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August 17, 2020

Ms. Vanessa Countryman
Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Responsive Written Statement Submitted Pursuant to the Order Granting Hearing and Scheduling Filing of Statements, *In the Matter of* Allianz Life Insurance Co. of North America, *et al.*, File No. 812-14722, Investment Company Act Release No. 33916 (July 1, 2020) (the "Order")

Dear Ms. Countryman:

Pursuant to the above-referenced Order, Franklin Advisers, Inc., Franklin Mutual Advisers, LLC and Templeton Global Advisors Limited (together, the "Advisers") hereby submit this Responsive Written Statement in opposition to the Fourth Amended and Restated Application (the "Application")[1] of Allianz Life Insurance Co. of North America, *et al*. (collectively, the "Insurer"). In the Advisers' Written Statement, we highlighted the factual deficiencies in the Application, which seeks the wholesale substitution of five Adviser Target Funds underlying variable contracts with Insurer-affiliated Destination Funds. The Advisers also noted that the purported "benefits" the Insurer cited provide little or no actual benefits to investors and pointed to the numerous unanswered questions the Application raised.

Rather than address these many shortcomings in its Application, the Insurer's Written Statement merely restates or updates information previously provided in its Application, and even cites the number of pages in its Application as evidence of adequate analysis for this sweeping substitution.[2] Notably, and as evidenced by the absence of information in the Insurer's Written

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[1] Fourth Amended and Restated Application for an Order of Approval Pursuant to Section 26(c) of the Investment Company Act of 1940 and an Order of Exemption Pursuant to Section 17(b) of the Act from Section 17(a) of the Act [hereinafter, the Application], Allianz Life Insurance Co. of North America, *et al*., File No. 812-14722 (Aug. 13, 2019), *available at* https://www.sec.gov/Archives/edgar/data/72499/000007249919000061/substappamend40oipaaug2019.htm.

[2] Insurer's Written Statement at 19-20.

Statement, the Application continues to lack data and analysis that would enable the Securities and Exchange Commission (the "Commission") to analyze the potential impact that this proposed "slate-clearing" substitution would have on contract holders. The Application lacks information in at least seven critical areas,[3] particularly as to how many contract holders will be affected, the number of contract holders already annuitizing, the availability of guarantees for each contract, and the effect on the guarantees the substitutions will have.

As there is no fiduciary looking out for contract holders in the substitution process, the Commission is the only safeguard protecting impacted investors. Therefore, it is critical that the Commission fulfill the underlying purpose of Section 26(c) of the Investment Company Act of 1940, as amended (the "1940 Act"), to ensure that full disclosure and analysis of the proposed substitutions' effect is reflected in the evidentiary record before granting an order.[4] If the Insurer claims there are benefits to contract holders resulting from the proposed substitutions, then the Insurer must support its claims with empirical data and critical analysis; the Commission cannot simply place "unquestioning reliance" on the Insurer's statements.[5] As an insurance company, the Insurer surely must have performed risk analysis on the substitutions, but it has failed to submit any such information into the record. Nothing in the Insurer's Written Statement rebuts the evidence in the Advisers' Written Statement that the Destination Funds are substantially different from the Target Funds and that the full impact on contract holders is unknown. These are all consequences Section 26(c) was intended to prevent.

In this Response, the Advisers will first emphasize why the gross disregard for investor choice found in the Application necessitates that the Advisers submit this opposition. Second, the Advisers will correct factual misstatements and mischaracterizations in the Insurer's Written Statement. Third, the Advisers discuss the Congressional history of, and the Commission's subsequent statements about, the policy and purpose of Section 26(c), which was to prevent harms such as those currently at issue in the Application. Finally, the Advisers will address the Insurer's apparent belief that simply repeating the terms and conditions of prior applications, which had substantially different facts, is all that is required to support the issuance of an order. *Susquehanna* governs the process the Commission must follow to establish the necessary evidentiary record. As no such process has been undertaken, there is no record to support any determination of the validity of those standardized terms and conditions, the appropriateness of other terms and conditions, and whether any Section 26(c) order would be "consistent with the protection of investors." Thus, there can be no order.

