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February 14, 2019

VIA ELECTRONIC MAIL
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Mr. Brent Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: File No. S7-23-18

Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts

Release Nos. 33-10569; 34-84508; IC-33286

Dear Mr. Fields:

The Committee of Annuity Insurers (the "Committee")[1] appreciates the opportunity to submit these comments to the Securities and Exchange Commission (the "Commission" or "SEC") on its proposals to modernize the disclosure requirements for registered variable annuity and variable life insurance contracts (together, "variable products" or "variable contracts") and specifically to permit the use of summary prospectuses for those products.

I. GENERAL

The Committee commends the Commission and the staff in the SEC's Division of Investment Management for their hard work and thoughtfulness in producing a truly comprehensive proposal to overhaul and modernize the disclosure regime for variable contracts.

Proposed Rule 498A under the Securities Act of 1933 (the "1933 Act") would permit (but not require) the use of summary prospectuses for variable products, with additional information available to investors online and upon request. To help investors make informed investment decisions, Rule 498A would utilize a layered disclosure approach similar to what is in place and works well for mutual funds under Rule 498. The disclosure approach under Rule 498A is designed so that investors receive important information in a summary prospectus about a variable product's terms, benefits, and risks, all in a concise and reader-friendly presentation, while having

[1] The Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's 31 member companies represent more than 80% of the annuity business in the United States. The Committee was formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of insurance, securities, banking, and tax policies regarding annuities. For over three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities at both the federal and state levels, working with and advocating before the SEC, CFTC, FINRA, IRS, Treasury Department, and Department of Labor, as well as the NAIC and relevant Congressional committees. A list of the Committee's member companies is attached as Appendix A.

the ability to access more detailed information online or in a paper or electronic format upon request.

Rule 498A would significantly enhance "Main Street" investors' ability to understand their variable product investments. The proposing release[2] (the "Proposing Release") notes that variable contracts can be complex products, that the structure and terminology associated with these products can be difficult for investors to understand, and that variable contract statutory prospectuses are often quite lengthy. Moreover, today, variable contract statutory prospectuses are typically bundled with or accompanied by prospectuses (either in statutory or summary form) for the underlying funds[3] that are available for investment. According to the Proposing Release, there are on average 59 underlying funds for variable annuity contracts and 64 underlying funds for variable life insurance contracts, and some variable products offer more than 300 underlying funds.[4] These underlying fund prospectuses are not only delivered to investors when they purchase their variable contracts, but also at least annually thereafter. In the Proposing Release, the Commission expresses its concerns that the volume, format, and content of these variable product and underlying fund disclosures may make it difficult for investors to find and understand the key information that they need to make informed investment decisions.[5] Rule 498A is intended to directly address those concerns.

The Committee shares many of the Commission's concerns noted above and described in more detail in the Proposing Release. Indeed, the Committee has been advocating for a variable product summary prospectus framework for many years and has submitted letters to the Commission and SEC staff in enthusiastic support of a summary prospectus disclosure regime.[6] Committee members have met numerous times with the SEC staff and have proffered "proof of concept" summary prospectus documents (in partnership with the Insured Retirement Institute) to demonstrate the feasibility and potential effectiveness of a summary prospectus. The Committee has also provided the SEC staff with materials that potential purchasers and contract owners typically receive over the lifecycle of a variable product in order to highlight the plethora of helpful information provided at the point of sale, on an annual basis thereafter, and upon certain events or transactions.

Overall, the Proposing Release represents the most significant advancement in variable product disclosure since the variable product registration statement forms were originally adopted. The Committee is in full support of the Commission's goal of modernizing the disclosure regime for variable products. More specifically, the Committee enthusiastically endorses the permitted use of variable product summary prospectuses for both new purchasers and in-force contract owners. The Committee agrees that a layered disclosure approach, as set forth in proposed Rule 498A, will vastly improve investors' experiences with respect to purchasing and owning variable products. In addition, the Committee applauds the Commission for dedicating considerable time and effort to revamp the variable product registration statement forms as well as to review and re-examine various outdated or unneeded rules and regulations applicable to variable products as

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[2] Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts, Release Nos. 33-10569, 34-84508, IC-33286 (83 Fed. Reg. 61730, Nov. 30, 2018). Unless otherwise indicated, capitalized terms used herein have the meanings given to them in the Proposing Release.

[3] This letter generally uses "portfolio company," "underlying fund," and "fund" synonymously. These terms refer to the mutual funds in which variable product separate accounts (organized as unit investment trusts) invest based on investment options selected by contract owners. As proposed, Rule 498A, Form N-4, and Form N-6 would define underlying funds as "Portfolio Companies." *See* Rule 498A(a)(7); General Instructions A to Form N-4 and Form N-6.

[4] 83 Fed. Reg. at 61732, n. 8.

[5] *See* 83 Fed. Reg. at 61732.

[6] *See, e.g.,* Letter to Walter J. Clayton III, SEC Chairman, from the Committee of Annuity Insurers, July 11, 2017; Letter to Andrew J. Donohue, former Director of the Division of Investment Management, June 4, 2010.

part of the Proposing Release. Against this backdrop, the Committee offers the input and recommendations set forth in this letter.

II. KEY ELEMENTS OF THE PROPOSALS

The variable contract summary prospectus is designed to be a succinct summary of a contract's key benefits, terms, expenses, and most significant risks. Because variable contracts often include numerous underlying fund options, optional benefits, and other features, a summary prospectus cannot, by its very nature, address all aspects of a contract. Thus, a summary prospectus will serve as the cornerstone of a new layered disclosure framework, providing investors with key information and alerting them to the availability of more detailed information in the statutory prospectus.

The primary elements of the new disclosure framework and the other components of the Proposing Release are listed below. The Committee's comments on each such element are set forth under "III. The Committee's Comments."

- **Optional use of summary prospectuses.** Rule 498A would permit the use of two distinct types of variable contract summary prospectuses: (1) an initial summary prospectus (an "ISP") for new sales and (2) an updating summary prospectus (a "USP") for in-force business (*i.e.*, for annual updates to existing contract owners). The ISP would include certain required information in Plain English in a prescribed order with standardized headings. The USP would include a subset of the information required to be in the ISP, as well as a brief description of certain changes to the contract that occurred during the previous year.

- **Availability of variable contract statutory prospectus and other materials.** The proposed rule would require a variable contract's statutory prospectus (hereinafter, the "Statutory Prospectus"), statement of additional information (the "SAI"), and summary prospectuses to be publicly accessible, free of charge, at a website address specified on the cover of the summary prospectus. An investor who receives a summary prospectus would be able to request the Statutory Prospectus or SAI in paper or electronically at no cost.

- **Optional "access equals delivery" method to satisfy underlying fund prospectus delivery requirements.** The Commission is proposing an optional method for satisfying underlying fund prospectus delivery obligations. This optional delivery method would make certain underlying fund documents (*i.e.*, the current summary prospectus, Statutory Prospectus, and SAI and the most recent shareholder reports) available online at the website address specified on the variable contract summary prospectus cover page. Investors could also request and receive those documents in paper or electronic format at no cost. As proposed, this new option for satisfying underlying fund prospectus delivery obligations would be available only for variable contracts that have summary prospectuses pursuant to Rule 498A.

- **Discontinued variable contracts.** The Commission is proposing an agency statement on the treatment of discontinued variable contracts. The Commission intends to grandfather discontinued variable contracts that are relying, as of the effective date of the final summary prospectus rules, on the SEC staff no-action letters commonly known as the "Great-West" no-action letters. As proposed, other than grandfathered contracts, no other variable contracts would be permitted to operate in reliance upon the Great-West no-action letters. The Proposing Release also solicits comments on alternative approaches in lieu of the proposed agency statement.

- **Registration statement form amendments.** The Commission is proposing amendments to the variable contract registration statement forms (Forms N-3, N-4, and N-6), including substantial Statutory Prospectus revisions. The form amendments would reflect the summary prospectus disclosure requirements, as well as other revisions and updates. The proposals are generally intended to incorporate certain summary information in a condensed presentation, reflect industry developments (*e.g.*, the prevalence of optional benefits in today's variable contracts), and otherwise improve disclosures provided to variable contract investors. Statutory Prospectuses would need to comport with the amended registration forms regardless of whether summary prospectuses under Rule 498A are used. Registrants would also be required to utilize Inline XBRL in connection with certain disclosures in the Statutory Prospectus.

- **Other regulatory proposals.** As previously noted, the Commission is proposing certain revisions, rescissions, and technical and conforming amendments to various rules under the 1933 Act and the Investment Company Act of 1940 (the "1940 Act") to reflect the proposed variable product disclosure regime, as well as to reflect statutory revisions to the 1940 Act and other developments that have occurred over the past twenty plus years.

III. THE COMMITTEE'S COMMENTS

As noted above, the Committee strongly endorses the summary prospectus option and layered disclosure approach (and the underlying fund prospectus delivery option) proposed by the Commission. The Committee believes that these reforms will produce transformative improvements in variable product disclosures and will significantly enhance the overall Main Street investor experience with respect to both purchasing and owning a variable product. In order to make certain elements of the Proposing Release more workable and practical, and to further enhance the overall investor experience, the Committee offers the comments below.

As an initial matter, several disclosure and presentation requirements for a summary prospectus are derived from Statutory Prospectus disclosure requirements (particularly, the ISP content requirements set forth under Rule 498A(b)(5)). Furthermore, many disclosure and presentation requirements for an ISP overlap with those for a USP. In order to avoid unnecessarily repeating comments, the Committee's comments on one component of the Commission's proposals (*e.g.*, the ISP), unless otherwise stated, apply equally to any identical or overlapping requirements applicable to other components (*e.g.*, the Statutory Prospectus and/or the USP). To assist the Commission, this letter generally includes cross-references where applicable to call out these identical or overlapping requirements.[7] In addition, while the Committee believes its overall comments thematically address many of the Commission's specific requests for comments set forth in the Proposing Release, this letter also directly addresses certain of those specific comment requests.

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[7] Generally, the proposals apply to variable life insurance contracts as well as variable annuity contracts supported by unit investment trust separate accounts (registered on Forms N-4 and N-6, respectively), and our comments apply to both, unless otherwise stated. For certain comments that are applicable only to variable life contracts, we have included a separate section titled "5. Variable Life Insurance Contracts." In addition, unless otherwise stated or the context otherwise requires, our comments also generally apply to variable annuities supported by management separate accounts and the corresponding items of Form N-3. When referencing specific requirements in registration statement forms, this letter attempts to assist the Commission by citing to Forms N-3, N-4, and N-6, as applicable.

A. SUMMARY PROSPECTUSES

Before addressing specific elements of the summary prospectus proposals, the Committee offers the following overarching comments:

- The Committee believes that imposing page limits and/or word counts with respect to any section of the summary prospectuses or the registration statements would be impractical, as variable contracts can vary greatly in terms of feature functionality and complexity. As such, the length of necessary and important disclosures also can vary greatly. Accordingly, the Committee urges the Commission to omit any such limitations in the final rule.

- The Committee supports the various aspects of the proposals that grant insurers the flexibility to prepare and revise disclosure as necessary to suit their specific facts and circumstances, particularly with respect to the various legends that are required in summary prospectuses and Statutory Prospectuses. Nonetheless, the Committee requests that the Commission confirm that all required disclosures may be presented or modified in a manner necessary to accurately communicate the specific aspects of a variable contract, including its structure, operation, and distribution (particularly, as may be necessary for group variable contracts).

- The Committee strongly prefers that any required cross-references from a summary prospectus to a Statutory Prospectus not be to specific page numbers. Given the fluid nature of prospectus preparation, and the often large number of individuals and entities that provide information as part of such preparation, page numbers are often in flux until the last moments prior to finalization. Accordingly, the Committee urges the Commission to permit registrants to cross-reference particular sections or sub-sections (or headings or sub-headings).

- Consistent with the shared goal of providing investors with simpler and easier-to-understand materials regarding their variable products, the Committee believes that the Commission should avoid prescribing any specific terminology about variable contracts, their features, or their benefits in the various components of the proposed layered disclosure regime. Instead, the Commission should prescribe the content of the disclosures and provide the industry with the flexibility to use terminology that makes their current and future product designs fully transparent and, in the case of in-force contracts, consistent with existing terminology. Of course, all special terms used in disclosure should be appropriately defined in glossary sections or in context as envisioned by the Commission in the Proposing Release.

  Permitting insurers to use flexible terminology will facilitate their ongoing efforts to move away from the “old” language of variable contracts to a “new,” investor-friendly language. It will also facilitate ongoing industry efforts to simplify the sometimes complex and perplexing language of variable products in order to better communicate product features, benefits, and risks in a manner that is clearer and easier to understand. Such flexibility will not only help to “future-proof” the Commission’s rules by allowing for continual consumer-friendly improvement in the way information is relayed to investors, but it will also support product evolution and innovation.

1. The Initial Summary Prospectus

The ability to use an ISP as the “point of sale” document is the lynchpin of the new layered disclosure framework for variable products. Rule 498A would, subject to certain conditions, cause an ISP to be deemed a prospectus that is authorized under Section 10(b) of the 1933 Act[8] for the purposes of Section 5(b)(1) of the 1933 Act. As the Committee has been advocating for a layered disclosure framework for many years, the ability to use an ISP as a point of sale document naturally has the Committee's full support.

Overall, the content requirements for an ISP (as set forth under Rule 498A(b)) dictate the first layer of information that a potential investor will receive in the new layered disclosure framework. While the content requirements in most respects are tailored and appropriate for the first layer of disclosure, the Committee believes that certain of the specific content requirements would require unnecessary information. In certain other respects, the ISP requirements should be clarified or improved.

a. Scope of an ISP. As proposed, Rule 498A provides that each ISP may describe only "a single [c]ontract . . . currently offered" by the registrant for sale.[9] In addition, with respect to any single contract currently offered for sale, Rule 498A would permit the contract's ISP to describe "more than one Class of the [c]ontract."[10] Rule 498A defines "Class" as "a [c]ontract that varies principally with respect to distribution-related fees and expenses."[11]

With respect to the scope of an ISP, the Committee recommends the following:

- **Multiple Classes/Versions** – Unlike mutual funds, where a share "class" is primarily tied to a fund's distribution-related fees and expenses (*e.g.*, Rule 12b-1 fees), a variable contract can and frequently does have "classes" that differ in ways other than distribution-related fees and expenses. For instance, variable contract classes may vary with respect to non-distribution-related fees and expenses (*e.g.*, administrative, insurance, and benefit charges), the availability of optional benefits, and the availability of features (*e.g.*, dollar cost averaging programs). Thus, the concepts of classes with respect to mutual funds and classes with respect to variable products do not necessarily correspond. Indeed, with respect to variable products, the term "class" is often used interchangeably with "versions."

  The Commission should also consider that there are no clear standards to distinguish (a) different classes of a contract and (b) different versions of a contract. Simply drawing a line at "distribution-related" fees and expenses would limit ISPs to covering currently-offered contracts that differ only with respect to distribution-related fees and expenses would represent a departure from a long-standing industry practice of including multiple classes/versions of a contract in a single Statutory Prospectus. It is also an artificial approach and does not recognize the overwhelming similarities that may exist between classes or versions with different distribution-related fees. In addition, requiring separate ISPs for contract versions that have differences beyond distribution-related fees would be a disservice to investors who often, in fact, make investment choices that involve choosing among multiple classes/versions of a contract. Permitting multiple classes/versions to be described in a single ISP ensures that prospective purchasers are aware of the different classes/versions that are available to them, and such disclosure would facilitate their ability to make informed choices between or among classes/versions.

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8 Also under Section 24(g) of the 1940 Act.

9 *See* Rule 498A(b)(1).

10 *See* id.

11 Rule 498A(a)(1).

Accordingly, the Commission should confirm that an ISP for a currently-offered contract may describe all classes (or versions) of the contract that are currently offered for sale regardless of how the classes or versions differ, including with respect to fees and expenses (beyond traditional distribution-related fees and expenses), optional benefits, and features, provided that all such classes or versions for the *same* contract are properly described in a single Statutory Prospectus.[12]

b. Key Information Table. Under the heading "Important Information You Should Consider About the [Contract]," the ISP would be required to include a "Key Information Table"[13] that, according to the Proposing Release, would provide "a brief description of key facts about the variable contract."[14] This table would include a summary of five specified topic areas: (i) fees and expenses; (ii) risks; (iii) restrictions; (iv) taxes; and (v) conflicts of interest.[15] As an overall matter, the Committee believes that the proposed Key Information Table's topics are appropriate, but the Committee offers the following comments regarding the specific content of the Key Information Table, organized below by the topic area:

- **Fees and Expenses** – The Committee respectfully submits that much of the information regarding fees and expenses in the Key Information Table is repetitive, redundant, and overlaps with information also required in the following sections of the ISP: "Other Benefits Available Under the [Contract]," "Additional Information About Fees," and "Appendix: [Portfolio Companies] Available Under the [Contract]." The ISP is designed to be a concise summary and the first layer in a layered disclosure approach, and in such a document repetition is unnecessary and even potentially misleading (insofar as a reader could be confused as to whether the same fee specified in two separate sections is actually the same fee or two separate fees). The Committee also notes that Rule 498, the mutual fund summary prospectus rule that serves as the predicate for Rule 498A, has none of the overlapping and redundant disclosures that are included in the proposals.

  Rather than repeating information about fees and expenses, all numerical fee and expense information should be disclosed clearly and concisely in only one place – and that place should be the Fee Table under "Additional Information About Fees." Numerical fee and expense information should not be provided in the Key Information Table because, at that point in the disclosure document, the investor has not been provided with sufficient explanation or context to understand those specific dollar figures or percentages. Rather, in the Key Information Table, a narrative explanation regarding the types of fees and expenses associated with the investment would be most useful to the investor.

  Although the Committee believes that any requirement to disclose numerical fee and expense information in the Key Information Table should be eliminated, the Committee believes that an investor would benefit from the proposed annual cost estimates, which are easy for an investor to understand and would not be repeated elsewhere in the ISP. Thus, the Committee supports the inclusion of the cost estimates in the Key Information Table.

  Based on the foregoing, the instructions for the "Surrender Charge," "Transaction Charges," and "Ongoing Fees and Expenses" line items of the Key Information

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[12] See discussion *infra* regarding the inclusion of multiple contracts in a single statutory prospectus or registration statement.

[13] *See* Rule 485A(b)(ii).

[14] 83 Fed. Reg. at 61742.

[15] *See* Item 3 of Form N-3, Form N-4, and Form N-6.

Table[16] should be revised to eliminate any requirements to disclose actual dollar amounts or percentages of fees and expenses, and instead require only: (i) a brief narrative statement regarding the existence of any surrender charge and the ongoing fees and expenses; (ii) the lowest and highest annual cost estimate example (with the proposed legend) (but with an assumed investment amount of only $10,000, as addressed below); and (iii) a cross-reference to the Fee Table in the ISP.

In this regard, the Committee believes that including a brief narrative statement of the various fees and expenses along with an annual cost estimate, but omitting the numerical dollar values and percentages associated with the fees and expenses that are fully disclosed in the Fee Table, achieves the Commission's objective of conveying the importance of a variable contract's fees and expenses early in the ISP, but in a more concise and meaningful way.

