affiliated interest transactions from the Arizona and Minnesota Commissions.

The waiting period under the Hart-Scott-Radion Antitrust Improvements Act of 1976, as amended, has expired. Apart from the approval of this Commission, the foregoing approvals are the only governmental approvals required for the Transaction.

NSP requests an order under section 3(a)(2) exempting it from all provisions of the Act, except section 9(a)(2), following consummation of the Transaction. NSP states that it will continue to be entitled to an exemption under section 3(a)(2) because it will continue to be predominately a public utility company operating in Minnesota, its state of incorporation, and the contiguous states of North Dakota and South Dakota.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 98–25656 Filed 9–24–98; 8:45 am]

**BILLING CODE 8010–01–M**

## SECURITIES AND EXCHANGE COMMISSION

**[Rel. No. IC–23440; File No. 812–11070]**

## The White Elk Funds, et al.

September 21, 1998.

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

**ACTION:** Notice of application for an order under Section 6(c) of the Investment Company Act of 1940 (the ''1940 Act'') for exemptions from the provisions of Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act, and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder.

**SUMMARY:** Applicants seek an order to permit shares of certain series of The White Elk Funds that are designed to fund insurance products (the ''Funds'') and shares of any other investment company that is designed to fund insurance products and for which White Elk Asset Management, Inc. or any of its affiliates may serve as investment advisor, administrator, manager, principal underwriter, or sponsor (collectively with the Funds, the ''Insurance Product Funds'') to be sold to and held by: (1) Separate accounts funding variable annuity and variable life insurance contracts (''Separate Accounts'') of both affiliated and unaffiliated life insurance companies (''Participating Insurance Companies''); and (2) qualified pension or retirement plans (''Plans'').

**APPLICANTS:** The White Elk Funds (the ''Company'') and White Elk Asset Management, Inc. (the ''Advisor'').

**FILING DATE:** The application was filed on March 13, 1998, and amended and restated on July 14, 1998.

**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 on this application by writing to the Secretary of the SEC and serving Applicants with a copy of the request, in person or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on October 16, 1998, and 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 interest, the reason for the request and the issues contested. Persons may request notification of the date of a hearing by writing to the Secretary of the SEC.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicants, c/o Joseph J. McBrien, Esq., State Street Bank and Trust Company, 1776 Heritage Drive, AFB4, North Quincy, MA 02171–2197.

**FOR FURTHER INFORMATION CONTACT:** Zandra Y. Bailes, Senior Counsel, or Mark C. Amorosi, Branch Chief, Division of Investment Management, Office of Insurance Products, at (202) 942–0670.

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

### Applicant's Representations

1. The Company is a Massachusetts business trust and is registered under the 1940 Act as an open-end diversified management investment company. The Company currently consists of eleven separate Funds, each of which has its own investment objective and policies. The Company may in the future issue shares of additional Funds and/or multiple classes of shares of each Fund.

2. The Advisor, an investment manager newly registered under the Investment Advisers Act of 1940, is the investment adviser to each of the Funds and is responsible for the overall administration of the Company. The Advisor has entered into a contract with William D. Witter, Inc. (''Witter''), whereby Witter will serve as sub-portfolio manager to various of the Funds.

3. Shares of each Fund may be offered to Separate Accounts, which are either registered or unregistered under the federal securities laws, that fund variable annuity contracts or variable life insurance policies (''Contracts''). Shares of the Funds may also be offered to Plans.

### Applicants' Legal Analysis

1. Section 6(c) of the 1940 Act authorizes the Commission, by order upon application, to conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities or transactions from any provisions of the 1940 Act or the rules promulgated thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

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) under the 1940 Act provides partial exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. The exemptions granted by Rule 6e–2(b)(15) are available, however, only where all of the assets of the separate account consist of the shares of one or more registered management investment companies which offer their shares ''*exclusively* to variable life insurance separate accounts of the life insurer, or of any affiliated life insurance company'' (emphasis added).[1] Therefore, the relief granted by Rule 6e–2(b)(15) is not available with respect to a scheduled premium variable life insurance separate account that owns shares of a management company that also offers its shares to variable annuity and variable life insurance separate accounts of the same insurance company or any other insurance company or to trustees of a Plan. The use of a common management investment company as the underlying investment medium for a variable annuity or a variable life insurance separate account of the same insurance company or of any affiliated life insurance company is referred to herein as ''mixed funding.'' In addition, the relief granted by Rule 6e–2(b)(15) is not available if the scheduled premium variable life insurance separate account owns shares of any underlying

[1] The relief provided by Rule 6e–2 is also available to a separate account's investment adviser, principal underwriter, and sponsor or depositor.

