdrawals from an allocation to a Guarantee Period, including cash withdrawals, transfers, and commencement of an annuity, may be subject to an MVA, which could increase or decrease Account Value. Guarantee Periods under the Old Contract are offered pursuant to a

registration statement under the 1933 Act filed on April 26, 1999 (File No. 333-77041) and will be carried forward upon exchange to the New Contract.

32. Account Value of an Old Contract may be accessed by means of partial surrenders or full surrender. The CDSC is not applied to the annual free withdrawal amount equal to 10% of purchase payments made during the last seven Contract years, including the current Contract year, plus all purchase payments made before the last seven Contract years that have not been previously withdrawn. For Old Contracts issued after November 1994, the annual withdrawal allowance may be carried forward and available for use in future years on a cumulative basis.

33. The Old Contract offers a basic death benefit determined as of the death benefit date. The Old Contract offers a choice of five annuity options. Each annuity option is available on a variable or fixed basis or combination thereof.

34. For maintenance of the Old Contract, an account fee equal to the lesser of \$30 or 2% of the value of the Old Contract is deducted from the Account Value of each Old Contract annually for the first five years of a Contract. After the fifth year, Sun Life may change this fee annually, but it will never exceed the lesser of \$50 or 2% of Account Value.

35. A mortality and expense risk charge at an annual rate of 1.25% of daily sub-account value and an administrative expense charge at an annual rate of 0.15% of daily sub-account value are deducted from Account Value.

36. Currently, no fee is imposed on the twelve transfers allowed per Contract year; however, Sun Life reserves the right to impose a transfer fee of up to \$15 per transfer. In addition, an MVA may be calculated on amounts transferred from or within the Fixed Account.

37. Charges for premium taxes, if any, imposed by a state or other governmental entity are deducted from purchase payments under the Old Contract. Certain states impose a premium tax, currently ranging up to 3.5%. Sun Life pays premium taxes at the time imposed under applicable state law and recovers the premium taxes upon full surrender, death or annuitization.

38. Applicants represent that the features and benefits of the New Contract will be no less favorable than under the Old Contract, except for differences in the annuitization options, free withdrawal amount and the Fixed Account Interest Out Program. Applicants also represent that the fees

and charges of the New Contract will be no higher than those of the Old Contract, with the exception of the annual account fee and the CDSC.

#### Terms of the Exchange Offer

39. Applicants propose to offer eligible owners of Old Contracts the opportunity to exchange their Old Contract for a New Contract by means of the Exchange Offer. Eligible MFS Regatta Gold Contract owners will be permitted to exchange their entire MFS Regatta Gold Contract for an MFS Regatta Choice Contract. To be eligible for the Exchange offer, Contract owners must (a) Have completed seven or more Contract years under their Old Contract, (b) not have made total purchase payments during the most recent five Contract years that are greater than 25% of the purchase payments made prior to the most recent seven Contract years, and (c) meet eligibility requirements of MFS Regatta Choice.

40. Sun Life, from its general account, will provide a 2% Bonus to each owner of an Old Contract who accepts the offer, which is based on the Account Value of each Old Contract surrendered in exchange for a New Contract. The Exchange Offer will provide that, upon acceptance of the offer, a New Contract will be issued with an Account Value equal to 2% greater than the Account Value of the Old Contract surrendered in the exchange. The Account Value of an Old contract ("Exchange Value"), together with the 2% Bonus and any additional purchase payments submitted with an Internal Exchange Application Form for the New Contract, will be applied to the New Contract as of the Exchange Date. No CDSC will be deducted upon the surrender of an Old Contract if received in connection with the Exchange Offer.

41. If a Contract owner exercises his or her right to cancel the New Contract during the free look period, the 2% Bonus will be returned to Sun Life and the Old Contract (including amounts allocated to Guarantee Periods) will be reinstated with an Account Value that reflects the investment experience while the New Contract was held. After expiration of the New Contract's free look period, withdrawals will be governed by the terms of the New Contract for purposes of calculating any CDSC. If a Contract owner surrenders his New Contract prior to the completion of the CDSC period, Sun Life will apply the applicable CDSC according to the New Contract's seven-year schedule. The Exchange Date will be the issue date of the New Contract for purposes of determining Contract years

and anniversaries after the Exchange Date.

42. Sun Life will send the Offering Letter to eligible Contract owners and their brokers that will explain the terms of the Exchange Offer and instruct eligible owners of Old Contracts to contact their brokers for assistance with completing the offer. Contract owners will be provided with a prospectus for the New Contract, the Offering Letter that compares the applicable Contracts and an Internal Exchange Application Form.

