SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–23536; No. 812–10694]

Variable Insurance Funds, et al.; Notice of Application

November 16, 1998.

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 (''1940 Act'').

SUMMARY OF APPLICATION: Applicants seek an amended order [1] to permit shares of each existing and future series of the Variable Insurance Funds Trust and any other investment company that is designed to fund variable insurance products and for which BISYS Fund Services, or any of its affiliates, may serve as principal underwriter or administrator 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; (b) qualified pension and retirement plans outside of the separate account context (''Qualified Plans'' or ''Plans''); (c) the manager of a Fund or certain related corporations (''Adviser''); and (d) the general account of any life insurance company, or certain related corporations, whose separate account holds, or will hold, shares of the Funds (''General Accounts'').

Applicants: Variable Insurance Funds (''Trust''), BISYS Fund Services (''BISYS''), Branch Banking and Trust Company (''BB&T''), and AmSouth Bank (''AmSouth'').

FILING DATE: The application was filed on June 5, 1997, and amended on June 2, 1998. Applicants have agreed to file another agreement, the substance of which is incorporated in this notice, during the notice period.

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 Commission 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 December 9, 1998, 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 Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, c/o BISYS, 3435 Stelzer Road, Columbus, Ohio 43219–3035.

FOR FURTHER INFORMATION CONTACT: Laura A. Novack, Senior Attorney, or Kevin M. Kirchoff, Branch Chief, Office of Insurance Products, Division of Investment Management at (202) 942–0670.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee from the Public Reference Branch of the Commission, 450 Fifth Street, N.W., Washington, D.C. 20549 (202–942–8090).

Applicants' Representations

1. The Trust is a business trust organized under the laws of Massachusetts on July 20, 1994. It is registered under the 1940 Act as an open-end management investment company and currently consists of four separate series, each with their own investment objectives and policies. The Trust may in the future establish additional series.

2. BISYS, a division of BISYS Group, Inc., is a registered broker-dealer and a member of the National Association of Securities Dealers, Inc. BISYS serves as the administrator and the principal underwriter for each series of the Trust. When the Commission granted the Original Order, BISYS operated under its former name, The Winsbury Company.

3. BB&T, a bank in North Carolina, is the principal bank affiliate of BB&T Corporation, a bank holding company whose headquarters are in North Carolina. BB&T serves as Adviser to two series of the Trust.

4. AmSouth is the principal bank affiliate of AmSouth Bancorporation, whose headquarters are in the mid-south region. AmSouth serves as Adviser to two series of the Trust.

5. The Funds currently are offered to one or more separate accounts of Hartford Life Insurance Company (''Hartford''), to serve as the investment medium for variable annuity contracts issued by Hartford. The Trust intends, however, to offer shares of its existing and future series to separate accounts of other insurance companies, including companies that are not affiliated with Hartford, to serve as the investment vehicle for various types of insurance products, which may include variable annuity contracts, scheduled premium variable life insurance contracts, and flexible premium variable life insurance contracts (collectively, ''variable contracts''). Insurance companies whose separate account or accounts may in the future own shares of the Trust or any other Fund are referred to herein as ''participating insurance companies.''

6. Each participating insurance company will have the legal obligation of satisfying all requirements applicable to it under the federal securities laws in connection with any variable contract issued by such company.

7. Fund shares also may be offered directly to Qualified Plans described in Treasury Regulation § 1.817–(f)(3)(iii).

8. The Qualified Plans may choose any of the Funds as the sole investment under the Plan or as one of several investments. Qualified Plan participants may or may not be given the right to select among the Funds, depending on the Qualified Plan itself. Fund shares sold to Qualified Plans will be held by the trustees of such Qualified Plans as required by Section 403(a) of the Employee Retirement Income Security Act (''ERISA''). No Adviser will act as investment adviser to any of the Qualified Plans that will purchase shares of a Fund advised by that Adviser.

9. Fund shares also may be offered to General Accounts whose separate account holds, or will hold shares of the Fund and to certain related corporations, pursuant to Treasury Regulation § 1.817–5(f)(3)(i).