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

3. In connection with flexible premium variable life insurance contracts issued through a separate account registered under the 1940 Act, Rule 6e–3(T)(b)(15) under the 1940 Act provides partial exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. These exemptions, however, 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 contracts or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company'' (emphasis added). Therefore, Rule 6e–3(T) grants the exemptions if the underlying fund engages in mixed funding, subject to certain conditions, but not if it engages in shared funding or sells its shares to Plans.

4. Applicants state that the current federal tax law permits the Insurance Product Funds to increase their asset base through the sale of shares to Plans. Section 817(h) of the Internal Revenue Code of 1986, as amended (the ''Code''), imposes certain diversification requirements on the assets underlying Contracts invested in the Insurance Products Funds. The Code provides that such Contracts will not be treated as annuity contracts or life insurance contracts for any period in which the underlying assets are not, in accordance with regulations issued by the Treasury Department (the ''Regulations''), adequately diversified. To meet the diversification requirements, all of the beneficial interests in the investment company must be held by the segregated asset accounts of one or more life insurance companies. The Treasury Regulations do, however, contain certain exceptions to this requirement, one of which allows shares in an investment company to be held by trustees of a Plan without adversely affecting the ability of shares in the same investment company also to be held by the separate accounts of insurance companies in connection with their Contracts (Treas. Reg. 1.817–5(f)(3)(iii)).

5. Applicants note that if the Insurance Product Funds were to sell their shares only to Plans, no exemptive relief would be necessary. The relief provided under Rule 6e–2(b)(15) and Rule 6e–3(T)(b)(15) does not relate to Plans or to a registered investment company's ability to sell its shares to Plans.

6. Applicants also note that the promulgation of Rules 6e–2(b)(15) and 6e–3(T)(b)(15) preceded the issuance of the Regulations. Thus, the sale of shares of the same investment company to both separate accounts and Plans could not have been envisioned at the time Rules 6e–2(b)(15) and 6e–3(T)(b)(15) were promulgated, given the then-current tax law.

7. Section 9(a)(3) of the 1940 Act provides that it is unlawful for any company to serve as investment adviser or principal underwriter of any registered open-end investment company if an affiliated person of that company is subject to a disqualification enumerated in either Section 9(a)(1) or 9(a)(2) of the 1940 Act. Rules 6e–2(b)(15) (i) and (ii) and 6e–3(T)(b)(15) (i) and (ii) provide exemptions from Section 9(a), subject to the limitations on mixed and shared funding. These exemptions limit the application of the eligibility restrictions to affiliated individuals or companies that directly participate in the management of the underlying fund.

8. Applicants state that the partial relief granted in Rules 6e–2(b)(15) and 6e–3(T)(b)(15) from the requirements of Section 9 of the 1940 Act limits, in effect, 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 state that those Rules recognize that it is not necessary for the protection of investors or the purposes fairly intended by the policy and provisions of the 1940 Act to apply the provisions of Section 9(a) to the many individuals who may be involved in an insurance company complex, but who would have no involvement in matters pertaining to investment companies funding the separate accounts. Applicants, assert, therefore, that there is no regulatory purpose in denying the partial exemptions because of mixed and shared funding and sales to Plans.

9. Applicants state that Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) under the 1940 Act provide exemptions from the pass-through voting requirement with respect to several significant matters, assuming the limitations on mixed and shared funding are observed. More specifically, Rules 6e–2(b)(15)(iii)(A) and 6e–2(b)(15)(iii)(A) provide that the insurance company may disregard the voting instructions of its contract with respect to the investment of an underlying investment company or any contract between an underlying investment company and its investment adviser, when required to do so by an insurance regulatory authority and subject to certain requirements. In addition, Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii(A)(*2*) provide that the insurance company may disregard the voting instructions of contract owners if the contract owners initiate any change in an underlying investment company's investment policies, principal underwriter or any investment adviser (provided that disregarding such voting instruction is reasonable and subject to the other provisions of Rules 6e–2 and 6e–3(T)).

