

8. The consummation of the Reorganization under the Plan is subject to a number of conditions precedent, including: (a) the Plan has been approved by the Board and the Selling Fund's shareholders in the manner required by applicable law; (b) management of the Selling Fund solicits proxies from its shareholders seeking approval of the Reorganization; (c) the Funds have received opinions of counsel stating, among other things, that the Reorganization will not result in federal income taxes for the Funds or their shareholders; and (d) Funds have received from the SEC an order exempting the Reorganization from the provisions of section 17(a) of the Act. Applicants agree not to make any material changes to the Plan that affect the application without prior SEC approval.

#### Applicants' Legal Analysis

1. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or any affiliated person of the person, acting as principal, knowingly from selling any security to, or purchasing any security from the company. Section 2(a)(3) of the Act defines the term "affiliated person" of another person to include: (a) any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person; (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the other person; (c) any person directly or indirectly controlling, controlled by, or under common control with, the other person; and (d) if the other person is an investment company, any investment adviser of the person.

2. Rule 17a-8 under the Act exempts from the prohibitions of section 17(a) of the Act mergers, consolidations, or purchases or sales of substantially all of the assets of registered investment companies that are affiliated persons solely by reason of having a common investment adviser, common directors, and/or common officers, provided that certain conditions are satisfied.

3. Applicants believe that they cannot rely on rule 17a-8 under the Act because the Funds may be affiliated for reasons other than those set forth in the rule. The Funds may be affiliated persons of each other because FUNB, as fiduciary for its customers, owns of record 25% or more of the outstanding securities of each Fund.

4. Section 17(b) of the Act provides that the SEC may exempt a transaction from section 17(a) of the Act if evidence

establishes that (a) the terms of the proposed transaction, including the consideration to be paid, are reasonable and fair and do not involve overreaching on the part of the person concerned; (b) the proposed transaction is consistent with the policy of each registered investment company concerned; and (c) the proposed transaction is consistent with the general purposes of the Act.

5. Applicants request an order under section 17(b) of the Act exempting them from section 17(a) of the Act to the extent necessary to consummate the Reorganization. Applicants submit that the Reorganization satisfies the provisions of section 17(b) of the Act. Applicants state that the Board has determined that the transaction is in the best interests of the Funds' shareholders and that the interests of the existing shareholders will not be diluted as a result of the Reorganization. In addition, Applicants state that the exchange of the Selling Fund's shares for shares of the Acquiring Fund will be based on the relative net asset values.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC-23424; File No. 812-11200]

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

September 2, 1998.

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

**ACTION:** Notice of application for an order pursuant to Section 6(c) of the Investment Company Act of 1940 (the "1940 Act").

**SUMMARY OF APPLICATION:** The Applicants seek an order pursuant to Section 6(c) of the 1940 Act exempting the Applicants, and other separate accounts of the Companies or affiliated insurance companies that support materially similar investment divisions, from the provisions of Section 12(d)(3) of the 1940 Act, to the extent necessary to permit the divisions of Separate Account Ten and the Select Ten Plus Division to invest up to 10% of their total assets in securities of issuers that derive more than 15% of their gross revenues from securities related activities.

**APPLICANTS:** Integrity Life Insurance Company ("Integrity"), Separate Account Ten of Integrity Life Insurance Company ("Separate Account Ten"), National Integrity Life Insurance Company ("National Integrity," together with Integrity, the "Companies"), and Select Ten Plus Division of Separate Account II of National Integrity Life Insurance Company (Select Ten Plus Division") (collectively, the "Applicants").

**FILING DATE:** The application was filed on June 26, 1998.

**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 Secretary of the SEC and servicing Applicants with a copy of the request, in person or by mail. Hearing requests must be received by the SEC by 5:30 p.m. on September 28, 1998, 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 requester'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, SEC, 450 Fifth Street, NW., Washington, DC 20459. Applicants, c/o ARM Financial Group, Inc., 515 West Market Street, Louisville, Kentucky 40202-3319.

**FOR FURTHER INFORMATION CONTACT:** Megan L. Dunphy, Attorney, or Mark C. Amorosi, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 942-0670.

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

#### Applicants' Representations

1. Integrity is a stock life insurance company and is authorized to sell life insurance and annuities. Integrity is an indirect, wholly-owned subsidiary of ARM Financial Group, Inc., ("ARM").

