or part of its investment: (a) Gives the General Partner sufficient, but not less than one day's, notice of its intent to dispose of its investment; and (b) refrains from disposing of its investment unless the Partnership has the opportunity to dispose of the Partnership's investment prior to or concurrently with, on the same terms as, and pro rata with the Co-Investor. The term ''Co-Investor'' with respect to any Partnership means any person who is: (a) An ''affiliated person'' (as defined in section 2(a)(3) of the Act) of the Partnership (other than a Third Party Fund); (b) BFC Group; (c) an officer or director of BFC Group; or (d) an entity (other than a Third Party Fund) in which the General Partner acts as a general partner or has a similar capacity to control the sale or other disposition of the entity's securities. The restrictions contained in this condition, however, will not be deemed to limit or prevent the disposition of an investment by a Co-Investor: (a) To its direct or indirect wholly-owned subsidiary, to any company (a ''Parent'') of which the Co-Investor is a direct or indirect wholly-owned subsidiary, or to a direct or indirect wholly-owned subsidiary of its Parent; (b) to immediate family members of the Co-Investor or a trust or other investment vehicle established for any immediate family member; (c) when the investment comprises securities that are listed on any exchange registered as a national securities exchange under section 6 of the Exchange Act; (d) when the investment comprises securities that are national market system securities pursuant to section 11A(a)(2) of the Exchange Act and rule 11Aa2–1 under the Exchange Act; (e) when the investment comprises government securities as defined in section 2(a)(16) of the Act or other money market instruments; or (f) when the investment comprises securities that are listed on or traded on any foreign securities exchange or board of trade that satisfies regulatory requirements under the law of the jurisdiction in which such foreign securities exchange or board of trade is organized similar to those that apply to a national securities exchange or a national market system for securities.

4. Each Partnership and the General Partner will maintain and preserve, for the life of such Partnership and at least two years thereafter, the accounts, books, and other documents that constitute the record forming the basis for the audited financial statements that are to be provided to the Participants in the Partnership, and each annual report of such Partnership required to be sent to such Participants, and agree that these records will be subject to examination by the SEC and its Staff.[5]

5. The General Partner of each Partnership will send to each Participant in such Partnership who had an interest in any capital account of such Partnership, at any time during the fiscal year then ended, Partnership financial statements audited by the Partnership's independent accountants. At the end of each fiscal year, the General Partner will make a valuation or have a valuation made of all of the assets of the Partnership as of the fiscal year end in a manner consistent with customary practice with respect to the valuation of assets of the kind held by the Partnership. In addition, within 120 days after the end of each fiscal year of each Partnership or as soon as practicable thereafter, the General Partner of such Partnership will send a report to each person who was a Participant in the Partnership at any time during the fiscal year then ended, setting forth the tax information necessary for the preparation by the Participant of federal and state income tax returns.

6. If purchases or sales are made by a Partnership from or to an entity affiliated with the Partnership by reason of a 5% or more investment in the entity by a BFC director, officer, or employee, such individual will not participate in the Partnership's determination of whether or not to effect the purchase or sale.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–33261 Filed 12–28–00; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–24796; File No. 812–12282]

First Defined Sector Fund, et al., Notice of Application

December 21, 2000.

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

ACTION: Notice of application for an order of exemption under Section 6(c) of the Investment Company Act of 1940 (''1940 Act'') for exemptions from the provisions of 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.

Applicants: First Defined Sector Fund and First Trust Advisors, L.P.

Summary of Application: Applicants seek an order to the extent necessary to permit shares of any existing or future portfolio of First Defined Sector Fund (''Trust'') designed to fund insurance products and shares of any other investment company or series thereof now or in the future registered under the 1940 Act that is designed to fund insurance products and for which First Trust Advisors, L.P. (''First Trust''), or any of its affiliates, may serve as investment adviser, administrator, manager, principal underwriter or sponsor (''Future Trusts'') (the Trust, together with Future Trusts are referred to, collectively, as the ''Trusts''), to be sold to and held by (1) separate accounts funding variable annuity and variable life insurance contracts issued by both affiliated and unaffiliated life insurance companies; (2) qualified pension and retirement plans outside of the separate account context; (3) separate accounts that are not registered as investment companies under the 1940 Act pursuant to exemptions from registration under Section 3(c) of the 1940 Act; and (4) First Trust or any of its affiliates.