10. Fund shares may also be offered to Advisers and to certain related corporations, pursuant to Treasury Regulation § 1.817–(f)(3)(ii).

11. Applicants anticipate that sales made pursuant to Treasury Regulation § 1.817(f)(3) (i) and (ii) generally will be made to Advisers, and generally for the purpose of providing the capital required under Section 14(a) of the 1940 Act.

Applicants' Legal Analysis

1. Applicants request that the Commission issue an order under Section 6(c) of the 1940 Act granting exemptive relief from Sections 9(a), 13(a), 15(a) and 15(b) thereof and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder, to the extent necessary to: (a) permit ''mixed'' and ''shared'' funding as defined below; and (b) allow shares of the Funds to be sold to Qualified Plans, Advisers and General Accounts. Applicants state that the

[1] Applicants seek an amendment of a prior order issued by the Commission in connection with File No. 812–9236 (''Original Order''), which granted exemptive relief to certain of the Applicants from the same provisions of the 1940 Act and rules thereunder from which Applicants now seek exemptive relief.

Commission previously granted the first element of the requested relief in the Original Order.

2. Section 6(c) authorizes the Commission to exempt any person, security or transaction, or any class or classes of persons, securities, or transactions, from the provisions of the 1940 Act, or the rules 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.

3. 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 (the ''Trust Account''), Rule 6e–2(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act. The exemptions granted by Rule 6e–2(b)(15) are available only where the management investment company underlying the Trust Account offers its shares ''*exclusively* to variable life insurance separate accounts of the life insurer or any affiliated life insurance company * * *'' (emphasis added).

4. The use of a common management investment company as the underlying investment medium for both variable annuity and variable life insurance separate accounts of a single life insurance company (or of two or more affiliated life insurance companies) is referred to as ''mixed funding.'' The use of a common management company as the underlying investment medium for variable life insurance separate accounts of one insurance company and separate accounts funding variable contracts of one or more unaffiliated life insurance companies is referred to as ''shared funding.'' 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 an underlying fund that also offers its shares to a variable annuity or a flexible premium variable life insurance separate account of the same company or of any affiliated company. Therefore, Rule 6e–2(b)(15) precludes mixed and shared funding.

5. Moreover, because the relief granted by Rule 6e–2(b)(15) is available only where shares are offered exclusively to separate accounts, additional exemptive relief may be necessary if the shares of the Funds are also to be sold to Plans, General Accounts or Advisers.

6. In connection with the funding of flexible premium variable life insurance contracts issued through a Trust Account, Rule 6e–3(T)(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act. The exemptions granted by Rule 6e–3(T)(b)(15) are available only where the underlying fund offers its 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, or which offer their shares to any such life insurance company in consideration solely for advances made by the life insurer in connection with the operation of the separate account * * *'' (emphasis added). Thus while Rule 6e–3(T)(b)(15) permits mixed funding with respect to a flexible premium variable life insurance separate account, it does not permit shared funding because the relief granted by Rule 6e–3(T)(b)(15) is not available with respect to a flexible premium variable life insurance separate account that owns shares of an underlying fund that also offers its shares to separate accounts of unaffiliated life insurance companies. Moreover, because the relief under Rule 6e–3(T) is available only where shares are offered exclusively to separate accounts, or to life insurers in connection with the operation of a separate account, additional exemptive relief may be necessary if the shares of the Funds are also to be sold to Plans or Advisers or General Accounts.

7. Applicants state that the current tax law permits the Funds to increase their asset base through the sale of shares to Qualified Plans. Section 817(h) of the Internal Revenue Code of 1986, as amended (the ''Code''), imposes certain diversification standards on the underlying assets of the variable contracts. The Code provides that such contracts shall not be treated as an annuity contract or life insurance contract for any period during which the investments are not adequately diversified in accordance with regulations prescribed by the Treasury Department. Treasury regulations provide that, 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. The regulations do contain certain exceptions to this requirement, however, one of which permits shares of an investment company to be held by the trustee of 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 (Treas. Reg. § 1.817–5(f)(3)(iii)).

