Wednesday, March 3

9:00 a.m.—Briefing by Executive Branch (Closed—Ex. 4 & 9b).

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Bill Hill, (301) 415–1661.

**ADDITIONAL INFORMATION:** By a vote of 5–0 on January 29, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that ''Affirmation of Hydro Resources Inc.: Presiding Officer's Scheduling Orders Dated January 21, 1999 And January 25, 1999'' (PUBLIC MEETING) be held on January 29, and on less than one week's notice to the public.''

The NRC Commission Meeting Schedule can be found on the Internet at:

http://www.nrc.gov/SECY/smj/schedule.htm

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to it, please contact the Office of the Secretary, Attn: Operations Branch, Washington, D.C. 20555 (301–415–1661). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to wmh@nrc.gov or dkw@nrc.gov.

Dated: February 5, 1999.

**William M. Hill, Jr.,**

*Secy, Tracking Officer, Office of the Secretary.*

[FR Doc. 99–3261 Filed 2–5–99; 2:50 pm]

**BILLING CODE 7590–01–M**

## SECURITIES AND EXCHANGE COMMISSION

**[Rel. No. IC–23678; File No. 812–11302]**

## AAL Variable Product Series Fund, Inc., et al.; Notice of Application

February 2, 1999.

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

**ACTION:** Notice of application for an order pursuant to section 6(c) of the Investment Company Act of 1940 (''1940 Act'') granting relief from sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder.

**SUMMARY OF APPLICATION:** Applicants seek an order to permit shares of certain series of the AAL Variable Product Series Fund, Inc. that are designed to fund insurance products (''Funds'') and shares of any other investment company that is designed to fund insurance products and for which Aid Association for Lutherans or any of its affiliates may serve as investment adviser, administrator, manager, principal underwriter, or sponsor (collectively with the Funds, the ''Insurance Product Funds'') to be sold to and held by: (1) Separate accounts funding variable annuity and variable life insurance contracts (''Separate Accounts'') of both affiliated and unaffiliated life insurance companies (''Participating Insurance Companies''); and (2) qualified pension and retirement plans (''Plans'').

**APPLICANTS:** The AAL Variable Product Series Fund, Inc. (''Company'') and Aid Association for Lutherans (''Adviser'').

**FILING DATE:** The application was filed on September 11, 1998, and amended and restated on December 9, 1998.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the SEC and serving applicants with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on March 1, 1999, and should be accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of the date of a hearing by writing to the Secretary of the SEC.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington DC 20549. Applicants, 125 North Superior Avenue, Appleton, Wisconsin 54911.

**FOR FURTHER INFORMATION CONTACT:** Elisa D. Metzger, Senior Counsel, or Susan Olson, 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).

### Applicant's Representations

1. The Company is a Maryland corporation and is organized under the 1940 Act as a diversified, open-end management investment company. The Company is comprised of seven series, each with its own investment objective or objectives and policies.

2. The Company may in the future create additional series and/or issue multiple classes of shares of each series.

3. The Adviser, is registered under the Investment Advisers Act of 1940 and is a non-profit, non-stock membership organization licensed to do business as a fraternal benefit society.

4. Shares of the Funds may be offered to Separate Accounts, which are either registered or unregistered under the federal securities laws, that fund variable annuity contracts or variable life insurance policies (''Contracts''). Shares of the Funds may also be offered to Plans.

### Applicants' Legal Analysis

1. Section 6(c) of the 1940 Act authorizes the Commission, by order upon application, to conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities or transactions from any provisions of the 1940 Act or 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 1940 Act.