2. Separate Account Ten is a separate account of Integrity and is a funding vehicle for variable annuity contracts. The account is registered with the SEC as an open-end management investment company and is divided into four non-diversified investment divisions, Select Ten Plus Division—March, Select Ten Plus Division—June, Select Ten Plus Division—September, and Select Ten

Plus Division—December (each a “Division” and collectively, with the Select Ten plus Division of National Integrity, the “Divisions”).

3. National Integrity is a stock life insurance company and is authorized to sell life insurance and annuities.

National Integrity is a wholly-owned subsidiary of Integrity and an indirect, wholly-owned subsidiary of ARM.

4. Separate Account II is a separate account of National Integrity and is a funding vehicle for variable annuity contracts. The account is registered with the SEC as a unit investment trust. The Select Ten Plus Division is a non-diversified investment division of Separate Account II that is registered with the Commission as an open-end management investment company. Additional similar investment divisions may be established in the future at the discretion of National Integrity.

5. The business and affairs of Separate Account Ten and the Select Ten Plus Division, respectively, are under the direction of a Board of Managers, currently consisting of five members. Integrity Capital Advisors, Inc. serves as the investment adviser (the “Adviser”) and National Asset Management Corporation serves as the sub-adviser (the “Sub-Adviser”) to both Separate Account Ten and the Select Ten Plus Division.

6. Applicants state that each of the Divisions will invest approximately 10% of its total assets in the common stock of each of the ten companies in the Dow Jones Industrial Average (the “DJIA”) that have the highest dividend yield calculated as of the day preceding the applicable specified Investment Date (the last business day of each calendar year for the Select Ten Plus Division and the last business day of the appropriate calendar quarter for the Divisions of Separate Account Ten).

7. The DJIA is composed of thirty stocks chosen by the editors of The Wall Street Journal as representative of the New York Stock Exchange and of American industry. The DJIA is the property of the Dow Jones & Company, Inc., which is not affiliated with the Applicants and has not participated in any way in the creation of Separate Account Ten or the Select Ten Plus Division or in the selection of their stocks.

8. Applicants state that the Divisions seek total return by acquiring the ten highest dividend yielding common stocks in the DJIA in equal weights and holding them for approximately twelve months. At the end of each Division's twelve-month period, the Division's portfolio is restructured to again hold the ten highest yielding stocks in the

DJIA in equal weights for the next twelve months. The term “highest yielding stocks” means the yield for each stock calculated by annualizing the last quarterly or semi-annual ordinary dividend distributed on that stock and dividing the result by the market value of that stock as of the close of the New York Stock Exchange on the business day prior to the applicable specified Investment Date.

9. Applicants state that the weights of the individual stock positions will not be rebalanced during the year, nor will new or additional contributions or transfers be accepted during any Division's twelve-month holding period. Rather, new or additional contributions or transfers will be invested on the next available Investment Date. Dividends from stocks in each Division's portfolio will be reinvested on the day the dividend is received in additional shares of the stock that paid the dividend. Upon the receipt of a withdrawal request, approximately equal dollar amounts of shares of each of the ten stocks will be sold, such that the total dollar amount sold equals the amount of the withdrawal.

10. Section 817(h) of the Internal Revenue Code of 1986, as amended (the “Code”), provides that in order for a variable contract which is based on a segregated asset account to qualify as an annuity contract under the Code, the investments made by such account must be “adequately diversified” in accordance with Treasury regulations. The Treasury regulations issued under Section 817(h) (Tres. Reg. § 1.817-5) apply a diversification requirement to each of the Divisions (“Section 817(h) diversification requirements”). To qualify as “adequately diversified,” each Division must have: (i) no more than 55% of the value of its total assets represented by any one investment; (ii) no more than 70% of the value of its total assets represented by any two investments; (iii) no more than 80% of the value of its total assets represented by any three investments; and (iv) no more than 90% of the value of its total assets represented by any four investments.