- **Assumed Investment Amount for the Cost Estimates** – The lowest and highest annual cost estimates should be based on an assumed investment amount of $10,000, not $100,000 as proposed, for two reasons. First the Proposing Release notes that the average variable annuity contract value has recently exceeded $100,000[17] but does not otherwise provide a basis for this significant proposed change from $10,000 to $100,000. An average account value is not the same as an average initial investment amount, so that statistic itself does not support such a change.[18] Second, mutual funds use an assumed investment amount of $10,000 in their prospectuses. Requiring variable contracts to use an assumed investment amount in their prospectuses that is ten times higher will place variable contracts at an unfair competitive disadvantage. Investors will, as a practical matter, be led to believe that the costs associated with a variable product are substantially higher than the costs associated with a mutual fund, regardless of any accompanying explanations or disclosures, and even though the investments' cost examples are not being calculated based on similar assumptions. Therefore, the Key Information Table should use the usual assumed investment amount of $10,000 for the cost estimates.[19]

- **Restrictions** – The Key Information Table would also require registrants to include a brief description of those features of a variable contract that include restrictions or limitations, specifically with regard to the investment options and optional benefits.[20] The Committee generally supports this disclosure requirement but believes it should be renamed "Investment Restrictions," and that any other restrictions or limitations related to optional benefits (*e.g.*, withdrawal limits) or other aspects of a contract should be disclosed in other, more appropriate sections of the ISP, such as "Other Benefits Available under the [Contract]" or "Surrendering Your [Contract] or Making Withdrawals: Accessing the Money in

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16 *See* id.

17 83 Fed. Reg. at 61742, n. 113.

18 An assumed investment amount of $100,000 (or similarly high dollar amount) will also result in certain commonly-charged fees from being excluded from cost examples, because such fees are often waived when account values reach thresholds well below $100,000.

19 In order to effectuate this change, Instructions 2.(a) and 2.(c)(ii)(B) to Item 3 of Form N-3 and Form N-4, and Instruction 2.(a) to Item 3 of Form N-6, should be revised to change $100,000 to $10,000. As noted above, the fee figure for the surrender charge example should be deleted and replaced with a narrative statement. However, if that is not done, then the surrender charge example should also be based on an assumed investment amount of $10,000 rather than $100,000.

20 *See* Item 3 of Form N-3, Form N-4, and Form N-6.

Your Contract" (as discussed below).[21] The Committee believes investment restrictions are important disclosures and, in fact, warrant their own section in the Key Information Table.

- **Conflicts of Interest** – The Key Information Table, as proposed, must disclose two generic conflicts of interest (regarding investment professional compensation and exchanges). The Committee suggests that the Commission clarify or modify the applicable instructions so that insurers are permitted, at their discretion, to also disclose in this section any specific additional conflicts of interest that may be applicable to their particular products or circumstances (*e.g.*, possible conflicts related to revenue sharing, managed volatility funds, restricted fund line-ups, or allocation requirements for optional benefits).[22] The Committee also suggests that the Commission clarify that disclosure regarding a conflict of interest may be omitted to the extent that it is inapplicable.

- **Linking to the Statutory Prospectus** – Rule 498A(h)(1)(iii) sets forth certain linking requirements for online and electronic versions of variable contract summary prospectuses. Specifically, the rule provides that the summary prospectuses "must permit persons . . . to move directly back and forth between: (A) Each section of the [s]ummary [p]rospectus and any section of the Statutory Prospectus and [c]ontract [SAI] that provides additional detail . . . or (B) Links located at both the beginning and end of the [s]ummary [p]rospectus, or that remain continuously visible . . . , [to the] tables of contents of both the Statutory Prospectus and the [c]ontract [SAI]." Thus, under this provision of the rule, the Commission would allow registrants to choose between linking their summary prospectuses to specific sections in the related Statutory Prospectuses or SAIs, or to their tables of contents. Yet, Instruction 1.(b) to Item 3 of Form N-3, Form N-4, and Form N-6 requires a registrant to include cross-reference in the Key Information Table to specific sections in the Statutory Prospectuses and SAIs, and to link such cross-references in online and electronic versions to those specific sections; there is no ability to link to the table of contents in the Statutory Prospectus or SAI. As such, the instructions in Form N-3, Form N-4, and Form N-6 abrogate the flexibility provided under Rule 498A(h)(1)(iii), which is a flexibility that mutual funds enjoy under Rule 498. The Committee recommends that the above-referenced instructions requiring links in the Key Information Table to specific sections of the Statutory Prospectus be eliminated.[23]

c. Standard Death Benefit. As proposed, the ISP would be required to have a "Standard Death Benefit" section that must include information such as a description of the benefit, its operation, how the death benefit amount may vary, and circumstances under which the death benefit amount may increase or be reduced.[24] For variable annuity contracts, requiring a separate section on the standard death benefit (particularly given the proposed amount of detail) elevates the variable annuity's standard death benefit to undue importance. The variable annuity standard

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21 In order to effectuate this change, the relevant line-item in the Key Information Table should be renamed and Instruction 4(b) to Item 3 of Form N-3, Form N-4, and Form N-6 should be revised to cover only benefit-related investment restrictions and any impact of not complying with such investment restrictions, including contract termination. The instruction should not extend to non-investment related restrictions, such as the impact of withdrawals.

22 *See* Instruction 6 to Item 3 of Form N-3, Form N-4, and Form N-6.

23 In the Proposing Release, the Commission requested comment regarding whether linking requirements should be broadened to apply to the SAI and Part C. *See* 83 Fed. Reg. 61776. The Committee would be opposed to any such requirement. Given that SAIs and Part Cs are rarely accessed by investors electronically (or otherwise), any linking requirements applicable to SAIs and Part Cs would burden insurers and provide no commensurate benefit to investors.

24 *See* Rule 498A(b)(5)(iii); Item 11(a) of Form N-3; Item 10(a) of Form N-4

death benefit is, of course, a benefit that provides a significant protection for investors, but it is not more important or significant than other features and benefits (such as optional death benefits and various living benefits) such that it should have a dedicated section in the ISP.[25]

- **Variable Annuity Contracts** – For variable annuities, the Committee recommends that the section titled "Standard Death Benefit" be eliminated as a separate section.[26] Instead, for variable annuities, the description of the standard death benefit should be covered by the section titled "Other Benefits Available Under the Contract" (with the word "Other" deleted from that section heading, as addressed below).[27]

- **Variable Life Insurance Contracts** – Death benefits under variable life insurance contracts present significantly different considerations and require significantly different disclosures than death benefits under variable annuities. The Committee's comments related to the disclosure of variable life insurance contract death and other benefits are addressed in Section III.A.6. of this letter.

d. Other Benefits Available Under the Contract. As proposed, under the heading "Other Benefits Available Under the [Contract]," the ISP would be required to include a table of other standard and/or optional benefits available to purchasers, including a brief summary of the benefit's purpose, its fee (if any), and applicable restrictions and limitations.[28] The Committee generally supports this disclosure item, with the following recommended revisions (related comments specific to variable life insurance contracts are addressed in Section III.A.6. of this letter)

- **Heading** – As indicated above, for variable annuity contracts (but not variable life insurance contracts) the heading of this section should be revised by deleting the word "Other," so the heading reads "Benefits Available Under the [Contract]" (because the standard death benefit should be included here).[29]

- **Fees** – For variable annuity and life insurance contracts, the requirement to disclose the specific fee for each benefit in this table[30] should be eliminated, as it is duplicative of the specific optional benefit fee disclosure in the Fee Table that appears shortly thereafter in the ISP. Instead, the Committee recommends that this table include (i) a statement disclosing whether there is a separate or additional fee for this benefit and (ii) a cross reference to the Fee Table for specific fee information, if applicable.

- **Rate Sheets** – The Committee notes that the benefits table does not call for disclosure regarding withdrawal rates, crediting rates, and similar information that

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[25] The typical variable annuity standard death benefit is either simply a return of the cash value (usually, this means any surrender charge is waived) or a return of net premiums (gross premiums minus any partial withdrawals), and it does not generally require an additional fee. It is the Committee's strong impression that variable annuity investors do not purchase variable annuities primarily for their standard death benefits.

[26] In order to effectuate this change, Item 11 of Form N-3 and Item 10 of Form N-4 should be eliminated, and Rule 498A(b)(5)(iv) should be revised so that it applies only to variable life insurance contracts and the section heading should reference the "Death Benefit."

[27] In order to effectuate this change, Item 12(a) of Form N-3 and Item 11(a) of Form N-4 should be revised to require information about both the standard death benefit and other benefits available under the contract, and the word "Other" should be deleted from that item heading.

[28] *See* Rule 498A(b)(5)(iv); Item 12(a) of Form N-3 and Item 11(a) of Form N-4 and Form N-6.

[29] *See* Item 12 of Form N-3 and Item 11 of Form N-4. Rule 485(b)(5)(iii) should be revised to be specific to variable life insurance contracts.

[30] *See* Item 12(a) of Form N-3 and Item 11(a) of Form N-4 and N-6.

is typically the subject of rate sheets, for those insurers that use them, or disclosed in the Statutory Prospectus for insurers that do not. The Committee supports not including this layer of detail in the benefits table. However, the Committee believes that clarification is necessary regarding the "rate sheeting" process. Because rate sheets would be part of the Statutory Prospectus, and the Statutory Prospectus would not be delivered except upon request, investors will not necessarily receive a paper rate sheets for their products. Thus, the rate sheeting filing process may not be needed under the new layered disclosure framework.

The Committee believes that the rate sheeting process should be modified. If an insurer changes a rate on a fluid basis, the insurer should be permitted to include the guaranteed maximum or minimum rate, as appropriate,[31] in the Statutory Prospectus. However, rather than preparing and filing rate sheets, insurers should be required to provide (in paper or electronic form) the current rates to investors as marketing material at the point of sale. This is similar to how rates and values (*e.g.*, interest rates, caps, floors, buffers) are communicated to investors for non-variable insurance products registered on Form S-1 or S-3. The Committee believes that a similar process would be well-suited for variable products as well.[32]

- **Benefits No Longer for Sale.** With respect to Item 12 of Form N-3 and Item 11 of Form N-4 and Form N-6, the Committee recommends that the Commission clarify that benefits (including versions and iterations of a single benefit) that are owned by existing contract owners but no longer for sale should not appear in an ISP, despite no instruction in the cited items to that effect.

  Clarification should be provided regarding whether benefits (and versions or iterations thereof) that are outstanding but are no longer for sale should be included in an ISP.

e. Surrenders and Withdrawals. This section of the ISP would include the information required by Item 14(a) of Form N-3, Item 13(a) of Form N-4, or Item 12(a) of Form N-6,[33] as applicable, which calls for a brief description of how the owner can make partial withdrawals, limits on that ability, how the proceeds are calculated, and when the proceeds are payable. However, as proposed this would not include the information in Item 14(c) of Form N-3, Item 13(c) of Form N-4, or Item 12(c) of Form N-6, which calls for information about how partial withdrawals will affect death benefits and living benefits. Nonetheless, the hypothetical ISP included with the Proposing Release *does* include a brief, generic reference to the fact that partial withdrawals might negatively impact certain benefits. The Committee believes this is important disclosure in this context, where applicable. In addition, given the recent proliferation of so-called "adviser" contracts, where the adviser's fee is often deducted from account value, the Committee

[31] More specifically, an insurer would include either a maximum or a minimum depending upon which would communicate the least favorable rate possible from the investor's perspective. For example, with respect a fee or charge, the Statutory Prospectus would disclose a maximum fee or charge possible. Conversely, with respect to a withdrawal rate, the Statutory Prospectus would disclose the minimum withdrawal rate possible.

[32] If the Commission does not agree that the rate sheeting process should be modified as recommended by the Committee, insurers could continue to prepare and file rate sheets in the same manner, but any updated rate sheets would be treated—for delivery purposes—as Rule 497 supplements to a Statutory Prospectus, not to an ISP. As a supplement to the Statutory Prospectus, the updated rate sheets would be posted online and available in paper upon request. In parallel, companies that do not use rate sheets, and instead disclose the current rates in their Statutory Prospectuses, would disclose changes to such rates by changing their Statutory Prospectuses (not via rate sheets) and would likewise make the updated disclosure available online and in paper upon request. Of course, carriers may choose to paper deliver the rate sheets nonetheless.

[33] *See* Rule 498A(b)(5)(vii).

believes that a reference to the potential negative effect of such fees should also be permitted in this section.

- **Effect of Withdrawals on Benefits** – The Committee recommends that the Commission revise the requirements for this section of the ISP to require disclosure, if applicable, in the form of a brief statement, regarding the possible negative impacts of partial withdrawals on particular benefits.[34]

- **Adviser Fees** – Given the potential tax implications and impact on benefits, the Committee recommends that the Commission revise the requirement for this section of the ISP as stated above so that insurers may also disclose the potential effects of taking withdrawals to pay adviser fees, if applicable.

f. **Fee Table**. Under the heading "Additional Information About Fees," the ISP will include the Fee Table required by Item 4 of Form N-3, Form N-4, or Form N-6.[35] The Committee generally supports this requirement, but recommends the following refinements:

- **Annual Transaction Expenses** – There is a portion of the Fee Table under Form N-3 and N-4 for "Annual Transaction Expenses." This part of the fee table includes expenses that are not deducted on an annual basis, such as sales loads and exchange fees. Instead, these fees are deducted only when a contract owner initiates certain transactions (*e.g.*, paying a premium, taking a withdrawal, making a subaccount transfer). The heading should be changed to "Transaction Expenses" (deleting the word "Annual").

- **Annual Contract Expenses** – There is a portion of the Fee Table under Form N-3 and Form N-4 for "Annual Contract Expenses." For some contracts, these types of fees are deducted on a periodic basis, not annually (*e.g.*, in some cases administrative charges or benefit charges may be deducted on a monthly or quarterly basis). The Commission should confirm that Instruction 3 to Item 4 of Form N-3 and Form N-4 (which permits modification of captions) would permit deleting or changing the word "Annual" in this heading, if appropriate for the particular product.

- **Base Contract Expenses** – Instruction 13 to Item 4 of Form N-3 and Form N-4 includes information regarding what should be included in the line for "Base Contract [Expenses]," but the Committee requests additional clarification regarding that definition, particularly when juxtaposed against the definition for "Administrative [Expenses]." For example, some variable products include monthly, annual, or daily charges that are charged to all contract owners, so they would seemingly be Base Contract Expenses under the proposed definition; however, these fees may be designed to cover administrative costs, so they could also qualify as Administrative Expenses. In short, not every product has a charge structure that fits into the specific framework and definitions of the proposed Fee Table requirements. The Commission should clarify what should be included in Base Contract Expenses, or clarify that registrants have reasonable flexibility to add, delete, and adjust captions as appropriate to clearly disclose the charges

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[34] In order to effectuate this change, the Commission should revise Rule 485(b)(5)(vi) to specifically identify Item 14(c) of Form N-3. Item 13(c) of Form N-4, and Item 12(c) of Form N-6 as required disclosure items.

[35] *See* Rule 498A(b)(5)(viii).

applicable to their specific products, provided, of course, that all charges are included in the table.[36]

- **Existing and Prior Terminology** – In addition to the overarching comment set forth above related to the need for flexible terminology, the Committee notes that many Statutory Prospectuses (as well as the contracts themselves and marketing materials) currently use, and for years have used, terminology for fees and charges that differs from the terminology in proposed Item 4 of Form N-3, N-4, and N-6, and there is a wide variety of terminology used in the industry.[37] Investors would likely be confused by receiving an ISP that uses different terminology than other related documents (such as the contract itself). Moreover, existing contract owners would certainly be confused by receiving new documents (such as a USP) that suddenly use new and different terminology than the documents they have been receiving for years. For the reasons noted above, as well as those included here, the Commission should permit insurers the flexibility to use existing and prior terminology in the Fee Table (in the ISP, the USP, and the Statutory Prospectus) as well as new terminology in the future.[38]

- **Assumed Investment Amount for the Cost Examples** – For the reasons discussed above with respect to the "Key Information Table," the Fee Table cost estimate examples should use an assumed investment amount of $10,000, not $100,000.[39]

- **Benefits at No Additional Charge** – In the Proposing Release, the Commission requested comment regarding whether registrants should be required to include benefits available at no additional charge in the Fee Table.[40] The Committee believes that registrants should be permitted to include such benefits in the Fee Table, but they should not be required to do so.

g. Portfolio Company Appendix.[41] The Proposing Release introduces a novel requirement to include an appendix that lists the underlying funds (which Rule 498A, Form N-4,

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[36] A similar clarification should be made with respect to Item 4 of Form N-6 and the instructions set forth under Instructions 1 and 2.

[37] Indeed, insofar as the proposals apply to closed books of business, as well as ongoing business with both new purchasers and in force contract owners, many insurers use existing policy forms for new offerings. The imposition of standardized terminology might obligate an insurer to re-file numerous contract forms with numerous state insurance departments, and the approval process for such filings could take many months or even years. In order to effect such revisions in some states, state statutes or regulations might even need to be amended.

[38] At least, if the use of existing and prior terminology is not permitted, then the use of footnotes or similar methods should be permitted to explain the connection between any new terminology and previously-used terminology (whether used in contracts or other materials).

[39] The Commission requested comment as to whether it should require an interactive fee calculator in connection with contract prospectuses that are posted online. While the Committee appreciates that interactive fee calculators could help investors better understand the fees, charges, and expenses associated with variable products, Committee members generally believe that it would be impractical to require interactive fee calculators, at least at this time. An interactive fee calculator may be extraordinarily difficult to design for even a single contract, given the potential complications associated with multiple classes/versions, fee structures, features, investment restrictions, and optional benefits. Those complications may make interactive fee calculators highly susceptible to design errors. In addition, given the complexities associated with even a single interactive fee calculator, administering interactive fee calculators for entire books of business may be virtually impossible for many companies.

[40] *See* 83 Fed. Reg. 61782.

[41] The comments in this section relate only to the proposed Form N-4 and N-6 requirements, and this section focuses on the first part of the proposed Portfolio Company Appendix, which discloses current fund

and Form N-6 would define as "Portfolio Companies") under a variable contract and to include certain information regarding those funds (the "Portfolio Company Appendix").[42] As proposed, the Portfolio Company Appendix would include the Portfolio Companies' expense ratios and performance histories.[43] However, the inclusion of such specific Portfolio Company data would impose an unworkable and impractical requirement.

- **Expense Ratios** – The Portfolio Company Appendix instructions should be revised to eliminate the requirement to disclose the expense ratio for each Portfolio Company. Gathering this data from unaffiliated mutual fund complexes on a timely basis (within the contextual timeframe for preparing and updating prospectuses) would be a very time consuming and burdensome undertaking each year. Indeed, Form N-4 previously required expense ratios for each Portfolio Company, but that requirement was later eliminated.[44] In this respect, the proposed requirement represents a step backwards.

