

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-25299/File No. 812-12572]

Mutual of America Life Insurance Company, et al.

November 26, 2001.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").**ACTION:** Notice of an application for an order pursuant to section 11(a) of the Investment Company Act of 1940 (the "Act").**APPLICANTS:** Mutual of America Life Insurance Company ("Mutual of America"), Mutual of America Separate Account No. 2 (the "Annuity Account") and Mutual of America Separate Account No. 3 (the "VUL Account," and together with the Annuity Account, "Mutual Accounts").**SUMMARY OF APPLICATION:** Applicants seek an order approving the terms of a proposed offer of exchange of interests in the Mutual Accounts for interests issued by The American Life Insurance Company of New York ("American Life").**FILING DATE:** The application was filed on July 13, 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 December 21, 2001, and 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, SEC, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants, Deborah S. Becker, Esq., Senior Vice President and Associate General Counsel, Mutual of America, 320 Park Avenue, New York, New York 10022.**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 Public

Reference Branch of the Commission, 450 Fifth Street, NW., Washington DC 20549-0102 (tel. (202) 942-8090).

Applicants' Representations

1. Mutual of America is a mutual life insurance company organized under the laws of the State of New York in 1945, having its home office at 320 Park Avenue, New York, New York 10022. Mutual of America is authorized to sell individual and group life insurance policies, variable annuity contracts and variable universal life policies in 50 states and the District of Columbia.

2. The Annuity Account is a separate account of Mutual of America established for the purpose of providing an investment medium for variable contracts, including individual annuities. It is registered under the Act as a unit investment trust (File No. 811-4679), and three registration statements on Form N-4 filed pursuant to the Securities Act of 1933 ("1933 Act") are in effect for sales of interests under group and individual variable accumulation annuity contracts (File Nos. 2-90201, 33-5609 and 33-11023). One registration statement (File No. 2-90201) covers several forms of contract, including Individual Retirement Annuity ("IRA") Contracts and Flexible Premium Deferred Annuity ("FPA") Contracts. The IRA and FPA Contracts issued by Mutual of America are herein referred to as the "Contracts."

3. The VUL Account is a separate account of Mutual of America established for the purpose of providing an investment medium for variable contracts, including individual life policies. It is registered under the Act as a unit investment trust (File No. 811-9487), and a registration statement on Form S-6 filed pursuant to the 1933 Act is in effect for sales of interests under individual variable universal life insurance policies (the "Policies") (File No. 333-83413).

4. The Mutual Accounts currently hold assets in their respective seventeen subaccounts ("investment funds"), each of which invests in shares of a corresponding mutual fund portfolio (collectively, the "Underlying Funds"). Each of the Underlying Funds is a series of a management investment company registered under the Act and its shares are registered for sale under the 1933 Act.

5. Mutual of America serves as the principal underwriter of the Contracts and the Policies, and also is the principal underwriter for the Mutual of America Investment Corporation. It is a broker-dealer registered under the Securities and Exchange Act of 1934

and is a member of the National Association of Securities Dealers, Inc.

6. Mutual of America intends to make offers of exchange to the holders ("Owners") of variable annuity and life insurance products that were issued by American Life at a time when American Life was an indirectly wholly-owned subsidiary of Mutual of America. American Life is a stock life insurance company organized under the laws of the State of New York in 1955, with headquarters at 435 Hudson Street, New York, New York 10014, and substantial operations at 300 Distillery Commons, Louisville, Kentucky 40206.

7. The American Separate Account No. 2 (the "American Annuity Account") is a separate account of American Life established for the purpose of providing an investment medium for variable contracts, including individual annuities. The American Annuity Account is registered under the Act as a unit investment trust (File No. 811-7904), and a registration statement on Form N-4 filed pursuant to the 1933 Act is in effect for sales of interests under IRA Contracts and FPA Contracts, which are variable individual accumulation annuity contracts (File No. 33-66406). The American IRA and American FPA Contracts issued by American Life are herein referred to as the "American Contracts."

8. The American Separate Account No. 3 (the "American VUL Account") is a separate account of American Life established for the purpose of providing an investment medium for variable contracts, including individual life policies. The American VUL Account is registered under the Act as a unit investment trust (File No. 811-8368), and a registration statement on Form S-6 filed pursuant to the 1933 Act is in effect for sales of interests under individual variable universal life insurance policies (the "American Policies") (File No. 33-75280).

