

## II. Commission's Response

**Intervention.** Those wishing to be heard in this matter are directed to file a notice of intervention on or before August 21, 2007. The notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site (<http://www.prc.gov>), unless a waiver is obtained for hardcopy filing. 39 CFR 3001.9(a) and 10(a).

**Settlement.** The Commission will authorize settlement negotiations in this proceeding and appoint Postal Service counsel as settlement coordinator. In this capacity, Postal Service counsel shall file periodic reports on the status of settlement discussions. The Commission authorizes the settlement coordinator to hold a settlement conference, and will make its hearing room available for this purpose upon request. Authorization of settlement discussions does not constitute a finding on the necessity of hearings in this case.

**Prehearing conference.** A prehearing conference will be held August 28, 2007, at 10 a.m. in the Commission's hearing room. Participants shall be prepared to identify any issues(s) that would indicate a need to schedule a hearing, along with other matters referred to in this order.

**Conditional Motion for Waiver.** Participants may comment on the Postal Service's conditional motion to waive certain filing requirements. Responses to the Postal Service's Motion for Waiver are due on or before August 22, 2007.

**Representation of the general public.** In conformance with section 3624(a) of title 39, the Commission designates Kenneth E. Richardson, acting director of the Commission's Office of the Consumer Advocate (OCA), to represent the interests of the general public in this proceeding. Pursuant to this designation, Mr. Richardson will direct the activities of Commission personnel assigned to assist him and, upon request, will supply their names for the record. Neither Mr. Richardson nor any of the assigned personnel will participate in or provide advice on any Commission decision in this proceeding.

*It is ordered:*

1. The Commission establishes Docket No. MC2007-3, Premium Forwarding Service, to consider the Postal Service Request referred to in the body of this order.

2. The Commission will sit *en banc* for this proceeding.

3. Postal Service counsel is appointed to serve as settlement coordinator in this proceeding.

4. Kenneth E. Richardson, acting director of the Commission's Office of the Consumer Advocate, is designated to represent the interests of the general public.

5. The deadline for filing notices of intervention is August 21, 2007.

6. A prehearing conference will be held August 28, 2007 at 10 a.m. in the Commission's hearing room.

7. Responses to the Postal Service's Conditional Motion for Waiver of certain filing requirements are due on or before August 22, 2007.

8. The Secretary shall arrange for publication of this notice and order in the **Federal Register**.

By the Commission.

**Steven W. Williams,**

*Secretary.*

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**BILLING CODE 7710-FW-P**

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-27921; File No. 812-13353]

### Sentinel Variable Products Trust, et al.; Notice of Application

August 3, 2007.

**AGENCY:** The Securities and Exchange Commission ("Commission").

**ACTION:** Notice of application for an exemption pursuant to section 6(c) of the Investment Company Act of 1940, as amended (the "1940 Act") 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.

**APPLICANTS:** Sentinel Variable Products Trust (the "Trust"), Sentinel Asset Management, Inc. ("SAM") (collectively, "Applicants").

**SUMMARY OF APPLICATION:** Applicants seek an order pursuant to section 6(c) of the 1940 Act, exempting each life insurance company separate account supporting variable life insurance contracts ("VLI Accounts") (and its insurance company depositor) that may invest in shares of the Trust or a "future trust" as defined below, 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 such VLI Accounts to hold shares of the Trust or a future trust when one or more of the following other types of investors also hold shares of the Trust or a future trust: (1) A life insurance company separate

account supporting variable annuity contracts (a "VA Account"), (2) a VLI Account of a life insurance company that is not an affiliated person of the insurance company depositor of any other VLI Account, (3) the general account of an insurance company depositor of a VLI Account (representing seed money investments in the Trust or future trust), (4) the Trust's or future trust's investment adviser (representing seed money investments in the Trust or future trust), or (5) trustees of group qualified pension and group retirement plans (hereinafter, a "Plan") outside the separate account context. As used herein, a "future trust" is any investment company (or investment portfolio or series thereof), other than the Trust, shares of which are sold to VLI Accounts and to which Applicants or their affiliates may in the future serve as investment advisers, investment sub-advisers, investment managers, administrators, principal underwriters or sponsors. Investment portfolios or series of the Trust or any future trust are referred to herein as "Insurance Funds."

**FILING DATE:** The application was filed on December 21, 2006, and amended on July 30, 2007.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 28, 2007, 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 the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090. Applicants, c/o Kerry A. Jung, National Life Insurance Company, 1 National Life Drive, Montpelier, Vermont 05604; copies to David S. Goldstein, Sutherland Asbill & Brennan LLP, 1275 Pennsylvania Avenue, NW., Washington, DC 20004-2404.

**FOR FURTHER INFORMATION CONTACT:** Ellen J. Sazzman, Senior Counsel, at (202) 551-6762, or Harry Eisenstein, Branch Chief, at (202) 551-6795, Office of Insurance Products, Division of Investment Management.

**SUPPLEMENTARY INFORMATION:** The following is a summary of the Application. The complete Application is available for a fee from the SEC's Public Reference Branch, 100 F Street, NE., Washington, DC 20549 ((202) 551-8090).

### Applicants' Representations

1. The Trust was formed as a Delaware business trust on March 14, 2000. The Trust is registered under the Act as an open-end management investment company. The Trust is a series investment company as defined by Rule 18f-2 under the 1940 Act and is currently comprised of six series: Sentinel Variable Products Common Stock Fund, Sentinel Variable Products Mid Cap Growth Fund, Sentinel Variable Products Small Company Fund, Sentinel Variable Products Balanced Fund, Sentinel Variable Products Bond Fund, Sentinel Variable Products Money Market Fund. The Trust issues a separate series of shares of beneficial interest for each Fund and has filed a registration statement under the Securities Act of 1933 (the "1933 Act") on Form N-1A (File No. 333-35832) to register such shares. The Trust may establish additional Funds in the future and additional classes of shares for such Funds.

2. The Trust and future trusts may offer each series of their shares to: VLI Accounts and VA Accounts of various life insurance companies ("Participating Insurance Companies"); Participating Insurance Company depositors of VLI Accounts investing seed money in one or more Funds through their general accounts; SAM, as a seed money investment in one or more Funds; an investment adviser of a future trust investing seed money in one or more Insurance Funds; and Plans. The VLI Accounts, VA Accounts, Participating Insurance Companies, Plans, and SAM are described below.

