extent deemed necessary to permit them to recapture the Credit under the Contracts.

**Conclusion**

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

Applicants further submit, for the reasons stated herein, that their exemptive requests meet the standards set out in Section 6(c) of the 1940 Act, namely, that the exemptions requested are necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act, and that, therefore, the Commission should grant the requested order.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 02–14716 Filed 6–11–02; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. IC–25604 ; File No. 812–11490]**

## Lord Abbett Series Fund, Inc., et al.; Notice of Application

June 4, 2002.

**AGENCY:** Securities and Exchange Commission (''SEC'' or ''Commission'').

**ACTION:** Notice of application for an order pursuant to Section 6(c) of the Investment Company Act of 1940 (the ''1940 Act'') granting relief 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)(b)(15) thereunder.

*Summary of Application:* Applicants seek an order to permit shares of any current or future series of the Lord Abbett Series Fund, Inc. (''Fund'') and shares of any other investment company that is designed to fund variable insurance products and for which Lord, Abbett & Co. (''Adviser''), or any of its affiliates, may serve now or in the future, as investment adviser, administrator, manager, principal underwriter or sponsor (the Fund together with such other investment companies, the ''Insurance Products Funds'') to be sold to, and held by (a) separate accounts funding variable annuity and variable life insurance contracts issued by both affiliated and unaffiliated life insurance companies (''Participating Insurance Companies''); (b) qualified pension and retirement plans outside of the separate account context (''Qualified Plans'' or ''Plans''); and (c) the Adviser or any of its affiliates.

*Applicants:* Lord Abbett Series Fund, Inc. and Lord, Abbett & Co.

*Filing Date:* The application was filed on February 1, 1999, and amendments thereto were filed on August 17, 2001, January 17, 2002, and June 3, 2002.

*Hearing or Notification of Hearing:* An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the Secretary of the SEC and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on July 1, 2002, and should be accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the SEC.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street, NW, Washington, DC 20549–0506. Applicants, c/o Blazzard, Grodd & Hasenauer, P.C., 943 Post Road East, Westport, CT 06880, Attention: Raymond A. O'Hara III, Esq.

**FOR FURTHER INFORMATION CONTACT:** Harry Eisenstein, Senior Counsel, or William Kotapish, Assistant Director, Office of Insurance Products, Division of Investment Management, at (202) 942–0670.

**SUPPLEMENTARY INFORMATION:** Following is a summary of the application. The complete application may be obtained for a fee from the Public Reference Branch of the SEC, 450 Fifth Street, NW, Washington, DC 20549–0102 (tel. (202) 942–8090).

**Applicants' Representations**

1. The Fund is a Maryland corporation that is registered under the 1940 Act as an open-end management investment company. The Fund is a series fund currently comprised of four portfolios—Bond-Debenture Portfolio, Growth and Income Portfolio, International Portfolio and Mid-Cap Portfolio. Each Portfolio is a separate series of the Fund with one class of shares except the Growth and Income Portfolio, which has two classes of shares—Variable Contract Class and Pension Class. The Fund may in the future offer additional series and/or classes of shares.

2. The Adviser, a New York partnership, is registered as an investment adviser under the Investment Advisers Act of 1940 and serves as the investment adviser for the Fund.

3. Shares of the Fund will be offered to separate accounts of Participating Insurance Companies to serve as investment vehicles for variable annuity and variable life insurance contracts (including single premium, scheduled premium, modified single premium and flexible premium contracts) (collectively, ''Variable Contracts''). These separate accounts either will be registered as investment companies under the 1940 Act or will be exempt from such registration.

4. The Participating Insurance Companies will establish their own separate accounts and design their own Variable Contracts. Each Participating Insurance Company will have the legal obligation of satisfying all applicable requirements under the federal securities laws. The role of the Insurance Products Funds, so far as the federal securities laws are applicable, will be limited to that of offering their shares to separate accounts of Participating Insurance Companies and to Qualified Plans and fulfilling any conditions the Commission may impose upon granting the order requested herein. Each Participating Insurance Company will enter into a fund participation agreement with the Insurance Products Fund in which the Participating Insurance Company invests.

