



**MARTHA C. CHEMAS, ESQ.**

March 8, 2019

Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**RE: FILE NUMBER S7-23-18; COMMENTS ON PROPOSED UPDATED  
DISCLOSURE REQUIREMENTS AND SUMMARY PROSPECTUS FOR  
VARIABLE ANNUITY AND VARIABLE LIFE INSURANCE CONTRACTS**

Madame Secretary,

Thank you for the opportunity to comment on "Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts" as proposed.

**Introduction:**

The Securities and Exchange Commission has reopened the comment period on its proposal to amend rules and forms to help investors make informed investment decisions, and has made available "Proposed Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts" to the public for review and comment. This letter serves to confirm review and present comments, as requested. This letter is not intended to provide a comprehensive enumeration of challenges observed in the proposed updated disclosure requirements, rather, it is intended to identify and to proffer brief comments on the sample of issues so presented.

## **Comments Sorted into Three Broad Categories:**

In reviewing the proposed updated disclosure requirements, and in contemplating the satisfaction of delivery obligations under the Securities Act of 1933, the following comments are presented. The presented comments with respect to “**Proposed Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts**” have been sorted into three broad categories:

1. Demonstration of Compliance Challenges
2. In Support of Inline XBRL Format
3. Litigation Related Challenges

### **Demonstration of Compliance Challenges:**

“**Proposed Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts**” presents updated proposed disclosure requirements and requests feedback. Upon reviewing the entire proposal, a general challenge is observed, that might be best described as “demonstration of compliance.”

How would compliance be demonstrated under the proposed updated disclosure requirements? The Commission provides detailed context with respect to its multi year history addressing electronic communications and disclosure requirements, and supplies very specific examples of “evidence of delivery” (p.18, n 32)<sup>1</sup>. The proposal, in drawing “on more than twenty years of experience with the use of the internet as a medium” (p.18), nevertheless does not directly address what approach should be taken, in the event that there is a case or controversy with regard to the demonstration of compliance for the proposed updated requirements, not directly addressed by the detailed context provided in the proposed updated requirements.

Many of the observed challenges could, nevertheless, potentially be efficiently and meaningfully addressed by generally specifying how such controversies would be addressed, before they actually become controversies.

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<sup>1</sup> Please note all page numbers referenced in this letter refer to the proposed rule, accessed at: <https://www.sec.gov/rules/proposed/2018/33-10569.pdf>

In order to consider how to address what approach should be taken, in the event that there is a case or controversy with regard to demonstration of compliance for the proposed updated requirements, not directly addressed by the detailed context provided in the proposal, some suggested questions to be considered could be:

What would be the relevant criteria for assessing whether the required standard of conduct was met, in the absence of an existing approach?

Could the proposed updated disclosure requirements, which would ostensibly extend to parties beyond the physical territory of the United States, conflict with existing requirements elsewhere? Is there an existing or recommended mechanism or process to address such a conflict, should it arise?

Specifically with respect to some of the examples and commentary provided in the documents cited in the body of footnote 32 on page 18, consideration should be given to clarifying whether a safe harbor or grace period would apply in the event of: a website suffering a DDOS attack, or other similar outage, for the relevant period for which the website was under attack.

Would there otherwise exist any rebuttable presumptions of compliance for any of the proposed updated requirements, with respect to delivery of disclosure obligations in the electronic manners proscribed? Any presumptions of compliance or non compliance for registrants should be analytically balanced with the long term interests of main street investors.

### **In Support of Inline XBRL Format:**

**"Proposed Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts"** presents updated proposed disclosure requirements and requests feedback. Upon reviewing the entire proposal, general support is offered regarding the use of Inline XBRL format.

Adoption of such a standard promotes the maintenance of orderly markets: In expressing general support for the use of Inline XBRL, with respect to the proposed updated disclosure requirements, rather than commenting on each part of the rule that will be affected by this proposed requirement, attention is instead directed to specifically and especially the following observations and contentions:

"[S]tructured data format would allow investors, financial intermediaries, third-part analysts, and others to more efficiently analyze and compare these products" (p. 35, n 76). Inline XBRL "can enhance the efficiency of review" (p. 281).

The proposed requirements consider the question of whether adoption of XBRL should be voluntary or mandated. Generally speaking, it could be helpful to conceive of a transition from voluntary to mandated use,

especially with respect to smaller organizations for which implementation could potentially be unduly burdensome. Thus, support is expressed for “*Availability of hardship exemptions*” (p. 285), especially so as the possibility of “other costs or burdens” (pp. 287, 343) potentially imposed on variable contract registrants, is acknowledged.