11. Applicants state that the Divisions intend to comply with the Section 817(h) diversification requirements. Separate Account Ten and the Select Ten Plus Division have each entered into an agreement with the Adviser, who in turn has entered into an agreement with the Sub-Adviser, that requires the Divisions be operated in compliance with the Treasury regulations. Therefore, the Adviser and the Sub-Adviser may depart from the Divisions' investment strategy, if

necessary, in order to meet these Section 817(h) diversification requirements.

12. Applicants represent that under all circumstances, except in order to meet Section 817(h) diversification requirements, the common stocks purchased for each Division will be chosen solely according to the formula described in the application and summarized in this notice, and will not be based on the research opinions or buy or sell recommendations of the Adviser or Sub-Adviser. The Adviser and Sub-Adviser have no discretion as to which common stocks are purchased.

13. Applicants state that securities purchased for each of the Divisions may include securities of issuers in the DJIA that derived more than 15% of their gross revenues in their most recent fiscal year from securities related activities. To the extent any of the ten highest yielding stocks qualifying for a Division are reasonably believed to receive 15% or more of their revenues from securities related activities, the Division will allocate a maximum of 5% of its assets to each of those stocks, and will allocate the remainder of its assets among the remaining stocks not so limited unless and until the exemptive relief from this limitation has been granted by the SEC.

#### **Applicants' Legal Analysis**

1. Section 12(d)(3) of the 1940 Act, with limited exceptions, prohibits an investment company from acquiring any security issued by any person who is a broker, dealer, underwriter or investment adviser. Rule 12d3-1 under the 1940 Act exempts from Section 12(d)(3) purchases by an investment company of securities of an issuer, except its own investment adviser, promoter or principal underwriter or their affiliates, that derived more than 15% of its gross revenues in its most recent fiscal year from securities related activities, provided that, among other things, immediately after any such acquisition the acquiring company has invested not more than 5% of the value of its total assets in the securities of the issuer.

2. Section 6(c) of the 1940 Act provides that the Commission may exempt any person, transaction, or class of persons or transaction from any provision of the 1940 Act or any rule thereunder if and to the extent that the 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 provision of the 1940 Act.

3. Applicants request that the Commission exempt Separate Account

Ten and the Select Ten Plus Division from the provisions of Section 12(d)(3) in order to permit the Divisions to acquire securities of an issuer that derives more than 15% of its gross revenues from securities related activities, provided that (i) those securities are included in the DJIA as of the day preceding the applicable specified Investment Date, (ii) those securities represent one of the ten companies in the DJIA that have the highest dividend yield as of the day preceding the applicable specified Investment Date, and (iii) as of the day preceding the applicable specified Investment Date, the value of the common stock of each securities related issuer represents approximately 10% of the value of any Division's total assets, but in no event more than 10.5% of the value of the Division's total assets. Applicants state that the use of the term "approximately" is intended to allow for such deviation from a precise 10% as to permit the purchase of round lots of 50 or 100 shares of stock. The 10.5% standard will be used on the prices of the common stock as of the close of business on the day preceding the applicable specified Investment Date.

4. Each of the Divisions undertakes to comply with all of the requirements of Rule 12d3-1, except the condition in subparagraph (b)(3) prohibiting an investment company from investing more than 5% of the value of its total assets in securities of a securities related issuer.

5. Applicants represent that Section 12(d)(3) was intended (i) to prevent investment companies from exposing their assets to the entrepreneurial risks of securities related businesses, (ii) to prevent potential conflicts of interest, (iii) to eliminate certain reciprocal practices between investment companies and securities related businesses, and (iv) to ensure that investment companies maintain adequate liquidity in their portfolios.

6. A potential conflict could occur, for example, if an investment company purchased securities or other interests in a broker-dealer to reward that broker-dealer for selling fund shares, rather than solely on investment merit. Applicants maintain that this concern does not arise in this situation since neither the Adviser, Sub-Adviser, nor any Division has discretion in choosing the common stock or amount purchased. The stock must first be included in the DJIA (which is unaffiliated with the Applicants, Adviser, Sub-Adviser or the Boards of Managers). In addition, the securities must also qualify as one of the ten companies in the DJIA that has the

highest dividend yield as of the day preceding the applicable specified Investment Date.