  In Committee members' experience, it can be extremely difficult for insurers to obtain expense information from Portfolio Companies on a timely basis prior to filing and printing deadlines. As such, the requirement imposes a burden on an insurer that largely depends on the cooperation of third-parties. Moreover, an insurer should not be responsible for disclosing specific data regarding Portfolio Companies in this layered disclosure framework. The Fee Table will include the highest and lowest Portfolio Company expense ratio,[45] and the specific expense ratio for each Portfolio Company will be readily available in the Portfolio Company's prospectus, which will be available at the website address specified in the introductory legend of the contract summary prospectus. Simply put, in a variable product layered disclosure framework, Portfolio Company details such as the exact expense ratio for each Portfolio Company should be limited to the underlying fund layer (*i.e.*, the Portfolio Company disclosures). There is no persuasive justification for requiring the insurance company to repeat this Portfolio Company data in the Portfolio Company Appendix (or any other variable product disclosures).[46]

  If the Portfolio Company Appendix ultimately requires that the expense ratios for every Portfolio Company be included, then at the very least, insurers should be permitted (but not required) to disclose net expense ratios in addition to gross ratios. As proposed, the Portfolio Company Appendix would include the Portfolio Companies' gross expenses ratios before any waivers or reimbursements.[47] If an insurer includes net expense ratios, the insurer should be required to include a footnote (or footnotes) explaining the general effect that voluntary and contractual waivers may have on Portfolio Company expense ratios. Particularly with respect to underlying funds that have recently commenced operations, net expense ratios

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availability for the base contact. Additional comments regarding the second part of the proposed Portfolio Company Appendix, regarding funds available with optional benefits, appear below.

[42] The Portfolio Company Appendix requirement would apply not just to ISPs, but also to USPs and to Statutory Prospectuses. The Committee's comments generally apply to all uses of the Portfolio Company Appendix. *See* Rule 498A(b)(5)(ix) and (c)(6)(iv); Item 18 of Form N-4 and Form N-6.

[43] *See* Item 18 of Form N-4 and Form N-6.

[44] *See* Disclosure of Costs and Expenses by Insurance Company Separate Accounts Registered as Unit Investments Trusts, Release No. IC-25802 (Nov. 13, 2002).

[45] *See* Item 4 of Form N-4 and Form N-6.

[46] For the same reasons, the expense ratios should not be required in the Portfolio Company Appendix that appears in the Statutory Prospectus. *See* Item 18 of Form N-4 and Form N-6.

[47] *See* Instruction 4 to Item 18 of Form N-4 and Form N-6.

provide investors with a more realistic estimate of the expenses associated with a fund.

- **Performance Data** – For the same reasons discussed above under "Expense Ratios," the Portfolio Company Appendix instructions should be revised to eliminate the requirement to include Portfolio Company performance histories. First, performance histories will be very difficult for insurers to gather from unaffiliated mutual fund complexes on a timely basis. Second, in a variable product layered disclosure framework, Portfolio Company performance data should be limited to the underlying fund layer (*i.e.*, the Portfolio Company disclosures). In that regard, the introductory legend to the Portfolio Company Appendix should be revised specifically to reference how Portfolio Company performance data can be obtained.[48] Limiting performance data to Portfolio Company disclosures will help ensure its accuracy and, in any event, the obligation to update that information should rest with the Portfolio Companies, not the insurers. In addition, the performance data required in the Portfolio Company Appendix would become outdated quickly, whereas more current and frequently updated performance data would generally be available online. Accordingly, the Committee recommends that Portfolio Company performance data not be required in the Portfolio Company Appendix (or any other variable product disclosures) and that the Appendix should instead include a cross-reference to the location where up-to-date fund performance is available.[49]

- **Paper Delivery of Portfolio Company Prospectuses** – The Portfolio Company Appendix requirement appears to be primarily designed for situations where the optional "access equals delivery" method under Rule 498A(j) is relied upon to satisfy Portfolio Company prospectus delivery obligations. However, reliance on Rule 498A(j) to deliver Portfolio Company prospectuses is optional, even if an insurer opts to use summary prospectuses for a variable contract. If an insurer does not rely on Rule 498A(j), and instead opts to deliver paper or electronic versions of the Portfolio Company prospectuses (either statutory prospectuses or summary prospectuses), then Portfolio Company expense and performance information is being delivered via the Portfolio Company prospectuses. Under such circumstances, there is even less reason to require fund specific information in the Portfolio Company Appendix.[50]

  Accordingly, in the event that insurers are ultimately required to include Portfolio Company expense and performance history data in the Portfolio Company Appendix, despite the reasons why Committee strongly believes such requirements should be eliminated, the Portfolio Company Appendix instructions should be revised to permit omission of such data if an insurer delivers paper or electronic versions of Portfolio Company prospectuses (instead of relying on Rule 498A(j)). In that context, replication of such data would serve no apparent purpose as contract owners would be receiving the same expense and performance information in both the contract summary prospectus (or Statutory Prospectus) and the Portfolio Company prospectuses.

- **"Soft Closed" Fund Options** – As a technical matter, as proposed, the Portfolio Company Appendix must include "those Portfolio Companies that are currently

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[48] *See* Item 18 of Form N-4 and Form N-6.

[49] For the same reasons, Portfolio Company performance data should not be required in the Statutory Prospectuses. *See* Item 18 of Form N-4 and Form N-6.

[50] In this context, there is no need to require the Portfolio Company Appendix in the ISP, in the USP, or in the variable contract Statutory Prospectus.

offered under the Contract."[51] The "currently offered" standard should be clarified. Clarification should be provided as to whether Portfolio Company options in which current investors are permitted to invest, but not new investors (sometimes referred to as "soft closed" fund options), are considered to be "currently offered."[52] If soft closed fund options must be included, then there must be footnotes or some other mechanism to disclose the limited availability of these options.

Specifically, the Committee suggests that an instruction be added to Item 18 of Form N-4 and Form N-6 indicating that "soft closed" fund options (i) should *not* be included in the Portfolio Company Appendix appearing in an ISP, (ii) but should be included in the Portfolio Company Appendix appearing in a USP and in a Statutory Prospectus, with an explanation (in a footnote or otherwise) of the limited availability of the options.

h. Investment Option Appendix (Form N-3 Variable Products Only). Variable annuity contracts registered on Form N-3 are supported by separate accounts organized as management investment companies. Such variable annuity contracts do not have underlying funds. Rather, they have one or more investment portfolios that may be selected by a contract owner for investment, which Rule 498A and Form N-3 define as "Investment Options."[53] Because variable products registered on Form N-3 do not have underlying funds, the Proposing Release does not contemplate a Portfolio Company Appendix for such products. Instead, the Proposing Release contemplates a similar appendix with information about the Investment Options (the "Investment Option Appendix").[54] The Committee believes that an aspect of the Investment Option Appendix, as proposed, should be revised.

- **Annual Contract Expenses –** The Annual Contract Expenses column should be removed from the Investment Option Appendix. The Annual Contract Expenses are required to be disclosed in the Fee Table required by Item 4 of Form N-3. Repeating those same expenses in the Investment Option Appendix would be unnecessarily duplicative.

e. Special Terms in Online Summary Prospectuses. As proposed, Rule 498A would require that investors be able to view the definition of each special term used in an online summary prospectus upon command, or to move directly back and forth between each special term and the corresponding entry in any glossary (or similar list of definitions) included in the summary prospectus.[55] The Committee is concerned that this requirement may be overly burdensome and excessive, as summary prospectuses may use special terms frequently.

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[51] Instruction 1.(a) to Item 18 of Form N-4 and Form N-6. The Portfolio Company associated with a soft closed fund option may or may not be issuing new shares. Instead, when a Portfolio Company option is soft closed, the insurer limits the ability of some or all contract owners to invest in the subaccount corresponding to that Portfolio Company.

[52] For this purpose, depending on the particular product, "current investors" could mean either all existing contract owners or only those contract owners with cash value already in the applicable subaccount. In either case, these current investors may be allowed to allocate new premiums to the soft-closed fund options (and potentially also transfer cash value into the soft closed fund options), but new purchasers would not be able to invest in those options (through either new premiums or transfers). The Committee believes that the Commission's intention was to have soft-closed fund options excluded from the Portfolio Company Appendix in the ISP, but to have them included in the Portfolio Company Appendix in the USP and Statutory Prospectus, but the Committee is seeking clarification on that point.

[53] *See* Rule 498A(a)(5); General Instruction A of Form N-3.

[54] *See* Item 19 of Form N-3.

[55] *See* Rule 498A(h)(2)(iv); 83 Fed. Reg. 61760.

Accordingly, Committee believes that insurers should be given greater flexibility regarding the use of technology to enhance investors' understanding of special terms in summary prospectuses.

- **Continuously Visible Links to Glossary –** The Commission should permit insurers to satisfy their obligations under Rule 498A(h)(2)(iv) by making a link to a summary prospectus's glossary (or similar list of definitions) continuously visible, thereby allowing an investor to move back-and-forth between the various sections of a summary prospectus and its glossary. The Committee notes that the Commission has proposed a similar approach to linking under Rule 498A(h)(2)(iii).

2. The Updating Summary Prospectus

Currently, full Statutory Prospectuses are generally delivered (in paper) every year to in-force owners of variable products – owners who have already made an initial purchase decision. Due in large part to the fact that variable products are detailed, state-approved contracts that constitute binding obligations, most of the information in these Statutory Prospectuses repeats what already has been disclosed to the contract owner both upon initial delivery of the prospectus and in the variable contract itself. Moreover, any new or updated information typically is woven into the Statutory Prospectuses without any obvious indication of which text is new or updated. In effect, it is very difficult for an ordinary investor to detect such changes. Importantly, because variable products are contracts, very few changes are, in fact, made after the contract is issued. This is because only those changes that the insurer contractually reserved the unilateral right to make (and the state has approved) are permitted without the consent of the affected contract owner.

Under the proposals, however, insurers would be allowed to use USPs to fulfill their obligations to deliver annually updated prospectuses to existing contract owners. The Committee enthusiastically supports this approach for providing annually updated disclosures for variable products and believes that USPs will be a significant improvement for in-force contract owners, who are burdened and even confused by the annual receipt of a dense paper Statutory Prospectus that reflects few changes. Indeed, the Committee took the lead role in creating a proposed annual disclosure solution for contract owners. In the context of this strong endorsement, the Committee offers the following comments on the USP proposals:

- **Applicability of Comments on the ISP** – The Committee's comments above on the Key Information Table and the Portfolio Company Appendix in context of the ISP also apply to the corresponding sections of the USP.[56] In addition, to the extent applicable to any changes that have been made since delivery of the most recent USP or Statutory Prospectus, the comments above in the context of the ISP regarding the standard death benefit, other benefits available under the contract, surrenders and withdrawals, the Fee Table, and the Portfolio Company Appendix also apply to the USP.[57]

- **Changes Included in the USP** – As proposed, the USP would provide a concise description of certain changes that have occurred since delivery of the most recent USP or Statutory Prospectus, as specified in Rule 498A(c)(6)(i). Rule 498A also permits concise descriptions of any other change with respect to the contract that occurred "within the time period that paragraph (c)(6)(i)" specifies.[58] However, since the delivery of the last USP or Statutory Prospectus, insurers may have delivered supplements to that USP or Statutory Prospectus. In these instances, the Committee suggests that highlighting and repeating those disclosures could be confusing, inferring that such information is new or different from the

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56 *See* Rule 498A(c)(6)(iii) and (iv).

57 *See* Rule 498A(c)(6)(i).

58 *See* Rule 498A(c)(6)(ii).

information that was previously disclosed. The Committee suggests that Rule 498A(c)(6) be revised to permit insurers to omit information that has been disclosed in a prior USP or Statutory Prospectus supplement delivered to contract owners. In order to avoid confusion, insurers opting to include previously disclosed information should be able to clarify in the USP that such information was previously communicated.

In some cases, it would be appropriate, and more convenient for contract owners, for a USP to include changes that have occurred outside of the limited time period specified in Rule 498A(c)(6)(i). Therefore, the Committee recommends that the time period restriction in subparagraph (c)(6)(ii) be deleted.[59]

- **Ability to Use USPs –** As proposed, a registrant may only use a USP for a contract if it uses an ISP for each currently offered contract described in the Statutory Prospectus to which the USP relates.[60] The Committee believes that the rule should be revised to permit the use of a USP in cases where an ISP is not being used with regard to each currently offered contract described in the Statutory Prospectus, either for business reasons, administrative constraints, or any other reason. The Committee believes that such circumstances may arise from time to time, and insurers do not want to be constrained from using UPSs in that context. New purchasers, in such a situation, will still have the benefit of the modernized disclosures required in the Statutory Prospectus.

  In addition, the Committee would appreciate the Commission's confirmation that a USP can be used for contract owners who did not receive an ISP in connection with the purchase of their contracts.

- **No Notice of Reliance on Rule 498A –** The Commission is seeking input related to whether insurers should be required to provide notice of their intention to rely on Rule 498A.[61] The Committee urges the Commission not to make such notice an element of reliance. The Committee believes that such notice, which would be akin to the advance notice required under the newly-adopted Rule 30e-3 under the 1940 Act,[62] is unnecessary in this context. Under Rule 30e-3, if a notice was not required, an investor would have no indication that the method of delivery of the documents he or she expects to receive is changing. Under Rule 498A, the USP itself serves as effective notice that the type of disclosure document that an investor expects to receive has changed, and the USP provides clear information and direction about how the previously provided disclosure documents may be obtained, as well as a level of information about the variable contract that may itself be sufficient for most investors.[63]

3. Benefits-Related Investment Restrictions (ISPs and USPs)

The Portfolio Company Appendix or Investment Option Appendix required by subparagraphs (b)(5)(ix) (for the ISP) and (c)(6)(iv) (for the USP) of Rule 498A is comprised of two parts: (1) an appendix for Portfolio Companies or Investment Options currently offered under

[59] We note that Rule 498A(c)(6)(ii) already includes a requirement that any such additional information should not, by its nature, quantity, or manner of presentation, obscure or impede understanding of the required information.

[60] *See* Rule 498A(c)(1).

[61] *See* 83 Fed. Reg. at 61759.

[62] *See* Rule 30e-3(i) under the 1940 Act.

[63] For avoidance of doubt, insurers should be permitted to provide advance notice of its intent to rely on Rule 498A, but such notice should not be required.

the base contract (as previously discussed)[64] and (2) *another* appendix for the Portfolio Companies or Investment Options that are available under each of the benefits offered under the contract.[65] This second appendix, focusing on benefit-related investment restrictions, may be feasible to prepare in the simple situation assumed in the hypothetical ISP and USP provided with the Proposing Release, but it is generally not tenable as a practical matter.

Both ISPs and USPs—perhaps particularly USPs, which as proposed could cover not only multiple classes of a contract but also multiple versions of a contract and different contracts—would in many cases reflect numerous iterations and versions of benefits. The investment restrictions associated with the iterations of a single benefit could vary depending on multiple factors, such as the date of issuance (of the contract or the benefit) or the class of contract. In addition, there may be many different versions of a single benefit that may have the same name, but vary with respect to investment restrictions due to differences in availability or features, such as variations in roll-up rates, step-up provisions, or payout percentages. For these reasons, particularly in the context of a USP, there could be dozens of variations in investment restrictions that would need to be included in the appendix. The Committee is very concerned that it will not be feasible in many cases to distill numerous possible variations in investment restrictions, clearly and concisely, into the tables envisioned by the Commission.

In addition to the foregoing, there are investment restrictions that are not necessarily amenable to a simple “yes or no” (or “available or not available”) tabular presentation. For example, some products require percentage distributions among funds (*e.g.*, in addition to a limited line-up of available funds, a particular benefit may require that between X and Y percent of cash value be allocated to a specified group of equity funds; that between A and B percent of cash value be allocated to a select group of fixed income funds; and that no more than C percent of cash value be allocated to certain aggressive or high-risk funds). In other cases, a particular benefit may require that cash value be automatically re-allocated (pursuant to a specified algorithm) at certain trigger points between a fund (or funds) selected by the contract owner and a fixed account or money market fund. Indeed, a single contract may include benefits that provide for methods of restricting investments that differ dramatically, some using restricted fund line-ups, some using cash value percentages, and some using algorithms, all as noted above. All of these variations and possible permutations are not susceptible to disclosure in a tabular format, particularly when such tables must address multiple contracts, multiple classes or versions of contracts, and multiple iterations of benefits. Simply disclosing all of this information is a daunting task that belies the notion of a summary prospectus.

- **Disclosure of Benefit Investment Restrictions.** For the reasons noted above, the Committee recommends that the requirement to disclose benefit-related investment restrictions as part of the Portfolio Company Appendix or Investment Option Appendix be eliminated. The Committee acknowledges that new investors should be made aware of benefit-related investment restrictions, but believes that the disclosure regarding benefit-related investment restrictions under “Other Benefits Available under the [Contract]” in the ISP provides investors with a clear understanding that not all Portfolio Companies or Investment Options may be available for investment and that additional information about such investment restrictions is provided in the Statutory Prospectus. The Committee recommends that the Commission limit the detailed benefit-related investment restriction information to the Statutory Prospectus, which should be disclosed on a benefit-by-benefit basis in accordance with Item 12 of Form N-3 and Item 11(c) of Form N-4 and N-6.

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[64] *See* Item 19 of Form N-3 and Instruction 1.(b) thereto; Item 18 of Form N-4 and Form N-6 and Instruction 1.(a) thereto.

[65] *See* Item 19 of Form N-3 and Instruction 1.(c) thereto; Item 18 of Form N-4 and Form N-6 and Instruction 1.(c) thereto.

The Committee acknowledges that Instruction 1.(c) to Item 19 of N-3 and Item 18 of Form N-4 and Form N-6 provides that "[t]his Appendix . . . could use any other presentation that might promote clarity and facilitate understanding." If information about benefit-related investment restrictions is ultimately required in the Portfolio Company Appendix or Investment Option Appendix, the Committee requests confirmation or clarification that the simplified presentation in the hypothetical ISP and USP is not required, and that "any other presentation" might encompass more than multiple tables, including narrative explanations, annotations, and other approaches or combinations thereof.

4. Prospectus Delivery

a. Portfolio Company Prospectus Delivery.[66] The vast majority of SEC-registered variable products utilize a two-tier structure. The top tier includes a separate account (registered under the 1940 Act) and the variable contract itself (registered under the 1933 Act). The bottom tier includes a product's underlying funds and the shares that they issue (registered under the 1940 and 1933 Acts, respectively). In this fairly unique structure, the Commission has applied the prospectus delivery requirement imposed by Section 5(b)(2) of the 1933 Act not only to the variable contract prospectus, but also to the prospectuses for the underlying funds.[67] Moreover, prospectus delivery requirements have been applied not only upon the initial sale and issuance of the variable contract, but also throughout the life of the variable contract. These prospectus delivery requirements result in the delivery of voluminous amounts of paper disclosure materials that, in reality, are never read.

Rule 498A(j) would reduce the number of paper underlying fund prospectuses that must be delivered. Rule 498A(j) would permit (but not require) an alternative online-based "access equals delivery" option for fulfilling the Section 5(b)(2) requirement to deliver underlying fund prospectuses. The Committee strongly supports this concept and approach, but suggests the following:

- **Ability to Rely on Online Fund Prospectus Delivery Even When Underlying Fund Does Not Use a Summary Prospectus –** Most underlying funds prepare and use summary prospectuses in accordance with Rule 498. In the highly unusual context where an underlying fund does not use a summary prospectus, an insurer also should be permitted to rely on the online delivery option under Rule 498A(j), provided the insurer ensures website access to the underlying fund documents required by Rule 498A(j)(1)(iii) (except the current fund summary prospectus, as it would not exist in that context). Under such circumstances, the investor would still receive the Portfolio Company Appendix, which is the primary fund-related disclosure in a variable contract's summary prospectuses and Statutory Prospectus regarding the underlying funds.

