Section 213.3318 Environmental Protection Agency

EPGS04008 Chief of Staff, Office of Air and Radiation to the Assistant Administrator for Air and Radiation. Effective May 05, 2004.

EPGS04011 Special Assistant to the Deputy General Counsel. Effective May 14, 2004.

Section 213.3328 Broadcasting Board of Governors

IBGS00016 Special Assistant to the Chairman, Broadcasting Board of Governors. Effective May 07, 2004.

Section 213.3330 Securities and Exchange Commission

SEOT00056 Legislative Affairs Specialist to the Director of Communications. Effective May 14, 2004.

Section 213.3331 Department of Energy

DEGS00414 Deputy Director of Public Affairs to the Director of Public Affairs. Effective May 14, 2004.

DEGS00418 Special Assistant to the Chief of Staff. Effective May 24, 2004.

DEGS00420 Special Assistant to the Director of Public Affairs. Effective May 25, 2004.

DEGS00416 Deputy Assistant Secretary for Environment and Science to the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective May 26, 2004.

DEGS00419 Special Assistant to the Secretary and Deputy White House Liaison to the Secretary. Effective May 26, 2004.

Section 213.3332 Small Business Administration

SBGS60189 Regional Administrator, Region 10, Seattle Washington to the Associate Administrator for Field Operations. Effective May 04, 2004.

SBGS60531 Senior Advisor to the Associate Deputy Administrator for Capital Access. Effective May 28, 2004.

Section 213.3337 General Services Administration

GSGS01317 Associate Administrator for Performance Improvement to the Administrator. Effective May 04, 2004.

GSGS60113 Special Assistant to the Regional Administrator, Region 1, Boston. Effective May 24, 2004.

GSGS00156 Confidential Assistant to the Administrator. Effective May 27, 2004.

Section 213.3342 Export-Import Bank

EBGS00058 Special Assistant to the Senior Vice President of Communications. Effective May 20, 2004.

Section 213.3352 Government Printing Office

GPSL00001 Chief of Staff to the Deputy Public Printer. Effective May 14, 2004.

GPSL00002 Special Assistant to the Public Printer. Effective May 14. 2004.

GPSL00003 Deputy Chief of Staff to the Chief of Staff. Effective May 14, 2004.

Section 213.3355 Social Security Administration

SZGS60012 Executive Editor to the Associate Commissioner for Retirement Policy. Effective May 14, 2004.

Section 213.3360 Consumer Product Safety Commission

PSGS60003 Special Assistant (Legal) to the Chairman. Effective May 18, 2004.

Section 213.3382 National Endowment for the Arts

NAGS60049 Deputy Congressional Liaison to the Director, Office of Government Affairs. Effective May 19, 2004.

NAGS00053 Director of Research and Analysis to the Chairman, National Endowment for the Arts. Effective May 24, 2004.

Section 213.3384 Department of Housing and Urban Development

DUGS60549 Senior Advisor to the Assistant Secretary for Housing, Federal Housing Commission. Effective May 04, 2004.

DUGS60344 Staff Assistant to the Assistant Secretary for Public Affairs. Effective May 24, 2004. DUGS60396 Staff Assistant to the Director of Executive Scheduling and Operations. Effective May 24, 2004.

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., P.218

Office of Personnel Management.

Kay Coles James,

Director.

[FR Doc. 04–14099 Filed 6–22–04; 8:45 am]

BILLING CODE 6325–39–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–26468; File No. 812–13088]

AXP Variable Portfolio Funds, et al., Notice of Application

June 16, 2004.

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

ACTION: Notice of Application for Exemption under section 6(c) of the Investment Company Act of 1940, as amended (the ''1940 Act''), for an exemption from the provisions of Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act, and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder.

APPLICANTS: AXP Variable Portfolio—Income Series, Inc., AXP Variable Portfolio—Investment Series, Inc., AXP Variable Portfolio—Managed Series, Inc., AXP Variable Portfolio—Money Market Series, Inc., AXP Variable Portfolio—Partners Series, Inc., AXP Variable Portfolio—Select Series, Inc. (the ''AXP VP Funds'') and American Express Financial Corporation (''AEFC'') (collectively, the ''Applicants'').

SUMMARY OF APPLICATION: Applicants seek an order pursuant to section 6(c) of the 1940 Act exempting certain life insurance companies and their separate accounts that currently invest or may hereafter invest in the AXP VP Funds (and, to the extent necessary, any investment adviser, principal underwriter and depositor of such an account) from the provisions of sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act, and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder, to the extent necessary to permit shares of the AXP VP Funds and shares of any other existing or future investment company that is designed to fund insurance products and for which AEFC or any of its affiliates may serve in the future as investment adviser, investment manager, subadviser, principal underwriter, sponsor or administrator (the ''Future Funds'') (the AXP VP Funds together with the Future Funds being hereinafter referred to individually as a ''Fund'' and collectively as the ''Funds''), or to permit shares of any existing or future series of any Fund (individually, a ''Portfolio'' and collectively, the ''Portfolios'') to be sold and held by: (a) Separate accounts funding variable annuity and variable life insurance contracts (the ''Variable Contracts'') issued by both affiliated and unaffiliated life insurance companies; (b) qualified pension and retirement plans (the ''Qualified Plans'') outside of the separate account context; (c) separate accounts that are not registered as investment companies under the 1940 Act pursuant to exemptions from registration under section 3(c) of the 1940 Act; (d) any investment manager to a Portfolio and affiliates thereof that is permitted to hold shares of a Portfolio consistent with the requirements of regulations issued by the Treasury Department (individually, a ''Treasury Regulation'' and collectively, the ''Treasury Regulations''), specifically

Treasury Regulation § 1.817–5 (collectively, the ''Manager'') and (e) any other person permitted to hold shares of the Portfolios pursuant to Treasury Regulation § 1.817–5 (the ''General Accounts'').