5. Applicants state that shares of the Insurance Products Funds also may be offered directly to Qualified Plans outside of the separate account context, including without limitation, those trusts, plans, accounts, contracts or

annuities described in Sections 401(a), 403(a), 403(b), 408(a), 408(b), 414(d), 457(b), 408(k) and 501(c)(18) of the Internal Revenue Code of 1986, as amended (''Code''), and any other trust, plan, account, contract or annuity that is determined to be within the scope of Treasury Regulation Section 1.817.5(f)(3)(iii). Shares of the Insurance Products Funds sold to Qualified Plans will be held, where applicable, by the trustees of such Plans as required by Section 403(a) of the Employee Retirement Income Security Act of 1974 (''ERISA'').

6. Additionally, shares of a Fund may be offered to the Adviser or any of its affiliates for purposes of providing necessary capital required by Section 14(a) of the 1940 Act or for other investment purposes in compliance with Treasury Regulation 1.817–5(f)(3)(ii). The return on shares of a Fund purchased by the Adviser or its affiliates will be computed in the same manner as for shares held by a separate account. Any shares of a Fund purchased by such persons will be automatically redeemed if and when their investment advisory agreement with a Fund terminates, to the extent required to comply with applicable Treasury Regulations.

7. The Plans may choose one or more Insurance Products Funds as the sole investment under the Plan or as one of several investments. Plan participants may or may not be given the right to select among Insurance Products Funds.

**Applicants' Legal Analysis**

1. Applicants request an order pursuant to Section 6(c) of the 1940 Act providing exemptions 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)(b)(15) thereunder, to the extent necessary to permit shares of the Insurance Products Funds to be offered and sold to, and held by (1) variable annuity and variable life insurance separate accounts of the same life insurance company or of any affiliated life insurance company (''mixed funding''); (2) separate accounts of unaffiliated life insurance companies (including both variable annuity and variable life separate accounts) (''shared funding''); (3) qualified pension and retirement plans outside the separate account context; and (4) the Adviser or any of its affiliates.

2. 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) provides partial exemptions from Section 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. These exemptions 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 any affiliated life insurance company. 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 (mixed 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 investment company that also offers its shares to separate accounts funding variable contracts of one or more unaffiliated life insurance companies (shared funding). Furthermore, because the relief under Rule 6e–2(b)(15) is available only where shares of the investment company are offered exclusively to separate accounts, exemptive relief is necessary if the shares of the Insurance Products Funds also are to be sold to Qualified Plans.

4. In connection with the funding of flexible premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a unit investment trust, Rule 6e–3(T)(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. These exemptions 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. Therefore, Rule 6e–3(T)(b)(15) permits mixed funding for a flexible premium variable life insurance account under certain circumstances, but does not permit shared funding.

5. In addition, because the relief under Rule 6e–3(T)(b)(15) is available only where shares of the investment company are offered exclusively to separate accounts, additional exemptive relief is necessary if shares of the Insurance Products Funds also are to be sold to Qualified Plans.

6. Applicants state that current tax law permits the Insurance Products Funds to increase their asset base through the sale of shares to Plans. Section 817(h) of the Code imposes certain diversification standards on the underlying assets of variable annuity and variable life contracts held by the portfolios of the Insurance Products Funds. The Code provides that such contracts shall not be treated as an annuity contract or life insurance contract for any period (and any subsequent period) during which the investments are not adequately diversified in accordance with regulations prescribed by the Treasury Department. On March 2, 1989, the Treasury Department issued regulations (Treas. Reg. Section 1.817–5), which established diversification requirements for the investment portfolios underlying variable annuity and variable life contracts. The regulations provide that, in order to meet the diversification requirements, all of the beneficial interests in an investment company must be held by the segregated asset accounts of one or more insurance companies. However, the regulations also contain certain exceptions to this requirement, one of which permits shares of an investment company to be held by the trustee of a ''qualified pension or retirement plan'' as defined by Revenue Ruling 94–62, 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 variable annuity and variable life contracts (Treas. Reg. Section 1.817.–5(f)(3)(iii)).

