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Life Insurance Industry's 'SEC Wish List' for Trump's Tilt with the 'Nanny State' of Excessive Regulation

By Gary O. Cohen

President Donald J. Trump's administration has ordered review and reform of federal agency regulations. In that process, the president has ordered agencies to listen to industry voices, including trade associations.

The chairman of the US Securities and Exchange Commission (SEC) has signed on to a review of its rules, including listening to those affected.

These pronouncements have emboldened the life insurance industry (industry) to think about rule reform that it could take up with the SEC. This article compiles a "Wish List" of matters for possible SEC consideration.

Trump Administration Reform of Agency Regulations

Republican Party Platform

The Republican Party Platform (Platform) describes America as a "Nanny State," where a "vast array of agencies" act as "a super-legislature, disregarding the separation of powers to declare as law what they couldn't push through Congress."[1]

The Platform says that "regulations are just another tax on consumers."[2] The Republicans pledge to "review all current regulations for possible reform or repeal" and remove one existing regulation for every new one enacted.[3]

President Trump's Executive Orders

President Trump has implemented the Platform by signing three Executive Orders.

The first Order[4] instructs agencies, when they propose a new regulation, to identify *two* existing regulations to repeal. So, President Trump went further than the Platform, which called for only *one* existing regulation to be repealed.

The second Order lays out the administration's core principles, including "make regulation efficient, effective, and appropriately tailored."[5] This order is particularly relevant to the industry, because of its need to have SEC regulations and forms tailored for insurance products and entities.

The third Executive Order[6] directs each executive agency to establish a task force to evaluate existing regulations and recommend repeal, replacement, or modification.

President Trump orders each agency to seek input from those affected by federal regulation, including "trade associations."[7]

SEC Chairman's View

SEC Chairman Jay Clayton, in his first public speech, acknowledged President Trump's Executive Orders and core principles, announced his own principles, and said that his principles "are consistent with, and complimentary to," the president's.[8]

Chairman Clayton also said that the SEC "should review its rules," to see if they're "functioning as intended" and, in doing this review, "listen to others."[9]

Reasons for Life Insurance Industry "SEC Wish List"

First, SEC regulation reform could benefit insurance product owners. This would be true, for example, if the SEC authorized a summary prospectus for variable annuity contracts (variable annuities).

Second, SEC regulation reform could reduce time, effort, and resources spent by life insurance companies. This would be true, for example, if the SEC tailored its registration forms to fit non-variable insurance products[10] that are required to be registered as securities.

Third, SEC regulation reform could help provide certainty and enhance consistency of SEC regulation. The SEC Staff officials[11] heading up regulation of insurance products and entities have tried to provide consistency for many years. However, some things at the SEC are beyond the control of those Staff officials.

Norm Champ, a former director of the SEC's Division of Investment Management (IM Division) has published a book[12] about his five-year experience on the Staff. He describes a number of SEC shortcomings that contribute to regulatory uncertainty.

Champ says that the SEC: "lacked formal procedures for anything";[13] had "no documented, agreed-upon system"[14] for how Staff members "would go about their jobs";[15] lacked "consistency in policy and procedures";[16] and relied "on managers in every office to act as village elders passing down the knowledge to new members of the tribe."[17]

Champ says that in "conducting exams,"[18] "almost no one was doing anything in a consistent or agreed-upon manner,"[19] there was no "published guidance on how the SEC went about its investment management exams,"[20] and "the SEC didn't have the tech infrastructure to do searches of internal exam reports to glean trends across regions."[21] "Examiners," says Champ, "were like air traffic controllers who couldn't track jets outside of local airspace."[22]

Fourth, SEC regulation reform, by providing more legal certainty, could discourage private litigation.

The plaintiffs' bar, which has brought years of litigation against mutual fund advisers under Section 36(b) of the Investment Company Act of 1940 (1940 Act), may someday turn to life insurance companies, raising novel questions about legal positions that the SEC and its Staff have taken regarding insurance products and entities.