FILING DATE: The Application was filed on May 17, 2004 and amended and restated on June 14, 2004.

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, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on July 8, 2004, 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 may request notification of a hearing by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Applicants: Mary Ellyn Minenko, Esq., Vice President and Group Counsel, American Express Financial Advisors Inc., 50607 AXP Financial Center, Minneapolis, MN 55474 with a copy to Michael S. Fischer, Esq., Halleland Lewis Nilan Sipkins & Johnson, P.A., Pillsbury Center South Suite 600, 220 South Sixth Street, Minneapolis, MN 55402.

FOR FURTHER INFORMATION CONTACT: Mark Cowan, Senior Counsel, or Zandra Bailes, 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 may be obtained for a fee from the SEC's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549–0102 (telephone (202) 942–8090).

Applicants' Representations

1. The AXP VP Funds are all Minnesota corporations and are registered as open-end management investment companies under the 1940 Act. AEFC, a Delaware corporation, is registered with the Commission under the Investment Advisers Act of 1940, as amended, (the ''Advisers Act'') and has served as the investment adviser to the AXP VP Funds since November 1, 2004. Prior to that time, IDS Life Insurance Company, a wholly owned subsidiary of AEFC, served as the investment adviser to the AXP VP Funds while AEFC served as the subadviser. Pursuant to investment subadvisory agreements, AEFC retains both affiliated and unaffiliated subadvisers for certain Portfolios under the AXP VP Funds. Each subadviser is registered as an investment adviser with the Commission under the Advisers Act. The AXP VP Funds currently consist of six open-end management investment companies offering shares of twenty-three Portfolios. Currently, shares of the AXP VP Funds Portfolios are offered solely to separate accounts funding flexible premium variable life insurance policies and variable annuity contracts issued by insurance company affiliates of AEFC.

2. Shares of the Portfolios may be offered in the future to separate accounts of both affiliated and unaffiliated insurance (each a ''Participating Insurance Company'' and collectively, the ''Participating Insurance Companies'') to serve as investment vehicles to fund Variable Contracts. These separate accounts either will be registered as investment companies under the 1940 Act or will be exempt from registration pursuant to exemptions from registration under section 3(c) of the 1940 Act (individually, a ''Separate Account'' and collectively, the ''Separate Accounts''). Shares of the Portfolios may also be offered to Qualified Plans, the Manager and General Accounts, including the general account of any life insurance company whose separate account holds, or will hold, shares of the Funds.

3. The Participating Insurance Companies at the time of their investment in the Funds have established or will establish their own Separate Accounts and design their own Variable Contracts. Each Participating Insurance Company has or will have the legal obligation of satisfying all applicable requirements under both State and Federal law. Each Participating Insurance Company, on behalf of its Separate Accounts, has entered or will enter into an agreement with the Funds concerning such Participating Insurance Company's participation in the Portfolios. The role of the Funds under this agreement, insofar as the Federal securities laws are applicable, will consist of, among other things, offering shares of the Portfolios to the participating Separate Accounts and complying with any conditions that the Commission may impose upon granting the order requested herein.

Applicants' Legal Analysis

1. Applicants seek an order pursuant to section 6(c) of the 1940 Act exempting certain life insurance companies and their separate accounts that currently invest or may hereafter invest in the AXP VP Funds (and to the extent necessary, any investment adviser, principal underwriter and depositor of such an account) from the provisions of sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act, and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder, to the extent necessary to permit shares of the AXP VP Funds and shares of any Future Funds to be sold to and held by: (a) Separate accounts funding Variable Contracts issued by both affiliated and unaffiliated life insurance companies; (b) Qualified Plans outside of the separate account context; (c) separate accounts that are not registered as investment companies under the 1940 Act pursuant to exemptions from registration under section 3(c) of the 1940 Act; (d) the Manager; and (e) any General Accounts, including the general account of any life insurance company whose separate account holds, or will hold, shares of the Funds.

2. In connection with the funding of scheduled premium variable life insurance contracts issued through a separate account registered as a unit investment trust (''UIT'') under the 1940 Act, Rule 6e–2(b)(15) provides partial exemptions from sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. The relief provided by Rule 6e–2 is also granted to the investment adviser, principal underwriter and depositor of the separate account. 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 UIT if an affiliated person of that company is subject to a disqualification enumerated in sections 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. Rule 6e–2(b)(15) provides that these exemptions apply only where all of the assets of the UIT are shares of management investment companies ''which offer their shares exclusively to variable life insurance separate accounts of the life insurer or of any affiliated life insurance company.'' Therefore, the relief granted by Rule 6e–2(b)(15) is not available with respect to a scheduled premium life insurance separate account that owns shares of an underlying fund that also offers its shares to a variable annuity separate account or a flexible premium variable life insurance separate account of the same company or any other affiliated insurance company. The use of a common management investment

company as the underlying investment vehicle for both variable annuity and variable life insurance separate accounts of the same life insurance company or of any affiliated life insurance company is referred to herein as ''mixed funding.''

3. The relief granted by Rule 6e–2(b)(15) also is not available with respect to a scheduled premium variable life insurance separate account that owns shares of an underlying fund that also offers its shares to separate accounts funding Variable Contracts of one or more unaffiliated life insurance companies. The use of a common management investment company as the underlying investment vehicle for variable annuity and/or variable life insurance separate accounts of unaffiliated life insurance companies is referred to herein as ''shared funding.''

4. The relief under Rule 6e–2(b)(15) is available only where shares are offered exclusively to variable life insurance separate accounts of a life insurer or any affiliated life insurance company; additional exemptive relief is necessary if the shares of the Portfolios are also to be sold to Qualified Plans or other eligible holders of shares, as described above. Applicants note that if shares of the Portfolios are sold only to Qualified Plans, exemptive relief under Rule 6e–2 would not be necessary. The relief provided by this section does not relate to Qualified Plans or to a registered investment company's ability to sell its shares to Qualified Plans. The use of a common management investment company as the underlying investment vehicle for variable annuity and variable life separate accounts of affiliated and unaffiliated insurance companies, and for Qualified Plans, is referred to herein as ''extended mixed and shared funding.''