7. Applicants state that the promulgation of Rules 6e–2 and 6e–3(T) preceded the issuance of these Treasury regulations, which made it possible for shares of an investment company to be held by a Qualified 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 Variable Contracts. Thus, applicants assert that, given the then current tax law, the sale of shares of the same investment company to 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).

8. Section 9(a)(3) of the 1940 Act provides that it is unlawful for any company to act as investment adviser to or principal underwriter for any registered open-end investment company if an affiliated person of that company is subject to a disqualification

enumerated in Sections 9(a)(1) or (2). Rules 6e–2(b)(15)(i) and (ii), and 6e–3(T)(b)(15)(i) and (ii) provide partial exemptions from Section 9(a) under certain circumstances, subject to the limitations on mixed and shared funding. These exemptions limit the application of eligibility restrictions to affiliated individuals or companies that directly participate in the management or administration of the underlying investment company.

9. Applicants state that the relief from Section 9(a) provided by Rules 6e–2(b)(15) and 6e–3(T)(b)(15), 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. Applicants assert that it is not necessary to apply the provisions of Section 9(a) of the 1940 Act to the many individuals who do not directly participate in the administration or management of the Insurance Products Funds, who are employed by the various unaffiliated insurance companies (or affiliated companies of Participating Insurance Companies) that may utilize the Insurance Products Funds as the funding medium for variable annuity and variable life insurance contracts. Applicants do not expect the Participating Insurance Companies to play any role in the management or administration of the Insurance Products Funds. Thus, Applicants state, that applying the restrictions of Section 9(a) to individuals employed by Participating Insurance Companies serves no regulatory purpose, would increase monitoring costs incurred by Participating Insurance Companies, and therefore would reduce the net rates of return realized by Variable Contract owners.

10. Applicants submit that the reasons underlying the Commission's grant of relief from Section 9(a) will not be affected in any way by the proposed sale of the Insurance Products Funds to Qualified Plans. Applicants state that the insulation of the Insurance Products Funds from those individuals who are disqualified under the 1940 Act remains in place. Applicants further submit that since Qualified Plans are not investment companies and will not be deemed affiliated solely by virtue of their shareholdings, no additional relief is necessary.

11. 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 on mixed and shared funding are satisfied.

12. Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(b)(15)(iii)(A) provide that the insurance company may disregard the voting instructions of its contract owners in connection with the voting of shares of an underlying investment company if such instructions would require such shares to be voted to cause an underlying investment company to make, or refrain from making, certain investments which would result in changes in the subclassification or investment objectives of such company, or to approve or disapprove any contract between an investment company and its investment adviser when an insurance regulatory authority so requires. Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii)(B) provide that the insurance company may disregard contract owners' voting instructions with regard to changes initiated by the contract owners in the investment company's investment policies, principal underwriter or investment adviser. Under the rules, voting instructions with respect to a change in investment policies may be disregarded only if the insurance company makes a good faith determination that such changes would: (a) Violate state law; (b) result in investments that were not consistent with the investment objectives of the separate account; or (c) result in investments that would vary from the general quality and nature of investments and investment techniques used by other separate accounts of the company or of an affiliated life insurance company with similar investment objectives. Voting instructions with respect to a change in an investment adviser may be disregarded only if the insurance company makes a good faith determination that: (a) The adviser's fee would exceed the maximum rate that may be charged against the separate account's assets; (b) the proposed adviser may be expected to employ investment techniques that vary from the general techniques used by the current adviser; or (c) the proposed adviser may be expected to manage the investment company's investments in a manner that would be inconsistent with its investment objectives or in a manner that would result in investments that vary from certain standards.