Finally, SEC regulation reform could level the competitive playing field with mutual funds that have been authorized to use a summary prospectus for many years.

So, for the foregoing reasons, this article takes a stab at compiling an "SEC Wish List" for the insurance industry.

Clarify Fundamental Concepts

In 1990, the SEC, under Chairman Richard Breeden, published a release stating that variable insurance products and separate accounts do not "fit comfortably"[23] under SEC regulation. The SEC acknowledged that there was no legal certainty as to what is the security, who is the issuer, and when is the sale.[24]

The SEC surprised the industry by asking whether variable insurance products and separate accounts should continue to be regulated under the federal securities laws[25] or whether "a separate statute for variable insurance products would result in a more efficient regulatory framework."[26]

In an ideal world, it would make sense to address these fundamental concepts and start

over with a regulatory clean slate. However, the SEC and Congress do not appear to have the inclination to create a dedicated statute at this time.

Wish No. 1: Authorize Variable Annuity Summary Prospectus

Probably the most fervent wish of the industry is for a summary prospectus for variable annuities (VA summary prospectus).[27]

There is wide agreement that the length and complexity of the currently required statutory prospectus is too daunting to be of much practical value to variable annuity offerees and owners. Virtually all involved agree[28] that a summary prospectus, based on the principles of the mutual fund summary prospectus, would provide more meaningful disclosure to offerees and contract owners.

The SEC proposed[29] the mutual fund summary prospectus in November 2007. At the time, the SEC Staff informally advised that it would recommend a VA summary prospectus to the Commission after the Commission had authorized the mutual fund summary prospectus.

However, since the Commission proposed the mutual fund summary prospectus, more than a decade has passed. During that period, there have been three US presidents, 14 SEC commissioners including five chairmen, and five IM Division Directors. An SEC commissioner and Staff officials, from time to time, have announced[30] that the Staff was working on the VA summary prospectus. However, the Commission has been required to give priority to adopting rules that Congress has mandated.[31]

The SEC has announced[32] that it intends to consider the VA summary prospectus[33] in April 2018. However, the SEC has, for several years, announced semi-annually dates for consideration, only to postpone these dates for another six months. The SEC has characterized the matter as "nonsignificant" with a "legal deadline" of "none."[34]

Wish No. 2: Adopt Tailored Registration Statement Forms

The industry has found it necessary to file certain non-variable insurance products as securities with the SEC. These include such products as guaranteed interest contracts that fall outside Rule 151 under the Securities Act of 1933 (1933 Act) and Section 3(a)(8) of the 1933 Act, and index annuities and life insurance that fall outside the Harkin Amendment of The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)[35] and Section 3(a)(8) of the 1933 Act.

Life insurance companies are required to file these products on the SEC's S forms that are not designed for such products and require GAAP financial statements. Consequently, it would save companies time, effort and resources if the SEC adopted registration statement forms that are tailored for insurance products and permit statutory financial statements.

President Trump, as noted above, has ordered agencies to follow "core principles," including "make regulation efficient, effective and appropriately *tailored*."[36] It follows that the SEC would seem to be inclined to tailor its registration statement forms for insurance products.

Wish No. 3: Clarify Harkin Amendment Exemptive Conditions

The Harkin Amendment of the Dodd-Frank Act requires the SEC to treat index products as exempt securities under Section 3(a)(8) of the 1933 Act, so long as they meet certain conditions.

One condition is that the product satisfy state "non-forfeiture laws" or "similar requirements."[37] The SEC has no way to police this condition, having no expertise in state insurance law and not having had an actuary on its Staff since the 1970s.

Another condition for exemptive treatment is that a life insurance company issuing index life insurance adopt suitability rules that comply with the NAIC Model Regulation for annuities.[38] This

condition creates a disconnect by subjecting *life* insurance to the regulation of *annuities*.

If the Republicans succeed in having Congress amend the Dodd-Frank Act to roll back some of its requirements, there may be a chance for the industry to clarify these conditions.

