

MEMORANDUM

To: U.S. Securities and Exchange Commission

From: The Committee of Annuity Insurers

Date: March 3, 2025

Re: Regulatory Modernization and Other Initiatives

This memorandum summarizes certain regulatory initiatives relating to registered insurance products that the Committee of Annuity Insurers (the “CAI”) believes deserve prominent places on the Securities and Exchange Commission’s (the “Commission” or “SEC”) regulatory agenda. These important initiatives will streamline and modernize the current SEC regulatory framework applicable to regulated insurance products that uniquely provide retail investors with valuable insurance benefits and guarantees. In doing so, these initiatives will facilitate the continued growth of the annuity and life insurance market, foster product innovation, mitigate unnecessary regulatory burdens, and improve the investor experience.

These initiatives are grouped below into two categories: (i) continued initiatives, where the CAI intends to push forward certain unresolved issues that were previously raised with the Commission and the staff in the SEC’s Division of Investment Management (the “IM staff”), and (ii) new initiatives, which mainly focus on modernizing the regulation of variable insurance contracts under the Investment Company Act of 1940 (the “1940 Act”). The CAI strongly believes that implementation of these initiatives will be very beneficial for investors, life insurance companies, and the insurance markets, and therefore merit a prominent place on the Commission’s regulatory agenda.

The Committee of Annuity Insurers

The CAI is a coalition of life insurance companies formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of federal policy with respect to securities, regulatory, and tax issues affecting annuities. The CAI’s 33 member companies represent approximately 80% of the annuity business in the United States.¹ For over 40 years, the CAI has been actively involved in shaping and commenting upon many aspects of the Commission’s regulatory framework as it applies to the offering of annuity and other retirement savings and protection products, particularly the 1940 Act, the Securities Act of 1933 (the “1933 Act”), and the Securities Exchange Act of 1934 (the “1934 Act”).

The CAI is keenly focused on how SEC rules and regulations directly or indirectly impact the development and offering of registered annuity and life insurance products, including variable annuities (“VAs”), variable life insurance policies (“VLs”), registered index-linked annuities (“RILAs”), market value adjustment annuities (“MVAs”), contingent deferred annuities (“CDAs”), and registered index-linked universal life insurance policies (“RILUs”). Since its formation, the CAI has commented on dozens of Commission rulemakings. For example, since 2022, the CAI has

¹ See Appendix A for a list of the CAI’s current member companies.



commented on rulemakings related to, *e.g.*, RILAs and MVAs, swing pricing/hard close, cybersecurity risk management, data privacy, investment company names, climate-related disclosures, adviser safekeeping, and intermediary use of predictive data analytics.²

Continued Initiatives: Pushing Forward on Unresolved Issues

A key goal of the CAI is to push forward certain critical issues that the CAI has previously raised with the Commission and IM staff, but that have not yet been fully resolved. Provided below is a brief summary of those unresolved issues that are of most importance to the CAI and its members. We welcome the opportunity to work with the Commission and its staff on these issues so as to implement practical solutions for the benefit of investors and insurers.

1. Making E-Delivery the Default Delivery Method under the Federal Securities Laws

- *The Commission should update its longstanding interpretive guidance, and as necessary amend its regulations, to make electronic delivery the default delivery method for prospectuses, shareholder reports, proxies, confirmations, and all other SEC regulatory documents that must be delivered to investors.*
- *In the context of registered insurance products, the new e-delivery framework must be available not only with respect to new investors, but also with respect to existing contract owners for whom an insurance company may not have electronic contact information.*

As the CAI has been urging for several years now, we respectfully submit that the time is long overdue for the Commission to update its interpretive guidance and regulations to make e-delivery the default delivery method under the federal securities laws.³ It has been 30 years since the Commission first established general standards for electronic delivery,⁴ when internet capabilities were still in their infancy. Since then, there have been transformative advances in electronic communication technologies, broad adoption of these technologies by the investing public, and profound changes in how the world communicates. As such, the Commission should bring its interpretative guidance and regulations into the modern age by fully embracing e-delivery as the default method for delivering SEC required documents.

² See Appendix B for a list of comment letters submitted to the SEC by the CAI since 2022.

³ See Letter to Jay Clayton, former Chairman, from the American Council of Life Insurers, the Committee of Annuity Insurers, and the Insured Retirement Institute, re Electronic Delivery of Required Documents under the Federal Securities Laws, dated Oct. 23, 2020.

⁴ See Use of Electronic Media for Delivery Purposes, Release No. 36345 (Oct. 6, 1995) [60 FR 53458 (Oct. 13, 1995)]; Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples Under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940, Release No. 37182 (May 9, 1996) [61 FR 24644 (May 15, 1996)]; Use of Electronic Media, Exchange Act, Release No. 42728 (Apr. 28, 2000) [65 FR 25843 (May 4, 2000)].



The Commission does have a patchwork of various rules relating to electronic delivery in specific circumstances,⁵ but that fragmented approach is unnecessarily limiting and has negative consequences for regulated entities and the investing public. It has resulted in disparate treatment among different regulated entities, varying standards for different regulatory documents, confusion among investors, and unnecessary burdens for market participants. Moreover, this ad hoc approach is out of touch with the world in which we live – a world that has fully embraced electronic media in all aspects of everyday life. In our view, rather than approaching e-delivery in a piecemeal fashion, the Commission should be working toward a more holistic framework.