10. Applicants assert that the offer and sale of shares of Insurance Product Funds to Plans will not have an impact on the relief requested. Under Section 403(a) of the Employee Retirement Income Security Act (''ERISA''), shares of the Insurance Product Funds sold to Plans would be held by the trustees of the Plan. Section 403(a) also provides that the trustee(s) must have exclusive authority and discretion to manage and control the Plan investments with two exceptions: (a) When the Plan expressly provides that the trustee(s) is (are) subject to the direction of a named fiduciary who is not a trustee, in which case the trustee(s) is (are) subject to proper directions of such fiduciary made in accordance with the terms of the Plan and not contrary to ERISA; and (b) when the authority to manage, acquire or dispose of assets of the Plan is delegated to one or more investment managers pursuant to Section 402(c)93) of ERISA. Unless one of the above two exceptions stated in Section 403(a) applies, Plan trustees have the exclusive authority and responsibility for voting proxies.

11. Where a named fiduciary to a Plan 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 trustee or the named fiduciary. In any event, Applicants assert that ERISA permits but does not require pass-through voting to participants in Plans. Some of the Plans, however, may provide participants with the right to give voting instructions.

12. Where a Plan provides participants with the right to give voting instructions, Applicants assert that there is no reason to believe that participants in Plans generally or those in a particular Plan, either as a single group or in combination with participants in other Plans, would vote in a manner that would disadvantage Contract owners. The purchase of shares of the Insurance Product Funds by Plans that provide voting rights to participants does not present any complications not otherwise occasioned by mixed and shared funding.

13. Applicants also maintain that no increased conflicts of interest would be presented by the granting of the requested relief. In this regard, Applicants assert that shared funding does not prevent any issues that do not already exist where a single insurance company is licensed to do business in several or all states. A particular state insurance regulatory body could require action that is inconsistent with the requirements of insurance regulators of other states in which the insurance company offer its policies. The fact that different insurers may be domiciled in different states does not create a sigfificantly different or enlarged problem.

14. Applicants submit that shared funding is, in this respect, no different that the use of the same investment company as the funding vehicle for affiliated insurers, which Rules 6e–2(b)(15) and 6e–3(T)(b)(15) permit under various circumstances. Affiliated insurers may be domiciled in different states and be subject to differing state law requirements. Affiliation does not reduce the potential, if any exists, for differences in state regulatory requirements. In any event, Applicants submit that the conditions set forth in the application and included in this notice are designed to safeguard against, and provide procedures for, resolving any adverse effects that differences among state regulatory requirements may produce.

15. Applicants assert that the right of an insurance company under Rules 6e–1(b)(15) and 6e–3(T)(b)(15) to disregard contract owners' voting instructions does not raise any issues different from those raised by the authority of state insurance administrators over separate accounts. Under Rules 6e–2(b)(15) and 6e–3(T)(b)(15), an insurer can disregard contract owner voting instructions only with respect to certain specific items. Affiliation does not eliminate the potential, if any exists, for divergent judgments as to the advisability or legality of a change in investment policies, principal underwriter, or investment adviser initiated by contract owners. The potential for disagreement is limited by the requirements in Rules 6e–26 and 6e–3(T) that an insurance company's disregard of voting instructions be reasonable and based on specific good-faith determinations.

16. A particular insurer's disregard of voting instructions nevertheless could conflict with the majority of Contract owner voting instructions. The insurer's action could be different from the determination of all or some of the other insurers (including affiliated insurers) that the contract owners' voting instructions should prevail, and either could preclude a majority vote approving the change or could represent a minority view. If the insurer's judgment represents a minority position or would preclude a majority vote, the insurer may be required, at the election of the relevant Insurance Product Fund to withdraw its Separate Account's investment in that Insurance Product Fund, and no charge or penalty would be imposed as a result of such withdrawal.