7. Applicants state that prior Section 12(d)(3) relief has been granted to applicants which were unit investment trusts with no discretion to choose the portfolio securities or the amount purchased, but with discretion to sell portfolio securities to the extent necessary to meet redemptions. The Adviser and Sub-Adviser are obligated to follow the investment formula described in the application and summarized in this notice as nearly as practicable. Securities purchased for each Division will be chosen with respect to the specified formulas and not at the Adviser's or Sub-Adviser's discretion.

8. The Adviser or Sub-Adviser would be permitted to deviate from the formula only where circumstances are such that the investment of a particular Division would fail to be "adequately diversified" under the Section 817(h) diversification requirements, and would thus cause the annuity contracts to fail to qualify as an annuity contract under the Code. In such a situation, the Adviser and Sub-Adviser must be permitted to deviate from the investment strategy in order to meet the 817(h) diversification requirements and then only to the extent necessary to do so. Applicants state that this limited discretion does not raise the concerns that Section 12(d)(3) is designed to prevent.

9. Applicants represent that the liquidity of a Division's portfolio is not a concern here since each common stock selected is a component of the DJIA, listed on the New York Stock Exchange, and among the most actively traded securities in the United States.

10. Applicants also represent that the effect of a Division's purchase of the stock of parents of broker-dealers would be de minimis. The common stocks of securities related issuers represented in the DJIA are widely held and have active markets. Potential purchases by a Division would represent an insignificant amount of the outstanding common stock and trading volume of any of these issuers.

11. Applicants state that a possible conflict of interest could occur if broker-dealers are influenced to recommend certain investment company funds which invest in the stock of the broker-dealer or any of its affiliates. Because of the large market capitalization of the DJIA issuers and the small portion of these issuers' common stock and trading volume that would be purchased by a Division, however, Applicants maintain that it is extremely unlikely that any

advice offered by a broker-dealer to a customer as to which investment company to invest in would be influenced by the possibility that a Division would be invested in the broker-dealer or parent thereof.

12. Finally, Applicants state that another potential conflict of interest could occur if an investment company directed brokerage to an affiliated broker-dealer which the company has invested to enhance the broker-dealer's profitability or to assist it during financial difficulty, even through the broker-dealer may not offer the best price and execution. To preclude this type of conflict, the Applicants agree, as a condition of the application, that no company whose stock is held in any Division, nor any affiliate of such company, will act as broker or dealer for any Division in the purchase or sale of any security for its portfolio.

13. Applicants seek relief not only with respect to Separate Account Ten and the Select Ten Plus Division, but also with respect to (i) other separate accounts of the Companies or affiliated insurance companies that support materially similar investment divisions, and (ii) other materially similar investment divisions of Separate Account II of National Integrity Life Insurance Company as may be created in the future. Applicants represent that the terms of relief requested are consistent with the standards set forth in Section 6(c) of the 1940 Act.

#### **Applicants' Conditions**

Applicants agree to the following conditions:

1. The common stock is included in the DJIA as of the day preceding the applicable specified Investment Date;

2. The common stock represents one of the ten companies in the DJIA that have the highest dividend yield as of the day preceding the applicable specified Investment Date;

3. As of the day preceding the Investment Date, the value of the common stock of each securities related issuer represents approximately 10% of the value of any Division's total assets, but in no event more than 10.5% of the value of the Division's total assets; and

4. No company whose stock is held in any Division, nor any affiliate thereof, will act as broker or dealer for any Division in the purchase or sale of any security for the Division.

#### **Conclusion**

For the reasons summarized above, 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 1940 Act.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 98-24206 Filed 9-9-98; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-23425; File No. 812-11110]

### Scudder Spain and Portugal Fund, Inc. and Scudder Kemper Investments, Inc.; Notice of Application

September 2, 1998.

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

**ACTION:** Notice of application for an order under section 17(b) of the Investment Company Act of 1940 ("Act") for an exemption from section 17(a) of the Act.

**SUMMARY OF APPLICATION:** Applicants, Scudder Spain and Portugal Fund, Inc. ("Fund") and Scudder Kemper Investments, Inc. ("Adviser"), seek an order that would permit an in-kind redemption of shares of the Fund held by affiliated persons of the Fund.

**FILING DATES:** The application was filed on April 20, 1998, and an amendment to the application was filed on September 2, 1998.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the SEC orders a hearing. Interested person may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on September 24, 1998, 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 SEC's Secretary.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, c/o Robert W. Helm, Esq., Dechert Price & Rhoads, 1775 Eye Street, N.W., Washington, D.C. 20006.

