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Rules for RILA and MVA Marketing Communications—Still Being Held Back, But There Remains a Crack in the Door

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On July 1, 2024, the Securities and Exchange Commission (Commission) issued a release (Adopting Release) adopting amendments to certain existing rules and forms for registered index-linked annuities (RILAs) and registered market-value adjustment annuities (MVAs).[1] Among these are certain communications related rules under the Securities Act of 1933 (1933 Act), that is, Rules 156, 433 and 482, and the decisions announced in the Adopting Release regarding the extent to which these rules should apply to RILAs and MVAs have generated some controversy.

The Commission noted in the Adopting Release that the rulemaking is "designed to provide parity between non-variable annuities and variable annuities that are currently registered on Form N-4.[2] Towards this end, for example, the amendments now offer issuers of RILAs and MVAs the opportunity to take advantage of the registration framework to which variable annuities are subject. These amendments will also require that these products be registered using that form by May 1, 2026. In addition, the amendments will result in parity for RILAs and MVAs with variable annuities with respect to, among other things: (a) the use of summary prospectuses; (b) being able to file evergreen prospectuses; and (c) paying registration fees on a net basis in arrears.

The Commission determined, however, not to extend one of the communications rules to which variable annuities are subject, Rule 482, to RILAs and MVAs. This rule, among other things, allows variable annuity issuers to disseminate written advertisements and other sales materials and literature (collectively referred to in this article as marketing communications) regarding these products without being subject to a prior or concurrent statutory or summary prospectus delivery requirement.

With one notable exception, marketing communications for RILAs and MVAs therefore are subject to the prospectus delivery requirement, with the practical result that insurers cannot engage in broad-based advertisements regarding these products. In sum, we believe this approach is unduly discriminatory against RILAs and MVAs.

This article explores what the Commission had originally proposed for the regulatory regime affecting marketing communications for these products, the reaction of industry participants and other stakeholders to those proposals, and how the Commission modified its rulemaking in response to those reactions. Given that the Commission expressed in

the Adopting Release a willingness to discuss with industry participants the possibility of further regulatory action on this subject, we also suggest potential approaches to engaging with Commission Staff in such discussions going forward.

Background

The 1933 Act restricts the types of marketing communications that may be used in connection with a registered public offering of securities, including the offering of variable contracts and RILA and MVA contracts.[3] Interestingly, the 1933 Act regulates marketing communications in an indirect way by defining virtually any written communication not preceded or accompanied by a prospectus that offers a security for sale as a "prospectus."[4] Other provisions of the 1933 Act then restrict the types of "prospectuses" that may be used. Over time the Commission has adopted various rules to provide issuers additional flexibility to use different types of marketing communications.

In determining which Commission rules apply to a proposed marketing communication, the first question is whether the communication will be in oral or written form. If it is an oral communication, it is generally outside the definition of a "prospectus." If it is in written form (including electronic communications), the next question is whether it constitutes an "offer" of the related security. If a written marketing communication constitutes an offer, the final consideration is whether as a practical matter the communication can be preceded or accompanied by a final, or "statutory," prospectus.[5]

If the communication can be preceded or accompanied by a statutory prospectus, the communication constitutes "supplemental sales literature." As such, these communications can be disseminated in a broad variety of media. If a marketing communication for a variable contract *cannot* practicably be preceded or accompanied by a statutory prospectus, the communication would not be considered "supplemental sales literature." Investment companies, including separate accounts issuing variable contracts, may nonetheless rely on Rule 482 under the 1933 Act, which does not require that the communication be preceded or accompanied by a statutory prospectus. By not having such a delivery requirement, Rule 482 provides considerable flexibility to these issuers to advertise in a wide variety of media.

RILA and MVA issuers, on the other hand, may not rely on Rule 482. They are restricted to using "free writing prospectuses," which are written communications that may contain information not in a prospectus. Free writing prospectuses are governed by Rule 433 under the 1933 Act, which permits marketing communications without a prospectus delivery requirement only in limited circumstances, as described below.