As a related matter involving index products, the Commission, during the adoption of Rule 151A under the 1933 Act, pronounced that Section 3(a)(8) of the 1933 Act is "not relevant,"[39] for index products. The Commission explained that index products are linked to *securities* market indexes and appeal to buyers on the basis of investment growth, which means that index products cannot be marketed except as securities.

Many observers believe that there are strong arguments that Section 3(a)(8) remains available for index products and the industry may wish to try to persuade the Commission or its Staff to state agreement.

Wish No. 4: Adopt Substitution Exemptive Rule

Life insurance company substitutions of underlying mutual funds continue to be problematic. The great variety of facts and circumstances have made it difficult for the SEC Staff to develop consistent and uniform standards for approval of substitutions pursuant to Section 26(c) of the 1940 Act. This problem has been made worse by the fact that responsibility for handling applications for approval of substitutions has been moved around in the Division.

The SEC Staff has come to believe that some aspects of substitutions should be approved by insurance product owner vote. However, the 1940 Act, as originally adopted, did not provide for Commission approval of substitutions. It was the Commission that asked Congress for this authority, telling Congress that "security holders in a unit investment trust are seldom in a position to judge the merits of the substituted security."[40] Some observers believe requiring a contract owner vote on substitutions is inconsistent with the statements that the SEC made to Congress.

So, the industry could work with the SEC Staff to try to draft a rule that would provide a safe harbor exemption for at least "plain vanilla" substitutions.

Wish No. 5: Reform Rule 12b-1 for Underlying Fund Plans

Every so often, SEC inspectors question an underlying fund Rule 12b-1 plan on the ground, for example, that the plan fees may duplicate product contract fees. This makes life companies vulnerable to SEC inquiry about the adequacy of the information required to be provided to an underlying mutual fund board under Rule 12b-1 under the 1940 Act and private lawsuits under Section 36(b) of the 1940 Act.[41]

This issue dates back to at least 1980, when the SEC banned[42] Rule 12b-1 plans for underlying mutual funds, and 1996, when the Staff stated,[43] after a 16-year ban, that underlying funds could have Rule 12b-1 plans.

The fact that SEC inspectors continue to question underlying mutual fund Rule 12b-1 plans could be attributable to what Norm Champ said about the SEC's exam program: "almost no one was doing anything in a consistent or agreed-upon manner."[44]

This Rule 12b-1 issue can be remedied by the SEC's adopting rules, created by Andrew J. "Buddy" Donohue, when he was director of the IM Division, that the SEC proposed[45] back in 2010. The rules, among other things, would no longer require the board of directors of a mutual fund to make any finding.

Wish No. 6: Adopt 'Mixed and Shared Funding' Exemptive Rule

Mixed and shared funding[46] has been a problem because of the perceived need for SEC exemptive orders. But the SEC Staff has now issued formal guidance[47] declaring that these exemptive orders are not required if life insurance companies comply with applicable sections of the 1940 Act.

Still, the industry would be better protected with a Commission rule, rather than a no-action position of the SEC Staff.

Wish No. 7: Adopt Holistic VA Exemptive Rule

Rule 6e-3(T) under the 1940 Act is a holistic exemptive rule for variable life insurance that reflects certain SEC interpretive, no-action, and in-action positions developed in the context of variable annuities, but never codified for variable annuities. For example, the SEC Staff has traditionally stated orally that a life insurance company could veto a proposal to change investment policy that might unduly increase the investment risk to the company.

The industry could ask the SEC to adopt a "Rule 6e-3(T)-type rule" for variable annuities that would combine and coordinate the 18 current variable annuity rules[48] on the books and various interpretive, no-action, and in-action positions. Such a holistic rule could help establish a higher degree of regulatory certainty.

Wish No. 8: Update Rule 6e-3(T)

The 1940 Act was amended[49] in 1996 to delete caps on individual insurance product charges and substitute a reasonableness test for aggregate product charges. The SEC—now for more than 20 years—has failed to amend Rule 6e-3(T) to reflect the statutory amendments.

Obviously, the amendments supersede the language of the rule. But conceivably, the outdated rule could cause some mischief—perhaps in litigation.