The proposed updated disclosure requirements consider the issue of competition (pp. 345, 348-349) with regard to the use of Inline XBRL. The promotion of competition serves to protect investors and promotes efficiency, and potentially, innovation. In adopting a reporting standard generally, care should be taken to consider and mitigate the risk of antitrust exposure, or what could potentially evolve into significant adverse effects on competition (p. 413). For example, when tagging or devising instructions on how to tag, variable registrant contracts, when, whether and how geographical areas are being described, should be considered.

Ultimately, adoption of such a standard with respect to the proposed updated disclosure requirements, could effectively promote the maintenance of orderly markets in the long term, when generally considering risk, and may provide evidence-based insight to inform future decision making with respect to the upcoming reference rate transition: “We are also proposing to require Principal Risks to be tagged so investors and their investment professionals can analyze a contract’s risks alongside the contract’s features and benefits” (p. 283).

#### **Litigation Related Challenges to be Considered:**

**“Proposed Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts”** presents updated proposed disclosure requirements and requests feedback. Upon reviewing the entire proposal, the following comments consider selected litigation related challenges, unrelated to XBRL adoption.

*Technical challenges related to “active hyperlink”*: In considering whether the implementation of the proposed updated requirements would pose any technical challenges (p. 66), the Commission’s proposed directive that “any cross-reference that is included in an electronic version of a summary prospectus must be an active hyperlink” does raise some questions, again as above articulated in the section with the header “Demonstration of Compliance Challenges”.

To illustrate, it may be helpful to consider the questions: How long could what is supposed to be an active hyperlink be a dead link before a registrant is deemed non compliant with this proposed updated requirement? Also, again, akin to the points previously raised in “Demonstration of Compliance Challenges” what specific facts would

have to be alleged to bring a claim for non compliance? In the event of a controversy as to whether there was an active hyperlink, would there be a rebuttable presumption of compliance, or non-compliance, and under what factual circumstances would such presumptions apply?

While recognizing that it is, of course, more efficient to communicate the disclosures contemplated by the proposal electronically, and thus in keeping with the Commission's mission, it is nevertheless important to consider what a class action, or series of class actions, or other mass litigation for non compliance could look like, and the kind of burden this could potentially place on the courts.

Again, as alleged above, these challenges could potentially be efficiently and meaningfully be addressed by specifying how such controversies would be addressed, before they become controversies.

*A second litigation challenge, with respect to technical implementation, unrelated to XBRL adoption exists with respect to current and ongoing litigation alleging certain websites are non ADA compliant. The Commission may wish to consider the proposed updated disclosure requirement proposal and/or the eventual implementation thereof, from the context of current and ongoing litigation which claims certain websites are non ADA compliant, alleging violation of Title III of the Americans with Disabilities Act. Rulings in this area have delivered contradictory results as to what kind of websites are places "of public accommodation." The lack of a definitive finding in this area may inject uncertainty into processes that promulgate rules regarding the form and/or function of a website.*

The Commission may wish to analyze the challenges observed under the heading "Litigation Related Challenges to be Considered" in light of *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 582 U.S. \_\_\_ (2017) (*finding the three year time limit in Section 13 of the Securities Act of 1933 is a statute of repose and thus not subject to equitable tolling*).

### **Conclusion:**

In reviewing "**Proposed Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts**" the preceding comments are hereby tendered. The preceding comments were sorted into three broad categories, pursuant to the proposal's request that comments be as specific as possible.

Any deliberation of the above noted challenges and support would ideally be considered from within the framework and context of the Commission's ongoing ability to apportion resources and pursue its mandate.

The preceding comments were made in contemplation of the satisfaction of delivery obligations under the Securities Act of 1933. The Commission is further proposing to rescind Rule 26a-2, Rule 27a-1, Rule 27a-2, Rule 27a-3, Rule 27d-2, Rule 27e-1, Rule 27f-1, Rule 27g-1, Rule 27h-1, Form N-27E-1, Form N-27F-1, Form N-27I-1, and Form N-27I-2 of The Investment Company Act. While the immediately preceding list of rules proposed to be rescinded was also reviewed, no comment is offered or presented at this time regarding those proposed rescindments.

Thank you again for the opportunity to comment and please feel free to reach out with any questions or observations. Hopefully, the presented comments will support the Commission in carrying out its tripartite mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation.

Kind regards,

*Martha C. Chemas, Esq.*