(1) If the securities (or portions thereof) involved are variable annuity contracts, then

(i) The exchange must be made on the basis of the relative net asset values of the securities to be exchanged, except that the offering account may deduct at the time of the exchange

(A) An administrative fee which is disclosed in the part of the offering account's registration statement under the Securities Act of 1933 relating to the prospectus, and

(B) Any front-end sales load permitted by paragraph (c) of this section, and

(ii) Any deferred sales load imposed on the acquired security by the offering account shall be calculated in the manner prescribed by paragraph (d) or (e) of this section; or

(2) If the securities (or portions thereof) involved are variable life insurance contracts offered by a separate account registered under the Act as a unit investment trust, then the exchange must be made on the basis of the relative net asset values of the securities to be exchanged, except that the offering account may deduct at the time of the exchange an administrative fee which is disclosed in the part of the offering account's registration statement under the Securities Act of 1933 relating to the prospectus.

(c) If the offering account imposes a front-end sales load on the acquired security, then such sales load

(1) Shall be a percentage that is no greater than the excess of the rate of the front-end sales load otherwise applicable to that security over the rate of any front-end sales load previously paid on the exchanged security, and

(2) Shall not exceed 9 percent of the sum of the purchase payments made for the acquired security and the exchanged security.

(d) If the offering account imposes a deferred sales load on the acquired security and the exchanged security was also subject to a deferred sales load, then any deferred sales load imposed on the acquired security:

(1) Shall be calulated as if

(i) The holder of the acquired security had been the holder of that security from the date on which he became the holder of the exchanged security and

(ii) Purchase payments made for the exchanged security had been made for the acquired security on the date on which they were made for the exchanged security; and

(2) Shall not exceed 9 percent of the sum of the purchase payments made for the acquired security and the exchanged security.

(e) If the offering account imposes a deferred sales load on the acquired security and a front-end sales load was paid on the exchanged security, then any deferred sales load imposed on the acquired security may not be imposed on purchase payments made for the exchanged security or any appreciation attributable to purchase payments made for the exchanged security that are transferred in connection with the exchange.

(f) Notwithstanding the foregoing, no offer of exchange shall be made in reliance on this section if both a front-end sales load and a deferred sales load are to be imposed on the acquired security or if both such sales loads are imposed on the exchanged security.

(Sec. 11(a) (15 U.S.C. 80a–11(a)) and sec. 38(a) (15 U.S.C. 80a–37(a)) of the Act)

[48 FR 36245, Aug. 10, 1983]

§ 270.11a–3 Offers of exchange by open-end investment companies other than separate accounts.

(a) For purposes of this rule:

(1) *Acquired security* means the security held by a securityholder after completing an exchange pursuant to an exchange offer;

(2) *Administrative fee* means any fee, other than a sales load, deferred sales load or redemption fee, that is

(i) Reasonably intended to cover the costs incurred in processing exchanges of the type for which the fee is charged, *Provided that:* the offering company will maintain and preserve records of any determination of the costs incurred in connection with exchanges for a period of not less than six years, the first two years in an easily accessible place. The records preserved under this provision shall be subject to inspection by the Commission in accordance with section 31(b) of the Act (15 U.S.C. 80a–30(b)) as if such records

were records required to be maintained under rules adopted under section 31(a) of the Act (15 U.S.C. 80a–30a)); or

(ii) A nominal fee as defined in paragraph (a)(8) of this section;

(3) *Deferred sales load* means any amount properly chargeable to sales or promotional expenses that is paid by a shareholder after purchase but before or upon redemption;

(4) *Exchanged security* means

(i) The security actually exchanged pursuant to an exchange offer, and

(ii) Any security previously exchanged for such security or for any of its predecessors;

(5) *Group of investment companies* means any two or more registered open-end investment companies that hold themselves out to investors as related companies for purposes of investment and investor services, and

(i) That have a common investment adviser or principal underwriter, or

(ii) The investment adviser or principal underwriter of one of the companies is an affiliated person as defined in section 2(a)(3) of the Act (15 U.S.C. 80a–2(a)(3)) of the investment adviser or principal underwriter of each of the other companies;

(6) *Offering company* means a registered open-end investment company (other than a registered separate account) or any principal underwriter thereof that makes an offer (an ''exchange offer'') to the holder of a security of that company, or of another open-end investment company within the same group of investment companies as the offering company, to exchange that security for a security of the offering company;

(7) *Redemption fee* means any fee (other than a sales load, deferred sales load or administrative fee) that is paid to the fund and is reasonably intended to compensate the fund for expenses directly related to the redemption of fund shares; and

(8) *Nominal fee* means a slight or *de minimis* fee.