To provide context for this article's discussion of how the new RILA rules will impact the dissemination of RILA and MVA marketing communications, the following section provides general background on Rules 482 and 433. It also provides an overview of Rule 156 under the 1933 Act, which provides guidance on when investment company marketing communications are misleading.[6]

Rule 482

The Commission adopted Rule 482 to permit mutual fund marketing communications to present more information than was allowed in tombstone advertisements.[7] Among other things, Rule 482 advertisements must state from whom a prospectus can be obtained and advises the investor to read it carefully before investing. Rule 482 permits investment companies, including separate accounts issuing variable products, to advertise any information, including performance data,[8] which accounts for its widespread use. Variable contract issuers as well as mutual funds use Rule 482 marketing communications extensively.

Rule 433

As part of its wide-ranging 2005 "Securities Offering Reform" initiative, the Commission

adopted new rules permitting marketing communications in the form of prospectus referred to as a "free writing prospectus."[9] Rule 405 of the 1933 Act defines a "free writing prospectus," in part, as any written communication that constitutes an offer to sell, or a solicitation of an offer to buy, the securities relating to a registration statement, and is made by means other than a red herring prospectus, a final prospectus, or a written communication that is preceded or accompanied by the final prospectus (that is, supplemental sales literature). With the exception of issuers that are considered to be "ineligible issuers,"[10] all other non-investment company issuers may utilize free writing prospectuses under Rule 433.[11]

The conditions for using free writing prospectuses depend on, among other things, whether the issuer is a "seasoned" or "unseasoned" issuer.[12] Unseasoned issuers must precede or accompany every free writing prospectus by a prospectus. Seasoned issuers are not subject to this requirement.

All free writing prospectuses prepared by or on behalf of or used or referred to by an issuer, as well as "issuer information" used in a free writing prospectus prepared by or on behalf of or used or referred to by other "offering participants," must, with certain exceptions, be filed with the Commission. Rule 433 generally requires that filings be made no later than first use.

Rule 156

Rule 156 under the 1933 Act was adopted by the Commission to provide general guidance to investment companies, including variable contract issuers, on what might constitute materially misleading marketing communications. Rule 156 reiterates that, as a threshold matter, various provisions of the federal securities laws prohibit the use of materially misleading marketing communications in connection with the offer or sale of securities issued by an investment company. Rule 156 provides that a marketing communication is materially misleading if it (i) contains any untrue statement of a material fact, or (ii) omits a material fact necessary to make any other statement contained in the communication, in light of the entire context of the communication, not misleading. Rule 156 states in effect that these general antifraud provisions apply fully to marketing communications disseminated by investment companies.

Importantly, however, Rule 156 also offers specific guidance as to when investment company marketing communications may be misleading. Therefore, in evaluating investment company marketing communications such as variable contract materials, even if the particular requirements of Rule 482 have been complied with, it is essential to consider the guidelines provided by Rule 156. In considering whether a statement, representation, or illustration included in investment company marketing communications is misleading, Rule 156 requires an evaluation of the context in which the communication was made. Rule 156 provides a list of specific reasons why a statement could be misleading.

Proposal

In the Proposing Release, the Commission proposed subjecting marketing communications for RILAs to Rule 156, but also proposed not extending the provisions of Rule 482 to these products. With respect to Rule 156, the Commission noted that Commission Staff had "identified common marketing approaches that could benefit from Rule 156's guidance about advertising statements that could be misleading ... without appropriate context."[13] The Commission cited examples of these approaches, such as statements that marketed RILAs as growth products, and noted the rule would require marketing communications regarding features of RILAs also to have "qualifying statements or explanations regarding the [associated] costs or tradeoffs...."[14]

Notwithstanding the proposed extension of the fair and balanced presentation requirements of Rule 156 to RILAs, the Commission determined not to propose extending Rule 482 to these products. In justifying this determination, the Commission

focused on the rule's provisions relating to the use of fund performance data, noting that these "do not align with current practices in RILA advertisements," in that insurers "typically market RILAs on other bases that are less amenable to standardized performance metrics."[15]