The CAI believes that the Commission can create a modernized, comprehensive electronic delivery framework by utilizing a combination of liberalized e-delivery principles and existing e-delivery models. When designing any new framework, however, the Commission should take into account the unique challenges that insurance companies face in selling and maintaining their long-term annuity and life insurance contracts. In that regard, any new e-delivery framework should provide for the following, at a minimum:

- For new investors, it should be permissible for an insurance company or broker-dealer to inform a prospective contract owner in writing about the availability of the SEC prospectus online and how prospectuses and other SEC regulatory documents will be electronically delivered in the future.
- For existing investors—*i.e.*, contract owners who purchased annuity or life insurance contracts prior to the adoption of any new e-delivery framework—the insurance company or broker-dealer should be permitted to begin electronic delivery after providing written notices, using either electronic contact information on file (if any) or a “notice and access” or “access equals delivery” model. In no event should an insurance company be precluded from utilizing electronic delivery merely because an insurance company has not been able to obtain electronic contact information from investors who may have owned their contracts for many years.

We recognize that there have been ongoing efforts in Congress to pass legislation that would direct the Commission to adopt broader e-delivery standards. Notwithstanding those efforts, we believe that the Commission is best positioned to craft an effective, modernized e-delivery framework, and therefore it should not wait for a Congressional directive to do so. This long overdue modernization should be at the top of the Commission’s 2025 near-term agenda. The CAI hopes that action will be taken this year so that by the end of 2025 a new e-delivery framework will be in place that will apply to fund shareholder reports and other SEC documents.

⁵ See, e.g., Rule 14a-16 under the 1934 Act for proxy materials, Rule 498 under the 1933 Act for mutual fund summary prospectuses, Rule 498A under the 1933 Act for variable contract and underlying mutual fund summary prospectuses, and Rule 30e-3 under the 1940 Act for shareholder reports. Rule 30e-3 is an especially illustrative example of the Commission’s struggle to embrace e-delivery, where the Commission effectively rescinded Rule 30e-3 only a few years after its adoption to institute a tailored shareholder report framework that generally requires paper delivery. See Tailored Shareholder Reports for Mutual Funds and Exchange-Traded Funds, Release Nos. 33-11125; 34-96158; IC-34731 (Oct. 26, 2022) [87 FR 72758 (Nov. 25, 2022)].

2. *Achieving a More Uniform Registration and Disclosure Framework for Registered Insurance Products after the RILA Rulemaking*

- *The Commission should amend Rule 482 under the 1933 Act to extend the marketing framework for variable insurance products to other registered insurance products.*
- *The Commission should adopt conforming amendments to Form N-6, as well as conforming rule amendments under the 1933 Act, to provide a tailored registration framework for RILUs that mirrors the tailored registration framework for RILAs.*
- *The Commission should adopt a non-enforcement policy with respect to any other regulated insurance product offerings registered on Form S-1 in order to mitigate the harms arising from inconsistent regulation.*

On July 1, 2024, the Commission adopted rule and form amendments to provide a tailored registration framework for RILAs and MVAs.⁶ The CAI enthusiastically supported the core elements of the rulemaking, as reflected in the CAI’s detailed comment letter submitted in response to the proposing release. However, certain critically important issues were not resolved or were not addressed in the final rulemaking, in part due to the practical challenges associated with that expedited rulemaking, and in part because the Commission thought further engagement would be beneficial.

The Commission now should take up the unresolved issues from the RILA rulemaking, as summarized below, to achieve a more cohesive regulatory framework for non-variable insurance products, and to avoid the harms and unnecessary costs that arise from inconsistent regulation. To that end, the CAI requests that the following items become part of the Commission’s near-term regulatory agenda.

- *Amendments to Rule 482 to encompass registered non-variable product marketing materials*

Even though the RILA rulemaking extended the registration and filing framework for VAs to RILAs and MVAs, the Commission declined to similarly extend the VA advertising framework. Specifically, the Commission determined not to amend Rule 482 under the 1933 Act, stating that any such amendments “would benefit from further consideration.”

In the context of marketing, the fundamental problem is that RILA, MVA, and other regulated non-variable product offerings continue to be subject to the same regulations as stock and bond offerings. These regulations are far more restrictive than the regulations applicable to variable insurance contracts, which of course are also regulated insurance products. This has severe, negative impacts on an insurance company’s ability to advertise. On one hand, companies can broadly advertise their variable product offerings using Rule 482 (which does not require prospectus delivery). But on the other hand, it is often practically impossible for those same companies to broadly advertise their RILA and other non-variable product offerings, primarily due to Rule 433’s onerous prospectus

⁶ 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, Release Nos. 33-11294; 34-100450; IC-35273 (July 1, 2024) [89 FR 59978 (July 24, 2024)].

delivery requirements.⁷ These prospectus delivery requirements are not the result of any public policy judgments relevant to regulated insurance products. They trace back to the Commission's decision to treat "seasoned issuers and well-known seasoned issuers" differently than "non-reporting and unseasoned issuers," allowing the former to use FWP's more liberally due to their established 1934 Act reporting histories. Yet, that distinction clearly isn't relevant in the context of annuities and life insurance, as an insurance company's reporting status has no bearing on an investor's ability to contextualize an advertisement for an insurance product.

The CAI recognized the concerns with amending Rule 482 that were stated in the RILA rulemaking proposing release and proffered sensible paths forward. In particular, in the proposing release, a potential concern was expressed that Rule 482's standardized performance data requirements would be difficult to apply to RILAs. In response, the CAI commented that amendments to Rule 482 could prohibit historical performance data in advertisements for RILAs. The CAI also suggested that amendments to Rule 482 could mandate filing with FINRA (which currently is a voluntary, albeit universal, practice among insurers).

Ultimately, the Commission decided that it was not yet ready to amend Rule 482 as requested, but identified certain factors as important considerations and invited further engagement by the insurance industry. The CAI agrees with the factors that the Commission identified as important, is prepared to continue this dialogue, and hopes that a new rulemaking proposal will be forthcoming in the near future.