3. Each VLI Account and VA Account is or will be established as a segregated asset account by a Participating Insurance Company pursuant to the insurance law of the insurance company's state of domicile. As such, the assets of each will be the property of the Participating Insurance Company, and that portion of the assets of such an Account equal to the reserves and other contract liabilities with respect to the Account will not be chargeable with liabilities arising out of any other business that the insurance company may conduct. The income, gains and losses, realized or unrealized from such an Account's assets will be credited to or charged against the Account without regard to other income, gains or losses

of the Participating Insurance Company. If a VLI Account or VA Account is registered as an investment company, it will be a "separate account" as defined by Rule 0-1(e) (or any successor rule) under the 1940 Act and will be registered as a unit investment trust. For purposes of the 1940 Act, the life insurance company that establishes such a registered VLI Account or VA Account is the depositor and sponsor of the Account as those terms have been interpreted by the Commission with respect to variable life insurance and variable annuity separate accounts.

4. The Participating Insurance Companies are National Life Insurance Company ("National Life") and various other life insurance companies that are not affiliated persons of National Life. National Life is an affiliated person of SAM and the Trust. At the current time, the following VLI Accounts and VA Accounts of National Life invest in the Trust: (2) National Variable Life Insurance Account, and (2) National Variable Annuity Account II.

5. SAM serves as the investment adviser to the Trust and each of its Funds. SAM is a Delaware corporation and is registered as an investment adviser under the Investment Advisers Act of 1940. It is a wholly owned subsidiary of NLV Financial Corporation and an affiliate of National Life Insurance Company. Under the supervision of the Trust's board of trustees, SAM is responsible for making all investment decisions for the Funds.

6. The Trust proposes to offer and sell its shares (and a future trust would offer and sell its shares) to VLI Accounts and VA Accounts of various Participating Insurance Companies as an investment medium to support variable life insurance contracts ("VLI Contracts") and variable annuity contracts ("VA Contracts") (together, "Variable Contracts") issued through such Accounts. As described more fully below, the Trust (or a future trust) will only sell its shares to registered VLI Accounts and registered VA Accounts if each Participating Insurance Company sponsoring such a VLI Account or VA Account enters into a participation agreement with the Trust (or a future trust). The participation agreements will define the relationship between the Trust (or a future trust) and a Participating Insurance Company and will memorialize, among other matters, the fact that, except where the agreement specifically provides otherwise, the Participating Insurance Company will remain responsible for establishing and maintaining any VLI Account or VA Account covered by the agreement and for complying with all

applicable requirements of state and federal law pertaining to such Accounts and to the sale and distribution of Variable Contracts issued through such Accounts. The participation agreements also will memorialize, among other matters, the fact that, unless the agreement specifically states otherwise, the Trust (or a future trust) will remain responsible for establishing and maintaining any Insurance Fund covered by the agreement, for complying with all applicable requirements of state and federal law pertaining to such Funds and to the offer and sale of its shares to VLI Accounts and VA Accounts covered by the agreement, and for compliance with the conditions stated in this application.

7. The use of a common management investment company (or investment portfolio thereof) as an investment medium for both VLI Accounts and VA Accounts of the same Participating Insurance Company, or of two or more insurance companies that are affiliated persons of each other, is referred to herein as "mixed funding." The use of a common management investment company (or investment portfolio thereof) as an investment medium for VLI Accounts and/or VA Accounts of two or more Participating Insurance Companies that are not affiliated persons of each other, is referred to herein as "shared funding."

8. The Trust (or a future trust) may sell its shares directly to the Plans (i.e., not to VLI Accounts or VA Accounts supporting Variable Contracts issued to Plans). As described below, federal tax law permits investment companies such as the Insurance Funds to increase their net assets by selling shares to Plans.

9. Section 817(h) of the Internal Revenue Code of 1986, as amended (the "Code"), imposes certain diversification standards on the assets underlying Variable Contracts, such as those in each Insurance Fund. The Code provides that Variable Contracts will not be treated as annuity contracts or life insurance contracts, as the case may be, for any period (or any subsequent period) for which the underlying assets are not, in accordance with regulations issued by the Treasury Department, adequately diversified. On March 2, 1989, the Treasury Department issued regulations (Treas. Reg. 1.817-5) that established diversification requirements for Variable Contracts, which require the separate accounts upon which these Contracts are based to be diversified as provided in the Treasury Regulations. In the case of separate accounts that invest in underlying investment companies, the Treasury Regulations provide a "look through" rule that permits the

separate account to look to the underlying investment company for purposes of meeting the diversification requirements, provided that the beneficial interests in the investment company are held only by the segregated asset accounts of one or more insurance companies. However, the Treasury Regulations also contain certain exceptions to this requirement, one of which permits shares in an investment company to be held by a Plan without adversely affecting the ability of shares in the same investment company to also be held by separate accounts funding Variable Contracts (Treas. Reg. section 1.817-5(f)(3)(iii)). Another exception allows the investment adviser of the investment company (and certain companies related to the investment adviser) to hold shares of the investment company representing seed capital.

10. Plans may invest in shares of an investment company as the sole investment under the Plan, or as one of several investments. Plan participants may or may not be given an investment choice depending on the terms of the Plan itself. The trustees or other fiduciaries of a Plan may vote investment company shares held by the Plan in their own discretion or, if the applicable Plan so provides, vote such shares in accordance with instructions from participants in such Plans. Applicants have no control over whether trustees or other fiduciaries of Plans, rather than participants in the Plans, have the right to vote under any particular Plan. Each Plan must be administered in accordance with the terms of the Plan and as determined by its trustee or trustees.

11. Applicants propose that any Insurance Fund also be permitted to sell shares to its investment adviser. The Treasury Regulations permit such sales as long as the return on shares held by the adviser is computed in the same manner as shares held by VLI Accounts and VA Accounts, the adviser does not intend to sell the shares to the public, and sales to an investment adviser are only made in connection with the creation or management of the Insurance Fund for the purpose of providing seed capital.

12. Applicants propose that any Insurance Fund also be permitted to sell shares to the general account of a Participating Insurance Company. The Treasury Regulations also permit such sales as long as the return on shares held by general accounts are computed in the same manner as shares held by VLI Accounts and VA Accounts, and the Participating Insurance Company does not intend to sell the shares to the

public. Applicants anticipate that sales of shares may be made to general accounts of Participating Insurance Companies in return for seed money.

13. The promulgation of Rules 6e-2(b)(15) and 6e-3(T)(b)(15) preceded the issuance of the Treasury Regulations permitting the shares of Insurance Funds to be held by a Plan, an adviser for the Fund, or the general account of a Participating Insurance Company without adversely affecting the ability of the VLI Account to also hold shares.

14. The use of a common management investment company (or investment portfolio thereof) as an investment medium for VLI Accounts, VA Accounts, Plans, investment advisers and general accounts of Participating Insurance Companies is referred to herein as "extended mixed funding."