17. Applicants submit that there is no reason why the investment policies of the Insurance Product Funds would or should be materially different from what those policies would or should be if the Insurance Product Funds funded only annuity contracts or only scheduled or flexible premium life contracts. In this regard, Applicants note that each type of insurance product is designed as a long-term investment program. In addition, Applicants represent that each Insurance Product Fund will be managed to attempt to achieve the investment objective of that Insurance Product Fund and not to favor or disfavor any particular insurer or type of insurance product.

18. Furthermore, 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 those factors in order to attract and retain purchasers.

19. Applicants note that Section 817(h) of the Code imposes certain diversification standards on the underlying assets of variable annuity and variable life insurance contracts held in the portfolios of management investment companies. The Regulations specifically permit ''qualified pension or retirement plans'' and insurance company separate accounts to share the same underlying investment company. For this reason, Applicants have concluded that neither the Code, nor the Treasury Regulations, nor the revenue rulings thereunder, present any inherent conflicts of interest if Plans, variable annuity separate accounts, and variable life insurance separate accounts all invest in the same management investment company.

20. Applicants note that while there are differences in the manner in which distributions from variable annuity contracts, variable life insurance contracts and Plans are taxed, the tax consequences do not raise any conflicts of interest. When distributions are to be made, and a Separate Account or Plan is unable to net purchase payments to make the distributions, the Separate Account or the Plan will redeem shares of the Insurance Product Fund at their net asset value. A Plan 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 Contract.

21. With respect to voting rights, Applicants state that it is possible to provide an equitable means of giving voting rights to Contract owners and to Plans. Applicants represent that the Insurance Product Funds will inform each shareholder, including each Separate Account and each Plan, of information necessary for the shareholder meeting, including its respective share of ownership in the respective Insurance Product Fund. Each Participating Insurance Company will then solicit voting instructions in accordance with the ''pass-through'' voting requirement.

22. Applicants contend that the ability of the Insurance Product Funds to sell their respective shares directly to qualified plans does not create a ''senior security,'' as that term is defined in Section 18(g) of the 1940 Act. Regardless of the rights and benefits of participants under the Plans or Contract owners under the Contracts, the Plans and the Separate Accounts have rights only with respect to their respective shares of the Insurance Product Funds. They can only redeem such shares at their net asset value. No shareholder of any of the Insurance Product Funds has any preference over any other shareholder with respect to distribution of assets or payments of dividends.

23. Applicants submit that there are no conflicts between the Contract owners of the separate accounts and plan participants with respect to the state insurance commissioners' veto powers over investment objectives. State insurance commissioners have been given the veto power in recognition of

the fact that insurance companies usually cannot simply redeem their separate accounts out of one fund and invest in another. Generally, time-consuming complex transactions must be undertaken to accomplish such redemptions and transfers. Conversely, trustees of Plans can make the decision quickly and redeem their interest in an Insurance Product Fund and reinvest in another funding vehicle without the same regulatory impediments faced by separate accounts or, as is the case with most Plans, even hold cash pending suitable investment. Based on the foregoing, Applicants have concluded that even if there should arise issues where the interests of Contract owners and the interests of participants in Plans are in conflict, the issues can be resolved almost immediately because the trustees of Plans can, on their own, redeem the shares out of the Insurance Product Fund.

24. Applicants assert that various factors have limited the number of insurance companies that offer variable annuities and variable life insurance contracts. These factors include the costs of organizing and operating a funding medium, the lack of expertise with respect to investment management (principally with respect to stock and money market investments), and the lack of name recognition by the public of certain insurers as investment experts. In particular, some smaller life insurance companies may not find it economically feasible, or within their investment or administrative expertise, to enter the variable contract business on their own.

25. Applicants contend that the use of the Insurance Product Funds as common investment vehicles for variable contracts would reduce or alleviate these concerns. 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 Advisor, but also from the cost efficiencies and investment flexibility afforded by a larger pool of assets. Therefore, making the Insurance Product Funds available for mixed and shares funding will encourage more insurance companies to offer variable contracts, and accordingly 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. Applicants also assert that the sale of shares of the Insurance Product Funds to Plans can also be expected to increase the amount of assets available for investment by the Insurance Product Funds and thus promote economies of scale and diversification.

