

states that, at December 31, 2000, its "aggregate investment," as defined in rule 53(a)(1), in exempt wholesale generators ("EWGs") and foreign utility companies ("FUCOs") was approximately \$2,420 billion, or approximately 53.52% of Southern's "consolidated retained earnings," also as defined in rule 53(a)(1) under the Act for the four quarters ended December 31, 2000 (\$4.522 billion). By order dated April 1, 1996 (HCAR No. 26501) ("April 1 Order"), the Commission authorized Southern to invest up to 100% of its consolidated retained earnings in EWGs and FUCOs. Southern's current aggregate investment in EWGs and FUCOs exceeds the limit specified in rule 53(a)(1) under the Act but is within the parameters authorized in the April 1 Order. For purposes of rule 54, Southern states that all other conditions specified in rule 53(a) are satisfied and that none of the adverse conditions specified in rule 53(b) exist.

Southern states that, as of December 31, 1995, the most recent fiscal year preceding the April 1 Order, Southern's consolidated capitalization consisted of 49.3% equity (including mandatorily redeemable preferred securities) and 50.7% debt (including \$1.68 billion of long-term, nonrecourse debt and short-term debt related to EWGs and FUCOs). As of December 31, 2000, that ratio was 58.1% equity<sup>3</sup> and 41.9% debt, including all nonrecourse debt. Southern further states that earnings attributable to its investments in international operations and competitive energy supply business made a positive contribution to earnings during the four calendar years since the Commission issued the order allowing Southern to invest up to 100% of its consolidated retained earnings in EWGs and FUCOs.

Fees, commissions and expenses to be incurred in connection with the proposed transactions are estimated to be \$675,000. Southern states that no state or federal commission, other than this Commission, has jurisdiction over the proposed transactions.

*It Is Ordered*, under rule 62 under the Act, that the declaration to the extent that it relates to the proposed solicitation of proxies is permitted to become effective immediately, subject to the terms and conditions contained in rule 24 under the Act.

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

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 01-8904 Filed 4-10-01; 8:45 am]

**BILLING CODE 8010-01-M**

## SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC-24929; File No. 812-12322]

### Jackson National Life Insurance Company of New York, et al.

April 5, 2001.

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

**ACTION:** Notice of Application for an Order under section 6(c) of the Investment Company Act of 1940 (the "1940 Act" or "Act") granting exemptions from the provisions of section 2(a)(32), and 27(i)(2)(A) and Rule 22c-1 thereunder.

*Applicants:* Jackson National Life Insurance Company of New York ("Jackson National NY"), JNLNY Separate Account I ("Separate Account I-NY" or "Separate Account"), Jackson National Life Distributors, Inc. ("JNLD") (collectively, "Applicants").

*Summary of Application:* Applicants seek an order under section 6(c) of the Act to the extent necessary to permit, under specified circumstances, the recapture of credits applied to premiums made under deferred variable annuity contracts that Jackson National NY will issue through Separate Account I-NY (the "Contracts"), as well as other contracts that Jackson National NY may issue in the future through any other separate account established by Jackson National NY in the future to support certain deferred variable annuity contracts issued by Jackson National NY ("Future Accounts") that are substantially similar in all material respects to the Contracts (the "Future Contracts"). Applicants also request that the order being sought extend to any other National Association of Securities Dealers, Inc. ("NASD") member broker-dealer controlling or controlled by, or under common control with, Jackson National NY, whether existing or created in the future, that serves as a distributor or principal underwriter for the Contracts or Future Contracts offered through Separate Account I-NY or any Future Account ("Jackson National NY Broker-Dealer(s)").

*Filing Date:* The application was filed on October 31, 2000, and amended and restated on March 21, 2001.

*Hearing or Notification of Hearing:* An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, in person or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on April 27, 2001, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the 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 Secretary of the SEC.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants, c/o Patrick W. Garcy, Jackson National Life Insurance Company of New York, One Corporate Way, Lansing, Michigan 48951.

**FOR FURTHER INFORMATION CONTACT:** Zandra Y. Bailes, Senior Counsel or Lorna J. 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 SEC's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549-0102 (tel. (202) 942-8090).