#### Applicants' Legal Analysis

1. Section 9(a)(2) of the 1940 Act makes it unlawful for any company to serve as an investment adviser or principal underwriter of any investment company, including a unit investment trust, if an affiliated person of that company is subject to disqualification enumerated in section 9(a)(1) or (2) of the 1940 Act. Sections 13(a), 15(a), and 15(b) of the 1940 Act have been deemed by the Commission to require "pass-through" voting with respect to an underlying investment company's shares.

2. Rule 6e-2(b)(15) under the Act provides partial exemptions from Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act to VLI Accounts supporting scheduled premium VLI Contracts and to their life insurance company depositors. The exemptions granted by the Rule are available, however, only where an Insurance Fund offers its shares *exclusively* to VLI Accounts of the same Participating Insurance Company and/or of Participating Insurance Companies that are affiliated persons of the same Participating Insurance Company and then, only where *scheduled* premium VLI Contracts are issued through such VLI Accounts. Therefore, VLI Accounts, their depositors and their principal underwriters may not rely on the exemptions provided by Rule 6e-2(b)(15) if shares of the Insurance Fund are held by a VLI Account through which flexible premium VLI Contracts are issued, a VLI Account of an unaffiliated Participating Insurance Company, an unaffiliated investment adviser, any VA Account or a Plan. In other words, Rule 6e-2(b)(15) does not permit a scheduled premium VLI Account to invest in shares of a management investment company that

serves as a vehicle for mixed funding, extended mixed funding or shared funding.

3. Accordingly, Applicants request an order of the Commission granting exemptions from sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act, and Rule 6e-2(b)(15) thereunder, to the extent necessary to permit a scheduled premium VLI Account to hold shares of Insurance Funds when one or more of the following types of investors also hold shares of the Insurance Funds: (1) VA Accounts, (2) VLI Accounts supporting flexible premium VLI Contracts, (3) VA Accounts or VLI Accounts of Participating Insurance Companies that are not affiliated persons of the depositor of the scheduled premium VLI Account, (4) the general account of a Participating Insurance Company, (5) the investment adviser (or an affiliated person of the investment adviser) of an Insurance Fund, or (6) a Plan.

4. Rule 6e-3(T)(b)(15) under the 1940 Act provides partial exemptions from sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act to VLI Accounts supporting flexible premium variable life insurance contracts and their life insurance company depositors. The exemptions granted by the Rule are available, however, only where an Insurance Fund offers its shares *exclusively* to VLI Accounts (through which either scheduled premium or flexible premium VLI Contracts are issued) of the same Participating Insurance Company and/or of Participating Insurance Companies that are affiliated persons of the same Participating Insurance Company, VA Accounts of the same Participating Insurance Company or of affiliated Participating Insurance Companies, or the general account of the same Participating Insurance Company or of affiliated Participating Insurance Companies. Therefore, VLI Accounts, their depositors and their principal underwriters may not rely on the exemptions provided by Rule 6e-3(T)(b)(15) if shares of the Insurance Fund are held by a VLI Account of an unaffiliated Participating Insurance Company, a VA Account of an unaffiliated Participating Insurance Company, the general account of an unaffiliated Participating Insurance Company, an unaffiliated investment adviser, or a Plan. In other words, Rule 6e-3(T)(b)(15) permits VLI Accounts supporting flexible premium VLI Contracts to invest in shares of a management investment company that serves as a vehicle for mixed funding but does not permit such a VLI Account to invest in shares of a management

investment company that serves as a vehicle for extended mixed funding or shared funding.

5. Accordingly, Applicants request an order of the Commission granting exemptions from sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act and Rule 6e-3(T)(b)(15) (and any comparable permanent rule) thereunder, to the extent necessary to permit a flexible premium VLI Account to hold shares of Insurance Funds when one or more of the following types of investors also hold shares of the Insurance Funds: (1) VA Accounts, (2) VA Accounts or VLI Accounts of Participating Insurance Companies that are not affiliated persons of the depositor of the flexible premium VLI Account, (3) the general account of a Participating Insurance Company, (4) the investment adviser (or an affiliated person of the investment adviser) of an Insurance Fund, or (5) a Plan.

6. As explained below, Applicants maintain that there is no public policy reason why VLI Accounts and their Participating Insurance Company depositors (or principal underwriters) should not be able to rely on the exemptions provided by Rules 6e-2(b)(15) and 6e-3(T)(b)(15) just because shares of Insurance Funds held by the VLI Accounts are also held by a Fund's investment adviser (or affiliated person), the general account of the Participating Insurance Company (or another Participating Insurance Company), or a Plan ("Eligible 817(h) Purchasers"). Rather, Applicants assert that the proposed sale of Insurance Fund shares to Plans may allow for the development of larger pools of assets, resulting in the potential for greater investment and diversification opportunities and decreased expenses at higher asset levels. Similarly, Applicants believe that the proposed sale of Insurance Fund shares to investment advisers (or their affiliates) and general accounts of Participating Insurance Companies for seed money may result in the creation of more Insurance Funds as investment options for certain VA Contracts and VLI Contracts than would otherwise be the case.

7. Applicants maintain that the reason the Commission did not grant more extensive relief in the area of mixed and shared funding when it adopted Rule 6e-3(T) is because of the Commission's uncertainty in this area with respect to issues such as conflicts of interest. Applicants believe, however, that the Commission's concern in this area is not warranted here. For the reasons explained below, Applicants have concluded that investment by Eligible 817(h) Purchasers in the Insurance

Funds should not increase the risk of material irreconcilable conflicts between owners of VLI Contracts and other types of investors or between owners of VLI Contracts issued by unaffiliated Participating Insurance Companies.

8. Pursuant to the Commission's authority under section 6(c) of the 1940 Act to grant exemptive orders to a class or classes of persons and transactions, Applicants request exemptions for a class of parties consisting of VLI Accounts, their Participating Insurance Company depositors and their principal underwriters.

9. In the context of mixed funding, extended mixed funding and shared funding, the Commission has granted numerous orders of exemption covering a class composed of registered VLI Accounts, their insurance company depositors and principal underwriters. Applicants assert that the scope of the exemptions and the conditions proposed in their Application are largely identical to these precedents. Applicants believe that the same policies and considerations that led the Commission to grant such exemptions to other similarly situated applicants are present should apply here.

10. Section 6(c) of the 1940 Act provides, in part, that the Commission, by order upon application, may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of the 1940 Act, or any rule or regulation 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. The Applicants submit that the exemptions requested 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.

11. Section 9(a)(3) of the 1940 Act provides, among other things, that it is unlawful for any company to serve as investment adviser or principal underwriter of any registered open-end investment company if an affiliated person of that company is subject to a disqualification enumerated in sections 9(a)(1) or (2). Rules 6e-2(b)(15)(i) and (ii) and Rules 6e-3(T)(b)(15)(i) and (ii) under the 1940 Act provide exemptions from Section 9(a) under certain circumstances, subject to the limitations discussed above on mixed funding, extended mixed funding and shared

funding. These exemptions limit the application of the eligibility restrictions to affiliated individuals or companies that directly participate in management of the underlying investment company.