The SEC could also amend Rule 6e-3(T) to eliminate the "(T)" and announce that the rule is not temporary. When the SEC adopted[50] Rule 6e-3(T) in 1984, and adopted[51] two amendments, the SEC adopted language on a temporary basis subject to further consideration. This allowed the industry to proceed without having to wait for the Commission to receive and assess public comments. However, this need of the industry is long past.

Prognosis

Some momentum is building for at least the VA summary prospectus and related disclosure matters.

The SEC's investor advocate, in his annual report to Congress, called for Congress to allow the SEC "to get back to basics" and address such "promising ideas" as "a summary prospectus for variable annuities."[52]

The US Department of the Treasury has published a report recommending that the SEC "lower expenses and improve the quality of disclosure"[53] by authorizing a VA summary prospectus and streamlining annual update prospectuses for variable annuities, as well as permitting online delivery of annual and semiannual underlying mutual fund reports and providing registration statement forms tailored for non-variable insurance products.

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NOTES

1 Republican Party Platform 2016, Section 5, "Government Reform—Regulation: the Quiet Tyranny," available at *https://gop.com/platform*.

2 *Id.*

3 *Id.*

4 Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, Executive Order No. 13771 (Jan. 30, 2017), [hereinafter President

Trump's First Executive Order] available at *https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling*. It is beyond the scope of this article to discuss whether a Presidential Executive Order addresses so-called "independent" agencies like the SEC, as well as "executive" agencies and departments. *See infra* n.8 and accompanying text.

5 Presidential Executive Order on Core Principles for Regulating the United States Financial System, Executive Order No. 13772 (Feb. 3, 2017) [hereinafter President Trump's Second Executive Order], available at *https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states*.

6 Presidential Executive Order on Enforcing the Regulatory Reform Agenda, Executive Order No. 13777 (Feb. 24, 2017), available at *https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda*.

7 President Trump's First Executive Order, *supra* n.4. The president orders agencies not only to listen to, but to invite, the views of, such industry associations. To the extent that the Presidential Executive Orders address the SEC, this would include such associations as the American Council of Life Insurers, Committee of Annuity Issuers, and Insured Retirement Institute.

8 Jay Clayton, Chairman, SEC, "Remarks at the Economic Club of New York" (July 12, 2017), available at *https/www.sec.gov/news/speech/remarks-economic-club-new-york.*

9 *Id*. at I.F.

10 Such products would include index annuity and life insurance products that fall outside Rule 151 under, and Section 3(a)(8) of, the Securities Act of 1933. The SEC has told a court that Section 3(a)(8) is not available for index products. *See infra* n.39 and accompanying text.

11 For example, William J. Kotapish, an assistant director who currently heads the SEC's Division of Investment Management's Office of Insured Investments, has been an SEC Staff member who, for approximately 17 years, has strived for consistency of regulation.

12 Norm Champ, "Going Public: My Adventures Inside the SEC and How to Prevent the Next Devastating Crisis" (2017) [hereinafter Champ Book]. For a review of the book, *see* Gary O. Cohen, "Going Public by Norm Champ: A Tell-Some Exposé of 'Bureaucratic Warfare,' 'Bizarro Decisions' and 'Political Hit Jobs' by a Former Director of the SEC's Division of Investment Management," *The Investment Lawyer*, Vol. 24, No. 9, Sept. 2017.

13 *Id.* at 12.

14 *Id*. at 51.

15 *Id*.

16 *Id*.

17 *Id*.

18 *Id*. at 56.

19 *Id.* at 50.

20 *Id.*

21 *Id*. at 145.

22 *Id.*

23 *Request for Comments on Reform of the Regulation of Investment Companies*, Securities Act Release No. 6868, Securities Exchange Act Release No. 28124, Investment Company Act Release No. 17534, Investment Advisers Act Release No. 1234, and International Series Release No. 128 at 52 (June 15, 1990), available at *http://www.gwlr.org/wp-content/uploads/2012/08/79-5-Healey.pdf.*

24 *Id*. at 53.