### Applicants' Representations

1. Jackson National NY is a stock life insurance company organized under the laws of the State of New York. Jackson National NY serves as depositor of Separate Account I-NY. Jackson National NY may in the future establish one or more Future Accounts for which it will serve as depositor.

2. Separate Account I-NY was established in 1997 as a segregated asset account of Jackson National NY. The Separate Account is registered with the Commission as a unit investment trust investment under the Act. The Separate Account will fund the variable benefits available under the Contracts. Units of interest in Separate Account I-NY under the Contracts they fund will be registered under the Securities Act of 1933 (the "1933 Act"). Jackson National NY may in the future issue Future Contracts through Separate Account I-NY or through Future Accounts. That portion of the assets of Separate Account I-NY that is equal to the reserves and other Contract liabilities with respect to Separate Account I-NY

<sup>3</sup> Excluding preferred stock and preferred securities from the equity component of Southern's consolidated capitalization, the equity component was 46.7% of total capitalization.

is not chargeable with liabilities arising out of any other business of Jackson National NY. Any income, gains or losses, realized or unrealized, from assets allocated to Separate Account I-NY are, in accordance with Separate Account I-NY's Contracts, credited to or charged against Separate Account I-NY, without regard to other income, gains or losses of Jackson National NY.

3. JNLD is a wholly-owned subsidiary of Jackson National Life Insurance Company, an affiliate of Jackson National NY, and will be the principal underwriter of Separate Account I-NY and distributor of the Contracts. JNLD is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934 and is a member of the NASD. The Contracts will be offered through unaffiliated broker-dealers who have entered into agreements with JNLD. JNLD, or any successor entity, may act as principal underwriter for any Future Accounts and distributor for any Future Contracts issued by Jackson National NY in the future. A successor entity also may act as principal underwriter for Separate Account I-NY.

4. The Contract is an individual deferred variable and fixed annuity contract. The Contract may be issued under a qualified plan, specially sponsored program or an individual retirement annuity or as a non-qualified contract. The Contract is designed to provide for the accumulation of assets and for income through the investment,

during an accumulation phase.

Premium payments may be made any time during the accumulation phase. The minimum initial premium is \$5,000 under most circumstances and \$2,000 for a qualified plan contract. Additional premiums of at least \$500 can be made (\$50 under the automatic investment plan).

5. The Contracts permit premiums to be allocated to guaranteed accounts of Jackson National NY ("Guaranteed Accounts"). The Guaranteed Accounts are not registered with the Commission.

6. Separate Account I-NY currently is divided into 37 accounts ("Investment Divisions"), each of which will be available under the Separate Account I-NY Contracts. Each Investment Division will invest in a series of JNL Series Trust ("Trust") or JNLNY Variable Fund LLC ("Fund"). The Investment Divisions and the Guaranteed Accounts will comprise the initial "Investment Options" under the Contract. Not all Investment Divisions may be available. Jackson National NY, at a later date, may determine to create additional Investment Divisions of Separate Account I-NY to invest in any additional series, or other such underlying portfolios or other investments as may now or in the future be available. Similarly, Investment Division(s) of Separate Account I-NY may be combined or eliminated from time to time.

8. The Contract provides for transfer privileges among Investment Divisions

and the Guaranteed Accounts, dollar cost averaging, rebalancing, and other features. The following charges are assessed under the Contract: (i) annual asset-based charges (applied to the daily net asset value of the Investment Divisions) as follows: 1.25% for mortality and expense risks, plus 0.15% for administration expenses; (ii) a \$30 contract maintenance charge per year during the accumulation phase; (iii) a transfer fee of \$25 for each transfer in excess of 15 in a Contract year; (iv) a contract enhancement charge, during the first seven years, equal to 0.425%, on an annual basis, of amounts into the Investment Divisions (the charge assessed against the Guaranteed Accounts will result in a credited interest rate of .425% less than the annual credited interest rate that would apply if the Contract Enhancement had not been elected); and (v) under certain circumstances, a recapture charge applies if an owner makes a withdrawal, exercises the free look provision or receives income payments. The Trust and Fund also impose a management and administrative fee which varies depending upon which Series is selected.