43. The Offering Letter will advise owners of an Old Contract that the Exchange Offer is specifically designed for those Contract owners who intend to continue to hold their Contracts as long-term investment vehicles. The Offering Letter will state that the offer is not intended for all Contract owners, and that it is especially not appropriate for any Contract owner who anticipates surrendering all or a significant part (*i.e.*, more than the "free withdrawal amount" on an annual basis) of his or her Contract before seven years. The Offering Letter will also state that Contract owners with amounts allocated to Old Contract Guarantee Periods will experience no change in Guarantee Period upon acceptance of the Exchange Offer. The Offering Letter will encourage Contract owners to carefully evaluate their personal financial situation when deciding whether to accept or reject the Exchange Offer. In addition, the Offering Letter will explain how an owner of an Old Contract contemplating an exchange may avoid the applicable CDSC on the New Contract if no more than the annual "free withdrawal amount" is surrendered and any subsequent deposits are held until expiration of the CDSC period. In this regard, the Offering Letter will state in concise, plain English that if the New Contract is surrendered during the initial CDSC period, (a) the 2% Bonus may be more than offset by the CDSC, and (b) a Contract owner may be worse off then if he or she had rejected the Exchange Offer.

44. The Internal Exchange Application Form, which will accompany the Offering Letter, will include an owner acknowledgment section with check-off boxes setting forth specific questions designed, among other things, to determine a Contract owner's suitability for the Exchange Offer. In particular, the form will seek affirmative confirmation that an owner does not anticipate a need to withdraw more than 15% per year (plus earnings) from the New Contract during the CDSC period. Other questions on the

form seek owner acknowledgment that the Exchange Offer is suitable only for a Contract owner if he or she expects to hold the New Contract as a long-term investment and the Contract owner may be better off rejecting the Exchange Offer if he or she plans to surrender the New Contract during the CDSC period. All boxes on the form must be checked off with affirmative responses before Sun Life will process the exchange. After making a suitability determination, broker-dealers will be required to forward completed forms to Sun Life for processing. In the event Sun Life receives an incomplete form (*i.e.*, a form with one or more acknowledgment boxes not checked off), Sun Life will not process the exchange, treating the transaction as "not in good order." Sun Life intends to contact any broker-dealer who submits a form not in good order, however, in no event will Sun Life process exchange transactions based on incomplete forms.

45. The Account Value of an Old Contract ("Exchange Value") together with the 2% Bonus and any additional purchase payments submitted with an Internal Exchange Application Form for the New Contract will be applied to the New Contract as of the Exchange Date. No CDSC will be deducted upon the surrender of an Old Contract if received in connection with the Exchange Offer. If a Contract owner surrenders his New Contract after the free look period but prior to the completion of the CDSC period, Sun Life will apply the CDSC based on the number of Contract years payment has been in a New Contract: 7% for Contract years 0-1, 7% for Contract years 1-2, 6% for Contract years 2-3, 6% for Contract years 3-4, 5% for Contract years 4-5, 4% for Contract years 5-6, 3% for Contract years 6-7, and 0% for Contract years 7 or more. If a Contract owner exercises his or her right to cancel the New Contract during the free look period, the 2% Bonus will be returned to Sun Life and the Old Contract (including amounts allocated to Guarantee Periods) will be reinstated with an Account Value that reflects the investment experience while the New Contract was held. The Exchange Date will be the issue date of the New Contract for purposes of determining Contract years and anniversaries after the Exchange Date.

46. To accept the Exchange Offer, an owner of an Old Contract must complete an Internal Exchange Application Form. Account Values will be allocated to the same Vairable Account investment options and the same Guarantee Periods under the New Contract on the Exchange Date. Account Values may

subsequently be reallocated under the new Contract (including to new Guarantee Periods of the Fixed Account) pursuant to Contract owner instructions. Payments submitted with the Internal Exchange Application Form will be assumed to be payments under the New Contract as of the date of issue of the New Contract. Applicants state that no adverse tax consequences will be incurred by those Contract owners who accept the Exchange Offer. As to non-qualified Contracts, the exchanges will constitute tax-free exchanges pursuant to Section 1035 of the Internal Revenue Code. Any exchange with respect to IRA Contracts will be a direct transfer and not taxable distributions to Contract owners.