The Commission did not discuss the fact, however, that the proposal meant that marketing communications for RILAs could not be disseminated without the prior or concurrent delivery of a summary or statutory prospectus, precluding for the most part broad-based advertising.[16] It also did not acknowledge that insurers with RILA offerings registered on Form S-3, which could circulate free writing prospectuses without a prospectus delivery requirement, would no longer be able to do so as a consequence of registering on N-4.[17] The Commission did suggest, however, that its underlying concern with marketing communications for these products was how insurers could "present such a complex product to investors in a way that they can understand" without investors having had a summary or statutory prospectus delivered.[18]

Industry Reaction

Several industry-affiliated commenters weighed in on the Commission's proposal to exclude marketing communications for RILA offerings from the ambit of Rule 482 and reacted sharply to the proposal. The grounds for the objections to this proposal fell largely into three different areas: (1) that the proposal resulted in an undeserved regulatory bias against RILAs; (2) that the proposal was unnecessary to protect investors; and (3) that the proposal was needlessly burdensome on insurers.

Some commenters pointed out that issuers of other complicated products, such as many if not most structured notes, as well as closed-end funds and certain exchange traded funds, could disseminate marketing communications for those products without a prospectus delivery requirement.[19] In fact, one commenter noted that closed-end funds were able to rely on Rule 482 to disseminate marketing communications for those funds without a prospectus delivery requirement, even though there were no standard performance data rules in place for closed-end funds, the primary basis cited by the Commission in proposing that RILAs not be allowed to rely on Rule 482.[20] In addition, one commenter noted that variable annuities and RILAs were similar products and, as such, the regulations governing how they are marketed should be similar.[21]

Further, certain commenters pointed out that the regulatory framework in place before the rulemaking allowing insurers registering RILAs on Form S-3, but not other RILA issuers, to disseminate marketing communications without a delivery requirement was itself illogical. In this regard, these commenters noted that the basis for the distinction, that is, whether the issuer was eligible to file on Form S-3 or not, was not relevant given that the key issue for investors was product-related disclosures.[22] One commenter also pointed out another illogical consequence of the proposal, that is, a RILA issuer that continued to use Form S-3 for non-variable products not covered by the RILA rulemaking would be able to engage in broad-based advertising for that product yet not for its RILA offerings."[23]

Some commenters also contended that requiring the concurrent or prior delivery of a prospectus was unnecessary. One commenter stated that conforming marketing communications to the requirements of Rules 482 and 156 would facilitate investor understanding and obviate the need for a concurrent or prior prospectus delivery requirement.[24] Another commenter pointed out that these marketing communications are currently and would continue to be submitted to the Financial Industry Regulatory Authority (FINRA) for review.[25]

Lastly, some commenters stated that the resulting disparate regulatory regimes for marketing communications between RILAs and variable annuities would be unduly burdensome. One commenter stated that the proposed approach would put RILAs at a competitive disadvantage "without providing any additional protections to investors."[26] Another

commenter pointed out the additional compliance costs and the potential for inadvertent compliance errors that would come with having to maintain two different regulatory regimes for advertising these products.[27]

Industry affiliated commenters universally opposed continuing the regulatory regime that treated some RILA issuers different from others and advocated for the extension of Rule 482 to all RILA issuers or, in the alternative, a revision to Rule 433 to allow all such issuers to use free writing prospectuses on the same basis as issuers using Form S-3. Nonetheless, certain of these commenters suggested different approaches that issuers could take to provide more assurance regarding the potential for investor confusion.

One approach, based on the Commission's concern regarding the lack of performance data rules in Rule 482 applicable to RILAs, was a recommendation made by some that RILA marketing communications not contain any performance data.[28] Certain commenters also stated one approach would be to make FINRA review of RILA marketing communications mandatory.[29] One of these commenters also suggested that these materials could be reviewed in the alternative by the Commission.[30]

Commission Action and Potential Future Discussions with Commission Staff

Amendments to Rule 156 but Not to Rule 482

Following the notice and comment period and subsequent consideration of comments addressing the regulatory framework for RILA marketing communications, the Commission determined that, as proposed, it would amend Rule 156 under the 1933 Act to apply this rule to marketing communications for RILAs.