Filing Date: The application was filed on October 2, 2000, and amended and restated on December 14, 2000.

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 on this application by writing to the Secretary of the SEC and serving Applicants with a copy of the request, in person or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on January 16, 2001, and 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 your interest, the reason for the request, and the issues you contest. Persons may request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549–0609. Applicants, c/o Eric F. Fess, Esquire, Chapman and Cutler, 111 West Monroe Street, Chicago, Illinois 60603.

FOR FURTHER INFORMATION CONTACT: Ronald A. Holinsky, Senior Counsel or Lorna MacLeod, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 942–0670.

[5] Each Partnership will preserve the accounts, books and other documents required to be maintained in an easily accessible place for the first two years.

SUPPLEMENTARY INFORMATION: Following is a summary of the application. The complete application is available for a fee from the SEC's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549–0102 (tel. (202) 942–8090).

Applicants' Representations

1. The Trust is a Massachusetts business trust registered as an open-end management investment company under the 1940 Act. The Trust currently consists of nine separate portfolios.

2. First Trust is registered as an investment adviser under the Investment Advisers Act of 1940 and serves as the investment adviser to the Trust.

3. The Trusts intend to offer its shares representing interests in each fund, and any other portfolio established by the Trusts, to separate accounts of both affiliated and unaffiliated insurance companies to serve as the investment vehicle for variable annuity and variable life insurance contracts (collectively referred to as ''Variable Contracts''). The insurance companies that elect to purchase shares of one or more portfolio are collectively referred to as ''Participating Insurance Companies.''

4. The Trusts also intend to offer shares representing interests in their portfolios directly to qualified pension and retirement plans (''Plans'') outside the separate account context. Shares of the portfolios sold to Plans will be held by the trustees of Plans as required by Section 403(a) of the Employee Retirement Income Security Act of 1974, as amended (''ERISA'').

5. The Participating Insurance Companies will establish their own separate accounts. Each Participating Insurance Company will enter into a fund participation agreement with the portfolios on behalf of its Participating Separate Account and will have the legal obligation of satisfying all requirements under state and federal law. The role of the Trusts, so far as the federal securities laws are applicable, will be to offer their shares to separate accounts of Participating Insurance Companies and to Plans and to fulfill any conditions that the Commission may impose upon granting the order requested in the application.

6. Plans may choose the Fund (or any series thereof) as their sole investment or as one of several investments. Plan participants may or may not be given an investment choice depending on the Plan itself. Shares of the portfolios sold to Plans would be held by the trustee(s) of the Plans as mandated by Section 403(a) of ERISA.

7. Shares of the portfolios also may be offered and sold to a portfolio's investment adviser or an affiliate pursuant to Treasury Regulation 1.817–5(f)(3)(ii).

8. Applicants state that the Treasury Department Regulations permit such sales as long as the return on shares held by the adviser or such an affiliate is computed in the same manner as for shares held by a separate account, the adviser or such affiliate does not intend to sell shares of the portfolios held by it to the public, and the adviser or such affiliate holds such shares only in connection with the creation or management of a portfolio.

Applicants' Legal Analysis

1. Applicants request that the Commission issue an order under Section 6(c) of the 1940 Act granting exemptive 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, to the extent necessary to permit shares of the portfolios to be offered and sold to variable annuity and variable life insurance separate accounts of both affiliated and unaffiliated insurance companies, Plans, and First Trust and its affiliates.

2. Section 6(c) of the 1940 Act provides, in part, that the Commission, by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of the 1940 Act, or the rules or regulations 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.

3. 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) 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 the management investment company underlying the separate account (''underlying fund'') offers its shares ''exclusively to variable life insurance separate accounts of the life insurer or any affiliated life insurance company . . .'' 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 an underlying fund that also offers its shares to a variable annuity or flexible premium variable life insurance separate account of the same company or of any affiliated life insurance company. The use of a common management investment company as the underlying investment medium for both variable annuity and variable life insurance separate accounts 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 shares of the underlying management investment company are offered to variable annuity or variable life insurance separate accounts of unaffiliated life insurance companies. The use of a common management investment company as the underlying investment medium for both variable annuity and variable life insurance separate accounts of the same insurance company or of any unaffiliated life insurance company is referred to herein as ''shared funding.''