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[3] Advisers' Written Statement at 10-11.

[4] 15 U.S. Code § 80a–26(c). Section 26(c) permits the Commission to issue a fund substitution approval order only "if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the 1940 Act]."

[5] *See* Susquehanna Int'l Grp., LLP v. SEC, 866 F.3d 442, 447 (D.C. Cir. 2017) (stating that the Commission is required to make findings and determinations and "not merely accept those made by" the applicant or place "unquestioning reliance" on the applicant's arguments).

I. The Advisers Oppose this Application Because It Is Not "Consistent with the Protection of Investors"

The Advisers oppose this Application because the proposed substitutions would harm investors. This Application presents the first slate-clearing substitution since the Hartford Life Insurance Company ("Hartford") Hearing Request [6] in which the Advisers' standing is indisputable, as shown by, among other things, the fact that remaining shareholders in the Advisers' funds will likely lose economies of scale and pay increased total expense ratios.[7] Given that the facts in the Application are so grossly contrary to the interest of investors, and there is no other party to defend investors' interests, the Advisers feel strongly that they must challenge this request.[8]

The Hartford Hearing Request exposed the dangers of slate-clearing substitutions, as shown by submissions from affected financial advisers and contract holders.[9] The terms and conditions applicants and the Commission Staff developed in over 200 substitution orders dealt primarily with instances where there was an underlying issue in a single fund. The terms and conditions of those substitution requests have been copied and pasted into slate-clearing applications, which are substantially different in nature, and as stated in the Advisers' Written Statement, these terms and conditions leave contract holders unprotected. As these slate-clearing substitutions reach critical mass, the record of the Commission's analysis of these substitutions as a whole is blank.[10] More data is needed so the Commission knows the effects that slate-clearing substitutions will have on investors before deciding whether to issue an order. The Commission cannot simply rely on standard terms and conditions developed under single-fund substitution

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6 Hearing Request from American Funds Insurance Series, File No. 812-14446 (Dec. 30, 2016), *available at* https://www.sec.gov/comments/812-14446/81214446-1485437-130579.pdf.

7 For example, the remaining shareholders in the Templeton Growth VIP Fund are likely to pay an additional 0.03% in management fees due to the loss of assets currently receiving a breakpoint. A loss of economies of scale would result in an increase in the remaining shareholders' individual costs and the Adviser Target Funds being less competitive, which are specific and material harms that grant standing to the Advisers. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 508 (1975) (noting that the right to a hearing, and the ability to contest the denial of a hearing, extends to persons and entities, like the Advisers, that have suffered an "injury in fact" – an invasion of a legally protected interest that is concrete and particularized); and Twin Rivers Paper Company LLC v. SEC, No. 18-1213, slip op. at 12-13 (D.C. Cir. 2019) (determining that standing exists where a party with a concrete interest is either an intended beneficiary of the securities laws at issue or the interest asserted by the party systematically coincides with those of shareholders).

8 As for the other advisers advising funds subject to this substitution, all of them, save one, stand on both sides of the transaction – meaning that their funds will be replaced and added, or replaced and the adviser will be added as a subadviser to a new fund. As for the one, the assets being transferred are only approximately $50,000, which will not harm the economies of scale of its remaining shareholders.

9 *See, e.g.*, Hearing Request from Hartford Variable Annuity Contract Holders Andrea D. Calhoun and Steven J. Calhoun, File No. 812-14446 (Dec. 29, 2016), *available at* https://www.sec.gov/comments/812-14446/81214446-1485512-130580.pdf; Hearing Request from Raymond James Financial, File No. 812-14446 (Dec. 28, 2016), *available at* https://www.sec.gov/comments/812-14446/81214446-1485624-130601.pdf.

