

Analyses of programs with terms different from those presented above may use a linear interpolation. For example, a four-year project can be evaluated with a rate equal to the average of the three-year and five-year rates. Programs with durations longer than 30 years may use the 30-year interest rate.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-24285; File No. 812-11912]

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

February 10, 2000.

**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, as amended (the "1940 Act"), granting exemptions from the provisions of Sections 2(a)(32), 22(c), and 27(i)(2)(A) of the 1940 Act and Rule 22c-1 thereunder to permit the recapture of credits applied to purchase payments made under certain variable annuity contracts.

**SUMMARY OF APPLICATION:** Applicants seek an order under Section 6(c) of the 1940 Act to the extent necessary to permit the issuance and subsequent recapture, upon exercise of the free-look cancellation right, of purchase payment credits applied to purchase payments made under: (i) certain deferred variable annuity contracts that Conseco Variable will issue through Separate Account H (the contracts, including certain contract data pages and endorsements and riders, are collectively referred to herein as the "Contracts"), and (ii) contracts that Conseco Variable may issue in the future through Separate Account H or any Future Accounts that are substantially similar in all material respects to the Contracts ("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, Conseco Variable, whether existing or created in the future, that serves as a distributor or principal underwriter of the Contracts or any Future Contracts offered through Separate Account H or any Future Accounts (collectively "Conseco Variable Broker-Dealers").

**APPLICANTS:** Conseco Variable Insurance Company ("Conseco Variable"), Conseco Variable Annuity Account H ("Separate Account H"), any other separate account established in the

future by Conseco Variable to support certain deferred variable annuity contracts issued by Conseco Variable ("Future Accounts"), and Conseco Equity Sales, Inc. ("CESI").

**FILING DATE:** The application was filed on December 27, 1999.

**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 Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 6, 2000, and should be 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 Commission.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Applicants, c/o Lynn Korman Stone, Esq., Blazzard, Grodd & Hasenauer, P.C., P.O. Box 5108, Westport, Connecticut, 06881-5108. Copies to Michael A. Colliflower, Conseco Variable Insurance Company, 11825 N. Pennsylvania Street, Carmel, Indiana 46032-4572.

**FOR FURTHER INFORMATION CONTACT:** Michael Pappas, 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 Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-0102 (tel. (202) 942-8090).

#### Applicants' Representations

1. Conseco Variable was originally organized in 1937. Prior to October 7, 1998, the company was known as Great American Reserve Insurance Company. In certain states, the name Great American Reserve Insurance Company may still be used until the name change is approved in that state. Conseco Variable is principally engaged in the life insurance business in 49 states and the District of Columbia. Conseco Variable is a stock company organized under the laws of the State of Texas and is an indirect wholly-owned subsidiary of Conseco, Inc. Conseco, Inc. is a publicly owned financial services

organization headquartered in Carmel, Indiana.

2. Separate Account H is a segregated asset account of Conseco Variable established under Texas insurance law on November 1, 1999. Separate Account H is registered with the Commission as a unit investment trust under the 1940 Act (File No. 811-9693) for the purpose of funding the Contracts which invest in underlying funds. Security interests under the Contracts have been registered under the Securities Act of 1933 (the "1933 Act") (File No. 333-90737).

3. Separate Account H will fund the variable benefits available under the Contracts. Conseco Variable may in the future issue Future Contracts through Separate Account H or through Future Accounts. Any income, gains or losses, realized or unrealized, from assets allocated to Separate Account H are, in accordance with the Contracts, credited to or charged against Separate Account H, without regard to other income, gains or losses of Conseco Variable.

4. Conseco Equity Sales, Inc. ("CESI"), an affiliate of Conseco Variable, is the principal underwriter of the Contracts. CESI is a broker-dealer registered under the Securities and Exchange Act of 1934 (the "1934 Act") and a member of the NASD. Sales of the Contracts will be made by registered representatives of unaffiliated broker-dealers authorized to sell the Contracts who have entered into agreements with CESI. All such unaffiliated broker-dealers will be registered broker-dealers under the 1934 Act and NASD members. CESI, or any successor entity, may act as principal underwriter for any Future Accounts and distributor for any Future Contracts issued by Conseco Variable.

5. The Contracts issued through Separate Account H are individual deferred variable and fixed annuity contracts. The Contracts may be issued under a qualified contract, or as a non-qualified contract. The Contracts are designed to provide for the accumulation of assets and for income through the investment during an accumulation phase.