By amending Rule 156, the Commission applied an antifraud rule applicable to investment company marketing communications to RILA marketing communications to address when non-investment company marketing communications are misleading under the federal securities laws. In addition, in a change from the proposal, the Commission extended this rule to cover marketing communications for MVAs, as well as extending to those products the registration framework that had been proposed for RILAs.

As proposed, however, the Commission determined not to amend Rule 482 to apply to marketing communications for RILAs and MVAs, with the consequence that issuers of these products may not rely on Rule 482 to disseminate broad-based advertisements for these products. The Commission acknowledged that commenters on the proposed rules urged the Commission to amend Rule 482 so that RILA marketing communications would be on equal footing with marketing communications for variable products in terms of the prospectus delivery component.[31] Nonetheless, the Commission declined to accept these comments, justifying its decision not to extend Rule 482 to marketing communications for RILAs and MVAs for the following reasons:

- Funds and variable products are substantively regulated under the 1940 Act; insurance companies offering non-variable annuities, like other non-fund issuers, are not subject to substantive requirements and regulations under the 1940 Act.[32]
- 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.[33]
- Congress expressly directed the Commission 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," and that

> are deemed to be permitted by Section 10(b) of the 1933 Act. Congress has not provided similar direction with regard to non-variable annuities.[34]

We believe the Commission's justifications for not amending Rule 482 do not withstand scrutiny. *First*, while it is true that RILAs and MVAs are not subject to substantive requirements and regulations under the 1940 Act, these products are subject to robust investor protections offered by comprehensive state regulation, and communications are generally reviewed by FINRA, a regime that has been in place since RILAs were first introduced.

Second, the fact that FINRA does not have performance standards for non-variable annuities should not preclude non-variable annuity issuers from enjoying the non-performance aspects of Rule 482. *Third*, as to the absence of Congressional direction, amending Rule 482 to achieve equal treatment of RILAs and MVAs with variable annuities should be done as a regulatory matter, in order to avoid expressing a preference for one type of well-regulated insurance product over another.

Modification of Rule 433 to Maintain the Status Quo

Under the current RILA regulatory framework, seasoned and well-known seasoned issuers eligible to file on Form S-3 are permitted by Rule 433(b)(1) to use "broad-based advertising" without delivery of a prospectus. To maintain the status quo for such issuers moving to Form N-4, the Commission amended Rule 433 by explicitly exempting RILA offerings that are registered on Form N-4 by issuers who file periodic reports pursuant to Section 15(d) of the Securities Exchange Act of 1934 (Exchange Act) from the prospectus delivery requirements.

In announcing this "technical amendment" to Rule 433, the Commission explained as follows:

> It would not be appropriate to subject non-variable annuity offerings to a categorically different regulatory treatment than offerings of other seasoned issuers or to deprive those insurance companies that are considered seasoned issuers of the ability to rely on the provisions of Rule 433 to use a free writing prospectus without complying with the prospectus delivery requirements.[35]

While maintaining the status quo for seasoned issuers is commendable, the Commission did not clarify its determination to continue the unequal treatment of non-seasoned RILA issuers (vis-à-vis seasoned RILA issuers) that are prevented from using broad-based advertising for their RILA offerings. We believe removing unequal treatment among RILA issuers should be an important priority.

Potential Future Discussions with Commission Staff

Notwithstanding its determination not to extend Rule 482 to RILAs and MVAs, the Commission noted that these issues "would benefit from further consideration," and invited "further engagement on these issues."[36] For non-seasoned RILA issuers that do not file Exchange Act reports, 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. In this regard, the Commission set forth factors for consideration in any future proposal regarding amendments to Rule 482, including:

- the nature and scope of any applicable conditions,
- the benefits of any such potential conditional expansion of Rule 482, and
- the potential risk of misleading investors.[37]

Whether or how the Commission ultimately will amend Rule 482 or Rule 433 to achieve equal treatment among RILA and MVA issuers in the regulation of marketing communications is for now just within the realm of speculation. The Commission has stated, however, that it is concerned about the complexity of RILAs and continues to consider how

best to address complexity.[38] To be sure, unequal treatment of RILA issuers in the use of RILA marketing communications—based on whether the issuer files Exchange Act reports—does not address complexity.