2. In connection with the funding of scheduled premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a unit investment trust, Rule 6e–2(b)(15) under the 1940 Act provides partial exemptions from sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. The exemptions granted by Rule 6e–2(b)(15) are available, however, only where all of the assets of the separate account consist of the shares of one or more registered management investment companies which offer their shares ''*exclusively* to variable life insurance separate accounts of the life insurer, or of any affiliated life insurance company'' (emphasis added). Therefore, the relief granted by Rule 6e–2(b)(15) is not available with respect to a scheduled premium variable life insurance separate account that owns shares of a management company that also offers its shares to variable annuity and variable life insurance separate accounts of the same insurance company or any other insurance company or to trustees of a Plan. The use of a common management investment company as the underlying investment medium for a variable annuity or a variable life insurance separate account of the same insurance company or of any affiliated life insurance company is referred to herein as ''mixed funding.'' In addition, the

relief granted by Rule 6e–2(b)(15) is not available if the scheduled premium variable life insurance separate account owns shares of any underlying investment company that also offers its shares to separate accounts funding variable contracts of one or more unaffiliated life insurance companies. The use of a common management company as the underlying investment medium for separate accounts of unaffiliated life insurance companies is referred to herein as ''shared funding.'' Furthermore, the relief granted by Rule 6e–2(b)(15) is not available if the scheduled premium variable life insurance separate account owns shares of an underlying management company that also offers its shares to Plans.

3. In connection with the funding of flexible premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a unit investment trust, Rule 6e–3(T)(b)(15) under the 1940 Act provides partial exemptions from sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. These exemptions, however, are available only where all of the assets of the separate account consist of the shares of one or more registered management investment companies which offer their shares ''*exclusively* to separate accounts of the life insurer, or of any affiliated life insurance company, offering either scheduled contracts or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company'' (emphasis added). Therefore, Rule 6e–3(T) grants the exemptions if the underlying fund engages in mixed funding, subject to certain conditions, but not if it engages in shared funding or sells its shares to Plans.

4. Applicants state that the current tax law permits the Insurance Product Funds to increase their asset base through the sale of shares to Plans. Section 817(h) of the Internal Revenue Code of 1986, as amended (the ''Code''), imposes certain diversification standards on the assets underlying the Contracts. The Code provides that such Contracts will not be treated as annuity contracts or life insurance contracts for any period (and any subsequent period) during which the investments are not adequately diversified in accordance with regulations prescribed by the Treasury Department (the ''Regulations''). Treasury Regulations provide that, to meet the diversification requirements, all of the beneficial interests in an investment company must be held by the segregated asset accounts of one or more insurance companies. The Treasury Regulations do contain certain exceptions to this requirement, however. One such exception permits shares of an investment company to be held by the trustees of a Plan without adversely affecting the ability of shares in the same investment company also to be held by the separate accounts of insurance companies in connection with their Contracts (Treas. Reg. Sec. 1.817–5(f)(3)(iii)).

5. Applicants state that the promulgation of Rules 6e–2(b)(15) and 6e–3(T)(b)(15) preceded the issuance of the Regulations. Thus, the sale of shares of the same investment company to both separate accounts and Plans could not have been envisioned at the time of the adoption of Rules 6e–2(b)(15) and 6e–3(T)(b)(15), given the then-current tax law.

6. Moreover, Applicants assert that if the Insurance Product Funds were to sell their shares only to Plans, no exemptive relief would be necessary. Applicants state that none of the relief provided for in Rules 6e–2(b)(15) and 6e–3(T)(b)(15) relates to Plans or to the ability of a registered investment company to sell its shares to Plans.

7. Section 9(a)(3) of the 1940 Act makes it unlawful for any company to serve as an investment adviser to, or principal underwriter for, any registered open-end investment company if an affiliated person of that company is subject to any disqualification specified in either Sections 9(a)(1) or 9(a)(2) of the 1940 Act. Rules 6e–2(b)(15) (i) and (ii) and 6e–3(T)(b)(15) (i) and (ii) provide partial exemptions from section 9(a) under certain circumstances, subject to limitations on mixed and shared funding. These exemptions limit the application of the eligibility restrictions to affiliated individuals or companies that directly participate in the management of the underlying fund.