**Applicants' Conditions**

Applicants have consented to the following conditions:

1. A majority of the Board of each Insurance Product Fund shall 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 or Members, then the operation of this condition shall be suspended: (a) For a period of 45 days if the vacancy or vacancies may be filled by the remaining Board Members; (b) for a period of 60 days if a vote of shareholder is required to fill the vacancy or vacancies; or (c) for such longer period as the Commission may prescribe by order upon application.

2. The Board will monitor their respective Insurance Product Funds for the existence of any material irreconcilable conflict among the interests of the Contract owners of all Separate Accounts investing in the Insurance Product Funds and of the Plan participants investing in the Insurance Product Funds. The Board will determine what action, if any, shall 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 Insurance Product Funds are being managed; (e) a difference in voting instructions given by variable annuity Contract owners, variable life insurance Contract owners, and trustees of Plans; (f) a decision by an insurer to disregard the voting instructions of Contract owners; or (g) if applicable, a decision by a Plan to disregard the voting instructions of Plan participants.

3. Participating Insurance Companies, the Advisor or any primary investment advisor of the Insurance Product Funds, and any Plan that executes a fund participation agreement upon becoming an owner of 10 percent or more of the assets of an Insurance Product Fund (a ''Participating Plan''), will report any potential or existing conflicts of which it becomes aware to the Board of any relevant Insurance Product Fund. Participating Insurance Companies, the Advisor and the Participating Plans will be responsible for assisting 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 appropriate Board whenever voting instructions of Contract owners are disregarded and, if pass-through voting is applicable, an obligation by each Participating 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 Board, will be contractual obligations of all Participating Insurance Companies investing in the Insurance Product Funds under their agreements governing participation in the Insurance Product Funds, and such agreements shall provide that these responsibilities will be carried out with a view only to the interests of the Contract owners. The responsibility to report such information and conflicts, and to assist the Board, will be contractual obligations of all Participating Plans under their agreements governing participation in the Insurance Product Funds, and such agreements will provide that their responsibilities will be carried out with a view only to the interests of Plan participants.

4. If it is determined by a majority of the Board of an Insurance Product Fund, or by a majority of the disinterested Board Members, that a material irreconcilable conflict exists, the relevant Participating Insurance Companies and Participating Plans will, at their own expense and to the extent reasonably practicable as determined by a majority of the disinterested Board Members, take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict, which steps could include: (a) In the case of Participating Insurance Companies, withdrawing the assets allocable to some or all of the Separate Accounts from the Insurance Product Fund or any portfolio thereof and reinvesting such assets in a different investment medium, including another portfolio of an Insurance Product Fund or another Insurance Product Fund, or submitting the question as to whether such segregation should be implemented to a

vote of all affected Contract owners and, as appropriate, segregating the assets of any appropriate group (*i.e.*, variable annuity Contract owners or variable life insurance Contract owners of one or more Participating Insurance Companies) that votes in favor of such segregation, or offering to the affected Contract owners the option of making such a change; (b) in the case of Participating Plans, withdrawing the assets allocable to some or all of the Plans from the Insurance Product Fund and reinvesting such assets in a different investment medium; and (c) establishing a new registered management investment company or managed Separate Account. If a material irreconcilable conflict arises because of a decision by a Participating Insurance Company to disregard Contract owner voting instructions, and that decision represents a minority position or would preclude a majority vote, then the insurer may be required, at the Insurance Product Fund's election, to withdraw the insurer's Separate Account investment in such Insurance Product Fund, and no charge or penalty will be imposed as a result of such withdrawal. If a material irreconcilable conflict arises because of a Participating 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 Participating Plan may be required, at the Insurance Product Fund's election, to withdraw its investment in such Insurance Product Fund, and no charge or penalty will be imposed as a result of such withdrawal. The responsibility to take remedial action in the event of a determination by a Board 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 Participating Plans under their agreements governing participation in the Insurance Product Funds, and these responsibilities will be carried out with a view only to the interest of Contract owners and Plan participants.

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

6. The determination of any Board of the existence of a material irreconcilable conflict and its implications will be made known in writing promptly to all Participating Insurance Companies and Participating Plans.

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

8. All reports of potential or existing conflicts received by the Board of an Insurance Product Fund, and all action by such Board with regard to determining the existence of a conflict, notifying Participating Insurance Companies and participating Plans of a conflict, and determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the meeting of such Board or other appropriate records, and such minutes or other records shall be made available to the Commission upon request.