(b) Nothwithstanding section 11(a) of the Act (15 U.S.C. 80a–11(a)), and except as provided in paragraphs (d) and (e) of this section, in connection with an exchange offer an offering company may cause a securityholder to be charged a sales load on the acquired security, a redemption fee, an administrative fee, or any combination of the foregoing, *Provided that:*

(1) Any administrative fee or scheduled variation thereof is applied uniformly to all securityholders of the class specified;

(2) Any redemption fee charged with respect to the exchanged security or any scheduled variation thereof

(i) Is applied uniformly to all securityholders of the class specified, and

(ii) Does not exceed the redemption fee applicable to a redemption of the exchanged security in the absence of an exchange.

Any scheduled variation of a redemption fee must be reasonably related to the costs to the fund of processing the type of redemptions for which the fee is charged;

(3) No deferred sales load is imposed on the exchanged security at the time of an exchange;

(4) Any sales load charged with respect to the acquired security is a percentage that is no greater than the excess, if any, of the rate of the sales load applicable to that security in the absence of an exchange over the sum of the rates of all sales loads previously paid on the exchanged security, *Provided that:*

(i) The percentage rate of any sales load charged when the acquired security is redeemed, that is solely the result of a deferred sales load imposed on the exchanged security, may be no greater than the excess, if any, of the applicable rate of such sales load, calculated in accordance with paragraph (b)(5) of this section, over the sum of the rates of all sales loads previously paid on the acquired security, and

(ii) In no event may the sum of the rates of all sales loads imposed prior to and at the time the acquired security is redeemed, including any sales load paid or to be paid with respect to the exchanged security, exceed the maximum sales load rate, calculated in accordance with paragraph (b)(5) of this section, that would be applicable in the absence of an exchange to the security (exchanged or acquired) with the highest such rate;

(5) Any deferred sales load charged at the time the acquired security is redeemed is calculated as if the holder of the acquired security had held that security from the date on which he became the holder of the exchanged security, *Provided that:*

(i) The time period during which the acquired security is held need not be included when the amount of the deferred sales load is calculated, if the deferred sales load is

(A) reduced by the amount of any fees collected on the acquired security under the terms of any plan of distribution adopted in accordance with rule 12b–1 under the Act (17 CFR 270.12b–1) (a ''12b–1 plan''), and

(B) Solely the result of a sales load imposed on the exchanged security, and no other sales loads, including deferred sales loads, are imposed with respect to the acquired security,

(ii) The time period during which the exchanged security is held need not be included when the amount of the deferred sales load on the acquired security is calculated, if

(A) The deferred sales load is reduced by the amount of any fees previously collected on the exchanged security under the terms of any 12b–1 plan, and

(B) The exchanged security was not subject to any sales load, and

(iii) The holding periods in this subsection may be computed as of the end of the calendar month in which a security was purchased or redeemed;

(6) The prospectus of the offering company discloses

(i) The amount of any administrative or redemption fee imposed on an exchange transaction for its securities, as well as the amount of any administrative or redemption fee imposed on its securityholders to acquire the securities of other investment companies in an exchange transaction, and

(ii) If the offering company reserves the right to change the terms of or terminate an exchange offer, that the exchange offer is subject to termination and its terms are subject to change;

(7) Any sales literature or advertising that mentions the existence of the exchange offer also discloses

(i) The existence of any administrative fee or redemption fee that would be imposed at the time of an exchange; and

(ii) If the offering company reserves the right to change the terms of or terminate the exchange offer, that the exchange offer is subject to termination and its terms are subject to change;

(8) Whenever an exchange offer is to be terminated or its terms are to be amended materially, any holder of a security subject to that offer shall be given prominent notice of the impending termination or amendment at least 60 days prior to the date of termination or the effective date of the amendment, *Provided that:*