4. In connection with the funding of flexible premium variable life insurance contracts issued through a separate account, Rule 6e–3(T)(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act. The exemptions granted by Rule 6e–3(T)(b)(15) are available, however, only where the separate account's underlying fund offers its 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, or which offer their shares to any such life insurance company in consideration solely for advances made by the life insurer in connection with the operation of the separate account. . . .'' Therefore, Rule 6e–3(T)(b)(15) permits mixed funding with respect to a flexible premium variable life insurance separate account. However, Rule 6e–3(T)(b)(15) does not permit shared funding because the relief granted by Rule 6e–3(T)(b)(15) is not available with respect to a flexible premium variable life insurance separate account that owns shares of a management investment company that also offers its shares to separate accounts (including flexible premium variable life insurance separate accounts) of unaffiliated life insurance companies.

5. Applicants state that the current tax law permits the Fund to increase its asset base through the sale of shares to Plans. Section 817(h) of the Code imposes certain diversification standards on the underlying assets of

the variable contracts. The Code provides that such contracts shall not be treated as an annuity contract or life insurance contract for any period during which the investments are not adequately diversified in accordance with regulations prescribed by the Treasury Department. 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 regulations do contain certain exceptions to this requirement, however, one of which permits shares of an investment company to be held by the trustee 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 variable contracts (Treas. Reg. 1.8 17–5(f)(3)(iii)).

6. Applicants state that the promulgation of Rules 6e–2(b)(15) and 6e–3(T)(b)(15) preceded the issuance of these Treasury regulations which made it possible for shares of a portfolio to be held by the trustee of a Plan without adversely affecting the ability of shares of the Fund to also be held by the separate accounts of insurance companies in connection with their variable life insurance contracts. Thus, Applicants assert that the sales of shares of a portfolio to separate accounts through which variable life insurance contracts are issued 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.

7. Section 9(a)(3) of the 1940 Act provides that it is unlawful for any company to act as investment adviser to, or principal underwriter for, any registered open-end investment company if an affiliated person of that company is subject to a disqualification enumerated in Sections 9(a)(1) or (2). 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 the limitations on mixed and shared funding. These exemptions limit the application of eligibility restrictions to affiliated individuals or companies that directly participate in the management of the underlying management investment company.

8. Applicants state that the relief provided by Rules 6e–2(b)(15) and 6e–3(T)(b)(15) permits the life insurer to serve as the underlying fund's investment adviser or principal underwriter, provided that none of the insurer's personnel who are ineligible pursuant to Section 9(a) are participating in the management or administration of the fund. Applicants state that the partial relief from Section 9(a) provided by Rules 6e–2(b)(15) and 6e–3(T)(b)(15), 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 assert that it is not necessary for the protection of investors or the purposes fairly intended by the policy and provisions of the 1940 Act to apply the provisions of Section 9(a) to the many individuals in an insurance company complex, most of whom typically will have no involvement in matters pertaining to investment companies funding the separate accounts. Applicants assert that it also is unnecessary to apply the restrictions of Section 9(a) to the many individuals in various unaffiliated insurance companies (or affiliated companies of participating insurance companies) that may utilize the Funds as a funding medium for variable contracts. Moreover, Applicants state that the appropriateness of the relief requested will not be affected by the proposed sale of shares of the Fund to Plans, because the insulation of the Fund from those individuals who are disqualified under the 1940 Act remains in place.

9. Applicants state that Rules 6e–2(b)(15)(iii) and 6e–3 [T] (b)(15) iii under the 1940 Act provide exemptions from the pass-through voting requirements with respect to several significant matters, assuming the limitations on mixed and shared funding are observed.

10. Applicants further represent that the sale of portfolio shares to Plans should not affect the relief requested. With respect to Plans, there is no requirement to pass-through voting rights to Plan participants. Shares of the portfolios sold to Plans would be held by the trustees of such Plans as mandated by Section 403(a) of ERISA. Section 403(a) also provides that the trustees must have exclusive authority and discretion to manage and control the Plan with two exceptions: (a) When the Plan expressly provides that the trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees 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 exceptions stated in Section 403(a) applies, the Plan trustees have exclusive authority and responsibility for voting proxies.