25 *Id*. at 51.

26 *Id*. at 52.

27 This "wish" subsumes a number of matters, such as: layered disclosure, access equals delivery, an abbreviated annual update prospectus, electronic delivery of annual reports to shareholders, and opt out of electronic delivery of disclosure instead of opt in.

28 *See e.g.*, *infra* n.52 and n.53 and accompanying text.

29 *Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies*, Securities Act Release No. 8861 and Investment Company Act Release No.

28064 (Nov. 21, 2007), available at *http://www.sec.gov/rules/proposed/2007/33-8861.pdf*. The SEC authorized the mutual fund summary prospectus in *Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies*, Securities Act Release No. 8998 and Investment Company Act Release No. 28584 (Jan. 13, 2009), available at *https://www.sec.gov/rules/final/2009/33-8998.pdf*.

30 *See e.g.,* Mary L. Schapiro, chairman, SEC, "The Consumer in the Financial Services Revolution," Consumer Federation of America 21st Annual Financial Services Conference (Dec. 3, 2009), available at *http://www.sec.gov/news/speech/2009/spch120309mls.htm*, and Norm Champ, Director, SEC Division of Investment Management, Remarks to the Investment Management Institute 2013 (Mar. 7, 2013), available at *http://www.sec.gov/News/Speech/Detail/Speech/1365171515032#.VCcv9fldVwQ*.

31 The House Committee on Appropriations passed the SEC's budget for fiscal year 2015 as part of the Financial Services and General Government Appropriations Bill. In doing so, the committee issued a report admonishing the SEC to prioritize rules mandated by the Congress over other rules, as follows:

> The Committee believes the SEC should undertake all statutory rulemakings of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and the Jumpstart Our Business Startups Act (JOBS Act) before undertaking any discretionary rulemakings.

HR Rep. No. 113-508, at 75 (2014).

32 SEC, Agency Rule List—Update 2017, US General Services Administration, Office of Information and Regulatory Affairs, Office of Management and Budget, available at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=3235-AK60*.

33 The SEC has not even mentioned a summary prospectus for variable *life insurance*, which would likely be more challenging to design than the VA summary prospectus.

34 *Id.*

35 Title IX., Sec. 989J of the Dodd-Frank Act [Pub. L. No. 111-203, 124 Stat. 1376] (July 21, 2010), is commonly referred to as the Harkin Amendment, named after Senator Tom Harkin, Democrat from Iowa, who introduced the section as an amendment to the bill then pending. For the legislative history of Section 989J, *see* Kristin A. Shepard, "The Harkin Amendment and the Abrogation of Rule 151A: A Suitable End to Securities Regulation of Indexed Products?," PLI Conference on the Securities Products of Insurance Companies in the Face of Regulatory Reform, Study Materials 159, 176-179 (Jan. 2011); Gary O. Cohen, "Indexed and Other Fixed Insurance Products: SEC, FINRA and State Regulation After American Equity Opinion and Dodd-Frank Act," ALI-ABA Conference on Life Insurance Company Products, Study Materials 773, 775-791 (Oct. 2010); and Steven A. Morelli, "The Story Behind the Story How SEC Ruling [sic] 151A Was Overturned," *InsuranceNewsNet Magazine,* Aug. 2010, at 10.

36 President Trump's Second Executive Order, *supra* n.5 (emphasis added).

37 Section 989J(a)(2)(A) of the Dodd-Frank Act, *supra* n.35.

38 Section 989J(a)(3)(A)(i), *id*.

39 *Indexed Annuities and Certain Other Insurance Contracts*, Securities Act Release No. 8996 and Exchange Act Release No. 59221 at 35 (Jan. 8, 2009) (adoption of Rule 151A), available at *https://www.sec.gov/rules/final/200933-8996.pdf*. The SEC repeated the statement in Brief for the United States, American Equity v. SEC, 613 F3d. 166, 209 (No. 09-1021, consolidated with No. 09-1056), available at *www.sec.gov/litigation/briefs/2009/americanequity-brief0409.pdf*.