5. In connection with flexible premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a UIT, Rule 6e–3(T)(b)(15) provides partial exemptions from sections 9(a), 13(a), 15(a) and 15(b) of the 1940. The exemptions granted by Rule 6e–3(T)(b)(15) are available only where all the assets of the separate account consist of the shares of one or more registered management investment companies that offer to sell their shares ''exclusively to separate accounts of the life insurer, or of any affiliated life insurance companies, offering either scheduled contracts or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company or which offer their shares to any such life insurance company in consideration solely for advances made by the life insurer in connection with the operation of the separate account.'' Therefore, Rule 6e–3(T)(b)(15) permits mixed funding but does not permit shared funding.

6. The relief under Rule 6e–3(T) is available only where shares are offered exclusively to variable life insurance separate accounts of a life insurance company or any affiliated life insurance company, and additional exemptive relief is necessary if the shares of the Portfolios are also to be sold to Qualified Plans or other eligible holders of shares as described above. Applicants note that if shares of the Portfolios were sold only to Qualified Plans, exemptive relief under Rule 6e–3(T)(b)(15) would not be necessary. The relief provided for under this section does not relate to Qualified Plans or to a registered investment company's ability to sell shares to Qualified Plans.

7. Applicants maintain, as discussed below, that there is no policy reason for the sale of the Portfolios' shares to Qualified Plans, the Manager or General Accounts to result in a prohibition against, or otherwise limit, a Participating Insurance Company from relying on the relief provided by Rules 6e–2(b)(15) and 6e–3(T)(b)(15). However, because the relief under Rules 6e–2(b)(15) and 6e–3(T)(b)(15) is available only when shares are offered exclusively to separate accounts, additional exemptive relief may be necessary if the shares of the Portfolios are also to be sold to Qualified Plans, the Manger or General Accounts. Applicants therefore request relief in order to have the Participating Insurance Companies enjoy the benefits of the relief granted in Rules 6e–2(b)(15) and 6e–3(T)(b)(15). Applicants note that if the Portfolios' shares were to be sold only to Qualified Plans, the Manger, General Accounts and/or separate accounts funding variable annuity contracts, exemptive relief under Rule 6e–2 and Rule 6e–3(T) would be unnecessary. None of the relief provided for in Rules 6e–2(b)(15) and 6e–3(T)(b)(15) relates to Qualified Plans, the Manager or General Accounts, or to a registered investment company's ability to sell its shares to such purchasers.

8. Applicants also note that the promulgation of Rules 6e–2(b)(15) and 6e–3(T)(b)(15) preceded the issuance of the Treasury Regulations that made it possible for shares of an investment company portfolio to be held by the trustees of a Qualified Plan, the investment company's investment manager or its affiliates or a General Account without adversely affecting the ability of shares of the same investment company portfolio to also be held by the separate accounts of insurance companies in connection with their variable insurance contracts. Thus, the sale of shares of the same portfolio to separate accounts through which variable insurance contracts are issued and to Qualified Plans, the investment company's investment manager or its affiliates or General Accounts was not contemplated at the time of the adoption of Rules 6e–2(b)(15) and 6e–3(T)(b)(15).

9. Consistent with 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, the Application requests relief for the class consisting of insurers and Separate Accounts (and to the extent necessary, investment advisers, principal underwriters, and depositors of such accounts) that will invest in the Portfolios.

10. Section 9(a)(3) of the 1940 Act provides that it is unlawful for any company to serve as investment adviser or principal underwriter of any registered open-end investment company if an affiliated person of that company is subject to a disqualification enumerated in 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 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 management investment company.

11. 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, in effect, limits the amount of monitoring of an insurance company's personnel that would otherwise be necessary to ensure compliance with section 9 to that which is appropriate in light of the policy and purposes of section 9. Those 1940 Act rules recognize that it is not necessary for the protection of investors or the purposes fairly intended by the policy and provisions of the 1940 Act to apply the provisions of section 9(a) to many individuals in a large insurance complex, most of whom will have no involvement in matters pertaining to investment companies in that organization. The Participating Insurance Companies and Qualified Plans are not expected to play any role in the management or administration of

the Funds. Those individuals who participate in the management of the Funds will remain the same regardless of which Separate Accounts or Qualified Plans invest in the Funds. Therefore, applying the monitoring requirements of section 9(a) of the 1940 Act because of investment by Separate Accounts of other Participating Insurance Companies or Qualified Plans would be unjustified and would not serve any regulatory purpose. Furthermore, the increased monitoring costs could reduce the net rates of return realized by contract owners and Qualified Plan participants.

12. Moreover, the relief requested should not be affected by the sale of shares of the Portfolios to Qualified Plans, the Manager or General Accounts. Since the Qualified Plans, the Manager and General Accounts are not themselves investment companies, and therefore are not subject to section 9 of the 1940 Act and will not be deemed affiliates solely by virtue of their shareholdings, no additional relief is necessary.

13. Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) under the 1940 Act provide exemptions from the pass-through voting requirement with respect to several significant matters, assuming the limitations on mixed and shared funding are observed. Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(b)(15)(iii)(A) under the 1940 Act provide that the insurance company may disregard the voting instructions of its contract owners with respect to the investments of an underlying fund, or any contract between such fund and its investment adviser, when required to do so by an insurance regulatory authority (subject to the provision of paragraphs (b)(5)(i) and (b)(7)(ii)(A) of such rules). Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii)(A)(2) under the 1940 Act provide that the insurance company may disregard the voting instructions of its contract owners if the contract owners initiate any change in an underlying portfolio'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), respectively, of Rules 6e–2 and 6e–3(T) under the 1940 Act).