6. Contract Owners may make purchase payments at any time during the accumulation phase. The minimum initial purchase payment is \$5,000 for non-qualified contracts and \$2,000 for qualified contracts. Additional purchase payments of at least \$500 can be made for non-qualified contracts, unless the Contract Owner participates in the automatic payment check option under which the minimum subsequent

payment is \$200 each month. The minimum subsequent payment for qualified contracts is \$50 each month. Unless Consecro Variable agrees otherwise, the maximum total purchase payments it accepts are \$2,000,000.

7. Purchase payments under the Contracts may be accumulated before annuitization, and annuity payments may be received after annuitization on a variable basis, a fixed basis, or a combination of both.

8. Contract Owners can allocate purchase payments under the Contracts to sub-accounts of Separate Account H, or to the fixed account ("Fixed Account") of Consecro Variable. The Fixed Account is not registered with the Commission. The Fixed Account may not be available in certain states. Separate Account H consists of sub-accounts, each of which will be available under the Separate Account H Contracts. The sub-accounts are referred to as "investment portfolios." Separate Account H currently consists of 40 investment portfolios. Each investment portfolio will invest in shares of a corresponding portfolio of certain underlying investment companies ("Funds"). The investment portfolios and the Fixed Account will comprise the initial investment choices under the Contracts. Currently, a Contract Owner can invest in up to 15 investment portfolios at one time.

9. Consecro Variable, at a later date, may determine to create additional investment portfolios of Separate Account H to invest in any additional Funds, or other such underlying portfolios or other investments as may now or in the future be available. Similarly, investment portfolio(s) of Separate Account H may be combined or eliminated from time to time.

10. Each time a Contract Owner makes a purchase payment, Consecro Variable will allocate to the Contract Owner's Contract Value a purchase payment credit ("Purchase Payment Credit") or 4% of the purchase payment. Consecro Variable will allocate Purchase Payment Credits among the investment portfolios and the fixed account in the same proportion as the corresponding purchase payments are allocated by the Contract Owner. Consecro Variable will fund the Purchase Payment Credits from its general account assets.

11. The Contracts provide that a Contract Owner may return the Contract within 10 days after receipt (or for a longer period in states where required) and Consecro Variable will refund the Contract Value, less any Purchase Payment Credit that was credited to the Contract ("free-look"). Under certain circumstances, Consecro Variable will

refund purchase payments. The Purchase Payment Credit may not be available in certain states. Consecro Variable reserves the right to limit the amount of Purchase Payment Credits in the future.

12. Consecro Variable will recapture Purchase Payment Credits from a Contract Owner only if the Contract Owner returns the Contract to Consecro Variable for a refund during the free-look period. Any earnings that resulted from the Purchase Payment Credit will not be recaptured. After the free-look period ends, the Purchase Payment Credit will vest and can be withdrawn at any time. Purchase Payment Credits, and any gains or losses attributable to Purchase Payment Credits, will be considered earnings under the Contracts for tax purposes.

13. A Contract Owner has access to the money in his or her Contract by making either a partial or complete withdrawal or by electing to receive annuity payments. A beneficiary will have access to the money in the Contract when a death benefit is paid.

14. A Contract Owner may elect to receive annuity payments under an annuity option. The Contracts also offer a death benefit. Under certain circumstances, a Contract Owner may select an optional guaranteed minimum death benefit under which the death benefit will have a guaranteed minimum value. A Contract Owner can also select an optional guaranteed minimum income benefit to be applied to the annuity option selected. The optional guaranteed minimum income benefit can only be selected with the optional guaranteed minimum death benefit.

15. The Contracts also provide for transfer privileges among investment portfolios, a dollar cost averaging program, a rebalancing program, and other features. The following charges are currently assessed under the Contracts: (i) An annual asset-based insurance charge of 1.40% for the standard contract, 1.70% if the optional guaranteed minimum death benefit is selected, or 2.00% if both of the benefits are selected; (ii) a contingent deferred sales charge, which starts at 8% in the first year and declines to 0% after 10 years, with a free withdrawal option under certain specified circumstances; (iii) a \$30 contract maintenance charge during the accumulation phase; and (iv) a transfer fee of \$25 for each transfer in excess of one transfer in each 30 day period during the accumulation period. Consecro Variable has reserved the right to increase certain charges up to a specified maximum. The Funds also impose a management and administrative fee which varies

depending upon which Funds are selected.

16. Applicants seek exemption pursuant to Section 6(c) of the 1940 Act from Sections 2(a)(32), 22(c), and 27(i)(2)(A) of the 1940 Act and Rule 22c-1 thereunder to the extent deemed necessary to permit Consecro Variable to issue the Contracts and Future Contracts that provide for Purchase Payment Credits upon the receipt of purchase payments, and to recapture the Purchase Payment Credits if the Contract Owner returns the Contract for a refund during the free-look period.