10 No hearing was held regarding the Hartford Hearing Request as the application was withdrawn. Order Permitting Withdrawal of Application, *In the Matter of* Harford Life Insurance Company, *et al.*, File No. 812-14446, Investment Company Act Release No. 32569 (March 23, 2017).

orders without analyzing the effects and harm these slate-clearing substitutions may have on contract holders.[11]

As shown below in Section III, these slate-clearings present exactly the types of investor harms Section 26(c) was designed to prevent. Further, slate-clearings arise from the commercial objectives of insurance companies and not from any necessity arising from the liquidation, closing, or other exigency in an underlying fund. Therefore, the Commission should analyze the Insurer's motivations behind the proposed substitutions, which are to increase advisory fee revenue to itself and to hedge its risk exposure less expensively. While some Destination Funds will have a subadviser, the Insurer omits the fact that the Destination Funds' primary adviser is an Insurer-affiliated entity that will earn more advisory fees after the proposed substitutions. And the Insurer does not address the fact that substituting actively-managed funds with passively-managed funds makes it easier and therefore less expensive to hedge its risks, another benefit to the Insurer's bottom line.

The Insurer attempts to strip contract holders of their investment decisions and to backdoor those benefits to itself via the Section 26(c) process. The Insurer's financial incentives demonstrate why it is vital that the Commission, as the only safeguard contract holders have, analyze this Application thoroughly and in accordance with the *Susquehanna* standard. An order should not issue unless the substitution would truly be "consistent with the protection of investors."

II. The Insurer's Written Statement Contains Numerous Factual Errors

Certain factual statements in the Insurer's Written Statement are incorrect, conclusory, or mischaracterize the facts. The Advisers will address the Insurer's statements on total operating expenses of certain Destination Funds, the availability of analysis and remaining investment options for affected contract holders, and the argument that the substitutions need not benefit contract holders in turn below.

A. The Insurer Mischaracterizes the Proposed Substitutions' Effect on Total Operating Expenses

In its Written Statement, the Insurer continues to promote the notion that contract holders investing in the Target Funds will benefit from lower fees if the substitutions are approved. What the Insurer does not emphasize, however, is that certain of these calculations rely upon temporary fee waivers that are not guaranteed past **April 30, 2021**.[12] Using this data mischaracterizes the long-term fees that contract holders are likely to pay. As shown in the Advisers' Written Statement, because investors will be moved to Destination Funds with significantly lower assets

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[11] This tectonic change in substitution applications has been noted by prior Directors of the Division of Investment Management, yet the Commission has never explicitly addressed the issue and its effect on contract holders. *See, e.g.*, P. Roye, *"Understanding the Securities Products of Insurance Companies,"* New York, N.Y. (Jan. 10, 2002) *available at* https://www.sec.gov/news/speech/spch533.htm (noting the change in applications being filed).

[12] *See* Destination Funds' Registration Statement on Form N-1A, Allianz Variable Insurance Products Trust (filed April 27, 2020), *available at* https://www.sec.gov/Archives/edgar/data/1091439/000109143920000003/azlvip485bapril272020.htm.

under management and will lose economies of scale, some contract holders are going to pay *increased* operating expenses if the temporary fee waivers are not renewed.[13] Among the five Adviser Target Funds, a true comparison shows that two Destination Funds will have increased total operating expense ratios as compared against the corresponding Target Funds while one Destination Fund has a minor decrease compared to the corresponding Target Fund.[14] This is in stark contrast to the Insurer's claim that all except two Destination Funds will have a double-digit basis point reduction and a far cry from the Insurer's claim of an average reduction of 26 basis points.[15] The shallow analysis the Insurer offered cannot support the issuance of an order under Section 26(c).

B. The Insurer's Statements About Available Analysis, Remaining Asset Categories, and Remaining Asset Managers for Each Variable Contract Are Conclusory in Nature

Variable contracts blend insurance benefits with investment, and it is hard to imagine that unilaterally changing the universe of investment choices, including shifting from active to passive investment strategies in a wholesale fashion, does not affect the benefits provided under the 36 different contracts named in the Application.[16] It defies logic that the Insurer, as a global provider of insurance-based solutions for retail investors planning for their retirements, has not analyzed in detail the benefits and costs of the proposed substitutions and the impact on their contract holders. Yet the Insurer has not provided any of its own analysis to the Commission, including what those costs and benefits would be to the potentially thousands of impacted contract holders. Further, while the Insurer states that contract holders "will continue to have access to investment options with a wide variety of asset categories and professional investment managers[,]"[17] nothing provided actually supports this assertion. Any reliance on these assertions as to the 36 affected variable contracts would be the "unquestioning reliance" disallowed under the Commission's standards.[18]

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[13] Advisers' Written Statement at 15-16.