11. Applicants state that where a named fiduciary 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. Accordingly, applicants submit that unlike the case with insurance company separate accounts, the issue of the resolution of material irreconcilable conflicts with respect to voting is not present with respect to Plans since such Plans are not entitled to pass-through voting privileges.

12. Applicants generally expect many Plans to have their trustee(s) or other fiduciaries exercise voting rights attributable to investment securities held by the Plan in their discretion. Some of the Plans, however, may provide for the trustee(s), or investment adviser(s) or another named fiduciary to exercise voting rights in accordance with instructions from participants. Applicants submit that where a Plan does not provide participants with the right to give voting instructions, there is no potential for material irreconcilable conflicts of interest between or among contract owners and Plan investors with respect to voting of the Fund's shares. Applicants further submit that where a Plan does provide participants with the right to give voting instruction, they see 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 Fund by Plans that provide voting rights does not present any complications not otherwise occasioned by mixed and shared funding.

13. Applicants submit that even if a Plan were to hold a controlling interest in the Fund, such control would not disadvantage other investors in the Fund to any greater extent than is the case when any institutional shareholder holds a majority of the voting securities of any open-end management investment company. In this regard applicants submit that investment in the Fund by a Plan will not create any of the voting complications occasioned by mixed and shared funding. Unlike mixed or shared funding, Plan investor voting rights cannot be frustrated by veto rights of insurers of state regulators.

14. Applicants state that no increased conflicts of interest would be presented by the granting of the requested relief. 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 states. Applicants note that where different Participating Insurance Companies are domiciled in different states, it is possible that the state insurance regulatory body in a state in which one Participating Insurance company is domiciled could require action that is inconsistent with the requirements of other insurance regulators in one or more other states in which other Participating Insurance Companies are domiciled. Applicants submit that this possibility is no different or greater than exists where a single insurer and its affiliates offer their insurance products in several states.

15. Applicants further submit that affiliation does not reduce the potential for differences in state regulatory requirements. In any event, the conditions discussed below are designed to safeguard against any adverse effects that these differences may produce. If a particular state insurance regulator's decision conflicts with the majority of other state regulators, the affected insurer may be required to withdraw its Participating Separate Account's investment in the Fund.

16. Applicants also argue that affiliation does not eliminate the potential, if any exists, for divergent judgments as to when a Participating Insurance Company could disregard contract owner voting instructions. Potential disagreement is limited by the requirement that disregarding voting instructions be both reasonable and based on specified good faith determinations. However, if a Participating Insurance Company's decision to disregard Contract owner voting instructions represents a minority position or would preclude a majority vote approving a particular change, such Participating Insurance Company may be required, at the election of the Fund, to withdraw its separate account, investment in the Fund. No change or penalty will be imposed as a result of such a withdrawal.

17. Applicants submit that there is no reason why the investment policies of the Fund with mixed funding would, or should, be materially different from what those policies would, or should, be if the Fund supported only variable annuity or only variable life insurance contracts. Hence, Applicants state, there is no reason to believe that conflicts of interest would result from mixed funding. Moreover, Applicants represent that the Fund will not be managed to favor or disfavor any particular insurer or type of contract.

18. As noted above, Section 817(h) of the Code imposes certain diversification standards on the assets underlying the variable contracts held in the portfolios of management investment companies. Treasury Regulation Section 1.817–5(f)(3)(iii), which establishes diversification requirements for such portfolios, specifically permits, among other things, ''qualified pension or retirement plans'' and separate accounts to share the same underlying management investment company. Therefore, Applicants assert that neither the Code, the Treasury regulations, nor the revenue rulings thereunder, recognize or proscribe any inherent conflicts of interest if qualified plans, variable annuity separate accounts, and variable life separate accounts all invest in the same management investment company.

