

N-23c-3 [17 CFR 274.211], a cover sheet that provides limited information about the fund and the type of offer the fund is making.<sup>1</sup> The fund must describe in its annual report to shareholders the fund's policy concerning repurchase offers and the results of any repurchase offers made during the reporting period. The fund's board of directors must adopt written procedures designed to ensure that the fund's investment portfolio is sufficiently liquid to meet its repurchase obligations and other obligations under the rule. The board periodically must review the composition of the fund's portfolio and change the liquidity procedures as necessary. The fund also must file copies of advertisements and other sales literature with the Commission as if it were an open-end investment company subject to section 24 of the Investment Company Act (15 U.S.C. 80a-24) and the rules that implement section 24.<sup>2</sup>

The requirement that the fund send a notification to shareholders of each offer is intended to ensure that a fund provides material information to shareholders about the terms of each offer, which may differ from previous offers on such matters as the maximum amount of shares to be repurchased (the maximum repurchase amount may range from 5% to 25% of outstanding shares). The requirement that copies be sent to the Commission is intended to enable the Commission to monitor the fund's compliance with the notification requirement. The requirement that the shareholder notification be attached to Form N-23c-3 is intended to ensure that the fund provides basic information necessary for the Commission to process the notification and to monitor the fund's use of repurchase offers. The requirements that the fund describe its current policy on repurchase offers and the results of recent offers in the annual shareholder report is intended to provide shareholders current information about the fund's repurchase policies and its recent experience. The requirement that the board approve and review written procedures designed to maintain portfolio liquidity is intended to ensure that the fund has enough cash or liquid securities to meet its

repurchase obligations, and that written procedures are available for review by shareholders and examination by the Commission. The requirement that the fund file advertisements and sales literature as if it were an open-end investment company is intended to facilitate the review of these materials by the Commission or the NASD to prevent incomplete, inaccurate, or misleading disclosure about the special characteristics of a closed-end fund that makes periodic repurchase offers.

The Commission estimates that 23 funds currently rely upon the rule. The Commission estimates that each fund spends approximately 80 hours annually in preparing, mailing, and filing shareholder notifications for each repurchase offer, 4 hours annually in preparing and filing Form N-23c-3, 6 hours annually in preparing disclosures in the annual shareholder report concerning the fund's repurchase policy and recent offers, 28 hours annually in preparing procedures to protect portfolio liquidity, and 8 hours annually in performing subsequent reviews of these procedures. The total annual burden of the rule's paperwork requirements for all funds thus is estimated to be 2898 hours. This represents an increase of 1638 hours from the prior estimate of 1260 hours. The increase results primarily from an increase in the number of funds relying upon the rule from 10 to 23 funds.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. Complying with the collection of information requirements of the rule is mandatory only for those funds that rely on the rule in order to repurchase shares of the fund. The information provided to the Commission on Form N-23c-3 will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens of the collections of information on respondents, including through the use of automated

collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: March 26, 2001.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 01-7891 Filed 3-29-01; 8:45 am]

**BILLING CODE 8010-01-M**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Rel. No. IC-24915; File No. 812-12364]**

### **Golden American Life Insurance Company, et al.**

March 26, 2001.

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

**ACTION:** Notice of application for an order pursuant to section 6(c) of the Investment Company Act of 1940 (the "Act") granting exemptions from the provisions of sections 2(a)(32) and 27(i)(2)(A) of the Act and Rule 22c-1 thereunder.

*Applicants:* Golden American Life Insurance Company ("Golden American"), Separate Account B of Golden American (the "Account") and Directed Services, Inc. ("DSI") (together, the "Applicants").

*Summary of the Application:* Applicants seek an order of the Commission, pursuant to Section 6(c) of the Act to the extent necessary to permit the recapture of certain credits applied to premium payments made in consideration of deferred variable annuity contracts which Golden American currently issues (the "Contracts") and substantially similar variable annuity contracts that Golden American may issue in the future ("Future Contracts") as well as any other separate accounts of Golden American and its successors in interest ("Future Accounts") that support in the future variable annuity contracts that are similar in all material respects to the Contracts and principal underwriters of such contracts ("Future Underwriters").

