CARLTON FIELDS | White Paper

A Sea Change in RILA Regulation: Navigating the New Waters

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Introduction

On July 1, 2024, the Securities and Exchange Commission adopted a new registration framework for registered index-linked annuity (RILA) contracts.[1] RILA contracts allow investors to allocate purchase payments to one or more "index-linked" investment options whose performance is based in part on the return of an index or other benchmark over a crediting period, subject to limits on gains and losses in that benchmark.[2]

Some insurers offer stand-alone RILA contracts, although most offer index-linked investment options within a variable annuity contract. In either case, RILAs have gained considerable popularity since their introduction in 2010.[3]

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1. See *Registration for Index-Linked Annuities and Registered Market Value Adjustment Annuities; Amendments to Form N-4 for Index-Linked Annuities, Registered Market Value Adjustment Annuities, and Variable Annuities; Other Technical Amendments*, Securities Act Release No. 11294 (July 1, 2024) [89 Fed. Reg. 59978 (July 24, 2024)] ("Adopting Release"), available at *https://www.sec.gov/files/rules/final/2024/33-11294.pdf*.
2. Some RILAs have offered an option to link performance to certain exchange-traded funds that provide exposure to asset classes not typically available through an index.
3. In reporting on U.S. annuity sales for the first half of 2024, LIMRA noted that RILA sales jumped 41% to $30.7 billion. In addition:

> For the third consecutive quarter, RILA sales have outpaced traditional variable annuity sales. More than a half dozen carriers have launched or enhanced their RILA products in the first half of the year. These product innovations are driving a more competitive landscape and signaling the RILA market still has significant growth potential. LIMRA is forecasting RILA sales to surpass $50 billion in 2024.

LIMRA: U.S. Annuity Sales Set New Record in First Half of 2024, LIMRA News Release (July 24, 2024)

It took some prodding initially by Congress for the SEC to develop and propose new rules,[4] but the rulemaking has generally been welcomed. Among other things, the framework adopted by the SEC will allow RILA issuers to use the same registration form, Form N-4, which is used to register variable annuities. Heretofore, RILAs have been required to be registered on general SEC registration forms used by corporate issuers and consequently include (or incorporate by reference) extensive information about the insurance company and its business that arguably is not relevant to RILA investors.

The disclosure that is now required by the amended Form N-4 reflects over a decade of SEC staff experience collaborating with RILA issuers to improve disclosure for these products. Importantly, the new framework also reflects a thoughtful and comprehensive effort to address concerns raised in investor testing that the features and terms of RILAs are difficult for investors to understand.

In addition, the SEC has determined to extend this framework to include another non-variable product, market value adjustment annuities (MVAs). These are fixed annuities that adjust contract value positively or negatively, based on changes in interest rates, for withdrawals before the end of a term.

Taken as a whole, the new framework is a win-win for investors and the industry. Nonetheless, certain questions and concerns remain. Following the table of contents below, we provide a summary of the more significant elements of the new registration framework, followed by a discussion of, and comment on, these elements.

(quoting Bryan Hodgens, senior vice president and head of LIMRA research), available at *https://www.limra.com/en/newsroom/news-releases/2024/limra-u.s.-annuity-sales-set-new-record-in-first-half-of-2024/.*

4. *See* Division AA, Title I of the Consolidated Appropriations Act, 2023, Pub. L. 117-328; 136 Stat. 4459 (Dec. 29, 2022) ("RILA Act") (authorizing the use of Form N-4 for the registration of RILA offerings if the SEC did not adopt a registration form for RILAs within 18 months following the date the RILA Act was enacted).

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I. Summary

Following is a brief summary of the important elements of the new framework:

Significant Amendments to Form N-4. While Form N-4 is designed to elicit insurance-related disclosure relevant to annuity investors generally, the form has been significantly amended primarily to address the investment-related features, operations, and risks of investing in RILAs and MVAs. Many of the requirements codify past practices on disclosure for RILAs and MVAs, but there is a strong focus in the amended form on strengthened, and somewhat repetitive, risk disclosure. There also are certain new disclosure requirements, such as the requirement for a performance chart overlayed with hypothetical limits on index gains and losses. Importantly, there also are new disclosure requirements that apply to Form N-4 filers whether or not a RILA or MVA is being registered.

Ability to Satisfy Prospectus Delivery Obligations Through the Use of a Summary Prospectus. The SEC has amended rule 498A under the Securities Act of 1933 (Securities Act), the variable annuity "summary prospectus" rule, to allow insurers to include RILA and MVA information in summary prospectuses. This new feature may be particularly attractive to RILA issuers, because summary prospectuses provide investors with a concise disclosure document and may be used to satisfy prospectus delivery obligations under the Securities Act. This amendment builds on the successful implementation of the summary prospectus approach for variable contract issuers, which have been relying on the rule since its adoption in 2020, and its implementation should significantly simplify disclosure on RILA contracts for investors.

Payment of Registration Fees in the Same Manner as Variable Annuities. RILA and MVA issuers will be able to pay registration fees in arrears, as is the case with variable annuities. In addition, the new fee payment rules will permit registrants to net redemptions against new sales and pay registration fees just on net sales (or carry forward credit for net redemptions). This netting provision also means that rollovers of amounts from prior periods will be effectively treated as having a net zero effect on registration fees.

Parity with Variable Annuities on Related Filing Rules. To provide RILA and MVA issuers with the same streamlined filing rules as are used by variable annuity issuers, related filing rules have been amended to, among other things, allow eligible post-effective amendments — including annual updates and "off-cycle" amendments — to become effective immediately, as well as obviate the current need to file new "refresh" registration statements every three years.

Allowing Changes in Limits on Index Gains for New Periods to Be Posted Online. In a change from the proposal, the SEC agreed to allow RILA issuers to disclose current limits on index gains by including a website address where those limits could be found and incorporating by reference the information on the website into the prospectus, as opposed to having to file a multitude of prospectus supplements for those changes.

Use of SAP Financial Statements in RILA and MVA Registration Statements. Registration statements for RILAs and MVAs generally will be allowed to include financial statements prepared in accordance with state statutory accounting principles (SAP) for insurance companies instead of generally accepted accounting principles (GAAP), on the same basis as variable annuities, without having to obtain permission from the SEC staff allowing the use of those financials.

Significant Changes in How RILA Sales Materials Are Regulated. Sales materials for RILAs and MVAs are now subject to the fair and balanced disclosure requirements of rule 156 under the Securities Act, as is the case with sales materials for variable products. However, in a departure from the general goal of the rulemaking to provide regulatory parity with variable annuity contracts, with one exception the SEC did not amend rules 482 or 433 under the Securities Act to cover RILAs or MVAs, thereby restricting the distribution of RILA and MVA sales materials to those preceded or accompanied by a prospectus filed with the SEC. In a change from what was proposed, however, to preserve the status quo, the SEC amended rule 433 (known as the "free writing prospectus" rule) to allow RILA and MVA issuers who are seasoned issuers and qualify to disseminate free writing prospectus materials without a prospectus delivery requirement to continue to do so. Nonetheless, the inability of most RILA and MVA issuers to use broad-based advertising places these issuers at a significant, and we believe unjustifiable, competitive disadvantage.

Expanded Disclosure Requirements for Fixed Investment Options in a Combination Contract. More disclosures will be required regarding fixed investment options in annuity contracts with variable, MVA**,** and/or RILA investment options, notwithstanding concerns raised by several commenters regarding the jurisdictional foundation for the disclosure requirements imposed on non-securities. In addition, these requirements extend to disclosures in the prospectus appendix listing investment options that are part of the summary prospectus.

Other Non-Variable Insurance Products Remain Subject to the Existing Registration Regime. Other registered non-variable insurance products, such as indexed-linked life insurance policies and contingent deferred annuities, will have to continue to be registered on an S-form and be subject to the disclosure requirements on those forms. In addition, these products will remain subject to existing S-form rules on amendments, registration fee payments, and financial statement preparation.

II. New Disclosure Elements

In mandating that the SEC adopt a new registration form for RILAs, the RILA Act did not require that Form N-4 be used for this purpose. Given that many of the existing disclosure requirements in Form N-4 are relevant to the registration of RILA and MVA offerings, however, it was logical for the SEC to amend the form to provide for the registration of these new non-variable products. In addition, for RILAs and MVAs offered as investment options in "combination" contracts together with variable investment options, registrants will now be able to use a single form to register these contracts.

The amendments the SEC has made to Form N-4 are intended to extend to RILA and MVA investors the benefits of the "layered disclosure" approach currently reflected in variable annuity summary prospectuses, where certain fundamental information is provided in summary prospectuses with more detailed information available in statutory prospectuses. Under this layered disclosure approach, certain fundamental new RILA and MVA disclosures will be required in response to items that must be included in a summary prospectus. More detailed information, including descriptions of the operation of the adjustments made in response to a removal of contract value before the end of a crediting period (referred to in the Adopting Release and here as "Contract Adjustments"), will be in prospectus sections that would not be in a summary prospectus and/or in the statement of additional information (SAI), Part B of Form N-4, that is provided to investors only upon request.

A. Specific RILA Disclosures in the Summary Prospectus[5]

Amended Form N-4 has specific RILA-related disclosure item requirements for the Overview, the Key Information Table ("KIT"), the Fee Table, and the Appendix. These items have been expanded to now require fundamental information regarding not only variable annuity contracts but also RILA contracts. These expanded disclosure items now require basic information regarding the operation of the limits on index gains and losses, including the requirement to provide simple examples of how these types of limits operate for amounts held until the end of a crediting period. These items also include disclosure requirements regarding other important terms and conditions (e.g., available indices and crediting periods, reallocations, index substitutions, and the types of transactions subject to Contract Adjustments).

