

Amendment"). Under the Delaware General Corporation Law, Cinergy may amend its certificate of incorporation to create new classes of stock upon appropriate action by the Board of Directors and shareholders duly adopting the proposed amendment. Cinergy's Board of Directors unanimously approved the Proposed Amendment. In order for the Proposed Amendment to be adopted, not less than a majority of the outstanding shares of common stock entitled to vote must be voted in favor of the Proposed Amendment.

Cinergy requests authorization for the solicitation of proxies from its shareholders for the purpose of obtaining the required shareholder approval of the Proposed Amendment at the shareholder meeting to be held on May 1, 2001. Cinergy requests authorization for the solicitation of proxies as soon as practicable under rule 62(d). It appears to the Commission that Cinergy's declaration regarding the proposed solicitation of proxies should be permitted to become effective immediately under rule 62(d).

For the purposes of compliance with rule 54, Cinergy states that it does not currently meet the conditions of rule 53(a). As of December 31, 2000, Cinergy's "aggregate investment," as defined in rule 53(a)(1), in exempt wholesale generators ("EWGs") and foreign utility companies ("FUCOs") was approximately \$1,371,200,000. This amount is equal to approximately 119% of Cinergy's average "consolidated retained earnings," also as defined in rule 53(a)(1), for the four quarters ending December 31, 2000, of approximately \$1,151,200,000. This amount exceeds the 50% "safe harbor" limitation contained in the rule. However, by order dated March 23, 1998 (HCAR No. 26848) ("1998 Order"), the Commission authorized Cinergy to increase its aggregate investment in EWGs and FUCOs to an amount equal to 100% of Cinergy's average "consolidated retained earnings" ("100% Cap"). By order dated June 23, 2000 (HCAR No. 27190) ("2000 Order"), the Commission granted Cinergy additional authorization to invest in EWGs and FUCOs beyond that granted in the 1998 Order. Specifically, the 2000 Order authorized investment of \$1,000,000,000 in addition to Cinergy's aggregate investment as of the date of the 2000 Order (approximately \$731,000,000). Therefore, although Cinergy's aggregate investment at December 31, 2000, exceeds the 50% "safe harbor" limitation and the 100% Cap, this investment is below the limitation authorized by the 2000 Order.

Cinergy states that none of the adverse conditions of rule 53(b) exist.

As of September 30, 1997, the most recent period for which financial statement information was evaluated in the 1998 Order, Cinergy's consolidated capitalization consisted of 44.1% equity and 55.9% debt. As of December 31, 2000, Cinergy's consolidated capitalization consisted of 41.3% equity and 58.7% debt.<sup>1</sup> Cinergy represents that the proposed transactions will have no impact on its consolidated capitalization; however the ultimate issuance of the preferred stock will increase the equity component of capitalization.

Fees and expenses in connection with the proposed transactions described in the declaration are estimated to be \$158,500. Cinergy further states that no state or federal commission, other than this Commission, has jurisdiction over the proposed transactions.

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

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

**Jonathan G. Katz,**  
Secretary.

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**BILLING CODE 8010-01-M**

## SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC-24894: File No. 812-12192]

### First Variable Life Insurance Company, et al.; Notice of Application

March 16, 2001.

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

**ACTION:** Notice of Application for an Order under Section 6(c) of the Investment Company Act of 1940, as amended (the "1940 Act" or "Act") granting exemptions from the provisions of Sections 2(a)(32) and 27(i)(2)(A) of the 1940 Act and Rule 22c-1 thereunder to permit the recapture of purchase payment credits applied to purchase payments made under certain deferred variable annuity contracts.

*Applicants:* First Variable Life Insurance Company, First Variable Annuity Fund E, and First Variable

Capital Services, Inc. ("FVCS") (collectively, "Applicants").

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

*Filing Date:* The application was filed on July 26, 2000, and amended and restated on March 9, 2001.

*Hearing or Notification of Hearing:* An order granting the Application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicant with a copy of the request, in person or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on April 9, 2001, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the SEC.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants, Jeffrey K. Hoelzel, First Variable Life Insurance Company, 2122 York Road, Oak Brook, IL 60523.