8. Applicants also state that the current tax law permits the Funds to sell shares to Advisers and General Accounts. Treasury regulations permit such sales as long as the return on shares held by a General Account or Adviser is computed in the same manner as for shares held by a separate account, and the General Account or Adviser does not intend to sell Fund shares held by it to the public. As to Advisers, Treasury regulations also require that the Advisers may only hold the shares in connection with the creation or management of the Fund.

9. Applicants state that the promulgation of Rules 6e–2(b)(15) and 6e–3(T)(b)(15) preceded the issuance of these Treasury regulations which made it possible for shares of a Fund to be held by the trustee of a Qualified Plan, an Adviser, or General Account without adversely affecting the ability of shares of the Fund to also be held by the separate accounts of insurance companies in connection with their variable life insurance contracts. Thus, Applicants assert that the sale of shares of a Fund to separate accounts through which variable life insurance contracts are issued and Qualified Plans, its Adviser or General Accounts could not have been envisioned at the time of the adoption of Rules 6e–2(b)(15) and 6e–3(T)(b)(15), given the then-current tax law.

10. Applicants assert that if the Funds were to sell shares only to Qualified Plans, Advisers and General Accounts, or to separate accounts funding variable annuity contracts, no exemptive relief would be necessary. Applicants state that none of the relief provided under Rules 6e–2(b)(15) and 6e–3(T)(b)(15) relates to Qualified Plans, Advisers or General Accounts, or to a registered investment company's ability to sell its shares to such purchasers. Exemptive relief is required in the application only because some of the separate accounts that will invest in the Funds may themselves be investment companies that rely on Rules 6e–2 and 6e–3(T) and that desire to have the relief continue in place.

11. 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 of the underlying management investment company.

12. Applicants state that the relief provided by Rules 6e–2(b)(15) and 6e-3(T)(b)(15) permits the life insurer to serve as the underlying fund's investment adviser or principal underwriter, provided that none of the insurer's personnel who are ineligible pursuant to Section 9(a) are participating in the management or administration of the fund. Applicants state that the partial 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 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 in an insurance company complex, most of whom typically will have no involvement in matters pertaining to investment companies in that organization. Applicants assert that it also is unnecessary to apply the restrictions of Section 9(a) to the many individuals in various unaffiliated insurance companies (or affiliated companies of participating insurance companies) that may utilize the Funds as a funding medium for variable contracts.

13. Applicants further state that there is no regulatory purpose in extending the monitoring requirements to embrace a full application of Section 9(a)'s eligibility restrictions because of mixed or shared funding. Applicants maintain that the relief previously granted in the Original Order and requested herein will in no way be affected by the proposed sale of shares of the Funds to Qualified Plans, Advisers or General Accounts. Applicants state that the insulation of the Funds from those individuals who are disqualified under the 1940 Act remains in place, and that since Qualified Plans, Advisers, and General Accounts are not investment companies and will not be deemed to be affiliates solely by virtue of their shareholdings, no additional relief is necessary.

14. Applicants submit that Sections 13(a), 15(a) and 15(b) of the 1940 Act require ''pass-through'' voting with respect to management investment company shares held by a separate account to permit the insurance company to disregard the voting instructions of its contract holders in certain limited circumstances. For example, Applicants state that subparagraph (b)(15)(iii)(B) of Rules 6e–2 and 6e–3(T) under the 1940 Act provide that the insurance company may disregard contract owners' voting instructions if the contract owners initiate any changes in the investment company's investment policies, principal underwriter or investment adviser, provided that disregarding such voting instructions is reasonable and complies with the other provisions of Rules 6e–2 and 6e–3(T).