13. As indicated above, shares of the Insurance Products Funds sold to Qualified Plans will be held, where applicable, by the trustees of such Plans as required by Section 403(a) of ERISA. Section 403(a) also provides that the trustees must have exclusive authority and discretion to manage and control the assets of the Plan with two exceptions: (a) When the Qualified Plan expressly provides that the trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees 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 Qualified 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, the Qualified Plan trustees have 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 the named fiduciary. The Qualified Plans may have their trustees or other fiduciaries exercise voting rights attributable to investment securities held by the Qualified Plans in their discretion. Some of the Qualified Plans, however, may provide for the trustee(s), an investment adviser (or advisers) or another named fiduciary to exercise voting rights in accordance with instructions from Plan participants.

14. Where a Qualified Plan does not provide participants with the right to give voting instructions, Applicants do not see any potential for irreconcilable material conflicts of interest between or among Variable Contract holders and Plan participants with respect to voting of the respective Insurance Products Fund's shares. Accordingly, Applicants state that, 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 Qualified Plans since the Plans are not entitled to pass-through voting privileges.

15. Applicants state that even if a Qualified Plan were to hold a controlling interest in an Insurance Products Fund, the Applicants do not believe that such control would disadvantage other investors in such Insurance Products Fund to any greater extent than is the case when any institutional shareholder holds a majority of the voting securities of any open-end management investment company. In this regard, Applicants submit that investment in an Insurance Products Fund by a Qualified Plan will not create any of the voting complications occasioned by mixed funding or shared funding.

16. Where a Plan provides participants with the right to give voting instructions, Applicants state that the

purchase of shares by such Qualified Plans does not present any complications not otherwise occasioned by mixed or shared funding.

17. Applicants state that there is no contractual or other relationship between the Participating Insurance Companies and any Qualified Plans which, for example, would affect the solvency of the life insurers, affect the performance of the life insurer's contractual obligations, or would be expected to increase the risks undertaken by the life insurer. Accordingly, Applicants state that, unlike the case with insurance company separate accounts, the issue of resolution of irreconcilable material conflicts with respect to voting is not present with respect to any of the Qualified Plans.

18. Applicants state that no increased conflict of interest would be presented by the granting of the requested relief. Applicants submit that shared funding does not present any issues that do not already exist where a single insurance company is licensed to do business in several states. In this regard, Applicants note that when different Participating Insurance Companies are domiciled in different states, it is possible that the state insurance regulatory body in a state in which one Participating Insurance Company is domiciled could require action that is inconsistent with the requirements of other insurance regulators in one or more other states in which other Participating Insurance Companies are domiciled. Applicants assert, however, that this possibility is no different or greater than exists when a single insurer and its affiliates offer their insurance products in several states, as is currently permitted.

19. Applicants state that affiliation does not reduce the potential, if any exists, for differences in state regulatory requirements. In any event, the conditions set forth below are designed to safeguard against any adverse effects that differences among state regulatory requirements may produce. If a particular state insurance regulator's decision conflicts with the majority of other state regulators, the affected insurer may be required to withdraw its separate account's investment in the relevant Insurance Products Funds.

20. Applicants also assert that affiliation does not eliminate the potential, if any exists, for divergent judgments as to when a Participating Insurance Company could disregard Variable Contract owner voting instructions. The potential for disagreement is limited by the requirements that disregarding voting instructions be reasonable and based on specified good faith determinations. However, if the Participating Insurance Company's decision to disregard Variable Contract owner voting instructions represents a minority position or would preclude a majority vote approving a particular change, such Participating Insurance Company may be required, at the election of the relevant Insurance Products Fund, to withdraw its separate account's investment in that Insurance Products Fund and no charge or penalty will be imposed upon the Variable Contract owners as a result of such withdrawal.