**FOR FURTHER INFORMATION CONTACT:** Keith A. O'Connell, Senior Counsel, or Lorna J. MacLeod, Branch Chief, Office of Insurance Products, Division of

<sup>1</sup> As of December 31, 2000, Cinergy's senior unsecured debt was rated "investment grade" by all the major rating agencies.

Investment Management, at (202) 942-0670.

**SUPPLEMENTARY INFORMATION:** The following is a summary of the Application. The complete Application is available for a fee from the SEC's Public Reference Branch, 450 Fifth St., NW., Washington, DC 20549-0102 (tel. (202) 942-8090).

#### Applicant's Representatives

1. First Variable is a stock life insurance company organized under the laws of the state of Arkansas in 1968. ILona Financial Group, Inc. ("ILona") owns all of First Variable's outstanding stock, and Irish Life & Permanent plc., in turn, owns all of ILona. First Variable serves as depositor for Annuity Fund E. First Variable may in the future establish one or more Future Accounts for which it will serve as depositor.

2. Annuity Fund E is a segregated asset account of First Variable. Annuity Fund E is registered with the Commission as a unit investment trust investment company under the Act. Annuity Fund E will fund the variable benefits available under the Contracts funded through it. Units of interest in Annuity Fund E under the Contracts they fund will be registered under the Securities Act of 1933 (the "1933 Act"). First Variable may in the future issue Future Contracts through Annuity Fund E or through Future Accounts. Applicants represent that Future Contracts funded by Annuity Fund E or any Future Accounts will be substantially similar in all material respects to the Contracts. That portion of the assets of Annuity Fund E that is equal to the reserves and other Contract liabilities with respect to Annuity Fund E is not chargeable with liabilities arising out of any other business of First Variable. Any income, gains or losses, realized or unrealized, from assets allocated to Annuity Fund E is, in accordance with Annuity Fund E's Contracts, credited to or charged against Annuity Fund E, without regard to other income, gains or losses of First Variable.

3. FVCS is a wholly-owned subsidiary of First Variable and will be the principal underwriter of Annuity Fund E and distributor of the Contracts funded through Annuity Fund E (the "Annuity Fund E Contracts"). FVCS is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934 (the "1934 Act") and is a member of the NASD. The Annuity Fund E Contracts will be offered through unaffiliated broker-dealers who have entered into agreements with FVCS. All of such unaffiliated broker-dealers will be

registered broker-dealers under the 1934 Act and NASD members. FVCS, or any successor entity, may act as principal underwriter for any Future Accounts and distributor for any Future Contracts issued by First Variable in the future.

4. The Contract is a part of First Variable's line of annuity products. The Contract is an individual deferred variable annuity contract. The Contract may be issued under a qualified plan, specially sponsored program or an individual retirement annuity or as a non-qualified contract. The Contract is designed to provide for the accumulation of assets and for income through the investment. Purchase payments may be made at any time during the accumulation phase. The minimum initial purchase payment is \$10,000 for non-qualified contracts and \$5,000 for qualified plan contracts. Additional purchase payments of at least \$200 can be made.

5. The Contract permits purchase payments to be allocated to a fixed account of First Variable ("Fixed Account"). The Fixed Account is not registered with the Commission.

6. Annuity Fund E currently is divided into 24 sub-accounts, each of which will be available under the Annuity Fund E Contracts. The sub-accounts are referred to as "Investment Options." Each Investment Option will invest in shares of a corresponding portfolio of the following underlying investment companies ("Funds"): AIM Variable Insurance Funds, Inc.; American Century Variable Portfolios, Inc.; Deutsche Asset Management VIT Funds; Federated Insurance Series; Templeton Variable Products Series Fund; Lord Abbett Series Fund, Inc.; MFS Variable Insurance Trust; Seligman Portfolios, Inc.; Variable Insurance Products Funds I, II and III; and Variable Investors Series Trust. The Funds are registered under the Act as open-end management investment companies and the shares are registered under the 1933 Act.