[14] The contract holders of the Franklin Income VIP Fund will pay an increase of 4 basis points in the corresponding Destination Fund. *Id*. Contract holders investing in the Templeton Growth VIP Fund will pay an increase of 1 basis point in the corresponding Destination Fund, while contract holders investing in the Franklin Allocation VIP Fund will pay a decrease of 4 basis points in the corresponding Destination Fund. *Compare* Target Funds' Registration Statement on Form N-1A, Franklin Templeton Variable Insurance Products Trust (filed April 27, 2020), *available at* https://www.sec.gov/Archives/edgar/data/837274/000137949120001654/filing1611.htm#213215811 *against* Destination Funds' Registration Statement on Form N-1A, *supra* note 12.

[15] Insurer's Written Statement at 4-5.

[16] Application at 5.

[17] Insurer's Written Statement at 4.

[18] *Susquehanna*, 866 F.3d at 447. S*ee also* Order Disapproving Proposed Rule Change Concerning The Options Clearing Corporation's Capital Plan, Exchange Act Release No. 85121 (Feb. 13, 2019) (citing *Susquehanna*); Order Disapproving Proposed Rule Change to Introduce a Liquidity Provider Protection Delay Mechanism on EDGA, Exchange Act Release No. 88261 (Feb. 21, 2020) (citing *Susquehanna*).

Contrary to the Insurer's assertions, the Advisers do *not* ask for a contract owner-by-contract owner analysis.[19] Rather, the Advisers request, and Section 26(c) requires, support in the record about the impact that the proposed substitutions will have on the 36 affected variable contracts so that the Commission can determine whether the proposed substitutions are "consistent with the protection of investors." The Insurer's position – that the Commission should accept the limited evidentiary record that the Insurer is willing to provide – would leave impacted contract holders in the dark as to the substitutions' effects, and the Commission without the requisite evidentiary record necessary to conduct the required analysis under Section 26(c). It is hard to understand why the Insurer would oppose, or the Commission would not request, an analysis of the 36 affected variable contracts and how substituting Target Funds with substantially different Destination Funds would affect the material aspects of those variable contracts.

C. The Insurer's Argument that the Substitutions Need Not Benefit Contract Holders Is Not Only Cavalier in Its Treatment of Contract Holders but Also Inconsistent with the Protection of Investors

The Insurer's claim that substitutions pursuant to Section 26(c) need not benefit contract holders demonstrates the Insurer's complete lack of understanding of Section 26(c).[20] The Insurer's argument is not only inconsistent with the protection of investors – and therefore at odds with the plain language of Section 26(c) – but also demonstrates its indifference towards contract holders. Although the Advisers do not believe a "best interest" analysis is required, as the Insurer asserts,[21] surely the Commission's determination that a substitution is "consistent with the protection of investors" would align with the interests of, and benefits to, investors. Section 26(c) is not a mere rubber stamp to allow insurers to increase profitability while depriving contract holders of their investment choices and potentially the value of their variable contracts. While the contracts may mention replacement of funds,[22] a substitution may not be completed without a Commission order, which is the sole safeguard for investors in this process, and any order requires a finding that such substitutions are "consistent with the protection of investors."

III. Section 26(c) Was Intended to Regulate the Proposed Substitutions and Prevent the Accompanying Harms that Will Result

The Insurer asserts that Section 26(c) was only intended to prevent the payment of costly redemption fees caused by forced redemptions and was not meant to apply to variable contracts that offer more than one underlying investment option.[23] Neither of those statements is accurate.

