

ACT LCA-40  
SECTION \_\_\_\_\_  
RULE 24F-2  
PUBLIC AVAILABILITY 1/24/89



DIVISION OF  
INVESTMENT MANAGEMENT

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

January 24, 1989

Dear Sir/Madam:

This letter provides general guidance to insurance companies filing post-effective amendments in connection with the offering of variable life and variable annuity contracts. These comments represent the informal views of the staff of the Office of Insurance Products and Legal Compliance and not necessarily those of the Commission. In this regard, they are intended only to assist registrants in the preparation of disclosure documents and are not to be considered of precedential value in any court or other official action.

The Commission recently issued a release amending Forms N-3 and N-4 requiring consolidation of all expense-related data in a table located near the front of each variable annuity prospectus. See infra General Comment 1.

Procedural Comments Relating to Filing Post-Effective Amendments

1. Updating Requirement

Section 10(a)(3) of the Securities Act of 1933 ("1933 Act") requires that any prospectus used more than nine months after the effective date of the registration statement contain information as of a date not more than sixteen months prior to such use. Therefore, any separate account and its sponsor/depositor wishing to maintain a continuous public offering must file a post-effective amendment to the registration statement of the separate account (and, where appropriate, its underlying portfolio company) containing updated financial statements and other information. Rules 485 and 486 under the 1933 Act govern this process.

2. Updating Procedures

Rule 486 specifies the procedures for updating the registration statement of any separate account registered under the Investment Company Act of 1940 ("1940 Act") either as a unit investment trust ("trust account") or as a management investment company ("management account"). Rule 485, as relevant here, enumerates the procedures for updating the registration statement of any management investment company serving as an underlying portfolio company for a trust account ("underlying portfolio company").

The registrant remains responsible for determining whether any changes in its registration statement (e.g., tax disclosure) warrants filing a post-effective amendment under paragraph (a) of Rule 485 or Rule 486 rather than paragraph (b).

Review of amendments will be expedited if, in addition to providing a red-lined copy, the transmittal letter enumerates the material changes which require that the amendment be filed under paragraph (a) rather than paragraph (b) of Rules 485 or 486.

The staff will make every effort to provide timely comments on post-effective amendments filed pursuant to Rules 485(a) or 486(a). If the registrant has not received comments within 45 days after the Commission receives their Rule 485(a) or 486(a) filing, it would be appropriate to inquire of the staff as to the status of the filing. Registrants that print disclosure documents before comments have been provided will do so at their own risk.

Any post-effective amendment filed pursuant to paragraph (b) of Rules 485 or 486 must include on its signature page the appropriate certification of the registrant and, if necessary, be accompanied by counsel's representation that the post-effective amendment does not contain disclosure that would render it ineligible to become effective pursuant to such paragraph. See paragraph (e) of Rules 485 and 486.

Filings must be sent directly to the Commission and should not be addressed or sent to members of the staff. If financial statement requirements are satisfied by incorporating by reference the Annual Report to Shareholders, it would be helpful if a copy of the Annual Report is provided with the filing.

Rule 497(b) requires that ten copies of the prospectus, in the exact form in which it is being used, be filed with the Commission within five days after the effective date. Rule 497(c) specifies that investment companies filing on Forms N-1A, N-3, or N-4 must file ten copies of both the prospectus and the Statement of Additional Information ("SAI") in the exact form in which it is used. Although not required, the staff would appreciate one "redlined" courtesy copy of these documents sent to the staff reviewer.

### 3. Effective Date and Request for Acceleration

Registrants relying on the automatic effective date provided by Rules 485(a) and 486(a) should note that a filing made on March 2 will have a May 1 effective date. An acceleration request will be necessary if a post-effective amendment is filed after March 2 requesting a May 1 effective date. In general, an acceleration request is necessary only if a post-effective

amendment, filed pursuant to Rules 485(a) or 486(a), must become effective before the earliest automatic effective date, which is the sixtieth day following filing, or a later date between the sixtieth and eightieth day following filing if such date is specified on the facing page of the post-effective amendment.

Registrants that file after March 2 must realize the possibility that, due to heavy staff workload during the months of March and April, there is no assurance that the staff will be able to accelerate the filing. If a registrant determines that it must request acceleration, the registrant should notify the staff as soon as possible of the reason why the filing cannot be made by March 2, the nature of the material changes, and an estimate of the date the filing will be made.

In accordance with Rule 461 of Regulation C under the 1933 Act, requests for acceleration of the effective date of a registration statement shall be made in writing by both the registrant and the principal underwriter.