9. The Contract also imposes a withdrawal charge, which starts at 7% in the first year, and declines 1% a year thereafter to 0% after 7 years with a 10% free withdrawal option. The Withdrawal Charge (as a percentage of premium payments equals:

Contribution Year of Premium .....	1	2	3	4	5	6	7	thereafter
Payment Charge (percent)	7	6	5	4	3	2	1	0

The withdrawal charge applies to each premium payment. During the accumulation phase, owners can make withdrawals without the imposition of a withdrawal charge of: (a) Premiums which are not subject to a withdrawal charge (premiums in Contract for seven years or longer and not previously withdrawn), (b) earnings, (c) for the first withdrawal of premium of the year, 10% of premium paid that is still subject to a withdrawal charge (not yet withdrawn) less earnings.

10. If the Contract Enhancement Option is elected, each time a Contract owner makes a premium payment during the first Contract year, Jackson National NY will add an additional amount to the Contract ("Contract Enhancement"). The Contract Enhancement will equal 3% of the premium payment. Jackson National NY will fund the Contract Enhancement

from its general account assets. Jackson National NY will allocate the Contract Enhancements to the Guaranteed Accounts and/or Investment Divisions in the same proportion as the premium payment allocation. Jackson National NY will recapture, in accordance with the recapture charge below, Contract Enhancement only under the following circumstances: (i) If the Contract owner exercises the right to return the Contract under the free-look provision of the Contract; (ii) if a Contract owner makes a withdrawal; or (iii) if a Contract owner receives payments under an income option.

#### RECAPTURE CHARGE

Contribution year of premium	Recapture charge percentage
1 and 2 .....	3

#### RECAPTURE CHARGE—Continued

Contribution year of premium	Recapture charge percentage
3, 4 and 5 .....	2
6 and 7 .....	1
after year 7 .....	0

The recapture charge percentage will be applied to the portion of the corresponding premium reflected in the amount withdrawn (except as provided in the free withdrawal provision). The amount recaptured will be taken from the Investment Divisions and the Guaranteed Accounts in the same proportion as the withdrawal charge.

11. Applicants seek exemption pursuant to section 6(c) from sections 2(a)(32) and 27(i)(2)(A) of the Act and Rule 22c-1 thereunder to the extent necessary to permit Jackson National

NY to recapture Contract Enhancements applied to the Contract and Future Contracts as described above.

#### Applicants' Legal Analysis

1. Section 6(c) of the Act authorizes the Commission to exempt any person, security or transaction, or any class or classes of persons, securities or transactions from the provisions of the Act and the rules promulgated thereunder if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request that the Commission, pursuant to section 6(c) of the Act, grant the exemptions summarized above with respect to the Contracts and any Future Contracts funded by separate Account I—NY or Future Accounts, that are issued by Jackson National NY and underwritten or distributed by JNLD or Jackson National NY Broker-Dealers. Applicants state that Future Contracts funded by Separate Account I—NY or any Future Accounts will be substantially similar in all material respect to the Contracts. 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 Act.

2. Subsection (i) of section 27 provides that section 27 does not apply to any registered separate account funding variable insurance contracts, or to the sponsoring insurance company and principal underwriter of such account, except as provided in paragraph (2) of the subsection. Paragraph (2) provides that it shall be unlawful for any registered separate account funding variable insurance contracts or a sponsoring insurance company of such account to sell a contract funded by the registered separate account unless, among other things, such contract is a redeemable security. Section 2(a)(32) defines "redeemable security" as any security, other than short-term paper, under the terms of which the holder, upon presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.

3. Applicants submit that the Contract Enhancement recapture provisions of the Contract would not deprive an owner of his or her proportionate share of the issuer's current net assets. Applicants state that an owner's interest in the amount of the Contract Enhancement allocated to his or her

Contract value upon receipt of first year premium payments is not vested until the applicable free-look period has expired without return of the Contract. Similarly, Applicants state that an owner's interest in the amount of any Contract Enhancement is not completely vested for seven years from the receipt of the premium, in accordance with the recapture charge percentage. Until or unless the amount of any Contract Enhancement is vested, Applicants submit that Jackson National NY retains the right and interest in the Contract Enhancement amount, although not in the earnings attributable to that amount. Thus, Applicants argue that when Jackson National NY recaptures any Contract Enhancement it is simply retrieving its own assets, and because an owner's interest in the Contract Enhancement is not vested, the owner has not been deprived of a proportionate share of the Separate Account's assets, *i.e.*, a share of the applicable Separate Account's assets proportionate to the owner's Contract value (including the Contract Enhancement).

