Generating Company (''AGC'');[7] and (c) the merger of AE Global with and into New AE Supply.

New AE Supply seeks a section 3(a)(2) exemption from registration under the Act. As a Maryland corporation, New AE Supply will be predominantly a public utility company whose operations do not extend beyond the state of organization and states contiguous thereto. New AE Supply will operate in Maryland, its state of incorporation, and in Virginia, West Virginia, and Pennsylvania, which are all contiguous to Maryland.

New AE Supply will be a holding company solely through its ownership of the following public utility companies: (a) Conemaugh; (b) Green Valley; and (c) AGC. Each of these entities was formed under the laws of Delaware and is exclusively engaged in selling power at wholesale.[8]

As part of the restructuring, Allegheny Energy Service Corporation (''AESC'') proposes to expand the scope of services to be provided to New AE Supply to include energy trading activities. AESC will engage in the trading activities solely as agent on behalf of New AE Supply. All trades will be booked at New AE Supply, and will not affect the financial condition or operations of AESC or the Operating Companies. AESC and New AE Supply, as successor to AE Supply, request authority to revise the service agreement to provide for AESC to effect trading transactions for and on behalf of New AE Supply involving electricity and other types of energy commodities, and hedging and/or financial transactions, including derivatives, future contracts, options and swaps, including, without limitation, electric power, oil, natural and manufactured gas, emission allowances, coal, refined petroleum products and natural gas liquids and to provide incidental related services, such as fuel management, storage and procurement services. All services will be provided by AESC at cost computed in accordance with rules 90 and 91 under the Act.

merge Conemaugh with and into Conemaugh II, with Conemaugh II as the surviving entity.

[7] New AE Supply will form a single-member Virginia limited liability company, to be referred to as AGC, LLC. New AE Supply proposes to merge AGC with and into AGC, LLC, with AGC, LLC as the surviving entity. The purpose of the reorganization of AGC is to effect a ''liquidation'' of AGC for tax purposes, which may enhance the tax treatment to Allegheny in the future, while maintaining AGC, LLC as a separate legal entity.

[8] At an appropriate time, AE Supply will seek to certify each entity as an EWG under section 32 of the Act. In the interim, they will remain public utility companies under the Act.

Alabama Power Company (70–9955)

Alabama Power Company (''Alabama Power''), 600 North 18th Street, Birmingham, Alabama 35291, a wholly owned public utility subsidiary of The Southern Company, a registered holding company, has filed a declaration under section 12(d) of the Act, and rules 44 and 54 under the Act.

Alabama Power proposes to sell, from time to time prior to December 31, 2006, distribution line poles located in Alabama to non-affiliated telephone and other non-electric utility companies (''Purchasers''). Alabama Power would convey the poles to the Purchasers by a bill of sale for a negotiated cash sale price that would exceed Alabama Power's average book value for the number of distribution poles of each class being sold, and the aggregate price of the sales would not exceed $30 million. The conveyance would include a release of the poles from Alabama's first mortgage indenture lien. The $30 million authority requested is in addition to any exceptions otherwise provided by rules under the Act relating to sales of utility securities or assets.

Alabama Power and each Purchaser have or will have entered into a joint use agreement under which each party may attach facilities to poles belonging to the other party, with each party obligated to the other for rental of space on poles owned by the other party. The proposed sale of poles is for the purpose of equalizing the rental payments under those joint use agreements, and it is anticipated that there will be no substantial change in the use of the poles.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–30324 Filed 12–6–01; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–25305; File No. 812–12544]

Touchstone Variable Series Trust, *et al.*

December 3, 2001.

AGENCY: Securities and Exchange Commission (the ''Commission'').

ACTION: Notice of an application for an order of exemption 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 and 6e–3(T) thereunder.

Applicants: Touchstone Variable Series Trust and Touchstone Advisors, Inc. (collectively, ''Applicants'').

Summary of Application: Applicants seek an order of exemption 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 to the extent necessary to permit shares of any current or future series of Touchstone Variable Series Trust (''TVST'') and shares of any other investment company that is offered as a funding medium for insurance products and for which Touchstone Advisors, Inc. (''Touchstone Advisors'' or the ''Manager'') or any affiliates thereof may now or in the future serve as manager, investment adviser, sub-adviser, administrator, principal underwriter or sponsor (TVST and such future investment companies are collectively referred to herein as the ''Trusts'' and individually as a ''Trust''; the current and future series of the Trusts are collectively referred to herein as the ''Funds'' and individually as a ''Fund'') to be sold and held by: (1) Variable annuity and variable life insurance separate accounts (''Participating Separate Accounts'') of both affiliated and unaffiliated life insurance companies (''Participating Insurance Companies''); (2) qualified pension and retirement plans (''Participating Plans'') outside the separate account context; and (3) the Manager and any other affiliated and unaffiliated registered investment advisor (each, a ''Subadvisor'') retained by the Manager to manager the portfolio securities of a Touchstone Fund, and any affiliate of the Manager and affiliates of the Subadvisors (collectively, the ''Participating Investors'').

Filing Date: The original application was filed on June 5, 2001. An amended and restated application was filed on November 28, 2001.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 28, 2001, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of writer'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 Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549. Applicants, c/o Frost Brown Todd LLC, 2200 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202, Attention: Karen M. McLaughlin, Esq. or Kevin L. Cooney, Esq.

FOR FURTHER INFORMATION CONTACT: Alison Toledo, Senior Counsel, or Lorna Macleod, 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 Commission's Public Reference Branch, 450 Fifth Street, NW, Washington, DC, 20549–0102 (202–942–8090).

Applicants' Representations

1. TVST is a Massachusetts business trust that is registered under the 1940 Act as an open-end diversified management investment company. TVST currently consists of, and offers shares of beneficial interests in, separate portfolios (each a ''Touchstone Fund'' and collectively the ''Touchstone Funds''), each of which has its own investment objectives and policies. TVST may in the future issue shares of additional portfolios.