#### 4. Selective Review

The staff encourages registrants to review Investment Company Act ("ICA") Release No. 13768 (Feb. 15, 1984), which relates to selective review procedures. If the registrant believes that selective review would be appropriate, a request for selective review should be made in the transmittal letter accompanying the filing. The request for selective review should state whether the material portions of the issuer's registration statement being amended have been reviewed by the staff in some other context. The transmittal letter should also briefly summarize the material changes in the registration statement.

#### 5. Responding to Staff Comments

To expedite the review of post-effective amendments, the following steps should be followed:

- 1) When drafting a written response to oral or written staff comments, the registrant should respond to each comment individually by repeating the staff comment, stating the response and making a cross-reference to any changes in the registration statement.

- 2) Prompt responses to comments and, if required, prompt filing of subsequent amendments, will greatly facilitate the post-effective amendment process. If an amendment to the registration statement is required to be filed, it should be marked to highlight the changes.

- 3) When responding to comments in writing, if the registrant believes that no change in the registration statement is

necessary or appropriate in response to any comment, this opinion, along with the basis for that opinion, should be indicated. The staff reserves the right to comment further on any subsequent amendments or letters.

#### 6. Amended Rule 24f-2 Requirements

Rule 24f-2(a)(1) of the 1940 Act requires that any post-effective amendment to a registration statement that has registered an indefinite number or amount of securities in reliance on Rule 24f-2 must include certain information on its facing sheet. See ICA Release No. 13624 (Nov. 14, 1983). This information consists of: (a) a statement to the effect that the issuer has registered an indefinite number or amount of securities in accordance with Rule 24f-2 ("24f-2 Notice"), and (b) the date on which the 24f-2 Notice for the issuer's most recent fiscal year was filed or will be filed, or a statement that the issuer need not file a Rule 24f-2 Notice because it did not sell any securities pursuant to the Rule 24f-2 declaration during the most recent fiscal year.

When preparing the 24f-2 Notice, carefully review the method of fee calculation described in paragraph (c) of Rule 24f-2. Note that only if the 24f-2 Notice is filed within two months after the close of the registrant's fiscal year may the registration fee calculation be based on the actual price of sales less redemptions and repurchases. If the Rule 24f-2 Notice for a company with a fiscal year ended December 31 is received by the Commission after February 28, redemptions cannot be netted against sales in calculating the fee. It is the staff's longstanding position that fund shares issued in connection with the reinvestment of dividends must be included in the total number of shares sold by the fund for the fiscal year. All 24f-2 Notices must include an opinion of counsel stating whether the securities being registered were legally issued, fully paid, and non-assessable.

#### 7. Exhibits to Registration Statements

Registrants filing amendments to registration statements must list all exhibits, lettered or numbered for convenient reference. See Item 24 of Form N-1A, Item 24 of Form N-4, Item 28 of Form N-3 and Instructions as to Exhibits of Form S-6. Where the exhibits are incorporated by reference, the reference must be made in the list of exhibits as to where the documents can be found.

## General Comments

### 1. Variable Annuity Fee Table

The Commission recently issued a release amending Forms N-3 and N-4 to require the consolidation of all expense information in a table located near the front of the prospectus. See ICA Release No. 16766 (Jan. 23, 1989).

For those separate accounts offering variable annuity contracts whose registration statements become effective on or after May 1, 1989, the revisions become effective for prospectuses used on or after May 1, 1989. For those with fiscal years ending on December 31, the revisions will become effective on May 1, 1989 as to any prospectuses used on or after that date, which is the date on which their post-effective amendments ordinarily must become effective. For all other separate accounts the revisions will become effective upon use of any prospectus contained in any post-effective amendment filed on or after May 1, 1989.

Any modifications to your disclosure documents to include expense-related information will require a post-effective amendment. A post-effective amendment filed for this purpose would not necessarily be disqualified from the provisions of paragraph (b) of Rules 485 or 486 if it otherwise met the condition for filing under that paragraph.

### 2. Tax Disclosure

The Technical and Miscellaneous Revenue Act of 1988, as well as the 1986 amendments to the Internal Revenue Code (the "Code"), have altered certain contractowner taxation matters relating to variable annuity and life insurance contracts. Prospectus and/or SAI tax disclosure reflecting these changes should be updated accordingly.

### 3. Recent Section 403(b) No-Action Letter

The staff has recently given no-action assurance relating to variable annuity registrants' compliance with Section 403(b)(11) of the Code and Sections 22(e), 27(c)(1) and 27(d) of the 1940 Act. See American Council of Life Insurance (pub. avail. Nov. 28, 1988). The conditions in the no-action letter include, among other things, prospectus and sales literature disclosure requirements and certain registration statement representations. Representations may be made in Part C of Forms N-3 or N-4. Please provide clear, concise, and prominent disclosure in conformity with the no-action letter.