*Filing Date:* The application was filed on December 13, 2000, and amended and restated on March 23, 2001.

*Hearing or Notification of Hearing:* An order granting the application will be issued unless the Commission orders a

<sup>1</sup> Form N-23c-3 requires the fund to state its registration number, its full name and address, the date of the accompanying shareholder notification, and the type of offer being made (periodic, discretionary, or both).

<sup>2</sup> Rule 24b-3 under the Investment Company Act [17 CFR 270.24b-3], however, would generally exempt the fund from the requirement when the materials are filed instead with the National Association of Securities Dealers ("NASD"), as nearly always occurs under NASD procedures, which apply to the underwriter of every fund.

hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving the Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on April 16, 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 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. Applicant, c/o Linda Senker, Esq., Golden American Life Insurance Company, 1475 Dunwoody Drive, West Chester, Pennsylvania 19380. Copies to Stephen E. Roth, Esq., Sutherland Asbill & Brennan LLP, 1275 Pennsylvania Avenue, NW., Washington, DC 20004-2415.

**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:** Following is a summary of the Application. The Application is available for a fee from the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549-0102 (tel. (202) 942-8090).

### **Applicant's Representations**

1. Golden American is a stock life insurance company originally incorporated under laws of Minnesota and later redomiciled in Delaware. Golden American is engaged in the business of writing annuities, both individual and group, in all states (except New York) and the District of Columbia. Golden American is a subsidiary of Equitable of Iowa Companies, Inc. ("Equitable of Iowa"). Golden American is ultimately controlled by ING Group N.V., a global financial services holding company.

2. Golden American established the Account as a segregated investment account under Delaware law. The assets of the Account support one or more varieties of variable annuity contracts, including the Contracts. The assets of the Account attributable to the Contracts and any other variable annuity contracts through which interests in the Account are issued are owned by Golden American but are held separately from all other assets of Golden American, for

the benefit of the owners of, and the persons entitled to payment under, Contracts issued through the Account. Consequently, such assets are not chargeable with liabilities arising out of any other business that Golden American may conduct. Income, gains and losses, realized or unrealized, from each subaccount of the Account, are credited to or charged against that subaccount without regard to any other income, gains or losses of Golden American. The Account is a "separate account" as defined by Rule 0-1(e) under the Act, and is registered with the Commission as a unit investment trust. Interests in the Account offered through the Contracts have been registered under the Securities Act of 1933 on Form N-4.

3. DSI is a wholly-owned subsidiary of Equitable of Iowa. It serves as the principal underwriter of Golden American separate accounts registered as unit investment trusts under the Act, including the Account, and is the distributor of the variable life insurance contracts and variable annuity contracts issued through such separate accounts, including the Contracts. DSI is registered as a broker-dealer under the Securities Exchange Act of 1934 and is a member of the National Association of Securities Dealers, Inc. (the "NASD").

4. The Contracts make available a number of subaccounts of the Account to which owners may allocate net premium payments and associated bonus credits (described below) and to which owners may transfer contract value. The Contracts also offer fixed-interest allocation options under which Golden American credits guaranteed rates of interest for various period (including interest crediting mechanisms which entail the imposition of "market value" adjustments under certain circumstances). The Contracts offer a variety of fixed and variable annuity payment options to owners. In the event of an owner's (or, in certain circumstances, an annuitant's) death prior to the annuity commencement date, beneficiaries may elect to receive death benefits in the form of one of the annuity payment options instead of a lump sum.

5. The Contracts generally may only be purchased with a minimum initial premium of \$10,000 or more (\$1,500 to certain employee benefit plans). Golden American may deduct a premium tax charge from premium payments in certain states, but otherwise deducts a charge for premium taxes upon surrender or annuitization of the Contract or upon the payment of a death benefit, depending upon the

jurisdiction. The Contracts provide for an annual administrative charge of \$40 that Golden American deducts on each Contract Anniversary and upon a full surrender of a Contract, a daily administrative charge deducted from the assets of the Account at an annual rate of 0.15% of the Account's average daily net assets and a daily mortality and expense risk charge deducted from the assets of the Account at annual rates ranging from 1.30% to 1.75% of the Account's average daily net assets. Three optional death benefit riders are available with the Contract: (1) The Annual Ratchet enhanced death benefit, (2) the 7% Solution enhance death benefit and (3) the Max 7 enhanced death benefit. If purchased, the charge for the optional death benefit riders is included in the mortality and expense risk charge. The Contracts also provide for a charge of \$25 for each transfer of contract value in excess of 12 per contract year. Lastly, the Contracts have a surrender charge in the form of a contingent deferred sales charge ("CDSC"), which is equal to the percentage of each premium payment surrendered or withdrawn, and declines from 8% during the first four years of the premium payment to 0% after 9 full years since the premium payment. No CDSC applies to contract value representing an annual free withdrawal amount or to contract value in excess of aggregate premium payments (less prior withdrawals of premium payments).

6. If an owner dies before the annuity commencement date, the Contracts provide, under most circumstances, for a death benefit payable to a beneficiary. If the owner is not a natural person, then the death benefit is payable upon the death of an annuitant.

7. Golden American offers a bonus credit provision under the Contracts, pursuant to which it credits an owner's contract value with an additional amount when a net premium payment is applied. Under the bonus credit provisions, Golden American credits contract value with an amount that is a percentage is currently 5% for issue ages under age 70 and 4% for issue age 70 and over. In the future Golden American may credit contract value with amounts that are a greater percentage of each premium payment. If above 4%, Golden American also may reduce that percentage upon 30 days advance written notice, but will never reduce it below 4%. Applicants acknowledge that the exemptive order requested herein will not provide an exemption for a bonus credit recapture in excess of 5%.

8. Under the bonus credit provision, Golden American recaptures or retains

the credited amount in the event that the owner exercises his or her cancellation right during the "free look" period. Also, in computing death benefits, Golden American may "recapture" bonus credits applied within twelve months prior to the date as of which the death benefit is computed. Finally, in the event of a surrender or withdrawal of contract value where the surrender charge is waived due to the owner's receipt of qualified extended medical care or date of such diagnosis of a qualifying terminal illness (as defined in the contract), Golden American will "recapture" all bonus credits applied during the twelve months prior to the receipt of such care or date of such diagnosis (a "waiver event").

9. Applicants request that the Commission issue an order pursuant to section 6(c) of the Act, exempting them as well as Future Accounts and Future Underwriters from the provisions of sections 2(a)(32) and 27(i)(2)(A) of the act and Rule 22c-1 thereunder, to the extent necessary to permit the recapture of certain credits applied to premium payments made in consideration of the Contracts.

#### Legal Analysis

1. Section 6(c) of the Act authorizes the Commission to exempt any person, security, or transaction or any class of persons, securities, or transactions from any provision or provisions of the Act and/or any rule 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.

2. Subsection (i) of section 27 provides that section 27 does not apply to any registered separate account supporting variable annuity 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 such a separate account or sponsoring insurance company to sell a contract funded by the registered separate account unless 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 or her proportionate share of the issuer's current net assets, or the cash equivalent thereof.

3. Applicants submit 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. Applicants submit that the recapture of bonus credits would not, at any time, deprive an owner of his or her proportionate share of the current net assets of the Account because, until the appropriate recapture period expires, Golden American retains the right to and interest in each owner's contract value representing the dollar amount of any unvested bonus credits. Therefore, Applicants argue that if Golden American recaptures any bonus credit or part of a bonus credit in the circumstances described above, it would merely be retrieving its own assets. Applicants state that Golden American would grant bonus credits out of its general account assets and the amount of the credits (although not the earnings on such amounts) remain Golden American's until such amounts vest with the owner. Thus, Applicants argue that to the extent that Golden American may grant and recapture bonus credits in connection with variable contract value, it would not, at either time, deprive any owner of his or her then proportionate share of an Account's assets.

4. Applicants state that the bonus credit recapture provisions are necessary for Golden American to offer the bonus credits. Applicants argue that it would be unfair to Golden American to permit owners to keep their bonus credits upon their exercise of the Contracts "free look" provision. Because no CDSC applies to the exercise of the "free look" provision. Applicants state that the owner could obtain a quick profit in the amount of the bonus credit at Golden American's expense by exercising that right. Likewise, Applicants argue that because no additional CDSC applies upon the death or an owner (or annuitant), and no CDSC applies upon a waiver event, such a death or waiver event shortly after the award of bonus credits would afford an owner or a beneficiary a similar profit at Golden American's expense.

5. Applicants represent that it is not administratively feasible to track the unvested value of bonus credits in the Account, and Golden American deducts the daily mortality and expense risk charge and the daily administrative charge from the entire net asset value of the Account. As a result, the daily mortality and expense risk charge and the daily administrative charge paid by any owner is greater than that which he or she would pay without the bonus credit.

6. Applicants assert that the dynamics of Golden American's bonus credit provisions would not violate sections 2(a)(32) or 27(i)(2)(A) of the Act. Nonetheless, in order to avoid any uncertainty as to full compliance with the Act, Applicants seek exemptions from these two sections.

7. Section 22(c) of the 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. Rule 22c-1 thereunder imposes requirements with respect to both the amount payable on redemption of a redeemable security and the time such amount is calculated. Specifically, Rule 22c-1, in pertinent part, 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 of redemption, or of an order to purchase or sell such security.

8. Golden American's recapture of any bonus credit could be viewed as the redemption of a contractowner's interest in the Account at a price above net asset value. Applicants content, however, that the bonus credits do not violate Rule 22c-1 under the Act. Applicants argue that bonus credit provisions do not give rise to either of the evils that Rule 22c-1 was designed to address. The Rule was intended to eliminate or reduce, as far as was reasonably practicable, 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 at a price above net asset value, or other unfair results, including speculative trading practices.

9. Applicants argue that the evils prompting the adoption of Rule 22c-1 were primarily the result of backward pricing, the practice of basing the price of a mutual fund share on the net asset value per share determined as of the close of the market on the previous day. Backward pricing permitted certain investors to take advantage of increases or decreases in net asset value that were not yet reflected in the price, thereby diluting the values, of outstanding shares.

10. Applicants argue that the proposed bonus credit provisions pose no such threat of dilution. Applicants

contend that an owner's interest in his or her contract value or in the Account would always be offered under the Contracts at a price determined on the basis of net asset value. Applicants assert that recaptures of bonus credits result in a redemption of Golden American's interest in an owner's contract value or in the Account at a price determined on the basis of the Account's current net asset value and not at an inflated price. Moreover, the amount recaptured will always equal the amount that Golden American paid from its general account for the credits. Similarly, although owners are entitled to retain any investment gains attributable to the bonus credits, the amount of such gains would always be computed at a price determined on the basis of net asset value.

11. Applicants contend that Rule 22c-1 should have no application to the bonus credit because neither of the harms that it was intended to address arise in connection with the proposed bonus credit provisions. Nonetheless, in order to avoid any uncertainty as to full compliance with the Act, Applicants seek an exemption from Rule 22c-1.

12. Applicants also submit that even if the proposed bonus credit provisions would conflict with sections 2(a)(32) or 27(i)(2)(A) of the Act or Rule 22c-1 thereunder, the Commission should grant the exemptions that they request because the bonus credit provisions are generally favorable and beneficial for owners. The recapture provisions of the Contracts temper this benefit somewhat, but owners, unless they (or, in certain circumstances, annuitants) die, retain the ability to avoid the recapture. Although there is a downside in declining markets to bonus credits if the owner (or annuitant) dies or if the owner exercises his or her cancellation right during the "free look" period or if the owner surrenders the Contract or withdraws Contract value where the surrender charge is waived due to a "waiver event", the bonus credit provisions (including their dynamic elements) are fully disclosed in the prospectuses for the Contracts. Applicants argue that the recapture provisions do not, on balance, diminish the overall value of the bonus credit provisions.

13. Applicants state that the Commission's authority under section 6(c) of the Act to grant exemptions from various provisions of the Act and rules thereunder is broad enough to permit orders of exemption thereunder that cover classes of unidentified persons. Applicants request an order of the Commission that would exempt them, Golden American's successors in

interest, Future Accounts and Future Underwriters from the provisions of sections 2(a)(32) and 27(i)(2)(A) of the Act and Rule 22c-1 thereunder.

Applicants submit that the exemption of these classes of persons is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act because all of the potential members of the class could obtain the foregoing exemptions for themselves on the same basis as the Applicants, but only at a cost to each of them that is not justified by any public policy purpose. As discussed, the requested exemptions would only extend to persons that in all material respects are the same as the Applicants. The Commission has previously granted exemptions to classes of similarly situated persons in various contexts and in a wide variety of circumstances, including class exemptions for recapturing bonus credits under variable annuity contracts.

14. Applicants represent that Future Contracts will be substantially similar in all material respects to the Contracts and that each factual statement and representation about the bonus credit provisions of the Contracts will be equally true of Future Contracts. Applicants also represent that each material representation made by them about the Account and DSI will be equally true of Future Accounts and Future Underwriters, to the extent that such representations relate to the issues discussed in the application. In particular, each Future Underwriter will be registered as a broker-dealer under the Securities Exchange Act of 1934 and be a NASD member.

#### Conclusion

Applicants represent that the requested exemptions are necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 01-7892 Filed 3-29-01; 8:45 am]

**BILLING CODE 8010-01-M**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44099; File No. S7-24-89]

### Joint Industry Plan; Solicitation of Comments and Order Approving Request To Extend Temporary Effectiveness of Reporting Plan for Nasdaq/National Market Securities Traded on an Exchange on an Unlisted or Listed Basis, Submitted by the National Association of Securities Dealer, Inc., the Pacific Exchange and the Boston, Chicago, Philadelphia, and Cincinnati Stock Exchanges

March 23, 2001.

#### I. Introduction

On March 19, 2001, the National Association of Securities Dealers, Inc. ("NASD"), on behalf of itself and the Boston Stock Exchange, Inc. ("BSE"), the Chicago Stock Exchange, Inc. ("CHX"), the Cincinnati Stock Exchange, Inc. ("CSE"), Pacific Exchange, Inc. ("PCX"), and the Philadelphia Stock Exchange, Inc. ("Phlx") (hereinafter referred to as the "Participants") submitted to the Securities and Exchange Commission ("Commission" or "SEC") a proposal to extend the operation of a joint transaction reporting plan ("Plan")<sup>1</sup> for Nasdaq/National Market ("Nasdaq/NM") securities traded on an exchange on an unlisted or listed basis.<sup>2</sup> The proposal would extend the effectiveness of the Plan through May 31, 2001. The Commission also is extending certain exemptive relief as described below. The March 2001 Extension Request does not seek permanent approval of the Plan

<sup>1</sup> See Letter from Jeffrey T. Brown, Vice President Regulation and General Counsel, CSE, to Jonathan G. Katz, Secretary, Commission, dated March 16, 2001 ("March 2001 Extension Request"). The March 2001 Extension Request also request that the Commission continue to provide exemptive relief, previously granted in connection with the Plan on a temporary basis, from Rules 11Ac1-2 and 11Aa3-1 under the Securities Exchange Act of 1934, as amended ("Act"). 15 U.S.C. 78a *et seq.* The signatories to the Plan are the Participants for purposes of this release; however, the BSE joined the Plan as a "limited participant" and reports quotation information and transaction reports only in Nasdaq/NM securities listed on the BSE. Originally, the American Stock Exchange Inc. ("Amex") was a Participant but withdrew its participation from the Plan in August 1994.

<sup>2</sup> Section 12 of the Act generally requires an exchange to trade only those securities that the exchange lists, except that Section 12(f) of the Act permits unlisted trading privileges ("UTP") under certain circumstances. For example, Section 12(f), among other things, permits exchanges to trade certain securities that are traded over-the-counter ("OTC/UTP"), but only pursuant to a Commission order or rule. The present order fulfills this Section 12(f) requirement. For a more complete discussion of the Section 12(f) requirement, see November 1995 Extension Order, *infra* note 7.