- *Form and rule amendments to provide a tailored registration framework for RILUs*

In response to the proposing release for the RILA rulemaking, the CAI requested that the Commission make conforming changes to Form N-6 to allow for the registration of RILUs on that form, and to make conforming rule amendments under the 1933 Act. In other words, the CAI asked the Commission to adopt a RILU framework that mirrors the new RILA framework. Unfortunately, the Commission declined to do so as part of the final rulemaking, stating that RILUs were beyond the rulemaking's scope. The CAI continues to believe that a tailored registration framework for RILUs is necessary to achieve a cohesive regulatory scheme, and urges the Commission to make RILUs a rulemaking priority.

RILUs are an emerging insurance product category. They are life insurance policies with index-linked investment options that are essentially the same as those offered through RILAs, and therefore offer investors similar investment opportunities. While the market for RILUs today is relatively small, the RILU market has the potential for significant growth in a relatively short period of time. Yet, its growth will be severely stunted, and retail investor choice will consequently be constrained, unless the SEC adopts a tailored registration framework for RILUs. In fact, following the RILA rulemaking, the need for a tailored RILU framework is greater than ever. Now that the RILA rulemaking has relieved many insurance companies from the most burdensome aspects of the Form S-1/S-3 framework, those many companies are extremely hesitant to take those burdens back on in order to offer RILUs.

⁷ The Commission did adopt technical amendments to Rule 433 under the 1933 Act in response to comments, but those amendments were intended to simply maintain the status quo regarding the use of free writing prospectuses ("FWPs") for RILAs and MVAs registered on Form N-4. We note that the restrictive nature of Rule 433 would be far less problematic if the Commission modernized its guidance related to electronic delivery, as previously discussed.



It is unquestionable that investors would be better served if RILUs were registered on Form N-6. For all the reasons that the Commission decided that Form N-4 would produce better disclosures for RILA investors, Form N-6 would produce better disclosures for RILU investors. It is also worth noting that a RILU rulemaking should be relatively straightforward and expeditious, as the Commission could largely follow the RILA rulemaking as a roadmap. We hope the Commission finds a place for this important initiative in its regulatory agenda.

- *Relief for non-variable insurance product offerings that continue to be registered on Form S-1 due to the absence of a tailored registration framework*

In its comment letter on the RILA rulemaking proposal, the CAI requested that the Commission take action to substantially mitigate the harms caused by inconsistent 1933 Act regulation of regulated insurance product offerings (*e.g.*, CDA offerings) registered on Form S-1 due to the absence of an available tailored registration framework. Specifically, the CAI commented that the SEC should announce a non-enforcement policy that would permit an S-1 registrant of a regulated insurance product offering to (i) omit from the Form S-1 prospectus company-related disclosures that are not required by Form N-4; (ii) use statutory financial statements in the Form S-1 prospectus if consistent with the limitations set forth in Form N-4; and (iii) include interim financial statements in the Form S-1 prospectus only in the limited circumstances required by Form N-4. The Commission declined to address this request in the final rulemaking, as it was deemed to be outside of the rulemaking's scope.

The CAI certainly recognizes that practical challenges associated with the RILA rulemaking placed inherent limitations on what the Commission could accomplish in that single expedited rulemaking. That said, there is now a glaring flaw in the overall regulatory scheme: the SEC's company-related disclosure and financial statement requirements are dramatically different depending on product type (*e.g.*, VA/VL/RILA/MVA *v.* RILU/CDA), even though there is no logical basis for those requirements to differ on a product-by-product basis. Regardless of the type of annuity or life insurance product, retail investors are always focused on the company's ability to honor its contractual guarantees, meaning that company-related disclosure and financial statement requirements should be uniform across all product offerings.

Inconsistent and illogical regulation in this area results in real-world harms to investors and insurance companies. As it currently stands, for regulated insurance product offerings for which there is no tailored registration framework (and therefore default to Form S-1), the SEC is generally conditioning access to the public markets based on (i) the preparation of extensive company-related disclosures that are immaterial, burdensome, and costly to prepare, (ii) the use of GAAP financial statements, even though statutory financials are sufficient for other regulated insurance product offerings, and (iii) potentially the use of interim financial statements, despite the fact that interim financials are typically unnecessary for other regulated insurance product offerings. These unnecessary hurdles dissuade insurance companies from developing and offering innovative non-variable insurance securities products and therefore limit retail investor choice. Perhaps most troubling is the fact that investors who purchase an insurance product registered on Form S-1 will continue to receive a lengthy prospectus with voluminous, immaterial company-related disclosures.

SEC regulation should not be so rigid that it ignores the universal aspects of regulated insurance products. For that reason, the CAI continues to believe strongly that the Commission should take

further action to implement a logically consistent regulatory scheme for all regulated insurance product offerings, including those that continue to be registered on Form S-1 through either a non-enforcement policy, adoption of exemptions from Regulation S-K and S-X for these specialized Form S-1 offerings, or other formal guidance.

3. *Re-establishing “Great-West” Relief for VAs and VLs No Longer Offered*

- *After a variable contract offering is discontinued, as that block of business naturally shrinks over time, the insurance company’s costs become increasingly disproportionate to the number of contract owners remaining. However, unlike mutual funds and other registered investment companies, state insurance laws prohibit insurance companies from terminating or liquidating variable contracts when they are no longer economically viable.*
- *The “Great-West” no-action letters were specifically designed to address this unique problem in a pragmatic and thoughtful manner, but they were withdrawn by the Commission in 2020. The non-enforcement policy that replaced them provides grandfather treatment, but provides no form of going-forward relief.*
- *The absence of going-forward relief is detrimental to both investors and insurance companies. The Commission therefore should extend the non-enforcement policy to qualifying blocks of discontinued VA and VL contracts on a going-forward basis.*

From 1977 until 2020, insurance companies relied heavily on a line of SEC staff no-action letters, commonly known as the “Great-West” letters.⁸ The Great-West letters permitted insurance company depositors and separate accounts to discontinue filing annual post-effective amendments and delivering updated prospectuses to owners of discontinued VAs and VLs, provided that certain conditions were satisfied (*e.g.*, fewer than 5,000 investors, delivery of underlying fund prospectuses and shareholder reports, delivery of financial statements, no material changes to the variable contract). This carefully designed relief alleviated the increasingly disproportionate costs borne by insurers when they are required to update registration statements and deliver updated prospectuses for small blocks of discontinued variable contracts. These disproportionate costs arise from the fact that, unlike mutual funds and other registered investment companies, state insurance regulations prohibit insurance companies from unilaterally liquidating or terminating variable contracts when they are no longer economically viable.