8. Applicants state that the partial relief granted under Rules 6e–2(b)(15) and 6e–3(T)(b)(15) from the requirements of section 9, in effect, limits the amount of monitoring necessary to ensure compliance with Section 9 to that which is appropriate in light of the policy and purposes of Section 9. Applicants submit that Rules 6e–2 and 6e–3(T) recognize that it is not necessary for the protection of investors or for the purposes of the 1940 Act to apply the provisions of Section 9(a) to the many individuals who may be involved in an insurance company complex, but who would have no involvement in matters pertaining to investment companies funding the separate accounts. Applicants assert, therefore, that there is no regulatory purpose in denying the partial exemptions because of mixed and shared funding and sales to Plans.

9. Applicants state that Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) provide exemptions from the pass-through voting requirement with respect to several significant matters, assuming the limitations on mixed and shared funding are observed. More specifically, Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(b)(15)(iii)(A) provide that the insurance company may disregard the voting instructions of its contract owners with respect to the investments of an underlying investment company or any contract between the underlying investment company and its investment adviser, when required to do so by an insurance regulatory authority and subject to certain requirements. In addition, Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii)(A)(*2*) provide that the insurance company may disregard contract owners' voting instructions if the contract owners initiate any change in an underlying investment company's investment policies, principal underwriter or any investment adviser (provided that disregarding such voting instructions is reasonable and subject to the other provisions of Rules 6e–2 and 6e–3(T)).

10. Applicants assert that the offer and sale of shares of the Insurance Product Funds to Plans will not have an impact on the relief requested. Under Section 403(a) of the Employment Retirement Income Security Act (''ERISA''), shares of the Insurance Product Funds sold to Plans must be held by the trustees of the Plan. Section 403(a) also provides that the trustee(s) must have exclusive authority and discretion to manage and control the Plan with two exceptions:

(a) When the Plan expressly provides that the trustee(s) is (are) subject to the direction of a named fiduciary who is not a trustee, in which case the trustee(s) is (are) subject to proper directions made in accordance with the terms of the Plan and not contrary to ERISA; and

(b) When the authority to manage, acquire or dispose of assets of the Plan is delegated to one or more investment managers pursuant to section 402(c)(3) of ERISA.

Unless one of the two above exceptions stated in section 403(a) applies, Plan trustees have the exclusive authority and responsibility for voting proxies.

11. Where a named fiduciary to a Plan appoints an investment manager, the investment manager has the responsibility to vote the shares held unless the right to vote such shares is reserved to the trustees or the named

fiduciary. In any event, Applicants assert that ERISA does not require pass-through voting to participants in Plans. Some of the Plans, however, may provide participants with the right to give voting instructions.

12. Where a Plan provides participants with the right to give voting instructions, Applicants assert that there is no reason to believe that participants in Plans generally or those in a particular Plan, either as a single group or in combination with participants in other Plans, would vote in a manner that would disadvantage Contract owners. The purchase of shares of the Insurance Product Funds by Plans that provide voting rights to participants does not present any complications not otherwise occasioned by mixed and shared funding.

13. Applicants also maintain that no increased conflicts of interest would be presented by the granting of the requested relief. In this regard, Applicants assert that shared funding does not present any issues that do not already exist where a single insurance company is licensed to do business in several or all states. A particular state insurance regulatory body could require action that is inconsistent with the requirements of insurance regulators of other states in which the insurance company offers its policies. The fact that different insurers may be domiciled in different states does not create a significantly different or enlarged problem.

14. Applicants submit that shared funding is, in this respect, no different than the use of the same investment company as the funding vehicle for affiliated insurers, which Rules 6e–2(b)(15) and 6e–3(T)(b)(15) permit under various circumstances. Affiliated insurers may be domiciled in different states and be subject to differing state law requirements. Affiliation does not reduce the potential, if any exists, for differences in state regulatory requirements. In any event, Applicants submit that the conditions set forth in the application and included in this notice are designed to safeguard against, and provide procedures for, resolving any adverse effects that differences among state regulatory requirements may produce.