1. Risk Disclosures

Aside from this basic information, which is commonly already provided in registration statements for RILAs and MVAs, summary prospectus disclosure requirements now included in Form N-4 focus on making clear in several places the risks of investing in RILAs. These required risk statements will have to be made about RILAs in the

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5. Under the layered disclosure approach in Form N-4, disclosure that must be provided in the Overview (Item 2), the Key Information Table (Item 3), the Fee Table (Item 4) and the Appendix (Item 17) forms the nucleus of summary prospectuses. Of course, this fundamental information is also required in statutory prospectuses. For ease of reference, in this article we refer to the disclosure required by Items 2, 3, 4, and Appendix A generally as "summary prospectus information," recognizing that this information is required in statutory and summary prospectuses.

disclosures regarding losses from negative index performance, the limits on gains due to associated caps and participation rates, and the disclosures regarding the risks from the application of Contract Adjustments.

a. Risks Relating to Losses From Negative Index Performance and Limits on Positive Index Performance

Form N-4 requires that RILA issuers make several statements and disclosures in summary prospectus information to highlight the risk of loss and the limits on gain from investing in a RILA. These include statements as to maximum loss and that an investor could lose a significant amount of money if the index declines in value. In addition, the summary prospectus must note that limits on upside performance constitute an implicit ongoing fee that could reduce the return to the investor below the performance of the index. Further, RILA issuers will have to state what the minimum limit on loss would be provided for the life of the contract or, alternatively, warn investors that there is no guarantee there will always be a limit on losses incurred with RILAs and that this would mean risk of loss of the entire amount invested.

Specifically, in the response to the "is there a risk of loss from poor performance" question in the KIT, RILA issuers will have to disclose the "maximum amount of loss an investor could experience from negative index performance" taking into account the current limits on index losses.[6] While the Adopting Release is not clear on this point, it appears that these and similar disclosure requirements contemplate disclosure regarding the maximum of loss from negative index experience if the investment is held *until the end of the crediting period.* For example, the cover page of a contract with index options must state separately (i) the "maximum amount of loss … from negative Index performance taking in account limits on losses," and (ii) the "maximum potential loss resulting from a negative Contract Adjustment." Further evidence is provided by disclosure that has already been provided in response to SEC Staff comments that the "maximum amount of loss you could experience due to negative index performance *at the end of a Term*, after taking into account these levels of protection, would be 90% for 10% downside protection," and, separately, that an investor may "lose up to 100% of the value of [their] investment if [they] make a withdrawal or surrender the Contract during a Term." Industry participants may seek additional clarity on this issue.

The statement disclosing that investors could lose a significant amount of money if the index declines in value must be included in the Overview,[7] and the "implicit ongoing fee" language must appear in the "Are There Ongoing Fees Expenses?" section of the KIT.[8] The statement regarding the minimum limit on loss for the life of the contract or the

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6. Form N-4, Item 3, Instr. 3(a). The form notes that issuers may provide a range of the maximum loss if the contract offers index options that have different limits. *Id.*

7. Form N-4, Item 2(b)(2)(ii).

8. If the contract offering RILAs has ongoing fees and expenses, the disclosure would have to precede the table in the KIT listing those fees and expenses, Form N-4, Item 3, Instr. 2(c)(i)(G). If the contract offering RILAs has no ongoing fees or expenses, this language would have to be included in lieu of that table. Form N-4, Item 3, Instr. 2(c)(iii).

alternative statement that the issuer does not guarantee the contract will always offer RILA options that limit index losses must be made in the Overview,[9] in the response to the "Is There a Risk of Loss From Poor Performance" question in the KIT,[10] and immediately following the table listing RILA options in the Appendix.[11]

In addition to these risk disclosures, RILA issuers must note in the legend after the "annual contract expenses" table in the Fee Table section that returns to investors may be lower than the returns on the index.[12] Lastly, it is important to keep in mind that, with respect to the risk disclosures required for the Overview and the KIT, RILA issuers will be unable to provide context (such as the likelihood of these risks) in the same sections as those disclosures, because the instructions to the Form prohibit additional information in the sections where these disclosures are required.[13]

b. Risks Relating to Contract Adjustments

When contract value is removed from a RILA during a crediting period, the issuer will adjust the contract value in the RILA to reflect not just the amount of the withdrawal but also changes in the value of the index. To date, this adjustment, referred to in amended Form N-4 as a Contract Adjustment, has been made to reflect at the time of the withdrawal either the actual change in the index to date or the change at that time in what is the expected value of the index as of the end of the crediting period. The determination of a Contract Adjustment can be complex, and the Adopting Release cites this complexity in noting the need for clear risk disclosure.[14]

As amended, the form requires two types of risk disclosures for Contract Adjustments in summary prospectus information. These are disclosures related to the potential for loss when withdrawals are made from contract value during a crediting period and disclosures related to characterizations of Contract Adjustments as a fee, expense or charge. As to the first type, for example, the KIT must disclose the maximum loss percentage resulting from a Contract Adjustment.[15] The KIT does not state whether current limits on index loss must be taken into account in determining this maximum potential loss. Such a calculation is explicitly required for amounts held through a crediting period, and it seems likely this is the intention with respect to Contract Adjustments as well; nonetheless, this may be an issue on which industry participants seek additional SEC Staff guidance.

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9. Form N-4, Item 2(b)(2)(iii).
10. Form N-4, Item 3, Instr. 3(a).
11. Form N-4, Item 17(b)(2).
12. Form N-4, Item 4. In addition to these risk disclosures, RILA prospectuses must "prominently" state in the Overview and below the table of Index-Linked Options in the Appendix what is the lowest limit, for each type of limit (e.g., cap, participation rate) on index gains that may be established under the contract. Form N-4, Item 2(b)(2)(iv) (Overview) and Form N-4, Item 17(b)(2) (Appendix). To provide maximum flexibility, it is likely registrants will generally set very low minimum limits.
13. Form N-4, General Instruction C.3(b).
14. *See* Adopting Release, *supra* note 1, at 12 (stating "providing investors with key information is particularly important in the context of RILAs, since their features are typically complex, and their risks may not be apparent or easily understood by prospective investors absent clear disclosure").
15. Form N-4, Item 3, Instr. 2(a).

With respect to the Form N-4 requirement to state the maximum loss attributable to a Contract Adjustment, since an index could hypothetically drop to zero at the time a withdrawal is taken during a crediting period, where a RILA has a minimum guaranteed buffer of 10%, presumably the maximum loss percentage in that case would be 90%. On the other hand, there are some RILAs that provide less than the full measure of the provided limit on losses upon a removal of contract value before the end of a crediting period.[16] Because the Adopting Release does not address these situations, it is unclear whether registrants would have to take into account such a reduced or even eliminated limit on loss in calculating the maximum loss percentage.

Further, the Overview must disclose, if applicable, that "an investor could lose a significant amount of money due to the Contract Adjustment if amounts are removed" from a RILA prior to the end of a crediting period.[17] In addition, the Appendix listing RILA options must be preceded by a legend noting that the Contract Adjustment "may result in a significant reduction in your Contract value that could exceed any protection from Index loss that would be in place" had the option been held until the end of the Crediting Period.[18]

Apart from disclosure that highlights the risk of loss concurrent with a Contract Adjustment, Form N-4 also requires disclosure that appears to equate the Contract Adjustment with some kind of cost. Specifically, in the "Lowest and Highest Annual Cost Table" in the KIT, registrants must disclose that the cost estimate in the table "assumes that [the investor] do[es] not take withdrawals from the Contract, which could add ...Contract Adjustments that substantially increase costs."[19]

To be sure, the Form does not require categorizing the potential loss that could occur upon a Contract Adjustment in the transaction expense table in the Fee Table Item as a "Fee or Expense," reserving that line item for a separate table in that section that is referred to as "Adjustments."[20] It is regrettable, nonetheless, that the "Lowest and Highest Annual Cost Table" in the KIT refers to Contract Adjustments as a "cost." In addition, we note that the legend before the Example in the Fee Table must disclose that the Example assumes all contract value is allocated to the variable options, and that it does not reflect any Contract Adjustments.[21] We disagree with these characterizations, and believe that Contract Adjustments are not amounts that are imposed to provide the insurer any additional fees or that impose any costs on the contract owner, but rather are adjustments to reflect index performance and, as such, can be positive as well as negative.

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16. A common method used to reduce the limit on loss available to absorb losses in the index is to prorate the amount of the stated limit based on the amount of time the removed amount was invested in the index option before removal relative to the total length of the crediting period.
17. Form N-4, Item 2(d).
18. Form N-4, Item 17(b).
19. Form N-4, Item 3, Instr. 2(c)(ii)(A).
20. Form N-4, Item 4. This is a welcome improvement from what was proposed in the proposing release, which would have required categorizing these losses in the in the Transaction Expense Table besides other transaction fees or expenses. Similarly, the discussion of Contract Adjustments in the KIT, which had been proposed to be in a section titled, "Fees and Expenses," will now be in a section titled, "Fees, Expenses, and Adjustments." Form N-4, Item 3.
21. Form N-4, Item 4.

2. Other Notable RILA-Related Summary Prospectus Disclosure

There are several other notable new RILA-related disclosures that are required to be provided in summary prospectus information. First, the Appendix has been substantially revised. It must now include a table disclosing all RILA options that are currently available under the contract, describing the index, crediting period length, and current limit on index loss if held until the end of a crediting period), and the minimum limit on index gains for each index option listed.[22] This table must also note, as does the Appendix table for variable investment options, whether investment in a particular RILA option is restricted (e.g., available only for investments from existing investors).[23] Further, following the table, RILA issuers must indicate the lowest limit on index gains for each type of upside limit (e.g., cap or participation rate).[24]

In addition to disclosing certain terms of RILA options, this Appendix table will have to include a preceding legend that notes the issuer may change the features of the listed options as well as offer new options and terminate existing ones.[25] In addition, this legend will also have to state that the issuer will provide notice of any such changes, other than changes to current limits on index gains.[26]

As to these limits on current gains, as discussed below, under certain conditions Form N-4 will allow current limits on index gains to be disclosed on a website as an alternative to being disclosed in the prospectus. Where registrants have chosen this option, as is expected most if not all RILA issuers will do, this preceding legend in the Appendix will also have to disclose a website address specific enough to lead investors directly to information on those current limits on index gains.[27]

Also, the legend will have to contain cross-references to those sections of the prospectus that describe material features and terms of RILA options.[28] In addition, if the calculation of the index return does not reflect the full performance of the assets tracked by the index (e.g., because the return excludes dividends from the index), a footnote to the Appendix must be added noting this, as well as stating that this will reduce the index return and cause the index to underperform a direct investment in the securities composing the index.[29]

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22. Form N-4, Item 17(b)(1).
23. Form N-4, Item 17(b), Instr. 1(b).
24. Form N-4, Item 17(b)(2). While the Adopting Release does not make clear the difference between this disclosure of the lowest limit on index gain and the disclosure in the table of the minimum gain for each index option, presumably the former is a summary of the lowest limit, by type, across all index options having that type of limit.
25. Form N-4, Item 17(b)(1).
26. *Id.*
27. Form N-4, Item 17(b), Instr. 1(e).
28. Form N-4, Item 17(b), Instr. 1(a).
29. Form N-4, Item 17(b), Instr. 1(d). This statement is also required, if applicable, in the response to the “What Are the Risks Associated with the Investment Options?” question in the Risks subsection of the KIT. Form N-4, Item 3, Instr. 3(c)(C).