2. Touchstone Advisors is registered as an investment adviser under the Investment Advisers Act of 1940, as amended, and is the investment adviser for each Touchstone Fund. Touchstone Advisors in turn has retained Subadvisors to manage the portfolio securities of each Touchstone Fund.

3. Shares of the Funds will be offered to Participating Separate Accounts of Participating Insurance Companies to serve as investment vehicles for various types of insurance products, which may include variable annuity contracts, single premium variable life insurance contracts, scheduled premium variable life insurance contracts, modified single premium variable life insurance policies and flexible premium variable life insurance contracts.

4. Each Participating Insurance Company will have the legal obligation to satisfy all requirements applicable to it under both state and federal securities laws in connection with any variable contract issued by such company. Each Participating Insurance Company will enter into a fund participation agreement with the applicable Trust on behalf of the Fund in which the Participating Insurance Company invests. With respect to the Participating Insurance Companies, the role of the funds, insofar as the federal securities laws are applicable, will be limited to offering shares to Participating Separate Accounts and fulfilling any conditions the Commission may impose upon granting the order requested by this Application.

5. Shares of the Funds will also be offered to Participating Plans. It is anticipated that Participating Plans may choose a Fund (or any one or more series thereof) as the sole investment under the Participating Plan or as one of several investments. Participating Plan participants may or may not be given an investment choice among investment alternatives, depending on the plan itself. Shares of the Funds sold to Participating Plans would be held by the trustee(s) of these plans as mandated by Section 403(a) of the Employee Retirement Income Security Act of 1974, as amended (''ERISA''). With respect to the Participating Plans, insofar as federal securities laws are applicable, the role of the Funds will be limited to offering shares to Participating Plans and fulfilling any conditions the Commission may impose upon granting the order requested by this Application.

6. Shares of each Fund also may be offered to the Participating Investors. When the Participating Investors invest in the Funds, they will have the legal obligation of satisfying all applicable requirements under the federal securities laws and other applicable laws. With respect to the Participating Investors, insofar as the federal securities laws are applicable, the role of the Funds will be limited to offering shares to the Participating Investors and fulfilling any conditions the Commission may impose upon granting the order requested by this Application.

Applicants' Legal Analysis

1. Applicants request an order of the Commission pursuant to Section 6(c) of the 1940 Act exempting the Participating Separate Accounts of Participating Insurance Companies (and, to the extent necessary, any investment adviser, sub-adviser, principal underwriter, manager, administrator or sponsor of a Fund) 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 (and any permanent rule comparable to Rule 6e–3(T)), to the extent necessary to permit shares of the Funds to be offered and sold to, and held by: (a) Variable annuity separate accounts and variable life insurance separate accounts (including both scheduled and flexible premium variable life insurance separate accounts) of the same life insurance company or of affiliated life insurance companies; (b) separate accounts of unaffiliated life insurance companies (including both variable annuity separate accounts and variable life insurance separate accounts); (c) trustees of qualified pension or retirement plans; and (d) the Participating Investors.

2. Section 6(c) of the Act authorizes the Commission to exempt any person, security or transaction from the provisions of the 1940 Act and rules promulgated thereunder, if and to the extent that, such exemption is necessary or appropriate in the public interest or for 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, 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. Section 9(a) of the 1940 Act provides that it is unlawful for any company to serve as an investment adviser or principal underwriter of any registered open-end investment company if an affiliated person of that company is subject to disqualification enumerated in Section 9(a)(1) or (2) of the 1940 Act. Rules 6e–2(b)(15)(i) and (ii) provide partial exemptions from Section 9(a). Rule 6e–2(b)(15)(iii) provides a partial exemption from Sections 13(a), 15(a) and 15(b) of the 1940 Act to the extent those sections have been deemed by the Commission to require ''pass-through'' voting with respect to an underlying fund's shares.

4. The exemptions granted by Rule 6e–2(b)(15) are available only where all of the assets of the separate account consist of the shares of one or more registered management investment companies that offer their shares ''exclusively to variable life insurance separate accounts of the life insurer, or of 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 company that also offers its shares to a flexible premium variable life insurance or variable annuity separate account of the same insurance company or any other insurance company. The use of a common management investment company as the underlying investment medium for both variable annuity and variable life insurance separate accounts of the same life insurance company or

of any affiliated life insurance company is referred to as ''mixed funding.''

5. In addition, applicants assert that 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 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 variable annuity and/or 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.''

6. Moreover, although the relief granted by Rule 6e–2(b)(15) is not affected by the purchase of shares of the Funds by Participating Plans and the Participating Investors, because the relief granted by Rule 6e–2(b)(15) is available only where shares are offered exclusively to variable life insurance separate accounts, additional exemptive relief may be necessary if the shares of the Funds are also sold to Participating Plans or to the Participating Investors.

7. 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) under the 1940 Act provides partial exemptions from Sections 13(a), 15(a), and 15(b) of the 1940 Act to the extent that those sections have been deemed by the Commission to require ''pass-through'' voting with respect to an underlying fund's shares. In addition, Rule 6e–3(T)(b)(15) provides a partial exemption from Section 9(a) to the extent that such section would render a company ineligible to serve as an investment adviser or principal underwriter of any registered open-end management investment company, where an officer, director, employee or affiliated person of such company is subject to a disqualification enumerated in Section 9(a), but the individual subject to such disqualification does not participate directly in the management or administration of the underlying management investment company.

8. The exemptions granted to a separate account by Rule 6e–3(T)(b)(15) 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) grants the exemptions if the underlying fund engages in mixed funding for a flexible premium variable life insurance separate account, subject to certain conditions, but does not permit shared funding.