  Also, many insurers currently utilize a first dollar/right mix delivery system for underlying fund prospectuses, pursuant to which contract owners receive prospectuses only for the underlying funds that they select for investment rather than all underlying funds. If insurers are only able to rely on Rule 498A(j) with respect to some underlying funds but not all, after Rule 498A becomes effective insurers will have to maintain first dollar/right mix systems in the event that one or more underlying funds do not use a summary prospectus. Even if an insurer

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[66] These comments only apply to variable products registered on Form N-4 or Form N-6.

[67] As a legal matter, the Committee does not necessarily agree with the premise that the Section 5(b)(2) prospectus delivery requirement applies to the prospectuses for the underlying funds, the shares of which are legally owned by the insurance company. The Committee notes that prospectus delivery requirements have not applied to investments with similar two-tier structures such as 401(k) retirement plans and 529 college savings plans.

would not initially need any such system because all of its underlying funds currently use a summary prospectus, the insurer would have bear the cost of tailoring and maintaining its internal systems to address the possibility a first dollar/right mix delivery system may be needed in the future, which seems overly burdensome.[68]

Lastly, should an underlying fund cease using a summary prospectus, an insurer is basically stuck with that fund as an investment option and is forced to resume paper delivery, as insurers have very few avenues for removing underlying funds from their fund line-ups. By not permitting an insurer to utilize the online delivery option for underlying funds that do not use summary prospectuses, the Commission is placing the ability of insurers to rely on Rule 498A(j) at the mercy of underlying funds.

- **Website Posting –** As proposed, if an insurance company seeks to deliver underlying fund prospectuses online in accordance with Rule 498A(j), the underlying fund documents set forth under Rule 498A(j)(1)(iii) must be publicly accessible, free of charge, "at the website address specified on the cover page or beginning of the [c]ontract [s]ummary [p]rospectuses."[69] In the Proposing Release, the Commission asks "should we—as proposed—specify that these [Portfolio Company] materials must be available at the *same* website address as the variable contract materials that appear online, or should there be flexibility regarding the website address on which the Portfolio Company materials appear?"[70] This suggests that the insurance company will be responsible for posting the underlying fund documents, ensuring their accuracy, and keeping them current, rather than simply providing links on the insurer's website to the underlying funds' document libraries. If so, the Committee has significant concerns regarding the necessary coordination between underlying funds and insurers that would be necessary, and the extent to which insurers would rely on underlying funds' cooperation. For example, insurance companies would essentially need to rely on underlying funds to provide updated, properly formatted versions of the necessary documents for posting, or to notify the insurance companies when such documents are available. The Committee also has serious concerns related to liability and issues regarding responsibility for regulatory compliance, and the likelihood that an insurer could be deemed liable or responsible for non-compliance stemming from the actions or inactions of an underlying fund as result of the website posting requirements as proposed.

As noted above, the Commission requested comment on whether there should be greater flexibility regarding the website address on which the underlying fund materials appear. The Committee strongly urges that the final rule provide such flexibility, and specifically permit insurers' websites to include website addresses or links directing contract owners to the underlying funds' website document libraries.

This would be a more practical approach than requiring insurers to post and maintain the underlying fund documents themselves, as the underlying funds are in a better position to upload and maintain the necessary documents, which they are already required to do in accordance with Rule 498. This approach would also

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[68] In the experience of Committee members, insurers have very little influence over an underlying fund's decision whether or not to use a summary prospectus. Insurers could seek to amend participation agreements with underlying funds to obligate them to use summary prospectuses, but an underlying fund can reject any such requirement essentially at will.

[69] Rule 498A(j)(1)(iii).

[70] 83 Fed. Reg. at 61769 (emphasis added).

enhance investors understanding that the underlying funds are separate entities from the insurance company and the separate account. Further, this approach would be consistent with the more flexible fund document website posting requirements of recently adopted Rule 30e-3 under the 1940 Act.[71]

- **Timing of Information Conveyed –** Rule 159 under the 1933 Act addresses the time at which information is deemed to be conveyed for purposes of disclosure liability under Section 12(a)(2) and Section 17(a)(2) of the 1933 Act. For mutual funds, Rule 498 under the 1933 Act provides that (i) for purposes of Rule 159, information is conveyed to a person not later than the time the fund's summary prospectus is delivered if such information is incorporated by reference into the fund's summary prospectus, and (ii) the fund's statutory prospectus may be incorporated by reference into the fund's summary prospectus.[72] By directly addressing Rule 159, Rule 498 provides clarity regarding the time that information in a mutual fund statutory prospectus is deemed to be conveyed when a mutual fund summary prospectus is delivered.

  Under Rule 498A, comparable clarity would be provided with respect to the conveyance of information in the variable contract's Statutory Prospectus and SAI. Specifically, Rule 498A(d)(2) provides that a registrant may incorporate by reference into a variable contract summary prospectus all of the information contained in *the registrant's* variable contract Statutory Prospectus and SAI, and paragraph (d)(3) provides that for purposes of Rule 159, information is conveyed to a person not later than the time that a summary prospectus is received by the person if the information is incorporated by reference into the summary prospectus in accordance with paragraph (d)(2). The Committee supports these proposed provisions, as they provide significant clarity on the relationship between Rule 498A and Rule 159.

  Although the provisions of Rule 498A noted above are necessary, they do not appear to be completely sufficient, because Rule 498A does not clarify the time at which *the information in underlying funds' statutory prospectuses* is deemed to be received for purposes of Rule 159. Rule 498A(j)(1) does specify that delivery of underlying fund summary prospectuses in accordance with Rule 498A(j) would satisfy any obligation under Section 5(b)(2) of the 1933 Act to deliver a statutory prospectus for an underlying fund, but Rule 498A does not specify for purposes of Rule 159 when the information in the statutory prospectus of the underlying fund is deemed to be conveyed.

  In order for Rule 498A to completely address how it relates to Rule 159, the Committee recommends that Rule 498A be revised to provide that when an underlying fund statutory prospectus is delivered for purposes of Section 5(b)(2) in accordance with Rule 498A(j), the information in the underlying fund statutory prospectus is deemed to be conveyed at the same time for purposes of Rule 159. For avoidance of doubt, the Committee is not recommending (and would be opposed to) the incorporation by reference of the underlying fund summary or statutory prospectus into the variable contract summary prospectus.

- **Interim Portfolio Company Supplements –** In the Proposing Release, the Commission asks whether it should require insurers that are relying on Rule 498A(j) to deliver interim underlying fund prospectus supplements to contract

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[71] *See* Rule 30e-3(b).

[72] *See* Rule 498(b)(3)(ii) and (b)(3)(iii).

owners.[73] The Committee opposes any such requirement. The Committee strongly believes that any such requirement would be confusing to contract owners and is simply at odds with the overall purpose and structure of the access equals delivery framework embodied in Rule 498A(j).

b. Variable Product Prospectus Online Delivery. In recent years, the Commission has exhibited through rulemakings an increasing comfort with online delivery models for disclosure documents. For example, in 2005, as part of broad securities offering reform primarily under the 1933 Act and the Securities Exchange Act of 1934 (the "1934 Act"), the Commission adopted Rule 172 under the 1933 Act, which established an online delivery model for prospectuses related to certain offerings registered under the 1933 Act.[74] In 2007, the Commission adopted an online access model for proxy materials required by the 1934 Act.[75] In 2018, the Commission adopted Rule 30e-3 under the 1940 Act, which established an online delivery model for investment company shareholder reports.[76] And, in the Proposing Release, the Commission has proposed an online delivery model for underlying fund prospectuses in connection with variable products. Given the momentum towards online delivery, and the unprecedented access that investors have to the internet, it is a natural progression to extend online delivery to the delivery of variable product prospectuses. The Committee would support an online delivery model for variable product prospectuses and is eager to assist the Commission in that regard. The Committee highlights that the Commission could facilitate the delivery of prospectuses for variable products (and other investment company securities) online by removing the exclusion for offerings of investment companies set forth in Rule 172(d)(1) under the 1933 Act.

c. Electronic Delivery of Disclosure Documents. The Commission has provided guidance on electronic delivery (or "e-delivery") of disclosure documents in three interpretative releases issued in 1995, 1996, and 2000 (the "E-Delivery Interpretive Releases").[77] The E-Delivery Interpretative Releases paved the way for issuers and intermediaries to deliver disclosure documents electronically; however, in the modern age of internet technology, e-delivery is being severely underutilized. Indeed, the Commission estimates that only 15% of variable contract Statutory Prospectuses and underlying fund summary prospectuses are being delivered electronically.[78] In the Committee's experience, even that estimate is likely higher than the actual percentage of contract owners that receive disclosure documents via e-delivery. Importantly, the Committee feels very strongly that the e-delivery election rate is in no way reflective of variable contract owner preferences; it is reflective of the outdated and cumbersome electronic enrollment process. Indeed, Committee members anecdotally report a significant spike in complaints in conjunction with the delivery of annual variable contract prospectuses.

The Committee believes that the Commission should take action to modernize the e-delivery framework, which may include modernizing its guidance. It may also include taking action with respect to the federal Electronic Signatures in Global and National Commerce Act of 2000 ("E-SIGN"), which includes provisions that impose significant burdens on how informed consent may be obtained. The Committee believes that it is an appropriate time for the Commission to re-consider the framework for e-delivery, and the Committee would be readily willing to assist the Commission in that regard.

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[73] *See* 83 Fed. Reg. 61769.

[74] *See* Securities Offering Reform, Release Nos. 33-8591, 34-52056, IC-26993 (July 19, 2005).

[75] *See* Internet Availability of Proxy Materials, Release No. 34-55146, IC-27671 (Jan. 22, 2007).

[76] *See* Optional Internet Availability of Investment Company Shareholder Reports, Release Nos. 33-10506, 34-83380, IC-33115 (June 5, 2018).

[77] *See* Use of Electronic Media, Release No. 33-7856 (Apr. 28, 2000); Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information, Release No. 33-7288 (May 9, 1996); Use of Electronic Media for Delivery Purposes, Release No. 33-7233 (Oct. 6, 1995).

[78] *See* 83 Fed. Reg. 61805-06.

5. Summary Prospectuses and Other Accommodations for Insurance Products Registered on Form S-1 or S-3

In addition to variable products, insurers also offer registered non-variable insurance products to investors, including index-linked annuities or index-linked variable annuities (together "ILVAs"), market value adjustment contracts ("MVAs"), and contingent deferred annuities. Insurers must register these non-variable products on Form S-1 or S-3 because no specific registration form exists for them. Because they are registered on Form S-1 or S-3, non-variable insurance products are subject to dramatically different and, in the context of insurance product offerings, more burdensome registration and disclosure regimes than the registration and disclosure regimes for variable insurance products. Yet, these products generally are offered to investors with similar needs and profiles as investors may purchase variable annuities. Indeed, these products are frequently offered to investors in conjunction with variable products through a combined S Form / N Form prospectus. The Committee believes that the Commission should take steps to accommodate the offering of registered non-variable products. Such accommodations should include expanding the ability of insurers to use summary prospectuses for their non-variable products.

The registration and disclosure regime for non-variable products is dramatically different and more burdensome for insurance companies than the registration and disclosure regime for variable products for several reasons, some of which include the following:

- Non-variable products are registered on forms that are tailored for more traditional offerings, like equity and debt offerings. As such, insurers are required to include disclosures in response to several items under Regulation S-K that are inapplicable, immaterial, or irrelevant to an insurance product offering, particularly the company-related disclosures required by Subpart 400 of Regulation S-K.

- When a non-variable product is registered, the insurer generally becomes subject to the periodic and current reporting requirements under the 1934 Act, unless the insurer qualifies for an exemption (most notably, under Rule 12h-7 under the 1934 Act). The obligation to prepare 10-Ks, 10-Qs, and 8-Ks is exceedingly burdensome, particularly because no such obligation arises when an insurer offers a variable product.

- Registration fees for non-variable products are not calculated in the same manner as for variable products. Unlike for variable products, registration fees for non-variable products must be paid in advance, and premiums and withdrawals for non-variable products cannot be netted for purposes of calculating registration fees as permitted under Rule 24f-2 under the 1940 Act. As a result, insurers must continuously monitor the amount of registered interests remaining and often must file new registration statements off-cycle to register new interests – something they never have to do for variable products.

The Committee believes that the Commission should take action to accommodate non-variable product offerings in the most expedited manner possible. The need of accommodation is especially acute in light of the new disclosure framework for variable contracts, because when a non-variable product is offered in conjunction with a variable product, an investor will receive ISPs and USPs for the variable portion of the investment, and a full statutory prospectuses for the non-variable portion. Such an outcome seems inconsistent with the general purposes and goals of this rulemaking.

The Committee is eager to assist the Commission in effecting new disclosure accommodations for registered non-variable product offerings. Such accommodations may come in the form of:

- Expanding Rule 431 under the 1933 Act and amending Form S-1 and S-3 to facilitate the ability of insurers offering non-variable products to use summary prospectuses;

- Excluding insurance companies offering non-variable products from the applicable disclosure requirements under Subpart 400 of Regulation S-K;

- Permitting insurance companies to use financial statements prepared in accordance with Statutory Accounting Principles (SAP) rather than Generally Accepted Accounting Principles (GAAP) for their non-variable product registration statements to the same extent that insurance companies are already permitted to use SAP financial statements in connection with variable product registration statements;

- Expanding Rule 172 under the 1933 Act so that its access equals delivery model is more compatible with the point of sale process;

- Adopting registration forms that are specific to non-variable products; and/or

- Allowing insurance companies to register non-variable products on an investment company form (namely, Form N-4).

By taking such actions, the Commission will not only alleviate the unnecessary burdens imposed on insurers offering registered non-variable products, but it will improve the investor experience. It also likely will spur innovation and competition, and thereby provide investors with more choices in the market.

6. Variable Life Insurance Contracts

As previously indicated, the Committee's concerns and comments expressed above regarding ISPs and USPs for variable annuities also generally apply to ISPs and USPs for variable life insurance ("VLI") contracts. However, in certain respects, given the different features of and benefits provided by VLI contracts, such contracts present certain unique issues under the summary prospectus proposals (and the related Statutory Prospectus proposals) that should be specifically addressed.

a. Standard Death Benefit. As proposed, the VLI ISP would be required to have a "Standard Death Benefit" section that must include information regarding "(i) when insurance coverage is effective; (ii) when the death benefit is calculated and payable; (iii) how the death benefit is calculated; (iv) who has the right to choose the form of benefit and the procedure for choosing the form of benefit, including when the choice is made and whether the choice is revocable; (v) the forms the benefit may take and form of benefit that will be provided if a particular form has not been elected; and (vi) whether there is a minimum death benefit guarantee associated with the [c]ontract."[79] In addition, the Standard Death Benefit section must also describe "if and how a contract owner may increase or decrease the face amount, including the minimum and the maximum amounts, any requirement of additional evidence of insurability, and whether charges, including sales load, are affected."[80]

- **Required ISP Disclosure –** The standard death benefit information required by Rule 498A(b)(5)(iii) is not a *summary*. It is, instead, virtually all of the death benefit disclosure required in the Statutory Prospectus. Consistent with the Commission's goal of implementing a new layered disclosure regime for variable

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79 *See* Rule 498A(b)(5)(iii); Item 10(a) of Form N-6.

80 *See* id.

products, the ISP requirements for VLI contracts should be revised to permit a *brief summary* of this death benefit information.[81]

- **ISP Section Heading –** The concept of a "standard" death benefit generally does not apply to VLI contracts; instead, VLI products generally offer a choice of two or three death benefit options (none which is "standard").[82] Nevertheless, the death benefit under VLI contracts is significantly more important than the standard death benefit under variable annuities. Accordingly, for VLI contracts, this section should remain but the heading of this section should be revised to simply say "Death Benefits" (eliminating the word "Standard").[83]

b. Other Benefits Available Under the Contract. As proposed, the VLI ISP would be required to include a table of other standard and/or optional benefits available to purchasers, including a brief summary of the benefit's purpose, its fee (if any), and applicable restrictions and limitations.[84] The Committee generally supports this disclosure item, with the following VLI-specific recommended revisions that supplement our comments regarding this section above.

- **Section or Table Heading** – For VLI contracts, this heading in the ISP (and in the Statutory Prospectus) should remain as proposed (*i.e.,* it should include the word "Other"), as there should be a separate "Death Benefit" section for VLI contracts (Rule 498A(b)(5)(iii) and Item 10(a) of Form N-6).[85]

- **Flexibility** – VLI contracts frequently have numerous additional benefits and riders (e.g., spousal riders, child riders, additional insurance riders, accidental death and dismemberment, disability income, guaranteed insurability, fixed benefit term, premium loans, etc.) that can be included automatically or are available as optional benefits. The Commission should confirm or provide clarification that there is significant additional flexibility in the "other benefits" ISP disclosure for VLI contracts because different terminology, headings and subheadings may be appropriate or necessary.

c. Buying the [Contract]. As proposed for VLI contracts, the ISP section titled "Buying the [Contract]" would include all of the information required by Items 9(a) through 9(e) of Form N-6. This includes information regarding purchase procedures (including seven specified sub-items), premium amount, premium payment plans, premium due dates, and automatic premium loans. This is virtually all of the information in the Premiums section of the VLI Statutory Prospectus (excepting only Item 9(f), which relates to sub-account valuation). In addition, some of this information (such as under what circumstances premiums may be required to avoid lapse, how the amount of such additional premiums will be calculated, and the effect of death during the grace period) can be complex. This proposed VLI ISP disclosure is not a summary and is inconsistent with the notion of a summary prospectus and a layered disclosure approach. Much of this detail in the VLI Statutory Prospectus is of little interest to most prospective purchasers (*e.g.,*

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81 Rule 498A (b)(5)(iii) should be revised to (i) eliminate references to Forms N-3 and N-4, so that it only applies to VLI contracts; (ii) change the heading reference to "Death Benefit;" and (iii) specifically allow a *brief summary* of the information required by Item 10(a) of Form N-6.

82 In overly simplified terms, for VLI contracts, these death benefits generally are: (a) face amount (the 'level' death benefit); (b) face amount plus cash or contract value (the 'increasing' death benefit); and in some cases, (c) return of (net) premium.

83 This also applies to the VLI Statutory Prospectus. Accordingly, in addition to revising Rule 498A(b)(5)(iii), the heading of Item 10 of Form N-6 should be revised to eliminate the word "Standard."

84 Rule 498A(b)(5)(iv); Item 11(a) of Form N-6.

85 For VLI, the heading in Item 11 of Form N-6 should remain as proposed (it should include the word "Other"), as there should be a separate 'Death Benefit' section (Item 10 of Form N-6).

the effect of death during the grace period), and in any event all of it is readily available in the Statutory Prospectus.

- **Flexibility** – The ISP requirements for VLI contracts should be revised to permit a *brief summary* of the premium information specified in Items 9(a) through 9(e). However, because product designs vary significantly with regard to these provisions and their materiality to purchasers, the ISP should allow flexibility to include information that is not required.

d. How Your [Contract] Can Lapse. This section of the proposed VLI ISP would require inclusion of all of the information required in the VLI Statutory Prospectus regarding 'Lapse and Reinstatement' (Item 14 of Form N-6). Much of this information (*e.g.*, reinstatement) is generally not of significant concern at the time of purchase but only later during the life of the policy. In any event, requiring all of the information set forth in the Statutory Prospectus regarding lapse and reinstatement is also inconsistent with the notion of a summary and with the layered disclosure approach.