21. Applicants submit that there is no reason why the investment policies of an Insurance Products Fund with mixed funding would or should be materially different from what those policies would or should be if such Insurance Products Fund or series thereof funded only variable annuity or variable life insurance contracts. The Insurance Products Funds will not be managed to favor or disfavor any particular insurer or type of insurance product. Regardless of the types of Insurance Products Fund shareholders, a Fund's adviser is legally obligated to manage the Fund in accordance with the Fund's investment objectives, policies and restrictions as well as any guidelines established by the Fund's board.

22. Applicants submit 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 Insurance Products Funds. In addition, mixed and shared funding also will facilitate the establishment of additional series of Insurance Products Funds serving diverse goals.

23. As noted above, Section 817(h) of the Code imposes certain diversification standards on the underlying assets of variable annuity and variable life contracts held in the portfolios of management investment companies. Treasury Regulation Section 1.817–5(f)(3)(iii), which established diversification requirements for such portfolios, specifically permits, among other things, ''qualified pension or retirement plans'' and insurance company separate accounts to share the same underlying investment company. Therefore, Applicants assert that neither the Code, nor the Treasury regulations, nor the revenue rulings thereunder present any inherent conflicts of interest if the Qualified Plans, variable annuity separate accounts and variable life insurance separate accounts all invest in the same management investment company.

24. Applicants do not see any greater potential for irreconcilable material conflicts arising between the interests of Plan participants under the Qualified Plans and owners of the Variable Contracts issued by the separate accounts of Participating Insurance Companies from possible future changes in the federal tax laws than that which already exists between variable annuity contract owners and variable life insurance contract owners. Applicants note that while there are differences in the manner in which distributions are taxed for variable annuity contracts, variable life insurance contracts and Plans, these differences do not raise any conflicts of interest. When distributions are to be made, and a separate account of the Participating Insurance Company or Qualified Plan is unable to net purchase payments to make distributions, the separate account or Qualified Plan will redeem shares of the Insurance Products Funds at their respective net asset values. The Qualified Plan then will 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 Variable Contract.

25. Applicants submit that the ability of the Insurance Products Funds to sell their respective shares directly to Qualified Plans does not create a ''senior security,'' as such term is defined under Section 18(g) of the 1940 Act, with respect to any Variable Contract owner as opposed to a participant under a Qualified Plan. ''Senior security'' is defined under the 1940 Act to include ''any stock of a class having priority over any other class as to distribution of assets or payment of dividends.'' As noted above, regardless of the rights and benefits of participants under the Qualified Plans, or Variable Contract owners under their Variable Contracts, the Qualified Plans and the separate accounts of Participating Insurance Companies have rights only with respect to their respective shares of the Insurance Products Funds. They only can redeem such shares at their net asset value. No shareholder of any of the Insurance Products Funds has any preference over any other shareholder with respect to distribution of assets or payment of dividends.

26. Applicants submit that there are no conflicts between the Variable Contract owners and the Plan participants with respect to state insurance commissioners' veto powers over investment objectives. Applicants note that the basic premise of shareholder voting is that not all shareholders may agree with a particular proposal. State insurance commissioners have been given the veto power to prevent, among other things, insurance companies indiscriminately redeeming their separate accounts out of one fund and into another. Time-consuming, complex transactions must be undertaken to accomplish such redemptions and transfers. On the other hand, trustees of (or Plan participants in) Qualified Plans can quickly redeem shares from Insurance Products Funds and reinvest in other funding vehicles without the same regulatory impediments or, as in the case with most Qualified Plans, even hold cash or other liquid assets pending suitable alternative investment. Applicants maintain that even if there should arise issues where the interests of Variable Contract owners and the interests of participants in Qualified Plans conflict, the issues can be almost immediately resolved because the trustees of the Plans can, on their own, redeem shares out of the Insurance Products Funds.