9. Applicants asset that the relief provided by Rule 6e–3(T) is not relevant to the purchase of shares of the Funds by Participating Plans or by the Participating Investors. However, because the relief granted by Rule 6e–3(T)(b)(15) is available only where shares of the underlying fund are offered exclusively to separate accounts, or to life insurers in connection with the operation of a separate account, additional relief may be necessary if shares of the Funds are also sold to Participating Plans or to the Participating Investors.

10. Applicants assert that if the Funds were to sell their shares only to Participating Plans or to the Participating Investors, no exemptive relief would be necessary. None of the relief provided for in Rules 6e–2(b)(15) and 6e–3(T)(b)(15) relates to qualified pension and retirement plans or to a registered investment company's ability to sell its shares to such plans or to the Participating Investors. Exemptive relief in connection with the sale of shares of the Funds to Participating Plans or the Participating Investors is requested only because Applicants are seeking relief under Rules 6e–2 and 6e–3(T) and do not wish to be denied such relief if the Funds sell shares to Participating Plans or to the Participating Investors.

11. Applicants state that the current tax law permits the Funds to sell their shares to the Participating Plans and to the Participating Investors. Section 817(h) of the Internal Revenue Code (the ''Code'') imposes certain diversification requirements on the underlying assets of variable contracts. The Code provides that variable contracts shall not be treated as an annuity contract or life insurance contract for any period (and any subsequent period) in which the underlying assets are not adequately diversified as prescribed by the U.S. Department of the Treasury (the ''Treasury Department''). The Treasury Department has issued regulations (Treas. Reg. 1.817–5) (the ''Treasury Regulations'') which establish diversification requirements for investment portfolios underlying variable contracts. To meet these diversification requirements, all of the beneficial interests in the investment company must be held by the segregated asset accounts of one or more insurance companies. The regulations, however, do contain certain exceptions to this requirement, one of which allows shares in an investment company to be held by the trustees of a pension or retirement plan as well as segregated asset accounts of insurance companies in connection with their variable contracts. (*See* Treas. Reg. § 1.817–5(f)(3)(iii)). Applicants assert that another exception allows shares in an investment company to be held by the investment manager of the investment company and certain companies related to the investment manager as well as the segregated asset accounts of insurance companies (Treas. Reg. § 1.817–5(f)(3)(ii)).

12. Applicants state that the promulgation of Rules 6e–2 and 6e–3(T) preceded the issuance of these Treasury Regulations, and that it is possible for shares of an investment company to be held by the trustee of a qualified pension or retirement plan or the investment company's investment manager and certain related companies without adversely affecting the ability of shares in the same investment company to be held by the separate accounts of insurance companies in connection with their variable contracts. Given the then-current tax law, the sale of shares of the same investment company to separate accounts of insurance companies, trustees of qualified plans or the investment company's investment manager and companies related to the investment manager could not have been envisioned at the time of the adoption of Rules 6e–2(b)(15) and 6e–3(T)(b)(15).

13. In general, Section 9(a) of the 1940 Act disqualifies any person convicted of certain offenses, and any company affiliated with that person, from acting or serving in various capacities with respect to a registered investment company. Section 9(a) provides that it is unlawful for any company to serve 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 Rules 6e–3(T)(b)(15)(i) and (ii) provide partial exemptions from Section 9(a) under certain circumstances, subject to limitations on mixed and shared funding imposed by the 1940 Act and the rules thereunder. These exemptions limit the application of the eligibility restrictions to affiliated individuals or companies that directly

participate in the management of the underlying management company.

14. Applicants state that the relief provided by Rules 6e–2(b)(15)(i) and 6e–3(T)(b)(15)(i) under the 1940 act permits a person disqualified under Section 9(a) to serve as an officer, director, or employee of the life insurer, or any of its affiliates, so long as that person does not participate directly in the management or administration of the underlying fund.

15. Applicants assert that the relief provided by Rules 6e–2(b)(15)(ii) and 6e–3(T)(b)(15)(ii) under the 1940 Act permits a 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 underlying fund.

16. 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, 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. The 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 many individuals in a typical insurance company complex, most of whom typically will have no involvement in matters pertaining to investment companies in that organization. Applicants assert that it is also unnecessary to apply Section 9(a) to the many individuals employed by Participating Insurance Companies (or affiliated companies of Participating Insurance Companies) who do not participate in the administration or management of the Funds.

17. The Applicants 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 and shared funding or sales to Participating Plans. Participating Insurance Companies and Participating Plans are not expected to play any role in the management or administration of the Funds. It is expected that those individuals who participate in the management or administration of the Funds will remain the same regardless of which separate accounts, insurance companies or qualified plans use the Funds. Therefore, applying the monitoring requirements of Section 9(a) because of investments by Participating Insurance Companies or Participating Plans would not serve any regulatory purpose. Furthermore, the increased monitoring costs would reduce the net rates of return realized by contract owners and plan participants.

18. Moreover, Applicants assert that the relief requested should not be affected by the sale of shares of the Funds to the Participating Investors. The eligibility restrictions of Section 9(a) will still apply to any officers, directors or employees of the Participating Investors who participate directly in the management or administration of the Funds.

19. Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) assume the existence of a pass-through voting requirement with respect to management investment company shares held by a separate account. Participating Insurance Companies will provide pass-through voting privileges to variable contract owners so long as the Commission interprets the 1940 Act to require pass-through voting privileges for variable contract owners. However, if the limitations on mixed funding and shared funding are observed, Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) provide exemptions from the pass-through voting requirements with respect to several significant matters.

20. Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(b)(15)(iii)(A)(*1*) provide that an insurance company may disregard the voting instructions of its contract owners with respect to the investments of an underlying fund, or any contract between a fund and its investment adviser, when required to do so by an insurance regulatory authority (subject to the provisions of paragraphs (b)(5)(i) and (b)(7)(ii)(A) of such Rules).

21. Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii)(A)(*2*) provide that, with respect to registered management investment companies whose shares are held by a separate account of an insurance company, the insurance company may disregard contract owners' voting instructions if the contract owners initiate any change in such company's investment objectives or any principal underwriter or investment adviser (provided that disregarding such voting instructions is reasonable and subject to the other provisions of paragraphs (b)(5)(ii) and (b)(7)(ii)(B) and (C) of Rules 6e–2 and 6e–3(T)).

22. Applicants state that in the case of a proposed change in the underlying fund's investment policies, the insurance company, in order to disregard contact owner voting instructions, must make a good faith determination that such a change either would: (a) Violate state law; or (b) result in investments that either (i) would not be consistent with the investment objectives of the separate account or (ii) would vary from the general quality and nature of investments and investments techniques used by other separate accounts of the company or of an affiliated life insurance company with similar investment objectives.

23. Applicants state that in the case of a change in an investment adviser or principal underwriter, the insurance company, in order to disregard contract owners' voting instructions, must make a good faith determination that either: (a) The proposed advisory fees would exceed the maximum rate that may be charged against the separate account's assets; or (b) the proposed adviser may be expected (i) to employ investment techniques that would vary from the general techniques used by the current adviser, or (ii) to manage the investments in a manner that either would be inconsistent with the investment objectives of the separate account or would result in investments that vary from certain standards.

24. 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. In adopting Rule 6e–2(b)(15)(iii), the Commission expressly recognized that state insurance regulators have authority, pursuant to state insurance laws or regulations, to disapprove or require changes in investment policies, investment advisers, or principal underwriters. The Commission also 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. The Commission, therefore, deemed exemptions from the pass-through voting requirements necessary ''to assure the solvency of the life insurer and 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.'' In this respect, flexible premium variable life insurance contracts are identical to scheduled premium variable life insurance contracts. Therefore, the corresponding provisions of Rule 6e–3(T), which apply to flexible premium insurance contracts and permit mixed funding, were adopted in recognition of the same considerations as the Commission applied in adopting Rule 6e–2.

25. Applicants assert that the considerations that prompted the

Commission to include exemptions from pass-through voting requirements in both Rules 6e–2 and 6e–3(T) are no less important and necessary when an insurance company funds its separate accounts with underlying funds engaged in mixed funding and shared funding. Such funding does not compromise the goals of the insurance regulatory authorities or the Commission. In connection with mixed funding, the Commission may have wished to reserve wide latitude with respect to the once unfamiliar variable annuity product, but that product is now familiar, and there appears to be no reason for the maintenance of prohibitions against mixed funding arrangements.

26. Applicants note that when the Commission amended Rule 6e–3(T) in 1985, it considered the appropriateness of extending the partial exemptions from the pass-through voting requirements to separate accounts that invest in underlying funds offering their shares to variable contract separate accounts of both affiliated and unaffiliated life insurance companies (*i.e.,* shared funding). At that time, the Commission stated that shared funding was a new and somewhat complicated area from a regulatory perspective and reiterated its concerns about voting arrangements and irreconcilable conflicts in the area of mixed and shared funding. The Applicants believe that the Commission's concerns about voting arrangements and material irreconcilable conflicts are not warranted in the context of shared funding because offering shares of an underlying fund to separate accounts of unaffiliated life insurance companies does not increase the risk of material irreconcilable conflicts among shareholders of the Funds. Furthermore, the Commission's application experience over the past 15 years in crafting appropriate safeguards to deal with potential conflicts of interest arising from shared funding arrangements is reflected in the conditions proposed by the Applicants.

27. Applicants further assert that the offer and sale of shares of the Funds to Participating Plans or to the Participating Investors will not have any impact on the relief requested with respect to pass-through voting. Shares of the Funds sold to Participating Plans will be held by the trustees or custodians of the Participating Plans as required by Section 403(a) of ERISA or applicable provisions of the Code. The exercise of voting rights by Participating Plans, whether by the trustees, by participants, by beneficiaries, or by investment managers engaged by the Participating Plans, does not present the type of issues with respect to voting rights that are presented by variable life separate accounts. ERISA does not require pass-through voting to participants in qualified pension or retirement plans that are not registered as investment companies under the 1940 Act.

28. Applicants submit that Section 403(a) of ERISA provides that the trustee(s) must have exclusive authority and discretion to manage and control the investments of the Participating Plans with two exceptions: (a) When a Participating 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 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)(3) of ERISA. Unless one of the two exceptions stated in Section 403(a) applies, plan trustees have the exclusive authority and responsibility for voting proxies. When 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. Accordingly, unlike the case with insurance company separate accounts, issues related to pass-through voting rights and potential material irreconcilable differences are not present with respect to Participating Plans that do not provide pass-through voting privileges to their participants.

29. Applicants note that some plans may provide participants with the right to give voting instructions. However, 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 other plans, would vote in a manner that would disadvantage variable contract owners. Therefore, the purchase of shares of the Funds by Participating Plans that provide voting rights to participants does not present any complications not otherwise occasioned by mixed funding and shared funding.

30. Applicants further assert that certain complications are not present with respect to these Participating Plans because insurance regulations would not be applicable to the plans and the insurance company could not disregard votes cast by a plan trustee, even if the votes were based on plan participant instructions. Moreover, the conditions proposed by the Applicants, which are based on those imposed by the Commission in numerous exemptive orders related to sales to qualified retirement and pension plans, will provide the appropriate safeguards for dealing with such conflicts of interest.

31. Moreover, Applicants assert that the Participating Investors are not subject to any pass-through voting requirements. Accordingly, the issue of the resolution of material irreconcilable conflicts with respect to voting is not present with respect to the Participating Investors.