19. Applicants note that while there are differences in the manner in which distributions from variable contracts and Plans are taxed, the tax consequences do not raise any conflicts of interest. When distributions are to be made, and the Participating Separate Account or a Plan cannot net purchase payments to make the distributions, the Participating Separate Account or Plan will redeem shares of the Fund at their net asset value in conformity with Rule 22c–1 under the 1940 Act to provide proceeds to meet distribution needs. The Plan will then make distributions in accordance with the terms of the Plan. The life insurance company will surrender values from the Separate Account into the general account to make distributions in accordance with the terms of the variable contract.

20. Applicants state that the sale of shares to Plans should not increase the potential for material irreconcilable conflicts of interest between or among different types of investors. Applicants submit that there should be very little potential for such conflicts beyond that which would otherwise exist between variable annuity and variable life insurance contract owners.

21. Applicants also state that it is possible to provide an equitable means of giving voting rights to separate account contract owners and to Plans. The transfer agent for the Trusts will inform each Participating Insurance company of each Participating Separate Account's share ownership in the Trusts, as well as inform the trustees of Plans of their holdings. The Participating Insurance company then will solicit voting instructions in accordance with Rules 6e–2 and 6e–3(T), as applicable, and its participation agreement with the Trusts. Shares held by Plans will be voted in accordance with applicable law. The voting rights provided to Plans with respect to shares of the Trusts would be no different from the voting rights that are provided to Plans with respect to shares of funds sold to the general public.

22. Applicants submit that the ability of the Trusts to sell its shares directly to Plans does not create a ''senior security,'' as such term is defined under Section 12(g) of the 1940 Act, with respect to any contract owner as opposed to a Plans participant. Regardless of the rights and benefits of Plan participants or contract owners, the Plans and the separate accounts only have rights with respect to their respective shares of the Trusts. No shareholder of the Trusts has any preference over any other shareholder with respect to distribution of assets or payments of dividends.

23. Applicants state that there are no conflicts between the contract owners of Participating Separate Accounts and Plan participants with respect to the state insurance commissioners' veto powers over investment objectives. The basic premise of shareholder voting is that shareholders may not all agree with a particular proposal. While interests and opinions of shareholders may differ, however, this does not mean that there are any inherent conflicts of interest between or among such shareholders. 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 in another. Generally, complex and time-consuming transactions must be undertaken to accomplish such redemptions and transfers. Conversely, trustees of Plans can make the decision quickly and redeem their shares of the Trusts 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 a suitable investment. Based on the foregoing, applicants represent that even should the interests of contract owners and the interests of Plans conflict, the conflicts can be resolved almost immediately because the trustees of the Plans can, independently, redeem shares out of the Trusts.

24. Applicants also assert that there does not appear to be any greater potential for material irreconcilable conflicts arising between the interests of Plan participants and contract owners of Participating Insurance Companies from possible future changes in the federal tax laws than that which already exists

between variable annuity and variable life insurance contract owners.

25. Applicants believe that the summary of the discussion contained herein demonstrates that the sale of shares of the Trusts to qualified plans and variable contracts does not increase the risk of material irreconcilable conflicts of interest. Furthermore, Applicants state that the use of the Trusts with respect to Plans is not substantially different from the Trusts' current use, in that Plans, like variable contracts, are generally long-term retirement vehicles. In addition, applicants assert that regardless of the type of shareholder in the Trusts, First Trust is or would be contractually or otherwise obligated to manage the Trusts solely and exclusively in accordance with the portfolio's investment objectives, policies and restrictions as well as any guidelines established by a portfolio's Board of Trustees.

26. Applicants assert that various factors have prevented more insurance companies from offering variable annuity and variable life insurance contracts than currently do so. These factors include the costs of organizing and operating a funding medium, the lack of expertise with respect to investment management, and the lack of public name recognition as investment professionals. 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. Applicants assert that use of the Trusts as a common investment medium for variable contracts would ameliorate these concerns. Participating Insurance Companies would benefit not only from the investment advisory and administrative expertise of First Trust and its affiliates, but also from the cost efficiencies and investment flexibility afforded by a large pool of funds. Applicants submit that therefore, making the Trusts available for mixed and shared funding will encourage more insurance companies to offer variable contracts. Applicants claim that this 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. Moreover, the sale of the shares of the portfolios to Plans should further increase the amount of assets available for investment by the fund. This in turn, should inure to the benefit of contract owners by promoting economies of scale, by permitting greater safety through greater diversification, and by making the addition of new portfolios more feasible.