14. Rule 6e–2 under the 1940 Act recognizes that a variable life insurance contract, as an insurance contract, has important elements unique to insurance contracts and is subject to extensive State regulation of insurance. In adopting Rule 6e–2(b)(15)(iii), the Commission expressly recognized that State insurance regulators have authority, pursuant to State insurance laws or regulations, to disapprove or require changes in investment policies, investment advisers, or principal underwriters. The Commission also expressly recognized that State insurance regulators have authority to require an insurance company to draw from its general account to cover costs imposed upon the insurer by a change approved by contract owners over the insurance company's objection. The Commission, therefore, deemed such exemptions necessary ''to assure the solvency of the life insurer and performance of its contractual obligations by enabling an insurance regulatory authority or the life insurer to act when certain proposals reasonably could be expected to increase the risks undertaken by the life insurer.'' In this respect, flexible premium variable life insurance contracts are identical to scheduled premium variable life insurance contracts. Therefore, the corresponding provisions of Rule 6e–3(T) under the 1940 Act undoubtedly were adopted in recognition of the same factors.

15. Applicants state that the sale of Portfolio shares to Qualified Plans, the Manager and General Accounts will not have any impact on the relief requested herein. With respect to Qualified Plans, which are not registered as investment companies under the 1940 Act, there is no requirement to pass through voting rights to Qualified Plan participants. Indeed, to the contrary, applicable law expressly reserves voting rights associated with Qualified Plan assets to certain specified persons. Under Section 403(a) of ERISA, shares of a portfolio of a fund sold to a Qualified Plan must be held by the trustees of the Qualified Plan. Section 403(a) also provides that the trustees must have exclusive authority and discretion to manage and control the Qualified Plan, with two exceptions: (a) When the Qualified Plan expressly provides that the trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees are subject to proper directions made in accordance with the terms of the Qualified Plan and not contrary to ERISA, and (b) when the authority to manage, acquire, or dispose of assets of the Qualified Plan is delegated to one or more investment managers pursuant to section 402(c)(3) of ERISA. Unless one of the above two exceptions stated in section 403(a) applies, a Qualified Plan trustees have the exclusive authority and responsibility for voting proxies.

16. Where a named fiduciary to a Qualified Plan appoints an investment manager, the investment manager has the responsibility to vote the shares held unless the right to vote such shares is reserved to the trustee or the named fiduciary. The Qualified Plans may have their trustees or other fiduciaries exercise voting rights attributable to investment securities held by the Qualified Plans in their discretion. Some of the Qualified Plans, however, may provide for the trustees, an investment adviser (or advisers), or another named fiduciary to exercise voting rights in accordance with instructions from participants. Similarly, the Manager and General Accounts are not subject to any pass-through voting requirements. Accordingly, unlike the case with insurance company separate accounts, the issue of resolution of material irreconcilable conflicts with respect to voting is not present with Qualified Plans, the Manager or General Accounts.

17. Where a Qualified Plan does not provide participants with the right to give voting instructions, the trustee or named fiduciary has responsibility to vote the shares held by the Qualified Plan. In this circumstance, the trustee has a fiduciary duty to vote the shares in the best interest of the Qualified Plan participants. Accordingly, even if the Manager were to serve in the capacity of trustee or named fiduciary with voting responsibilities, the Manager would have a fiduciary duty to vote those shares in the best interest of the Qualified Plan participants.

18. In addition, even if a Qualified Plan were to hold a controlling interest in a Portfolio, Applicants do not believe that such control would disadvantage other investors in such Portfolio to any greater extent than is the case when any institutional shareholder holds a majority of the voting securities of any open-end management investment company. In this regard, Applicants submit that investment in a Portfolio by a Qualified Plan will not create any of the voting complications occasioned by mixed funding or shared funding. Unlike mixed funding or shared funding, Qualified Plan investor voting rights cannot be frustrated by veto rights of insurers or State regulators.

19. Where a Qualified Plan provides participants with the right to give voting instructions, Applicants see no reason to believe that participants in Qualified Plans generally or those in a particular Qualified Plan, either as a single group or in combination with participants in other Qualified Plans, would vote in a manner that would disadvantage Variable Contract holders. The purchase of shares of Portfolios by Qualified Plans that provide voting rights does not

present any complications not otherwise occasioned by mixed or shared funding.

20. The prohibitions on mixed and shared funding might reflect concern regarding possible different investment motivations among investors. When Rule 6e–2 under the 1940 Act was first adopted, variable annuity separate could invest in mutual funds whose shares were also offered to the general public. Therefore, the Commission staff contemplated underlying funds with public shareholders, as well as with variable life insurance separate account shareholders. The Commission staff may have been concerned with the potentially different investment motivations of public shareholders and variable life insurance contract owners. There also may have been some concern with respect to the problems of permitting a State insurance regulatory authority to affect the operations of a publicly available mutual fund and to affect the investment decisions of public shareholders.

21. For reasons unrelated to the 1940 Act, however, Internal Revenue Service Revenue Ruling 81–225 (1981–2 C.B. 12) (as clarified in Revenue Ruling 82–55, 1982–1 C.B. 12) effectively deprived variable annuities 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 variable contracts (including variable life contracts). Section 817(h) of the Internal Revenue Code of 1986 (the ''Code''), as amended, in effect requires that the investments made by variable annuity and variable life insurance separate accounts be ''adequately diversified.'' If a separate account is organized as a UIT that invests in a single fund or series, the diversification test will be applied at the underlying fund level, rather than at the separate account level, but only if ''all of the beneficial interests'' in the underlying fund ''are held by one or more insurance companies (or affiliated companies) in their general account or in segregated asset accounts* * *.'' Accordingly, a UIT separate account that invests solely in a publicly available mutual fund will not be adequately diversified. In addition, any underlying mutual fund, including any Portfolio, that sells shares to separate accounts, in effect, would be precluded from also selling its shares to the public. Consequently, there will be no public shareholders in any Portfolio.