32. Applicants assert that the Commission's primary concern with respect to mixed and shared funding issues is that of potential conflicts of interest. Therefore the prohibitions on mixed and shared funding might reflect some concern with possible divergent interests among different classes of investors. When Rule 6e–2 was adopted, variable annuity separate accounts could (and some did) invest in mutual funds whose shares were also offered to the general public. Therefore, at the time of the adoption of Rule 6e–2, the Commission staff contemplated underlying funds with public shareholders and with variable life insurance separate account shareholders. The Commission staff may have been concerned with the potentially different investment motivations of public shareholders and variable life insurance contract owners. There also may have been some concern with a state insurance regulatory authority having the authority to affect the operations of a publicly available mutual fund, and hence, affect the investment decisions of public shareholders.

33. Applicants note that, for reasons unrelated to the 1940 Act, Internal Revenue Service Ruling 81–225 (Sept. 25, 1981) effectively deprived variable annuities funded by publicly available mutual funds of their tax-benefited status. Applicants state that the Tax Reform Act of 1984 codified the prohibition against the use of publicly available mutual funds as an investment medium for variable contracts (including variable life contracts). Applicants further state 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.'' If a separate account is registered as a unit investment trust that invests in a single fund or series, Applicants maintain that Section 817(h) and the Treasury Regulations provide, in effect, that the diversification test will be applied at the underlying fund level rather than at 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, accordingly, a unit investment trust separate account that invests solely in a publicly available mutual fund would not be adequately diversified. In addition, Applicants state that any underlying fund, including any fund that sells its shares to separate accounts, in effect, would be precluded from selling its shares to the public. Consequently, there will be no public shareholders of the Funds.

34. Moreover, Applicants assert that the National Association of Insurance Commissioners Variable Insurance Model Regulation (the ''NAIC Model Regulation'') reflects the Commission's apparent confidence that mixed and shared funding is appropriate and that state insurance regulators can adequately protect the interests of all contract owners. The NAIC Model Regulation suggests that it is unlikely that insurance regulators would find an investment policy, principal underwriter or investment adviser inappropriate for one insurance product, but not for another insurance product. Applicants note that the NAIC Model Regulation, at Article VI, Section 1.9, as amended, removes a previous requirement that variable life insurance separate accounts not be used for variable annuity contracts. The NAIC Model Regulation has long permitted the use of a single underlying fund for different separate accounts. The NAIC Model Regulation, at Article VI, Section 3, as amended, eliminates a previous prohibition on one separate account investing in a separate account of another insurance company. As between scheduled premium and flexible premium variable life insurance policies, Applicants note that the NAIC Model Regulation draws no distinction.

35. Applicants assert that shared funding by unaffiliated insurance companies does not present any issues that do not already exist where a single insurance company is licensed to do business in several or all states. If insurers are domiciled in different states, it is possible that the particular state insurance regulatory body in a state in which one insurance company is domiciled could require action that is inconsistent with the requirements of insurance regulators of other states in which other insurance companies are domiciled. The fact that different Participating Insurance Companies are domiciled in different states does not create a significantly different or enlarged problem.

36. Applicants assert that shared funding by unaffiliated insurers does not present any issues that do not already exist where the same investment company serves as the funding vehicle for affiliated insurers, which Rules 6e–2(b)(15) and 6e–3(T)(b)(15) permit. Affiliated insurers may be domiciled in different states and be subject to differing state law requirements. Applicants submit that affiliation does not reduce the potential, if any exists, for differences in state regulatory requirements. In any event, the conditions proposed below, which are adopted from the conditions included in Rule 6e–3(T)(b)(15) and which are virtually identical to the conditions imposed in other mixed and shared funding orders granted by the Commission, are designed to safeguard against, and provide procedures for, resolving any adverse effects that differences among state regulatory requirements may produce. For example, if a particular state insurance regulatory decision conflicts with the majority of other states regulators, then the affected Participating Insurance Company will be required to withdraw its separate account's investment in the Fund. This requirement will be included in agreements that will be entered into by Participating Insurance Companies with respect to their participation in the Funds.

37. Shared funding does not present any issues that do not already exist when a life insurer disregards contract owner voting instructions. Under Rules 6e–2(b)(15) and 6e–3(T)(b)(15), an insurer may disregard contract owner voting instructions only with respect to certain specified 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–2 and 6e–3(T) that the insurance company's disregard of voting instructions be reasonable and based on specific good faith determinations.

Nevertheless, a particular insurer's disregard of voting instructions could conflict with the voting instructions of a majority of contract owners. One insurer might determine to disregard voting instructions when all or some of the other insurers (including affiliated insurers) determine to follow the voting instructions of contract owners. If the insurer's judgment represents a minority position or would preclude a majority vote, the insurer may be required, at the relevant Fund's election, to withdraw its separate account's investment in the Fund. No charge or penalty will be imposed as a result of such withdrawal. The participation agreements executed by the Participating Insurance Companies will contain these provisions.

38. Applicants submit that investment by the Participating Plans and the Participating Investors in any of the Funds will similarly present no additional conflict. The likelihood that voting instructions of variable contract owners will ever be disregarded or the possible withdrawal referred to immediately above is extremely remote and this possibility will be known, through prospectus disclosure, to any plans choosing to invest in a Fund. Moreover, Applicants state that even if a material irreconcilable conflict involving a Participating Plan or the Participating Investors arises, the Participating Plan or the Participating Investors may simply redeem its Fund shares and make alternative investments.

39. Applicants state that there is no reason why the investment policies of a Fund when it engages in sales to Participating Plans would or should be materially different from the investment policies of the Fund when it supports only variable annuity separate accounts or variable life insurance separate accounts, whether flexible premium or scheduled premium contracts. Each type of insurance product is designed as a long-term investment program. The investment objective of a qualified pension or retirement plan should coincide with a long-term investment program and should not increase the potential for conflicts.