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[19] Insurer's Written Statement at 21 n.51.

[20] *Id.* at 15.

[21] *Id.* at 21 n.51.

[22] The Insurer additionally argues that the substitution order should issue because "the ability to effect substitutions is a fully-disclosed contractual right reserved by Allianz under the Contracts[.]" *Id.* at 16. As discussed in Section III *infra,* this argument, along with several others, disregards the legislative and Congressional record of Section 26(c).

[23] Insurer's Written Statement at 9 & 11.

First, while Section 26(c) was intended to prevent costly redemption fees, the overarching purpose behind Section 26(c) was to ensure that the status quo was maintained in all matters except the actual change in the underlying fund.[24] In its 1966 report to Congress discussing the reasons for legislation adopting Section 26(c), the Commission stated that if a contract holder was transferred into a fund they did not like:

> their only relief, if dissatisfied, would be to redeem their shares. In doing this they might incur a substantial loss because . . . if they reinvest the proceeds in another unit investment trust or in an open-end company directly they may be subject to an additional sales load.[25]

This statement makes clear that protection of investor choice was a fundamental purpose of Section 26(c), and the Commission thereafter made this a bedrock of the Section 26(c) application process. For example, historically the Commission has focused on the degree of similarity between the investment objectives of the removed fund and those of the substituted fund. Although Section 26(c) does not contain any express requirement that the substituted fund be similar to the removed fund, the absence of a high degree of similarity could very well lead to the exact consequence Congress and the Commission wanted to avoid: dissatisfied investors terminating their contracts and paying additional sales charges to buy a new investment.[26] As the Advisers demonstrated in their Written Statement, the Target Funds have substantially different strategies than the Destination Funds. Further, if contract holders were to terminate their variable contract, another variable contract with the same guarantees and riders may not be available. If the Commission were to issue an order approving the Application, the result would be at odds with the very purpose of Section 26(c).

Second, the Insurer states that the phrase "unit investment trust holding the security of a single issuer" in Section 26(c) implies that Section 26(c) was not meant to regulate variable contracts with more than one underlying investment option. This not only ignores the legislative history, it also turns a blind eye to all subsequent statements the Commission has made regarding Section 26(c) and variable contracts. In 1966, when the Commission submitted the PPI Report to Congress and recommended legislation adopting Section 26(c), only two types of unit investment trusts existed: a *portfolio* unit investment trust that "holds a variety of securities" and a *conduit* unit investment trust that is "simply [a] mechanism[] for selling the shares of a management investment company on an installment payment basis [including] periodic payment plan

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[24] Stephen E. Roth, *Reorganizing Insurance Company Separate Accounts Under Federal Securities Laws*, 46 Bus. Law. 537, 583 (Feb. 1991) (discussing the representations the Commission historically required in substitution applications as part of its goal to ensure that status quo is being maintained).

[25] Securities and Exchange Commission, Public Policy Implications of Investment Company Growth [hereinafter, the PPI Report] (1966) at 158. The PPI Report was submitted to Congress on December 2, 1966, pursuant to H Res. 35, 89th Congress. *See* H.R. Rep. No. 2337, 89th Cong., 2d Sess. I (1966).

[26] Roth, *supra* note 24, at 584 (noting that "in the context of the contractual plan substitutions which were the focus of section 26([c])'s legislative history, the absence of a high degree of similarity could very well lead to the very consequence Congress and the SEC wanted to avoid: redemption by dissatisfied investors and additional sales charges to purchase new investments").

certificates[.]"[27] Variable contracts, as they exist today where a separate account is registered as a unit investment trust and contract holders choose underlying funds each of which is a distinct subaccount of the separate account, did not exist in 1966.[28] The "single issuer" language was added to Section 26(c) to distinguish between a *portfolio* unit investment trust and a *conduit* unit investment trust. This is why the Commission stated, after the adoption of Section 26(c), that "[a] variable annuity contract which is permitted to be paid for with more than one purchase payment . . . is a periodic payment plan certificate" subject to Section 26(c).[29] And further, the Commission has stated that each separate account subaccount holding a mutual fund, for purposes of Section 26(c), is a separate unit investment trust.[30] Therefore, Section 26(c) is intended to regulate substitutions in variable contracts, as the same risks apply to the proposed substitutions as applied in 1966: redemption by dissatisfied investors and additional sales charges to purchase new investments.