15. Applicants assert that the right of an insurance company under Rules 6e–2(b)(15) and 6e–3(T)(b)(15) to disregard contract owners' voting instructions does not raise any issues different from those raised by the authority of state insurance administrators over separate accounts. Under Rules 6e–2(b)(15) and 6e–3(T)(b)(15), an insurer can disregard contract owner voting instructions only with respect to certain specified items. Affiliation does not eliminate the potential, if any exists, for divergent judgments as to the advisability or legality of a change in investment policies, principal underwriter, or investment adviser initiated by contract owners. The potential for disagreement is limited by the requirements in Rules 6e–2 and 6e–3(T) that an insurance company's disregard of voting instructions be reasonable and based on specific good-faith determinations.

16. A particular insurer's disregard of voting instructions nevertheless could conflict with the majority of Contract owner voting instructions. The insurer's action could be different from the determination of all or some of the other insurers (including affiliated insurers) that the contract owners' voting instructions should prevail, and either could preclude a majority vote approving the change or could represent a minority view. If the insurer's judgment represents a minority position or would preclude a majority vote, the insurer may be required, at the election of the relevant Insurance Product Fund, to withdraw its Separate Account's investment in that Insurance Product Fund, and no charge or penalty would be imposed as a result of such withdrawal.

17. Applicants submit that there is no reason why the investment policies of the Insurance Product Funds would or should be materially different from what those policies would or should be if the Insurance Product Funds funded only annuity contracts or only scheduled or flexible premium life contracts. In this regard, Applicants note that each type of insurance product is designed as a long-term investment program. In addition, Applicants represent that each Insurance Product Fund will be managed to attempt to achieve the investment objective of that Insurance Product Fund and not to favor or disfavor any particular insurer or type of insurance product.

18. Furthermore, Applicants submit that no one investment strategy can be identified as appropriate to a particular insurance product or to a Plan. Each pool of variable annuity and variable life insurance contract owners is composed of individuals of diverse financial status, age, insurance and investment goals. A fund supporting even one type of insurance product must accommodate those factors in order to attract and retain purchasers.

19. Applicants note that section 817(h) of the Code imposes certain diversification standards on the underlying assets of variable annuity and variable life insurance contracts held in the portfolios of management investment companies. The Regulations specifically permit ''qualified pension or retirement plans'' and insurance company separate accounts to share the same underlying investment company. For this reason, Applicants have concluded that neither the Code, nor the Treasury Regulations, nor the revenue rulings thereunder, present any inherent conflicts of interest of Plans, variable annuity separate accounts, and variable life insurance separate accounts all invest in the same management investment company.

20. Applicants note that while there are differences in the manner in which distributions from variable annuity contracts, variable life insurance contracts and Plans are taxed, the tax consequences do not raise any conflicts of interest. When distributions are to be made, and a Separate Account or Plan is unable to net purchase payments to make the distributions, the Separate Account or the Plan will redeem shares of the Insurance Product Fund at their net asset value. A Plan will make distributions in accordance with the terms of the Plan, and the Participating Insurance Company will make distributions in accordance with the terms of the Contract.

21. With respect to voting rights, Applicants state that it is possible to provide an equitable means of giving voting rights to Contract owners and to Plans. Applicants represent that the Insurance Product Funds will inform each shareholder, including each Separate Account and each Plan, of information necessary for the shareholder meeting, including its respective share of ownership in the respective Insurance Product Fund. Each Participating Insurance Company will then solicit voting instructions in accordance with the ''pass-through'' voting requirement.

22. Applicants content that the ability of the Insurance Product Funds to sell their shares directly to Plans does not crease a ''senior security,'' as that term is defined in section 18(g) of the 1940 Act. Regardless of the rights and benefits of participants under the Plans or Contract owners under the Contracts, the Plans and the Separate Accounts have rights only with respect to their respective shares of the Insurance Product Funds. They can only redeem such shares at their net asset value. No shareholder of any of the Insurance Product Funds has any preference over any other shareholder with respect to distribution of assets or payments of dividends.