40. Each Fund will be managed to attempt to achieve the investment objective or objectives of the Fund, and not to favor or disfavor any particular Participating Insurance Company or Participating Plan, the Participating Investors or any particular type of insurance product or plan. There is no reason to believe that the different features of various types of contracts, including the ''minimum death benefit'' guarantee under certain variable life insurance and variable annuity contracts, will lead to different investment policies for different types of variable contracts. First, minimum death benefit guarantees generally are specifically provided for by particular charges, and always are supported by general account reserves as required by state insurance law. Second, certain variable annuity contracts also have minimum death benefit guarantees. To

the extent that the degree of risk may differ as between variable annuity contracts and variable life insurance policies, the differing insurance charges imposed, in effect, adjust any such differences and equalize the insurer's exposure in either case. Third, the sale, persistency and ultimate success of all variable insurance products depend, at least in part, on satisfactory investment performance, which provides an incentive for the insurer to optimize investment performance. Fourth, under existing statutes and regulations, an insurance company and its affiliates can offer a variety of variable annuity and life insurance contracts, some with death benefit guarantees of different types and significance (and different degrees of risk for the insurer), some without death benefit guarantees, all funded by a single mutual fund.

41. Applicants note that no one investment strategy can be identified as appropriate to a particular insurance product or to a particular pension or retirement plan. Each pool of variable annuity and variable life insurance contract owners is composed of individuals of diverse financial status, age, insurance needs, and investment goals. Likewise participants in a particular pension or retirement plan differ in financial status, age and investment goals. A Fund supporting even one type of insurance product or one type of pension or retirement plan must accommodate these diverse factors in order to attract and retain purchasers. Applicants submit that permitting sales to Participating Plans will provide economic support for the continuation of the Funds. In addition, the broader base of contract owners and participants can be expected to provide economic support for the creation of additional Funds with a greater variety of investment objectives and policies.

42. In connection with the proposed sale of shares of the Funds to Participating Plans or to the Participating Investors, Applicants submit that either there are no conflicts of interest or there exists the ability by the affected parties to resolve any such conflicts without harm to the contract owners in the Participating Separate Accounts or to participants under the Participating Plans. Section 817(h) of the Code imposes certain diversification standards on the underlying assets of variable contracts held in the portfolios of management investment companies. Treasury Regulation 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. In addition, Treasury Reg. 1.817–5(f)(3)(ii) permits the Participating Investors to invest in the same underlying investment company. Applicants assert, therefore, that neither the Code, nor the Treasury Regulations, nor the revenue rulings thereunder recognize any inherent conflicts of interests if Participating Plans, Participating Separate Accounts and the Participating Investors all invest in the same management investment company.

43. Although there may be differences in the manner in which distributions from variable annuity contracts, variable life insurance contracts and qualified pension and retirement plans are taxed, Applicants state that the tax consequences do not raise any conflicts of interest with respect to use of the Funds. When distributions are to be made, and a Participating Separate Account or a Participating Plan cannot net purchase payments to make the distributions, the Participating Separate Account or the Participating Plan will redeem shares of the Fund at their net asset value. The Participating Plan will then 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.

44. Applicants state that it is possible to provide an equitable means of giving voting rights to separate account contract owners and to Participating Plans and the Participating Investors. Applicants represent that each Fund will inform each shareholder, including each Participating Separate Account, each Participating Plan and the Participating Investors, of its respective share of ownership in the Funds. Each Participating Insurance Company then will solicit voting instructions in accordance with the applicable ''pass-through'' voting requirement.

45. Applicants submit that the ability of a Fund to sell its shares directly to Participating Plans or the Participating Investors does not create a ''senior security'' with respect to any variable contract owner as opposed to a participant in a Participating Plan or the Participating Investors. The term ''senior security'' is defined under Section 18(g) of 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.'' Regardless of the rights and benefits of participants under the Participating Plans, or contract owners under variable contracts, Participating Plans, Participating Separate Accounts and the Participating Investors have rights only with respect to their respective shares of a Fund. They can only redeem such shares at their net asset value. No shareholder of any of the Funds will have any preference over any other shareholder with respect to distribution of assets or payment of dividends.

46. Applicants assert that there are no conflicts between the variable contract owners of the Participating Separate Accounts and the participants under the Participating Plans or the Participating Investor with respect to the state insurance commissioners' veto powers (direct with respect to variable life and indirect with respect to variable annuities) over investment objectives. The basic premise of shareholder voting is not all shareholders may agree with a particular proposal. This does not mean that there are any inherent conflicts of interest between shareholders. 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 investment company and invest in another. Generally, time-consuming, complex transactions must be undertaken to accomplish such redemptions and transfers. On the other hand, trustees of qualified plans can redeem their shares from an investment company and reinvest 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 have concluded that even if issues arise where the interests of variable contract owners and the interests of Participating Plans are in conflict, the issues can be almost immediately resolved because the trustees of the Plans, on their own, can redeem their shares from an investment company and reinvest in another funding vehicle at any time.

47. The Applicants assert that permitting the sale of a Fund's shares to the Participating Investor in compliance with Treasury Reg. 1.817–5 will enhance Fund management without raising significant concerns regarding material irreconcilable conflicts. Section 14(a) of the 1940 Act generally requires that an investment company have a net worth of $100,000 upon making a public offering of its shares. Initial capital is also required in connection with the creation of new series and the voting of initial shares of such series on matters requiring the approval of shareholders. A potential source of initial capital for a new Trust or a new Fund is the Manager or its affiliates or a Participating Insurance Company. Any of these parties may have an interest in

making the capital expenditure, and in participating with the new Trust or the new Fund in its organization. However, provision of seed capital or the purchase of Fund shares by the Participating Investor or by a Participating Insurance Company may be deemed to violate the exclusivity requirement of Rule 6e–2(b)(15) and/or Rule 6e–3(T)(b)(1) under the 1940 Act.