22. 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 regulatory body could require action that is inconsistent with the requirements of other States in which the insurance company offers its policies. The fact that different Participating Insurance Companies may be domiciled in different States does not create a significantly different or enlarged problem.

23. Shared funding by unaffiliated Participating Insurance Companies, in this respect, is no different than the use of the same investment company as the funding vehicle for affiliated Participating Insurance Companies, which Rules 6e–2(b)(15) and 6e–3(T)(b)(15) under the 1940 Act permit under various circumstances. Affiliated Participating Insurance Companies 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 affected Funds. This requirement will be provided for in agreements that will be entered into by Participating Insurance Companies with respect to their participation in the relevant Portfolio.

24. Rules 6e–2(b)(15) and 6e–3(T)(b)(15) under the 1940 Act give an insurance company the right to disregard contract owners' voting instructions. This right does not raise any issues different from those raised by the authority of State insurance administrators over separate accounts. Under Rules 6e–2(b)(15) and 6e–3(T)(b)(15), an insurer can disregard contract owner voting instructions only with respect to certain specified items. Affiliation does not eliminate the potential, if any exists, for divergent judgments as to the advisability or legality of a change in investment policies, principal underwriter, or investment adviser initiated by contract owners. The potential for disagreement is limited by the requirements in Rules 6e–2 and 6e–3(T) under the 1940 Act that the insurance company's disregard of voting instructions be reasonable and based on specific good faith determinations.

25. A particular Participating Insurance Company's disregard of voting instructions, nevertheless, could conflict with the majority of contract owners' voting instructions. 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 insurance companies) that the voting instructions of 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 affected Fund's election, to withdraw its Separate Account's investment in such Portfolio. No charge or penalty will be imposed as a result of such withdrawal. This requirement will be provided for in the agreements entered into with respect to participation by the Participating Insurance Companies in each Portfolio.

26. Each Portfolio will be managed to attempt to achieve the investment objective or objectives of such Portfolio, and not to favor or disfavor any particular Participating Insurance Company or type of insurance product. There is no reason to believe that different features of various types of contracts, including the ''minimum death benefit'' guarantee under certain Variable Contracts, will lead to different investment policies for different types of Variable Contracts. To the extent that the degree of risk may differ as between variable annuity contracts and variable life insurance policies, differing insurance charges imposed may well, in effect, adjust any such differences and serve to equalize the insurance company's exposure in either case.

27. Applicants do not believe that the sale of the shares of the Portfolios to Qualified Plans, the Manager or General Accounts 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 variable annuity and variable life insurance contract owners. Moreover, in considering the appropriateness of the requested relief, Applicants have analyzed the following issues to assure themselves that there were either no conflicts of interest or that there existed the ability by the affected parties to resolve the issues without harm to the contract owners in the Separate Accounts or to the participants under the Qualified Plans.

28. Applicants considered whether there are any issues raised under the Code, or Treasury Regulations or Revenue Rulings thereunder, if Qualified Plans, the Manager, General Accounts, variable annuity separate accounts and/or variable life insurance separate accounts all invest in the same underlying fund. As noted above, section 817(h) of the Code imposes certain diversification standards on the underlying assets of variable annuities and variable life insurance contracts held in an underlying mutual fund. The Code provides that a variable contract will not be treated as an annuity contract or as life insurance, as applicable, for any period (and any subsequent period) for which the investments are not, in accordance with Treasury Regulations, adequately diversified.

29. Treasury Regulations issued under section 817(h) provide that, in order to meet the statutory diversification requirements, all of the beneficial interests in the investment company must be held by the segregated asset accounts of one or more insurance companies. However, Treasury Regulation § 1.817–5(f)(3) specifically permits, among other things, ''qualified pension or retirement plans,'' ''the general account of a life insurance company,'' ''the manager * * * of an investment company'' and separate accounts to share the same underlying management investment company. For this reason, Applicants have concluded that neither the Code, nor Treasury Regulations or Revenue Rulings thereunder, present any inherent conflicts of interest if Separate Accounts, Qualified Plans, the Manager and General Accounts all invest in the same underlying fund.

30. Applicants note that, while there are differences in the manner in which distributions from Variable Contracts and Qualified Plans are taxed, these differences will have no impact on the Funds. When distributions are to be made, and a Separate Account or Qualified Plan is unable to net purchase payments to make distributions, the Separate Account or Qualified Plan will redeem shares of the relevant Portfolio at their respective net asset values in conformity with Rule 22c–1 under the 1940 Act (without the imposition of any sales charge) to provide proceeds to meet distribution needs. A Participating Insurance Company then will make distributions in accordance with the terms of its Variable Contract, and a Qualified Plan then will make distributions in accordance with the terms of the Qualified Plan.

31. In connection with any meeting of shareholders, the soliciting Fund will inform each shareholder, including each Separate Account, Qualified Plan, Manager and General Account, of information necessary for the meeting, including their respective share of ownership in the relevant Portfolio. Each Participating Insurance Company then will solicit voting instructions in accordance with Rules 6e–2 and 6e–3(T), as applicable, and its agreement with the Portfolio concerning participation in the relevant Portfolio. Shares of a Portfolio that are held by the Manager and any General Account will be voted in the same proportion as all Variable Contract owners having voting rights with respect to that Portfolio. However, the Manager and any General Account will vote their shares in such a manner as the Commission may require. Shares held by Qualified Plans will be voted in accordance with applicable law. The voting rights provided to Qualified Plans with respect to shares of a Portfolio would be no different from the voting rights that are provided to Qualified Plans with respect to shares of funds sold to the general public. Furthermore, if a material irreconcilable conflict arises because of a Qualified Plan's decision to disregard Qualified Plan participant voting instructions, if applicable, and that decision represents a minority position or would preclude a majority vote, the Qualified Plan may be required, at the election of the affected Fund, to withdraw its investment in such Portfolio, and no charge or penalty will be imposed as a result of such withdrawal.