(i) No such notice need be given if the only material effect of an amendment is to reduce or eliminate an administrative fee, sales load or redemption fee payable at the time of an exchange, and

(ii) No notice need be given if, under extraordinary circumstances, either

(A) There is a suspension of the redemption of the exchanged security under section 22(e) of the Act [15 U.S.C. 80a–22(e)] and the rules and regulations thereunder, or

(B) The offering company temporarily delays or ceases the sale of the acquired security because it is unable to invest amounts effectively in accordance with applicable investment objectives, policies and restrictions; and

(9) In calculating any sales load charged with respect to the acquired security:

(i) If a securityholder exchanges less than all of his securities, the security upon which the highest sales load rate was previously paid is deemed exchanged first; and

(ii) If the exchanged security was acquired through reinvestment of dividends or capital gains distributions, that security is deemed to have been sold with a sales load rate equal to the sales load rate previously paid on the security on which the dividend was paid or distribution made.

(c) If either no sales load is imposed on the acquired security or the sales load imposed is less than the maximum allowed by paragraph (b)(4) of this section, the offering company may require the exchanging securityholder to have

held the exchanged security for a minimum period of time previously established by the offering company and applied uniformly to all securityholders of the class specified.

(d) Any offering company that has previously made an offer of exchange may continue to impose fees or sales loads permitted by an order under section 11(a) of the Act upon shares purchased before the earlier of (1) One year after the effective date of this section, or (2) When the offer has been brought into compliance with the terms of this section, and upon shares acquired through reinvestment of dividends or capital gains distributions based on such shares, until such shares are redeemed.

(e) Any offering company that has previously made an offer of exchange cannot rely on this section to amend such prior offer unless

(1) The offering company's prospectus disclosed, during at least the two year period prior to the amendment of the offer (or, if the fund is less than two years old, at all times the offer has been outstanding) that the terms of the offer were subject to change, or

(2) The only effect of such change is to reduce or eliminate an administrative fee, sales load or redemption fee payable at the time of an exchange.

[54 FR 35185, Aug. 24, 1989, as amended at 61 FR 49016, Sept. 17, 1996]

§ 270.12b–1 Distribution of shares by registered open-end management investment company.

(a)(1) Except as provided in this section, it shall be unlawful for any registered open-end management investment company (other than a company complying with the provisions of section 10(d) of the Act (15 U.S.C. 80a–10(d))) to act as a distributor of securities of which it is the issuer, except through an underwriter.

(2) For purposes of this section, such a company will be deemed to be acting as a distributor of securities of which it is the issuer, other than through an underwriter, if it engages directly or indirectly in financing any activity which is primarily intended to result in the sale of shares issued by such company, including, but not necessarily limited to, advertising, compensation of underwriters, dealers, and sales personnel, the printing and mailing of prospectuses to other than current shareholders, and the printing and mailing of sales literature.

(b) A registered, open-end management investment company (''Company'') may act as a distributor of securities of which it is the issuer: *Provided*, That any payments made by such company in connection with such distribution are made pursuant to a written plan describing all material aspects of the proposed financing of distribution and that all agreements with any person relating to implementation of the plan are in writing: *And further provided*, That:

(1) Such plan has been approved by a vote of at least a majority of the outstanding voting securities of such company, if adopted after any public offering of the company's voting securities or the sale of such securities to persons who are not affiliated persons of the company, affiliated persons of such persons, promoters of the company, or affiliated persons of such promoters;

(2) Such plan, together with any related agreements, has been approved by a vote of the board of directors of such company, and of the directors who are not interested persons of the company and have no direct or indirect financial interest in the operation of the plan or in any agreements related to the plan, cast in person at a meeting called for the purpose of voting on such plan or agreements; and

(3) Such plan or agreement provides, in substance:

(i) That it shall continue in effect for a period of more than one year from the date of its execution or adoption only so long as such continuance is specifically approved at least annually in the manner described in paragraph (b)(2) of this section;

(ii) That any person authorized to direct the disposition of monies paid or payable by such company pursuant to the plan or any related agreement shall provide to the company's board of directors, and the directors shall review, at least quarterly, a written report of the amounts so expended and the purposes for which such expenditures were made; and