27. Applicants state that various factors have hindered insurance companies from offering variable annuity and variable life insurance contracts. Applicants submit that mixed and shared funding should provide several benefits to Variable 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 Insurance Products Funds, thereby promoting economies of scale, by permitting increased safety through greater diversification, and by making the addition of new series more feasible. Applicants assert that therefore, making the Insurance Products Funds 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 Insurance Products Funds to Plans also can be expected to increase the amount of assets available for investment by the Insurance Products Funds and thus promote economies of scale and greater diversification.

28. 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 Qualified Plans, will have any adverse federal income tax consequences.

**Applicants' Conditions**

Applicants have consented to the following conditions:

1. A majority of each Insurance Products Fund's Board of Trustees or Directors (each, a ''Board'') will consist of persons who are not ''interested persons'' thereof, 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 Board member, then the operation of this condition will be suspended: (a) For a period of 45 days, if the vacancy or vacancies may be filled by the Board; (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. Each Insurance Products Fund's Board will monitor their respective Funds for the existence of any material irreconcilable conflict between and among the interests of the Variable Contract owners of all separate accounts and of Plan participants and Qualified Plans investing in the Insurance Products Funds, and determine what action, if any, should be taken in response to such conflicts. 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 the funds are being managed; (e) a difference in voting instructions given by variable annuity contract owners, variable life insurance contract owners or trustees of the Plans; (f) a decision by a Participating Insurance Company to disregard the voting instructions of Variable Contract owners; or (g) if applicable, a decision by a Qualified Plan to disregard the voting instructions of Plan participants.

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

4. If a majority of an Insurance Products Fund's Board members, or a majority of the disinterested Board members, determine that a material irreconcilable conflict exists, the relevant Participating Insurance Companies and Qualified Plans, at their expense and to the extent reasonably practicable (as determined by a majority of the disinterested Board members), will take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict, including: (a)

Withdrawing the assets allocable to some or all of the separate accounts from the Insurance Products Fund or any of its series and reinvesting such assets in a different investment medium, which may include another series of the Insurance Products Fund or another Insurance Products Fund; (b) in the case of Participating Insurance Companies, submitting the question as to whether such segregation should be implemented to a vote of all affected Variable Contract owners and, as appropriate, segregating the assets of any appropriate group (i.e., variable annuity 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 Variable Contract owners the option of making such a change; (c) withdrawing the assets allocable to some or all of the participating Qualified Plans from the relevant Insurance Products Fund and reinvesting those assets in a different investment medium; and (d) 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 Variable Contract owner voting instructions, and this decision represents a minority position or would preclude a majority vote, the Participating Insurance Company may be required, at the election of the Insurance Products Fund, to withdraw its separate account's investment in such Fund, and no charge or penalty will be imposed as a result of such withdrawal. If a material irreconcilable conflict arises because of a Qualified 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 Qualified Plan may be required, at the election of the Insurance Products Fund, to withdraw its investment in such Fund, and no charge or penalty will be imposed as a result of such withdrawal. To the extent permitted by applicable law, the responsibility to take remedial action in the event of a Board determination 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 Qualified Plans under their agreements governing participation in the Insurance Products Funds and these responsibilities will be carried out with a view only to the interests of the Variable Contract owners and, as applicable, Plan participants.

5. For purposes of Condition 4, a majority of the disinterested members of the applicable Board shall determine whether or not any proposed action adequately remedies any material irreconcilable conflict, but in no event will an Insurance Products Fund or the Adviser (or any other investment adviser of the Insurance Products Funds) be required to establish a new funding medium for any Variable Contract. No Participating Insurance Company shall be required by Condition 4 to establish a new funding medium for any Variable Contract if a majority of Variable Contract owners materially and adversely affected by the material irreconcilable conflict, vote to decline such offer. No Qualified Plan shall be required by Condition 4 to establish a new funding medium for such Qualified Plan if: (a) A majority of Plan participants materially and adversely affected by the material irreconcilable 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 Adviser, all Participating Insurance Companies and the Qualified Plans will be informed promptly in writing of a Board's determination of the existence of an irreconcilable material conflict and its implications.