23. Applicants submit that there are no conflicts between the Contract

owners of the Separate Accounts and Plan participants with respect to the state insurance commissions' veto powers over investment objectives. State insurance commissioners have been given the veto power in recognition of the fact that insurance companies usually cannot simply redeem their separate accounts out of one fund and invest another. Generally, time-consuming complex transactions must be undertaken to accomplish such redemptions and transfers. Conversely, trustees of Plans can make the decision quickly and redeem their interest in an Insurance Product Fund and reinvest in another funding vehicle without the same regulatory impediments faced by separate accounts or, as is the case with most Plans, even hold cash pending suitable investment. Based on the foregoing, Applicants have concluded that even if there should arise issues where the interest of Contract owners and the interests of participants in Plans are in conflict, the issues can be resolved almost immediately because the trustees of Plans can, on their own, redeem the shares out of the Insurance Product Fund.

24. Applicants assert that various factors have limited the number of insurance companies that offer variable annuities and variable life insurance contracts. These factors include the costs of organizing and operating a funding medium, the lack of expertise with respect to investment management (principally with respect to stock and money market investments), and the lack of name recognition by the public of certain insurers as investment experts. In particular, some smaller life insurance companies may not find it economically feasible, or within their investment or administrative expertise, to enter the variable contract business on their own.

25. Applicants content that the use of the Insurance Product Funds as common investment vehicles for variable contracts would reduce or alleviate these concerns. Mixed and shared funding should provide several benefits to variable contract owners by eliminating a significant portion of the costs of establishing and administering separate funds. Participating Insurance Companies will benefit not only from the investment and administrative expertise of the Adviser, but also from the cost efficiencies and investment flexibility afforded by a larger pool of assets. Therefore, making the Insurance Product Funds available for mixed and shared funding will encourage more insurance companies to offer variable contracts, and accordingly should result in increased competition with respect to both variable contract design and pricing, which can be expected to result in more product variation and lower charges. Applicants also assert that the sale of shares of the Insurance Product Funds to Plans can also be expected to increase the amount of assets available for investment by the Insurance Product Funds and thus promote economies of scale and diversification.

**Applicants' Conditions**

*Applicants Consent to the Following Conditions*

1. A majority of the Board of each Insurance Product Fund shall consist of persons who are not ''interested persons'' thereof, as defined by section 2(a)(19) of the 1940 Act, and the rules thereunder and as modified by any applicable orders of the Commission, except that if this condition is not met by reason of the death, disqualification or bona fide resignation of any Board Member or Members, than the operation of this condition shall be suspended: (a) For a period of 45 days if the vacancy or vacancies may be filled by the remaining Board Members; (b) for a period of 60 days if a vote of shareholders is required to fill the vacancy or vacancies; or (c) for such longer period as the Commission may prescribe by order upon application.

2. The Board will monitor their respective Insurance Product Fund for the existence of any material irreconcilable conflict among the interests of the Contract owners of all Separate Accounts investing in the Insurance Product Funds and of the Plans participants investing in the Insurance Product Funds. The Board will determine what action, if any, shall be taken in response to such conflicts. A material irreconcilable conflict may arise for a variety of reasons, including: (a) An action by any State insurance regulatory authority; (b) a change in applicable Federal or State insurance, tax or securities laws or regulations, or a public ruling, private letter ruling, no-action or interpretive letter, or any similar action by insurance, tax or securities regulatory authorities; (c) an administrative or judicial decision in any relevant proceeding; (d) the manner in which the investments of the Insurance Product Funds are being managed; (e) a difference in voting instructions given by variable annuity Contract owners, variable life insurance Contract owners, and trustees of Plans; (f) a decision by an insurer to disregard the voting instructions of Contract owners; or (g) if applicable, a decision by a Plan to disregard the voting instructions of Plan participants.