15. Applicants state that Rule 6e–2 recognizes that a variable life insurance contract has important elements unique to insurance contracts and is subject to extensive state regulation of insurance. Applicants assert that in adopting Rule 6e–2(b)(15)(iii), the Commission expressly recognized that state insurance regulators have authority to disapprove or require changes in investment policies, investment advisers, or principal underwriters. Applicants also maintain that the Commission has expressly recognized that state insurance regulators have authority to require an insurer to draw from its general account to cover costs imposed upon the insurer by a change approved by contract owners over the insurer's objection. Applicants state that the Commission deemed such exemptions necessary to assure the solvency of the life insurer and the performance of its contractual obligations by enabling an insurance regulatory authority or the life insurer to act when certain proposals reasonably could be expected to increase the risks undertaken by the life insurer. Applicants further state that in this respect, flexible premium variable life insurance contracts are identical to scheduled premium variable life insurance contracts, and that therefore corresponding provisions of Rule 6e–3(T) were adopted in recognition of the same considerations as the Commission applied in adopting Rule 6e–2.

16. Applicants further represent that the sale of Fund shares to Qualified Plans, Advisers, or General Accounts does not affect the relief previously granted by the Commission in the Original Order and requested herein in this regard. Shares of the Funds sold to Plans would be held by the trustees of such Plans as mandated 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 Qualified 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 Qualified 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 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. In any event, there is no pass-through voting to the participants in such Plans. Similarly, Advisers and General Accounts are not subject to any pass-through voting requirements. Accordingly, Applicants assert that, unlike the case with the insurance company separate accounts, the issue of the resolution of material irreconcilable conflicts with respect to voting is not present with Qualified Plans, Advisers or General Accounts.

17. Applicants note that Section 817(h) of the Code in effect requires that the investments made by variable annuity and variable life insurance separate accounts be ''adequately diversified.'' Applicants state that if a separate account is organized as a unit investment trust that invests in a single fund or series, the separate account will not be diversified. In this situation, however, Applicants state that Section 817(h) provides, in effect, that the diversification test will be applied at the underlying fund level rather than the separate account level, but only if ''all of the beneficial interests'' in the underlying fund ''are held by one or more insurance companies (or affiliated companies) in their general account or in segregated asset accounts * * * .'' Applicants state that Treasury Regulation 1.817–5, which established diversification requirements for such funds, specifically permits, among other things, investment company managers, insurance company general accounts, ''qualified pension or retirement plans'' and separate accounts to share the same underlying investment company. Therefore, Applicants have concluded that neither the Code, the Treasury regulations nor revenue rulings thereunder present any inherent conflicts of interest if Advisers, General

Accounts, Qualified Plans, variable annuity separate accounts and variable life separate accounts all invest in the same management investment company.

18. Applicants state that while there are differences in the manner in which distributions are taxed for variable annuity contracts, variable life insurance contracts and Qualified Plans, the tax consequences do not raise any conflicts of interest. When distributions are to be made, and the separate account or the Qualified Plan cannot net purchase payments to make the distributions, the separate account or the Plan will redeem shares of the Funds at their net asset value. The Plan will then make distributions in accordance with the terms of the Plan and the insurance company will make distributions in accordance with the terms of the variable contract.

19. Applicants state that there are no conflicts of interest between the contract owners of the separate accounts and the participants under the Qualified Plans with respect to the state insurance commissioners' veto powers over investment objectives. The state insurance commissioners have been given the veto power in recognition of the fact that insurance companies cannot simply redeem their separate accounts out of one Fund and invest in another. To accomplish such redemptions and transfers, complex and time consuming transactions must be undertaken. Conversely, trustees of Qualified Plans can make the decision quickly and implement redemption of shares from a Fund and reinvest the moneys in another funding vehicle without the same regulatory impediments or, as is the case with most Plans, even hold cash pending suitable investment. Based on the foregoing, Applicants represent that even should the interests of contract owners and the interests of Qualified Plans conflict, the conflicts can be almost immediately resolved because the trustees of the Qualified Plans can, independently, redeem shares out of the Funds.