By facilitating the ability of insurers to administer small blocks of discontinued variable contracts in an economically viable manner without sacrificing the protections afforded to investors, the Great-West letters proved over several decades to be an effective, pragmatic solution to a unique problem. Importantly, the Great-West letters also promoted variable product innovation and facilitated consumer choice insofar as insurers, when deciding whether to develop and offer a new variable product, could take comfort from the fact that if the new product offering was discontinued the ongoing costs of administering that closed block of contracts could be mitigated.

⁸ See, *e.g.*, Great-West Life & Annuity Insurance Company, SEC Staff No-Action Letter (pub. avail. Oct. 23, 1990).

In 2020, the Great-West letters were withdrawn as part of the variable contract summary prospectus rulemaking.⁹ In consideration of the extent to which insurers had come to rely on the Great-West letters, the Commission did adopt a non-enforcement policy that provides a form of conditional grandfather treatment. But to the disappointment of the industry, the Commission declined to adopt any form of going-forward relief for discontinued VA or VL contracts. In doing so, the Commission encouraged interested parties to continue sharing their views with the Commission and its staff about the possibility of going-forward relief in the future.

With nearly 50 years of experience under the Great-West letters and the non-enforcement policy combined, it is clear that this type of relief is workable and very important to insurance companies, does not raise fundamental investor confusion or protection issues, and in fact may facilitate variable insurance product innovation and consumer choice. The CAI will be re-engaging on this issue to urge the Commission and the IM staff to extend the non-enforcement policy to qualifying blocks of discontinued VA and VL contracts on a going-forward basis.

New Initiatives: Modernizing Variable Contract Regulation under the 1940 Act

As the Commission is developing a new agenda and setting its priorities, there are opportunities for smart, targeted rulemakings and other regulatory actions that will appropriately modernize the SEC's current regulatory framework. Making electronic delivery the default delivery method under the federal securities laws, as previously discussed, is a perfect example. There are also important modernization opportunities specific to the SEC's regulation of variable annuity and life insurance products. In that regard, and as discussed further below, the CAI has identified several modernizations of the 1940 Act regulatory scheme applicable to variable contracts that would provide significant benefits to retail investors and insurers, and would benefit the overall insurance marketplace. We urge the Commission to include these initiatives in its regulatory agenda.

1. De-Regulation of Variable Contract Exchange Offers under 1940 Act Section 11

- *The existing regulation of variable product exchange offers under Section 11 is fundamentally flawed and outdated. Section 11 creates unfair competitive disadvantages among insurers. In addition, exemptive Rule 11a-2 is burdensome, unclear insofar as it relates VL exchange offers, and is in direct tension with modern standard of conduct regulations, which have generally rendered rigid 1940 Act regulation of variable product exchange offers unnecessary and excessive.*
- *To resolve these issues and remove outdated regulatory barriers, Rule 11a-2 should be amended to broadly permit both VA and VL exchange offers that are subject to standard of conduct regulations.*

Generally, Section 11 of the 1940 Act prohibits an insurance company issuer or principal underwriter of a VA or VL contract (or any affiliated insurer) from making an exchange offer to owners the contract, where such owners are offered a different VA or VL contract in exchange for their existing contract, unless the terms of the offer have been approved by the Commission upon

⁹ See Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts, Release Nos. 33-10765, 34-88358, IC-33814 (Mar. 11, 2020) [85 FR 29614 (May 18, 2020)].

application or otherwise comply with an exemptive rule. Exemptive Rule 11a-2 permits exchange offers involving VAs so long as sales charges on the old and new contracts are “waived” and “tacked” as prescribed by the rule, such that a contract owner will not incur any additional immediate or future sales loads as a direct result of the exchange. Also in play under Section 11 is the so-called “retail exception.” Section 11(a) provides that an offer by a principal underwriter to an individual investor “in the course of a retail business” is not an exchange offer prohibited by Section 11. There was little authority on the retail exception until June 2001, when IM published written guidance in a letter to the insurance industry.¹⁰ In that letter, the staff characterized the retail exception as a fact-specific inquiry and identified various non-exclusive factors that it considers when determining whether an offer falls within the retail exception. Today, the vast majority of VA and VL exchange activity takes place under the retail exception, not pursuant SEC exemptive orders or under Rule 11a-2.

The regulation of exchange offers under the 1940 Act has long been the source of significant frustration, primarily for the following reasons:

- Section 11 creates unfair competitive disadvantages in the marketplace. In general, Section 11 does not apply to exchange offers involving variable contracts issued by unaffiliated insurers.¹¹ Consequently, other insurers and broker-dealers are free to lure away an insurance company’s existing customers with exchange offers, while that insurance company’s ability to counter those offers is severely restricted by Section 11.
- Rule 11a-2 has little real-world utility. The rule’s requirements for waiving and tacking surrender charges are complicated and overly burdensome to administer, and generally incongruous with exchange offers made under the retail exception. As a result, few insurance companies look to Rule 11a-2 as a viable option for performing exchange offers.
- Even though Rule 11a-2 is specific to variable contracts, there is considerable doubt about how and the extent to which the rule applies to VL contract exchange offers. On its face, the rule could be read to generally encompass VL contract exchanges. However, in the adopting release, the Commission indicated that VL contract exchanges involving sales loads are not covered by Rule 11a-2.¹² That statement and the wording of some of the Rule 11a-2 provisions have created confusion for many years, not only for insurance companies, but also for the Commission staff, which has been unable to settle on a consistent interpretation.

Furthermore, putting aside these flaws in the existing framework, it is highly questionable why exchange offers of either VA or VL contracts should even be subject to prescriptive 1940 Act regulation in light of the development and implementation of a comprehensive set of modern

¹⁰ Letter from Susan Nash, Associate Director, U.S. Securities and Exchange Commission, to National Association for Variable Annuities, Insurance Marketplace Standards Association, and American Council of Life Insurers (June 19, 2001).

¹¹ See Alexander Hamilton Funds, SEC Staff No-Action Letter (pub. avail. July 20, 1994).

¹² See Exchange Offers by Certain Registered Separate Accounts or Others, Release No. IC-13407 (Jul. 28, 1983) at 5-6 [48 FR 36243, 36244 (Aug. 10, 1983)] (“However, the Commission has determined not to extend the rule to include variable life exchange offers involving the imposition of a sales load, at least until it has had more experience with this type of exchange offer through the application process.”).

standard of conduct regulations. The legislative purpose of Section 11 is to provide the Commission with an opportunity to review the terms of exchange offers to ensure that a proposed offer is not being made “solely for the purpose of exacting additional selling charges.”¹³ Originally, Section 11 was a necessary investor protection, as there were few, if any, laws to prevent such nefarious sales practices. Today, however, there are robust standard of conduct regulations at the federal and state level—such as the SEC’s Regulation Best Interest, the NAIC Suitability in Annuity Transactions Model Regulation, and the NAIC Life Insurance and Annuities Replacement Model Regulation—which have overlapping requirements that protect against the type of harmful inducements that Section 11 was created to combat.

Indeed, these modern standard of conduct regulations have rendered rigid 1940 Act regulation of exchange offers under Section 11 unnecessary and excessive. For example, exchange offers under the retail exception occur with some frequency, without tacking or waiving of any remaining sales loads, but with broker-dealers making good faith determinations under Regulation Best Interest that those exchange offers are in a customer’s “best interest” due to the particular features, benefits, options and guarantees offered under the respective contracts. Yet, if those exchange offers were made on the exact same terms, but under Rule 11a-2 rather than the retail exception, those offers could be deemed a violation of Section 11. This is an illogical result created by the intersection of Section 11 and standard of conduct regulation, and signals that modern laws have rendered Section 11’s regulation of contract exchanges superfluous.

With these considerations in mind, de-regulation of VA and VL contract exchange offers under Section 11 deserves a high priority in the Commission’s rulemaking agenda. The CAI urges the Commission to propose amendments to Rule 11a-2 that would exempt both VA and VL contract exchanges from Section 11, without any requirement to waive or tack sales loads, on the condition that any such exchange offers be subject to standard of conduct regulation. For the reasons above, the CAI believes such amendments would simultaneously fix the flaws in the existing framework and modernize the regulation of exchange offers. The CAI would welcome the opportunity to further discuss this initiative and collaborate with the Commission and IM on a rulemaking proposal.

2. Access to Registered Closed-End Funds Through Variable Contracts

- *Various types of registered closed-end funds—including traditional closed-end investment companies, interval funds, tender offer funds, and business development companies—continue to grow in popularity and are becoming more widely accessible to the retail investing public.*
- *Retail variable product offerings operate in an overall competitive marketplace that depends to a significant extent on being able to offer an array of underlying fund options similar to what retail investors could purchase directly. Insurance companies are therefore very interested in offering variable contracts that include registered closed-end funds as underlying investment options. However, under the 1940 Act, the interests in a registered separate account must be “redeemable,” making it seemingly impossible to bring a variable product including such options to the public market.*
- *The CAI believes that as a matter of public policy the SEC should be amenable to facilitating the offering of these products. The CAI would welcome an opportunity to discuss with the*

¹³ H. Rep. No. 2639, 76th Cong., 2d Sess. 8 (1940).

Commission and IM staff the legal and policy issues associated with offering variable contracts that include less liquid underlying fund options, including the terms of any potential individual exemptive relief or exemptive rules, so that insurance companies may be better positioned to develop, register and offer such products.

The registered closed-end fund sector has experienced significant growth in recent years. Total assets in registered closed-end funds increased from approximately \$417 billion at year-end 2020 to approximately \$544 billion at year-end 2023.¹⁴ Furthermore, as less liquid investment strategies become increasingly popular, public demand for the various types of closed-end funds is at an all-time high. It is estimated that 3.2 million U.S. households owned shares in closed-end funds in 2023.¹⁵ As such, it should come as no surprise that insurance companies are increasingly interested in offering to retail investors variable insurance contracts that include less liquid options investing in underlying closed-end funds.

There are several reasons why the Commission should be open to, and indeed supportive of, insurance companies' efforts to publicly-offer variable contracts with less liquid investment options:

- Given that the various types of registered closed-end funds are already accessible to retail investors, as well as through retirement accounts and retirement plans, there is no compelling public policy reason why retail investors should not have access to the same types of funds through variable insurance products.
- Variable contracts are especially long-term investments. They are specifically designed for retirement saving and other long-term financial planning, and they typically have design features and surrender charges that strongly discourage short-term investing. Their long-term nature makes them particularly well-suited for less liquid investment options such as registered closed-end funds.
- The public policy reasons that led to the idiosyncratic requirement that variable insurance products always be redeemable securities are murky at best, and in any event are no longer compelling in light of the robust competition in the investment products marketplace and the enhanced investor protections that the SEC and other regulators have implemented over the past 30 years.
- The product is not theoretical – it already exists. Less liquid variable contracts with underlying private and public closed-end funds have been available for several decades to high net-worth individuals and corporate purchasers in the private placement market. Insurance companies would be using the same or very similar product designs, but in a public offering.
- Since the invention of guaranteed living benefit riders – guaranteed lifetime withdrawal benefits, guaranteed minimum income benefits, etc. – there has been limited innovation in the variable insurance product market. Sales of variable products are now being outpaced by other product categories, such as RILAs and fixed indexed annuities. Being able to offer

¹⁴ See Investment Company Institute, 2024 Investment Company Fact Book: US Closed-End Funds.

¹⁵ *Id.*



less liquid underlying fund options is precisely the type of variable product innovation and enhanced investor choice that the market may be looking for at this juncture.

Despite these rather compelling reasons why insurance companies should be permitted to bring less liquid variable insurance products to market, the regulation of variable contracts under the 1940 Act has made it practically impossible to do so. Under state law, variable contracts must be supported by a segregated asset account (or separate account) of the issuing insurance company. Variable products funded by separate accounts that primarily hold securities (*e.g.*, fund shares) and that are publicly offered to retail investors require the registration of the separate account as an investment company. The overwhelming majority of these separate accounts are registered as unit investment trusts (“UITs”) that invest in underlying funds. Under the existing 1940 Act regulatory framework, registered variable contracts and therefore the units issued by the registered separate account must be “redeemable.”¹⁶ As a result unit values must be struck daily,¹⁷ orders must be forward priced,¹⁸ and redemption proceeds must be paid within seven days.¹⁹ The redeemable nature of the separate account units dictates that each underlying fund be daily priced and fully liquid; otherwise, the separate account would be unable to meet its redeemability obligations under the 1940 Act. This is why the underlying funds offered through variable contracts have always been limited to mutual funds (or, in the rare case, exchange-traded funds or other UITs). It’s also why it has been practically impossible to have a UIT separate account that invests in any of the various types of closed-end funds as underlying funds.

Consistent with the overarching goal of increasing retail investor access to investment opportunities, the CAI believes that the SEC should facilitate the offering of registered variable insurance products with less liquid underlying fund options. That in turn means taking the steps necessary to remove the existing regulatory barriers that are preventing insurance companies from registering such products, whether through the proposal and adoption of exemptive rules or through the individual exemptive application process. Therefore, the CAI is requesting the opportunity to discuss with the Commission and IM staff the legal and policy issues associated with offering such less liquid variable insurance products, including the terms of any potential exemptive relief.

¹⁶ See Sections 4 and 27(i) of the 1940 Act (together requiring variable contracts to be redeemable securities, and entitling an investor to a proportionate share of the fund upon presentation). See also Rule 22e-4 under the 1940 Act (requiring UITs to invest their assets in a manner consistent with the redeemable nature of the securities they issue).

¹⁷ See Rule 22c-1 under the 1940 Act (generally requiring daily pricing and processing of purchase and redemption orders for redeemable securities).

¹⁸ See *id.*

¹⁹ See Section 22(e) of the 1940 Act (requiring payment of redemption proceeds within seven days, and generally prohibiting an issuer of redeemable securities from suspending the right of redemption).

3. *Rationalizing and Streamlining Regulation of Underlying Fund Changes*

- *Variable insurance products typically offer many dozens of underlying fund options. At the same time, underlying fund liquidation and merger activity has increased substantially.*
- *There are more than a dozen Commission staff no-action letters relating to underlying fund liquidations and mergers, dating back to as early as 1972.*
- *The Commission should encourage IM staff to work with the CAI on updating the no-action letter framework for underlying fund changes, as there are opportunities to improve the investor experience and reduce burdens and costs for insurance companies.*

Section 26(c) (formerly Section 26(b)) of the 1940 Act prohibits an insurance company depositor of a UIT separate account from substituting underlying funds without first obtaining Commission approval. The classic substitution scenario arises when an insurance company seeks to replace an existing underlying fund in a variable contract with a different underlying fund, such that contract values allocated to the existing fund are to be automatically re-invested in the replacement fund (absent contract owner instructions to allocate any such contract value to another fund). These classic substitution transactions are fairly common. Over several decades, the Commission has approved dozens of applications based on terms and conditions that have been developed, refined, and largely standardized through the application process.²⁰

However, it has never been fully settled whether or what extent underlying fund liquidations and mergers raise issues under Section 26(c). Fund liquidations and mergers do result in changes to the underlying funds offered through a variable contract, and do impact contract owners' existing allocations, but unlike the classic substitution scenario, fund liquidations and mergers generally are not initiated by the insurance company depositor. They are initiated by the underlying funds and their majority independent boards, over which the insurance company depositor has no control. Fortunately, the Commission staff has provided substantial comfort on underlying fund liquidations and mergers through the no-action letter process, such that insurers almost never apply for an order

²⁰ In 2021, the Commission issued a statement regarding applications for substitution orders (the "SEC Statement"). The SEC Statement sets forth the Commission's position that the substitution by an insurance company of registered open-end investment companies used as investment options for variable insurance contracts will not provide a basis for enforcement action under Section 26(c) (and Section 17(a) for in-kind substitutions) if the insurance company does not obtain an order under Section 26(c) (and Section 17(b)) so long as the terms and conditions of the proposed substitution are substantially similar to those approved in a qualifying prior substitution order and certain other conditions are satisfied. *See* Commission Statement on Insurance Product Fund Substitution Applications, Release No. IC-34199 (Feb. 23, 2021). Since 2021, the SEC Statement has proven to be an effective and efficient regulatory tool, with numerous companies relying on the SEC Statement to substitute underlying funds. However, there is a simple, yet important improvement that the CAI wishes to raise with the Commission and IM staff. Specifically, an insurance company that *does not* have a qualifying prior order should nonetheless be permitted to rely on the SEC Statement if an affiliated insurance company *does* have a qualifying prior order. Affiliated insurance companies often have overlapping product offerings, such that a substitution impacting one company's products will similarly impact another affiliated company's products. In such a situation, the utility of the SEC Statement is entirely negated unless all affiliated companies can rely on the relief. Furthermore, precluding affiliated insurance companies from relying on the SEC Statement appears arbitrary in nature, as affiliated companies generally share the same personnel, systems, and other infrastructures.

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under Section 26(c) in connection with a fund liquidation or merger. There are more than a dozen of these no-action letters. The first letter was published in 1972, and the most recent was published in 2008. The letters address a variety of factual scenarios, such as the liquidation of funds that are not affiliated with the insurance company depositor (“unaffiliated funds”),²¹ liquidations of funds that are affiliated with the insurance company depositor (“affiliated funds”),²² mergers of unaffiliated funds subject to a shareholder vote,²³ mergers of affiliated funds subject to a shareholder vote,²⁴ and mergers under Rule 17a-8.²⁵

The CAI cannot overstate how valuable these no-action letters are to the insurance industry. Variable insurance products typically offer dozens of underlying fund options, with some products offering in excess of 100 options. Frankly, it would be impossible to administer variable contracts if an insurance company depositor had to seek relief under Section 26(c) every time that an underlying fund liquidated or merged. Nonetheless, with underlying fund liquidation and merger activity on the rise in recent years, the CAI believes that there are meaningful opportunities for rationalization and modernization of the no-action letter framework. For example:

- The letters related to the liquidation of unaffiliated funds permit insurance company depositors to reallocate liquidation proceeds to a money market fund in the absence of contract owner instructions. The CAI agrees that a money market fund is well-suited to serve as a default reallocation option, but believes that insurance company depositors should be permitted to use other default options, such as fixed account options or other types of ultra-conservative funds, for the same purpose.
- The letters related to the liquidation of affiliated funds call for a shareholder vote, even if the fund’s governance documents do not require a shareholder vote to liquidate. This is an incredibly awkward and confusing procedure, especially because the fund’s proxy statement in this circumstance focuses on how the insurance company depositor intends to reallocate the liquidation proceeds. In any event, given that all underlying funds are governed by majority independent boards, there is no clear reason why *affiliated* fund liquidations should continue to be subject to different no-action terms and conditions compared to *unaffiliated* fund liquidations. As such, the CAI believes that the no-action framework for unaffiliated fund liquidations should be expanded to encompass affiliated fund liquidations.
- Generally, the letters related to underlying fund mergers require the surviving fund to be added as an underlying fund under the contract. As a result, if the surviving fund is not already included in the menu of investment options, the insurance company depositor is

²¹ See American Enterprise Life Insurance Company, SEC Staff No-Action Letter (pub. avail. Apr. 30, 2002); AIG Life Insurance Company, SEC Staff No-Action Letter (pub. avail. Aug. 16, 2001).

²² See Northwestern Nat’l Life Insurance Company, SEC Staff No-Action Letter (pub. avail. Apr. 10, 1995); Northwestern Nat’l Life Insurance Company, SEC Staff No-Action Letter (pub. avail. Apr. 27, 1990).

²³ See, e.g., Life Insurance Company of North America, SEC Staff No-Action Letter (pub. avail. Oct. 28, 1978); TMR Appreciation Fund, Inc., SEC Staff No-Action Letter (pub. avail. Nov. 23, 1974).

²⁴ See, e.g., Connecticut General Life Insurance Company, SEC Staff No-Action Letter (pub. avail. Oct. 3, 1985); American General Enterprise Fund, Inc., SEC Staff No-Action Letter (pub. avail. Aug. 29, 1979); Washington National Insurance Company, SEC Staff No-Action Letter (pub. avail. June 8, 1979).

²⁵ See Janus Aspen Series, SEC Staff No-Action Letter (pub. avail. Apr. 10, 2008).



effectively forced into onboarding (and doing business with) the surviving fund. The CAI's view is that the insurance company depositor should have a choice in onboarding the surviving fund, and if the insurance company decides not to do so, it should be permitted to use any default reallocation option permitted under the liquidation no-action letters.

- Under the no-action letters, the investor notice requirements differ. Some letters require multiple notices, some require only one, and some do not specify any particular notice requirements. The notice requirements for underlying fund liquidations and mergers should be conformed. For simplicity and to reduce burdens, the CAI believes that the notice requirement for any underlying fund liquidation or merger should generally track the notice requirement that has been a longstanding condition for substitution orders (*i.e.*, single notice pre-transaction, reminder with the transaction confirmation).

The CAI intends to engage with IM staff on updating the regulation of underlying fund changes, with the overall goal of improving the investor experience and reducing burdens and costs for insurance companies. The CAI asks that the Commission support these efforts by encouraging IM staff to collaborate with the CAI on rationalizing and modernizing this existing no-action letter framework.

Conclusion

We very much appreciate the Commission's consideration of the regulatory initiatives and goals enumerated and summarized above. The CAI stands ready to provide any information that may further the Commission's consideration of these initiatives. We are prepared to meet with Commissioners, their staffs, and IM staff in an effort to ensure these initiatives are accorded the high priority we believe they are due.

APPENDIX A

THE COMMITTEE OF ANNUITY INSURERS MEMBER LIST

Allianz Life
Ameriprise Financial
American Equity Investment Life Insurance Company
Athene USA
Augustar Life
Brighthouse Financial, Inc.
Corebridge Financial
Equitable
Fidelity & Guaranty Life Insurance Company
Fidelity Investments Life Insurance Company
Fortitude Re
Genworth Financial
Global Atlantic Financial Group
Guardian Insurance & Annuity Co., Inc.
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Lincoln Financial Group
Massachusetts Mutual Life Insurance Company
Metropolitan Life Insurance Company
Nationwide Life Insurance Companies
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Pacific Life Insurance Company
Protective Life Insurance Company
Prudential Insurance Company of America
Sammons Financial Group
Security Benefit Life Insurance Company
Symetra Financial Corporation
Talcott Life Insurance Company
Thrivent
TIAA
TruStage
USAA Life Insurance Company

APPENDIX B

COMMENT LETTERS SUBMITTED TO THE COMMISSION BY THE CAI SINCE 2022

Committee of Annuity Insurers, Supplement to Comment Letter on Registration for Index-Linked Annuities; Amendments to Form N-4 for Index-Linked and Variable Annuities, File No. S7-16-23 (Apr. 5, 2024) available at <https://www.sec.gov/comments/s7-16-23/s71623-1167914.htm>.

Committee of Annuity Insurers, Comment Letter on Registration for Index-Linked Annuities; Amendments to Form N-4 for Index-Linked and Variable Annuities, File No. S7-16-23 (Nov. 28, 2023) available at <https://www.sec.gov/comments/s7-16-23/s71623-303439-781302.pdf>.

Committee of Annuity Insurers, Comment Letter on Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, File No. S7-12-23 (Oct. 10, 2023) available at <https://www.sec.gov/comments/s7-12-23/s71223-270779-653502.pdf>.

Committee of Annuity Insurers, *et al.*, Joint Comment Letter of 26 Joint Trade Associations on Safeguarding Advisory Client Assets, File No. S7-04-23 (Sep. 12, 2023) available at <https://www.sec.gov/comments/s7-04-23/s70423-258159-603042.pdf>.

American Council of Life Insurers and Committee of Annuity Insurers, Supplement to Joint Comment Letter on Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, File No. S7-26-22 (Aug. 24, 2023) available at <https://www.sec.gov/comments/s7-26-22/s72622-250519-571902.pdf>.

Committee of Annuity Insurers, Comment Letter on Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Adopt Supplementary Material .18 (Remote Inspections Pilot Program) under FINRA Rule 3110 (Supervision), File No. SR-FINRA-2023-007 (May 25, 2023) available at <https://www.sec.gov/comments/sr-finra-2023-007/srfinra2023007-195079-387362.pdf>.

Committee of Annuity Insurers, Supplement to Comment Letter on Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies, File No. S7-04-22 (May 22, 2023) available at <https://www.sec.gov/comments/s7-04-22/s70422-192539-383122.pdf>.

Committee of Annuity Insurers, Comment Letter on Safeguarding Advisory Client Assets, File No. S7-04-23 (May 8, 2023) available at <https://www.sec.gov/comments/s7-04-23/s70423-187999-343062.pdf>.

Committee of Annuity Insurers, Comment Letter on Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Adopt Supplementary Material .19 (Residential Supervisory Location) under FINRA Rule 3110 (Supervision), File No. SR-FINRA-2023-006 (Apr. 27, 2023) available at <https://www.sec.gov/comments/sr-finra-2023-006/srfinra2023006-20165207-334511.pdf>.



- American Council of Life Insurers and Committee of Annuity Insurers, Joint Comment Letter on Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, File No. S7-26-22 (Feb. 14, 2023) available at <https://www.sec.gov/comments/s7-26-22/s72622-20157259-325508.pdf>.
- Committee of Annuity Insurers, Supplement to Comment Letter on Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Adopt Supplementary Material .18 (Remote Inspections Pilot Program) under FINRA Rule 3110 (Supervision), File No. SR-FINRA-2022-021 (Dec. 7, 2022) available at <https://www.sec.gov/comments/sr-finra-2022-021/srfinra2022021-20152480-320343.pdf>.
- Committee of Annuity Insurers, Supplement to Comment Letter on Notice of Filing of a Proposed Rule Change to Adopt Supplementary Material .19 (Residential Supervisory Location) under FINRA Rule 3110 (Supervision), File No. SR-FINRA-2022-019 (Nov. 23, 2022) available at <https://www.sec.gov/comments/sr-finra-2022-019/srfinra2022019-20151665-320138.pdf>.
- Committee of Annuity Insurers, Comment Letter on Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Adopt Supplementary Material .18 (Remote Inspections Pilot Program) under FINRA Rule 3110 (Supervision), File No. SR-FINRA-2022-021 (Sep. 6, 2022) available at <https://www.sec.gov/comments/sr-finra-2022-021/srfinra2022021-20138362-308395.pdf>.
- Committee of Annuity Insurers, Comment Letter on Notice of Filing of a Proposed Rule Change to Adopt Supplementary Material .19 (Residential Supervisory Location) under FINRA Rule 3110 (Supervision), File No. SR-FINRA-2022-019 (Aug. 23, 2022) available at <https://www.sec.gov/comments/sr-finra-2022-019/srfinra2022019-20137273-307827.pdf>.
- Committee of Annuity Insurers, Comment Letter on Investment Company Names, File No. S7-16-22 (Aug. 16, 2022) available at <https://www.sec.gov/comments/s7-16-22/s71622-20145034-309624.pdf>.
- Committee of Annuity Insurers, Comment Letter on The Enhancement and Standardization of Climate-Related Disclosures for Investors, File No. S7-10-22 (June 17, 2022) available at <https://www.sec.gov/comments/s7-10-22/s71022-20131983-302449.pdf>.
- Committee of Annuity Insurers, Comment Letter on Notice of Shortening the Securities Transaction Settlement Cycle, File No. S7-05-22 (Apr. 11, 2022) available at <https://www.sec.gov/comments/s7-05-22/s70522-20123276-279544.pdf>.
- Committee of Annuity Insurers, Comment Letter on Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies, File No. S7-04-22 (Apr. 11, 2022) available at <https://www.sec.gov/comments/s7-04-22/s70422-20123264-279536.pdf>.
- Committee of Annuity Insurers, Comment Letter on Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants, File No. S7-19-2 (Jan. 3, 2022) available at <https://www.sec.gov/comments/s7-19-21/s71921-20111255-264899.pdf>.