#### **Applicants' Legal Analysis and Conditions**

1. Section 6(c) of the 1940 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 1940 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 1940 Act, grant the exemptions summarized above with respect to the Contracts and any Future Contracts, funded by Separate Account H or any Future Accounts, that are issued by Consecro Variable and underwritten or distributed by CESI or Consecro Variable Broker-Dealers. Applicants represent that any Future Contracts funded by Separate Account H or any Future Accounts will be substantially similar in all material respects to the Contracts. Applicants believe 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.

2. Applicants represent that it is not administratively feasible to track the Purchase Payment Credit amount in Separate Account H after the Purchase Payment Credit is applied. Accordingly, the asset-based charges applicable to Separate Account H will be assessed against the entire amounts held in Separate Account H, including the Purchase Payment Credit amount. As a result, the aggregate asset-based charges assessed against Contract Value will be higher than those that would be charged if the Contract Owner's Contract Value did not include the Purchase Payment Credit.

3. Subsection (i) of Section 27 of the 1940 Act 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 such a separate account or sponsoring insurance company 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 submit that the recapture of the Purchase Payment Credit if a Contract Owner returns the Contract during the free-look period would not deprive a Contract Owner of his or her proportionate share of the issuer's current net assets. Applicants state that a Contract Owner's interest in the amount of the Purchase Payment Credit allocated to his or her Contract Value upon receipt of purchase payments is not vested until the applicable free-look period has expired without return of the Contract. Until or unless the amount of any Purchase Payment Credit is vested, Applicants submit that Consecro Variable retains the right and interest in the Purchase Payment Credit amount, although not in the earnings attributable to that amount. Applicants argue that when Consecro Variable recaptures any Purchase Payment Credit it is simply retrieving its own assets, and because a Contract Owner's interest in the Purchase Payment Credit is not vested, the Contract Owner has not been deprived of a proportionate share of the applicable Separate Account H's assets, i.e., a share of the applicable Separate Account H's assets proportionate to the Contract Owner's Contract Value (including the Purchase Payment Credit).

5. Applicants further state that it would be patently unfair to allow a Contract Owner exercising the free-look 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 Consecro 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. Applicants represent that the Purchase Payment Credit will be attractive to and in the interest of investors because it will permit Contract

Owners to put up to 104% of their purchase payments to work for them in the selected sub-accounts and the fixed account. Also, the Contract Owner will retain any earnings attributable to the Purchase Payment Credit, and the principal amount of the Purchase Payment Credit will be retained under the conditions set forth in the application.

7. Applicants submit that the provisions for recapture of any Purchase Payment Credit under the Contract does not, and any such Future Contract provisions will not, violate Sections 2(a)(32) and 27(i)(2)(A) of the 1940 Act. Nevertheless, to avoid any uncertainties, Applicants request an exemption from Sections 2(a)(32) and 27(i)(2)(A), to the extent deemed necessary, to permit the recapture of any Purchase Payment Credit under the circumstances described herein with respect to the Contract and any Future Contracts, without the loss of the relief from Section 27 provided by Section 27(i).

8. 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 to accomplish the same purposes as contemplated by Section 229(a). 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.

9. 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.

10. Applicants assert that the proposed recapture of the Purchase Payment Credit poses no such threat of dilution. To effect a recapture of a Purchase Payment Credit, Consecro Variable will redeem interests in a Contract Owner's Contract at a price determined on the basis of the current

net asset value of the respective sub-accounts. The amount recaptured will equal the amount of the Purchase Payment Credit that Consecro Variable paid out of its general account assets. Although Contract 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 the respective sub-accounts. Thus, Applicants argue no dilution will occur upon the recapture of the Purchase Payment Credit.

11. Applicants also submit that the second harm that Rule 22c-1 was designed to address, namely, speculatively trading practices calculated to take advantage of backward pricing, will not occur as a result of the recapture of the Purchase Payment Credit.

12. Because neither of the harms that Rule 22c-1 was meant to address are found in the recapture of the Purchase Payment Credit, Applicants state that Rule 22c-1 and Section 22(c) should have no application to any Purchase Payment Credit. However, to avoid any uncertainty as to full compliance with the 1940 Act, Applicants request an exemption from the provisions of Section 22(c) and Rule 22c-1 to the extent deemed necessary to permit them to recapture the Purchase Payment Credit under the Contracts and Future Contracts.

### Conclusion

Section 6(c) of the 1940 Act provides, in pertinent part, that the Commission, by order upon application, may conditionally or unconditionally exempt any persons, security or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of the 1940 Act, or any rule or regulation thereunder, 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.