7. The Contract also provides for transfer privileges among Investment Options, dollar cost averaging, rebalancing and other features. The following charge are assessed under the Contract: (i) annual asset-based charges as follows: 1.25% for mortality and expense risks, plus .15% for administration expenses, (ii) optional additional benefit charges, during the accumulation period and while the rider is in effect, which equal .15% of Contract value for the Best Anniversary Value Death Benefit; .20% of Contract value for Extra Protector Death Benefit Rider; and .25% of Contract value for the Guaranteed Minimum Income

Payment Rider; (iii) a withdrawal charge (assessed against each purchase payment withdrawn) which starts at 8.5% in the first year, and declines thereafter to 0% after 9 years<sup>1</sup> with a 15% free withdrawal option; (iv) a \$30 per year contract maintenance charge during the accumulation period; and (v) a transfer fee of \$10 for each transfer in excess of 12 in a Contract year. The Funds also incur management fees and operating expenses which vary depending upon which Portfolios are selected.

The withdrawal charge is: years since premium payment <sup>1</sup>	Charge (percent)
1 or less .....	8.5
2 .....	8.5
3 .....	8.5
4 .....	7.5
5 .....	6.5
6 .....	5.5
7 .....	4.5
8 .....	3
9 .....	2
10 or more .....	0

8. Each time a Contract Owner makes a purchase payment, First Variable will add an additional amount to the Contract ("Purchase Payment Credit"). The Purchase Payment Credit will equal: 4% of each purchase payment if the sum of all withdrawals is less than \$250,000 on the day First Variable receives the purchase payment, 4.5% of each payment if the sum of all purchase payments reduced by the sum of all withdrawals is equal to or greater than \$250,000 but less than \$2,000,000, and 5% of each purchase payment if the sum of all purchase payments reduced by the sum of all purchase payments reduced by the sum of all withdrawals is equal to or greater than \$2,000,000. First Variable will fund the Purchase Payment Credit from its general account assets. First Variable will allocate the Purchase Payment Credit to the Investment Options in the same proportion as the purchase payment.

9. First Variable will recapture any Purchase Payment Credit applied to a Contract: (i) if the owner returns the Contract within the Free-Look period; (ii) for any purchase payment made within one year prior to the death of the Owner, or Annuitant if the Contract is owned by a non-natural person, however, the Owner will never receive less than the purchase payments; (iii) for any purchase payment made within one year prior to a partial or full withdrawal or surrender; and (iv) for any purchase payment made within three years prior to the annuity date. The Purchase Payment Credit will be recaptured on a pro-rata basis for partial

withdrawals, including partial withdrawals under the free withdrawal option.

10. Applicants seek exemption pursuant to Section 6(c) from Sections 2(a)(32), and 27(i)(2)(A) of the Act and Rule 22c-1 thereunder to the extent necessary to permit First Variable to recapture, with respect to the Contracts and Future Contracts, an amount equal to any Purchase Payment Credit in the following instances; (i) when the Contract Owner exercises the right to return the Contract under the Free-Look provision of the Contract (the Contract value refunded will be reduced by any Purchase Payment Credit applied); (ii) if a death benefit is payable (any Purchase Payment Credit based on any purchase payment received within 12 months prior to the date of death of the Contract Owner or annuitant (when the owner is a non-natural person) will be returned to First Variable, however, the Owner will never receive less than the purchase payments; (iii) for withdrawals or surrenders, including partial withdrawals (any Purchase Payment Credit resulting from purchase payments paid within 12 months prior to receipt of the request for the withdrawal or surrender will be deducted from the Contract value prior to determining the amount available for withdrawal or surrender); and (iv) for any purchase payment made within 3 years prior to the annuity date.