40 SEC, Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 337 (1966). However, in all fairness to the SEC, it must be noted that separate accounts were originally organized as management companies rather than unit investment trusts investing in underlying funds. The industry gradually shifted

the organizational form of separate accounts from management companies to unit investment trusts. It wasn't until 1977 that more separate accounts were organized as unit investment trusts rather than management companies. *See* SEC, Annual Report 1997 at 304. So, the SEC, in seeking congressional authority to approve substitutions, had not had experience with substitution of separate account underlying funds and the facts and circumstances peculiar to that category of substitutions.

41 Courts have found that the express private right of action granted by Section 36(b) of the 1940 Act extends beyond investment advisory fees to distribution fees under Rule 12b-1 plans. As one court has ruled, "the costs of 12b-1 plans involving such affiliates … are subject to review under Section 36(b)." Meyer v. Oppenheimer Management Corp, 895 F.2d 861, 866 (2d Cir. 1990).

42 The SEC Staff, presumably with the Commission's authority, imposed the ban by what was then called "administrative muscle." The Staff, in processing underlying mutual fund filings of registration statements or post-effective amendments, would give the comment that Rule 12b-1 plans were not permitted. Registrants would comply with the comment in order to obtain effectiveness of the filings under the 1933 Act.

43 Letter from Heidi Stam, associate director, SEC IM Division, to Gary E. Hughes, chief counsel, Securities and Banking, American Council of Life Insurance, Paul Schott Stevens, general counsel, Investment Company Institute, and Mark J. Mackey, president & CEO, National Association for Variable Annuities 2 (May 30, 1996), available at *www.sec.gov/divisions/investment/noaction/1996/hughes-acli052696.pdf*. The Staff's statement was in the context of an independent money management firm establishing mutual funds as underlying funding media for variable annuity and variable life insurance products presumably issued by more than one *unaffiliated* life insurance company. *Id*.

44 Champ book, *supra* n.12, at 57.

45 *Mutual Fund Distribution Fees; Confirmations*, Securities Act Release No. 9128, Securities Exchange Act Release No. 62544, and Investment Company Act Release No. 29367 at 85 (July 21, 2010) (proposing "a new rule and rule amendments that would replace rule 12b-1"), available at *http://www.sec.gov/rules/proposed/2010/33-9128.pdf.*

46 The SEC Staff has defined "mixed funding" and "shared funding" as follows:

> In the context of variable insurance contracts, "mixed funding" refers to the sale of the shares of a mutual fund to various types of offerees, such as when a fund is used as an investment option in both variable annuity contracts and variable life insurance contracts or when a fund is used as an investment option in both variable life insurance contracts and retirement plans. "Shared funding" refers to the sale of the shares of a mutual fund as an investment option in variable insurance contracts issued by multiple unaffiliated insurance companies.

SEC IM Division, Mixed and Shared Funding Orders, IM Guidance Update, No. 2014-10 at 1 (Oct. 2014) (footnote omitted)[hereinafter SEC Staff Mixed and Shared Funding Guidance], available at *http://www.sec.gov/investment/im-guidance-2014-10.pdf*.

47 *Id*. at 10. The SEC Staff issued the formal guidance after issuing a no-action letter in Maxim Series Fund, Inc., SEC No-Action Letter (July 31, 2009), available at *https://www.sec.gov/divisions/investment/noaction/2009/maximseries073109.htm*. The author's firm obtained the no-action letter, and the author co-signed the request for the no-action letter, available at *https://www.sec.gov/divisions/investment/noaction/2009/maximseries073109.htm.*