12. The relief provided by Rules 6e-2(b)(15)(i) and 6e-3(T)(b)(15)(i) permits a person that is disqualified under sections 9(a)(1) or (2) of the Act to serve as an officer, director, or employee of the life insurance company, or any of its affiliates, as long as that person does not participate directly in the management or administration of the underlying investment company. The relief provided by Rules 6e-2(b)(15)(ii) and 6e-3(T)(b)(15)(ii) under the 1940 Act permits the life insurance company to serve as the underlying investment company's investment adviser or principal underwriter, provided that none of the insurer's personnel who are ineligible pursuant to section 9(a) participates in the management or administration of the investment company.

13. In effect, the partial relief granted in Rules 6e-2(b)(15) and 6e-3(T)(b)(15) under the 1940 Act from the requirements of section 9 of the 1940 Act 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. Those rules recognize that it is not necessary for the protection of investors or the purposes fairly intended by the policy and provisions of the 1940 Act to apply the provisions of section 9(a) to all individuals in a large insurance complex, most of whom 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) of the 1940 Act to the many individuals in various unaffiliated insurance companies (or affiliated companies of Participating Insurance Companies) that may utilize the Insurance Funds as investment vehicles for VLI Accounts and VA Accounts. Applicants maintain there is no regulatory purpose served in extending the monitoring requirements to embrace a full application of section 9(a)'s eligibility restrictions because of mixed funding, extended mixed funding or shared funding. The Participating Insurance Companies and Plans are not expected to play any role in the management of the Insurance Funds. Those individuals who participate in the management of the Insurance Funds will remain the same regardless of which VA Accounts, VLI Accounts, Plans or other Eligible 817(h) Purchasers invest in the Insurance Funds. Applicants assert that applying the

monitoring requirements of section 9(a) of the Act because of investment by VLI Accounts would be unjustified and would not serve any regulatory purpose. Furthermore, the increased monitoring costs could reduce the net rates of return realized by owners of VLI Contracts and Plan participants.

14. Rules 6e-2(b)(15)(iii) and 6e-3(T)(b)(15)(iii) under the 1940 Act provide exemptions from pass-through voting requirements with respect to several significant matters, assuming the limitations on mixed funding, extended mixed funding and shared funding are observed. Rules 6e-2(b)(15)(iii)(A) and 6e-3(T)(b)(15)(iii)(A) provide that the insurance company may disregard the voting instructions of its variable life insurance contract owners with respect to the investments of an underlying investment company, or any contract between such an investment company 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 Rules 6e-2 and 6e-3(T)).

15. Rules 6e-2(b)(15)(iii)(B) and 6e-3(T)(b)(15)(iii)(A)(2) provide that an insurance company may disregard the voting instructions of owners of its variable life insurance contracts if such owners initiate any change in an underlying investment company's investment policies, principal underwriter or any investment adviser (provided that disregarding such voting instructions is reasonable and subject to the other provisions of paragraphs (b)(5)(ii), (b)(7)(ii)(B) and (b)(7)(ii)(C) of Rules 6e-2 and 6e-3(T)).

16. In the case of a change in the investment policies of the underlying investment company, the insurance company, in order to disregard contract owner voting instructions, must make a good faith determination that such a change either would: (1) Violate state law, or (2) result in investments that either (a) would not be consistent with the investment objectives of its separate account, or (b) would vary from the general quality and nature of investments and investment techniques used by other separate accounts of the company, or of an affiliated life insurance company with similar investment objectives.

17. Both Rule 6e-2 and Rule 6e-3(T) generally recognize that a variable life insurance contract is primarily a life insurance contract containing many important elements unique to life insurance contracts and subject to extensive state insurance regulation. In adopting subparagraph (b)(15)(iii) of these Rules, the Commission implicitly 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.

18. Applicants assert that the sale of Insurance Fund shares to Eligible 817(h) Purchasers will not have any impact on the exemptions requested herein regarding the disregard of pass-through voting rights. Shares sold to Plans will be held by such Plans. Applicants believe that the exercise of voting rights by Plans, whether by trustees, participants, beneficiaries, or investment managers engaged by the Plans, does not raise the type of issues respecting disregard of voting rights that are raised by VLI Accounts. With respect to Plans, which are not registered as investment companies under the 1940 Act, there is no requirement to pass through voting rights to Plan participants. Indeed, to the contrary, applicable law expressly reserves voting rights associated with Plan assets to certain specified persons. Under section 403(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), shares of a portfolio of an investment company sold to a Plan must be held by the trust(s) funding the Plan. Section 403(a) also provides that the trustee(s) of such trusts must have exclusive authority and discretion to manage and control the Plan, with two exceptions: (1) When the Plan expressly provides that the trustee(s) are subject to the direction of a named fiduciary who is not a trustee, in which case the trustee(s) are subject to proper directions made in accordance with the terms of the Plan and not contrary to ERISA, and (2) 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 above two exceptions stated in section 403(a) applies, Plan trustees have the exclusive authority and responsibility for voting investment company shares (or related proxies) held by their Plan.

19. Where a Plan does not provide participants with the right to give voting instructions, Applicants do not see any potential for material irreconcilable conflicts of interest between or among the Variable Contract owners and Plan participants with respect to voting of the respective Insurance Fund shares. Accordingly, unlike the circumstances surrounding VLI Accounts and VA Accounts, because Plans are not required to pass through voting rights to participants, Applicants believe that the issue of resolution of material irreconcilable conflicts of interest

should not arise with respect to voting Insurance Fund shares.

20. In addition, if a Plan were to hold a controlling interest in an Insurance Fund, Applicants do not believe that such control would disadvantage other investors in such Insurance Fund to any greater extent than is the case when any institutional shareholder holds a majority of the shares of any open-end management investment company. In this regard, Applicants submit that investment in an Insurance Fund by a Plan will not create any of the voting complications occasioned by VLI Account investments in the Fund. Unlike VLI Account investments, Plan voting rights cannot be frustrated by veto rights of Participating Insurance Companies or state insurance regulators.

21. Where a Plan provides participants with the right to instruct the trustee(s) as to how to vote Insurance Fund shares, Applicants see no reason why such participants generally or those in a particular Plan, either as a single group or in combination with participants in other Plans, would vote in a manner that would disadvantage VLI Contract owners. Applicants believe that the purchase of shares by Plans that provide voting rights does not present any complications not otherwise occasioned by mixed or shared funding.