9. The American Annuity Account and American VUL Account are herein called the "American Accounts." The American Accounts each have seventeen investment funds that invest in shares of corresponding Underlying Funds.

10. American Life ceased selling the American Contracts and Policies as of April 1, 2000. In reliance on the Commission's no-action position in *Great-West Life & Annuity Insurance Co.* (publicly available October 23, 1990), American Life in 2001 did not file updating amendments to the registration statements covering the American Contracts and the American Policies.

11. On March 16, 2001, Mutual of America sold to a third party all of the

outstanding common stock of a holding company, which owned all of the outstanding common stock of American Life. For accounting purposes, the sale was effective as of February 28, 2001. Under an Indemnity Reinsurance Agreement, dated as of February 28, 2001, between Mutual of America and American Life (the "Indemnity Agreement"), Mutual of America has indemnity reinsured American Life's general account liabilities under the American Contracts and Policies. Under an Administrative Services Agreement, dated as of February 28, 2001, between Mutual of America and American Life (the "Servicing Agreement"), Mutual of America provides all administrative services for the American Contracts and America Policies, including administrative services with respect to the American Accounts. Under an Amendment, dated as of February 28, 2001, to the Distribution and Administration Agreement between Mutual of America and American Life, Mutual of America is the principal underwriter of the American Contracts and Policies for new contributions and premiums paid by existing Owners (the "Distribution Agreement"). Mutual of America entered into the Servicing Agreement, the Indemnity Agreement and the Distribution Agreement to facilitate the sale of American Life to a third party.

12. American Life and Mutual of America entered into a reinsurance and assumption agreement, which was effective April 1, 2000 (the "assumption agreement"), relating to various individual annuity contracts and individual life policies, including the then outstanding American Contracts and Policies. In the assumption agreement, American Life ceded all of its obligations, rights and liabilities under the American Contracts and Policies to Mutual of America on an assumption reinsurance basis, and Mutual of America agreed to assume all such obligations, rights and liabilities transferred to it, subject to compliance with applicable state insurance laws and regulations.

13. Under the insurance laws and regulations of some states, Owners had the right to opt out of the proposed assumption reinsurance of their contracts by Mutual of America, and in some states Owners were required to affirmatively consent to the assumption reinsurance. In addition, the New York State Insurance Department has administratively prohibited the assumption reinsurance of variable annuity contracts and variable life insurance policies issued in New York when contractholders are no longer New

York residents. Upon effectiveness of the assumption agreement, a substantial portion of the American Contracts and Policies were transferred to Mutual of America, which replaced American Life as the issuer of such Contracts and Policies. Mutual of America, however, was not able to assumption reinsure American Contracts and Policies when an Owner: (a) Was required under applicable state insurance law to give affirmative consent to Mutual of America's assumption reinsurance and did not provide such consent; (b) had the right under applicable state insurance law to opt out of Mutual of America's assumption reinsurance and timely exercised such right; or (c) was a resident of the State of New York when the American Contract or Policy was issued and subsequently moved to another state.

14. On November 4, 1999, Mutual of America, the Mutual Accounts, American Life and the American Accounts (the "Initial Applicants") filed with the Commission an application for an order pursuant to Section 17(b), Section 17(d) and Rule 17d-1 thereunder, and Section 11(a) of the Act, in connection with the assumption agreement and the reinsurance transactions contemplated thereunder. Among other things, the application requested an order to permit the offers of exchange when Owners had opt out rights or the consent of Owners was required in connection with the assumption reinsurance of American Contracts and Policies by Mutual of America. The Initial Applicants filed an amended and restated application on February 16, 2000 (the "Initial Application"), and the Commission issued an Order granting the requested exemptions to the Initial Applicants on March 13, 2000, Inv. Co. Act Rel. No. 24336, File No. 812-11840 (the "Initial Order").

15. At the time of the Initial Application, Mutual of America and American Life contemplated that they would make additional offers of exchange only through requests for consent to assumption by Owners whose American Contracts and Policies were not assumption reinsured effective April 1, 2000. Accordingly, the exemptive relief that was requested in the Initial Application and granted in the Initial Order with respect to offers of exchange contemplated that such offers would be made in connection with assumption reinsurance transactions, either before or after the sale of American Life by Mutual of America.