**FOR FURTHER INFORMATION CONTACT:** Brian t. Hourihan, Senior Counsel, at (202) 942-0526, or Mary Kay Frech, Branch Chief, at (202) 942-0564, (Division of Investment Management,

Office of Investment Company Regulation.)

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application is available for a fee from either the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549 (tel. 202-942-8090).

### Applicants' Representations

1. The Fund, a Maryland corporation, is registered under the Act as a close-end management investment company. The Adviser, a Delaware corporation, is registered under the Investment Adviser's Act of 1940 as an investment adviser and serves as investment adviser to the Fund. The Fund has one class of shares outstanding which is traded on the New York Stock Exchange. At April 20, 1998, three stockholders of the Fund each owned more than 5% of the Fund's outstanding shares.<sup>1</sup>

2. The board of directors of the Fund ("Board") has approved a plan under which the Fund will offer its stockholders the right to demand a one-time in-kind redemption of their shares at net asset value ("NAV"). The redemption right will be offered pursuant to section 23(c)(2) of the Act and will be registered as a tender offer under the Securities Exchange Act of 1934. The redemption right will give each stockholder of the Fund the right to demand that the Fund repurchase all, but not less than all, of his or her shares of the Fund in exchange for portfolio securities of the Fund. The portfolio securities of the Fund to be exchanged for shares of the Fund will be selected in accordance with guidelines established by the Board. No more than 75% of the Fund's outstanding shares will be redeemed. If more than 75% of the Fund's shares are tendered for repurchase, there will be a *pro rata* reduction in the number of shares repurchased from each stockholder who has tendered shares. Each redeeming stockholder will pay the transaction costs associated with the redemption of his or her shares of the Fund.

3. The redemption is designed to permit a significant amount of the Fund's shares to be redeemed in-kind at NAV without changing the closed-end structure of the Fund, and to ensure that only those stockholders of the Fund who desire to redeem their shares recognize at tax liability under the Internal Revenue code of 1986, as amended. Applicants request relief to

<sup>1</sup> Bankgesellschaft Berlin AG 9.6% Deep Discount Advisors, Inc. owned 12.1% and Ron Olin Investment Management Company owned 9.7% of the outstanding shares of the Fund.

permit the Fund to satisfy redemption requests on any stockholder of the Fund who, at the time of the redemption request, is an "affiliated person" of the Fund by reason of owning, controlling, or holding with the power to vote, 5% or more of the Fund's shares ("Affiliated Stockholders").

### Applicants' Legal Analysis

1. Section 17(a)(2) of the Act prohibits an affiliated person of a registered investment company, or any affiliated person of the person, acting as principal, from knowingly purchasing any security or other property from the company. Section 2(a)(3) of the Act defines an "affiliated person" of another person to include any person who directly or indirectly owns, controls, or holds with power to vote 5% or more of the outstanding voting securities or the other person. Applicants also state that to the extent that the proposed in-kind redemption would constitute the purchase of securities by an Affiliate stockholder, the redemption would be prohibited by Section 17(a)(2). Accordingly, applicants request an exemption from section 17(a) of the Act to permit the proposed in-kind redemption by affiliated Stockholders.

2. Section 17(b) of the Act authorizes the Commission to exempt any transaction from the provisions of Section 17(a) if the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the transaction is consistent with the policy of each registered investment company and with the general purposes of the Act.

3. Applicants assert that the terms of the proposed in-kind redemption meet the requirements of section 17(b) of the Act. Applicants assert that neither the Fund nor the Affiliated Stockholders has any choice as to the portfolio securities to be received as redemption proceeds. Instead, stockholders will receive their *pro rata* portion of each of the Funds' portfolio securities, excluding (a) securities which, if distributed, would have to be registered under the Securities Act of 1933 ("Securities Act"), and (b) securities issued by entities in countries which restrict or prohibit the holding of securities by non-nationals (other than qualified investment vehicles such as the Fund), as well as certain portfolio assets which involves the assumption of contractual obligations, require special trading facilities, or may only be traded with the counterpart to the transaction. Moreover, applicants state that the portfolio securities to be distributed in