27. Applicants assert that there is no significant legal impediment to permitting mixed and shared funding and sales of shares to Plans.

Applicant's conditions

Applicant consents to the following conditions if the application is granted:

1. A majority of the Board of Trustees or Board of Directors (''Board'') of each Trust will consist of persons who are not ''interested persons'' of such Trust, 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 trustee or director, then 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 Board; (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 rule or order upon application.

2. Each Board will monitor its respective Trust for the existence of any material irreconcilable conflict among the interests of the contract owners of all separate accounts, participants of all Plans, and First Trust or any of its affiliates investing in such Trust and determine what action, if any, should 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 interpretative 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 such Trust are being managed; (e) a difference in voting instructions given by variable annuity contract owners and variable life insurance contract owners, and trustees of Plans; (f) a decision by a Participating Insurance Company to disregard the voting instructions of contract owners; or (g) if applicable, a decision by a Plan to disregard voting instructions of Plan participants.

3. Participating Insurance Companies, First Trust or an affiliate, and any Plan that executes a participation agreement upon becoming an owner of 10% or more of the assets of any portfolio (collectively, ''Participants'') will report any potential or existing conflicts to the relevant Board. Participants will be responsible for assisting the relevant Board in carrying out the Board's responsibilities under these conditions by providing the Board with all information reasonably necessary for the Board to consider any issues raised. This includes, but is not limited to, an obligation by each Participating Insurance Company to inform the relevant Board whenever contract owner voting instructions are disregarded, and, if pass-through voting is applicable, an obligation of each 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 a contractual obligation of all Participating Insurance Companies under their participation agreements with the Trusts, and 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, also will be contractual obligations of all Plans with participation agreements, and such agreements shall provide that these 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, or a majority of its disinterested trustees or directors of such Board, that a material irreconcilable conflict exists, then the Participant will, at its own expense and to the extent reasonably practicable (as determined by a majority of the disinterested trustees or directors), take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict, up to and including: (a) withdrawing the assets allocable to some or all of the separate accounts from the relevant portfolio and reinvesting such assets in a different investment, including another portfolio of the Trusts, or in the case of insurance company participants 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.,* annuity contract owners or 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; and (b) 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 election of the relevant Trust, to withdraw such insurer's separate account's investment in the such Trust, and no charge or penalty will be imposed as a result of such withdrawal. If a material irreconcilable conflict arises because of a 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 Plan may be required, at the election of the relevant Trust, to withdraw its investment in such Trust, and no charge or penalty will be imposed as a result of such withdrawal. To the extent permitted by applicable law, the responsibility to take remedial action in the event of a Board determination of a material irreconcilable conflict and bear the cost of such remedial action shall be a contractual obligation of all Participating Insurance Companies and Plans under their agreements governing participation in the Fund and these responsibilities will be carried out with a view only to the interests of the contract owners and Plan participants, as appropriate.

For purposes of Condition 4, a majority of the disinterested members of a Board will determine whether or not any proposed action adequately remedies any material irreconcilable conflict, but, in no event will any Trust, First Trust, or First Trust's affiliates, as relevant, be required to establish a new funding medium for any variable contract. No Participating Insurance Company will be required by Condition 4 to establish a new funding medium for any variable contract if an offer to do so has been declined by a vote of the majority of contract owners materially and adversely affected by the material irreconcilable conflict. Further, no Plan will be required by Condition 4 to establish a new funding medium for such Plan if: (a) A majority of the Plan participants materially and adversely affected by the irreconcilable material conflict vote to decline such offer or (b) pursuant to documents governing the Plan and applicable law, the Plan makes such decision without a Plan participant vote.

5. Participants will be informed promptly in writing of the Board's determination of the existence of a material irreconcilable conflict and its implications.