22. Similarly, an investment adviser to an Insurance Fund (or its affiliates) and the general accounts of Participating Insurance Companies are not subject to any pass-through voting requirements. Accordingly, Applicants submit that, unlike the circumstances surrounding VLI Account and VA Account investments in Insurance Fund shares, investment in such shares by Eligible 817(h) Purchasers should not raise issues of resolution of material irreconcilable conflicts of interest with respect to voting.

23. Applicants recognize that the Commission's primary concern with respect to mixed funding, extended mixed funding and shared funding issues is the potential for irreconcilable conflicts between the interests of owners of variable life insurance contracts and those of other investors in an open end investment company serving as an investment vehicle for such contracts. Applicants submit that the prohibitions on mixed and shared funding might reflect concern regarding possible different investment motivations among investors. When Rule 6e-2 was first adopted, variable annuity separate accounts could invest in mutual funds whose shares were also offered to the general public. Therefore, the Commission staff may have been

concerned with the potentially different investment motivations of public shareholders and owners of variable life insurance contracts. Applicants submit there also may have been some concern with respect to the problems of permitting a state insurance regulatory authority to affect the operations of a publicly available mutual fund and the investment decisions of public shareholders.

24. For reasons unrelated to the 1940 Act, however, Revenue Ruling 81-225 (Sept. 25, 1981) effectively deprived variable annuity contracts funded by publicly available mutual funds of their tax-benefited status. The Tax Reform Act of 1984 codified the prohibition against the use of publicly available mutual funds as an investment vehicle for both variable annuity contracts and variable life insurance contracts. In particular, section 817(h) of the Code, in effect, requires that the investments made by both variable annuity and variable life insurance separate accounts be "adequately diversified." If such a separate account is organized as part of a "two-tiered" arrangement where the account invests in shares of an underlying open-end investment company (*i.e.*, an underlying fund), the diversification test will be applied to the underlying fund (or to each of several underlying funds), rather than to the separate account itself, 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." Accordingly, a separate account that invests in a publicly available mutual fund will not be adequately diversified for these purposes. As a result, any underlying fund, including any Insurance Fund that sells shares to VA Accounts or VLI Accounts, would, in effect, be precluded from also selling its shares to the public. Consequently, the Insurance Funds may not sell their shares to the public.

25. Applicants submit that the rights of an insurance company or a state insurance regulator to disregard the voting instructions of owners of Variable Contracts is not inconsistent with either mixed funding or shared funding. The National Association of Insurance Commissioners Variable Life Insurance Model Regulation (the "NAIC Model Regulation") suggests that it is unlikely that insurance regulators would find an underlying fund's investment policy, investment adviser or principal underwriter objectionable for one type of Variable Contract but not another type. The NAIC Model Regulation has long permitted the use of

a single underlying fund for different separate accounts. Moreover, Article VI, section 3 of the NAIC Model Regulation has been amended to remove a previous prohibition on one separate account investing in another separate account. Lastly, the NAIC Model Regulation does not distinguish between scheduled premium and flexible premium variable life insurance contracts. Applicants contend that the NAIC Model Regulation therefore reflects the NAIC's apparent confidence that such combined funding is appropriate and that state insurance regulators can adequately protect the interests of owners of all variable contracts.

26. Applicants submit 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. A particular state insurance regulator could require action that is inconsistent with the requirements of other states in which the insurance company offers its contracts. However, Applicants believe that the fact that different insurers may be domiciled in different states does not create a significantly different or enlarged problem.

27. Applicants submit that shared funding by unaffiliated insurers, in this respect, is no different than the use of the same investment company as the funding vehicle for affiliated insurers, which Rules 6e-2(b)(15) and 6e-3(T)(b)(15) permit. Affiliated insurers may be domiciled in different states and be subject to differing state law requirements. Affiliation does not reduce the potential, if any exists, for differences in state regulatory requirements. In any event, the conditions set forth below are designed to safeguard against, and provide procedures for resolving, any adverse effects that differences among state regulatory requirements may produce. If a particular state insurance regulator's decision conflicts with the majority of other state regulators, then the affected Participating Insurance Company will be required to withdraw its separate account investments in the relevant Insurance Fund. This requirement will be provided for in the Participation Agreement that will be entered into by Participating Insurance Companies with the relevant Insurance Fund.

28. Rules 6e-2(b)(15) and 6e-3(T)(b)(15) give the Participating Insurance Company the right to disregard the voting instructions of VLI Contract owners in certain circumstances. This right derives from the authority of state insurance regulators over VLI Accounts and VA

Accounts. Under Rules 6e-2(b)(15) and 6e-3(T)(b)(15), a Participating Insurance Company may disregard VLI Contract owner voting instructions only with respect to certain specified items. Applicants maintain that 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 such Contract owners. The potential for disagreement is limited by the requirements in Rules 6e-2 and 6e-3(T) that the Participating Insurance Company's disregard of voting instructions be reasonable and based on specific good faith determinations.

29. A particular Participating Insurance Company's disregard of voting instructions, nevertheless, could conflict with the voting instructions of a majority of VLI Contract owners. The Participating Insurance Company's action possibly could be different than the determination of all or some of the other Participating Insurance Companies (including affiliated insurers) that the voting instructions of VLI Contract owners should prevail, and either could preclude a majority vote approving the change or could represent a minority view. If the Participating Insurance Company's judgment represents a minority position or would preclude a majority vote, then the Participating Insurance Company may be required, at the relevant Insurance Fund's election, to withdraw its VLI Accounts' and VA Accounts' investments in the relevant Insurance Fund. No charge or penalty will be imposed as a result of such withdrawal. This requirement will be provided for in the Participation Agreement entered into by the Participating Insurance Companies with the relevant Insurance Fund.

30. Applicants submit that there is no reason why the investment policies of an Insurance Fund would or should be materially different from what these policies would or should be if the Insurance Fund supported only VA Accounts or VLI Accounts, whether flexible premium or scheduled premium VLI Contracts. Each type of insurance contract is designed as a long-term investment program.

31. Applicants represent that each Insurance Fund will be managed to attempt to achieve its specified investment objective, and not favor or disfavor any particular Participating Insurance Company or type of insurance contract. Applicants contend that there is no reason to believe that different features of various types of Variable Contracts will lead to different

investment policies for each or for different VLI Accounts and VA Accounts. The sale of Variable Contracts and ultimate success of all VA Accounts and VLI Accounts depends, at least in part, on satisfactory investment performance, which provides an incentive for each Participating Insurance Company to seek optimal investment performance.

32. Applicants represent that no single investment strategy can be identified as appropriate to a particular Variable Contract. Each "pool" of VLI Contract and VA Contract owners is composed of individuals of diverse financial status, age, insurance needs and investment goals. An Insurance Fund supporting even one type of Variable Contract must accommodate these diverse factors in order to attract and retain purchasers. Applicants contend that permitting mixed and shared funding will provide economic support for the continuation of the Insurance Funds, and will broaden the base of potential Variable Contract owner investors, which may facilitate the establishment of additional Insurance Funds serving diverse goals.