4. In addition, with respect to Contract Enhancement recapture upon the exercise of the free-look privilege, Applicants state that it would be unfair to allow an owner exercising that privilege to retain a Contract Enhancement amount under a Contract that has been returned for a refund after a period of only a few days. Applicants state that if Jackson National NY could not recapture the Contract Enhancement, individuals could purchase a Contract with no intention of retaining it, and simply return it for a quick profit.

5. Furthermore, Applicants state that the recapture of Contract Enhancements relating to premiums made within seven years of a withdrawal of corresponding premium or the receipt of income payments is designed to provide Jackson National NY with a measure of protection. Applicants state that the risk is that an owner will make very large premiums shortly before making withdrawals or receiving income payments, thereby leaving Jackson National NY less time to recover the cost of the Contract Enhancements applied. Again, the amounts recaptured were provided by Jackson National NY from its own general account assets as a Contract Enhancement, and any gain would remain as part of the Contract's value.

6. Applicants represent that it is not administratively feasible to track the Contract Enhancement amount in the Separate Account after the Contract enhancement is applied. Accordingly, the asset based charges applicable to the

Separate Account will be assessed against the entire amounts held in the Separate Account, including the Contract Enhancement. As a result, the aggregate asset based charges assessed against an owner's Contract value will be higher than those that would be charged if the owner's Contract value did not include the Contract Enhancement.

7. Applicants represent that the Contract Enhancement will be attractive to and in the interest of investors because it will permit owners to put 103% of their first year premiums to work for them in the selected Investment Options and/or Guaranteed Accounts. Also, any earnings attributable to the Contract Enhancement will be retained by the owner, and the principal amount of the Contract Enhancement will be retained if the contingencies set forth in the application are satisfied.

8. Applicants submit that the provisions for recapture of any applicable Contract Enhancement under the Contracts do not, and any such Future Contract provisions will not, violate section 2(a)(32) and 27(i)(2)(A) of the Act. Nevertheless, to avoid any uncertainties, Applicants request an exemption from those Sections, to the extent deemed necessary, to permit the recapture of any Contract Enhancement under the circumstances described herein with respect to the Contracts and any Future Contracts, without the loss of the relief from Section 27 provided by Section 27(i).

9. Section 22(c) of the 1940 Act authorizes the Commission to make rules and regulations applicable to registered investment companies and to principal underwriters of, and dealers in, the redeemable securities of any registered investment company to accomplish the same purposes contemplated by section 22(a) of the Act. Rule 22c-1 thereunder prohibits a registered investment company issuing any redeemable security, a person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and a principal underwriter of, or dealer in, such security, from selling, redeeming, or repurchasing any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

10. Arguably, Jackson National NY's recapture of the Contract Enhancement might be viewed as resulting in the redemption of redeemable securities for a price other than one based on the current net asset value of Separate

Account I-NY. Applicants contend, however, that recapture of the Contract Enhancement does not violate section 22(c) and Rule 22c-1. Applicants argue that the recapture does not involve either of the evils that Rule 22c-1 was intended to eliminate or reduce, namely: (i) the dilution of the value of outstanding redeemable securities of registered investment companies through their sale at a price below net asset value or their redemption or repurchase at a price above it, and (ii) other unfair results including speculative trading practices. See Adoption of Rule 22c-1 under the 1940 Act, Investment Company Release No. 5519 (Oct. 16, 1968). To effect a recapture of a Contract Enhancement, Jackson National NY will redeem interests in an owner's Contract value at a price determined on the basis of current net asset value of Separate Account I-NY. The amount recaptured will equal (or may be less, depending upon the year of the recapture) the amount of the Contract Enhancement that Jackson National NY paid out if its general account assets. Although Owners will be entitled to retain any investment gain attributable to the Contract Enhancement, the amount of such gain will be determined on the basis of the current net asset value of Separate Account I-NY. Thus, no dilution will occur upon the recapture of the Contract Enhancement. Applicants also submit that the second harm that Rule 22c-1 was designed to address, namely, speculative trading practices calculated to take advantage of backward pricing, will not occur as a result of the recapture of the Contract Enhancement. However, to avoid any uncertainty as to full compliance with the Act, Applicants request an exemption from the provisions of Rule 22c-1 to the extent deemed necessary to permit them to recapture the Contract Enhancement under the Contracts and Future Contracts.