Other notable changes to summary prospectus information requirements for RILA-related disclosures include: (a) a requirement for the Overview to state the minimum limit on index gain that may be established under the contract for each type of limit (e.g., cap or participation limit);[30] and (b) as to contracts that have variable options, for the Expense Example in the Fee Table section to note that the expense projections assume all assets are allocated to variable options and do not reflect Contract Adjustments.[31]

B. Specific RILA Disclosures Outside of Summary Prospectus Information

The new RILA-related disclosure requirements outside of those items that appear in the summary prospectus require more information on how RILAs operate with additional emphasis on disclosing the risks of investing in RILAs. Much of this information is similar to the product-specific information RILA issuers have already been providing in prospectuses on Form S-1 and Form S-3, both in initial filings and in amendments following staff review, with some notable exceptions described below.

1. Describing the Operation of RILAs and Contract Adjustments – Items 6(d) and 7(e)

A new element in Form N-4, Item 6(d) of *Description of Insurance Company, Registered Separate Account, and Investment Options*, lays out more detailed disclosure requirements for RILAs, except for Contract Adjustments, which are dealt with primarily in the form item for Charges, in new Item 7(e). Aside from a repetition of certain of the risk disclosures described above,[32] the requirements in new Item 6(d) deal with a range of subjects that RILA issuers have already been addressing in prospectuses filed using Form S-1 or Form S-3. Among other things, these include a basic description of the options[33] and crediting periods available,[34] how returns and limits are calculated for amounts held to the end of a crediting period,[35] how reallocations at the end of a crediting period are handled,[36] and how substitutions of an index are handled.[37]

As to Contract Adjustments, Item 7(e) of *Charges and Adjustments*, directs registrants to briefly describe the purpose of these adjustments and to disclose “in simple terms” the way they are determined, including whether the adjustment uses a particular formula.[38] In a change from current practice, specific examples illustrating the

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30. Form N-4, Item 2(b)(2)(iv).
31. Form N-4, Item 4 and Item 4, Instr. 19.
32. These include the statements that an investor could lose a significant amount of money if the index declines in value and could lose a significant amount of money due to the Contract Adjustment if amounts are removed from an index option before the end of the crediting period. Form N-4, Items 6(d)(1)(ii) and (iii). Also required is either disclosing what the minimum limit on loss is for each index option that will always be available under the contract or a statement that the issuer does not guarantee that the contract will always offer index options that limit index losses. Form N-4, Item 6(d)(2)(i)(B).
33. Form N-4, Item 6(d)(1).
34. Form N-4, Item 6(d)(2)(iii).
35. Form N-4, Items 6(d)(2)(i) and (ii).
36. Form N-4, Item 6(d)(2)(vii).
37. Form N-4, Item 6(d)(2)(v)(B).
38. Form N-4, Item 7(e), Instr. 4.

application of a Contract Adjustment will be part of the SAI,[39] which is not part of the summary or statutory prospectus that must be delivered to an investor.

The item also requires another recitation of the maximum loss percentage that could result from a negative Contract Adjustment.[40] In addition, the item requires a warning "that a negative adjustment could reduce" contract values by more than the amount withdrawn.[41] This latter requirement likely reflects the fact that the contract value is adjusted to reflect changes in performance at the time of a Contract Adjustment, and that Contract Adjustments in some RILAs are calculated using a proportionate formula that gives greater weight to withdrawals taken at a time index performance has been negative. We believe, however, that changes in contract value due to changes in performance should not be characterized as a feature of the Contract Adjustment *per* se, and not all Contract Adjustments are determined using a proportionate formula. Hopefully, staff will engage with registrants on clarifying language to address these situations.

There are other disclosures required by this item, generally similar to the disclosures registrants provide in prospectuses for RILAs currently. These include, among other things, a description of:

(a) The factors that cause a positive or negative adjustment;[42]
(b) Any proportionate withdrawal formula;[43]
(c) How adjustments are applied to contract values, surrender values, and any living benefits;[44] and
(d) The transactions triggering an adjustment.[45]

There are other elements of Item 6(d) requiring disclosure related to RILAs that are new (other than the risk disclosures discussed above),[46] or that require disclosures that may not have been provided consistently in the past. One such item is the requirement to describe the factors issuers use in determining limits on index gains and losses,[47] such as market volatility and investment performance. In addition, there is now an explicit requirement for a description of how a current limit affects other terms of a RILA (such as a higher cap being provided with less downside protection)[48] and for an explanation of what investors should consider regarding limits before selecting a particular option in a RILA Contract.[49]

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39. Form N-4, Item 22(d).
40. Form N-4, Item 7(e), Instr. 1.
41. Form N-4, Item 7(e), Instr. 5.
42. Form N-4, Item 7(e), Instr. 4(ii).
43. Form N-4, Item 7(e), Instr. 4(iii).
44. Form N-4, Item 7(e), Instr. 5.
45. Form N-4, Item 7(e), Instr. 3
46. *See* supra note 32.
47. Form N-4, Item 6(d)(2)(i)(C) (as to limit on index losses) and Item 6(d)(2)(ii)(C) (as to limit on index gains).
48. *Id*.
49. *Id*.

The SEC noted in the Adopting Release that an explanation of these factors is being required to help investors understand how particular index option features will impact the option's risk/return profile and manage their expectations as to how the product operates.[50] It is unclear how detailed a description will be required in practice, however. A description of these factors will likely be somewhat boilerplate, as is currently the case with some prospectuses that do outline these factors. Hopefully, the staff will provide predictable and consistent guidance over the course of reviews of products registered on the new form as to what is acceptable disclosure.

Another notable element in new Item 6(d) is the requirement to provide for each index offered in a RILA contract a bar chart displaying historical performance over the last 10 years (or for the life of the index if shorter), after the application of a hypothetical 5% cap and -10% buffer.[51] The SEC stated in the Adopting Release that this chart is intended to demonstrate how the returns in a particular RILA investment option can differ from the returns in the index. In addition, to avoid investor confusion, the chart would have to be preceded by a legend that states, among other things, in bold that the displayed performance is not the performance of any RILA investment option.[52]

Since some RILA contracts may not offer a RILA investment option that uses a buffer, which limits the investor's exposure to losses up to a fixed percentage, Form N-4 will allow the use of a measure to limit losses that is "comparable" to a 10% buffer. Unfortunately, index returns adjusted for a floor vary differently from returns that are adjusted for a buffer. Hopefully, the staff will engage with registrants to provide more clarity on what level of a floor it would accept as being "comparable" to that level of a buffer.

2. Disclosure of Current Limits on Index Gains

In a welcome and important change from the proposed requirement that changes in current limits on index gains be filed via a prospectus supplement, the SEC explained in the Adopting Release that RILA issuers may in the alternative post new limits on a specific page on the issuer's website, as is currently being done, and incorporate by reference this information into the response to Item 6(d) in the prospectus.[53]

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50. *See* Adopting Release*, supra* note 1, at 106-107.
51. Form N-4, Item 6(d)(2)(iv)(B). If the index in the bar chart is a price return index, i.e., an index that does not include dividends on the assets tracked by the index, the chart will have to include a footnote disclosing this fact, as well as disclosing that this will reduce the return to investors from the index and cause the index to underperform a direct investment in the securities composing the index. Form N-4, Item 6(d)(2)(iv)(B), Instr. 4.
52. Form N-4, Item 6(d)(2)(iv)(B).
53. Form N-4, Item 6(d)(2)(ii)(B).

Under this approach, which it is expected many if not all RILA issuers will adopt, the webpage must be publicly accessible, free of charge, and the address cited in the prospectus must be specific enough to lead investors directly to the current limits.[54] These current limits must include any limit variations (e.g., variations for distribution channel, state requirements, and optional benefits). As has been allowed recently in another context,[55] registrants may find it convenient to use a "landing page" with direct links to applicable limit variations and in those cases should consider engaging with the staff to explore whether the staff would permit the use of a landing page here.

Other notable related requirements in Item 6(d), among other things, are that the prospectus must state that the current limit on index gains will not change during a crediting period, and the prospectus also must note the lowest limit on index gains that may be established under the contract, by each type of limit.[56]

3. Other Notable RILA-Related Disclosure Outside of Summary Prospectus Information

The emphasis on RILA risk disclosures required for summary prospectus information and the description of how RILAs operate required by Items 6(d) and 7(e) charges carries over to other prospectus elements as well, i.e., the "principal risks" section and the cover page. The principal risks section has been substantially revised to require risk disclosures related to investing in RILAs. One subsection of the principal risks section of Form N-4, titled "Index-Linked Option Risk," requires disclosure of the risks relating to:

(a) The limits on upside gain and the potential for losses beyond any downside protection;
(b) Particular crediting methodologies (although the Adopting Release is silent on what is intended, one example likely would be timing risks associated with a performance lock, if one is available);
(c) The impact of fees on amounts credited; and
(d) Reallocations at the end of a crediting period.[57]

In addition, this subsection requires disclosure of other RILA-related risks, such as the market risks inherent in the offered indexes, the limitations of indexes that don't include dividends, and the possible substitution of an index before the end of a crediting period.[58]

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54. Form N-4. Instruction to Item 6(d)(2)(ii)(B).
55. In addressing certain process issues with the recently enacted rules on shareholder reports, the staff agreed in a recently issued FAQ that a fund delivering electronic notice of the availability of the fund's shareholder report could include a link directing the investor to a website landing page that itself includes direct links that are limited to the shareholder report(s) for the fund(s) and share class(es) that the investor owns. *See Tailored Shareholder Reports Frequently Asked Questions* (Jan. 26, 2024), Response to Question 9, available at *https://www.sec.gov/investment/tailored-shareholder-reports-faqs*.
56. Form N-4, Item 6(d)(2)(ii)(B).
57. Form N-4, Item 5(c), Instr. (1).
58. Form N-4, Item 5(c), Instr. (2).