33. Applicants do not believe that the sale of the shares to Plans will increase the potential for material irreconcilable conflicts of interest between or among different types of investors. In particular, Applicants see very little potential for such conflicts beyond those that would otherwise exist between owners of VLI Contracts and VA Contracts. Applicants submit that either there are no conflicts of interest or that there exists the ability by the affected parties to resolve such conflicts consistent with the best interests of VLI Contract owners, VA Contract owners and Plan participants.

34. Applicants considered whether there are any issues raised under the Code, Treasury Regulations, or Revenue Rulings thereunder, if Plans, VA Accounts, and VLI Accounts all invest in the same Insurance Fund. Section 817(h) of the Code is the culmination of a series of Revenue Rulings aimed at the control of investments by owners of Variable Contracts and discusses insurance company separate accounts. Treasury Regulation 1.817-5(f)(3)(iii), which establishes the diversification requirements for underlying funds, specifically permits, among other things, "qualified pension or retirement plans," separate accounts to invest in the same underlying fund. Applicants have concluded for this reason that neither the Code, nor the Treasury Regulations nor Revenue Rulings thereunder, present any inherent conflicts of interest if Plans, VLI

Accounts, and VA Accounts all invest in the same Insurance Fund.

35. Applicants note that, while there are differences in the manner in which distributions from VLI Accounts and Plans are taxed, these differences have no impact on the Insurance Funds. When distributions are to be made, and a VLI Account or Plan is unable to net purchase payments to make distributions, the VLI Account or Plan will redeem shares of the relevant Insurance Fund at its net asset values in conformity with Rule 22c-1 under the Act (without the imposition of any sales charge) to provide proceeds to meet distribution needs. A Participating Insurance Company will then make distributions in accordance with the terms of its VLI Contract and a Plan will then make distributions in accordance with the terms of the Plan.

36. Applicants considered whether it is possible to provide an equitable means of giving voting rights to VLI Contract owners and Plans. In connection with any meeting of Insurance Fund shareholders, the Fund's transfer agent will inform each Participating Insurance Company and other Eligible 817(h) Purchaser of their share holdings and provide other information necessary for such shareholders to participate in the meeting (e.g., proxy materials). Each Participating Insurance Company then will solicit voting instructions from owners of VLI Contracts and VA Contracts as required by either Rules 6e-2 or 6e-3(T), or section 12(d)(1)(E)(iii)(aa) of the Act, as applicable, and its Participation Agreement with the relevant Insurance Fund. Shares held by a Participating Insurance Company general account will be voted by the Company in the same proportion of shares for which it receives voting instructions from its Variable Contract owners. Shares held by Plans will be voted in accordance with applicable law. The voting rights provided to Plans with respect to the shares would be no different from the voting rights that are provided to Plans with respect to shares of mutual funds sold to the general public. Furthermore, if a material irreconcilable conflict arises because of a Plan's decision to disregard Plan participant voting instructions, if applicable, and that decision represents a minority position or would preclude a majority vote, the Plan may be required, at the election of the relevant Insurance Fund, to withdraw its investment in the Insurance Fund, and no charge or penalty will be imposed as a result of such withdrawal.

37. Applicants do not believe that the veto power of state insurance commissioners over certain potential changes to Insurance Fund investment objectives approved by owners of VLI Contracts creates conflicts between the interests of such owners and the interests of Plan participants. Applicants note that a basic premise of corporate democracy and shareholder voting is that not all shareholders may agree with a particular proposal. Their interests and opinions may differ, but this does not mean that inherent conflicts of interest exist between or among such shareholders or that occasional conflicts of interest that do occur between or among them are likely to be irreconcilable.

38. Applicants represent that although Participating Insurance Companies may have to overcome regulatory impediments in redeeming shares of an Insurance Fund held by their VLI Accounts, the Plans and the participants in participant-directed Plans can make decisions quickly and redeem their shares in a Fund and reinvest in another investment company or other funding vehicle without impediments, or as is the case with most Plans, hold cash pending suitable investment. As a result, conflicts between the interests of VLI Contract owners and the interests of Plans and Plan participants can usually be resolved quickly since the Plans can, on their own, redeem their Insurance Fund shares.

39. Finally, Applicants considered whether there is a potential for future conflicts of interest between Participating Insurance Companies and Plans created by future changes in the tax laws. Applicants do not see any greater potential for material irreconcilable conflicts arising between the interests of VLI Contract owners (or, for that matter, VA Contract owners) and Plan participants from future changes in the federal tax laws than that which already exists between VLI Contract owners and VA Contract owners.

40. Applicants recognize that the issues described above are not all-inclusive, but rather are representative of issues that they believe are relevant to the application. In light of the above, Applicants believe that the sale of Insurance Fund shares to Plans trustees would not increase the risk of material irreconcilable conflicts between the interests of Plan participants and VLI Contract owners or other investors. Further, Applicants submit that the use of the Insurance Funds with respect to Plans is not substantially dissimilar from each Insurance Fund's anticipated

use, in that Plans, like VLI Accounts, are generally long-term investors.

41. Applicants represent that a potential source of initial capital is an Insurance Fund's investment adviser or a Participating Insurance Company. Either of these parties may have an interest in making a capital investment and in assisting an Insurance Fund in its organization. However, provision of seed capital or the purchase of shares in connection with the management of an Insurance Fund by its investment adviser 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)(15).

42. Applicants assert that permitting an Insurance Fund to sell its shares to its investment adviser (or the adviser's affiliates) or to the general account of a Participating Insurance Company for the purpose of obtaining seed money will enhance management of each Insurance Fund without raising significant concerns regarding material irreconcilable conflicts among different types of investors.

43. Given the conditions of Treasury Regulation 1.817-5(f)(3) and the harmony of interest between an Insurance Fund, on the one hand, and its investment adviser (or affiliates) or a Participating Insurance Company, on the other, 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 an investment adviser (or its affiliates), or by general accounts of Participating Insurance Companies, will permit the orderly and efficient creation and operation of an Insurance Fund, and reduce the expense and uncertainty of using outside parties at the early stages of the Insurance Fund's operations.

44. Applicants also submit that, regardless of the type of shareholder in an Insurance Fund, its investment adviser (and the adviser's affiliates) are or would be contractually and otherwise obligated to manage the Insurance Fund solely and exclusively in accordance with that Fund's investment objectives, policies and restrictions, as well as any guidelines established by the its board of trustees (a "Board"). Thus, each Insurance Fund will be managed in the same manner as any other mutual fund.