32. Applicants reviewed whether a ''senior security,'' as such term is defined under section 18(g) of the 1940 Act, is created with respect to any Variable Contract owner as opposed to a participant under a Qualified Plan, the Manager or a General Account. Applicants concluded that the ability of the Funds to sell their Portfolios directly to Qualified Plans, the Manager or General Accounts does not create a ''senior security.'' ''Senior security'' is defined under section 18(g) of the 1940 Act to include ''any stock of a class having priority over any other class as to distribution of assets or payment of dividends.'' As noted above, regardless of the rights and benefits of participants under Qualified Plans or contract owners under Variable Contracts, Qualified Plans, the Manager, General Accounts and the Separate Accounts only have rights with respect to their respective shares of the Portfolio. They only can redeem such shares at net asset value. No shareholder of a Portfolio has any preference over any other shareholder with respect to distribution of assets or payment of dividends.

33. Applicants also considered whether there are any conflicts between contract owners of the Separate Accounts and the participants under the Qualified Plans, the Manager and the General Accounts with respect to the State insurance commissioners' veto powers over investment objectives. Although the interests and opinions of shareholders may differ, this does not mean that inherent conflicts of interest exist between or among such shareholders. State insurance commissioners have been given certain veto powers in recognition of the fact that insurance companies usually cannot simply redeem their separate accounts out of one fund and invest in another. Generally, time-consuming, complex transactions must be undertaken to accomplish such redemptions or transfers. Conversely, the trustees of Qualified Plans or the participants in participant-directed Qualified Plans, the Manager and General Accounts can make decisions quickly, redeem their interests in the Portfolios and reinvest in another funding vehicle without the same regulatory impediments faced by the Separate Accounts or, as in the case with most Qualified Plans, even hold cash pending suitable investments. Based on the foregoing, issues where the interests of contract owners and the interests of Qualified Plans, the Manager and General Accounts are in conflict can be almost immediately resolved since the trustees (or participants in) the Qualified Plans, the Manager and the General Accounts can, on their own, redeem shares out of the Portfolios.

34. Applicants do not see any greater potential for material irreconcilable conflicts arising between the interests of participants in Qualified Plans, General Accounts and contract owners of the Separate Accounts from future changes in the Federal tax laws than that which already exists between variable annuity contract owners and variable life insurance contract owners.

35. Applicants assert that permitting a Portfolio to sell its shares to the Manager in compliance with Treasury Regulation § 1.817–5 will enhance Portfolio management without raising significant concerns regarding material irreconcilable conflicts. Unlike the circumstances of many investment companies that serve as underlying investment media for variable insurance products, the Funds may be deemed to lack an insurance company ''promoter'' for purposes of Rule l4a–2 under the

1940 Act. Accordingly the Funds and any Portfolios thereunder that are established as new registrants may be subject to the requirements of section 14(a) of the 1940 Act, which generally requires that an investment company have a net worth of $100,000 upon making a public offering of its shares. A potential source of the requisite initial capital is a Portfolio's Manager or a Participating Insurance Company. Given the conditions of Treasury Regulation § 1.817–5(f)(3) and the harmony of interest between a Portfolio, on the one hand, and its Manager or a Participating Insurance Company on the other, Applicants assert that little incentive for overreaching exists. Furthermore, permitting investments by the Manager or Participating Insurance Companies' General Accounts will permit the orderly and efficient creation and operation of the Funds or Portfolios thereof, and reduce the expense and uncertainty of using outside parties at the early stages of Portfolio operations.

36. Various factors have limited the number of insurance companies that offer variable annuity and variable life insurance contracts. Use of a Portfolio as a common investment vehicle for Variable Contracts, Qualified Plans and General Accounts would help reduce or eliminate these factors because Participating Insurance Companies, Qualified Plans and General Accounts will benefit not only from the investment and administrative expertise of AEFC, or any other investment manager to a Portfolio, but also from the cost efficiencies and investment flexibility afforded by a large pool of funds. Therefore, making the Funds available for mixed and shared funding and permitting the purchase of Portfolio shares by Qualified Plans and General Accounts may encourage more insurance companies to offer variable contracts. This should result in increased competition with respect to both variable contract design and pricing, which can be expected to result in more product variation and lower charges. Mixed and shared funding also may benefit Variable Contract owners by eliminating a significant portion of the costs of establishing and administering separate funds. Furthermore, granting the requested relief should result in an increased amount of assets available for investment by the Funds. This may benefit Variable Contract owners by promoting economies of scale, by reducing risk through greater diversification due to increased money in the Fund, or by making the addition of new Portfolios more feasible.

Applicant's Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions, which will apply to the AXP VP Funds as well as any Future Fund that relies on the requested order:

1. A majority of the Board of Trustees or Board of Directors (the ''Board'') of each Fund will consist of persons who are not ''interested persons'' of the Fund, as defined by section 2(a)(19) of the 1940 Act, and the rules thereunder, and as modified by any applicable orders of the Commission (''Independent Board Members''), except that if this condition is not met by reason of the death, disqualification, or bona-fide resignation of any trustee or director, 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. Each Board will monitor each Fund for the existence of any material irreconcilable conflict among and between the interests of the contract owners of all Separate Accounts and participants of all Qualified Plans investing in such 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 any Portfolio are being managed; (e) a difference in voting instructions given by variable annuity contract owners, variable life insurance contract owners and trustees of the Qualified Plans; (f) a decision by a Participating Insurance Company to disregard the voting instructions of contract owners; or (g) if applicable, a decision by a Qualified Plan to disregard the voting instructions of Qualified Plan participants.