20. Applicants submit that shared funding by unaffiliated insurance companies does not present any conflict of interest issues that do not already exist where a single insurance company is licensed to do business in several or all states. Applicants note that a particular state insurance regulatory body could require action that is inconsistent with the requirements of other states in which the insurance company offers its policies. Applicants state that if a particular state insurance regulator's decision conflicts with a majority of other insurance regulators, the affected insurer may be required to withdraw its separate account's investment in a Fund. Applicants submit that the fact that different insurers may be domiciled in different states does not create a significantly different or enlarged problem.

21. Applicants further submit that affiliation does not reduce the potential, if any exists, for differences in state regulatory requirements. In any event, the conditions discussed below are designed to safeguard against, and provide procedures for resolving, any adverse effects that these differences may produce.

22. Applicants also argue that affiliation does not eliminate the potential, if any exists, for divergent judgments as to when an insurance company can disregard contract owners' voting instructions. Potential disagreement is limited by the requirements that the insurance company's disregard of voting instructions be reasonable and based on specific good faith determinations. However, if a particular insurance company's decision to disregard voting instructions represents a minority position or would preclude a majority vote, the insurance company may be required, at a Fund's election, to withdraw its separate account's investment in that Fund. No charge or penalty will be imposed as a result of such a withdrawal.

23. Applicants submit that there is no reason why the investment policies of a Fund, or a series thereof, would or should be materially different from what they would or should be if such Fund or series funded only variable annuity contracts or variable life insurance policies, whether flexible premium or scheduled premium policies. Applicants state that each type of insurance product is designed as a long-term investment program, and Applicants represent that each Fund, or series thereof, will be managed to attempt to achieve its investment objective, and not to favor or disfavor any particular participating insurer or type of insurance product.

24. Applicants argue that the ability of the Funds to sell their respective shares directly to Qualified Plans, Advisers, and General Accounts does not create a ''senior security'' as such term is defined under Section 18(g) of the 1940 Act, with respect to any contract owner as opposed to a participant under a Qualified Plan, an Adviser, or an insurer. Regardless of the rights and benefits of participants under the Qualified Plans or contract owners, the Qualified Plans, Advisers, General Accounts and the separate accounts have rights only with respect to their respective shares of the Funds. They only can redeem such shares at their net asset value. No shareholder of any of the Funds has any preference over any other shareholder with respect to distribution of assets or payment of dividends.

25. Applicants assert that with respect to voting rights, it is possible to provide an equitable means of giving such voting rights to contract owners and to Qualified Plans, Advisers, and General Accounts. The transfer agent will inform each participating insurance company of its share ownership in each separate account, as well as inform the trustees of Qualified Plans, Advisers and insurers of their holdings. The participating insurance company will then solicit voting instructions in accordance with Rules 6e–2 and 6e–3(T).

26. Applicants assert that permitting a Fund to sell its shares to its Adviser(s) or to the general account of a participating insurance company in compliance with Treasury Regulation § 1.817–5 will enhance Fund management without raising significant concerns regarding material irreconcilable conflicts. Applicants state that unlike the circumstances of many investment companies that serve as underlying investment media for variable insurance products, the Trust may be deemed to lack an insurance company ''promoter'' for purposes of Rule 14a–2 under the 1940 Act. Applicants state that they anticipate that many other Funds may lack an insurance company promoter. Accordingly, Applicants state that such Funds will be subject to the requirements of Section 14(a) of the 1940 Act, which generally requires that an investment company have a net worth of $100,000 upon making a public offering of its shares.

27. Applicants assert that given the conditions of Treas. Reg. § 1.817–5(f)(3) and the ''harmony of interest'' between a Fund and its Adviser or a participating insurance company, little incentive for overreaching exists. Applicants also argue that such investments should not implicate the concerns discussed above regarding the creation of material irreconcilable conflicts. Instead, Applicants represent that permitting investment by Advisers or General Accounts will permit the orderly and efficient creation and operation of Funds, or series thereof, and reduce the expense and uncertainty of using outside parties at the early stages of Fund operations.