3. Participating Insurance Companies, the Adviser, and any Plan that executes a fund participation agreement upon becoming an owner of 10 percent or more of the assets of an Insurance Product Fund (a ''Participating Plan''), will report any potential or existing conflicts of which it becomes aware to the Board of any relevant Insurance Product Fund. Participating Insurance Companies, the Adviser and the Participating Plans will be responsible for assisting the Board in carrying out its responsibilities under these conditions by providing the Board with all information reasonably necessary for the Board to consider any issues raised. This responsibility includes, but is not limited to, an obligation by each Participating Insurance Company to inform the Board whenever voting instructions of Contract owners are disregarded and, if pass-through voting is applicable, an obligation by each Participating Plan to inform the Board whenever it has determined to disregard Plan participant voting instructions. The responsibility to report such information and conflicts, and to assist the Board, will be contractual obligations of all Participating Insurance Companies investing in the Insurance Product Funds under their agreements governing participation in the Insurance Product Funds, and such agreements shall provide that these responsibilities will be carried out with a view only to the interests of the Contract owners. The responsibility to report such information and conflicts, and to assist the Board, will be contractual obligations of all Participating Plans under their agreements governing participation in the Insurance Product Funds, and such agreement will provide that their responsibilities will be carried out with a view only to the interests of Plan participants.

4. If it is determined by a majority of the Board of an Insurance Product Fund, or by a majority of the disinterested Board Members, that a material irreconcilable conflict exists, the relevant Participating Insurance Companies and Participating Plans will, at their own expense and to the extent reasonably practicable as determined by a majority of the disinterested Board Members, take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict, which steps could include: (a) In the case of Participating Insurance Companies, withdrawing the assets allocable to some or all of the Separate Accounts from the Insurance Product Fund or any portfolio thereof and reinvesting such assets in a different investment medium,

including another portfolio of an Insurance Product Fund or another Insurance Product Fund, or submitting the question as to whether such segregation should be implemented to a vote of all affected Contract owners and, as appropriate, segregating the assets of any appropriate group (i.e., variable annuity Contract owners or variable life insurance Contract owners of one or more Participating Insurance Companies) that votes in favor of such segregation, or offering to the affected Contract owners the option of making such a change; (b) in the case of Participating Plans, withdrawing the assets allocable to some or all of the Plans from the Insurance Product Fund and reinvesting such assets in a different investment medium; and (c) establishing a new registered management investment company or managed Separate Account. If a material irreconcilable conflict arises because of a decision by a Participating Insurance Company to disregard Contract owner voting instructions, and that decision represents a minority position or would preclude a majority vote, then the insurer may be required, at the Insurance Product Fund's election, to withdraw the insurer's Separate Account investment in such Insurance Product Fund, and no charge or penalty will be imposed as a result of such withdrawal. If a material irreconcilable conflict arises because of a Participating Plan's decision to disregard Plan participant voting instructions, if applicable, and that decision represents a minority position or would preclude a majority vote, the Participating Plan may be required, at the Insurance Product Fund's election, to withdraw its investment in such Insurance Product Fund, and no charge or penalty will be imposed as a result of such withdrawal. The responsibility to take remedial action in the event of a determination by a Board of a material irreconcilable conflict and to bear the cost of such remedial action will be a contractual obligation of all Participating Insurance Companies and Participating Plans under their agreements governing participation in the Insurance Product Funds, and these responsibilities will be carried out with a view only to the interest of Contract owners and Plan participants.

5. For purposes of Condition 4, a majority of the disinterested Board Members of the applicable Board will determine whether or not any proposed action adequately remedies any material irreconcilable conflict, but in no event will the relevant Insurance Product Fund or the Adviser be required to establish a new funding medium for any Contract. No Participating Insurance Company shall be required by Condition 4 to establish a new funding medium for any Contract if any offer to do so has been declined by vote of a majority of the Contract owners materially and adversely affected by the material irreconcilable conflict. Further, no Participating Plan shall be required by Condition 4 to establish a new funding medium for any Participating Plan if (a) a majority of Plan participants materially and adversely affected by the irreconcilable material conflict vote to decline such offer, or (b) pursuant to governing Plan documents and applicable law, the Participating Plan makes such decision without a Plan participant vote.