- **Brevity** – The ISP requirements for VLI contracts should be revised to permit a *brief summary* of the lapse and reinstatement information required in the full VLI Statutory Prospectus.

e. Form S-6 Registration Statements. Variable products supported by unit investment trust separate accounts that were offered before the adoption of the registration forms for variable products were registered on Form S-6 and many, particularly VLI contracts, remain on that registration form today. These variable products registered on Form S-6 will not be eligible to rely on Rule 498A as proposed. As a result, insurers will be obligated to deliver statutory prospectuses to owners of variable products registered on Form S-6.

- **Incorporate Financial Statements by Reference** – The Commission should amend Form S-6 to permit insurers with variable products that continue to be registered on Form S-6 to file the required financial statements as an exhibit and incorporate them by reference into the prospectus. Of course, such insurers should be obligated to deliver those financial statements upon request. This will not only reduce the volume of disclosures that are provided to owners of variable products registered on Form S-6, but it will also make the disclosure framework for variable products registered on Form S-6 more similar to the disclosure framework for variable products registered on Form N-3, N-4, and N-6, where financial statements are included in the SAI and delivered only upon request.

B. DISCONTINUED CONTRACTS

As part of the Commission's proposal to modernize the disclosure framework for registered variable contracts, the Commission has proposed an agency statement on the treatment of a subset of discontinued variable contracts (*i.e.*, variable contracts that are no longer available for sale to new purchasers) that are commonly known as "Great-Wested" contracts.[86] Great-Wested contracts are contracts for which registration statements are no longer updated, and for which updated prospectuses are no longer delivered, in accordance with a line of SEC staff no-action letters dating back to 1977 (the "Staff Letters").[87] In order to qualify for relief under the Staff Letters, there must be a relatively small number of contract owners.

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[86] 83 Fed. Reg. at 61769-75.

[87] The Staff Letters were issued to Great-West Life and Annuity Insurance Company and other insurers. *See, e.g.*, Great-West Life and Annuity Insurance Company, SEC Staff No-Action Letter (pub. avail. Oct. 23, 1990); MML Bay State Life Ins. Co., SEC Staff No-Action Letter (pub. avail. Apr. 12, 1990); Transamerica Occidental Life Insurance Co., SEC Staff No-Action Letter (pub. avail. Mar. 16, 1990); Connecticut Mutual

As acknowledged by the Commission in the Proposing Release, the Staff Letters alleviate the increasingly disproportionate costs that are uniquely borne by insurers when they are required to update registration statements and deliver updated prospectuses for small blocks of discontinued variable contracts.[88] These disproportionate costs primarily arise from the fact that, unlike mutual funds and other registered investment companies, variable contracts cannot be liquidated or unilaterally terminated by an insurer when they no longer economically viable. By facilitating the ability of insurers to administer small blocks of discontinued variable contracts in an economically viable manner, the Staff Letters have proven vital to the variable insurance industry. The Staff Letters have also ensured that owners of Great-Wested contracts continue to receive information about their investments and still benefit from protections afforded by the federal securities laws.

Under the proposed agency statement, the Commission would nullify the Staff Letters but extend grandfather treatment to Great-Wested contracts. Specifically, the Commission would permit Great-Wested contracts operating in accordance with the Staff Letters as of the effective date of the final summary prospectus rules (the "Effective Date") to continue operating in that manner.[89] All other discontinued contracts would be required to comply with current regulatory requirements.[90]

In the Proposing Release, the Commission also sets forth two alternative approaches it is considering in lieu of the proposed agency statement that would take the form of a rule.[91] Each alternative approach would provide a form of relief similar to the Staff Letters, but with certain significant differences.[92] Importantly, the alternative approaches may or may not include a grandfathering component for Great-Wested contracts.[93]

The Staff Letters are integral to the variable insurance business, and Committee members deeply appreciate the consideration the Commission has given to the Staff Letters generally, to the wide-spread industry practices that have evolved around the Staff Letters, and to the need for continued relief. Nonetheless, the Committee has certain recommendations, concerns, and points of emphasis that it urges the Commission to carefully consider to help ensure that its final actions related to discontinued variable contracts are consistent and fair for both investors and insurers.

The Committee's comments related to discontinued variable contracts are summarized below.

- **Importance of Grandfather Treatment if the Staff Letters are Nullified** – The Committee strongly believes that the grandfathering of Great-Wested contracts is necessary if the Commission takes any final action that would nullify the Staff Letters. Committee members emphasize that they are resolutely opposed to any final action that would nullify the Staff Letters but not extend grandfather

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Life Insurance Company, SEC Staff No-Action Letter (pub. avail. Mar. 7, 1990). *See also* 83 Fed. Reg. at 61770, n. 364. The Staff Letters are commonly referred to as the "Great-West" no-action letters.

In general, in order to "Great West" a variable contract under the Staff Letters, the contract must no longer be for sale to new purchasers, the contract may have no more than a certain amount of contract owners, and there must not have been any material changes to the contract since the last time that the registration statement was updated.

88 *See* 83 Fed. Reg. at 61769-70.

89 The Commission would refer to such grandfathered Great-Wested contracts as "Alternative Disclosure Contracts." *See* 83 Fed. Reg. at 61771.

90 Id.

91 83 Fed. Reg. at 61772-75. These alternative approaches are referred to as "Approach 1" and "Approach 2."

92 See 83 Fed. Reg. at 61772.

93 *See* id.

treatment to Great-Wested contracts. If the Commission ultimately decides to preserve the Staff Letters, as preferred by the Committee and as discussed in more detail below, there would be no need to grandfather Great-Wested contracts.

- **Change to the Cut-Off Date for Grandfather Treatment –** The cut-off date for grandfather treatment of Great-Wested contracts should not be the Effective Date, but should instead be the May 1 that follows the Effective Date. The Committee believes that May 1 is a more logical and reasonable cut-off date than the Effective Date for the reasons discussed herein. Nevertheless, if the Effective Date is less than six months prior to the proceeding May 1, the cut-off date should be the May 1 of the next fiscal year after the Effective Date. This letter refers to the applicable cut-off date proffered by the Committee as the "Next May 1."

- **No Loss of Grandfathered Status for Any Reason –** The Committee strongly disagrees that a grandfathered Great-Wested contract should lose its grandfather status whenever there is a material change with respect to the contract or for any other reason. The Commission's proposal on this point would serve no purpose other than to reduce the number of Great-Wested contracts in existence at a faster rate than would otherwise naturally occur. Yet, the Commission's proposal would have important practical implications, such as disadvantaging insurers that make material changes (even when those changes are due to external events, such as changes in law), discouraging changes that are beneficial to investors, and inhibiting common corporate transactions that involve Great-Wested contracts.

- **Sensible Modernizations for Great-Wested Contract –** The Commission should adopt two sensible modernizations to the Great-Wested contract disclosure framework. Specifically, the Commission should permit (i) updated audited financial statements to be delivered to contract owners only upon request and (ii) underlying fund prospectuses to be delivered online if the information required in a Portfolio Company Appendix is delivered to contract owners. Therefore, whether or not the Commission ultimately decide to preserve the Staff Letters, as preferred by the Committee, the Commission should adopt these modernizations to the Great-Wested contract disclosure framework.

- **Importance and Preferred Form of Going-Forward Relief for Discontinued Variable Contracts –** The Committee believes it is critical for insurers to continue to have relief for discontinued variable contracts. In this regard, the Committee disagrees with the Commission's proposal to nullify the Staff Letters going forward. Rather, the Commission should preserve the Staff Letters and modernize the framework as described herein.

  Nonetheless, with respect to the options set forth in the Proposing Release, the Committee would support the adoption of Approach 1, conditioned upon Approach 1 including a grandfathering component as described under Method One. In addition, the Committee believes, as described in more detail below, that the maximum investor threshold under Approach 1 should either be (a) more flexible in light of the industry practices that have evolved around the Staff Letters or (b) replaced with a time-based standard.

1. Importance of Grandfather Treatment if the Staff Letters are Nullified

Since 1977, insurers have been relying on the Staff Letters to no longer update registration statements or deliver updated prospectuses for small blocks of discontinued variable contracts. Indeed, the Staff Letters have become woven into the fabric of the current disclosure framework for variable contracts.[94] The elemental nature and importance of the Staff Letters to the variable product industry and overall registered variable product disclosure framework is underscored by several factors, including the length of time that the relief has existed, and the fact that the relief's framework has facilitated product innovation and the launch of new products. Furthermore, as the disclosure framework and the conditions associated with the earlier Staff Letters were reinforced and refined by future Staff Letters over time, and as industry practices developed around the Staff Letters, the ability to Great-West discontinued variable contracts became increasingly normative.

The insurance industry's reliance on the Staff Letters has become so deeply rooted that it would be utterly impractical to expect insurers to undo over 40 years of reliance (or in other words, "un-Great-West" contracts) as part of any final action by the Commission. The process of preparing new disclosure documents for Great-Wested contracts would be extraordinarily burdensome and costly and would be virtually impossible for many insurers. For perspective, many insurers have registration statements for contracts that have been Great-Wested for several decades and in some cases have never been filed on EDGAR. In addition to the already extraordinary burdens and costs that would be associated with un-Great-Westing contracts, those burdens and costs would be exacerbated by the fact the insurers would be simultaneously dedicating time and other resources to preparing contract summary prospectuses in accordance with Rule 498A and updating their registration statements to comply with the proposed amendments to Form N-4 and Form N-6.

In light of some or all of these considerations, the Commission appears to have correctly determined that if it nullifies the Staff Letters, its final action should include a grandfathering component for Great-Wested contracts, and the Committee applauds the Commission's foresight in that regard.[95] However, the Committee is particularly concerned that the Commission is considering alternatives that would nullify the Staff Letters but not include grandfathering (*i.e.*, Approaches 1 or 2 implemented in the manner described under Method Two). Even if an alternative approach provides relief akin to the relief in the Staff Letters, if insurers are required to un-Great-West contracts or otherwise prepare new disclosure documents for contracts that have been Great-Wested for long periods of time, the significant burdens associated with such requirements would be unreasonable and unfair to insurers and provide no commensurate benefit to investors.

For the reasons described above, Committee members strongly support the grandfathering of Great-Wested contracts if the Commission takes any final action that would nullify the Staff Letters. Again, the Committee emphasizes that it is resolutely opposed to any final action that would nullify the Staff Letters but not extend grandfather treatment to Great-Wested contracts.

2. Change to the Cut-Off Date for Grandfather Treatment

Under the Commission's proposed position (or potentially under an alternative approach), grandfather treatment would be extended only to Great-Wested contracts that are operating in

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94 The importance of the Staff Letters to the variable insurance industry is reflected in the SEC's estimates regarding the number of in-force variable contracts that have been Great-Wested. *See* 83 Fed. Reg. at 61770; 83 Fed. Reg. at 61806, n. 662.

95 With the exception of the cut-off date (as discussed below), the Committee supports the Commission's approach as to which contracts should qualify for grandfather treatment. The Committee believes that it is the most logical and workable approach. The Committee believes that other potential approaches (*e.g.*, limiting relief based on aggregate contract value) could result in undue burdens on insurers that have been administering Great-Wested contracts in good faith, could prove unworkable or impractical, and may undermine the importance of grandfather treatment as described herein.

accordance with the Staff Letters as of the Effective Date. The Committee believes that the Next May 1, rather than the Effective Date, should be the cut-off date for grandfather treatment.[96]

The Committee believes that the Next May 1 is a more logical and reasonable cut-off date for grandfather treatment than the Effective Date primarily for two reasons. First, using the Next May 1 as the cut-off date would avoid any possible uncertainties related to the precise time that a variable contract is considered to be Great-Wested. As a result of Section 10(a)(3) of the 1933 Act, which requires information in a prospectus to be no more than 16 months old, registration statements under the 1933 Act must be updated annually.[97] Because insurers have fiscal years that end on December 31, the updates to variable contract registration statements required by Section 10(a)(3) must be effective no later than May 1. However, the Staff Letters provide relief from having to update registration statements in accordance with Section 10(a)(3). As such, a fair assumption would be that even if a variable contract *could* be Great-Wested (*i.e.*, the variable contract is no longer for sale, it satisfies the maximum contract owner threshold, and no material changes have been made to the contract since the last update to the registration statement), it cannot *actually* be Great-Wested until the registration statement for that contract has not been updated in accordance with Section 10(a)(3) by a May 1. However, it could also be argued that a variable contract can be Great-Wested before a May 1, provided that the variable contract satisfies the aforementioned requirements. If the Commission uses the Next May 1 as the cut-off date, rather than the Effective Date, there would be no need to resolve this question for which there is no objectively correct answer.

Second, using the Next May 1 as the cut-off date for grandfather treatment would provide insurers with a more reasonable time frame to react to the final action taken by the Commission. The adopting release will be the first statement of the Commission's final action on the Staff Letters. However, if the Effective Date is used as the cut-off date for grandfather treatment, insurers will have no meaningful opportunity to consider and react to the Commission's final action. The Committee believes that it is necessary for the Commission to use the Next May 1 as the cut-off date in order to provide insurers with sufficient opportunity to develop their business plans related to blocks of discontinued variable contracts. Insurers certainly have been considering the Commission's proposed agency statement as discussed in the Proposing Release, but the possible alternative approaches (with and without grandfathering) being considered by the Commission necessarily have created uncertainty regarding the scope and contours of the future disclosure framework for discontinued variable contracts and made it very difficult for insurers to make informed decisions. For instance, an insurer may wish to Great-West certain discontinued variable contracts under the Staff Letters on May 1, 2019, but might not do so because an alternative approach with no grandfathering could be adopted by the Commission, in which case the insurer instead should be focusing on the development of contract summary prospectuses and revised registration statements for those contracts. Yet, if the Next May 1 is used as the cut-off date for grandfather treatment, all insurers will have the ability to make decisions about their discontinued variable contracts with the clarity associated with the Commission's final action.

The Committee recognizes the fact that, largely depending on the timing of the adopting release, the Effective Date and the May 1 that follows may be so close in time as to undermine the reasons for using May 1 as the cut-off date as described in the paragraph above. To ensure that insurers have a meaningful opportunity to react to the final action taken by the Commission, the Committee believes that if the Effective Date is less than six months prior to the following May 1, the cut-off date for grandfather treatment should be the May 1 of the next fiscal year after the

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[96] If the Commission does not change the cut-off date for grandfather treatment to the Next May 1, the Committee proffers that the cut-off date for grandfather treatment should correspond with the compliance date of the registration statement form amendments, rather than the Effective Date. The Committee believes that this would provide insurers with a meaningful opportunity to react to the final action of the Commission regarding discontinued variable contracts, unlike if the Effective Date is used as the cut-off date.

[97] *See* Section 10(a)(3) of the 1933 Act.

Effective Date. For example, if the Effective Date is April 1, 2020, the cut-off date for grandfather treatment should be May 1, 2021. This approach to the cut-off date would ensure both (i) that there is a logical cut-off date (*i.e.*, a May 1) and (ii) that insurers have a fair opportunity to make decisions regarding their variable product businesses.

3. No Loss of Grandfathered Status for any Reason.

Under the proposed grandfather treatment to be extended to Great-Wested contracts, it is possible for Great-Wested contracts subsequently to lose their grandfathered status. Specifically, the Proposing Release states that "if a material change is made with respect to [a grandfathered Great-Wested contract], the registration statement for that contract would be required to be updated, and the contract would no longer be permitted to operate as [a grandfathered Great-Wested contract]."[98]

While the Committee acknowledges that, under the Staff Letters, an insurer heretofore has been required to update the registration statement for a Great-Wested contract when there has been a material change to the contract, and that such a requirement would presumptively extend to grandfathered Great-Wested contracts, the Committee firmly disagrees that in the context of the proposed agency statement, a grandfathered Great-Wested contract should lose its grandfathered status as a result of any such change. Such a loss of grandfather status would have significant negative practical implications and would serve no purpose other than to simply diminish the number of grandfathered Great-Wested contracts in existence at a faster rate than would otherwise naturally occur. Yet the practical implications outweigh any interest in simply reducing the number grandfathered Great-Wested contracts in existence.

The loss of grandfather status would unfairly burden insurers that administer grandfathered Great-Wested contracts. For instance, if an insurer has maintained a grandfathered Great-Wested contract for many years, but is required to make a material change to the contract for any reason, the insurer would be required to thereafter administer the contract in accordance with current regulatory requirements. This would occur despite the disproportionate costs associated with administering small blocks of discontinued variable contracts that the Commission acknowledged in the Proposing Release. Such a result would be particularly unfair when the insurer makes a material change to the contract in response to external events, such as changes in law, or when the material change is relatively unimportant to existing contract owners.

The loss of grandfather status would also be unfair to investors, as insurers will be disinclined to make material changes that, even though they may not be required, are beneficial to owners of a grandfathered Great-Wested contract, as such changes would cause a contract to lose its grandfathered status. For example, an insurer may decide not to offer a new rider to owners of a grandfathered Great-Wested contract, or an insurer may decide not to extend a "buy back" offer to owners of a grandfathered Great-Wested contract, through which such contract owners would be given the opportunity to voluntarily terminate a guaranteed benefit in exchange for a cash payment or other form of consideration that would otherwise not be available.

The prospect of losing grandfather status would also inhibit common corporate transactions, including mergers and assumption reinsurance transactions that involve grandfathered Great-Wested contracts by imposing substantial burdens on the insurers involved in such transactions. The longstanding practice has been that when a merger or assumption reinsurance transaction involving variable contracts occurs, new registration statements for the variable contracts are filed and declared effective in order to reflect the change in issuer, including for any Great-Wested contracts. However, after the new registration statements are filed, the contracts that were previously Great-Wested have not lost their ability again to be Great-Wested under the Staff Letters. Indeed, the insurer administering those variable contracts—which often assumes the responsibility for administering those contracts as part of the transaction—typically

98 83 Fed. Reg. at 61771, n. 374.

"re-Great-Wests" those contracts. It is the ability to re-Great-West those contracts that facilitates the insurer's ability to manage the disproportionate costs associated with administering small blocks of discontinued variable contracts. As proposed by the Commission, however, grandfathered Great-Wested contracts would automatically and irrevocably lose their grandfathered status if they are involved in a merger or assumption reinsurance transaction that triggers the filing of new registration statements. As a result, insurers who are (or would become) responsible for administering small blocks of variable product business after such transactions would lose an important tool in managing their costs.

To avoid these overly harsh consequences to insurers and investors alike, the Commission should permit grandfathered Great-Wested contracts to maintain their grandfathered status – that is, to re-Great West previously Great-Wested contracts – regardless of whether an insurer is required to file an updated or new registration statement for the contract for any reason.

4. Sensible Modernizations for Great-Wested Contracts

As part of the proposed grandfather treatment that would be extended to Great-Wested contracts, the Commission would require such contracts to comply with the conditions set forth in the Staff Letters. Certain of those conditions, however, are outdated when compared to the current disclosure framework for variable contracts. As such, both in the context of the Commission's proposed grandfather treatment and if, as the Committee prefers, the Commission preserves the Staff Letters in the adopting release, the Committee believes that two sensible modernizations ought to be afforded to insurers that administer Great-Wested contracts.