48. Applicants anticipate that such investment by the Participating Investor or by a Participating Insurance Company will be made in compliance with Treasury Reg. 1.817–5(f)(3). Given the conditions of Treasury Reg. 1.817–5(f)(3) under the Code and the harmony of interest between a Fund, on the one hand, and the Participating Investors or a Participating Insurance Company, on the other, the Applicants assert that little incentive for overreaching exists. Furthermore, such investment should not implicate the concerns discussed above regarding the creation of material irreconcilable conflicts. Instead, permitting investments by the Participating Investor or a Participating Insurance Company will permit the orderly and efficient creation and operation of the Funds.

49. Applicants state that various factors have limited the number of insurance companies offering variable annuity and variable life insurance contracts. Applicants state that 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 professionals. In particular, some small 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.

50. Applicants argue that use of the Funds as common investment mediums for variable contracts, as well as for qualified plans, could ameliorate these concerns for insurance companies that decide to participate in the Funds. Applicants also submit that mixed and shared funding should provide a benefit to variable contract owners by eliminating a significant portion of the costs of establishing and administering separate funds. Participating Insurance Companies should also benefit from the investment and administrative expertise of Touchstone Advisors and Western-Southern, or any other investment adviser or sub-adviser to a fund, and the cost efficiencies and investment flexibility afforded by a larger pool of assets. Therefore, making the Funds available for shared funding should encourage more insurance companies to offer variable contracts and 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.

51. The Applicants further assert that sale of shares of the Funds to Participating Plans should further increase the amount of assets available for investment by the Funds. This larger asset base should benefit variable contract owners and plan participants by promoting economies of scale, by permitting greater diversification, and by making the addition of new Funds more feasible. In connection with the proposed sale of shares of the Funds to Participating Plans, Applicants further submit that the intended use of the Funds with Participating Plans is not dissimilar from the intended use of the Funds with variable contracts in that Participating Plans, like variable contracts, are generally long-term retirement vehicles. The Applicants further submit that the sale of shares of the Funds to Participating Plans does not increase the risk of material irreconcilable conflicts to such Funds or to the Participating Separate Accounts.

52. Applicants assert that there is no significant legal impediment to permitting mixed and shared funding. Applicants also note that the Commission has granted numerous applications for orders permitting mixed and shared funding with respect to both scheduled and flexible premiums, including where sales are made to qualified pension and retirement plans. Applicants further note there is ample precedent for extending exemptive relief to members of a class or classes of persons, not currently identified, that may be similarly situated in the future. Such relief has been granted in various contexts and from a wide variety of the 1940 Act's provisions, including class exemption in the context of mixed and shared funding. Applicants assert that the requested exemption is 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.

Applicants' Conditions

Applicants have consented to the following conditions if the order requested in its application is granted:

1. A majority of the Board of Trustees of each Fund (a ''Board'') will consist of persons who are not ''interested persons'' of that Trust, 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. However, if this condition is not met by reason of the death, disqualification, or bona fide resignation of any trustee or trustees, then the operation of this condition will be suspended: (a) For a period of 90 days if the vacancy or vacancies may be filled by the remaining trustees;

(b) for a period of 150 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 Board will monitor its respective Funds for the existence of any material irreconcilable conflict among the interests of the variable contract owners of the Participating Separate Accounts, participants under the Participating Plans and the Participating Investor investing in the Fund, and the Board will 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 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 are being managed; (e) a difference in voting instructions given by variable annuity contract owners, variable life insurance contract owners, plan trustees or plan participants; (f) a decision by an insurer to disregard the voting instructions of variable contract owners; or (g) if applicable, a decision by a Participating Plan to disregard voting instructions of its participants.

3. Any Participating Plan that executes a fund participation agreement upon becoming an owner of 10 percent or more of the issued and outstanding shares of the Fund (a ''Reporting Plan''), Participating Insurance Companies, and the Participating Investor investing in a Fund (collectively, the ''Reporting Entities'') will report any potential or existing conflicts to the relevant Board and 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. These responsibilities include, but are not limited to, (a) an obligation by each Participating Insurance Company to inform the Board whenever it has determined to disregard voting instructions of variable contract

owners, and (b) if pass-through voting is applicable, an obligation by each Reporting Plan to inform the relevant Board whenever it has determined to disregard its participants' voting instructions. The responsibility to report such information and conflicts and to assist the relevant Board will be contractual obligations of all Participating Insurance Companies and Reporting Plans under their agreements governing participation in the Funds, and such agreements will provide that these responsibilities will be carried out with a view only to the interests of the variable contract owners and plan participants, as applicable.

4. If it is determined by a majority of the Board of a Trust, or by a majority of its disinterested trustees, as appropriate, that a material irreconcilable conflict exists with respect to a Fund, the relevant Participating Insurance Companies and Relevant Participating Plans, at their own expense (or at the discretion of a Manager of the Fund, at that Manager's expense), will take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict to the extent reasonably practicable (as determined by a majority of the disinterested trustees). These steps could include: (a) Withdrawing the assets allocable to some or all of the separate accounts of the Participating Insurance Companies from the Fund and reinvesting such assets in a different investment medium, including another Fund, (b) 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 that votes in favor of such segregation, (c) offering to the affected variable contract owners the option of making such a change; (d) withdrawing the assets allocable to some or all of the Participating Plans from the Fund and reinvesting such assets in a different investment medium; or (e) 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, or, if applicable, a decision by a trustee of a Participating Plan to disregard participant voting instructions, and that decision represents a minority position or would preclude a majority vote, then that insurer or plan, as applicable, may be required, at the Fund's election, to withdraw its investment in the 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 Reporting Plans under their agreements governing participation in the Funds, and these responsibilities will be carried out with a view only to the interests of variable contract owners and plan participants, as applicable.

5. For purposes of Condition 4, a majority of the disinterested trustees of the relevant Board will determine whether or not any proposed action adequately remedies any material irreconcilable conflict, but in no event will the Trust or the Participating Investor be required to establish a new funding medium for any variable contract or qualified plan. No Participating Insurance Company will be required by Condition 4 to establish a new funding medium for any variable contract if a majority of the variable contract owners materially and adversely affected by the material irreconcilable conflict vote to decline such offer. Furthermore, no Participating Plan will be required by Condition 4 to establish a new funding medium for such 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 documents and applicable law, the Participating Plan makes such decision without plan participant vote.