Further, reflecting the new risk disclosures required elsewhere (as noted above), the principal risks section will have to disclose the maximum loss percentage resulting from negative index performance after taking into account the current limits on index loss provided under the contract,[59] as well as state the maximum loss resulting from a negative Contract Adjustment.[60] In addition, this section must include the statement regarding what is the minimum limit on index losses for the life of the contract or the alternative statement that the issuer does not guarantee the contract will always offer RILA options that limit index losses.[61]

The cover page item also has been amended to require disclosure of some of the risks noted above associated with investments in RILAs. These include disclosing:

(a) The maximum amount as a percentage that an investor could lose from negative index performance after taking into account the minimum guaranteed limit on index loss provided under the contract;[62]
(b) That withdrawals could result in negative Contract Adjustments as well as the maximum potential percentage loss resulting from a negative Contract Adjustment;[63]
(c) The minimum limit on loss for the life of the contract or the alternative statement that the issuer does not guarantee the contract will always offer RILA options that limit index losses; and
(d) That the issuer limits the amount an investor can earn on a RILA[64] and the lowest limit on index gains that may be established under the contract, for each type of limit.[65]

Lastly, the prospectus cover page will have to disclose the types of options available (variable, fixed, non-variable) and provide cross-references to the Appendix.[66]

There is one other notable but minor disclosure change for RILAs outside of summary prospectus information. Specifically, RILA issuers must note in the prospectus section describing the operation of investment options (Item 6) whether they are relying on rule

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59. Form N-4, Item 5(a). As elsewhere, RILA issuers may provide here a range of maximum loss percentages if the contract offers different limits on index loss. *Id.*
60. Form N-4, Item 5(b).
61. Form N-4, Item 5(a).
62. Form N-4, Item 1(a)(6)(a). As is the case with this risk disclosure requirement made elsewhere in the prospectus, the RILA issuer may provide a range of the maximum amount of loss if the contract offers different limits on Index loss.
63. Form N-4, Item 1(a)(7).
64. Form N-4, Item 1(a)(6)(b)
65. Form N-4, Item 1(a)(6).
66. Form N-4, Item 1(a)(5).

12h-7[67] under the Securities Exchange Act of 1934 (Exchange Act) in not filing periodic reports under that Act.[68]

C. Non-RILA-Related Disclosures

Although the SEC did not propose that MVAs be included in the same registration framework as RILAs, the SEC has determined to do so and has laid out specific disclosure requirements for these products. This new framework, among other things, will facilitate registering an offering of contracts having MVA options in addition to variable and/or RILA options, since that now can be done on one form, and insurers can now use a summary prospectus for MVA contracts. In addition, an insurer will now also be able to use SAP financial statements in registration statements for MVA contracts and contracts with MVA options under the same circumstances and pay registration fees in arrears on the basis of net sales in the same fashion as other issuers using Form N-4.

Notwithstanding requests of commenters that MVA issuers be allowed, but not required, to register these products on Form N-4, the SEC determined to make the new registration framework mandatory for these products. While there are certainly benefits to the use of this framework, many MVAs are older products, no longer sold to new customers, and conversion could be difficult for these closed blocks of business.

Separate from MVAs, the SEC has also adopted disclosure changes that affect all contracts registered on Form N-4, whether or not those contracts have RILA or MVA options. These include changes to summary prospectus information items as well as other items, among which are new requirements relating to unregistered fixed investment options.

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67. Rule 12h-7 [17 CFR § 240.12h–7] permits issuers of registered non-variable products such as RILAs to avoid having to prepare and file periodic reports under the Exchange Act if, among other things, the only offerings triggering the periodic reporting requirement for these issuers are those products.

68. Form N-4, Instruction to Item 6(a). Among other things, as a condition to the exemption provided by the rule, registration statements for non-variable annuities by issuers relying on the rule must include a statement that the issuer is relying on the rule, *see* rule 12h-7(f), and the SEC noted that this new requirement in Form N-4 is intended to remind registrants to include that statement. Adopting Release, *supra* note 1, at 92-93.

1. New Disclosure Requirements for MVAs

Below is a summary of how Form N-4 is being amended in several respects to accommodate the registration of MVAs, whether stand-alone MVAs or MVA options in a combination contract that also offers variable options and/or RILAs. As a threshold matter, it should be noted that the interest-based adjustments to contract value made upon withdrawals before the end of a term are — as is the case with RILAs — also referred to as Contract Adjustments and consequently are subject to many of the same disclosure requirements as those relating to Contract Adjustments for RILAs. Since amounts held in an MVA are designed to deliver a specified fixed rate of return for amounts held to the end of a term, however, the disclosures related to losses in amounts invested in RILAs that are held through the end of a crediting period will not apply to MVAs.

a. MVA Disclosures in Summary Prospectus Information

In the Overview section of summary prospectus information, an MVA issuer will have to provide a brief overview of the MVAs being offered, as they would for RILAs or, for that matter, any other investment option offered under the annuity contract being registered. As with RILAs, the Overview also must note that an investor could lose a significant amount of money due to the Contract Adjustment.[69]

In the KIT, the required statement noted above that must be made in the response to the "Are There Any Charges for Early Withdrawals" question as to the consequences of Contract Adjustments for RILAs, including the maximum loss percentage possible, as well as to what are the transactions subject to Contract Adjustments must also be made with respect to MVAs.[70] In addition, in the response to the "Are There Any Ongoing Fees and Expenses" question, MVA issuers must make the statement noted above that negative Contract Adjustments substantially increase costs,[71] as well as disclose in the response to the "Is This a Short-Term Investment" question in the Risks subsection that amounts withdrawn from an MVA before the end of a term may result in a negative Contract Adjustment.[72] In addition, in the "Adjustments" subsection of the Fee Table, MVA issuers must also include a line item of the maximum loss percentage possible in an MVA due to a Contract Adjustment, as well as list in a footnote the transactions triggering a Contract Adjustment.[73]

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69. Form N-4, Item 2(d).
70. Form N-4, Item 3, Instr. 2(a).
71. Form N-4, Item 3, Instr. 2(c)(ii)(A).
72. Form N-4, Item 3, Instr. 3(b).
73. Form N-4, item 4, Instr. 12.

Two questions arise in calculating and stating this maximum percentage loss for MVAs. With respect to calculating a maximum percentage loss, the disclosure may simply be confusing to investors without issuers being allowed to make certain reasonable assumptions. Unlike RILAs, where zero is the known minimum value of an equity-based index, decreases in contract value from a Contract Adjustment made to an MVA depend on the size of increases in interest rates, for which there is no maximum.[74]

Second, as noted above, Form N-4 does not explicitly state that a range of maximum loss percentages resulting from a Contract Adjustment can be provided if there is more than one index option, as it does for possible losses from RILAs or MVAs outside the context of a Contract Adjustment. Where a contract offers both RILAs and MVAs, it's unclear whether only the highest maximum loss percentage of all investment options should be stated or whether — as seems reasonable — that a range of maximum loss percentage for all investment options, including MVAs, may be provided. Hopefully, SEC staff will engage with the industry to develop commonsense approaches to these interpretive questions.

In the Appendix, MVA issuers will have to list each MVA offered in an annuity contract in the table for fixed options and specify the name, the term, and the guaranteed minimum rate.[75] In addition, since the adjustments to contract value in an MVA are referred to in Form N-4 as a Contract Adjustment, the table in the Appendix that discloses the MVAs and any fixed options will have to state in a preceding legend that the insurer may apply a Contract Adjustment if amounts are withdrawn before the end of its term, and that this could result in a substantial reduction in contract value.[76] Further, the legend will also need to include cross-references to the prospectus sections providing details regarding fixed options (in response to Item 6(e)) and to the prospectus sections providing details regarding Contract Adjustments (in response to Item 7(e)).[77] Lastly, as an investment option, any restrictions in a contract benefit on the availability of an MVA must be included in the table on benefit availability restrictions already required by Form N-4.[78]

b. MVA Disclosures Outside of Summary Prospectus Information

Outside of items that would appear in a Summary Prospectus, other Form N-4 prospectus items that will require MVA-specific disclosures include (a) the cover page; (b) Item 6 requiring a discussion of the contract and the operation of the investment options; (c) Item 7 requiring a discussion of charges and the operation of the Contract Adjustment; and (d) Item 5 requiring a discussion of principal risks. The cover page of a prospectus for MVAs must state that withdrawals could result in negative Contract Adjustments and state the maximum potential loss percentage resulting from a negative Contract Adjustment.[79] In this regard, the open questions noted above regarding the

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74. For example, under one type of MVA calculation, an increase in applicable interest rates of from 5% to 25% at the time contract value is removed before the end of a term would result in a reduction in contract value applicable to amounts removed before the end of a term of approximately 16%.
75. Form N-4, Item 17(c).
76. *Id*.
77. Form N-4, Item 17(c), Instr. 1(a).
78. Form N-4, Item 17(d)(2).
79. Form N-4, Item 1(a)(7).

calculation and use of a range for different options subject to a Contract Adjustment apply here as well.

In the section discussing the operation of the investment options, beyond the specific disclosures now required for all fixed options (discussed below), the prospectus will have to state that investors in MVAs could lose a significant amount of money due to Contract Adjustments if amounts are removed before the end of the option's term, and will have to disclose the transactions that are subject to a Contract Adjustment.[80] Lastly, as is noted above for RILAs, MVA issuers relying on rule 12h-7 for an exemption from periodic reporting requirements must also note in this section their reliance on the rule for that exemption.[81]

2. New Disclosure Requirements for Fixed Investment Options

Another controversial new element in Form N-4 is the new disclosure requirements for unregistered fixed investment options. Notwithstanding the objection of several commentators that these options are not securities and so should not be subject to specific disclosure requirements, the SEC has adopted these disclosure requirements substantially as proposed.