16. Mutual of America intends to make offers of exchange to Owners,

pursuant to which Owners would exchange their American Contracts and Policies for Contracts and Policies, respectively. A reduction in the number of Owners, or their elimination, would reduce or eliminate, respectively, the cost to Mutual of America of providing administrative services for the American Contracts and Policies and the American Accounts, as required under the Servicing Agreement, and for reinsuring American Life's general account liabilities, pursuant to the Indemnity Agreement. It would be less expensive for Mutual of America to provide administrative services only to owners of its Contracts and Policies rather than to provide such services for both Contracts and Policies and American Contracts and Policies. The exchanges also would benefit Owners, because owners of Contracts and Policies may utilize Mutual of America's regional service offices and may use Mutual of America's toll-free telephone number and Internet web site for transactions as well as to obtain contract information, while Owners must send transaction requests in writing to the New York administrative office that is servicing the American Contracts and Policies and may use a toll free number only to obtain information. American Life will not issue additional contracts or policies through the American Accounts, and therefore the Accounts are expected to decline in asset size and number of Owners over a period of time.

17. The terms of the Contracts and Policies are identical to the American Contracts and Policies except for the identity of the issuing company and depositor of the separate account, the funding separate account, and the right of owners of Contracts and Policies to participate in the divisible surplus of Mutual of America, a mutual company. In addition, when Mutual of America issues policies in exchange for American Policies, it will waive the suicide clause and will not require medical underwriting. As a consequence, Owners will not be subject to new incontestability periods under their Policies for suicide or medical conditions.

18. The Underlying Funds, the current administrative charges and the maximum permitted administrative charges, the mortality and expense risk charges, and the rates for the cost of insurance charges in the case of the Policies are identical under the Contracts and Policies and the American Contracts and Policies, respectively. The unit values for the investment funds of the Annuity Account and the American Annuity

Account are identical, and the unit values for the investment funds of the VUL Account and the American VUL Account also are identical.

19. Mutual of America will send offers of exchange to Owners who, after being contacted by a Mutual of America representative, indicate their interest in receiving the exchange materials. The materials will include a current prospectus and any supplements thereto for the Contract or Policy, as appropriate. Owners who wish to accept the offers of exchange will complete and return the exchange materials to Mutual of America, which will review them for completeness. When an Owner's exchange materials are incomplete, a representative of Mutual of America will contact the Owner to attempt to obtain any missing information or signatures.

20. Applicants expect that Owners will have no adverse tax consequences from the exchanges. Exchanges of American IRA Contracts will be non-taxable direct transfers under the Internal Revenue Code, as amended (the "Code"), and exchanges of American FPA Contracts and American VUL Policies will be tax-free exchanges under Section 1035 of the Code.

21. In certain limited circumstances, a Policy may be treated differently for tax purposes than the American Policy being exchanged. Prior to making offers of exchange to Owners, Mutual of America will review the amount of insurance coverage under each American Policy, the initial premium to be paid under the Policy issued in exchange and the Policy's scheduled premiums to ascertain whether the Policy (a) Would be a modified endowment contract ("MEC") under the Code when the American Policy is not an MEC, (b) would be unable to accept additional premiums, because such payments would cause the Policy to not be treated as life insurance under the Code when premiums could be paid under the American Policy, (c) would become an MEC upon the payment of additional scheduled premiums, when payment of such premiums under the American Policy would not cause that Policy to become an MEC, or (d) would fail to continue to qualify as life insurance as defined in the Code. As part of any exchange offer made in such situation, Mutual of America will notify the Owner in writing of the potential change in tax treatment that would result from the issuance of a Policy in exchange for the Owner's American Policy. Mutual of America may suggest an increase in the face amount of the insurance coverage under the Policy in an amount sufficient so that the

situations in (a)–(d), as the case may be, would not apply to the Policy, and Mutual of America will not issue a Policy if it would not be deemed life insurance under the Code.

22. When an Owner's exchange materials are complete, Mutual of America will provide the surrender request to American Life, which will redeem the shares of the Underlying Funds held by the American Accounts that are attributable to the American Contract or Policy exchanged and arrange for the withdrawal of any funds held in American Life's general account. An Owner's account balance as of the close of business on the date of surrender of the American Contract or Policy, without the imposition of any sales charge, as of the close of business on the purchase order date. The applicable Mutual Account will purchase shares of the Underlying Funds, and/or Mutual of America will allocate amounts to its General Account,¹ based on the allocation instruction set forth on the purchaser's application and the amount transferred to Mutual of America from American Life.