First, the Commission should eliminate the requirement that updated audited financial statements annually must be delivered to owners of Great-Wested contracts. Under the Staff Letters, within 120 days after the close of a fiscal year, updated audited financial statements of the separate account, as well as updated audited financial statements of the insurer in the case of variable life insurance contracts, must be delivered to investors.[99] This requirement is anachronistic because insurers are not generally required to deliver audited financial statements to existing owners of registered variable contracts. Instead, because the audited financial statements included in Form N-4 and Form N-6 filings appear in the SAI, audited financial statements (along with the remainder of the SAI) are delivered only upon request.[100] There does not appear to be any logical reason why financial statements must be delivered to owners of Great-Wested contracts when no such delivery requirement applies to owners of other registered variable contracts. Therefore, insurers should be required to deliver updated audited financial statements to owners of Great-Wested contracts only upon request.[101]

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[99] *See* 83 Fed. Reg. at 61770.

[100] Committee members have reported that requests for SAIs by owners of variable contracts are extremely low if not virtually non-existent. Also, the differences between the requirements to deliver financial statements under the Staff Letters and the requirements to deliver SAIs under current disclosure requirements lead to illogical results. For instance, an individual could own a variable contract for many years and, unless he or she has requested SAIs, will never receive financial statements for the separate account or the insurer. However, if the block of variable contracts to which that contract belongs is later Great-Wested, that contract owner will thereafter receive financial statements on an annual basis.

[101] If the Commission is unwilling to allow updated audited financial statements to be delivered only upon request, the Commission should permit insurers to satisfy the delivery requirement by making the updated audited financial statements available online, provided that paper financial statements are delivered upon request. The Committee notes that this approach is already embodied within Approach 1 and Approach 2. *See* 83 Fed. Reg. at 61773-74.

If insurers are permitted to deliver financial statements only upon request or online, the Commission could require that a written notice be delivered to owners of a Great-Wested contract within 120 days after the close of the fiscal year indicating that the updated audited financial statements are available. Insurers could be permitted to deliver the aforementioned information in a standalone notice or as part of any account statement.

Second, the Commission should permit an insurer to deliver underlying fund prospectuses online to owners of Great-Wested contracts in the same manner permitted by Rule 498A(j), provided that the following conditions are satisfied:

(1) The insurer delivers the information required in a Portfolio Company Appendix per Item 18 of Form N-4 or Form N-6 to owners of the Great-Wested contract, as applicable.[102] The insurer would be required to deliver such information annually. In addition, when the information set forth therein materially changes, the insurer would be required to deliver updated information. As an important aside, the concerns and comments expressed in this letter regarding the Portfolio Companies Appendix apply equally in this context, and the Committee would expect the same modifications, if any, to apply to the information delivered to owners of Great-Wested contracts.

(2) The insurer complies with the requirements of Rule 498A(j), except for the requirement to specify on the cover page of the contract's ISP and USP the website address at which the underlying fund documents listed in Rule 498A(j)(iii) are posted, as Great-Wested contracts will have neither ISPs nor USPs.

(3) The insurer modifies the legends required under Item 18 of Form N-4 or Form N-6 as necessary to (i) reflect the variable contract's status as a Great-Wested contract and (ii) specify the website address at which the underlying fund documents listed in Rule 498A(j)(iii) are publicly accessible free of charge.

As discussed in the Proposing Release, the proposed option for satisfying underlying fund prospectus delivery requirements in Rule 498A(j) is intended to alleviate concerns that investors may be overwhelmed by "hundreds of pages of underlying portfolio company prospectuses."[103] Those same concerns apply to owners of Great-Wested contracts. As such, the Commission should facilitate the ability of insurers to deliver underlying fund prospectuses online to owners of Great-Wested contracts. The Committee believes that the conditions outlined above would ensure that owners of Great-Wested contracts would receive and have access to the same information regarding their variable contracts' underlying funds as owners of other registered variable contracts.

5. Going-Forward Relief for Discontinued Variable Contracts

As set forth in the Proposing Release, the Commission is proposing that the Staff Letters would be nullified on a going-forward basis, with grandfather treatment extended to Great-Wested contracts as of a certain cut-off date.[104] If this proposed position is adopted, there would be no relief (other than grandfather treatment afforded to Great-Wested contracts) for small blocks of variable contracts that would be discontinued going forward. However, in recognition of the unique burdens borne by insurers that administer blocks of discontinued variable contracts, the Commission indicated in the Proposing Release that it is considering potential relief in the forms of Approach 1 and Approach 2 in lieu of the proposed agency statement.[105] Both Approach 1 and Approach 2 may include or exclude grandfather treatment for Great-Wested contracts as described under Method One or Method Two, respectively.[106]

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[102] The concerns and comments expressed in this letter regarding the Portfolio Companies Appendix apply equally in this context, and the Committee would expect the same modifications, if any, to apply to the information delivered to owners of grandfathered Great-Wested contracts.

[103] *See* 83 Fed. Reg. at 61777-78.

[104] *See* 83 Fed. Reg. at 61770-71.

[105] 83 Fed. Reg. at 61772-75.

[106] 83 Fed. Reg. at 61772.

Committee members are of the strongly held view that it is critical to continue to have relief for blocks of variable contracts that may be discontinued in the future. Given that the Staff Letters embody a disclosure framework that has served the needs of insurers and investors for more than 40 years, the Committee believes that the Commission should preserve and therefore not nullify the Staff Letters, except to the extent necessary to adopt the modernizations described under "Sensible Modernizations for Great-Wested Contracts," above.[107] However, if the Staff Letters are not preserved, with respect to the options set forth in the Proposing Release, the Committee would support the adoption of Approach 1, conditioned upon Approach 1 including a grandfathering component as described under Method One. With respect to Approach 1, the Committee believes that the maximum investor threshold under Approach 1 should be more flexible or it should be replaced with a time-based standard.

a. Importance of Going-Forward Relief. The Committee firmly believes that insurers should be afforded relief for blocks of discontinued variable contracts separate and apart from any grandfather treatment afforded to Great-Wested contracts. Such relief is critical to the insurance industry for several reasons:

- **Managing Disproportionate Costs –** As acknowledged by the Commission, when an insurer discontinues selling a variable contract to new purchasers, the costs associated with updating the registration statement and delivering updated prospectuses for that contract increase over time in proportion to the diminishing asset base.[108] Yet, unlike mutual funds and other types of registered investment companies, which may liquidate when they are no longer economically viable, variable contracts have no mechanism under federal or state law that permits an insurance company to unilaterally terminate a block of variable contracts once the asset base becomes such that the insurer's ongoing costs cannot be offset. For over 40 years, the Staff Letters have been the only so-called "escape hatch" available to insurers from the disproportionate costs associated with diminishing blocks of discontinued variable contracts. If the Commission does not provide a similarly effective form of relief on a going-forward basis, insurers will be forced to bear the full weight of the increasingly disproportionate costs associated with updating registration statements and delivering updated prospectuses for such blocks of business.

- **Facilitating Product Innovation and New Offerings –** Innovation is a fundamental component of the ever-changing business of insurance. Insurers introduce and change products in response to a variety of factors, including investor demands, competition, and regulatory requirements. In this sense, the Staff Letters have not only eased the unique burdens of insurers late in the life cycles of variable contract offerings, but they have also facilitated the ability of insurers to innovate. When an insurer is considering whether to offer a new product, it must take into account the risk that the product will not generate significant sales. While an insurer can stop selling a contract to new investors at any time, it will nonetheless be required to continue to administer the contracts that it sold. The Staff Letters have made this risk more tolerable from the insurer's perspective because they have contributed to the insurer's ability to manage the disproportionate costs associated with diminishing blocks of discontinued variable contracts, as described above. As such, the Staff Letters have indirectly supported insurers' ability to innovate and introduce new products into the marketplace. If the Commission does not provide a similarly effective form of relief on a going-forward basis, insurers generally will be more hesitant to innovate and offer new products. Not only would that potentially limit the growth of the insurance

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107 If the Commission preserves the Staff Letters in the adopting release, it would not be necessary to extend grandfather treatment to Great-Wested contracts.

108 *See* 83 Fed. Reg. at 61769-70.

industry, but it may also dampen competition in the variable contract market, limit investor choice, and stall innovation in the retirement income market where innovation is sorely needed.

- **Managing Future Fees and Charges –** Insurers actuarially project the costs that they will bear over the life cycle of a variable contract offering, including after a variable contract is no longer offered for sale. Because the Staff Letters have facilitated the ability of insurers to mitigate the costs associated with the administration of discontinued variable contracts, the Staff Letters have indirectly helped moderate the fees and charges under variable contracts.

While the proposed new summary prospectus disclosure framework would help to reduce the costs of delivering variable contract and underlying fund prospectuses, and such cost savings would mitigate some of the cost burdens associated with administering blocks of discontinued variable contracts, such costs savings do not outweigh the disproportionate cost and resource burdens associated with preparing annually updated Statutory Prospectuses and SAIs, maintaining registration statements, and delivering variable contract prospectuses (even in summary form) for such closed blocks of business. As such, the Committee believes that the new disclosure framework for variable contracts does not abrogate the need for relief for blocks of discontinued variable contracts on a going-forward basis.

b. Preferred Form of Going-Forward Relief. Given the importance of the relief afforded by the Staff Letters, the Committee welcomes the opportunity to assist the Commission in addressing the future for blocks of discontinued variable contracts. In that sense, the Committee applauds the Commission's foresight and inventiveness in putting forth Approaches 1 and 2 for consideration.

The Committee does not agree that the Staff Letters should be nullified as part of the Commission's final action. Since 1977, the Staff Letters have fostered a workable and pragmatic disclosure framework for insurers and investors alike. Not only have the Staff Letters eased insurers' unique burdens, facilitated innovation, and helped moderate contract fees and charges, they have done so while ensuring that investors benefit from protections under the federal securities laws and that they continue to receive information about their investments. In that regard, the Commission should preserve the Staff Letters in the adopting release, except to the extent necessary for the Commission to adopt the modernizations for Great-Wested contracts described under "Sensible Modernizations for Great-Wested Contracts," above.

Nonetheless, with respect to the options set forth in the Proposing Release, the Committee would support the adoption of Approach 1 as an alternative form of going-forward relief, emphasizing again that the Committee's support would be contingent upon Approach 1 including a grandfathering component as described under Method One. In addition, the Committee believes the maximum investor threshold under Approach 1 should either be more flexible or replaced with a time-based standard.

- **Ease Insurers' Burdens.** The Committee believes that Approach 1 would go a long way towards addressing the unique burdens borne by insurers that administer blocks of discontinued variable contracts, as the disclosure frameworks under the Staff Letters and Approach 1 are substantially similar. Unlike under the Staff Letters, insurers would be required to bear the costs associated with preparing and delivering the annual notices required by Approach 1.[109] However, the Committee believes that those additional costs would be largely (if not completely) offset by other cost-reducing aspects of Approach 1 as described in the Proposing

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[109] The Committee requests that the Commission consider the Committee's comments on the proposed content requirements of USPs as being applicable to the proposed content requirements of the annual notices under Approach 1 or Approach 2.

Release, such as (i) the requirement to post financial statements online and deliver them only upon request and (ii) the ability to deliver Portfolio Company prospectuses online. The Committee also believes that like the Staff Letters, Approach 1 should also facilitate product innovation and new offerings and help to indirectly moderate contract fees and charges.

- **Robust Investor Protections.** The Committee also believes that Approach 1 would provide robust investor protections. The annual notices required by Approach 1 would include the same types of information included in a USP, including (i) the Key Information Table, (ii) information about material changes to the offering, (iii) the Portfolio Company Appendix, and (iv) informative legends.[110] As a result, owners of variable contracts being administered in accordance with Approach 1 would receive the same types of information about their investments as owners of other variable contracts.

  In addition, owners of contracts subject to Approach 1 would benefit from important protections under the federal securities laws afforded to owners of other variable contracts and investors generally.[111]

  - Annual notices would be subject to the general anti-fraud protections afforded by (i) Rule 10b-5 under the Securities Exchange Act of 1934; (ii) Section 17(a) of the 1933 Act; and (iii) Section 34(b) of the 1940 Act.

  - Any "sales" under a contract for purposes of Section 5 of the 1933 Act would continue to be subject to the protections against material misstatements and omissions afforded by Section 12(a)(2) of the 1933 Act. Although the annual notice itself may not be deemed a prospectus (or part of a prospectus) for purposes of Section 12(a)(2) liability (because as proposed it would not be a Section 10(b) prospectus like a variable contract summary prospectus),[112] purchases of securities off the contract's most recent prospectus, as supplemented, would generally remain subject to Section 12(a)(2).[113] Further, even though annual notices as proposed technically may not be subject to Section 12(a)(2), annual notices would still serve an important purpose for contract owners and insurers, as insurers will use the annual notices to ensure that contract owners have up-to-date information.[114] Thus, insurers will be incentivized to provide informative disclosures in their annual notices.

Given these considerations, the Committee agrees with the Commission's assessment that Approach 1 "provide[s] many of the benefits to investors associated with the summary prospectus framework while limiting the burden of updating registration statements relating to contracts that are only offered to a limited number of investors."[115] Further, given the substantial similarity

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[110] *See* 83 Fed. Reg. at 61772.

[111] *See* id.

[112] *See* 83 Fed. Reg. at 61772.

[113] In addition, an insurer with a variable contract subject to Approach 1 could voluntarily supplement the contract's current prospectus via Rule 497 under the 1933 Act to incorporate updated material information related to the offering. Those prospectus supplements would be subject to anti-fraud protections under the federal securities laws, including Section 12(a)(2) under the 1933 Act.

[114] *See* Section 12(a)(2) under the 1933 Act.

[115] *See* 83 Fed. Reg. at 61773.

between the disclosure frameworks under the Staff Letters and Approach 1,[116] the Committee believes that Approach 1 would provide a workable and longstanding solution to the problems associated with blocks of discontinued variable contracts. As such, if the Commission ultimately nullifies the Staff Letters as part of the adopting release, the Committee would support the adoption of Approach 1, contingent upon Approach 1 including a grandfathering component as described under Method One.

c. Changes to or Replace of the Maximum Investor Threshold. As described in the Proposing Release, other than in connection with any grandfather treatment afforded to Great-Wested contracts, in order to rely on Approach 1 (or Approach 2), three threshold requirements must be satisfied: (i) the variable contract must be no longer offered to new purchasers; (ii) there must not be any material changes to the contract since the most recent update; and (iii) there must be fewer than 5,000 investors (whether individual contract owners or participants).[117] The Committee believes that the maximum investor threshold should either be (a) more flexible in light of the industry practices that have evolved around the Staff Letters or (b) replaced with a time-based standard.

- **More Flexible Number-Based Standard –** In light of the framework established by the Staff Letters that has endured for several decades, if a maximum contract owner threshold is ultimately included under Approach 1, the Committee believes that it should be revised to provide a level of flexibility similar to the Staff Letters. Specifically, the Committee proposes that a contract could qualify for the relief if either:

  (a) The contract has fewer than 5,000 investors; or

  (b) The contract has had between 5,000 and 50,000 investors (or some other similar range) for a certain period of time, perhaps three consecutive 12-month periods.

  The Committee believes that additional flexibility in the maximum investor threshold will help preserve the benefits that the Staff Letters have afforded the insurance industry and investors since 1977. Often, a block of discontinued variable contracts will shrink naturally over time, but the rate at which it shrinks will slow as the investors with the longest time horizons begin to represent an increasingly larger portion of the block. Under Approach 1, as described in the Proposing Release, a discontinued variable contract with more than 5,000 investors would not be eligible to rely on the going-forward relief, but very well may have fit within the relief under the Staff Letters. By including a "waiting period" for reliance on Approach 1 when the number of investors exceeds 5,000, the Committee's proposed maximum investor threshold represents a compromise between the relief that would be afforded under the Staff Letters and the relief under Approach 1 as described in the Proposing Release.

- **Time-Based Standard –** In lieu of having a maximum contract owner threshold, the Committee proffers that a discontinued variable contract could be eligible for the relief under Approach 1 if it has not been offered for sale to new purchasers for at least a certain amount of time, perhaps three consecutive 12-month periods. A time-based standard may be viable in light of the fact that in-force customers with contracts being administered in accordance with Approach 1 will be receiving disclosures that are virtually identical to a USP. As such, there should be virtually

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[116] 83 Fed. Reg. at 61773

[117] 83 Fed. Reg. at 61772-73.

no disruption in the information that an in-force customer receives about his or her investment after a contract transitions to Approach 1.

d. Additional Comments Related to the Alternative Approaches. The Committee believes that it is important to make its position clear with respect to other aspects of Approach 1 and Approach 2.

- **Approach 2 with Grandfathering –** Although it is no Committee members' preference, the Committee could support the adoption of Approach 2, provided it includes a grandfathering component as described under Method One. The Committee is not as confident that Approach 2 would adequately address the unique burdens borne by insurers that administer blocks of discontinued variable contracts. The Committee has concerns about the costs insurers would bear to (i) maintain updated registration statements and (ii) post updated statutory prospectuses and statements of additional information online.[118] Moreover, the Committee does not believe that any incremental increases in investor protection effected by the described Approach 2 mechanisms would outweigh the additional burdens imposed on insurers. Nonetheless, the Committee acknowledges that Approach 2 is preferable to having no form of going-forward relief. The Committee's comments regarding changes to Approach 1 above would apply equally to Approach 2.

- **Approach 1 or 2 without Grandfathering –** Committee members resolutely oppose the adoption of Approach 1 or 2 if it does not include a grandfathering component, as described under Method Two. Unless the maximum threshold is increased, Great-Wested contracts with more than 4,999 contract owners would have to be un-Great-Wested. The costs, resources, and complications associated with un-Great-Westing those contracts, some of which have been Great-Wested under the Staff Letters for many years or even decades, would be extreme. It would be unreasonable to impose such inordinate burdens upon insurers that have been operating in compliance with the Staff Letters in good faith.[119]

  In addition, under Approach 1 or 2 without grandfathering, insurers would be faced with the ominous cost- and resource-intensive task of preparing annual notices for variable contracts that have been Great-Wested under the Staff Letters for several years or decades. The preparation of such annual notices (which are basically USPs) will in many cases be extraordinarily difficult and costly, particularly when such insurers would be dedicating much of their resources to the preparation of ISPs, USPs, and updated registration statements for their other variable contracts. Moreover, under Approach 2 without grandfathering, insurers not only would be required to prepare annual notices for their formerly Great-Wested contracts, but they would also be required for purposes of website posting to reconstruct statutory prospectuses and SAIs for those contracts, which would be unfairly costly and time consuming, and may be virtually impossible for some companies.

  Given the extreme burdens that could be imposed on insurers under Approach 1 or Approach 2 without a grandfathering component, Committee members are firmly opposed to the adoption of either such approach, as well as to any other

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118 83 Fed. Reg. at 61773.

119 The Committee notes that the Commission estimates that only four variable annuity registration statements, representing "at most 90,542 investors," include Great-Wested contracts with more than 4,999 investors. *See* 83 Fed. Reg. at 61806, n. 662. However, based on the Committee's experience, the Commission has significantly underestimated the number of Great-Wested contracts with more than 4,999 investors. In turn, the Committee believes that the Commission and the SEC staff significantly underestimate the negative impacts of adopting Approach 1 or Approach 2 without a grandfathering component, as described under Method Two.

alternative approach that nullifies the Staff Letters but does not include a meaningful grandfathering component for Great-Wested contracts.