Perhaps one way to amend Rule 482 to achieve parity among variable and non-variable product issuers would be for the Commission Staff to work with FINRA Staff to adopt standards for RILA marketing communications. Then, FINRA would be in a position to review all RILA marketing communications under objective standards. Another way to achieve parity among RILA issuers would be for the Commission to permit the use of quick-response codes (QR Codes) to satisfy prospectus delivery requirements. Arguably, the time has come for the Commission and FINRA to allow technology that is readily available to satisfy supplemental sales literature prospectus delivery requirements.

Commenters on the proposed rule suggested another way to amend Rule 482. That is, "the ability of RILA advertisements to use Rule 482 could be conditioned upon other criteria, such as performance principles that ensure that performance presentations are not misleading, or requiring that RILAs meet certain standards applicable to variable annuity products, such as a requirement that rates and fees be reasonable in relationship to the services rendered and risks assumed under the contract."[39]

Conclusion

The willingness of the Commission to at least preserve the "status quo" in the regulation of marketing communications for RILAs and MVAs is welcomed. The fact remains, however, that the Commission has not explained the logic behind distinguishing between RILA and MVA issuers who otherwise would qualify for registering on Form S-3, on the one hand, and RILA and MVA issuers who would not, on the other.

In addition, we believe the regulatory bias against RILAs illustrated by the continued requirement for concurrent or prior prospectus delivery by many RILA issuers is inconsistent with congressional intent behind the RILA Act passed to update the registration framework for these products. Hopefully, Commission Staff will engage seriously and expeditiously with industry representatives on creative approaches to remedy this regulatory anomaly in a manner that addresses industry concerns.

Mr. Conner, **Mr. Eisenstein**, and **Ms. Furman** are shareholders, and **Mr. Kotapish** is of counsel, at Carlton Fields, P.A., in Washington, DC. They counsel insurance companies, mutual funds, ETFs, broker-dealers, and investment advisers. Mr. Conner was the first General Counsel of the Insured Retirement Institute and a staff member in the SEC's Office of Insurance Products. Mr. Eisenstein was previously a Senior Special Counsel in the SEC's Division of Investment Management (IM), where he served both in the Disclosure Review Office and in the Chief Counsel's Office. Ms. Furman co-chairs Carlton Fields' Financial Services Regulatory Practice Group and serves on *The Investment Lawyer's* Editorial Board. Mr. Kotapish was previously an assistant director in IM, where he oversaw the Office of Insurance Products. The views expressed are those of Mr. Conner, Mr. Eisenstein, Ms. Furman, and Mr. Kotapish and do not necessarily reflect the views of their firm, its lawyers, or its clients.

NOTES

1 *Registration for Index-Linked Annuities; Amendments to Form N-4 for Index-Linked and Variable Annuities*, Securities Act Release No. 11294 (July 1, 2024) [89 Fed. Reg. 59978 (July 24, 2024)] available at *https://www.sec.gov/files/rules/final/2024/33-11294.pdf*. This rulemaking follows a mandate from Congress to update the registration framework for RILAs by the end of June of 2024. *See* Division AA, Title I of the Consolidated Appropriations Act, 2023, Pub.

L. 117-328; 136 Stat. 4459 (Dec. 29, 2022) (RILA Act).

RILAs are annuity contracts that 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 index gains and losses. MVAs are fixed annuities that adjust contract value positively or negatively for withdrawals before the end of a term based on changes in interest rates.