23. Because Mutual of America is providing all administrative services for the American Contracts and Policies and the American Accounts and has indemnity reinsured American Life's general account portion of the American Contracts and Policies, Mutual of America will implement the surrender of an American Contract or Policy and issue its Contract or Policy on the same day. As a result, the redemption order given to the Underlying Funds by Mutual of America, as servicer for American Life and the American Accounts, and the purchase order given to the Underlying Funds by Mutual of America, as issuer of the Contract or Policy, will be placed with the Underlying Funds on the same day. Assuming that the Owner selects the same investment allocations in the Mutual of America application as the Owner has selected under the American Contract or Policy, the Underlying Funds will be able to offset the redemption and purchase orders, and therefore the exchange will have no impact on the Underlying Funds' portfolio securities. The Underlying Funds are not parties to the exchange offers, and the terms of the Participation Agreements pursuant to which they sell shares to and redeem shares from the American Accounts and Mutual

Accounts are not affected by the exchanges.

24. Applicants anticipate that some Owners will retain their American Contracts and Policies, which will remain unchanged. Mutual of America will continue to provide administrative services to these Owners pursuant to the Servicing Agreement, and will indemnify reinsure the general account portion of such Contracts and Policies pursuant to the Indemnity Agreement. As previously noted, the American Accounts are expected to decline in asset size and number of Owners over a period of time. Depending on the number of Owners who remain in each of the American Accounts, either one or both of the American Accounts may be deregistered pursuant to Section 8(f) of the Act, immediately following the exchanges made in response to the offers or at some future date.

Applicants Legal Analysis

1. Section 11(a) of the Act makes it unlawful for a registered open-end investment company or its principal underwriter to offer securities of an investment company in exchange for other securities of the same or another investment company, unless the exchange either is based on the respective net asset values of the securities or the terms of the offer have received prior approval of the Commission. Section 11(c) provides that in the case of a unit investment trust, the prohibition of Section 11(a) is applicable irrespective of the basis of exchange.

2. The exchange offers to be made to Owners by Mutual of America relate to contracts that participate in the American Accounts and the Mutual Accounts, which are registered unit investment trusts. Therefore, the offers of exchange fall within the prohibitions of Section 11(a) and (c).²

² In *Alexander Hamilton Funds* (available July 20, 1994), the Commission stated that the legislative history of Section 11(a) shows "Congress primarily intended to deter switching between affiliated investment funds," rather than offers by unaffiliated investment companies, so long as offers are at relative net asset values. It noted, however, that "there may be circumstances when Section 11(a) would apply to exchange offers between unaffiliated funds," explaining in footnote 4: "For example, Section 11 would apply if two unaffiliated fund complexes agree, formally or informally, to offer a waiver of sales load or some other incentive for an exchange of shares from one fund family to the other." Mutual of America has an economic incentive to issue Contracts and Policies in place of American Contracts and Policies in order to reduce or eliminate the costs of administering the American Contracts and Policies and the American Accounts and of indemnity reinsuring the general account portion of the American Contracts and Policies. In addition, Owners may not place orders

¹ The transfer of general account amounts under American Contracts and Policies to Contracts and Policies issued in exchange will be without charge or expense to the Owners.

3. The Commission in the Initial Order granted exemptions for exchange offers made in the context of opt-out rights and affirmative consent for assumption reinsurance transactions. Those exemptions are not applicable to the proposed exchange offers, solely because the proposed offers will not involve any assumption reinsurance transactions.

4. Applicants request an order pursuant to Section 11(a) approving the terms of Mutual of America's proposed offers of exchange to Owners of American Contracts and Policies.

5. Applicants submit that the terms of the proposed exchange offers are fair to Owners and should be approved by the Commission. Since no sales or other charges will be assessed in connection with the exchanges made pursuant to the offers, the sales charge abuse to which Section 11(a) is directed will not be present.³ The only change resulting from the exchange of American Contracts and Policies for Mutual of America's Contracts and Policies is in the identity of the issuing insurance company and depositor of the separate account, the funding separate account, and the right of owners of Contracts and Policies to participate in Mutual of America's divisible surplus. In addition, the unit values of the investment funds in the Annuity Account are identical to those of the American Annuity Account, and the unit values of the investment funds in the VUL Account are identical to those of the American VUL Account. Applicants believe as well that the exchanges of American IRA Contracts will be tax-free direct transfers and that the exchanges of American FPA Contracts and American Policies will come within the provisions of Section 1035 of the Code, so that there will be no adverse tax consequences for Owners as a result of the exchanges. As part of the exchange offers, Mutual of America will disclose to each Owner when the tax treatment for the Policy would be different than that of the American Policy in that the Policy would be an MEC, would not be able to accept additional premiums because such payments would cause the Policy to not

via a toll free telephone number of Internet web site, while holders of Contracts and Policies may place orders using Mutual of America's toll free telephone number or its web site, which may provide an incentive to Owners to make the exchanges.