47. Applicants state that the Exchange Offer is meant to encourage existing Contract owners to remain with Sun Life rather than surrender their Contracts in exchange for a competitor's product offering a similar bonus. If the New Contract CDSC is not permitted on the Exchange Value, Applicants believe that some Contract owners might exchange their New Contract intending to take advantage of the 2% Bonus and then surrender the New Contract intending to take advantage of the 2% Bonus and then surrender the New Contract without a CDSC. Without the CDSC, Sun Life would have no assurance that a Contract owner who accepted the Exchange Offer would persist for long enough for the 2% Bonus and payments to registered representatives to be recouped through standard fees from the ongoing operation of the New Contract. Applicants state that registered representatives will be paid commissions for soliciting exchanges that are less than they normally are paid for soliciting sales of the New Contract. Applicants state that compensating registered representatives for these exchanges is necessary in order to provide sufficient incentive for them to compete with competitors' registered representatives.

#### **Applicants' Conditions**

Applicants agree to the following conditions:

1. The Offering Letter will contain concise, plain English statements that (a) The Exchange Offer is suitable only for Contract owners who expect to hold their Contracts as long-term investments and (b) if the New Contract is surrendered during the initial CDSC period, the 2% Bonus may be more than offset by the CDSC and a Contract owner may be worse off than if he or she had rejected the Exchange Offer.

2. The Offering Letter will disclose in concise, plain English each aspect of the New Contract that will be less favorable than the Old Contract.

3. Sun Life will send the Offering Letter directly to eligible contract owners. A Contract owner choosing to exchange will then complete and sign an Internal Exchange Application Form, which will prominently restate in concise, plain English the statements required in Condition No. 1, and return it to Sun Life. If the Internal Exchange Application Form is more than two pages long, Sun Life will use a separate document to obtain Contract owner acknowledgment of the statements required in Condition No. 1.

4. Sun Life will maintain the following separately identifiable records in an easily accessible place for the time periods specified below in this Condition No. 4, for review by the Commission upon request: (a) Records showing the level of exchange activity and how it relates to the total number of Contract owners eligible to exchange (quarterly as a percentage of the number eligible); (b) copies of any form of Offering Letter and other written materials or scripts for presentations by representatives regarding the Exchange Offer that Sun Life prepares or approves, including the dates that such materials were used; (c) records containing information about each exchange transaction that occurs, including the name of the Contract owner; Old and New Contract numbers; the amount of the CDSC waived on surrender of the Old Contract; Guarantee Periods carried forward; optional death benefits selected; Bonus paid; the name and C.R.D. number of the registered representative soliciting the exchange, firm affiliation, branch office address, telephone number, and name of the registered representative's broker-dealer; commission paid; the Internal Exchange Application Form (and separate document, if any, used to obtain the Contract owner's acknowledgment of the statements required in Condition No. 1) showing the name, date of birth, address and telephone number of the Contract owner, and the date the Internal Exchange Application Form (or separate document) was signed; amount of Account Value exchanged; and persistency information relating to the New Contract including the date of any subsequent surrender and the amount of CDSC paid on surrender; and (d) logs showing a record of any Contract owner complaint about the exchange; state insurance department inquiries about the exchange; or litigation, arbitration or other proceedings regarding any

exchange. The logs will include the date of complaint or commencement of proceeding; name and address of the person making the complaint or commencing the proceeding; nature of the complaint or proceeding; and persons named or involved in the complaint or proceeding. Applicants will retain records specified in (a) and (d) for six years after the date the records are created, records specified in (b) for a period of six years after the date of last issue, and records specified in (c) for a period of two years after the date that the initial CDSC period of the New Contract ends.

#### **Applicants' Legal Analysis**

##### *Section 11*

1. Section 11(a) of the Act makes it unlawful for any registered open-end company, or any principal underwriter for such a company, to make or cause to be made an offer to the holder of a security of such company, or of any other open-end investment company, to exchange his security for a security in the same or another such company on any basis other than the relative net asset values of the respective securities, unless the terms of the offer have first been submitted to and approved by the Commission or are in accordance with Commission rules adopted under section 11.

2. Section 11(c) of the Act, in pertinent part, requires, in effect, that any offer of exchange of the securities of a registered unit investment trust for the securities of any other investment company be approved by the Commission or satisfy applicable rules adopted under section 11, regardless of the basis of the exchange.

3. The purpose of section 11 of the Act is to prevent "switching," the practice of inducing security holders of one investment company to exchange their securities for those of a different investment company, "solely for the purpose of exacting additional selling charges." That type of practice was found by Congress to be widespread in the 1930s prior to adoption of the Act.