As to summary prospectus information, the Appendix that discloses all variable investment options, in addition to providing disclosures for RILAs, will have to include disclosure of all fixed investment options, including MVAs.[82] This disclosure now must include the name, the term, and the minimum guaranteed rate of each fixed option, and must be preceded by a legend that discloses the issuer may change those options' features, may offer new fixed options, and may terminate existing ones.[83] In addition, as with RILAs and MVAs, any restrictions in a contract benefit on the availability of a fixed option must be included in the table on benefit availability restrictions already required by Form N-4.[84]

The revision to the Appendix to require a table for fixed options describing specified terms of those options raises a technical issue registrants should be aware of. That is, contracts registered on Form N-4 may include fixed indexed investment options, where there may be no minimum rate or, for that matter, a minimum on index gain. The instructions, however, do allow modifications and exclusions "as necessary to describe the material features of a Fixed Option."[85] Hopefully, staff will engage with registrants to clarify what modifications and exclusions should be made for these options.

As to the detailed prospectus disclosure Form N-4 now requires, these include, among others, requirements to describe (a) the manner in which interest is calculated and when credited, (b) the details as to how investors receive notice of a maturing option,

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80. Form N-4, Item 6(e)(1).
81. Form N-4, Item 6(a).
82. Form N-4, Item 17(c).
83. *Id.* The legend must also contain cross-reference to prospectus sections describing the features of the fixed options. Form N-4, item 17(c), Instr. 1(a).
84. Form N-4, Item 17(d).
85. Form N-4, Item 17(c), Instr. 1(c).

and how reallocation instructions for a new period may be provided, and (c) other material terms, such as transfer limitations.[86]

3. Other Summary Prospectus Information Changes

There are also several new, albeit somewhat minor, disclosure requirements in the Overview and the KIT applicable to all registrants using Form N-4, and there is a change in the Appendix specifically applicable to issuers of variable contracts. In the Overview section, the disclosure of optional contract benefits must be expanded to include a discussion of all contract benefits.[87] In the KIT, the reference in the "Fees, Expenses, and Adjustment" section to losses on an early withdrawal being greater if there is a negative Contract Adjustment also must disclose this potential for loss that is due to taxes or tax penalties, whether or not the contract has a RILA investment option.[88] The Risks section of the KIT must disclose in the "Is This a Short-Term Investment?" subsection that amounts withdrawn from the Contract may result in surrender charges, taxes, and tax penalties.[89]

There are also new disclosure requirements for the Restrictions subsection of the KIT. This section must now state any rights the issuer reserves to stop accepting purchase payments.[90] Further, the "Should I Exchange My Contract" line entry in the Conflicts of Interest" section must now explicitly disclose that fees and penalties in terminating existing contracts should be included as part of the fees of the contracts being compared when considering an exchange,[91] and the disclosure of limitations to the availability of optional benefits must be expanded to cover all benefits.[92] In addition, Form N-4 will now require that the sections of the KIT be phrased in a question-and-answer format and that the KIT be preceded by the Overview.

Lastly, in a change from the proposal, variable contract issuers will be allowed to group variable investment options listed in the Appendix by fund complex,[93] to improve the organization and readability of the listing of these options in the Appendix.[94]

4. Other Changes Outside of Summary Prospectus Information

The Principal Risks section has been amended to require more risk disclosure regarding contracts regardless of whether those contracts have any RILA or MVA options. These new requirements include disclosure of risks of accessing contract benefits, such as those resulting from excessive withdrawals,[95] and risks relating to rights reserved by the insurer (a) to remove or substitute underlying funds, (b) to impose

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86. Form N-4, Item 6(e)(2).
87. Form N-4, Item 2(c).
88. Form N-4, Item 3, Instr. 2(a).
89. Form N-4, Item 3, Instr. 3(b).
90. Form N-4, Item 3, Instr. 4(a).
91. Form N-4, Item 3, Instr. 6(b).
92. Form N-4, Item 3, Instr. 4(b).
93. Form N-4, Item 17(a), Instr. 1(f)
94. *See* Adopting Release, *supra* note 1, at 126.
95. Form N-4, Item 5(d).

investment restrictions, and (c) to limit additional purchase payments or transfers between options.[96] Many if not most prospectuses of contracts registered on Form N-4 already disclose these risks in the Principal Risks section, but the amended Form N-4 makes the requirements for these disclosures explicit.

In addition, all issuers registering annuities on Form N-4 must now include more risk disclosures on the cover page. Aside from the cover page disclosures noted above for combination contracts that relate to RILA and MVA options, these new required disclosures for all contracts registered on Form N-4 include statements that:

(a) The contract is a complex investment vehicle and involves risks, including potential loss of principal;[97]
(b) The contract is not a short-term investment and is not appropriate for an investor who needs ready access to cash;[98]
(c) Withdrawals could result in surrender charges, taxes, and tax penalties;[99] and
(d) The issuer's obligations under the contract are subject to its financial strength and claims-paying ability.[100]

Also, as noted above, the prospectus cover page will have to disclose the types of options available (i.e., variable, unregistered fixed, MVA**,** RILA),[101] and provide cross-references to the Appendix.[102]

Lastly, in the in-depth discussion in the prospectus of variable options (Item 6), variable contract issuers must disclose that "contract value allocated to a Variable Option will vary based on the investment experience of the corresponding Portfolio Company in which the Variable Option invests" and that "[t]here is a risk of loss of the entire amount invested."[103] Form N-4 already requires that the KIT disclose that investors "can lose money." In contrast to what is required of RILA options, however, the statement regarding the risk of losing the entire amount invested is not required in summary prospectus information for a variable option.

III. Registration Fees and Filing Rules

A. Registration Fees

As a consequence of this rulemaking, insurers will no longer have to submit a filing fee table exhibit and pay a registration fee for a specified amount of interests in RILAs or MVAs when filing a registration statement or when filing an amendment to register an offering of more of those interests. Instead, like variable annuity issuers, insurers registering these offerings on amended Form N-4 will be deemed to be registering an

96. Form N-4, Item 5(f).
97. Form N-4, Item 1(a)(6).
98. Form N-4, Item 1(a)(7).
99. *Id*.
100. Form N-4, Item 1(a)(8).
101. Form N-4, Item 1(a)(5).
102. *Id*.
103. Form N-4, Item 6(c)(1).

indeterminate amount of securities upon the effectiveness of the registration statement.[104] Among other things, the registration of an indeterminate amount of securities will eliminate the risk of inadvertent oversales (i.e., selling unregistered securities).

Like variable annuity issuers, RILA and MVA issuers will pay registration fees annually on amended Form 24F-2, based on their net sales of these securities during a fiscal year, no later than 90 days after the issuer's fiscal year-end.[105] In addition, these issuers will be allowed to treat amounts rolled over from a prior crediting period as a redemption and a new sale, resulting in zero net sales (and consequently no registration fees) for those rolled-over amounts.[106]

Further, to avoid double payment of registration fees, amended instructions to Form 24F-2 clarify that the item in a RILA or MVA issuer's initial Form 24F-2 filing listing aggregate sales should exclude sales in the initial reporting period covered by the Form 24F-2 filing of previously registered interests in the issuer's RILAs and/or MVAs.[107] Similarly, RILA and MVA issuers will be able to take credit for redemptions of interests in the fiscal year ending prior to the effectiveness date of the new rules that had not yet been claimed.[108]

In addition, the SEC has clarified that each issuer of RILA and/or MVA contracts will be able to file a single Form 24F-2 annually for all its ongoing RILA and MVA offerings, allowing the payment of net registration fees across all such offerings [109] Where an insurer has issued a "combination contract" offering interests in variable options as well as interests in RILAs and/or MVAs, separate Form 24F-2 filings will be required for the insurer and the separate account issuing interests in the variable options.[110]

The SEC noted that one consequence of this requirement is that transfers between variable and non-variable options in a combination annuity contract will not be netted out as a simultaneous redemption and sale.[111] In responding to a request to allow this netting, the Commission further noted that expanding net zero fee transactions to include these "would expand the ability of a registrant to determine net sales, and thus potentially reduce registration fees, to a greater extent than other registrants using Form 24F-2."[112]

To accommodate these changes, each issuer of interests in RILAs and/or MVAs will be assigned a central index key (CIK) in EDGAR for its RILA and MVA offerings that are different from the CIK number used for its non-RILA and MVA securities offerings, if

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104. Securities Act rule 456(e)(1) [17 CFR § 230.456(e)(1)].
105. Securities Act rules 456(e)(2) [17 CFR § 230.456(e)(2)] (requiring payment within 90 days) and 457(u) [17 CFR § 230.457(u)] (providing for fees based on net sales).
106. Form 24F-2, Instr. C.4.
107. Form 24F-2, Instr. C.5.
108. Form 24F-2, Item 5(iii).
109. Form 24F-2, Instr. A.6.
110. *See* Adopting Release, *supra* note 1, at 221.
111. *See id*.
112. *See id*.

any, and each such RILA and/or MVA offering will be assigned a contract identification number in EDGAR.[113]

B. Filing Rules

Under the new filing rules, insurers registering interests in RILAs and/or MVAs also will no longer be subject to the S-form rule requirement to submit a refresh initial filing for the offering of those interests every three years.[114] In addition, insurers can rely on rule 485 under the Securities Act to update registration statements for offerings of these interests on the same basis as is done with variable products. Among other things, this means RILA and MVA issuers are permitted to file certain amendments, such as those for routine annual updating to include updated financial statements and other non-material changes, that become effective immediately and automatically. Other amendments including material non-routine changes will become effective automatically, but only after a review period of 60–80 days.

Another filing rule to which RILA and MVA issuers will be subject is rule 497 under the Securities Act, under which all changes to a prospectus be filed with the SEC as a supplement to the prospectus, if not filed as an amendment to the registration statement. As proposed, this posed an issue for RILA issuers, inasmuch as current limits on index gains change frequently, which across the many numbers of contracts would have required the filing of many prospectus supplements to reflect these changes.