45. Applicants do not believe that the ability of an Insurance Fund to sell its shares to its investment adviser (or an affiliated person of the adviser), to Plans, or to the general account of a Participating Insurance Company gives rise to a senior security. A "Senior

Security" is defined in section 18(g) of the Act to include "any stock of a class having priority over any other class as to distribution of assets or payment of dividends." As noted above, regardless of the rights and benefits of participants under Plans and owners of VLI Contracts, VLI Accounts, VA Accounts, Participating Insurance Companies, Plans, and investment advisers (or their affiliates), only have, or will only have, rights with respect to their respective shares of an Insurance Fund. These parties can only redeem such shares at net asset value. No shareholder of an Insurance Fund has any preference over any other shareholder with respect to distribution of assets or payment of dividends.

46. In addition, Applicants note that the Commission has issued numerous orders permitting mixed funding, extended mixed funding and shared funding. Therefore, Applicants submit that granting the exemptions requested herein is in the public interest and, as discussed above, will not compromise the regulatory purposes of sections 9(a), 13(a), 15(a), or 15(b) of the Act or Rules 6e-2 or 6e-3(T) thereunder.

#### Applicants' Conditions

Applicants agree that the order granting the requested relief shall be subject to the following conditions which shall apply to the Trust as well as any future trust that relies on the order:

1. A majority of the Board of each Insurance Fund will consist of persons who are not "interested persons" of the Insurance 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 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 Board, (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, or by future rule.

2. The Board of each Insurance Fund will monitor the Insurance Fund for the existence of any material irreconcilable conflict between and among the interests of the owners of all VLI Contracts and VA Contracts and participants of all Plans investing in the Insurance Fund, and determine what action, if any, should be taken in response to such conflicts. A material irreconcilable conflict may arise for a

variety of reasons, including: (a) An action by any state insurance regulatory authority, (b) a change in applicable federal or state insurance, tax, or securities laws or regulations, or a public ruling, private letter ruling, no-action or interpretive letter, or any similar action by insurance, tax or securities regulatory authorities, (c) an administrative or judicial decision in any relevant proceeding, (d) the manner in which the investments of the Insurance Fund are being managed, (e) a difference in voting instructions given by VA Contract owners, VLI Contract owners, and Plans or Plan participants, (f) a decision by a Participating Insurance Company to disregard the voting instructions of contract owners; or (g) if applicable, a decision by a Plan to disregard the voting instructions of Plan participants.

3. Participating Insurance Companies (on their own behalf, as well as by virtue of any investment of general account assets in an Insurance Fund), an adviser and its affiliates, and any Plan that executes a Participation Agreement upon its becoming an owner of 10% or more of the net assets of an Insurance Fund (collectively, "Participants") will report any potential or existing conflicts to the Board of the Insurance Fund. Each Participant will be responsible for assisting the Board in carrying out the Board's 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 Variable Contract owner voting instructions are disregarded, and, if pass-through voting is applicable, an obligation by each Plan to inform the Board whenever it has determined to disregard Plan participant voting instructions. The responsibility to report such information and conflicts, and to assist the Board, will be a contractual obligation of all Participating Insurance Companies under their Participation Agreement with an Insurance Fund, and these responsibilities will be carried out with a view only to the interests of the Variable Contract owners. The responsibility to report such information and conflicts, and to assist the Board, also will be contractual obligations of all Plans under their Participation Agreement with an Insurance Fund, and such agreements will provide that these responsibilities will be carried out with a view only to the interests of Plan participants.

4. If it is determined by a majority of the Board of an Insurance Fund, or a



majority of the disinterested directors/trustees of such Board, that a material irreconcilable conflict exists, then the relevant Participant will, at its expense and to the extent reasonably practicable (as determined by a majority of the disinterested directors/trustees), take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict, up to and including: (a) Withdrawing the assets allocable to some or all of their VLI Accounts or VA Accounts from the Insurance Fund and reinvesting such assets in a different investment vehicle including another Insurance Fund, (b) in the case of a Participating Insurance Company, submitting the question as to whether such segregation should be implemented to a vote of all affected Variable Contract owners and, as appropriate, segregating the assets of any appropriate group (*i.e.*, VA Contract owners or VLI Contract owners of one or more Participating Insurance Companies) that votes in favor of such segregation, or offering to the affected Contract owners the option of making such a change, (c) withdrawing the assets allocable to some or all of the Plans from the affected Insurance Fund and reinvesting them in a different investment medium, and (d) establishing a new registered management investment company or managed separate account. If a material irreconcilable conflict arises because of a decision by a Participating Insurance Company to disregard Variable Contract owner voting instructions, and that decision represents a minority position or would preclude a majority vote, then the Participating Insurance Company may be required, at the election of the Insurance Fund, to withdraw such Participating Insurance Company's VA Account and VLI Account investments in the Insurance Fund, and no charge or penalty will be imposed as a result of such withdrawal. If a material irreconcilable conflict arises because of a Plan's decision to disregard Plan participant voting instructions, if applicable, and that decision represents a minority position or would preclude a majority vote, the Plan may be required, at the election of the Insurance Fund, to withdraw its investment in the Insurance Fund, and no charge or penalty will be imposed as a result of such withdrawal. The responsibility to take remedial action in the event of a Board determination of a material irreconcilable conflict and to bear the cost of such remedial action will be a contractual obligation of all Participants under their Participation Agreement with an Insurance Fund, and these

responsibilities will be carried out with a view only to the interests of Variable Contract owners or, as applicable, Plan participants.

For purposes of this Condition 4, a majority of the disinterested directors/trustees of the Board of each Insurance Fund will determine whether or not any proposed action adequately remedies any material irreconcilable conflict, but, in no event, will the Insurance Fund or its investment adviser be required to establish a new funding vehicle for any Variable Contract or Plan. No Participating Insurance Company will be required by this Condition 4 to establish a new funding vehicle for any Variable Contract if any offer to do so has been declined by vote of a majority of the Contract owners materially and adversely affected by the material irreconcilable conflict. Further, no Plan will be required by this Condition 4 to establish a new funding vehicle for the Plan if: (a) A majority of the Plan participants materially and adversely affected by the irreconcilable material conflict vote to decline such offer, or (b) pursuant to documents governing the Plan, the Plan trustee makes such decision without a Plan participant vote.

5. The Board of each Insurance Fund's determination of the existence of a material irreconcilable conflict and its implications will be made known in writing promptly to all Participants.

6. Participating Insurance Companies will provide pass-through voting privileges to all Variable Contract owners whose Contracts are issued through registered VLI Accounts or registered VA Accounts for as long as required by the Act as interpreted by the Commission. However, as to Variable Contracts issued through VA Accounts or VLI Accounts not registered as investment companies under the Act, pass-through voting privileges will be extended to owners of such Contracts to the extent granted by the Participating Insurance Company. Accordingly, such Participating Insurance Companies, where applicable, will vote the shares of each Insurance Fund held in their VLI Accounts and VA Accounts in a manner consistent with voting instructions timely received from Variable Contract owners. Participating Insurance Companies will be responsible for assuring that each of their VLI and VA Accounts investing in an Insurance Fund calculates voting privileges in a manner consistent with all other Participating Insurance Companies investing in that Fund.