IV. The Standard of Review Requires Facts, Not Unsupported Assertions

The Insurer seems to believe that it has satisfied the standard of review by repeating the standard terms and conditions of prior applications, despite their significantly different facts and circumstances. As the Commission recently noted, Section 26(c) orders are fact-intensive and not appropriate for expedited review.[31] The standard terms and conditions in the vast majority of the over 200 substitution applications dealt with issues with the underlying funds, such as a fund

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[27] PPI Report, *supra* note 25, at 7 & 38.

[28] *Id.* at 331 n.24 (noting that at the time of the PPI Report, only four separate accounts of insurance companies were registered as investment companies under the 1940 Act.) Further, the one registered separate account cited as an example in the PPI Report was registered as a mutual fund, not a unit investment trust, as was common at the time. *See* Prudential Insurance Company of America, Investment Company Act Release No. 3620 (1963). The structure of the Insurer's variable contracts simply did not exist when Section 26(c) was adopted. Congress cannot comment on something that does not yet exist, but the Commission was clear in the PPI Report that Section 26(c) was meant to regulate unit investment trusts that served as conduits to invest in other investment companies. That is why the Commission subsequently applied Section 26(c) to variable contracts as they evolved.

[29] Payment of Administrative Fees to the Depositor or Principal Underwriter of a Unit Investment Trust, Investment Company Act Release No. 13705 at n.6 (Jan. 9, 1984). *See also* Memorandum on the Regulation of Unit Investment Trusts from the Division of Investment Management to the Securities and Exchange Commission, at n.45 (Sept. 22, 1988) (stating that Section 26(c) was intended to regulate substitutions in "UITs that serve as a vehicle for investing in mutual funds").

[30] *See* Adoption of Permanent Exemptions from Certain Provisions of the Investment Company Act of 1940 for Registered Separate Accounts and Other Persons, Investment Company Act Release No. 12678 (Sept. 21, 1982) ("Commission approval is required for a substitution of securities in any subaccount of a registered separate account."). This Release has been cited in nearly every subsequent substitution application, including the Insurer's, further underscoring the Insurer's incomplete understanding of Section 26(c). *See also* Roth, *supra* note 24, at 582 (noting that the Commission and its Staff have "treated each subaccount as a unit investment trust for this purpose so that section 26([c]) has been interpreted to apply to a substitution of the securities held by a subaccount").

[31] Amendments to Procedures with Respect to Applications Under the Investment Company Act of 1940, Investment Company Act Release No. 33658 (Oct. 18, 2019) ("Certain kinds of applications appear highly unlikely to be suitable for expedited review. These would include, for example, applications filed under sections . . . 26(c) of the Act. These types of applications are generally too fact-specific for applicants to be able to meet the substantially identical standard.").

liquidation, and were not slate-clearing substitutions like the Insurer's. The validity of these standard terms and conditions has never been tested in slate-clearing substitutions, but certainly have raised objections from other market participants.[32] As the Commission has stated of Section 26(c), standard terms and conditions are only applicable if "the matter does not appear to present issues not previously settled by the Commission or to raise questions of fact or policy indicating that the public interest or the interest of investors requires that a hearing be held."[33]

Slate-clearing substitutions raise novel issues not previously settled by the Commission, hence this hearing is necessary.[34] In this hearing, *Susquehanna* and the Administrative Procedures Act (the "APA") require fact-finding and an evidentiary record.[35] The Insurer claims that *Susquehanna* is not controlling because a factually different order was at issue.[36] The Insurer misinterprets *Susquehanna*: *Susquehanna* stands for the process required of the Commission to establish an evidentiary record necessary to support *any* order. Whether the Commission is asked to approve a self-regulatory organization rule change as in *Susquehanna* or a fund substitution under Section 26(c), both approval orders are agency actions. Both need to be supported by an appropriate record. The Commission must have evidence to support its action and cannot rely on the unsupported arguments of the requesting party.[37] The Insurer has merely recycled standard terms and conditions of factually distinct applications without providing the necessary data for the Commission to test whether these terms and conditions would be "consistent with the protection of investors" as required under Section 26(c).