Fortunately, the SEC agreed with the suggestion of certain commenters to allow RILA issuers to choose an alternative to disclosing current limits on index gains by including a website address where those limits could be found and incorporating by reference the information on the website into the prospectus.[115] This accords with current practice, and the SEC noted in the Adopting Release that it anticipates the "vast majority" of RILA issuers will use this method to disclose those limits.[116]

This website citation will have to be specific enough to lead investors directly to the current limits on Index gains, rather than to the homepage or other section of the website on which the limits are posted.[117] In addition, those who choose to incorporate current upside limits into the prospectus for a RILA by reference to a website will have to report in the annual update all historical limits on gains offered for that RILA in the prior year a structured data format as part of new census data reporting requirements, [118] discussed below.[119]

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113. *See* Adopting Release, *supra* note 1, at n.591.
114. Securities Act rule 415(b) [17 CFR § 230.415(b)].
115. Form N-4, Item 6(d)(2)(ii)(B), Instr. 1. The Form notes that the website must include all variations in limits, such as those due to different distribution channel and date of Contract Purchase, among other things, and be limited only to the rates that are currently available. Form N-4, Item 6(d)(2)(ii)(B), Instr. 2.
116. Adopting Release, *supra* note 1, at 104.
117. Form N-4, Item 6(d)(2)(ii)(B), Instr. 2.
118. Form N-4, Item 31A.
119. *See infra* Section VI.A.

Lastly, some commenters requested that the SEC extend to RILA and MVA issuers permission to use "rate sheet" prospectus supplements, currently allowed for variable products,[120] to note changes in certain numerical rates and terms in insurance-related features. The Commission stated that this extension was outside the scope of the rulemaking but encouraged registrants to "engage with Commission staff" on the issue, [121] and subsequently SEC staff members have informally advised that these issuers will be able to use those supplements to note those changes to the same extent as can variable annuity issuers.

IV. Financial Statements

A. Use of SAP Financial Statements on the Same Basis as Variable Products

1. Use of SAP Financial Statements Generally

Several important changes apply to the financial statement requirements relating to RILA and MVA registration statements. First and foremost, insurers issuing interests in these products are now generally able to take advantage of the instructions in Form N-4 that conditionally allow depositors of separate accounts issuing variable annuities to file SAP financial statements instead of GAAP financial statements where the insurance company is not otherwise required to prepare GAAP financial statements,[122] which obviates the need to seek individualized permission from the SEC staff to do so.[123]

In discussing this change, the Adopting Release recognizes the argument made in individual requests for RILAs and MVA issuers to use SAP financial statements that these financials "provide material information for investors evaluating [these products]" and that permitting the use of these financial statements to the same extent as what is permitted to separate account depositors is consistent with maintaining investor protection.[124] Given the significant cost burdens of complying with GAAP, this is a very significant development that could provide substantial cost savings to insurers considering entering the RILA and/or MVA market and who would not otherwise be required to submit GAAP financial statements.

One of the conditions in the form instructions permitting the use of SAP financial statements is that the insurer would not have to prepare GAAP financial statements except for use in the registration statement or other registration statements filed on

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120. *See* ADI 2018-05 - Use of rate sheet supplements in connection with variable insurance products (June 12, 2018), available at *https://www.sec.gov/about/divisions-offices/division-investment-management/accounting-disclosure-information/adi-2018-05-use-rate-sheet-supplements-connection-variable-insurance-products*.

121. Adopting Release, *supra* note 1, at n.627.

122. Form N-4, Item 26(b), Instr. 1.

123. Most RILA issuers and some MVA issuers have obtained permission from SEC staff, acting under delegated authority, to use SAP financial statements in registration statements for these products instead of GAAP financials statements, pursuant to the authority provided in Regulation S-X § 3-13 [17 CFR § 210.3-13].

124. Adopting Release, *supra* note 1, at 211.

Forms N-3, N-4, or N-6. This condition means that a RILA and/or MVA issuer that also has other securities registered under the Securities Act, including general securities and/or non-variable products not registrable on Form N-4, such as indexed life insurance policies or contingent deferred annuities registered on S-forms, will not be able to file SAP financial statements in registration statements for the issuer's RILAs or MVAs, absent individualized permission for those other products from SEC staff under Regulation S-X rule 3-13.[125] In addition, a subsidiary RILA or MVA issuer that prepares GAAP financial information for use by an Exchange Act reporting parent in the form of partial GAAP financial statements or a GAAP reporting package would be unable to file SAP financial statements in RILA registration statements.[126]

2. Potential Issue for Current S-3 Filers in Using SAP Financial Statements

There may be another hurdle for certain RILA and MVA issuers who currently have registered their RILA and MVA products on Form S-3 and may wish to take advantage of the instructions in Form N-4 to use SAP financial statements in the registration statements for these products. S-3 issuers who elected to file on Form S-3, but were not seasoned issuers required to file on S-3, fall into this category. The issue is that some current elective S-3 issuers may not have an "anti-assignment" clause in their RILA or MVA contracts that is necessary for these issuers to be able to avoid having to prepare GAAP financial statements that are required in Exchange Act reports.

Unlike separate accounts issuing variable contracts, issuers of non-variable contracts such as RILAs and MVAs are obligated under the Exchange Act to submit periodic reports such as 10-Ks and 10-Qs.[127] Exchange Act reports must include GAAP financial statements.[128] While most RILA and MVA issuers are able to rely on an exemption from these reporting requirements set forth in Exchange Act rule 12h-7, insurers with RILA and/or MVA offerings currently registered on Form S-3 are separately subject to that Form's requirement to file those periodic reports[129] and so cannot take advantage of the exemption provided by rule 12h-7.

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125. One consideration for RILA or MVA issuers that also issue registered index life insurance policies is that SEC staff appears to have been generally unwilling to grant permission for issuers of registered index life policies to use SAP financial statements. In this new environment, however, we believe RILA and MVA issuers that also issue registered index life insurance policies should engage with the staff on obtaining permission under rule 3-13 for those products so that the issuers can use SAP financial statements for their RILAs and/or MVAs in accordance with Form N-4.

126. *See* Registration Form for Insurance Company Separate Accounts Registered as Unit Investment Trusts that Offer Variable Life Insurance Policies, Investment Company Act Release No. 23066 (Mar. 13, 1998) [63 FR 13988 (Mar. 23, 1998)] (discussing the same instruction in Form N-6), available at *https://www.govinfo.gov/content/pkg/FR-1998-03-23/pdf/98-7072.pdf*. In this release, the SEC noted that a subsidiary would not prepare a partial GAAP financial statement or GAAP reporting package where the subsidiary's accounts were immaterial to the parent's financial statements.

127. *See* Sections 13(a) and 15(d) of the Exchange Act [15 U.S. Code §§ 78m(a) and 78(o)(d)]. Investment companies, including separate accounts issuing variable products, provide reports pursuant to Section 30(d) of the Investment Company Act of 1940 (1940 Act) in lieu of their obligation to file periodic reports under the Exchange Act.

128. *See* Regulation S-X § 4.01(a)(1) [17 CFR § 210-4.01(a)(1)].

129. *Se* Form S-3, Gen. Instr. I.A.3(a).

One of the conditions in rule 12h-7 is that RILA and MVA issuers take steps reasonably designed to prevent the development of a trading market in these contracts, including having the right to refuse contract assignments or transfers on a non-discriminatory basis, except to the extent prohibited by state requirements.[130] Even though seasoned S-3 issuers are not able to take advantage of rule 12h-7 in the first place, some non-seasoned Form S-3 issuers may not have such an "anti-assignment" clause in their contracts and in that case, notwithstanding being able to register on Form N-4 as opposed to Form S-3, would not be able to qualify for the exemption in rule 12h-7 from Exchange Act reporting requirements and thus would have to file GAAP financial statements.[131]

Notwithstanding a request made during the comment process for the SEC to take an interpretive or non-enforcement position allowing reliance on rule 12h-7 for existing contracts currently registered on Form S-3 but without an anti-assignment clause, the Commission confirmed this requirement would stay in place, noting this was "an important condition" in the rule.[132] As a consequence, insurers with RILA and MVAs currently registered using Form S-3 who wish to take advantage of the Form instructions allowing the use of SAP financial statements should identify those contracts, if any, without such a clause and consider securing an endorsement including such a clause in those states where the inclusion is not prohibited. In addition, insurers considering offering RILAs and MVAs should keep in mind the need for an anti-assignment clause in preparing their contracts.

3. Rescission of Existing Letters Permitting the Use of SAP Financial Statements

Almost two dozen RILA and MVA issuers have already received letters providing permission to use SAP financial statements filed in connection with the registration of these products. The permissions in those letters relating to these products will be withdrawn as of the Compliance Date,[133] given the ability of these issuers to rely on the conditional authority in Form N-4 to use SAP financial statements. Some of these letters also provide permission to use SAP financials in connection with contingent deferred annuities, and the permission granted with respect to financial statements for those products will remain in place.[134]

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130. *See* Exchange Act rule 12h-7(e) [17 CFR § 240.12h-7(e)].
131. The requirement for RILA and MVA issuers to file Exchange Act periodic reports resulting from not qualifying for the exemption under rule 12h-7 means that these issuers would have to use GAAP financial statements in registration statements on Form N-4 for these products. *See* Form N-4, Item 26(b), Instr. 1 (noting that a condition to the use of SAP financial statements in connection with registration statements on that form is that the issuer not be subject to Exchange Act periodic reporting requirements under Sections 13(a) and 15(d) of that Act).
132. Adopting Release, *supra* note 1, at 930.
133. *See id.* at 246.
134. *See id.* at 247.

B. Filing Without Interim Financial Statements

Another important change to the financial statement filing regime for RILAs and MVAs should provide more flexibility for certain issuers to update registration statements for these products without having to update certain financial statements. Unlike N-4 filers, RILA issuers using Form S-1 have been required to include interim financials (which may be unaudited) in any new registration statement or post-effective amendment that goes effective more than 134 days after the date of the issuer's financial statements that were most recently filed.[135] For insurers whose offerings of interests in these products are registered on Form S-1 and who are not filing quarterly financial statements, this limited the periods when those issuers could amend existing — or register new — non-variable product offerings without having to update their financial statements.