6. Comments Related to Discontinued Insurance Contracts Registered on Form S-1 or Form S-3

In response to a specific Commission request for comment in the Proposing Release, the Committee urges the Commission to extend relief from maintaining registration statements and delivering updated prospectuses to blocks of discontinued non-variable insurance contracts registered on Form S-1 or S-3.[120] The burdens associated with administering diminishing blocks of these contracts are substantially similar to the burdens associated with administering diminishing blocks of discontinued variable contracts. As the market for insurance contracts registered on Form S-1 and S-3 continues to grow, particularly with respect to ILVAs, there is an increasing need for such relief.

The need for relief for discontinued insurance products registered on Form S-1 or S-3 is particularly acute when such products are offered in conjunction with variable investment options through combined prospectuses. For example, insurers have historically registered MVA contracts on Form S-1 or S-3, and the MVA investment options are offered along with variable annuity investment options through a combined S Form / N Form prospectus. A similar approach has been adopted by several insurers offering ILVAs that include index-linked investment options (registered on Form S-1 or S-3) and variable annuity investment options (registered on Form N-4). Absent relief for blocks of discontinued non-variable contracts, many insurers will be placed in the impractical (and rather confusing) position of separating combined prospectuses for discontinued products so that the registration statement for the variable product portion may be "Great-Wested," while an updated registration statement must continue to be maintained for the portion of the product registered on Form S-1 or S-3.

The Committee would welcome the opportunity to assist the Commission in setting the parameters of any such relief as part of the rulemaking process.

C. VARIABLE CONTRACT REGISTRATION STATEMENTS

1. Statutory Prospectuses and SAIs[121]

Generally, the Committee's comments above on the ISP (and USP) also apply to the related Statutory Prospectus requirements, as the ISP requirements are imported from specific

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120 *See* 83 Fed. Reg. at 61775.

121 In the Proposing Release, the Commission has requested comment in several places regarding the ordering of the items in Forms N-3, N-4, and N-6 and the General Instructions related to the order in which certain items must appear in a registration statement. *See, e.g.*, 83 Fed. Reg. 61775. The Committee supports the proposed order of the items in the amended forms and the related General Instructions.

The Commission also requested comment on whether the registration forms should require a registrant to include the names of the Investment Options / Portfolio Companies on the front cover page of the Statutory Prospectus, as is currently required by the registration forms. *See* 83 Fed. Reg. 61779. The Committee objects to any such requirement. A list of the Investment Options or Portfolio Companies now would appear in the Investment Option Appendix or Portfolio Company Appendix, as applicable. Including the Investment Options / Portfolio Companies on the front cover page would be unnecessarily duplicative. Moreover, as the number of options has proliferated, the inclusion of all such options on the cover page has unduly lengthened cover pages to the point that they have strayed far from the concise overview that the Commission originally intended.

items of the registration statement forms.[122] Accordingly, the Committee's comments above related to the ISP also apply to those items in the context of the applicable Statutory Prospectus.

a. Preferred Approach: Unconditionally Eliminate Accumulation Unit Value Tables ("AUV Tables"). Given variable annuity product evolution, AUV Tables are anachronistic and no longer provide useful information to investors.[123] As such, Committee members endorse the Commission's efforts to modify the AUV Tables requirements in Form N-4, but the Committee strongly urges the Commission to go further and no longer require any AUV Tables in variable annuity registration statements or in other communications. Generating AUV Tables for the registration and annual updating process is a very laborious, time consuming, and resource draining exercise that results in no added value to investors. In fact, it detracts from the investor experience and may ultimately mislead and confuse investors. In this regard, while AUVs once may have been considered proxies for the "price" of purchasing a variable annuity contract, this perspective is no longer valid because unit values do not reflect the total assortment of fees now typically paid by contract owners. This is because AUVs only reflect those fees assessed at the separate account level, but today's variable annuity contracts typically have an assortment of fees that are assessed at the contract level (*i.e.*, fees that reduce the number of units owned under a contract, and consequently reduces the account value, but not the value of the individual units).

When N-4 was first adopted, variable annuity contracts typically offered a standard death benefit (at no additional charge) and a future annuity payout stream based on the contract's account value and any current annuity purchase factors. As such, these variable annuity contracts were fairly simply, and fees did not vary from contract owner to contract owner and generally all charges were reflected in the AUVs. Hence, a variable annuity contract's AUV was akin to a mutual fund's NAV. Indeed, the operation of separate accounts supporting variable annuity contracts were viewed in many ways as very similar to that of mutual funds.

Since that time, however, the features and charge structures of variable annuity contracts have changed dramatically. Today, as the Commission has recognized, variable annuity contracts typically offer a wide menu of death benefit and living benefit options – each with their own unique additional fee. These additional fees are structured such that a contract owner's actual expenses are uniquely determined based on the particular guaranteed benefit option or options he or she has chosen. These additional fees in turn are often computed based on the value of those benefit(s) rather than based on the contract's account value. Some insurers do design these additional fees as daily separate account charges, so that they are calculating into each day's unit value; however others, instead, deduct them periodically from account value, which effectively cancels units and reduces contract value. Some insurers assess additional non-benefit related charges on an annual and/or quarterly and/or transactional basis, also effectively cancelling units. As a result of these contract-level charges (*i.e.*, charges that are not reflected in the AUV), AUVs today generally do not reflect total contract expenses.

The Committee strongly believes that the proliferation of unbundled optional benefits; the availability of multiple riders at various price points under a single contract that can be elected singly or in combination; the array of charge structure designs from company to company and contract to contract; and the ever expanding number of underlying funds has made variable annuity contracts much more similar to variable life insurance contracts than to mutual funds. Like variable life insurance, today's variable annuity contracts effectively reflect individualized costs – making AUV Tables almost meaningless to an individual investor. In light of this product evolution toward individualized pricing, the inclusion of AUV Tables should no longer be required in variable

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[122] Indeed, generally the comments on specific items of the ISP would be implemented by revisions to the specified registration form items referenced in Rule 498A.

[123] While the discussion herein regarding AUV tables and the justifications for the Committee's comments primarily relate to variable annuities registered on Form N-4, for simplicity, the Committee proffers that (to the extent potentially applicable) any changes to the AUV Tables in Form N-4 should also be made in Form N-3.

annuity registration statements for the same reasons they were never included in Form N-6 registration statements for variable life insurance contracts.

- The requirements to include AUV Tables in variable annuity registration statements should be eliminated unconditionally in their entirety. The information that AUVs provide is very limited in the variable contract context because unit values do not reflect the full panoply of possible charges.

b. Three-Part Alternative to the Proposed AUV Table Requirements. If the Commission does not entirely eliminate the requirement to include AUV Tables in variable annuity registration statements, the Committee strongly suggests that the following three-part alternative to the proposed requirements should be adopted.

Part 1: Relocate AUV Tables, Reduce Number of Years Covered, and Eliminate Number of Units Outstanding. As proposed in the Proposing Release, AUV Tables would be relocated from the variable annuity prospectus to the SAI, and the years covered by the AUV Tables would be reduced from ten to five years.[124] If the requirement to include AUV Tables is retained, then the Committee strongly supports these revisions. However, under no circumstances should the "number of units" outstanding be retained as an element of AUV Tables. The Committee cannot proffer a single reason why such information is material to investors. If an investor is interested in a number of units, it would be the number of units he or she is holding.

Part 2: Individualized Performance Option. The proposed amendments to the variable annuity registration forms include a provision that would permit (but not require) registrants to omit the AUV Tables in their its entirety if the registrant provides an annual account statement that discloses "the actual [investment] performance of each subaccount reflecting all contract charges incurred by the contract owner."[125] This would be required for each class of accumulation units held by the contract owner. If the AUV Table requirement in variable annuity registration statements is not removed unconditionally, in concept, the Committee could wholeheartedly support something similar to the proposed option. However, providing individualized 'performance' data to every contract owner that is tailored to all of an individual's particular contract charges (*i.e.*, periodic contract charges that are implemented by cancelling units, rather than being an asset-based charge that is reflected in the unit value) likely would require massive amounts of system investments for most insurers given the current state of insurer administrative systems.

The Committee believes that the proposed option should be modified to only require that the annual account statements include the contract owner's beginning and ending AUVs that would reflect all daily asset-based charges (both base contract and rider charges, if applicable) assessed against the sub-account under that contract. In addition, the annual account statement would set forth, in close proximity, all contract and/or transaction charges deducted over the course of the year. The Committee believes that providing a contract owner with their tailored unit values on an annual basis is far more meaningful than providing them with 5 years of stale AUVs, many of which are irrelevant to the contract owner.

Part 3: Option to Disclose AUV Tables Online. As part of this three-part alternative, the Committee strongly suggests that the Commission include another method for providing AUV Tables: insurers should be permitted to provide the AUV Tables on their websites rather in the registration statements. Many investors today seek performance information online, and online AUV Tables would be far more accessible than AUV Tables included in registration statements. Many insurers already publish AUVs voluntarily on their websites, so this option would represent a convenient approach for both insurers and investors.

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[124] *See* Item 33 of Form N-3; Item 27 of proposed Form N-4.

[125] *See* Instruction 7 to Item 33 of Form N-3; Instruction 6 to Item 27 of proposed Form N-4.

c. Financial Statements. The instructions to Item 24(b) of Form N-6 (proposed to become Item 27(b)) state that an insurer may file SAP financial statements rather than GAAP financial statements in connection with a Form N-6 registration statement if the insurer "would not have to prepare financial statements in accordance with generally accepted accounting principles except for use in [that] registration statement or other registration statements filed on Forms N-3, N-4, or N-6." Continuing, the instructions state that the insurer's "financial statements must be prepared in accordance with [GAAP] if the [insurer] prepares financial information in accordance with [GAAP] for use by the [insurer]'s parent, . . . in any report under sections 13(a) and 15(d) of [1934 Act] or any registration statement filed under the [1933 Act]." Although the corresponding instructions in Form N-4 do not currently track Form N-6 (but would under the proposed amendments), the instructions in Form N-6 have been interpreted to apply equally to Form N-4. The Committee believes, however, that the instructions for both Form N-4 and Form N-6 should be simplified to facilitate the use of SAP financial statements. All insurers are required to prepare SAP financial statements, and SAP financial statements are appropriate and of a comparable character to GAAP financial statements. Indeed, unlike GAAP financial statements, SAP financial statements are specifically designed in connection with insurance.

- The Committee believes that insurers should be permitted to use SAP financial statements in connection with their Form N-3, N-4, and N-6 registration statements so long as they are not otherwise preparing full, audited GAAP financial statements.

d. Voting of Portfolio Company Shares (Form N-4 and Form N-6 Variable Contracts Only). Item 6(d) of Form N-4 and Form N-6 would, as proposed, require prospectus disclosure regarding the rights of contract owners to give instructions on the voting of underlying fund shares. This disclosure is substantively the same for every registrant and for every variable contract (*i.e.*, it effectively is "boilerplate"). It is also typically carried forward each year without any change or modification.

- The Committee recommends that the underlying fund voting rights information in both Forms N-4 and N-6 be completely relocated to the SAI.

e. Centralization of Principal Risk Disclosure. As proposed, Item 5 of Form N-3, N-4, and N-6, as applicable, would require disclosure regarding the principal risks of investing in the variable contract to which the registration statement relates. In light of this centralization of principal risk disclosures, it should no longer be necessary for insurers to include and repeat the principal risks throughout the Statutory Prospectus, as is common today. Rather, principal risk disclosures for variable products should be presented in a manner similar to principal risk disclosures for mutual funds. Principal risk disclosures for mutual funds appear solely in the principal risks sections; they generally are not repeated elsewhere in mutual fund prospectuses.

- Clarification should be provided that insurers may limit disclosures regarding principal risks to the portion of a Statutory Prospectus titled "Principal Risks of Investing in the Contract," and that an insurer is not required to (but may) repeat principal risk disclosure in other sections of the Statutory Prospectus. Clarification should also be provided that non-principal risk disclosures are not required to appear in the principal risks section, and may be disclosed elsewhere in the Statutory Prospectus or SAI, as appropriate.

f. Operating Expenses. Form N-4 currently includes under Item 6(f) (and would continue to include after the proposed amendments under Item 7(d)) a requirement to disclose, among other information, "the type of operating expenses for which the [separate account] is responsible." As proposed in the Proposing Release, a similar requirement would be added to Form N-6 under Item 7(e). The Committee does not believe that these disclosure items are generally applicable to variable product separate accounts registered on Form N-4 or N-6, which have units derived solely from the net asset values of the underlying funds as reduced by any daily asset-based charges assessed at the subaccount level.

- The Committee believes that the aforementioned disclosure items should be removed from Form N-4 or not added to N-6, as applicable, because they are not generally relevant to variable products registered on those forms.

2. Multiple Contracts: The "Essentially Identical" Standard

a. Multiple "Contracts" in a Single Prospectus. General Instruction C.3.(e)(i) of Form N-3, Form N-4, and Form N-6, as proposed, states that a single Statutory Prospectus may describe multiple contracts that are "essentially identical." The instruction states that the application of this standard depends on the facts and circumstances, but "essentially identical" is not defined. An example in the instruction states that a contract that does not offer optional benefits is not essentially identical to one that does. The Committee submits that this specific example (and similar examples) are unnecessarily restrictive. Consistent with industry practice, albeit varied, in conjunction with SEC staff comments and input, a single Statutory Prospectus should certainly be able to describe two (or more) contracts that are identical except that one offers a particular optional benefit and the other doesn't. Requiring multiple Statutory Prospectuses (and perhaps multiple registration statements) in these circumstances would serve no persuasive purpose and would be unnecessarily burdensome for insurers. Moreover, it does not recognize the simple fact that even contracts with certain differences, on balance, often are overwhelmingly similar.

- The Committee recommends that the Commission eliminate that example from the cited instruction and allow reasonable flexibility to describe, in a single Statutory Prospectus, the same contract (or contracts) that offer different versions of a particular optional benefit, different combinations of optional benefits, and other variations.

b. Multiple Prospectuses in a Single Registration Statement. General Instruction C.3.(e)(ii) of Form N-3, Form N-4, and Form N-6, as proposed, states that multiple Statutory Prospectuses can be combined in a single registration statement if the prospectuses describe contracts that are "essentially identical." Three examples are included in the instruction, but they differ from the examples in the preceding instruction regarding presumably the same "essentially identical" standard. This is confusing. Neither the Proposing Release nor the proposed form amendments provide any explanation of what the "essentially identical" standard means or what purpose it serves in this context. Nor is there an explanation of whether the same standard applies in both situations (as the same standard is referenced) or whether there are different standards (as different examples are given). The Proposing Release seeks comment on this issue precisely, asking whether General Instruction C.3.(e) is clear and appropriate, and whether the "essentially identical" standard is clear.

- The current industry practice, although varied, is generally one where registrants have reasonable flexibility to include more than one Statutory Prospectus in a single registration statement, if the prospectuses are reasonably related. For example, insurers should be permitted to include more than one Statutory Prospectus in a single registration statement if the prospectuses describe different versions or iterations of contacts that are on the same or substantially similar policy forms, that offer different combinations and/or iterations of benefits, or that address different distribution arrangements.

c. Grandfathering Current Filings. Currently, many variable product registration statements include more than one Statutory Prospectus, and also many Statutory Prospectuses describe more than one contract. An existing Statutory Prospectus may describe only contracts that are no longer available for purchase, only contracts that are available for purchase, or a combination of both. It would serve no purpose to require insurers to "unwind" these Statutory Prospectuses, or to require the filing of new registration statements to separate multiple Statutory Prospectuses from a single registration statement, if such Statutory Prospectuses or registration statements do not meet the "essentially identical" standard, if the Commission's intent is that such standard not reflect current industry practice. Forcing insurers to take such actions would impose substantial and unnecessary burdens on insurers, with no correlative benefit to investors.

- The Committee requests that the Commission confirm that existing Statutory Prospectuses that describe more than contract, and existing registration statements that include more than one Statutory Prospectus, will not need to be unwound or separated if the "essentially identical" standard is narrower than current industry practice.

3. Part C

a. Reinsurance and Credit Support Agreements: Filing Requirements. As proposed, revised Forms N-3, N-4, and N-6 would require as exhibits "[a]ny contract of reinsurance related to a [c]ontract," and also any "[o]ther material contracts not made in the ordinary course of business."[126] These are not new requirements, and therefore the Proposing Release does not discuss or explain any reason for these requirements. However, the Proposing Release does ask for comment with regard to whether guarantees and credit support agreements between insurers (*e.g.*, from parent to subsidiary) should specifically be required to be filed.

Reinsurance contracts, credit support agreements, and guarantees generally are different types of arrangements. Reinsurance can provide back-up financial support for certain obligations under specified insurance contracts or groups of insurance contracts. Reinsurance generally obligates the reinsurer, who may or may not be affiliated with the company issuing the insurance contract, to pay certain amounts to the ceding company under specified circumstances. Credit support agreements generally involve a stand-by or "keep well" letter or agreement to provide financial support necessary to maintain an insurer's overall financial status (*e.g.,* capital and surplus) at a specified level, generally do not relate to a particular contract or product, and typically are provided by parent companies (or other affiliates). Reinsurance and credit support agreements are commonly used in the insurance industry. These types of agreements typically do not give contract owners the right to directly sue (and collect benefits from) the reinsurer or credit support provider.

Generally, the Committee believes that the existence and terms of reinsurance and credit support types of agreements are not significant or material facts for contract purchasers or owners. Reinsurance and credit support agreements generally add to, and do not detract from, the depositor insurance company's ability to fulfill its financial obligations and responsibilities.

- The Committee recommends that there should be no requirement to file reinsurance agreements or credit support agreements as exhibits.

Guarantees, on the other hand, may relate to specific contracts or specified benefits under certain contracts (or groups of contracts), and may (or may not) give contact owners a legal right to directly sue the guarantor for payment of those benefits. These types of agreements may be of material interest to contract purchasers or owners only if the particular guarantee gives contract owners the right to directly sue (and collect benefits from) the guarantor. Accordingly, there should be no requirement to file guarantee agreements, unless (a) the financial statements of the guarantor are otherwise required to be filed due to the particular terms and nature of the

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[126] *See* Items 34(i) and (l) of Form N-3, Items 28(g) and (j) of Form N-4 and Items 29(g) and (j) of Form N-6

guarantee agreement, and (b) contract owners have a legal right to recourse directly against (the right to sue and collect benefits from) the guarantor.[127]

b. Confidential Treatment of Reinsurance and Other Material Contracts. Reinsurance contracts and other material contracts frequently contain confidential or proprietary information, and the process for obtaining confidential treatment (which includes filing a separate request for confidential treatment) is unnecessarily burdensome, time-consuming, and with uncertain results.

This same process currently applies to insurance companies that register non-variable insurance products on Forms S-1 or S-3. In the recent FAST Act Release,[128] the Commission identified the modernization and simplification of the disclosure requirements of Regulation S-K as a primary goal of the proposed amendments. The proposed addition of paragraph (b)(10)(iv) to Item 601 of Regulation S-K supports that goal by permitting registrants, including insurance companies that register non-variable insurance contracts on Form S-1 or S-3, to omit confidential information from material contracts filed as exhibits without requiring them to file a request for confidential treatment with the SEC. (The proposed relief would be subject to certain conditions).