As proposed, these amendments were applicable only to RILAs, although the Commission requested comment on extending their scope to include MVAs. *See Registration for Index-Linked Annuities; Amendments to Form N-4 for Index-Linked and Variable Annuities*, Securities Act Release No. 11250, Securities Exchange Act Release Act No. 98624, Investment Company Act Release No. 35028 (Sept. 29, 2023) (Proposing Release) [88 Fed. Reg. 71088 (Oct. 13, 2023)] available at *https://www.sec.gov/files/rules/final/2024/33-11294.pdf*.

2 Adopting Release, *supra* n.1 at 226.

3 This article focuses on the application of the Commission's marketing communications rules to variable contracts, RILAs, and MVAs. The rules applicable to variable contracts, however, are also widely relied on by mutual funds.

4 *See* 1933 Act Section 2(a)(10) [15 U.S.C. § 77b(a)(10)].

5 For variable contracts, in addition to statutory prospectuses, "summary prospectuses" permitted under Rule 498A under the 1933 Act may be used to precede or accompany marketing communications. Hereinafter, where applicable, the term "prospectus" includes statutory and summary prospectuses.

6 MVA and RILA issuers also may use very limited "tombstone" advertisements under Rule 134 of the 1933 Act. This article does not discuss tombstone advertisements. This article also does not discuss the applicability of FINRA rules to RILAs and MVAs, which to date has not been impacted by the new RILA and MVA rules.

7 *Advertising by Investment Companies*, Investment Company Act Release No. 10852 (Aug. 31, 1979).

8 Rule 482 requires that any quotation of performance data in connection with a variable annuity contract be limited to quotations of yield, tax-equivalent yield, and average annual total return and non-standardized total return. This performance data must be calculated in accordance with the standardized methods of computation prescribed in Form N-4. Interestingly, although Rule 482 permits variable life insurance separate accounts to advertise performance data for its contracts, the Commission has not prescribed standardized performance data calculation methodology for those contracts.

9 *Securities Offering Reform*, Securities Act Release No. 8591 (July 19, 2005) [70 Fed. Reg. 44722 (Aug. 3, 2000)], available at *https://www.sec.gov/files/rules/final/33-8591.pdf.*

10 "Ineligible issuers" include blank check companies, shell companies, issuers that issue penny stock, limited partnerships that are offering securities other than in a firm commitment underwritten offering, issuers that filed for bankruptcy protection during the last three years, issuers convicted of felonies or certain misdemeanors during the past three years, or issuers that are currently or, within the past three years, were the subject of certain judicial or administrative proceedings. *See* 1933 Act Rule 405(f) [17 C.F.R. § 230.405].

11 The Commission determined that investment company issuers did not need Rule 433 because they could rely on Rule 482.

12 Seasoned issuers are issuers that have registered on Form S-3. Form S-3, which permits the use of a streamlined prospectus, requires, among other things, that an issuer have filed periodic reports on Forms 10-K and 10-Q under the Exchange Act for at least 12 months. Form S-1, which is the Commission's default and so-called "long form" registration form, must be used by issuers that do not qualify to use Form S-3.

13 Proposing Release, *supra* n.1 at 199.

14 *Id.* at 201.

[15] Adopting Release, *supra* n.1 at 241. Interestingly, Rule 482 did not include any performance advertising requirements when it was initially adopted (as Rule 434d) in 1979. In fact, then-Rule 434(d) was adopted solely to permit funds, which until then could only use "tombstone" advertisements permitted by 1933 Act Rule 134, to communicate a wider range of information in their advertisements than what was permitted under Rule 134. It wasn't until 1988 that the Commission amended (by then) Rule 482 to standardize the computation of performance data in mutual fund marketing communications. *See Advertising by Investment Companies*, Securities Act Release No. 6753, Investment Company Act Release No. 16245 (Feb. 2, 1988) [53 Fed. Reg. 3868 (Feb. 2, 1988)].