4. Variable Life and Variable Annuity Administrative Expense Charges

Rules 6e-3(T)(c)(4)(iv) and 6e-2(c)(4)(iv) provide relief from certain provisions of the 1940 Act to permit the deduction from separate account assets of administrative expense charges associated with variable life insurance contracts. Rule 26a-1 provides similar relief for variable annuity contracts. Deductions of these administrative expense charges may continue only so long as the amounts collected do not exceed costs. The relief provided by the above rules does not extend to any amounts deducted in excess of actual costs. Disclosure of these administrative expense charges should state that the charges have been set at a level that will recover no more than the actual costs associated with administering the contract.

5. Use of Simplified Underwriting

If an insurance company intends to use simplified underwriting that would result in the actual or guaranteed cost of insurance charges exceeding the maximum allowed by the 1980 CSO Table, provide Summary Page disclosure of the following: (1) the amount by which the actual or guaranteed cost of insurance charges will exceed the maximum allowed by the 1980 CSO tables; and (2) that the cost of insurance charges (which may be viewed as substandard risk charges) are generally higher for healthy individuals when this method of underwriting is used than they would be if other methods of underwriting were used. (Note that unless the registrant can substantiate a claim that the portion of the charge that exceeds the 1980 CSO is properly attributable to a substandard risk charge, it must be treated as sales load).

6. Fees and Charges Associated with Variable Life Contracts

All fees and charges associated with a contract, including all forms of sales load, should be disclosed in one location in the prospectus summary. See Form S-6, Instructions as to the Prospectus, Instruction 2, Presentation of Information. This disclosure should include fees and charges assessed against the separate account and the underlying portfolio company.

7. Disclosure Regarding Sales Load Shortfall

The registrant must disclose in the prospectus whether the explicit sales load imposed on a variable life or variable annuity contract is designed to recover all of the contract's distribution costs. If not, the registrant must disclose from what sources this shortfall will be recovered, particularly where the shortfall is made up from general account assets consisting of, among other things, amounts derived from a mortality and expense risk charge.

## 8. Mixed and Shared Funding

Where a fund underlying a variable life contract sells its shares to both variable annuity and variable life insurance separate accounts of the same insurance company or of related insurance companies ("mixed funding"), or to variable annuity or variable life insurance separate accounts of unrelated insurance companies ("shared funding"), or variable annuity and variable life insurance separate accounts of unrelated insurance companies ("mixed and shared funding"), the fund's prospectus must disclose the risks involved in mixed and/or shared funding. Also, the insurance product's prospectus must provide at a minimum an explanatory cross-reference to the fund's risk disclosure regarding mixed and/or shared funding.

A separate account investing in a fund under a mixed and/or shared funding arrangement should file a copy of the mixed and/or shared funding participation agreement as an exhibit to the separate account's registration statement.

## 9. Variable Life Illustrations

Registrant's illustrations should include, among other things, the following information:

- 1) The illustrations should reflect all separate account expenses as well as the underlying fund expenses. For fund(s) past the start-up stage, actual operating expenses incurred by the underlying fund(s) should be used. The staff considers the start-up period to be one year after the fund has commenced operations/sales. For funds that are adding a new series, it would be appropriate to estimate the expenses that will be incurred in that new series, so long as the estimate is reasonable, i.e., if they are in line with or conform to the actual expenses incurred by the other series.
- 2) The narrative to the illustrations should disclose the existence and operation of any expense reimbursement arrangement. The narrative must disclose the amount of expenses that would have been incurred absent the reimbursement agreement and the likelihood of the expense reimbursement agreement continuing past the current year, as well as the effect of discontinuing the agreement.
- 3) The illustrations should reflect a simple average of the investment advisory fees of the underlying fund(s).
- 4) Registrant should file an actuarial opinion pertaining

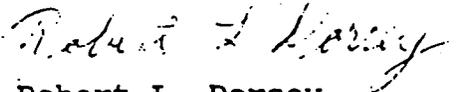
to the illustrations with each post-effective amendment.

10. Allocation of Initial Purchase Payments for Variable Annuity Products

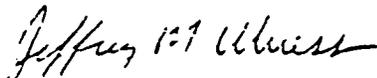
The staff has recently issued three no-action letters concerning the allocation of an initial purchase payment for a variable annuity contract to a money market subaccount during the free look period. See Fidelity Investments Variable Annuity Account I (pub. avail. Dec. 8, 1987), LBVIP Variable Annuity Account I (pub. avail. Jan. 22, 1988), and MONY America Var. Account A (pub. avail. Oct. 26, 1988).

We trust that the above matters will assist you in the preparation of forthcoming filings and will reduce unnecessary delays.

Sincerely yours,



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