11. Applicants submit that their request for an order is appropriate in the public interest. Applicants state that such an order would promote competitiveness in the variable annuity market by eliminating the need to file redundant exemptive applications, thereby reducing administrative expenses and maximizing the efficient use of Applicants' resources. Applicants argue that investors would not receive any benefit or additional protection by requiring Applicants to repeatedly seek exemptive relief that would present no issue under the Act that has not already been addressed in their application described herein. Applicants submit

that having them file additional applications would impair their ability effectively to take advantage of business opportunities as they arise. Further, Applicants state that if they were required repeatedly to seek exemptive relief with respect to the same issues addressed in the application, investors would not receive any benefit or additional protection thereby.

#### Conclusion

Applicants submit, based on the grounds summarized above, that their exemptive request meets the standards set out in section 6(c) of the Act, namely, that the exemptions requested are necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

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

**Jonathan G. Katz,**  
Secretary.

[FR Doc. 01-8903 Filed 4-10-01; 8:45 am]

**BILLING CODE 8010-01-M**

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-24925; File No. 812-12368]

#### New England Life Insurance Company, et al.

April 5, 2001.

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

**SUMMARY OF THE APPLICATION:** The Section 26 Applicants request an order pursuant to section 26(b) of the 1940 Act to permit certain registered unit investment trusts to substitute Class A shares of the MetLife Stock Index Portfolio (the "Replacement Portfolio") of the Metropolitan Series for shares of the Westpeak Stock Index Series (the "Substituted Portfolio," and together with the Replacement Portfolio, the "Portfolios") of the Zenith Fund currently held by those unit investment trusts. The Section 17(b) Applicants request an order pursuant to section 17(b) of the 1940 Act to permit certain in-kind transactions in connection with the substitution.

**APPLICANTS:** New England Life Insurance Company ("NELICO"), New England Variable Life Separate Account ("Separate Account 1"), Metropolitan Life Insurance Company ("MetLife"), The New England Variable Account ("Separate Account 2") (together with Separate Account 1, the "Separate Accounts"), the Metropolitan Series

Fund, Inc. ("Metropolitan Series"), and the New England Zenith Fund (the "Zenith Fund"). NELICO, MetLife, and the Separate Accounts are collectively referred to herein as the "Section 26 Applicants." The Section 26 Applicants, the Metropolitan Series, and the Zenith Fund are collectively referred to herein as the "Section 17(b) Applicants" or "Applicants."

**FILING DATE:** The application ("Application") was filed on December 19, 2000 and amended and restated on April 5, 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 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 April 26, 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 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, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants, c/o Thomas Lenz, Esq. and Marie C. Swift, Esq., New England Life Insurance Company, 501 Boylston Street, Massachusetts 02116. Copy to Stephen E. Roth, Esq. and Kimberly J. Smith, Esq., Sutherland Asbill & Brennan LLP, 1275 Pennsylvania Ave., NW., Washington, DC 20004-2415.

**FOR FURTHER INFORMATION CONTACT:** Harry Eisenstein, Senior Counsel, or Keith Carpenter, Branch Chief, Division of Investment Management, Office of Insurance Products, 202-942-0670.

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

#### Applicants' Representations

1. NELICO is a life insurance company that is domiciled in Massachusetts. Its operations include both life insurance and annuity products as well as financial and retirement services. As of September 30, 2000, NELICO had assets of approximately \$8.1 billion. NELICO is authorized to operate as a life insurance