³ The Commission's Report on the "Public Policy Implications of Investment Company Growth," H.R. Rep. No. 2337 (1966) at p. 331, stated:

Section 11(a) was specifically designed to prevent the practices of "switching" and "reloading" whereby the holders of securities were induced to exchange their certificates for new certificates on which a new load would be payable.

be treated as life insurance, would become an MEC upon the payment of additional scheduled premiums or would not qualify as life insurance under the Code. Mutual of America will not issue a Policy if it would not be deemed life insurance under the Code. Mutual of America has substantial assets and surplus to assure the performance of its obligations under the Contracts and Policies, and it currently performs all administrative services for the American Contracts and Policies pursuant to the Servicing Agreement.

6. Owners will receive current prospectuses for the Contracts or Policies, as applicable. The exchanges of interests will be made on the basis of relative net asset values. The provisions of the Contracts and Policies will be identical to the provisions of the American Contracts and American Policies, respectively, except for the addition of the right to participate in Mutual of America's divisible surplus. Owners will have investment funds available in the Mutual Accounts with the same Underlying Funds as available in the America Accounts.

7. Applicants note that the Commission has previously approved offers of exchange in circumstances when Rule 11a-2 would not apply because the insurance companies were not affiliated or might not be affiliated at the time certain exchange offers for variable annuities were made or consummated relating to assumption reinsurance transactions.⁴ In *Family Life Insurance Company, et al.*, the applicants noted that the offers of exchange for the variable annuity contracts involved would satisfy all of the conditions of Rule 11a-2 if made prior to the sale of the ceding company. Applicants state that the terms of their proposed exchange offers would satisfy all of the conditions of Rule 11a-2 applicable to affiliated companies if they had been made prior to the sale of American Life by Mutual of America and that the offers satisfy the standards of the Commission for determining that

⁴ *Family Life Insurance Company, et al.*, Inv. Co. Act Rel. Nos. 18179 (June 3, 1991) (notice) and 18217 (July 2, 1991) (order), involved exchange offers under assumption reinsurance between affiliates in contemplation of the sale of the ceding company; and *The Lincoln National Life Insurance Company, et al.*, Inv. Co. Act Rel. Nos. 22189 (Aug. 29, 1996) (notice) and 22251 (Sept. 26, 1996) (order); *AUSA Life Insurance Company, Inc. et al.*, Inv. Co. Act Rel. Nos. 20518 (Aug. 31, 1994) (notice) and 20587 (Sept. 28, 1994) (order); and *Pacific Corinthian Life Insurance Company, et al.*, Inv. Co. Act Rel. Nos. 18925 (Sept. 2, 1992) (notice) and 18975 (Sept. 24, 1992) (order), involved exchange offers under variable annuity assumption reinsurance transactions between non-affiliates when Rule 11a-2 would have been available if the insurance companies had been affiliated.

the terms of an exchange offer are fair to contract holders. Applicants further state that the terms of the proposed exchange offers are identical to the exchange offers approved by the Commission in the Initial Order except that the proposed offers would not be made in connection with assumption reinsurance transactions.

Conclusion

On the basis of the precedents cited and the showing by Applicants that the terms of the exchange offers involved are fair, Applicants submit that the requested relief should 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. 34-45094; File No. SR-ISE-00-17]

Self Regulatory Organizations; International Securities Exchange LLC; Order Granting Approval to Proposed Rule Change and Amendments No. 1 and No. 2 by the International Securities Exchange LLC Relating to Its Arbitration Program

November 21, 2001.

I. Introduction

On November 20, 2000, the International Securities Exchange LLC ("ISE") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to make certain changes to its arbitration rules. These changes were intended to reflect and facilitate ISE's regulatory services agreement with NASD Regulation, Inc. ("NASDR") pursuant to which, among other things, NASDR provides services related to arbitration proceedings to involving ISE members.³ On March 5, 2001, the Exchange filed Amendment

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Commission notes that although the regulatory services agreement at issue is between ISE and NASDR, the actual administration of arbitrations on behalf of ISE members pursuant to the agreement will be performed by a recently-created NASD subsidiary, NASD Dispute Resolution, which performs all arbitration and mediation services for NASD members.