6. Participating Insurance Companies will be required to provide pass-through voting privileges to all contract owners so long as the Commission interprets the 1940 Act to require pass-through voting privileges for contract owners. Accordingly, the Participating Insurance Companies will vote shares of the applicable portfolios held in their separate accounts in a manner consistent with voting instructions timely received from contract owners. Participating Insurance Companies shall be responsible for assuring that each of their separate accounts calculates voting privileges in a manner consistent with all other participating Insurance Companies. The obligation to calculate voting privileges in a manner consistent with all other separate accounts investing in the portfolio will be a contractual obligation of all participating Insurance Companies under the agreements governing participation in a portfolio. Each Participating Insurance Company will be required to vote shares for which it has not received voting instructions as well as shares attributable to it in the same proportion as it votes shares for which it has received instructions. Each Plan will vote as required by applicable law and governing Plan documents.

7. As long as the 1940 Act requires pass-through voting privileges to be provided to variable contract owners, First Trust or any of its affiliates will vote its shares of any portfolio in the same proportion of all variable contract owners having voting rights with respect to the portfolio; provided, however, that First Trust or any of its affiliates shall vote its shares in such other manner as may be required by the Commission or its staff.

8. Each Trust will comply with all provisions of the 1940 Act requiring voting by shareholders (which, for these purposes, shall be the persons having a voting interest in the shares of the respective portfolio). In particular, each Trust will either provide for annual meetings (except to the extent that 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 Trusts are not one of the trusts described in Section 16(c) of the Act), as well as with Section 16(a) and, if and when applicable, Section 16(b) of the 1940 Act. Further, each Trust will act in accordance with the Commission's interpretation of the requirements of Section 16(a) with respect to periodic elections of trustees and with whatever rules the Commission may promulgate with respect thereto.

9. The Trusts will notify all Participants that separate account prospectuses or Plan prospectuses or other Plan document disclosure regarding potential risks of mixed and shared funding may be appropriate. Each Trust will disclose in its prospectus that: (a) Shares of such Trust may be offered to insurance company separate accounts of both annuity and life insurance contracts and, if applicable, to Plans; (b) due to differences in tax treatment and other considerations, the interests of various contract owners participating in each Trust and the interest of Plans investing in each Trust, if applicable, may conflict; and (c) the Board will monitor events in order to identify the existence of any material conflicts and determine what action, if any, should be taken in response to any such conflict.

10. If and to the extent Rule 6e–2 and Rule 6e–3(T) under the 1940 Act are 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 by Applicants, then the Trust and/or Participating Insurance Companies as appropriate, shall take steps as may be necessary to comply with Rules 6e–2 or 6e–3(T), as amended, or Rule 6e–3, as adopted, as such rules are applicable.

11. The Participants, at least annually, will submit to the Board of each Trust such reports, materials or data as the Board reasonably may request so that the trustees of the Board may fully carry out the obligations imposed upon a Board by the conditions contained in this Application. Such reports, materials and data will be submitted more frequently if deemed appropriate by a Board. The obligations of the Participants to provide these reports, materials, and data to the Board, when it so reasonably requests, will be a contractual obligation of all Participants under their agreements governing participation in the portfolios.

12. All reports of potential or existing conflicts of interest received by a Board, and all Board action with regard to determining the existence of a conflict, notifying Participants of a conflict, and determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the relevant Board or other appropriate records, and such minutes or other records shall be made available to the Commission upon request.

13. The Trust will not accept a purchase order from a Plan if such purchase would make the Plan participant shareholder an owner of 10% or more of the assets of such

portfolio unless such Plan executes an agreement with the relevant Trust governing participation in such portfolio that includes the conditions set forth to the extent applicable. A Plan or Plan participant will execute an application containing an acknowledgment of this condition at the time of its initial purchase of shares of any portfolio.

14. Any shares of a portfolio purchased by First Trust or its affiliates will be automatically redeemed if and when First Trust's advisory agreement terminates, to the extent required by applicable Treasury regulations. Neither First Trust nor its affiliates will sell such shares of the portfolios to the public.

Conclusion

For the reasons stated above, Applicants believe that the requested exemptions, in accordance with the standards of Section 6(c) of the 1940 Act, 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. 00–33262 Filed 12–28–00 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–24794; File No. 812–12124]

Market Street Fund, Inc., et al.; Notice of Application

December 21, 2000.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an order of exemption pursuant to Section 17(b) of the Investment Company Act of 1940 (the ''Act'') from Section 17(a) of Act.