3. Participating Insurance Companies (on their own behalf, as well as by virtue of any investment of general account assets in a Portfolio), the Manager and any Qualified Plan that executes a participation agreement upon becoming an owner of 10 percent or more of the assets of any Portfolio (collectively, the ''Participants'') will report any potential or existing conflicts to the Board. The Participants 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 contract owner voting instructions are disregarded, and, if pass-through voting is applicable, an obligation by each Qualified Plan to inform the Board whenever it has determined to disregard Qualified 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 agreements with the Funds, and these responsibilities will be carried out with a view only to the interests of the contract owners. The responsibility to report such information and conflicts, and to assist the Board, also will be contractual obligations of all Qualified Plans with participation agreements, and such agreements will provide that these responsibilities will be carried out with a view only to the interests of Qualified Plan participants.

4. If it is determined by a majority of the Board, or a majority of the Independent Board Members, 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 Independent Board Members), 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 the Separate Accounts from the relevant Portfolio and reinvesting such assets in a different investment vehicle including another Portfolio, if any or, in the case of Participating Insurance Company Participants, submitting the question as to whether such segregation should be implemented to a vote of all affected contract owners and, as appropriate, segregating the assets of any appropriate group (*i.e.*, variable annuity contract owners or variable life insurance contract owners of one or more Participating Insurance Companies) that votes in favor of such segregation, or offering to the affected contract owners the option of making such a change; and

(b) establishing a new registered management investment company or managed separate account. If a material irreconcilable conflict arises because of a decision by a Participating Insurance Company to disregard contract owner voting instructions, and that decision represents a minority position or would preclude a majority vote, then the Participating Insurance Company may be required, at the election of a Fund, to withdraw such Participating Insurance Company's Separate Account's investment in the Fund, and no charge or penalty will be imposed as a result of such withdrawal. If a material irreconcilable conflict arises because of a Qualified Plan's decision to disregard Qualified Plan participant voting instructions, if applicable, and that decision represents a minority position or would preclude a majority vote, the Qualified Plan may be required, at the election of a Fund, to withdraw its investment in the 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 agreements governing participation in the Funds, and these responsibilities will be carried out, with a view only to the interests of contract owners and, as applicable, Qualified Plan participants.

For purposes of this Condition 4, a majority of the Independent Board Members will determine whether or not any proposed action adequately remedies any material irreconcilable conflict, but, in no event, will a Fund or the Manager, as relevant, be required to establish a new funding vehicle for any Variable Contract. 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 Qualified Plan will be required by this Condition 4 to establish a new funding vehicle for the Qualified Plan if: (a) A majority of the Qualified Plan participants materially or adversely affected by the irreconcilable material conflict vote to decline such offer, or (b) pursuant to documents governing the Qualified Plan, the Qualified Plan makes such decision without a Qualified Plan participant vote.

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

6. As to Variable Contracts issued by Separate Accounts registered under the 1940 Act, Participating Insurance Companies will provide pass-through voting privileges to all Variable Contract owners as required by the 1940 Act as interpreted by the Commission. However, as to Variable Contracts issued by unregistered Separate Accounts, pass-through voting privileges will be extended to contract owners to the extent granted by the issuing insurance company. Accordingly, such Participants, where applicable, will vote shares of the applicable Portfolio held in their Separate Accounts in a manner consistent with voting instructions timely received from Variable Contract owners. Participating Insurance Companies will be responsible for assuring that each Separate Account investing in a Portfolio calculates voting privileges in a manner consistent with other Participants.

The obligation to calculate voting privileges as provided in the Application will be a contractual obligation of all Participating Insurance Companies under their agreements with the Funds governing participation in a Portfolio. Each Participating Insurance Company will vote shares for which it has not received timely voting instructions, as well as shares it owns through its Separate Accounts, in the same proportion as it votes those shares for which it has received voting instructions. Each Qualified Plan will vote as required by applicable law and governing Qualified Plan documents.

7. As long as the 1940 Act requires pass-through voting privileges be provided to Variable Contract owners, the Manager and any General Account will vote its shares of any Portfolio in the same proportion as all Variable Contract owners having voting rights with respect to that Portfolio; provided, however, that the Manager or any insurance company General Account will vote its shares in such other manner as may be required by the Commission or its staff.

8. The Funds will comply with all provisions of the 1940 Act requiring voting by shareholders, which for these purposes, will be the persons having a voting interest in the shares of the respective Portfolios, and, in particular the Funds will either provide for annual meetings (except insofar as the Commission may interpret Section 16 of the 1940 Act not to require such meetings) or comply with section 16(c) of the 1940 Act (although the AXP VP Funds are not the type of funds described in section 16(c) of the 1940 Act), as well as with section 16(a) of the 1940 Act and, if and when applicable, section 16(b) of the 1940 Act. Further, the Portfolios will act in accordance with the Commission's interpretation of the requirements of section 16(a) of the 1940 Act with respect to periodic elections of directors or trustees and with whatever rules the Commission may promulgate with respect thereto.

9. A Portfolio will make its shares available to the Separate Accounts and Qualified Plans at or about the same time it accepts any seed capital from the Manager or General Account of a Participating Insurance Company.

10. The Funds will notify all Participants that Separate Account prospectus disclosure or Qualified Plan prospectuses or other Qualified Plan disclosure documents regarding potential risks of mixed and shared funding may be appropriate. The Funds will disclose in their prospectuses that: (a) Shares of the Portfolios may be offered to Separate Accounts of Variable Contracts and, if applicable, to Qualified Plans; (b) due to differences in tax treatment and other considerations, the interests of various contract owners participating in the Funds and the interests of Qualified Plans investing in the Funds, if applicable, may conflict; and (c) the Board will monitor events in order to identify the existence of any material irreconcilable conflicts and determine what action, if any, should be taken in response to any such conflict.