28. Applicants state that various factors have limited the number of insurance companies that offer variable contracts. These factors include the cost

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, a number of 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. Applicants state that use of the Funds as a common investment medium for variable contracts and Qualified Plans would help alleviate these concerns for smaller life insurance companies because participating insurance companies and Qualified Plans will benefit not only from the investment and administrative expertise of BB&T, AmSouth, any other Adviser and BISYS, but also from the cost efficiencies and investment flexibility afforded by a large pool of funds. Therefore, making the Funds available for mixed and shared funding and permitting the purchase of fund shares by Qualified Plans may encourage more life insurance companies to offer variable contracts. Applicants submit that 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.

29. Applicants assert that mixed and shared funding also should benefit variable contract owners by eliminating a significant portion of the costs of establishing and administering separate funds. Furthermore, granting the requested relief should result in an increased amount of assets available for investment by the Funds. Applicants assert that this also may benefit variable contract owners by promoting economies of scale, by permitting increased safety through greater diversification, or by making the addition of new portfolios more feasible.

30. Applicants believe that mixed and shared funding and sales of Fund shares to Qualified Plans, Advisers, and General Accounts will have no adverse federal income tax consequences.

Applicants' Conditions

Applicants have consented to the following conditions:

1. A majority of the Board of Trustees or Directors (''Board'') of each Fund shall consist of persons who are not ''interested persons'' of the Fund, 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 death, disqualification, or bona fide resignation of any trustee or director, then the operator of this condition shall 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 Fund's Board will monitor the Fund for the existence of any material irreconcilable conflict among the interests of the contract owners of all separate accounts investing in the Fund and of Plan participants investing in the Fund. 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 interpretative letter, or any similar action by insurance, tax, or securities regulatory authorities; (c) an administrative or judicial decision in any relevant proceeding; (d) the manner in which the investments of any Fund or series are being managed; (e) a difference in voting instructions given by owners of variable annuity contract owners and variable life insurance contract owners; (f) a decision by an insurer to disregard the voting instructions of contract owners; or (g) if applicable, a decision by a Qualified Plan to disregard the voting instructions of Plan participants.

3. In the event that a Qualified Plan shareholder should become an owner of 10% or more of the assets of a Fund selling its shares in reliance on the requested exemptive relief, such Qualified Plan shareholder will execute a fund participation agreement providing for the conditions of this Application (to the extent applicable) with such Fund. A Qualified Plan shareholder will execute an application containing an acknowledgment of this condition at the time of its initial purchase of shares of a Fund.

4. Participating insurance companies (on their own behalf as well as by virtue of any investment of general account assets in a Fund), BISYS, the Adviser, and any Qualified Plan that executes a fund participation agreement (collectively ''Participants'') will report any potential or existing conflicts to the Board. Participants will be responsible for assisting the 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 contract owner voting instructions are disregarded. The responsibility to report such information and conflicts and to assist the Board will be a contractual obligation of all insurers investing in a Fund under their agreements governing participation in the Fund, as well as a contractual obligation of any Qualified Plan that executes such a participation agreement, and such agreements shall provide that such responsibilities will be carried out with a view only to the interests of the contract owners or, as appropriate, Qualified Plan participants.

5. If a majority of the Board, or a majority of its disinterested trustees or directors, 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 trustees or directors), shall take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict. Such steps could include: (a) withdrawing the assets allocable to some or all of the separate accounts from the Fund or any series thereof and reinvesting such assets in a different investment medium, which may include another series of the Fund; (b) 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.*, annuity or life insurance contract owners or variable 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 charge; and (c) establishing a new registered management investment company or managed separate account. If a material irreconcilable conflict arises because of an insurer's decision to disregard contract owner voting instructions and that decision represents a minority position or would preclude a majority vote, the insurer may be required, at the election of the 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.

The reponsibility 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 shall be a contractual obligation of all participating insurance companies and Plans that have executed participation agreements under their agreements

governing participation in the Fund. These responsibilities shall be carried out with a view only to the interests of contract owners and Plan participants, as appropriate.