Now, however, RILA and MVA issuers will be able to take advantage of the instructions in Form N-4 that allow these issuers to file and amend their registration statements without the need to update their most recently filed audited year-end financial statements with interim financials.[136] In addition, the period following the close of a RILA or MVA issuer's fiscal year after which the issuer's audited financial statements for that year must be filed with any new or amended registration statement is now generally 90 days, the same as for variable annuity separate account depositors,[137] as opposed to the 45-day period required by Form S-1.[138] Additionally, in a change from the proposal, separate accounts issuing variable annuities will now also have the same 90-day grace period to file their financial statements similar to the separate accounts' depositors.[139]

As is the case with registration statement filings for variable contracts, any filing of a new or amended registration statement that goes effective before the end of that period will have to include financial statements as of the third quarter of that year unless audited year-end financials can be provided at that time.[140]

C. Other Accounting Matters

One accounting-related change to the SAI adopted for RILA and MVA issuers is that this section will have to include certain information clarifying any changes in the accountants engaged to audit the financial statements being filed or any disagreements with accountants on certain matters relating to those financial statements.[141] In addition, registration statements for RILAs or MVAs must include as an exhibit any letters from a former accountant regarding its view of statements the insurer made in the registration statement as to the accountant's resignation or dismissal.[142] According to the Adopting

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135. Regulation S-X rule 3-12(a) and (g)(1)(ii) [17 CFR § 210.3-12(a) and (g)(1)(ii)].
136. Form N-4, Item 26(b), Instr. 3. This exception does not apply, among other things, to new issuers of RILAs or MVAs. Form N-4, Item 26(b), Instr. 3(a).
137. *Id.* This exception does not apply, among other things, to new issuers of RILAs or MVAs. Form N-4, Item 26(b), Instr. 3(a)
138. *See* Reg S-X rule 3-01(c) [17 CFR § 210.3-01(c)].
139. Form N-4, Item 26(a), Instr. (v).
140. Form N-4, Item 26(b), Instr. 3.
141. Form N-4, Item 26(c).
142. Form N-4, Item 27(q).

Release, these requirements, which are currently imposed on Form S-1 and S-3 issuers, are being carried over onto the amended form in an effort to avoid "opinion shopping."[143]

In a welcome change from the proposal, the SEC also confirmed that a RILA or MVA issuer can file a single set of required financial statements using the N-VPFS EDGAR submission type for incorporation by reference into the registration statements for all of the issuer's RILAs and MVAs.[144] This should reduce auditing and other preparation costs related to multiple RILA and MVA filings.

V. Sales Materials

Sales materials relating to investment company securities are subject to, among other things, fair and balanced disclosure requirements in rule 156 under the Securities Act and standardized performance disclosure requirements in rule 482 under the Securities Act. Rule 482 also allows the distribution of sales materials without requiring a prior or concurrent delivery of a statutory or summary prospectus.[145] This permits broad-based advertising for investment company securities, including interests in variable contracts. As proposed and adopted, RILA and MVA sales materials will now be subject to the fair and balanced disclosure requirements of rule 156. In addition, in an important change from the proposal that should be of immediate concern to current RILA and MVA issuers, rule 156 becomes applicable to RILA and MVA sales materials on the effective date for the rulemaking, i.e., September 23, 2024,[146] whether or not those issuers have chosen to convert registration statements to Form N-4 for these contracts.[147] Current RILA and MVA issuers should review RILA and MVA sales materials at their earliest opportunity with the requirements of rule 156 in mind.

Notwithstanding the decision to apply rule 156 to RILA and MVA sales materials, the SEC has followed its proposal to not extend any of the provisions of rule 482 to those materials. The Commission acknowledged that commenters on the proposed rules urged the Commission to amend rule 482 so that RILA sales materials would be on equal footing with sales materials for variable products in terms of the prospectus delivery component.[148] With one notable exception discussed below, the Commission declined to allow the use of RILA and MVA sales materials without prior or concurrent prospectus delivery. To justify its decision, the Commission noted:

(a) Funds and variable products are substantively regulated under the 1940 Act; insurance companies offering non-variable annuities, like other non-fund

143. Adopting Release, *supra* note 1, at 213-214.
144. *See id.* at 174.
145. References in this white paper to the prospectus delivery requirement are to the delivery of a statutory or summary prospectus.
146. *See* Adopting Release, *supra* note 1, at 256-257.
147. *See* Securities Act rule 156(a) [17 CFR § 230.156(a)] (stating that this rule applies "in connection with the offer or sale of registered non-variable annuity securities").
148. See Adopting Release, *supra* note 1 at 241 (citing CAI Comment Letter; ACLI Comment Letter; IRI Comment Letter; Gainbridge Comment Letter; VIP Working Group Comment Letter).

issuers, are not subject to substantive requirements and regulations under the 1940 Act;

(b) Rule 482 includes standards for using performance data in advertisements, and FINRA reviews fund performance advertisements according to specific rules and standards. FINRA does not currently have rules that expressly require similar standards for non-variable annuities; and

(c) Congress expressly directed the SEC to adopt rules that permit registered investment companies to use prospectuses that include "information the substance of which is not included in the statutory prospectus" but has not provided similar direction with regard to non-variable annuities.

We believe the SEC's rationales for its decision not to extend rule 482 are flawed. While a detailed examination of these rationales is outside the scope of this white paper,[149] we contend that the fair and balanced disclosure requirements as well as the FINRA review regime in place for these products provide the guardrails on what marketing materials can disclose that would well protect against the potential for investor confusion. In addition, the decision to exclude RILA issuers from using broad-based advertising not only imposes an unfair playing field on these products relative to variable annuities but also ignores the fact that many index-linked notes, which include features similar to RILAs, are able to distribute sales literature without a prospectus delivery requirement.

The one exception to the prospectus delivery requirement for RILA and MVA sales materials is for seasoned RILA and MVA issuers otherwise eligible to file on Form S-3 (which includes being Exchange Act periodic reporting issuers). Seasoned RILA and MVA issuers, like other issuers on Form S-3, currently are allowed under Securities Act rules to disseminate sales materials without this prospectus delivery requirement. By amending rule 433 under the Securities Act, the SEC determined to continue the "status quo" for these issuers.[150] While maintaining the status quo for seasoned issuers is commendable, we believe the continued distinction for this purpose between those RILA and MVA issuers who are eligible to file on Form S-3 and those who are not is regrettable and makes little sense.

Fortunately, the SEC noted that amending rule 482 "would benefit from further consideration," and invited "further engagement on these issues."[151] The Commission's invitation for further engagement is a positive sign that signals the Commission's willingness to consider amendments to rule 482 for all RILA issuers, and we expect that industry participants will propose different approaches to addressing the Commission's investor protection concerns.

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149. For an in-depth discussion of advertising issues faced by RILA issuers and distributors, *see* T. Conner, H. Eisenstein, A. Furman, and W. Kotapish, *Rules for RILA and MVA Marketing Communications—Still Being Held Back, But There Remains a Crack in the Door*, 31 The Inv. Lawyer 9, 2024 WLNR 15977012 (Sept. 1, 2024).

150. *See* Securities Act rule 433(b)(1) [17 CFR 433(b)(1)].

151. Adopting Release, *supra* note 1, at 244.

VI. Other Disclosure and Filing Requirements

A. Exhibits, Undertakings, and Census Information

The transition to Form N-4 will also include new and changed disclosures RILA and MVA issuers make with respect to exhibits, undertakings, and other information required in Part C of the registration statement. As to exhibits, generally, RILA and MVA issuers will have to file exhibits that are substantially similar to those that have been required of these issuers (e.g., charter documents, contract forms, consents, legality opinion, powers of attorney), but there are a few differences. The filing fee exhibit will no longer

be required, given that RILA and MVA issuers will now be reporting fees on Form 24F-2. RILA issuers using a summary prospectus will have to include in the exhibits a form of the initial summary prospectus, as do variable products issuers that also use a summary prospectus.[152]

Certain undertakings currently required of RILA and MVA issuers will be no longer required as a consequence of registering on Form N-4. These include, among others, undertakings related to filing procedures for continuous offerings by registrants other than investment companies and related to removing from registration securities that remain unsold at the termination of an offering. RILA and MVA issuers will, however, continue to provide certain other undertakings required under the S-form registration framework. One is to submit for adjudication, under certain circumstances, any arrangement to indemnify the issuer's directors and officers of the issuer, among others, for liability under the Securities Act.[153] The others are to file a post-effective amendment to keep prospectuses current as required by the Securities Act and to consider any such amendment to be the initial offering for liability purposes.[154]

One other notable new item in Part C of Form N-4 will now require census information for each contract offering RILAs or MVAs, comparable to what variable annuities must provide on Form N-CEN.[155] This includes data such as the number of outstanding contracts, the number of contracts sold in the prior year, and the total value in that contract attributable to RILA and, separately, for MVA options. In addition, as noted above, issuers additionally will be required to disclose historical limits on index gains in effect for each index-linked option during the 12 months ending on December 31 of the prior year for the year in census information to be provided in Part C.[156]

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152. Form N-4, Item 27(o).
153. Securities Act rule 484 [17 CFR § 230.484].
154. Form N-4, Item 34(b). Form N-4 has been amended to include these undertakings only for RILA and MVA issuers, because these obligations are already imposed on investment companies by the 1940 Act.
155. Form N-4, Item 31A(a). The SEC rejected concerns expressed during the comment period that disclosing this information would reveal competitive information, stating, among other things, that the same information is already being disclosed on Form N-CEN with respect to variable products. *See* Adopting Release, *supra* note 1, at 159.
156. Form N-4, Item 31A(b). Instead of providing this historical information directly in Part C of the registration statement, the SEC stated registrants would be allowed to include the information instead as an exhibit to the registration statement. *See* Adopting Release, *supra* note 1, at 160 *and* Form N-4, Item 27(r).

B. XBRL

In place of the company-related information RILA and MVA issuers have been required to tag in Inline eXtensible Business Reporting Language (XBRL), under the new registration framework RILA and MVA issuers will have to tag those disclosures that Form N-4 currently requires to be tagged. These include: (a) the KIT; (b) the Fee Table; (c) the Principal Risks section; (d) the section describing contract benefits; and (e) the Appendix.[157] In addition, RILA and MVA issuers will be required to tag certain new information disclosed in their prospectuses and SAIs. This includes:

(a) That part of the Overview dealing with RILAs and MVAs, as well as the more in-depth descriptions of RILAs, MVAs, and Contract Adjustments in new Items 6(d), 6(e), and 7(e);[158]
(b) Census-type information regarding contracts with index-linked options (discussed below);[159]
(c) Information disclosed about changes in and disagreements with accountants;[160]
(d) The in-depth description in the prospectus of any fixed options;[161] and
(e) The disclosure indicating that the insurance company is relying on the exemption from Exchange Act reporting requirements provided by rule 12h-7, if applicable.[162]

Variable contract issuers also have new tagging requirements, apart from tagging obligations described above that apply to contracts with RILA and/or MVA options. Specifically, if a variable contract also has fixed options, the issuer will have to tag the in-depth disclosure in the prospectus of the fixed options.