The obligation to calculate voting privileges as provided in this Application shall be a contractual

obligation of all Participating Insurance Companies under their Participation Agreement with the Fund. Each Participating Insurance Company will vote shares of each Insurance Fund held in its VLI or VA Accounts for which no timely voting instructions are received, as well as shares held by its general account or otherwise attributed to it, in the same proportion as those shares for which voting instructions are received. Each Plan will vote as required by applicable law, governing Plan documents and as provided in this application.

7. As long as the Act requires pass-through voting privileges to be provided to Variable Contract owners or the Commission interprets the Act to require the same, an Insurance Fund investment adviser (or its affiliates) or any general account will vote their shares of the Fund in the same proportion as all votes cast on behalf of all Variable Contract owners having voting rights; provided, however, that such an investment adviser (or affiliates) shall vote its shares in such other manner as may be required by the Commission or its staff.

8. Each Insurance Fund will comply with all provisions of the Act requiring voting by shareholders (which, for these purposes, shall be the persons having a voting interest in its shares), and, in particular, the Insurance Fund will either provide for annual meetings (except to the extent that the Commission may interpret Section 16 of the Act not to require such meetings) or comply with section 16(c) of the Act (although each Insurance Fund is not, or will not be, one of those trusts of the type described in section 16(c) of the Act), as well as with section 16(a) of the Act and, if and when applicable, section 16(b) of the Act. Further, each Insurance Fund will act in accordance with the Commission's interpretations of the requirements of section 16(a) with respect to periodic elections of directors/trustees and with whatever rules the Commission may promulgate thereto.

9. An Insurance Fund will make its shares available to the VLI Accounts, VA Accounts, and Plans at or about the time it accepts any seed capital from its investment adviser (or affiliates) or from a general account of a Participating Insurance Company.

10. Each Insurance Fund has notified, or will notify, all Participants that disclosure regarding potential risks of mixed and shared funding may be appropriate in VLI Account and VA Account prospectuses or Plan documents. Each Insurance Fund will disclose, in its prospectus that: (a)

Shares of the Fund may be offered to both VA Accounts and VLI Accounts and, if applicable, to Plans, (b) due to differences in tax treatment and other considerations, the interests of various Variable Contract owners participating in the Insurance Fund and the interests of Plan participants investing in the Insurance Fund, if applicable, may conflict, and (c) the Insurance Fund's 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 conflicts.

11. If and to the extent Rule 6e-2 and Rule 6e-3(T) under the Act are amended, or Rule 6e-3 under the Act is adopted, to provide exemptive relief from any provision of the 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 in this Application, then each Insurance Fund and/or Participating Insurance Companies, as appropriate, shall take such steps as may be necessary to comply with Rules 6e-2 or 6e-3(T), as amended, or Rule 6e-3, to the extent such rules are applicable.

12. Each Participant, at least annually, shall submit to the Board of each Insurance Fund such reports, materials or data as the Board reasonably may request so that the directors/trustees of the Board may fully carry out the obligations imposed upon the Board by the conditions contained in this Application. Such reports, materials and data shall be submitted more frequently if deemed appropriate by the Board of an Insurance Fund. The obligations of the Participants to provide these reports, materials and data to the Board, when it so reasonably requests, shall be a contractual obligation of all Participants under their Participation Agreement with the Insurance Fund.

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

14. Each Insurance Fund will not accept a purchase order from a Plan if such purchase would make the Plan an owner of 10 percent or more of the net assets of the Insurance Fund unless the Plan executes an agreement with the Insurance Fund governing participation in the Insurance Fund that includes the

conditions set forth herein to the extent applicable. A Plan will execute an application containing an acknowledgement of this condition at the time of its initial purchase of shares.

### Conclusions

Applicants submit, for all the reasons explained above, that the exemptions requested 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.

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-56193; File No. SR-Amex-2007-38]

### Self-Regulatory Organizations; American Stock Exchange LLC; Order Approving Proposed Rule Change Amending Preferred Stock Voting Rights

August 2, 2007.

#### I. Introduction

On April 20, 2007, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the minimum voting rights that must be provided to preferred shareholders in order for a preferred stock issue to list on the Amex. The proposed rule change was published for comment in the **Federal Register** on July 7, 2007.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

Section 124 of the Amex Company Guide, "Preferred Voting Rights," provides that the Exchange may decline to list a preferred stock issue on the Amex if the issuer does not provide certain minimum voting rights to holders of preferred stock. Specifically, under the current rule, the Exchange

may decline to list a preferred stock issue unless the preferred shareholders have the right, voting as a class, to vote on: (i) Any change in the rights, privileges or preferences of their preferred shares; and (ii) the creation of any additional class of preferred stock senior to or equal in preference to their preferred shares. The rule provides that any such change in the rights, privileges or preferences of preferred shares and any creation of an additional class of senior preferred stock must be approved by at least two-thirds of the preferred shareholders. Any creation of an additional class of preferred stock equal in preference must be approved by at least a majority of the preferred shareholders.

The Exchange now proposes to modify the minimum preferred voting rights required for listing of a preferred stock issue on the Amex. First, the Exchange proposes to amend the provision relating to changes in the rights, privileges, or preferences of preferred shareholders, to provide that holders of at least two-thirds of the outstanding shares of a preferred stock issue should be required for the adoption of any charter or by-law amendment that would materially affect existing terms of the preferred stock. The amended rule would also provide that, if all series of a class of preferred stock are not equally affected by a proposed change to the terms of the preferred stock, two-thirds approval of both the class and the series that will have a diminished status should be required to authorize such change. The Exchange also proposes to require that an issuer's charter not hinder the preferred shareholders' right to alter the terms of their stock by limiting modification to specific items, e.g., interest rate, redemption price.

With respect to the creation of a senior issue, the amended rule would continue to provide that the creation of a senior issue should require approval of at least two-thirds of the outstanding preferred shares. However, the Exchange proposes to amend the rule to also provide that a vote by an existing series of preferred stock is not required for the board of directors of an issuer to create a senior series of preferred stock if shareholders authorized such action when the existing series was created. Further, a vote by an existing class is not required for the creation of a senior issue if the existing class received adequate notice of redemption to occur within 90 days and the existing issue is not being retired with proceeds from the sale of the new issue.

The amended rule would also provide that an increase in the authorized

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 55963 (June 26, 2007), 72 FR 36081.