4. Section 11(c) of the Act requires Commission approval (by order or by rule) of any exchange, regardless of its basis, involving securities issued by a unit investment trust, because investors in unit investment trusts were found by Congress to be particularly vulnerable to switching operations.

5. Applicants assert that the potential for harm to investors perceived in switching was its use to extract additional sales charges from those investors.

6. Applicants assert that the terms of the proposed Exchange Offer do not present the abuses against which section 11 was intended to protect. The Exchange Offer was designed to allow Sun Life to compete on a level playing field with its competitors who are making bonus offers to its Contract owners. No addition sales load or other fee will be imposed at the time of exercise of the Exchange Offer.

7. Rule 11a-2, by its express terms, provides Commission approval of certain types of offers of exchange of one variable annuity contract for another. Applicants assert that other than the relative net asset value requirement (which is not satisfied solely because Contract owners accepting the offer will be given a 2% Bonus) the only part of Rule 11a-2 that would not be satisfied by the proposed Exchange Offer is the requirement that payments under the exchanged contract (the Old Contract) be treated as if they had been made under the acquired contract (the New Contract) on the dates actually made. This provision of Rule 11a-2 is often referred to as a "tacking" requirement because it has the effect of "tacking together" the CFSC expiration periods of the exchanged and acquired contracts.

8. Applicants assert that the absence of tacking does not mean that an exchange offer cannot be very attractive and beneficial to investors. Applicants state that the proposed Exchange Offer would assure an immediate and enduring economic benefit to investors. The 2% Bonus would be applied immediately and the fact that asset-based charges would be decreased by the exchange (except for those who select two or three additional optional death benefit riders) would assure that the benefit would endure. An owner of an Old Contract who intends to continue to hold the Contract as a long-term retirement planning vehicle will be significantly advantaged by the Exchange Offer because this 2% Bonus will automatically be added to his or her Account Value upon receipt of an enhanced New Contract. No sales charge will ever be paid on the amounts rolled over in the exchange unless the New Contract is surrendered before expiration of the New Contract's CDSC period.

9. Applicants assert that tacking should be viewed as a useful way to avoid the need to scrutinize the terms of an offer of exchange to make sure that there is not abuse. Tacking is not a requirement of Section 11. Rather, it is a creation of a rule designed to approve the terms of offers of exchange "sight unseen." Tacking focuses on the closest

thing to multiple deduction of sales loads that is possible in a CDSC context—multiple exposure to sales loads upon surrender or redemption. If tacking and other safeguards of Rule 11a-2 are present, there is no need for the Commission or its staff to evaluate the terms of the offer. The absence of tacking in this fully scrutinized Section 11 application will have no impact on offers made pursuant to the rule on a "sight unseen" basis.

10. Applicants assert that the terms of the Exchange Offer are better than those of its competitors. No tacking is required when Sun Life's competitors offer than variable annuity contracts to owners of Old Contracts or when Sun Life makes such an offer to competitor's contract owners. In those exchanges, unlike the ones proposed here, the exchanging Contract owners actually must pay any remaining CDSC on the exchanged Contract at the time of the exchange.

11. To the extent there are differences in the Contracts, those differences relate to enhanced contractual features and charges that are fully described in prospectuses for the New Contracts. Furthermore, the Offering Letter will contain concise, plain English statements that (a) the Exchange Offer is suitable only for Contract owners who expect to hold their Contracts as long-term investments and (b) if the New Contract is surrendered during the initial CDSC period, the 2% Bonus may be more than offset by the CDSC and a Contract owner may be worse off than if or she had rejected the Exchange Offer. Applicants assert that Contract owners should have the opportunity to decide, on the basis of full and fair disclosure, whether the enhancements of the New Contracts and the 2% Bonus justify accepting the offer.

Sections 2(a)(32), 22(c), 27(i)(2)(A) and Rule 22c-1

12. Section 6(c) of the 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 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 Act. Applicants seek exemption pursuant to section 6(c) from sections 2(a)(32), 22(c), and 27(i)(2)(A) of the Act and Rule 22c-1 thereunder to the extent deemed necessary to permit Sun Life to issue New Contracts that provide for a 2% Bonus upon exchange and to recapture the 2% Bonus when a

Contract owner returns a New Contract to Sun Life for a refund during the free look period.