7. As to contracts issued by separate accounts registered under the Act, Participating Insurance Companies will provide pass-through voting privileges to all Variable Contract owners so long as the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for Variable Contract owners. However, as to Variable Contracts issued by unregistered separate accounts, pass-through voting privileges will be extended to Variable Contract owners to the extent granted by the Participating Insurance Company. Accordingly, such Participating Insurance Companies, where applicable, will vote shares of the Insurance Products Fund held in their separate accounts in a manner consistent with voting instructions timely received from Variable Contract owners. In addition, each Participating Insurance Company will vote shares of the Insurance Products Fund held in its separate accounts for which it has not received timely voting instructions from contract owners, as well as shares it owns, in the same proportion as those shares for which it has received voting instructions. Participating Insurance Companies will be responsible for assuring that each of their separate accounts investing in an Insurance Products Fund calculates voting privileges in a manner consistent with all other Participating Insurance Companies. The obligation to vote an Insurance Products Fund's shares and calculate voting privileges in a manner consistent with all other separate accounts investing in the Insurance Products Fund will be a contractual obligation of all Participating Insurance Companies under the agreements governing participation in the Insurance Products Fund. Each Plan will vote as required by applicable law and governing Plan documents.

8. As long as the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for Variable Contract owners whose Contracts are funded through a registered separate account, the Adviser (or any of its affiliates) will vote its shares of any Insurance Products Fund, or any series thereof, in the same proportion as all Variable Contract owners having voting rights with respect to that Fund or series thereof; provided, however, that the Adviser (or any of its affiliates) shall vote its shares in such other manner as may be required by the Commission or its staff.

9. All reports of potential or existing conflicts of interest received by a Board, and all Board action with regard to: (a) Determining the existence of a conflict; (b) notifying the Adviser, Participating Insurance Companies, and the Qualified Plans of a conflict; and (c) determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of meetings of the appropriate Board or other appropriate records. Such minutes or other records shall be made available to the Commission upon request.

10. Each Insurance Products Fund will notify all Participating Insurance Companies and Qualified Plans that disclosure in separate account prospectuses or any Qualified Plan prospectuses or other plan disclosure documents regarding potential risks of mixed and shared funding may be appropriate. Each Insurance Products Fund will disclose in its prospectus that: (a) Its shares may be offered to insurance company separate accounts that fund both variable annuity and variable life insurance contracts, and to Qualified Plans; (b) differences in tax treatment or other considerations may cause the interests of various Variable Contract owners participating in the Insurance Products Fund and the interests of Qualified Plans investing in the Insurance Products Fund to conflict; and (c) the Board will monitor events in order to identify the existence of any material conflicts of interest, and to determine what action, if any, should be taken in response to any such conflict.

11. Each Insurance Products Fund will comply with all provisions of the 1940 Act requiring voting by shareholders (for these purposes, the persons having a voting interest in the shares of the Insurance Products Funds). In particular, each such Insurance Products Fund either will 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 none of the Insurance Products Funds shall be one of the trusts described in 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, each Insurance Products Fund will act in accordance with the Commission's interpretation of the requirements of Section 16(a) with respect to periodic elections of Board members and with whatever rules the Commission may promulgate with respect thereto.

12. If and to the extent that Rules 6e–2 or 6e–3(T) under the 1940 Act is amended, or 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 and shared funding, on terms and conditions materially different from any exemptions granted in the order requested in the application, then the Insurance Products Funds, the Participating Insurance Companies and Qualified Plans, as appropriate, shall take such steps as may be necessary to comply with Rule 6e–2 and Rule 6e–3(T), as amended, or proposed Rule 6e–3 as adopted, to the extent such Rules are applicable.