[16] The Commission has for some time allowed securities issuers to disseminate marketing communications online where the materials have an active hyperlink to the prospectus, on the basis that the active hyperlink *essentially* constituted the concurrent delivery of the prospectus. *See Use of Electronic Media*, Securities Act Release No. 7856, Securities Exchange Act Release No. 42728, Investment Company Act Release No. 24426 (April 20, 2000) [65 Fed. Reg. 25843 (May 4, 2000)], available at *https://www.govinfo.gov/content/pkg/FR-2000-05-04/pdf/00-11079.pdf*.

[17] Insurers that have registered their RILA offerings on Form S-3 have relied on Securities Act Rule 433(b)(1)(i) to disseminate marketing communications through the use of a free writing prospectus without the burden of a prior or concurrent prospectus delivery requirement. Registration of those offerings on Form N-4 would mean these insurers could not rely on that section to disseminate marketing communications without that requirement.

[18] Adopting Release, *supra* n.1 at 205.

[19] *See,* for example, *Comment Letter of the Committee of Annuity Insurers* (Nov. 28, 2023) (hereinafter, CAI Comment Letter), available at *https://www.sec.gov/comments/s7-16-23/s71623-303439-781302.pdf*. Structured notes generally are filed by issuers that register their offerings on Form S-3 and thus qualify for the exemption in 1933 Act Rule 433(b)(1)(i) from the prospectus delivery requirement. Closed-end funds and exchange traded funds, like variable annuities, are investment companies and as such are subject to 1933 Act Rule 482.

[20] *See id*. at 53. Separately, we note that issuers of variable life insurance policies also may disseminate marketing communications for those policies without a prospectus delivery requirement even though there are no standardized performance data rules in place in Form N-6 for variable life insurance policies.

[21] *See Comment Letter of the VIP Working Group*, at 7 (Nov. 10, 2023) (hereinafter, VIP Comment Letter), available at *https://www.sec.gov/comments/s7-16-23/s71623-297139-724642.pdf*.

[22] *See,* for example, Comment Letter from Gainbridge Life Insurance Company and Delaware Life Insurance Company at 5 (Nov. 28, 2023) (hereinafter, Gainbridge Comment Letter), available at *https://www.sec.gov/comments/s7-16-23/s71623-303559-781542.pdf*.

[23] *See* Email from Michele Abate of Brighthouse Financial (May 2, 2024) (Brighthouse Email), available at *https://www.sec.gov/comments/s7-16-23/s71623-1235274.htm*.

[24] *See* Gainbridge Comment Letter, *supra* n.22 at 6.

[25] *See* CAI Comment Letter, *supra* n.19 at 51. This commenter noted that while as a technical matter, FINRA review of these marketing communications is not mandatory, "virtually all" RILA marketing communications are voluntarily submitted to [FINRA] for review."

[26] Gainbridge Comment Letter, *supra* n.22 at 6.

[27] *See* CAI Comment Letter, *supra* n.19 at 53.

[28] *See* Brighthouse Email, *supra* n.23 *and* CAI Comment Letter, *supra* n.19 at 53.

[29] *See* CAI Comment Letter, *supra* n.19 at 54 *and* VIP Comment Letter, *supra* n.21 at 7. The CAI Comment Letter also pointed out that, although FINRA does not require that RILA issuers submit

planned marketing communications for these products to FINRA, "virtually all" those materials are submitted to FINRA for review. CAI Comment Letter, *supra* n.19 at 54.

30 *See* VIP Comment Letter, *supra* n.21 at 7.

31 *See* Adopting Release, *supra* n.1 at 241 (*citing* CAI Comment Letter; ACLI Comment Letter; IRI Comment Letter; Gainbridge Comment Letter; VIP Working Group Comment Letter).

32 The Commission noted that substantive regulations under the 1940 Act applicable to funds and variable products provide a range of investor protections "by, for example, regulating fund structure, holdings and operations, and reducing fund complexity and helping ensure that fund fees are reasonable in relation to services rendered." Adopting Release, *supra* n.1 at 239.

33 *Id*.

34 *Id*. at 240.

35 *Id.* at 245.

36 *Id*. at 244.

37 *Id*. at 245.

38 *Id*. at 9 ("RILAs are complex financial products that are sold to retail investors.").

39 *Id*. at 243.