6. The affected Reporting Entities will be informed promptly in writing of a Board's determination of the existence of a material irreconcilable conflict and its implications.

7. 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. Accordingly, each Participating Insurance Company will vote shares of a Fund held in its Participating Separate Accounts in a manner consistent with voting instructions timely received from variable contract owners. Each Participating Insurance Company also will vote shares of the Fund held in its Participating Separate Accounts for which it has not received timely voting instructions from contract owners, as well as shares of the Fund that the Participating Insurance Company itself owns, in the same proportion as those shares of the Fund for which voting instructions from contract owners are timely received. Each Participating Insurance Company will be responsible for assuring that each of its Participating Separate Accounts investing in a Fund calculates voting privileges in a manner consistent with other Participating Insurance Companies investing in the Fund. The obligation to vote the Fund shares and to calculate voting privileges in a manner consistent with all other Participating Separate Accounts investing in a Fund will be a contractual obligation of all Participating Insurance Companies under the agreements governing their participation in that Fund. 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, and all Board actions with regard to determining the existence of a conflict, notifying affected Reporting Entities of a conflict, and determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the meetings of the Board or other appropriate records, and such minutes or other records will be made available to the Commission upon request.

9. Each Fund will notify all Participating Insurance Companies and all Participating Plans that disclosure regarding potential risks of mixed and shared funding may be appropriate in separate account prospectuses or plan documents. Each Fund will disclose in its prospectus that: (a) The Fund is intended to be a funding vehicle for all types of 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 variable contract owners participating in the Fund and the interests of Participating Plans investing in the Fund may conflict, and (c) the relevant Board 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 Trust 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 Fund). In particular, each Trust will either provide for annual shareholder 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 Trusts 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 Trust will act in accordance with the Commission's interpretation of the requirements of Section 16(a) with respect to periodic elections of directors and with whatever rules the Commission may promulgate with respect thereto.

11. So long as the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for variable contract owners, the Participating Investor will vote their shares in the same proportion as all contract owners having voting rights with respect to the relevant Funds; provided, however, that the Participating Investor shall vote their shares in such other manner as may be required by the Commission or its staff.

12. If and to the extent that Rules 6e–2 and Rule 6e–3(T) under the 1940 Act 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 promulgated thereunder, with respect to mixed funding or shared funding, on terms and conditions materially different from any exemptions granted in the order requested in this Application, then the Trusts and/or Participating Insurance Companies, as appropriate, will take such steps as may be necessary to comply with Rules 6e–2 and 6e–3(T), as amended, or Rule 6e–3, as adopted, to the extent that such rules are applicable.

13. The Reporting Entities, at least annually, will submit to the relevant Board such reports, materials, or data as the Board may reasonably request so that the Board may fully carry out the obligations imposed upon it by the conditions contained in this Application. Such reports, materials, and data will be submitted more frequently if deemed appropriate by the Board. The obligations of the Participating Insurance Companies and the Reporting Plans to provide these reports, materials, and data to the Board will be a contractual obligation under their agreements governing participation in the Funds.

14. If a Participating Plan should ever become a holder of ten percent or more of the issued and outstanding shares of a Fund, such plan will execute a participation agreement with the Fund, which will include the conditions set forth herein to the extent applicable. A Participating Plan will execute a document containing an acknowledgement of this condition upon such plan's initial purchase of the shares of any Fund.

15. Any shares of a Fund purchased by the Manager or its affiliates will be automatically redeemed if and when the Manager's investment management agreement terminates, and to the extent required by the applicable Treasury Regulations. No Participating Investor will sell such shares of the Funds to the public.

Conclusion

For the reasons summarized above, Applicants assert 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. 34–45118; File No. SR–NYSE–2001–34]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Amending NYSE Rule 103A To Delete an Unused Measure of Specialist Performance

November 29, 2001.

On August 29, 2001, the New York Stock Exchange, Inc. (''NYSE'' 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] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Rule 103A (Specialist Stock Reallocation and Member Education and Performance) to delete an unused measure of specialist performance.

Currently, NYSE Rule 103A provides authority for the Market Performance Committee (''MPC'') to establish and administer measures of specialist performance, conduct performance improvement actions where a specialist unit does not meet the performance standards in the Rule, and reallocate stocks if a unit does not achieve its specified goals when subject to a performance improvement action. The performance standards in the Rule include the Specialist Performance Evaluation Questionnaire, timeliness of stock openings, SuperDot order turnaround, administrative message responses and market share. This latter provision refers to a significant decline in market share, as measured by share volume, in two consecutive quarters where the decline is determined to be attributable to factors within the control of the specialist unit.

At the time the Exchange adopted the market share measure, it was intended that the Exchange would develop criteria as to what constitutes ''significant decline'' before the market share performance standard could be enforced. However, criteria were never developed, and the MPC has never used the market share standard as a performance measure.

The proposed rule change was published for comment in the **Federal Register** on October 26, 2001.[3] The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange [4] and, in particular, the requirements of section 6 of the Act.[5] The Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,[6] which requires, among other things, that the rules of an exchange promote just and equitable principles of trade and in general to protect investors and the public interest. The Commission believes that the remaining measurements of specialist performance set forth in NYSE Rule 103A should be sufficient to assist the Exchange in ensuring a certain level of market quality and performance in Exchange listed securities is maintained. The Exchange should continue to review its standards for measuring specialist performance and ensure that there are adequate, objective measures to assess such performance.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[7] that the proposed rule change (SR–NYSE–2001–34) be, and it hereby is, approved.

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 44961 (October 19, 2001), 66 FR 54316.

[4] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(2).