13. Applicants assert that with respect to refunds paid upon the return of the New Contract within the free look period, the amount payable by Sun Life must be reduced by the 2% Bonus amount. Otherwise, purchasers could apply for the New Contract for the sole purpose of exercising the free look provision and making a quick profit. Applicants represent that it is not administratively feasible to track the 2% Bonus amount in the Variable Account after the 2% Bonus is applied. Accordingly, the asset-based charges applicable to the Variable Account will be assessed against the entire amounts held in the Variable Account, including the 2% Bonus amount, during the free look period. As a result, during such period, the aggregate asset-based charges assessed against a Contract owner's Account Value will be higher than those that would be charged if the Contract owner's Account Value did not include the 2% Bonus.

14. Subsection (i) of Section 27 of the 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.

15. Applicants submit that the recapture of the 2% Bonus upon return of a New Contract during the free look period would not deprive the owner of his or her proportionate share of the issuer's current net assets. Applicants assert that a Contract owner's interest in the 2% Bonus allocated to his or her Account Value upon exchange is not vested until the applicable free look period has expired without return of the Contract. Until the right to recapture has expired and 2% Bonus is vested. Applicants assert that Sun Life retains the right and interest in the 2% Bonus, although not in the earnings attributable to that amount. Applicants assert that when Sun Life recaptures the 2% Bonus, it is merely retrieving its own

assets, and the Contract owner has not been deprived of a proportionate share of the Variable Account's assets because his or her interest in the Bonus amount has not vested.

16. In addition, Applicants assert that permitting a Contract owner to retain a 2% Bonus under a New Contract upon the exercise of the right to cancel during the free look period would not only be unfair, but would also encourage individuals to exchange into a New Contract with no intention of keeping it and returning it for a quick profit. The amounts recaptured equal the 2% Bonus provided by Sun Life from its general account assets, and any gain would remain a part of the Contract owner's Account Value. In addition, the amount the Contract owner receives in the circumstances where the 2% Bonus is recaptured will always equal or exceed the surrender value of the New Contract.

17. Applicants submit that the provisions for recapture of the 2% Bonus under the New Contract does not violate sections 2(a)(32) and 27(i)(2)(A) of the Act. However, to avoid any uncertainty as to full compliance with the 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 the 2% Bonus under the circumstance described in the Application with respect to the New Contract, without the loss of relief from section 27 provided by section 27(i).

18. Section 22(c) of the 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 to accomplish the same purposes as contemplated by section 22(a). 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.

19. Sun Life's recapture of the 2% Bonus might arguably 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 Account. Applicants contend, however, that the recapture of the Bonus does not violate section 22(c)

and Rule 22c-1. Applicants argue that the recapture of the 2% Bonus does not involve either of the evils that Rule 22c-1 was intended to eliminate or reduce as far as reasonably practicable, namely: (a) 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 (b) other unfair results, including speculative trading practices. The proposed recapture of the 2% Bonus does not pose such a threat of dilution. To effect a recapture of the 2% Bonus, Sun Life will redeem interests in a Contract owner's Contract at a price determined on the basis of the current net asset value of that Contract. The amount recaptured will equal the amount of the 2% Bonus that Sun Life paid out of its general account assets. Although the Contract owner will be entitled to retain any investment gain attributable to the 2% Bonus, the amount of that gain will be determined on the basis of the current net asset value of the Contract. Thus, Applicants state that no dilution will occur upon the recapture of the 2% Bonus. 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 2% Bonus.

20. Applicants argue that Section 22(c) and Rule 22c-1 should not apply because neither of the harms that Rule 22c-1 was meant to address are found in the recapture of the 2% Bonus. However, to avoid any uncertainty as to full compliance with the 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 2% Bonus under the New Contract.

### Conclusion

For the reasons summarized above, Applicants submit that the Exchange Offer is consistent with the protections provided by Section 11 of the Act and that approval of the terms of the Exchange Offer is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act. Applicants further submit that their request for exemptions from Sections 2(a)(32), 22(c) and 27(i)(2)(A) of the Act and Rule 22c-1 thereunder meet the standards set out in Section 6(c) of the Act. Applicants submit that the requested order should therefore be granted.

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. 34-443553; File No. SR-CBOE-2001-18]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Incorporated To Exempt Certain Deep-in-the-Money Options Transactions From the Exchange Marketing Fee

May 25, 2001.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 10, 2001, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The CBOE proposes to make a change to its marketing fee to exempt call/put "combo" transactions from the fee. The text of the proposed rule change is available at the CBOE and at the Commission.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

<sup>2</sup> 17 CFR 240.19b-4.