#### Applicants Legal Analysis

1. Section 6(c) of the Act authorizes the Commission to exempt any person, security or transaction, or any class or classes of persons, securities or transactions from the provisions of the Act and the rules promulgated thereunder if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request that the Commission, pursuant to section 6(c) of the Act, grant the exemptions summarized above with respect to the Contracts and any Future Contracts funded by Annuity Fund E or Future Accounts, that are issued by First Variable and underwritten or distributed by FVCS or First Variable Broker-Dealers. Applicants assert that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

2. The asset-based charges applicable to Annuity Fund E will be assessed against the entire amounts held in the

Annuity Fund E, including the Purchase Payment Credit amount during the Free-Look period and the 12-month period following a purchase payment preceding certain events (i.e., payment of a death benefit and withdrawals or surrenders) and the 3 year period following a purchase payment when an owner annuitizes the Contract. As a result, during such periods, the aggregate asset-based charges assessed against an Owner's Contract value will be higher than those that would be charged if the Owner's Contract value did not include the Purchase Payment Credit.

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

4. Applicants assert that the Purchase Payment Credit recapture provisions of the Contract would not deprive an Owner of his or her proportionate share of the issuer's current net assets. Applicants state that an Owner's interest in the amount of the Purchase Payment Credit allocated to his or her Contract value upon receipt of a purchase payment is not vested until the applicable Free-Look period has expired without return of the Contract. Similarly, Applicants state that an Owner's interest in the amount of any Purchase Payment Credit allocated upon receipt of purchase payments made during the 12-month period before a death benefit is payable, or a withdrawal or surrender is made or for purchase payments made during the 3-year period prior to annuitization also is not vested. Until or unless the amount of any Purchase Payment Credit is vested, Applicants assert that First Variable retains the right and interest in the Purchase Payment Credit amount, although not in the earnings attributable to that amount. Thus, Applicants argue that when First Variable recaptures any

Purchase Payment Credits it is simply retrieving its own assets, and because an Owner's interest in the Purchase Payment Credit is not vested, the Owner has not been deprived of a proportionate share of Annuity Fund E's assets, i.e., a share of the applicable Annuity Fund E's assets proportionate to the owner's Contract value (including the Purchase Payment Credit).

5. In addition, with respect to Purchase Payment Credit recapture upon the exercise of the free-look privilege, Applicants state that it would be patently unfair to allow an Owner exercising that privilege to retain a Purchase Payment Credit amount under a Contract that has been returned for a refund after a period of only a few days. Applicants state that if First Variable could not recapture the Purchase Payment Credit, individuals could purchase a Contract with no intention of retaining it, and simply return it for a quick profit.

6. Furthermore, Applicants state that the recapture of Purchase Payment Credit relating to purchase payments made within twelve months of the payment of a death benefit, or a withdrawal or surrender or within 3 years of annuitization is designed to provide First Variable with a measure of protection. Applicants state that the risk is that, rather than spreading purchase payments over a number of years, an Owner will make very large purchase payments shortly before certain events, thereby leaving First Variable less time to recover the cost of the Purchase Payment Credits applied, to its financial detriment. Again, the amounts recaptured equal the Purchase Payment Credits provided by First Variable from its own general account assets, and any gain would remain as part of the Contract's value.

7. Applicants assert that the Purchase Payment Credit will be attractive to and in the interest of investors because it will permit Contract Owners to put between 104% and 105% of their purchase payments to work for them in the selected Investment Options. Also, any earning attributable to the Purchase Payment Credit will be retained by Contract Owners and the principal amount of the Purchase Payment Credit will be retained if the contingencies set forth in the Application are satisfied.

8. Applicants assert that the provisions for recapture of any applicable Purchase Payment Credit under the Contracts do not, and any such Future Contract provisions will not, violate Section 2(a)(32) and 27(i)(2)(A) of the Act. Nevertheless, to avoid any uncertainties, Applicants request an exemption from those

Sections, to the extent deemed necessary, to permit the recapture of any Purchase Payment Credit under the circumstances described herein with respect to the Contracts and any Future Contracts, without the loss of the relief from Section 27 provided by Section 27(i).