Applicants: Market Street Fund, Inc. (the ''Fund''), Market Street Fund (the ''Trust''), Provident Mutual Life Insurance Company (''PMLIC''), Market Street Investment Management Company (''MSIM''), and Providentmutual Life and Annuity Company of America (''PLACA'').

Summary of Application: Applicants seek an order exempting certain transactions from the provisions of Section 17(a) of the Act to the extent necessary to permit the reorganization of the Fund, a Maryland corporation, into a Delaware business trust. At the conclusion of the transactions, the assets and liabilities currently held in the Money Market, Equity 500 Index, Growth, Bond, Managed, Aggressive Growth, International, All Pro Large Cap Growth, All Pro Small Cap Growth, All Pro Large Cap Value, and All Pro Small Cap Value Portfolios (collectively, the ''Fund Portfolios'') of the Fund will be held by the corresponding portfolios of the Trust (collectively, the ''Trust Portfolios'') which previously will have had no operations. Because of certain affiliations, Applicants may not rely on Rule 17a–8 under the Act.

Filing Dates: The application was filed on May 19, 2000, and amended and restated on December 20, 2000.

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 January 16, 2001, and should be accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. For the Applicants: James A Bernstein, Esq., Market Street Fund Inc., Market Street Trust, 103 Bellevue Parkway, Wilmington, Delaware 19809; Provident Mutual Life Insurance Company, Market Street Investment Management Company, 1000 Chesterbrook Boulevard, Berwyn, Pennsylvania 19312–1181; Michael Berenson, Esq., Jorden Burt Boros Cicchetti Berenson & Johnson LLP, 1025 Thomas Jefferson Street, NW., Suite 400 East, Washington, DC 20007–0805; Providentmutual Life and Annuity Company of America, 300 Continental Drive, Newark, Delaware 19713–4399.

FOR FURTHER INFORMATION CONTACT: Keith A. O'Connell, Senior Counsel, or Lorna J. MacLeod, 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 may be obtained for a fee from the Public Reference Branch of the Commission, 450 5th Street, NW., Washington, DC 20549 (tel. (202) 942–8090).

Applicant's Representations

1. The Fund, a Maryland corporation incorporated on March 21, 1985, is an open-end, management investment company registered under the Act. Eleven of the twelve portfolios will participate in the reorganization: the Money Market, Equity 500 Index, Growth, Bond, Managed, Aggressive Growth, International, All Pro Large Cap Growth, All Pro Small Cap Growth, All Pro Large Cap Value, and All Pro Small Cap Value Portfolios (each, a ''Portfolio''). The Fund receives investment advisory services from Sentinel Advisors Company (''SAC'')[1] for the Money Market, Bond, Growth, Managed, and Aggressive Growth Portfolios and from Market Street Investment Management Company (''MSIM'') for the Equity 500 Index, International, All Pro Large Cap Growth, All Pro Small Cap Growth, All Pro Large Cap Value, and All Pro Small Cap Value Portfolios. MSIM retains various sub-advisers that are responsible for the day-to-day decision making for the portfolios for which it serves as investment adviser.

2. The Trust, a Delaware business trust, was created on October 30, 2000. On or about January 26, 2001, the Trust will adopt the Fund's registration statement under the Act as an open-end management investment company. The Trust will offer 11 investment portfolios corresponding to the various portfolios of the Fund, excluding the Sentinel Growth Portfolio. The Trust will receive investment advisory services from MSIM for all of the Trust Portfolios. Each of the Trust Portfolios into which the Fund Portfolios will be merged has the same investment objective as the corresponding Fund Portfolios. In addition to the reorganization, shareholders of the Fund Portfolios are being asked to approve by proxy (1) A proposal to change the investment approaches of and rename certain Portfolios and to change the investment objective of the Growth Portfolio, (2) a proposal for a new investment advisory agreement between the Fund and MSIM for all of its Portfolios, and (3) a proposal to permit MSIM to enter and materially amend subadvisory agreements for certain Portfolios without shareholder approval.

[1] SAC is registered as an investment adviser under the Investment Advisers Act of 1940 and is a Vermont general partnership indirectly wholly owned by PMLIC, National Life Insurance Company and Penn Mutual Life Insurance Company.