CONCLUSION

As demonstrated in the Advisers' Written Statement and this Response, the Insurer has failed to provide the Commission with sufficient information to evaluate, let alone approve, the Application. Rather than provide this information, the Insurer's Written Statement repeats the same incomplete and irrelevant arguments from its Application. The Insurer then layers on inaccurate statements and erroneous interpretations of the legislative history of Section 26(c), arguing that its Application provides sufficient support for its proposed slate-clearing substitution.

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[32] *See, e.g.*, Response from Capital Research and Management Co. and American Funds Insurance Series to Hartford's Opposition to Hearing Request, File No. 812-14446 (Feb. 2, 2017), *available at* https://www.sec.gov/comments/812-14446/81214446-1557057-131501.pdf (arguing that a hearing is necessary, in part, because Hartford "[i]gnores or misstates prior Commission precedents regarding the standards applicable to substitution applications").

[33] Delegation of Authority to Director of Investment Management, Investment Company Act Release No. 11030 (Jan. 30, 1980). The Insurer also argues that certain conclusory statements in the Notice, Investment Company Act Release No. 33721, mean that the Commission has already decided particular issues. The statements in the Notice are not evidence, and the purpose of this hearing is to review whether the evidentiary record supports the Application, which the Advisers have demonstrated does not.

[34] The fact that senior Staff of the Commission noted the novelty of slate-clearing substitutions almost 20 years ago – and yet some orders were issued using inappropriate terms and conditions – is all the more troubling. *See* Roye, *supra* note 11.

[35] *Susquehanna*, the APA, and the required standard of review is discussed in detail in the Advisers' Written Statement at 4-7.

[36] Insurer's Written Statement at 25.

[37] *Susquehanna*, 866 F.3d at 447.

As a result, the Application fails to meet the standard of review required under *Susquehanna* because any Commission action would have to grant "unquestioning reliance" upon the Insurer's statements. Therefore, an order cannot issue.

There is a very simple solution that protects investors' decisions while also enhancing investor choice: add the Destination Funds as additional investment options. This will not create unknown impacts on contract holders and will allow contract holders to choose these investments if they believe they are appropriate. Why the Insurer would spend so many resources and years attempting to obtain a substitution order that would rob contract holders of their investment choices when an available solution could be enacted tomorrow without harm – or a Commission order – calls out the real underlying purpose of this Application: The Insurer seeks to substitute the Adviser Target Funds with distinctly different Insurer-affiliated Destination Funds to increase advisory fee revenue for Insurer affiliates, reduce Insurer-paid overhead costs, de-risk Insurer liabilities, and maximize Insurer profit at the expense of contract holders. Given the insufficient record, the Commission should protect investors by denying the Application.

Should you have any questions or would like to discuss this Responsive Written Statement, please feel free to call me at 202 373-6725 or Monica L. Parry at 202 373-6179.

Very truly yours,

Thomas S. Harman

cc: The Hon. Jay Clayton, Chairman
The Hon. Hester M. Peirce, Commissioner
The Hon. Elad L. Roisman, Commissioner
The Hon. Allison Herren Lee, Commissioner
Dalia Blass, Director, Division of Investment Management
Paul Cellupica, Deputy Director and Chief Counsel, Division of Investment Management
Rick A. Fleming, Office of the Investor Advocate
Alison Baur, Franklin Templeton Investments
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Erik T. Nelson, Senior Securities Counsel, Allianz Life Insurance Company of North America
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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing to be served upon:

Chip Lunde, as counsel to Allianz Life Insurance Company of North America, *et al.*
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via electronic mail on August 17, 2020 before 5:30 p.m.

Thomas S. Harman