9. Section 22(c) of the 1940 Act authorizes the Commission to make rules and regulations applicable to registered investment companies and to principal underwriters of, and dealers in, the redeemable securities of any registered investment company, whether or not members of any securities association, to the same extent, covering the same subject matter, and for the accomplishment of the same ends as are prescribed in Section 22(a) in respect of the rules which may be made by a registered securities association governing its members. Rule 22c-1 thereunder prohibits a registered investment company issuing any redeemable security, a person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and a principal underwriter of, or dealer in, such security, from selling, redeeming, or repurchasing any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

10. Arguably, First Variable's recapture of the Purchase Payment Credit might be viewed as resulting in the redemption of redeemable securities for a price other than one based on the current net asset value of Annuity Fund E. Applicants contend, however, that recapture of the Purchase Payment Credit is not violative of Rule 22c-1. Applicants argue that the recapture does not involve either of the evils that Rule 22c-1 was intended to eliminate or reduce, namely: (i) The dilution of the value of outstanding redeemable securities of registered investment companies through their sale at a price below net asset value or their redemption or repurchase at a price above it, and (ii) other unfair results including speculative trading practices. See Adoption of Rule 22c-1 under the 1940 Act, Investment Company Release No. 5519 (Oct. 16, 1968). To effect a recapture of a Purchase Payment Credit, First Variable will redeem interests in an Owner's Contract value at a price determined on the basis of current net asset value of Annuity Fund E. The amount recaptured will equal the amount of the Purchase Payment Credit that First Variable paid out of its general

account assets. Applicants state that, although Owners will be entitled to retain any investment gain attributable to the Purchase Payment Credit, the amount of such gain will be determined on the basis of the current net asset value of Annuity Fund E. Thus, Applicants state that no dilution will occur upon the recapture of the Purchase Payment Credit. Applicants also assert that the second harm that Rule 22c-1 was designed to address, namely, speculative trading practices calculated to take advantage of backward pricing, will not occur as a result of the recapture of the Purchase Payment Credit. However, to avoid any uncertainty as to full compliance with the Act, Applicants request an exemption from the provisions of Rule 22c-1 to the extent deemed necessary to permit them to recapture the Purchase Payment Credit under the Contracts and Future Contracts.

### Conclusion

Applicants assert that their request for an order is appropriate in the public interest. Applicants state that such an order would promote competitiveness in the variable annuity market by eliminating the need to file redundant exemptive applications, thereby reducing administrative expenses and maximizing the efficient use of Applicants' resources. Applicants argue that investors would not receive any benefit or additional protection by requiring Applicants to repeatedly seek exemptive relief that would present no issue under the Act that has not already been addressed in their Application described herein. Applicants assert that having them file additional applications would impair their ability effectively to take advantage of business opportunities as they arise. Further, Applicants state that if they were required repeatedly to seek exemptive relief with respect to the same issues addressed in the Application described herein, investors would not receive any benefit or additional protection thereby.

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

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

**Jonathan G. Katz,**  
*Secretary.*

[FR Doc. 01-7106 Filed 3-21-01; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44073; File No. SR-CBOE-01-05]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Extending the Pilot Program for Rule 6.8(c) Regarding Operation of the Retail Automatic Execution System

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 16, 2001, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed a proposed rule change with the Securities and Exchange Commission ("SEC" or "Commission"). The proposed rule change is described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as a "non-controversial" rule change under paragraph (f)(6) of Rule 19b-4,<sup>3</sup> which renders the proposed rule change effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange hereby proposes to amend CBOE Rule 6.8(c) in order to extend, for an additional six-month period until August 21, 2001, the pilot program ("Pilot") that currently provides for certain orders to be rejected from the CBOE's retail Automatic Execution System ("RAES")<sup>4</sup> for manual handling in certain limited situations.<sup>5</sup> The text of the proposed rule change is available at the CBOE and the Commission.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> RAES is the Exchange's automatic execution system for public customer market or marketable limit orders of less than a certain size.

<sup>5</sup> The current Pilot expired on February 21, 2000. See discussion below, Section II.A.1.