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

12. The Participants, at least annually, will submit to the Board such reports, materials, or data as the Board reasonably may request so that the directors or trustees of the Board may fully carry out the obligations imposed upon the Board by the conditions contained in the Application. Such reports, materials, and data will be submitted more frequently if deemed appropriate by the Board. The obligations of the Participants to provide these reports, materials, and

data to the Board, when it so reasonably requests, will be a contractual obligation of all Participants under their agreements governing participation in the Portfolios.

13. All reports of potential or existing conflicts received by the Board, 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 will be made available to the Commission upon request.

14. A Fund will not accept a purchase order from a Qualified Plan if such purchase would make the Qualified Plan shareholder an owner of 10 percent or more of the assets of such Portfolio unless the Qualified Plan executes an agreement with the Fund governing participation in such Portfolio that includes the conditions set forth herein to the extent applicable. A Qualified Plan or Qualified Plan Participant will execute an application containing an acknowledgement of this condition at the time of its initial purchase of shares of any Portfolio.

Conclusion

Applicants submit, based on the grounds summarized above, that the requested exemptions, in accordance with the standards of section 6(c), 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 1940 Act.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–14139 Filed 6–22–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49863; File No. 4–429]

Joint Industry Plan; Order Approving Joint Amendment No. 12 to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage Relating to the Limitation in Liability for Filling Satisfaction Orders Sent Through the Linkage at the End of the Trading Day

June 15, 2004.

I. Introduction

On April 26, 2004, April 26, 2004, May 5, 2004, May 7, 2004, May 7, 2004, and May 11, 2004, the International Securities Exchange, Inc. (''ISE''), the Pacific Exchange, Inc. (''PCX''), the American Stock Exchange LLC (''Amex''), the Boston Stock Exchange, Inc. (''BSE''), the Philadelphia Stock Exchange, Inc. (''Phlx''), and the Chicago Board Options Exchange, Inc. (''CBOE'') (collectively, the ''Participants''), respectively, filed with the Securities and Exchange Commission (''Commission'') an amendment (''Joint Amendment No. 12'') to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage (''Linkage Plan'').[1] In Joint Amendment No. 12, the Participants propose to extend the pilot provision limiting Trade-Through[2] liability at the end of the trading day for an additional seven months, until January 31, 2005, and to increase the limitation on liability from 10 contracts to 25 contracts.

The proposed amendment to the Linkage Plan was published in the **Federal Register** on May 19, 2004.[3] No comments were received on the proposed amendment. This order approves the proposed amendment to the Linkage Plan.

II. Description of the Proposed Amendment

In Joint Amendment No. 12, the Participants propose to extend the pilot provision contained in Section 8(c)(ii)(B)(2)(c) of the Linkage Plan, which limits Trade-Through liability for the last seven minutes of the trading day for an additional seven months, until January 31, 2005, and to increase the limitation on liability from 10 contracts to 25 contracts, per Satisfaction Order.[4] The proposed increase in the limit on liability would become effective on July 1, 2004, when the current pilot expires. Pursuant to the pilot as currently in effect, the Trade-Through liability of a member of a Participant is limited to 10 contracts per Satisfaction Order for the period between five minutes prior to the close of trading in the underlying security and the close of trading in the options class.

III. Discussion

When this pilot was originally proposed in Joint Amendment No. 4 to the Linkage Plan,[5] the Participants represented to the Commission that their members had expressed concerns regarding their obligations to fill Satisfaction Orders (which may be sent by a Participant's member that is traded through) at the close of trading in the underlying security. Specifically, the Participants represented that their members were concerned that they may not have sufficient time to hedge the positions they acquire.[6] The Participants stated that they believed that their proposal to limit liability at the end of the options trading day to the filling of 10 contracts per exchange, per transaction would protect small customer orders, but still establish a reasonable limit for their members' liability. The Participants further represented that the proposal should not affect a member's potential liability under an exchange disciplinary rule for engaging in a pattern or practice of

[1] On July 28, 2000, the Commission approved a national market system plan for the purpose of creating and operating an intermarket option linkage proposed by Amex, CBOE, and ISE. *See* Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000). Subsequently, Phlx, PCX, and BSE joined the Linkage Plan. *See* Securities Exchange Act Release Nos. 43573 (November 16, 2000), 65 FR 70850 (November 28, 2000); 43574 (November 16, 2000), 65 FR 70851 (November 28, 2000); and 49198 (February 5, 2004), 69 FR 7029 (February 12, 2004). On June 27, 2001, May 30, 2002, January 29, 2003, June 18, 2003, and January 29, 2004, the Commission approved joint amendments to the Linkage Plan. *See* Securities Exchange Act Release Nos. 44482 (June 27, 2001), 66 FR 35470 (July 5, 2001); 46001 (May 30, 2002), 67 FR 38687 (June 5, 2002); 47274 (January 29, 2003), 68 FR 5313 (February 3, 2003); 48055 (June 18, 2003), 68 FR 37869 (June 25, 2003); and 49146 (January 29, 2004), 69 FR 5618 (February 5, 2004).

[2] A ''Trade-Through'' is defined as a transaction in an options series at a price that is inferior to the national best bid and offer in an options series calculated by a Participant. *See* Section 2(29) of the Linkage Plan.

[3] *See* Securities Exchange Act Release No. 49692 (May 12, 2004), 69 FR 28956.

[4] A ''Satisfaction Order'' is defined as an order sent through the Intermarket Options Linkage to notify a Participant of a Trade-Through and to seek satisfaction of the liability arising from that Trade-Through. *See* Section 2(16)(c) of the Linkage Plan.

[5] *See* Securities Exchange Act Release No. 47028 (December 18, 2002), 67 FR 79171 (December 27, 2002) (Notice of Proposed Joint Amendment No. 4).

[6] *See* letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Annette Nazareth, Director, Division of Market Regulation, Commission, dated November 19, 2002.