48 These rules are: Rule 0-1. Definition of Terms Used in the Rules and Regulations of Exemptions Under the Rules Listed Below; Rule 6c-6. Exemption for Certain Registered Separate Accounts and Other Persons; Rule 6c-7. Exemptions from Certain Provisions of Sections 22(e) and 27 for Registered Separate Accounts Offering Variable Annuity Contracts

to Participants in the Texas Optional Retirement Program; Rule 6c-8. Exemptions for Registered Separate Accounts to Impose a Deferred Sales Load and to Deduct Certain Administrative Charges; Rule 11a-2. Offers of Exchange by Certain Registered Separate Accounts or Others the Terms of Which Do Not Require Prior Commission Approval; Rule 14a-2. Exemption From Section 14(a) for Certain Registered Separate Accounts and Their Principal Underwriters; Rule 15a-3. Exemption for Initial Period of Investment Adviser of Certain Registered Separate Accounts from Requirement of Security Holder Approval of Investment Advisory Contract; Rule 16a-1. Exemption for Initial Period of Directors of Certain Registered Accounts from Requirement of Election by Security Holders; Rule 22c-1. Pricing of Redeemable Securities for Distribution, Redemption and Repurchase; Rule 22d-2. Exemption from Section 22(d) for Certain Registered Separate Accounts; Rule 22e-1. Exemption from Section 22(e) During Annuity Payment Period of Variable Annuity Contracts Participating in Certain Registered Separate Accounts; Rule 26a-1. Payment of Administrative Fees to the Depositor or Principal Underwriter of a Unit Investment Trust; Exemptive Relief for Separate Accounts; Rule 26a-2. Exemptions from Certain Provisions of Sections 26 and 27 for Registered Separate Accounts and Others Regarding Custodianship of and Deduction of Certain Fees and Charges from the Assets of Such Actions; Rule 27a-1. Conditions for Compliance with and Exemption from Certain Provisions of Paragraph (1) of Section 27(a) and Paragraph (1) of Section 27(h) for Certain Registered Separate Accounts; Rule 27a-2. Exemption from Paragraph (3) of Section 27(a) and Paragraph (3) of Section 27(h) for Certain Registered Separate Accounts; Rule 27a-3. Exemption from Paragraph (4) of Section 27(a) and Paragraph (5) of Section 27(h) for Certain Registered Separate Accounts; Rule 27c-1. Exemption from Section 27(c)(1) and Section 27(d) During Annuity Payment Period of Variable Annuity Contracts Participating in Certain Registered Separate Accounts; and Rule 32a-2. Exemption for Initial Period from Vote of Security Holders on Independent Public Accountant for Certain Registered Separate Accounts.

[49] National Securities Market Improvement Act of 1996, Pub. L. 104-290 (Oct. 1996). For a discussion of the bill that became the amendments, *see* Gary O. Cohen, "Regulation of Charges Under Legislation Regarding Variable Annuity Contracts and Variable Life Insurance," Conference on Life Insurance Products, Current Securities, Tax, ERISA, and State Regulatory Issues, ALI-ABA Course of Study 327 (Nov. 1996).

[50] *Separate Accounts Funding Flexible Premium Variable Life Insurance Contracts*, Investment Company Act Release No. 14234 at 4-5 (Nov. 14, 1984) (adopting Rule 6e-3(T)).

[51] *Separate Account Funding Flexible Premium Variable Life Insurance Contract*s, Investment Company Act Release No. 14625 (July 10, 1985) (adopting amendments to Rule 6e-3(T)). In doing so, the Commission stated that "it believes that amendment of rule 6e-3(T) along the aforesaid lines should facilitate the life insurance industry designing flexible contracts which are consistent with the policies of the [1940] Act." *Id*. However, the Commission also stated that it was "not yet prepared to adopt the rule on a permanent basis," and that it was "not at this time adopting a permanent rule." *Id*. The Commission did not specify the reasons for not adopting a permanent rule.

[52] Rick A. Fleming, "SEC Investor Advocate, Report on Objectives for FY 2018 on Behalf of the Office of the Investor Advocate" at 1 (June 29, 2017), available at *https://www.sec.gov/files/sec-office-investor-advocate-report-on-objectives-fy2018.pdf.*

[53] US Department of the Treasury, "A Financial System That Creates Economic Opportunities—Asset Management and Insurance" 112 (Oct. 2017), available at *https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf.* The report is to President Donald J. Trump in response to President Trump's Second Executive Order, *supra* n.5.