13. The Adviser (or any other investment adviser of an Insurance Products Fund), the Participating Insurance Companies and the Qualified Plans, at least annually, shall submit to each Board such reports, materials or data as each Board may reasonably request so that such Boards may fully carry out the obligations imposed upon them by the conditions stated in the application. Such reports, materials and data shall be submitted more frequently if deemed appropriate by the Boards. The obligations of the Adviser (or any other investment adviser of an Insurance Products Fund), the Participating Insurance Companies and Qualified Plans to provide these reports, materials and data upon reasonable request of a Board shall be a contractual obligation of the Adviser (or any other investment adviser of an Insurance Products Fund), the Participating Insurance Companies and the Qualified Plans under the agreements governing their participation in the Insurance Products Funds.

14. If a Qualified Plan or Plan participant shareholder should become an owner of 10% or more of the issued and outstanding shares of an Insurance Products Fund, such Plan will execute a participation agreement with such Fund, which includes the conditions set forth herein to the extent applicable. A Qualified Plan or Plan participant will execute an application containing an acknowledgment of this condition upon such Plan's initial purchase of the shares of any Insurance Products Fund.

**Conclusion**

For the reasons summarized above, Applicants believe that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

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. 34–46032; File No. SR–OPRA–2002–02]**

## Options Price Reporting Authority; Notice of Filing and Immediate Effectiveness of Amendment to OPRA Plan To Extend a Pilot To Permit Fee-Exempt Access to Market Data

June 5, 2002.

Pursuant to Rule 11Aa3–2 under the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on May 31, 2002, the Options Price Reporting Authority (''OPRA'')[2] submitted to the Securities and Exchange Commission (''SEC'' or ''Commission'') an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan''). The proposed OPRA Plan amendment would extend the pilot period during which off-floor market maker members of participant exchanges will be permitted to access options market data on a fee-exempt basis for an additional two years, until May 31, 2004, or such later date as OPRA may subsequently determine. The Commission is publishing this notice to solicit comments from interested persons on the proposed OPRA Plan amendment.

### I. Description and Purpose of the Amendment

Section VII(d)(vi) of the OPRA Plan provides that during a pilot period, the members of a floor-based exchange that is a party to the OPRA Plan who act in the capacity of brokers or dealers on the party's trading floor, and their counterparts on an electronic exchange that is a party to the OPRA Plan, are permitted to access options market information over the OPRA system without thereby becoming liable to pay OPRA's subscriber fees. In addition, Section VII(d)(vi) of the OPRA Plan provides that the pilot period will end ''on May 31, 2002, or on such later date as OPRA may determine.'' The purpose of the proposed amendment is to reflect the determination by OPRA to extend the expiration of the pilot period provided for in Section VII(d)(vi) of the OPRA Plan for an additional two years, until May 31, 2004, or such later date as OPRA may subsequently determine.

This temporary exemption from subscriber fees was added to the OPRA Plan two years ago, when ISE was about to begin trading options in an entirely electronic market.[3] The purpose of the exemption was to provide equal treatment for that exchange and its specialists and market-makers (and the off-floor specialists and market makers of any other electronic exchange or facility that may in the future be operated by an OPRA participant) so long as the floor-based counterparts of such members of electronic exchanges or facilities are not subject to subscriber fees. At the time the temporary fee exemption was adopted, OPRA had not decided on a permanent basis whether it would continue to exempt floor-based and off-floor specialists and market makers from OPRA fees, or whether it

[1] 17 CFR 240.11Aa3–2.

[2] OPRA is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 11Aa3–2 thereunder. *See* Securities Exchange Act Release No. 17638 (Mar. 18, 1981). The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the member exchanges. The five participants to the OPRA Plan that operate an options market are the American Stock Exchange LLC, the Chicago Board Options Exchange, Inc. (''CBOE''), the International Securities Exchange LLC (''ISE''), the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc. The New York Stock Exchange, Inc. is a signatory to the OPRA Plan, but sold its options business to the CBOE in 1997. *See* Securities Exchange Act Release No. 38542 (April 23, 1997), 62 FR 23521 (April 30, 1997).

[3] *See* Securities Exchange Act Release No. 43109 (August 2, 2000), 65 FR 48769 (August 9, 2000).