Applicants submit 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 assert, based on the grounds summarized above, that their exemptive request meets the standards set out in Section 6(c) of the 1940 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 1940 Act and that therefore, the Commission should grant the requested order.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42407; File No. SR-Amex-99-29]

### Self-Regulatory Organizations; Order Approving Proposed Rule Change by the American Stock Exchange LLC Relating to Disclosures by Specialists Under Amex Rule 174

February 9, 2000.

#### I. Introduction

On August 6, 1999, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to amend Amex Rule 174 pertaining to the disclosure of specialists' orders. The proposed rule change was published for comment in the **Federal Register** on September 20, 1999.<sup>3</sup>

#### II. Description of the Proposal

Presently, Amex Rule 174 prohibits specialists from disclosing information regarding orders left with the specialist other than to a Floor Official or an authorized Amex official. This prohibition is subject to three exceptions: (1) a specialist may disclose information to requesting members or issuer representatives regarding names of buying and selling member organizations in completed or partially executed Amex transactions unless parties to the trade direct otherwise; (2) in response to a member's probe of the market, the specialist, in a fair and impartial manner, may provide information about buying and selling interest at or near the prevailing

quotation, including the identity of bidders or offerors represented on the book, unless the entering broker directs otherwise; and (3) the specialist must disclose information regarding limited price orders held by the specialist to the extent required by the Intermarket Trading System Plan.

The Exchange proposes to amend Amex Rule 174 to expand the information that the specialist, while acting in a market making capacity on the Floor, is permitted to disclose in response to a member's market probe in the normal course of business. The proposed rule change would eliminate the specialist disclosure restriction for information regarding orders "at or near the prevailing quotation," and instead would permit any information concerning buying and selling interest of orders held by the specialist on the specialist's book to be disclosed following a member's market probe. In addition, the specialists would be permitted to disclose information regarding stop orders if the specialist reasonably believes that the requesting member intends to trade the security at a price at which stop orders would be relevant.<sup>4</sup> The proposed rule change also will permit, although not require, disclosure of percentage orders in a manner similar to disclosure of any other orders (except stop orders).<sup>5</sup> Although a specialist would not be required to disclose any order information on the specialist's book in response to a member's market probe, under the existing or the proposed rule, if the specialist determines to make such disclosure, it must disclose the same information in a fair and impartial manner to any member on the Floor.

#### III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,<sup>6</sup> and, in particular, with the

requirements of Sections 6(b)(5),<sup>7</sup> 11A(a)(1)(C)(iii),<sup>8</sup> and 1(b) of the Act.<sup>9</sup> Section 6(b)(5) of the Act<sup>10</sup> requires, among other things, that an exchange have rules which are designed to promote just and equitable principles of trade, to facilitate transactions in securities, to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest. In Section 11A(a)(1)(C)(iii) of the Act,<sup>11</sup> Congress found that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Section 11(b) of the Act,<sup>12</sup> among other things, prohibits a specialist or Exchange official from disclosing information with respect to orders that is not available to all members of the Exchange to any person other than an official of the Exchange, a representative of the Commission, or a specialist who may be acting for such specialist.

Presently, Amex Rule 174 prohibits specialists from disclosing Book information to other exchange members who are probing the market, unless the market probe is made at or near the prevailing quote. The proposed rule change would liberalize the specialist disclosure provisions by permitting specialists, while acting in a market maker capacity and in response to a market probe by a member, to give information concerning buying and selling interest or orders the specialist holds on the Book in a stock. All market participants, including individual investors and issuers, will be able to obtain the Book information through a member's probe. The Commission believes that this provision should promote the objectives of Sections 6(b)(5) and 11A of the Act<sup>13</sup> by increasing price transparency, broadening the public dissemination of market information, and enhancing the ability of investors to develop strategies and make informed investment decisions. Moreover, because the proposed amendments to Amex Rule 174 will make Book information available to all member organizations on a non-exclusive basis and requires a specialist to disclose information in a

<sup>4</sup> A stop order to buy (sell) becomes a market order when a transaction in the security occurs at or above (below) the stop price after the order is represented in the Trading Crowd. A stop limit order to buy (sell) becomes a limit order executable at the limit price or better when a transaction occurs at or above (below) the stop price after the order is represented. See Amex Rule 131(q) and (r), respectively.

<sup>5</sup> A percentage order is a limited price order to buy or sell 50% of the volume of a specified stock after its entry. A percentage order is "elected" and becomes capable of execution under circumstances set forth in Amex Rule 131.

<sup>6</sup> In approving this rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>9</sup> 15 U.S.C. 78k(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>12</sup> 15 U.S.C. 78k(b).

<sup>13</sup> 15 U.S.C. 78f(b)(5) and 15 U.S.C. 78k-1.

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

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

<sup>3</sup> Securities Exchange Act Release No. 41870 (September 13, 1999), 64 FR 51156 (September 21, 1999).