As noted above, insurance companies that register variable contracts with the SEC currently are required to file reinsurance and other material contracts as exhibits to their registration statements. In this respect, the Form N-3. N-4 and N-6 requirements are substantially the same as the requirements that Form S-1 and Form S-3 registrants must meet pursuant to Item 601(b)(10) of Regulation S-K. In addition, insurance companies that file Form N-3, Form N-4, or N-6 registration statements and request confidential treatment of information in material contracts filed in exhibits (and of supplementary material related to those requests) are subject to the same requirements governing those requests and the same costs and burdens in preparing the requests as registrants that file on Form S-1 or S-3.

Reinsurance contracts and other material contracts typically contain confidential and/or proprietary information that insurance companies should not be compelled to disclose publicly (or to competitors). As such, the compelling reasons discussed in the FAST Act Release for providing the proposed relief to Form S-1 and S-3 registrants apply equally to insurance companies that file Form N-3, Form N-4, or N-6 registration statements.[129] Because there does not appear to be any basis to treat insurance companies that register variable contracts on Form N-3, N-4 or N-6 differently than Form S-1 and S-3 registrants, and because of the significant cost savings that would be achieved in extending comparable relief to Forms N-3, N-4 and N-6, the Committee recommends that the Commission extend comparable relief to insurance companies that register variable contracts with the SEC.[130] Allowing confidential treatment of this information, in a reasonable matter, is of utmost important to insurers.

- If and to the extent that reinsurance agreements and other material contracts are required to be filed as exhibits, an insurance company filing a registration

[127] *See* Section 2710 of the Division of Corporation Finance's Financial Reporting Manual; *see also* Frequently Requested Accounting and Financial Reporting Interpretations and Guidance (March 31, 2001) (Division of Corporation Finance), addressing whether certain types of guarantees are securities under Section 2(1) of the Securities Act of 1933. Whether those standards and interpretations are appropriate, especially in the context of insurance products, is beyond the scope of these comments.

[128] FAST Act Modernization and Simplification of Regulation S-K, Securities Act Release No. 33-10425 (Oct. 11, 2017), 82 Fed. Reg. 50988 (Nov. 2, 2017) (the "FAST Act Release").

[129] The FAST Act Release requested comment on whether the relief that would be granted by paragraph (b)(10)(iv) should be extended to exhibits filed with forms that include their own exhibit requirements and that do not reference Item 601. Forms N-4 and N-6 fall in this category.

[130] The Committee submitted a comment letter to this effect in connection with the FAST Act Release. *See* Comment Letter addressed to Brent J. Fields, SEC Secretary, from the Committee of Annuity Insurers, December 21, 2017.

statement on Form N-3, N-4, or N-6 should be permitted to redact confidential and proprietary information in the same manner as Form S-1 and S-3 registrants.

c. Persons under Common Control. Form N-3, N-4, and N-6 registrants are required to include a list or diagram of all persons (companies) directly or indirectly under common control with the depositor or registrant. It is not unusual for such a list or diagram to include literally hundreds of remote affiliates; the list can be many pages long, single spaced, listing numerous entities that have nothing to do with the variable product or the depositor's business. Moreover, Forms N-3, N-4, and N-6 already require disclosure of the person or persons that control the depositor.

- Item 36 of Form N-3, Item 30 of Form N-4, and Item 31 of Form N-6 should be deleted, or revised to require only information regarding entities that control the depositor or that provide services related to the separate account or variable product being registered.

4. Inline XBRL

The Commission is proposing to require the use of Inline XBRL format for certain required disclosures in variable contract Statutory Prospectuses. This would allow investors and their investment professionals (as well as data aggregators, financial analysts, and other data users) to efficiently analyze and compare available information about available contracts. This would be very beneficial in determining which, if any, variable product is best suited for a particular investor's needs and circumstances.

a. Inline XBRL for Discontinued Variable Contracts. It would be appropriate to apply the Inline XBRL tagging requirements only to variable insurance products currently offered for sale so that professionals can recommend, and investors can choose, an appropriate insurance product given the particular circumstances and needs of the individual investor. To that end, the Proposing Release notes that the data to be tagged in Statutory Prospectuses are the items that "provide key information about a variable contract's key features, costs, risks" and which would be "of greatest utility for investors and other data users that seek structured data to analyze and compare variable contracts."[131] However, there is no need to require the use of Inline XBRL with respect to variable contracts that are no longer being sold, as Inline XBRL is primarily designed to help investors and other market participants compare investments and decide which, if any, to buy. Applying the Inline XBRL requirements to insurance contracts no longer being sold would impose unnecessary costs and burdens on insurers without providing any benefit to investors. Accordingly, the Committee has the following specific comment:

- As proposed, Inline XBRL would apply to all contracts for which an insurance company is maintaining a registration statement. In some cases, current registration statements are maintained for discontinued variable contracts. There is no compelling reason to require Inline XBRL in connection with discontinued variable contracts. Therefore, the Committee recommends that (i) the Inline XBRL requirements should not apply at all to Statutory Prospectuses that relate only to discontinued variable contracts and (ii) the Inline XBRL requirements should not apply to any portion of a Statutory Prospectus that relates to a discontinued variable contract if the Statutory Prospectus covers a contract that is currently offered for sale and a contract that is discontinued.

b. Inline XBRL for Posted Materials – The Commission requested comment on whether materials required to be posted online should be required to use Inline XBRL (in addition to being in human-readable format), to facilitate review, analysis, and comparison. However, applicability of the Inline XBRL requirement to the key information in the Statutory Prospectus

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[131] 83 Fed. Reg. 61800

already accomplishes this, so the costs and burdens of also using XBRL for the same information posted online is unnecessary.

- The Committee believes that there should be no requirement that posted materials for variable contracts be in Inline XBRL format.

5. Template and Selective Review

Based on the filing process described in the Proposing Release, in order to update their registration statements to comport with the amended variable product registration forms and to utilize summary prospectuses,[132] many insurers will be filing numerous Rule 485(a) filings within a short period of time. The sheer number of filings will likely strain both the SEC staff and insurers, and the effect of that strain may result in unnecessary uncertainty, work, and delay for registrants.

When preparing these filings, an insurer will frequently be making the same changes across its registration statements, and their ISPs and USPs will have substantial overlap in their disclosures. As a result, the Commission could ease the review process for the SEC staff and registrants by facilitating the use of template and selective review processes.

- The Commission should confirm that registrants may request template filing relief under Rule 485(b)(1)(vii) to avoid the need to file multiple Rule 485(a) filings and have the SEC staff separately review filings with substantially identical disclosures. The Commission should also confirm that registrants may request selective review of filings that contain disclosures that are substantially similar to the disclosures contained in other filings. The Commission should clarify how template and selective review processes could apply to draft ISPs and USPs, which as proposed must be filed as exhibits to registration statements.

D. VARIABLE PRODUCT REGULATORY FRAMEWORK – TECHNICAL AND CONFORMING AMENDMENTS AND OTHER PROPOSED RULEMAKINGS

The Commission is proposing to rescind a number of rules under the 1940 Act and to amend others that provide exemptions so that variable products can operate properly without violating the 1940 Act. Many of these exemptions were superseded or rendered superfluous by the National Securities Market Improvement Act of 1966 ("NSMIA"), which amended Sections 26 and 27 of the 1940 Act to replace specific limits and restrictions on variable product fees and charges with a requirement that fees and charges be reasonable when considered in the aggregate. Other proposed rule and form changes reflect industry and other developments over time. As noted above, the Committee commends the Commission and its staff for taking this opportunity to make these important updates and improvements, and the Committee supports the various proposed technical, conforming and updating amendments.[133] However, the Committee suggests that this is an appropriate time for the SEC to make certain additional improvements.

1. Rule 6c-8

Rule 6c-8 under the 1940 Act currently provides exemptions for variable annuity contracts from the 'redeemability' requirements and sales load provisions of the 1940 Act (Sections 2(a)(32), 2(a)(35), 22(c), 26(a)(2)(C), 27(c)(1), 27(c)(2), and 27(d) of the 1940 Act and Rule 22c-1 thereunder) in order to permit registered separate accounts (and their depositors and

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[132] *See* 83 Fed. Reg. at 61765.

[133] The Committee commends the SEC and its staff for proposing amendments to Rules 6e-2 and 6e-3(T) under the 1940 Act for VLI contracts, and generally supports the concept of revising and updating those rules to reflect NSMIA and other developments. However, the Committee is not commenting on specific proposed revisions to Rules 6e-2 and 6e-3(T) since the Committee's primary focus is on annuity products.

underwriters) to deduct deferred sales loads and full (non-prorated) annual administrative charges upon redemption (surrender) or annuitization. Proposed amendments to Rule 6c-8 would delete the exemptions from the sales load provisions and delete the 9% sales load limit (because these provisions have been superseded or rendered superfluous and superseded by NSMIA), but the exemptions from the redeemability provisions would be retained. The Committee agrees that rescinding the sales load exemptions and the 9% limit in Rule 6c-8 while retaining the redeemability exemptions is appropriate in light of NSMIA.

However, Rule 6c-8 can, and should, be further improved by expanding the redeemability exemptions that it provides for variable annuity contracts from the 1940 Act so that the Rule 6c-8 redeemability relief is more fully consistent with the scope of the redeemability relief that the Commission provides for VLI contracts in Rules 6e-2 and 6e-3(T). More specifically, the Rule 6c-8 relief should be expanded to include other types of variable annuity contract and separate account charges. For example, for optional living or other (e.g., death) benefits variable annuity contracts could impose a deferred charge on redemption or a charge on a quarterly or annual basis; or a contract administrative charge could be imposed on a quarterly (rather than an annual) basis. All or a portion of such deferred or periodic charges could be assessed upon redemption or annuitization.

NSMIA's reasonableness (of charges in the aggregate) requirement, FINRA suitability requirements, and applicable state insurance suitability standards and requirements (see below regarding Rule 11a-2), taken together, provide robust protections for investors. Moreover, the new disclosure requirements proposed for the summary prospectuses (and Statutory Prospectuses) will provide for a better registered variable product disclosure framework, further protecting investors. We note that NSMIA's reasonableness requirement and the proposed disclosure requirements are, of course, subject to the Commission's authority (to implement, enforce, and revise if necessary.)[134] These various investor protections ensure that variable annuity contracts will be 'redeemable' even if these types of charges are deducted upon surrender, just like surrender charges. Therefore, an expanded exemption in Rule 6c-8 from the redeemability provisions would be appropriate and consistent with the protection of investors.

- The Committee recommends that the amendments to Rule 6c-8 provide additional relief for variable annuity contracts from the 1940 Act's redeemability requirements to permit the deduction of deferred and non-pro rata administrative, insurance, and benefit (including rider) charges upon redemption or annuitization.

2. Rule 11a-2

Section 11(a) of the 1940 Act, pursuant to section 11(c), applies to any offer of exchange of the securities of unit investment trusts for any other investment company security. Rule 11a-2 under the 1940 Act provides exemptions from Section 11 for certain exchanges of variable product securities, subject to certain conditions and limitations. The Commission is proposing to amend subparagraph (c)(2) of Rule 11a-2 to eliminate a limit of 9% on combined sales loads. The Committee agrees that eliminating that limit in subparagraph (c)(2) is appropriate.

However, as proposed, the amendment to Rule 11a-2 would leave intact the 9% limit in subparagraph (d)(2); the Committee questions why the 9% limit in subparagraph (d)(2) should not also be eliminated. The Committee believes that the limit in subparagraph (d)(2) should also be removed for the same reason.

Despite the exemptions provided by Rule 11a-2, for many variable product exchange offers, insurers must still submit applications for, and the Commission staff must address and process, individual exemptive orders, because Rule 11a-2 would continue to impose unnecessary

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134 Although the NSMIA reasonableness requirement is statutory, the Commission has specific rulemaking authority regarding that requirement. See Section 26(f)(4) of the 1940 Act.

limitations and restrictions on affiliated or 'internal' exchange offers (*e.g.*, the 'tacking' requirement in paragraph (d) and the sales load restrictions in paragraph (e) of Rule 11a-2). Section 11 was intended to bar "churning" by securities salespersons in order to obtain additional commissions. Since Rule 11a-2's adoption, however, numerous other regulatory regimes applicable to variable product exchanges have come into play that provide robust investor protections that should make these particular Rule 11a-2 restrictions and conditions unnecessary with respect to registered variable insurance products. These other investor protections now include (or have been proposed to include):

- As noted above, the NSMIA revisions to Sections 26(f) and 27(i) of the 1940 Act impose a requirement that all fees and charges be reasonable "in the aggregate;" and in the context of 'internal' exchange offers by an insurer, the "aggregate" charges could include charges on both the exchanged and the acquired security, making most of the Rule 11a-2 restrictions and limitations unnecessary;

- FINRA Rule 2111 imposes both substantive and procedural requirements regarding suitability (including a customer-specific suitability obligation), and applies when variable insurance products are involved in an exchange transaction or strategy.[135]

- Insurance regulations in most states impose specific suitability and other consumer protection requirements on insurance product exchanges (usually referred to as 'replacements' in the insurance industry).[136]

- The proposed new ISP and Statutory Prospectus disclosure requirements for variable contracts include a specific warning disclosure in the Key Information Table regarding exchanges of variable contracts.[137]

- The SEC's proposed "Regulation Best Interest" standard for broker/dealers, and the fiduciary standard for registered investment advisers, also may come into play,

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[135] *See* NASD Notice to Members 05-50, at 5, providing guidance on Rule 2111 ("[R]ecommendations to liquidate or surrender a registered security such as a mutual fund, variable annuity, or variable life insurance contract must be suitable, including where such liquidations or surrender[s] are for the purpose of funding the purchase of an unregistered [equity indexed annuity]."); FINRA Regulatory Notice 12-25, n. 45; FINRA Regulatory Notice 12-55, n 20.

FINRA Rule 2330 specifically incorporates the general principles of FINRA Rule 2111, and additional investor protections (regarding disclosure, suitability, principal review and approval, supervision, information gathering, training, and documentation) to exchanges (as well as sales) of deferred variable annuity contracts. In addition, FINRA Rule 2330(b)(1)(B) adds required procedures related specifically to recommended exchanges.

[136] The NAIC's *Life Insurance and Annuities Replacement Model Regulation* (Model # 613) defines "Replacement" to mean any transaction in which a new policy or contract is to be purchased, and is known or should be known to the producer (or insurer if there is no producer), that an existing policy or contract has been or will be lapsed, forfeited, surrendered or partially surrendered, or assigned to the replacing insurer. This regulation imposes numerous specific duties on both agents and insurers to protect applicants involved in insurance product exchanges, including exchanges involving variable products. The NAIC website indicates that some 44 states have adopted some version of the NAIC model replacement regulation. In addition, the NAIC's *Suitability In Annuity Transactions Model Regulation* (Model # 275) imposes additional duties with respect recommendations to exchange or replace an annuity. The NAIC website indicates that some 46 states have adopted some version of this regulation.

[137] See proposed Item 3, Instruction 6.(b) of Forms N-4 and N-6.

providing additional protections for exchange transactions (including exchanges involving variable products).[138]

With respect to both variable annuity and variable life insurance products, Rule 11a-2 currently contains restrictions and limitations that are unnecessary in light of the protections and developments summarized above. Moreover, these restrictions and limitations may operate to impede or prevent exchange offers that could benefit and be in the best interests of investors. The Committee believes that Rule 11a-2 should be fully re-examined and revised to eliminate these unnecessary restrictions and limitations and to appropriately take into account the current overall regulatory regimes governing exchanges of variable annuity and variable life insurance products.

Apart from the broader concerns just discussed,, the restrictions and limitations currently in Rule 11a-2 applicable to VLI contracts often make it unfeasible for insurers to offer exchanges of VLI contracts in reliance on the rule.[139] Paragraph (b)(2) severely limits the usefulness of the rule for VLI contracts. Moreover, paragraph (f) makes the rule inapplicable to many common types of variable life insurance products since many such products impose both a front-end and deferred sales load.[140] A review and reconsideration of Rule 11a-2 should include a focus on the outdated limitations that make it unavailable for many exchange offers involving VLI contracts.

E. COMPLIANCE DATES

In the Proposing Release, the Commission proposes to provide a transition period after the Effective Date in order to give registrants sufficient time to update their registration statements in accordance with the proposed form amendments.[141] Specifically, the Commission would require all initial registration statements on Forms N–3, N–4, and N–6, and all post-effective amendments that are annual updates to effective registration statements on those forms, filed 18 months or more after the Effective Date, to comply with the proposed amendments. The Commission would also require variable contract registrants to submit to the Commission certain specified disclosures in Inline XBRL within the same 18-month compliance period.

The Committee believes the 18-month compliance period for updating variable product registration statements is necessary and appropriate. However, the Committee believes that the Inline XBRL requirement should be subject to a 36-month compliance period. The Committee notes that in the recent release adopting Inline XBRL requirements for mutual funds, small fund groups were given a three-year compliance period.[142] The Committee believes that insurance companies are similarly situated to smaller mutual funds with respect to compliance with Inline XBRL requirements, and could even be viewed as less prepared than small fund groups at the present time. Unlike mutual funds, insurance companies have no experience with XBRL with respect to their Form N-3, Form N-4, and Form N-6 registration statements. Indeed, insurance companies will need to either create the necessary in-house capabilities or find third-party service providers to comply with the Inline XBRL requirements. This process will require substantial time and resources, and the Commission recognized these hurdles in the Proposing Release.[143] In addition, the disclosures associated with variable products can be far more complicated than the disclosures

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[138] Proposed Regulation BI would apply to recommendations of exchanges of any security. See Release No. 34-83062 (April 18, 2018), text at n. 153.

[139] Applying for an individual exemptive order is, of course, currently possible. But that process takes a considerable amount of time and effort, and is expensive. Accordingly, the narrower relief that Rule 11a-2 currently affords VLI contract exchange offers may have discouraged exchange offers beneficial to investors.

[140] Therefore, as a practical matter, VLI contract exchange offers cannot be made in reliance on Rule 11a-2 even if they could comply with the ‘tacking’ requirement and/or waive surrender charges.

[141] *See* 83 Fed. Reg. 61804.

[142] *See* Inline XBRL Filing of Tagged Data, Release No. IC-33139 (June 28, 2018).

[143] *See* 83 Fed. Reg. 61816.

associated with mutual funds and will likely be more difficult to tag. As such, the Committee believes that all insurance companies should be given an extended compliance period of 36 months to comply with the Inline XBRL requirements.

F. CONCLUSION

While the Committee has a number of comments and recommendations related to the Proposing Release that it urges be taken into account, the Committee cannot overstate its appreciation to the Commission and the SEC staff for the thoughtfulness, time, and effort that is readily apparent in the comprehensive and impressive proposal to modernize and streamline the disclosure regime for registered variable products so as to materially improve the investor experience. The Committee hopes that its comments will provide helpful assistance to the Commission and the SEC staff so as to be able to expeditiously adopt final rules and form amendments that will implement this new disclosure regime. We thank you for the opportunity to provide these comments.

Respectfully submitted,

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