6. For purposes of Condition 5, a majority of the disinterested members of the Board shall determine whether any proposed action adequately remedies any material irreconcilable conflict. In no event will the Fund be required to establish a new funding medium for any variable contract. No participating insurance company shall be required by Condition 5 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.

7. Participants will be informed promptly in writing of a Board's determination of the existence of a material irreconcilable conflict and its implications.

8. Participating insurance companies will provide pass-through voting privileges to all variable contract owners whose contracts are funded through a registered separate account so long as the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for variable contract owners. Accordingly, such participating insurance companies will vote shares of each Fund or series thereof held in its registered separate accounts in a manner consistent with voting instructions timely received from contract owners. In addition, each participating insurance company will vote shares of each Fund, or series thereof, held in its registered separate accounts for which it has not received timely voting instructions, 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 registered separate accounts participating in a Fund 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 a Fund shall be a contractual obligation of all participating insurance companies under the agreements governing their participation in the Fund. Each Qualified Plan will vote as required by applicable law and governing Plan documents.

9. Each Fund will notify all participating insurance companies that prospectus disclosure regarding potential risks of mixed and shared funding may be appropriate. Each Fund shall disclose in its prospectus that: (a) its shares are offered to insurance company separate accounts that fund both annuity and life insurance contracts; (b) differences in tax treatment or other considerations may cause the interests of various contract owners participating in the Fund to conflict; and (c) the Board will monitor for any material conflicts and determine what action, if any, should be taken.

10. 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 Participants of a conflict; and (c) determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the relevant Board or other appropriate records. Such minutes or other records shall be made available to the Commission upon request.

11. If and to the extent Rule 6e–2 and Rule 6e–3(T) are 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 thereunder with respect to mixed or shared funding on terms and conditions materially different from any exemptions granted in the order requested by Applicants, then each Fund and/or participating insurance companies, as appropriate, shall take such steps as may be necessary to comply with Rule 6e–2 and Rule 6e–3(T), as amended, and Rule 6e–3, as adopted, to the extent such rules are applicable.

12. Each Fund will comply with all the provisions of the 1940 Act requiring voting by shareholders (for these purposes, the persons having a voting interest in the shares of the Fund). In particular, each Fund either will provide for annual meetings (except to the extent that 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 Funds are not one of the trusts described in Section 16(c) of the 1940 Act) as well as with Section 16(a) and, if and when applicable, Section 16(b) of the 1940 Act. Further, each Fund will act in accordance with the Commission's interpretation of the requirements of Section 16(a) with respect to periodic elections of directors (or trustees) and with whatever rules the Commission may promulgate with respect thereto.

13. As long as the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for variable contract owners, each Adviser and insurance company general account will vote its shares in the same proportion as all contract owners having voting rights with respect to that Fund, provided, however, that the Adviser or insurance company general account shall vote its shares in such other manner as many be required by the Commission or its staff.

14. No less than annually, the Participants shall submit to a Board such reports, materials or data as the Board may reasonably request so that such Board may carry out fully the obligations imposed upon it by the conditions contained in this application. Such reports, materials and data shall be submitted more frequently if deemed appropriate by the Board. The obligations of the participating insurance companies and Plans to provide these reports, materials and data upon reasonable request of a Board shall be a contractual obligation of all participating insurance companies and any Qualified Plan that has executed a participation agreement under the agreements governing their participation in each Fund.

15. A participating insurance company, or any affiliate, will maintain at its home office, available to the Commission, (a) a list of its officers, directors and employees who participate directly in the management or administration of the Funds or any variable annuity or variable life insurance separate account, organized as a unit investment trust, that invests in the Funds and/or (b) a list of its agents who, as registered representatives, offer and sell the variable annuity and variable life contracts funded through such a separate account. These individuals will continue to be subject to the automatic disqualification provisions of Section 9(a).

Conclusion

For the reasons summarized above, Applicants represent that the exemptions requested are 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.

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