These new XBRL requirements, as well as the current requirements, will only apply to contracts being sold to new investors; prospectus disclosure for contracts no longer being sold to new investors will not need to be tagged.[163]

The timing of Interactive Data File (IDF) submissions containing the tagged disclosure will be the same as for variable contracts. In general, for initial registration statements and post-effective amendments containing information that must be tagged and for initial registration statements, these files must be submitted on or before the date that the initial registration statement or post-effective amendment containing that information becomes effective.[164] IDFs for prospectus supplements will have to be filed concurrently with the filing of the supplement, however.[165]

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157. Regulation S-T §405(b)(2)(iii) [17 CFR § 232.405(b)(2)(iii)] (citing Form N-4 Items 3, 4, 5, 10 and 17).
158. *Id.* (citing Form N-4 Items 2(b)(2), 2(d), 6(d), 6(e), and 7(e)).
159. *Id.* (citing Form N-4 Item 31A).
160. *Id.* (citing Form N-4 Item 26(c)).
161. *Id.* (citing Form N-4 Item 6(e)).
162. *Id.* (citing Form N-4 Instr. to Item 6(a)).
163. Form N-4, Gen. Instr. C.3(h)(i).
164. Form N-4, Gen. Instr. C.3(h)(i)(A).
165. Form N-4, Gen. Instr. C.3(h)(ii).

C. Great West Status of Variable Annuities Offered Together With MVAs

MVAs are often an investment option offered together with variable investment options in contracts combining the MVAs with variable annuities. Some of these variable annuities are closed to new investors and do not update their registration statements in reliance on the SEC's no-enforcement portion announced in a recent release adopting, among other things, certain amendments to disclosure requirements for variable annuities.[166]

In the release adopting the summary prospectus rule for variable products, i.e., Securities Act rule 498A,[167] the SEC noted that issuers of these discontinued contracts would not be able to rely on this position where there are material changes made to the variable annuity.[168] SEC staff members have informally advised, however, that an N-4 compliant amendment to a registration statement for an MVA offered as an investment option together with a discontinued variable annuity will not inhibit the ability of the insurer to continue to rely on that Commission position for the variable annuity.[169]

D. EDGAR Filing Process Issues in Registering RILAs and MVAs on Form N-4

In the Adopting Release, the SEC explained that each RILA/MVA issuer must obtain an EDGAR investment company type designation and EDGAR contract ID numbers (collectively, "EDGAR Identifications") for the contracts being registered on Form N-4.[170] In addition, the SEC stated that not all RILA/MVA issuers can use the same CIK for their RILA/MVA offerings as they currently do. Specifically, RILA/MVA issuers must use a CIK for these offerings that is separate from any CIK they may have for any other offerings not registered on Form N-4, such as contingent deferred annuity contracts or general securities offerings.[171]

Because of these requirements, depending on a particular insurance company's specific factual situation, there appear to be two alternative approaches for RILA/MVA issuers to take in getting EDGAR Identifications and, where necessary, new Securities Act file numbers. As to those RILA/MVA issuers that may use the same CIK to register these

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166. *Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts*, Securities Act Release No. 10765, Securities Exchange Act Release No. 88358, Investment Company Act Release No. 33814 (Mar. 11, 2020), available at *https://www.sec.gov/files/rules/final/2020/33-10765.pdf*.

167. 17 CFR § 230.498A.

168. *See id.,* at 309.

169. In this regard, MVAs offered as investment options with discontinued variable annuities would almost certainly be registered using a prospectus that only describes the MVA options, since the prospectus for a discontinued variable annuity relying on the SEC position would not have to be updated. As a consequence, it is likely the disclosures in the Form N-4 compliant filing for the MVA would focus only on MVA-related disclosures, although SEC staff members have informally advised their hope is that registrants in these circumstances will engage with SEC staff before filing.

170. Adopting Release, *supra* note 1, at n.697.

171. *Id.* at n.591 (stating "one CIK will be utilized to register the offerings of non-variable annuities on Form N-4").

offerings on Form N-4 as they are currently using for these offerings (because they do not have other offerings not registered on Form N-4), the SEC noted these issuers can use the same Securities Act file number and obtain the EDGAR Identifications on the post-effective amendments that are used to register these offerings on Form N-4.[172] Although this was not explicitly described in the Adopting Release, SEC staff members have informally advised that, similarly, new issuers of RILA and/or MVAs would use the initial registration statement to obtain EDGAR Identifications, in addition to obtaining new Securities Act file numbers.

As to RILA/MVA issuers who have other offerings not registered on Form N-4 and as a consequence obtain a separate CIK for their RILA/MVA offerings, however, the SEC described a somewhat different, two-step procedure to be followed.[173] Specifically, the SEC noted that issuers using a new CIK for their RILA/MVA offerings must first file an EDGAR-only administrative submission to obtain new Securities Act file numbers for those offerings.[174] Importantly, SEC staff members have informally confirmed that the need to obtain new Securities Act file numbers applies to RILA/MVA offerings registered under an existing Securities Act number by an issuer who has obtained a new CIK as well as for new RILA/MVA offerings.

In a second step, according to the Adopting Release, once an issuer of existing RILAs and/or MVAs using a new CIK has obtained a Securities Act file number (and EDGAR Identifications) via this administrative submission, the issuer would then file the Form N-4 compliant post-effective amendment on 485APOS or 485BPOS under that new file number.[175]

VII. Status of Other Non-Variable Products

The SEC regrettably declined to amend Form N-6 to allow the registration of indexed life insurance policies, notwithstanding that the logic to allow RILAs to register on Form N-4 applies with full force to the registration of indexed life insurance policies on Form N-6. In addition, contingent deferred annuities will also continue to be registered on Forms S-1 or S-3. These omissions may be somewhat understandable, given the 18-month deadline the RILA Act imposed to finalize a new registration framework, but the omission is nonetheless a missed opportunity and may not be addressed in the foreseeable future.

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172. *Id.* at n.697. The SEC noted in the adopting release that the submission types used to file these post-effective amendments, i.e., 485APOS and 485BPOS, would allow the issuers to keep their current Securities Act file numbers for their existing RILA/MVA offerings. *Id.*
173. As noted above, this two-step process applies only to existing RILA/MVA offerings, since new issuers of RILAs and/or MVAs can use the initial registration statement to obtain a new Securities Act file number and EDGAR Identifications.
174. Adopting Release, *supra* note 1, at n.697. This administrative submission would also be used to obtain the investment company type designation and EDGAR contract IDs. *Id.*
175. *Id.*

VIII. Important Dates

There have been several changes to the transition dates proposed that registrants should keep in mind. September 23, 2024, is the date on which RILA and MVA issuers are permitted to register these products on amended Form N-4 and rely on the amended summary prospectus rule (i.e., rule 498A). In a change from the proposal, however, with one exception relating to XBRL noted below, all other form and rule amendments, e.g., the registration fee-related rule, form amendments, and the amendments to the filing rules, will be effective as of September 23, 2024, as well.[176]

This is good news and provides certainty regarding the applicability of the filing and registration fee payment rules for those issuers who wish to register RILAs and MVAs on Form N-4 sooner than later. On the other hand, as noted above, the fair and balanced requirements of rule 156 will be applicable to RILA and MVA sales materials by the effective date for the rulemaking, i.e., September 23, 2024,[177] whether or not those issuers have chosen to convert registration statements to Form N-4 for these contracts.[178]

The compliance date also has been changed and, instead of being one year after the effective date as had been proposed, is now May 1, 2026. More importantly, the May 1, 2026, compliance date is now structured as (a) the latest effectiveness date by which all post-effective amendments to registration statements for those RILAs and/or MVAs must comply with the requirements of Form N-4, and (b) the date after which all initial registration statements for RILAs and/or MVAs must comply with Form N-4.[179] This date applies also to the date by which registrants must submit interactive data files in XBRL tagging items in these filings as required by the amended XBRL rule.[180]

Lastly, in a welcome change from the proposal, issuers of variable contracts that are not "combination" contracts (i.e., have no RILA or MVA options), and so have fewer changes in disclosure requirements to contend with, will be allowed to file a complying post-effective amendment under the automatic effectiveness provisions of rule 485(b).[181]

Conclusion

While the benefits of the new registration framework for RILAs and MVAs are significant and most welcome, there are also significant costs that have to be taken into account. Separate from the costs associated with compliance with Form N-4 disclosure requirements, these include, among others, developing an infrastructure to take advantage of the various related registration fee and filing rules, expanding data tagging

176. As a consequence of this change, there is no longer a need for the delayed effectiveness date that had been proposed.
177. *See* Adopting Release, *supra* note 1, at 256-257.
178 *See* Securities Act rule 156(a) [17 CFR § 230.156(a)] (stating that this rule applies "in connection with the offer or sale of registered non-variable annuity securities").
179. *See* Adopting Release, *supra* note 1, at 252-253.
180. *See id.* at 254-255.
181. *See id.* at 253-254.

capabilities to comply with applicable XBRL requirements, and revising sales materials as necessary to comply with the fair and balanced presentation requirements of rule 156.

There are also potential uncertainties that certain issuers will have to take into consideration. As one example, as noted above, RILA and or MVA issuers that also have registered indexed life insurance policies may not be able to take advantage of Form N-4 instructions that conditionally allow RILA and MVA issuers to use SAP financial statements in registration statements for these offerings. In addition, as noted above, there are a number of ambiguities in the disclosure requirements for RILA and MVA issuers registering on Form N-4 that will have to be clarified with staff over the course of staff reviews.

Nonetheless, the rulemaking represents a tremendous opportunity for current and prospective RILA and MVA issuers to register on a form specifically tailored for these products, to pay registration fees in arrears, to satisfy prospectus delivery requirements with a summary prospectus, and to file SAP financial statements without seeking SEC staff approval. To take full advantage, the hard work of coming into compliance with the new framework should start sooner than later, especially considering the longer lead time for staff review that will likely be needed, given the volume of disclosure reviews the staff can be expected to face in the upcoming cycle of annual updates.

In the meantime, the SEC and its staff are to be commended for bringing to fruition a comprehensive and well-considered change in the registration framework for RILAs and MVAs, and for having done so within an extraordinarily short period of time.

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