6. The determination of the Board of the existence of a material irreconcilable conflict and its implications will be made known in writing promptly to all Participating Insurance Companies and Participating Plans.

7. Participating Insurance Companies will provide pass-through voting privileges to Contract owners who invest in registered Separate Accounts so long as and to the extent that the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for Contract owners. As to Contracts issued by unregistered Separate Accounts, pass-through voting privileges will be extended to participants to the extent granted by issuing insurance companies. Each Participating Insurance Company will also vote shares of the Insurance Product Funds held in its Separate Accounts for which no voting instructions from Contract owners are timely received, as well as shares of the Insurance Product Funds which the Participating Insurance Company itself owns, in the same proportion as those shares of the Insurance Product Funds for which voting instructions from contract owners are timely received. Participating Insurance Companies will be responsible for assuring that each of their registered Separate Accounts participating in the Insurance Product Funds calculates voting privileges in a manner consistent with other Participating Insurance Companies. The obligation to calculate voting privileges in a manner consistent with all other registered Separate Accounts investing in the Insurance Product Funds will be a contractual obligation of all Participating Insurance Companies under their agreements governing their participation in the Insurance Product Funds. Each Participating Plan will vote as required by applicable law and governing Plan documents.

8. All reports of potential or existing conflicts received by the Board of an Insurance Product Fund and all action by such Board with regard to determining the existence of a conflict, notifying Participating Insurance Companies and Participating Plans of a conflict, and determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the meetings of such Board or other appropriate records, and such minutes or other records shall be made available to the Commission upon request.

9. Each Insurance Product Fund will notify all Participating Insurance Companies that separate disclosure in their respective Separate Account prospectuses may be appropriate to advise accounts regarding the potential risks of mixed and shared funding. Each Insurance Product Fund shall disclose in its prospectus that (a) the Insurance Product Fund is intended to be a funding vehicle for variable annuity and variable life insurance contracts offered by various insurance companies and for qualified pension and retirement plans; (b) due to differences of tax treatment and other considerations, the interests of various Contract owners participating in the Insurance Product Fund and/or the interests of Plans investing in the Insurance Product Fund may at some time be in conflict; and (c) the Board of such Fund will monitor events in order to identify the existence of any material irreconcilable conflicts and to determine what action, if any, should be taken in response to any such conflict.

10. Each Insurance Product Fund will comply with all provisions of the 1940 Act requiring voting by shareholders (which, for these purposes, will be the persons having a voting interest in the shares of the Insurance Product Funds), and, in particular, the Insurance Product Funds will either provide for annual shareholder meetings (except insofar as the Commission may interpret section 16 of the 1940 Act not to require such meetings) or comply with section 16(c) of the 1940 Act, although the Insurance Product Funds are not the type of trust described in section 16(c) of the 1940 Act, as well as with section 16(a) of the 1940 Act and, if and when applicable, section 16(b) of the 1940 Act. Further, each Insurance Product Fund will act in accordance with the Commission's interpretation of the requirements of section 16(a) with respect to periodic elections of Board Members and with whatever rules the Commission may promulgate with respect thereto.

11. If and to the extent Rules 6e–2 or 6e–3(T) under the 1940 Act is amended, or proposed Rule 6e–3 under the 1940

Act is adopted, to provide exemptive relief from any provision of the 1940 Act or the rules promulgated thereunder, with respect to mixed or shared funding on terms and conditions materially different from any exemptions granted in the order requested in the application, then the Insurance Product Funds and/or Participating Insurance Companies and Participating Plans, as appropriate, shall take such steps as may be necessary to comply with such Rules 6e–2 and 6e–3(T), as amended, or proposed Rule 6e–3, as adopted, to the extent that such Rules are applicable.