9. Each Insurance Product Fund will notify all Participating Insurance Companies that separate disclosure in their respective Separate Account prospectuses may be appropriate to advise accounts regarding the potential risks of mixed and shared funding. Each Insurance Product Fund shall disclose in its prospectus that (a) the Insurance Product Fund is intended to be a funding vehicle for variable annuity and variable life insurance contracts offered by various insurance companies and for qualified pension and retirement plans; (b) due to differences of tax treatment and other considerations, the interests of various Contract owners participating in the Insurance Product Fund and/or the interests of Plans investing in the Insurance Product Fund may at some time be in conflict; and (c) the Board of such Insurance Product Fund will monitor events in order to identify the existence of any material irreconcilable conflicts and to determine what action, if any, should be taken in response to any such conflict.

10. Each Insurance Product Fund will comply with all provisions of the 1940 Act requiring voting by shareholders (which, for these purposes, will be the persons having a voting interest in the shares of the Insurance Product Funds), and, in particular, the Insurance Product Funds will either provide for annual shareholder meetings (except insofar as the Commission may interpret Section 16 of the 1940 Act not to require such meetings) or comply with Section 16(c) of the 1940 Act, although the Insurance Product Funds are not the type of trust 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 Product 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.

11. If and to the extent Rule 6e–2 or 6e–3(T) under the 1940 Act is amended, or proposed Rule 6e–3 under the 1940 Act is adopted, to provide exemptive relief from any provision of the 1940 Act or the rules promulgated thereunder, with respect to mixed or

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

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

13. If a Plan should ever become a holder of ten percent or more of the assets of an Insurance Product Fund, such Plan will execute a participation agreement with the Insurance Product Fund that includes the conditions set forth herein to the extent applicable. A Plan will execute an application containing an acknowledgment of this condition upon such Plan's initial purchase of the shares of any Insurance Product Fund.

## Conclusion

For the reasons summarized above, Applicants submit that the exemptive relief requested is necessary and 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.*

[FR Doc. 98–25733 Filed 9–24–98; 8:45 am]

BILLING CODE 8010–01–M

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of September 28, 1998.

A closed meeting will be held on Tuesday, September 29, 1998, at 2:30 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at the closed meeting.

Commissioner Hunt, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the closed meeting scheduled for Tuesday, September 29, 1998, at 2:30 p.m., will be:

Institution and settlement of injunctive actions.

Institution and settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alternations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942–7070.

Dated: September 23, 1998.

**Jonathan G. Katz,**

*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–40451; File No. SR–CBOE–98–21]**

### Self-Regulatory Organizations; Order Approving Proposed Rule Change by the Chicago Board Options Exchange, Incorporated Relating to Minimum Opening Transaction Size in FLEX Equity Options

September 18, 1998.

### I. Introduction

On May 18, 1998, the Chicago Board Options Exchange, Incorporated (''CBOE or Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] a proposed rule change which was published for comment in Securities Exchange Act Release No. 40221 (July 16, 1998).[2] No comments were received on the proposal. For the reasons discussed below, the Commission is approving the proposed rule change.

### II. Description of the Proposal

The Exchange proposes to change the minimum value size for opening transactions (other than FLEX Quotes responsive to a FLEX Request for Quotes) in any FLEX Equity Option[3] series in which there is no open interest at the time the Request for Quotes is submitted. The proposal will change CBOE Rule 24A.4 from requiring a minimum value size for these opening transactions from 250 contracts to the lesser of 250 contracts or the number of contracts overlying $1 million of the underlying securities. According to the CBOE, the rule was originally put in place with a minimum of 250 contracts in order to limit participation in FLEX Equity options to sophisticated, high net worth individuals. The Exchange believes the dollar value of the securities underlying the FLEX Equity Options, if set at the right limit, can also prevent the participation of investors who do not have adequate resources. The CBOE notices that the limitation on the minimum value size for opening transactions in FLEX Index Options is

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

[2] 63 FR 39610 (July 23, 1998).

[3] FLEX equity options are flexible exchange-traded options contracts which overlie equity securities. In addition, FLEX equity options provide investors with the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices.