3. The Commission in the Initial Order granted exemptions for exchange offers made in the context of opt-out rights and affirmative consent for assumption reinsurance transactions. Those exemptions are not applicable to the proposed exchange offers, solely because the proposed offers will not involve any assumption reinsurance transactions.

4. Applicants request an order pursuant to Section 11(a) approving the terms of Mutual of America's proposed offers of exchange to Owners of American Contracts and Policies.

5. Applicants submit that the terms of the proposed exchange offers are fair to Owners and should be approved by the Commission. Since no sales or other charges will be assessed in connection with the exchanges made pursuant to the offers, the sales charge abuse to which Section 11(a) is directed will not be present.[3] The only change resulting from the exchange of American Contracts and Policies for Mutual of America's Contracts and Policies is in the identity of the issuing insurance company and depositor of the separate account, the funding separate account, and the right of owners of Contracts and Policies to participate in Mutual of America's divisible surplus. In addition, the unit values of the investment funds in the Annuity Account are identical to those of the American Annuity Account, and the unit values of the investment funds in the VUL Account are identical to those of the American VUL Account. Applicants believe as well that the exchanges of American IRA Contracts will be tax-free direct transfers and that the exchanges of American FPA Contracts and American Policies will come within the provisions of Section 1035 of the Code, so that there will be no adverse tax consequences for Owners as a result of the exchanges. As part of the exchange offers, Mutual of America will disclose to each Owner when the tax treatment for the Policy would be different than that of the American Policy in that the Policy would be an MEC, would not be able to accept additional premiums because such payments would cause the Policy to not be treated as life insurance, would become an MEC upon the payment of additional scheduled premiums or would not qualify as life insurance under the Code. Mutual of America will not issue a Policy if it would not be deemed life insurance under the Code. Mutual of America has substantial assets and surplus to assure the performance of its obligations under the Contracts and Policies, and it currently performs all administrative services for the American Contracts and Policies pursuant to the Servicing Agreement.

6. Owners will receive current prospectuses for the Contracts or Policies, as applicable. The exchanges of interests will be made on the basis of relative net asset values. The provisions of the Contracts and Policies will be identical to the provisions of the American Contracts and American Policies, respectively, except for the addition of the right to participate in Mutual of America's divisible surplus. Owners will have investment funds available in the Mutual Accounts with the same Underlying Funds as available in the America Accounts.

7. Applicants note that the Commission has previously approved offers of exchange in circumstances when Rule 11a–2 would not apply because the insurance companies were not affiliated or might not be affiliated at the time certain exchange offers for variable annuities were made or consummated relating to assumption reinsurance transactions.[4] In *Family Life Insurance Company, et al.,* the applicants noted that the offers of exchange for the variable annuity contracts involved would satisfy all of the conditions of Rule 11a–2 if made prior to the sale of the ceding company. Applicants state that the terms of their proposed exchange offers would satisfy all of the conditions of Rule 11a–2 applicable to affiliated companies if they had been made prior to the sale of American Life by Mutual of America and that the offers satisfy the standards of the Commission for determining that the terms of an exchange offer are fair to contract holders. Applicants further state that the terms of the proposed exchange offers are identical to the exchange offers approved by the Commission in the Initial Order except that the proposed offers would not be made in connection with assumption reinsurance transactions.

Conclusion

On the basis of the precedents cited and the showing by Applicants that the terms of the exchange offers involved are fair, Applicants submit that the requested relief should be granted.

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

Margaret H. McFarland,

Deputy Secretary.

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via a toll free telephone number of Internet web site, while holders of Contracts and Policies may place orders using Mutual of America's toll free telephone number or its web site, which may provide an incentive to Owners to make the exchanges.

[3] The Commission's Report on the ''Public Policy Implications of Investment Company Growth,'' H.R. Rep. No. 2337 (1966) at p. 331, stated:

Section 11(a) was specifically designed to prevent the practices of ''switching'' and ''reloading'' whereby the holders of securities were induced to exchange their certificates for new certificates on which a new load would be payable.

[4] *Family Life Insurance Company, et al.,* Inv. Co. Act Rel. Nos. 18179 (June 3, 1991) (notice) and 18217 (July 2, 1991) (order), involved exchange offers under assumption reinsurance between affiliates in contemplation of the sale of the ceding company; and *The Lincoln National Life Insurance Company, et al.,* Inv. Co. Act Rel. Nos. 22189 (Aug. 29, 1996) (notice) and 22251 (Sept. 26, 1996) (order); *AUSA Life Insurance Company, Inc. et al.,* Inv. Co. Act Rel. Nos. 20518 (Aug. 31, 1994) (notice) and 20587 (Sept. 28, 1994) (order); and *Pacific Corinthian Life Insurance Company, et al.,* Inv. Co. Act Rel. Nos. 18925 (Sept 2. 1992) (notice) and 18975 (Sept. 24, 1992) (order), involved exchange offers under variable annuity assumption reinsurance transactions between non-affiliates when Rule 11a–2 would have been available if the insurance companies had been affiliated.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45094; File No. SR–ISE–00–17]

Self Regulatory Organizations; International Securities Exchange LLC; Order Granting Approval to Proposed Rule Change and Amendments No. 1 and No. 2 by the International Securities Exchange LLC Relating to Its Arbitration Program

November 21, 2001.

I. Introduction

On November 20, 2000, the International Securities Exchange LLC (''ISE'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to make certain changes to its arbitration rules. These changes were intended to reflect and facilitate ISE's regulatory services agreement with NASD Regulation, Inc. (''NASDR'') pursuant to which, among other things, NASDR provides services related to arbitration proceedings to involving ISE members.[3] On March 5, 2001, the Exchange filed Amendment

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

[2] 17 CFR 240.19b–4.

[3] The Commission notes that although the regulatory services agreement at issue is between ISE and NASDR, the actual administration of arbitrations on behalf of ISE members pursuant to the agreement will be performed by a recently-created NASD subsidiary, NASD Dispute Resolution, which performs all arbitration and mediation services for NASD members.

No. 1 to the proposed rule change,[4] and on July 16, 2001, the Exchange filed Amendment No. 2 to the proposed rule change.[5]

The proposed rule change was published for comment in the **Federal Register** on July 26, 2001.[6] The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

II. Description of the Proposal

In its proposed rule change, the ISE proposed amendments to Chapter 18, Arbitration, of the ISE Rules. Specifically, the ISE proposes to repeal Rules 1800 through 1835 and create new Rule 1800, which will state that the NASD Code of Arbitration, as the same may be in effect from time to time, shall govern Exchange arbitrations. The proposed rule also states that the Exchange shall retain jurisdiction over its members for failure to honor arbitration awards and any right, action or determination by the Exchange which it would otherwise be authorized to adopt, administer or enforce is in no way limited or precluded by incorporation of the NASD Code of Arbitration.

The Exchange has contracted with NASDR to perform arbitrations under ISE's rules. Accordingly, the Exchange proposes to eliminate all of the arbitration rules currently contained in Chapter 18 of the ISE Rules and incorporate the NASD Code of Arbitration by reference.[7] The proposed rule also specifies that potential violations of ISE rules identified during an arbitration hearing may be referred to the ISE for investigation, and that disciplinary action may be brought by the ISE as a result thereof. Finally, a member or person associated with a member will be subject to discipline by the ISE if it fails to honor an award made as a result of an arbitration initiated under ISE Rules.[8]

III. Discussion

After careful review, the Commission finds that implementation of the proposed rule change is consistent with the requirements of section 6 of the Act[9] and the rules and regulations thereunder applicable to a national securities exchange.[10] Specifically, the Commission believes that the proposal is consistent with section 6(b)(5) of the Act.[11] Section 6(b)(5) requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to facilitate transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.[12] Section 6(b)(5) also requires that those rules not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In particular, the Commission believes that the proposed rule change eliminating the ISE's arbitration program and referring cases to NASDR for arbitration will help protect investors and the public interest by ensuring that there is a fair arbitration forum available for all ISE arbitration claims.

The proposed rule change submitted by the ISE would eliminate all of the arbitration rules currently contained in Chapter 18 of the ISE Rules and create new ISE Rule 1800, essentially incorporating the NASD Code of Arbitration by reference, by stating that the NASD Code of Arbitration, as the same may be in effect from time to time, shall govern Exchange arbitrations. The Commission believes that it is consistent with the Act to allow NASDR to administer ISE arbitrations, as the ISE has made the business decision to enter into an agreement with NASDR to provide a forum for its arbitrations for a flat annual fee, rather than to absorb the ongoing costs and administrative burden of continuing to manage its own arbitrations.

Procedurally, the Commission believes that the proposed rule change should ensure that all arbitration cases otherwise subject to ISE's arbitration process will be administered under the NASDR arbitration program by virtue of ISE members being deemed ''members'' of the NASD for purposes of arbitrating any claims involving the securities business of any members of ISE, except for narrowly enumerated exceptions. The proposed rule change accomplishes this by subjecting ISE members to the NASD Code of Arbitration for ''[a]ny dispute, claim or controversy arising out of or in connection with the business of any member of the Exchange, or arising out of the employment or termination of employment of associated person(s) with any member may be arbitrated under this Rule 1800 except that (1) a dispute, claim, or controversy alleging employment discrimination (including a sexual harassment claim) in violation of a statute may only be arbitrated if the parties have agreed to arbitrate it after the dispute arose; and (2) any type of dispute, claim, or controversy that is not permitted to be arbitrated under the NASD Code of Arbitration, such as class action claims, shall not be eligible for arbitration under this Rule 1800.''[13] In effect, the proposed rule change requires that ISE members abide by the NASD's Code of Arbitration as if they were members of the NASD for purposes of arbitration.

In addition, the Commission believes that the proposed rule change provides for enforcement of arbitration awards and discipline of members, as appropriate, in a manner consistent with the Act, because ISE will continue to have ultimate responsibility for the enforcement and disciplining of its members regarding arbitration. An ISE member's refusal to submit to arbitration pursuant to the NASD Code of Arbitration or failure to pay an arbitration award rendered pursuant to the NASD Code of Arbitration would constitute a violation of section (b) of new ISE Rule 1800, which subjects ISE members to NASD jurisdiction, as well as section (e) which reserves ISE's right to discipline its members.

As stated above, by virtue of ISE's agreement with NASDR to perform arbitrations for ISE members, as well as the proposed amendments to ISE's arbitration rules contained herein, the ISE proposes to incorporate by reference the NASD Code of Arbitration. Accordingly, the ISE has submitted to the Commission a letter requesting an

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[4] *See* Letter from Katherine Simmons, Vice President and Associate General Counsel, ISE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated March 5, 2001 (''Amendment No. 1''). In Amendment No. 1, the ISE added paragraphs (a) and (b), which are jurisdictional provisions currently contained in ISE Rule 1800, to the proposed rule text.

[5] *See* Letter from Jennifer M. Lamie, Assistant General Counsel, ISE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated July 16, 2001 (''Amendment No. 2''). Amendment No. 2 replaced the initial filing and Amendment No. 1 in their entirety. In Amendment No. 2, the ISE made minor changes to the order of the subsections under ISE rule 1800, amended the language of its proposed jurisdictional provisions, and added subsection (c), which governs predispute arbitration agreements.

[6] *See* Securities Exchange Act Release No. 44572 (July 18, 2001), 66 FR 39069 (July 26, 2001).

[7] The ISE represents that, as of this date, no cases have been opened under the Exchange's existing arbitration rules.

[8] NASDR performs arbitrations for the Philadelphia Stock Exchange. *See* Securities Exchange Act Release No. 40517 (October 1, 1998), 63 FR 54177 (October 8, 1998). Because there have not been any arbitrations initiated under ISE rules, the proposed rule does not contain language found in the Phlx rules to address pending arbitrations.

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(5).

[11] *Id.*

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

[13] *See* proposed ISE Rule 1800(b) (''Jurisdiction'').

exemption pursuant to Section 36 of the Act from the rule filing procedures of Section 19(b) of the Act and Rule 19b–4 thereunder,[14] with respect to the arbitration and margin rules of other self-regulatory organizations it has incorporated by reference, in accordance with the section 36 exemptive request filing procedures published by the Commission.[15] According to the ISE, the purpose of this request is to avoid having to file duplicative proposed rule changes with the Commission pursuant to section 19(b) and Rule 19b–4 each time the NASD changes its Code of Arbitration. In its letter, the ISE also represents that its proposed incorporations by reference are regulatory in nature and are intended to be a comprehensive integration of the relevant rules of the other exchange into the ISE rules, and that the ISE agrees to provide written notice to its members whenever the Commission publishes for comment a proposed rule change to the NASD Code of Arbitration.

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[16] that the proposed rule change (SR–ISE–00–17), as amended, is hereby approved.

For the Commission, by the Division of market Regulation, pursuant to delegated authority.[17]

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45087; File No. SR–ISE–2001–29]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the International Securities Exchange LLC Relating to Changes to the Exchange's Delisting Criteria

November 20, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 19, 2001, the International Securities Exchange LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the ISE. The proposed rule change has been filed by the ISE as a ''non-controversial'' rule change under Rule 19b–4(f)(6) under the Act.[3] The Commission is publishing this notice to solicit comments on the proposed change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend ISE Rule 503, Withdrawal of Approval of Underlying Securities, governing the circumstances under which the Exchange may not continue to add new options series for underlying securities.

The text of the proposed rule change is available at the ISE and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the ISE included statements concerning the purpose of and statutory basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

ISE Rule 503, Withdrawal of Approval of Underlying Securities, contains certain criteria with respect to the securities underlying options classes traded on the Exchange. The rule restricts the Exchange from adding additional series of an options class in the event that the underlying security fails to meet these criteria. These criteria currently are uniform across all of the options exchanges. However, due to the complexity of the requirements, it has become apparent that the options exchanges do not always interpret and apply these rules in a consistent manner.

ISE Rule 503 currently provides that the Exchange may not list additional series if, among other things, the underlying security has not closed above $5 for the majority of business days during the preceding six calendar months as measured by the highest closing price reported in any market in which the underlying security traded. ISE Rule 503 further provides that new series may not be added unless the closing price from the preceding day was at least $5. However, there is an exception to these two $5 criteria that permits the Exchange to add additional series, so long as the underlying security has closed above $3 for the majority of business days during the preceding six calendar months and the underlying price is at least $3 at the time the new series are authorized, in addition to certain other criteria being satisfied, provided that if this exception were relied upon to add any new series during the preceding calendar months, each of the $3 requirements becomes a $4 requirement.

The ISE represents that the application of the current requirements and exceptions in ISE Rule 503 creates unnecessary confusion and administrative burdens on the Exchange, and often results in disputes between the exchanges, as inconsistent application of the criteria can competitively disadvantage an exchange that interprets the requirements differently. Accordingly, the ISE proposes to amend ISE Rule 503 to simplify the criteria used to determine whether new options series may be added with respect to particular options classes, and to clarify when new options series may not be added by the Exchange. The Exchange believes its proposal is consistent with a similar proposal by the Chicago Board Options Exchange (''CBOE'').[4]

Under the ISE proposal, the $5 criteria described above, as well as the $3 and $4 exceptions, would be replaced by a single $3 requirement. None of the other requirements currently contained in Rule 503 (such as the number of shares that must be held by non-insiders, number of holders and trading volume) would be changed. The new proposed requirement specifies the following: (1) New series may not be added for the next day unless, in addition to satisfying the other requirements of the rule, the underlying security closed at or above $3 on the previous trading day; and (2) new series may not be added intra-day unless, in addition to satisfying the other requirements of the rule, including that the underlying security

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[14] *See* Letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Jonathan G. Katz, Secretary, Commission, dated October 29, 2001.

[15] *See* Securities Exchange Act Release No. 39624 (February 5, 1998), 63 FR 8101 (February 18, 1998).

[16] 15 U.S.C. 78s(b)(2).

[17] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 44964 (October 19, 2001), 66 FR 54559 (October 29, 2001) (order approving File No. SR–CBOE–2001–29).