12. The Participating Insurance Companies and Participating Plans and/or the Adviser, at least annually, will submit to the Board such reports, materials or data as the Board may reasonably request so that the Board may fully carry out obligations imposed upon it by the conditions contained in the application. Such reports, materials and data will be submitted more frequently if deemed appropriate by the Board. The obligations of the Participating Insurance Companies and Participating Plans to provide these reports, materials and data to the Board, when the Board so reasonably requests, shall be a contractual obligation of all Participating Insurance Companies and Participating Plans under their agreements governing participation in the Insurance Product Funds.

13. If a Plan should ever become a holder of ten percent or more of the assets of an Insurance Product Fund, such Plan will execute a participation agreement with the Insurance Product Fund that includes the conditions set forth herein to the extent applicable. A Plan will execute an application containing an acknowledgment of this condition upon such Plan's initial purchase of the shares of any Insurance Product Fund.

## Conclusion

For the reasons summarized above, Applicants submit that the exemptive relief requested is necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 99–3102 Filed 2–8–99; 8:45 am]

BILLING CODE 8010–01–M

## SECURITIES AND EXCHANGE COMMISSION

**[Rel. No. IC–23677; File No. 812–11366]**

## Endeavor Series Trust, et al.; Notice of Application

February 2, 1999.

**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 (''Act'') for exemptions from the provisions of sections 9(a), 13(a), 15(a) and 15(b) of the Act, and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder.

**SUMMARY OF APPLICATION:** Applicants seek an order to permit shares of any current or future series of the Trust and shares of any other investment company that is designed to fund insurance products or to serve as an investment vehicle for qualified pension and retirement plans and for which Endeavor or any of its affiliates may in the future serve as investment adviser, administrator, manager, principal underwriter or sponsor (the Trust and such other investment companies are hereinafter referred to collectively as the ''Funds'') to be sold to and held by (i) variable annuity and variable life insurance company separate accounts of both affiliated and unaffiliated life insurance companies (''Participating Insurance Companies'') and (ii) qualified pension and retirement plans outside the separate account context (''Plans'').

**APPLICANTS:** Endeavor Series Trust (''Trust'') and Endeavor Management Co. (''Endeavor'' or ''Manager'').

**FILING DATE:** The application was filed on October 20, 1998, and amended on December 21, 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 serving Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the SEC by 5:30 p.m. on March 1, 1999, and accompanied by proof of service on 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, SEC, 450 Fifth Street, NW, Washington, DC 20549. Applicants, c/o Vincent J. McGuinness, Jr., President, Endeavor Management Co., 2101 East Coast Highway, Suite 300, Corona del Mar, California 92625.

**FOR FURTHER INFORMATION CONTACT:** Elisa D. Metzger, Senior Counsel, or Susan M. Olson, Branch Chief, Division of Investment Management, Office of Insurance Products, at (202) 942–0670.

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained 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. The Trust was organized on November 18, 1988 as a Massachusetts business trust and is registered as an open-end management investment company with the SEC. The Trust consists of multiple, separately managed investment portfolios (''Portfolios'') and may in the future issue shares of additional Portfolios.

2. Endeavor is registered under the Investment Advisers Act of 1940. Endeavor serves as Manager of the Trust. The Manager is responsible for providing investment management and administrative services to the Trust and in the exercise of such responsibility selects other affiliated and unaffiliated registered investment advisers (''Advisers'') for each of the Portfolios and monitors the Advisers' investment programs and results, reviews brokerage matters, oversees compliance matters and supervises the provision of services by third parties such as the Trust's custodian. The Manager has entered into or will enter into investment advisory agreements with the Advisers that will be primarily responsible for the day-to-day investment programs of each Portfolio. Vincent J. McGuinness, a trustee of the Trust, together with his family members and trusts for the benefit of his family members, owns all of Endeavor's outstanding common stock.

3. The Funds (including the Trust) propose to offer shares of one or more of their series to insurance company separate accounts that fund variable annuity and variable life insurance contracts (''Contracts'') established by Participating Insurance Companies. These separate accounts may be registered as investment companies under the Act or exempt from registration pursuant to Section 3(c)(l). Each Participating Insurance Company will enter into a fund participation agreement with the Funds in which the Participating Insurance Company