

**MEMO# 33133**

February 25, 2021

# **SEC Issues Statement Providing No-Action Relief for Substitution of Variable Insurance Product Investment Options**

[33133]

February 25, 2021 TO: ICI Members

SEC Rules Committee

Variable Insurance Products Advisory Committee SUBJECTS: Fees and Expenses  
Investment Advisers

Variable Insurance Products RE: SEC Issues Statement Providing No-Action Relief for  
Substitution of Variable Insurance Product Investment Options

On February 23, the Securities and Exchange Commission issued a policy statement (“Statement”) regarding the substitution by insurance companies of funds used as investment options in variable insurance contracts. The Commission will not recommend enforcement action for a substitution made without a request for exemptive relief under section 26(c) (and section 17(b)) of the Investment Company Act of 1940 so long as the terms and conditions of the substitution are substantially similar to those approved in a prior substitution order obtained by the insurance company since January 1, 2004.[\[1\]](#) Any insurance company that has not obtained an order under section 26(c) for a substitution since January 1, 2004 will need to apply for one.

Any insurance company making a substitution pursuant to the Statement must submit correspondence to the Commission staff, accompanying the company’s disclosure of the upcoming substitution in a prospectus supplement filed with the Commission pursuant to Rule 497 under the Securities Act of 1933. Such correspondence should:

1. indicate that the substitution is of the type discussed in the Statement;
2. identify the prior order with substantially similar terms and conditions on which the company is relying;[\[2\]](#)
3. confirm that the substitution is consistent with the terms and conditions of the identified prior order; and
4. explain why each existing fund and corresponding replacement fund are substantially similar, including a comparison of the investment objectives, strategies, and risks of each existing fund and its corresponding replacement fund.

The Commission bases its relief on its understanding that insurance companies typically reserve the right, subject to compliance with applicable laws, to substitute investment options and offer separate accounts with the expectation and understanding that the companies will have the ability to make changes among the investment options in appropriate circumstances.

Further, the Commission reviews its history of administering substitution orders and concludes that it has consistently required terms and conditions that focus on key investor protections designed to address the concerns expressed in the legislative history of section 26(c). These conditions include, among others, disclosure notifying affected contract owners at least 30 days in advance of the substitution; a requirement that each substitute fund have substantially similar investment objectives, principal investment strategies, and principal risks to the fund it is replacing; and a cap on total operating expenses of the substitute fund, such that they will not exceed those of the fund it is replacing for at least two years. The Commission asserts that the terms and conditions of substitution applications it has approved under section 26(c) have been substantially similar to one another for at least the past 17 years.<sup>[3]</sup>

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#### **endnotes**

<sup>[1]</sup> Commission Statement on Insurance Product Fund Substitution Applications, Release No. IC-34199 (Feb. 23, 2021), *available at* <https://www.sec.gov/rules/policy/2021/ic-34199.pdf>. The Statement is effective upon its publication in the Federal Register.

<sup>[2]</sup> While it uses the term “substantially similar” in the conditions for relief in the statement, the Commission does not define the term or reference its recent rulemaking that established an expedited review process for certain exemptive applications under the Investment Company Act that are “substantially identical” to two previously approved precedential applications. See Amendments to Procedures With Respect to Applications Under the Investment Company Act of 1940, Release No. IC-33921 (July 6, 2020), *available at* <https://www.sec.gov/rules/final/2020/ic-33921.pdf>.

<sup>[3]</sup> Although not mentioned in the Statement, the Commission’s relief follows its recent issuance of an order approving a contested application for exemptive relief under sections 26(c) and 17(b). That order addressed in detail the standard of relief under section 26(c), which permits the SEC to grant an order approving a substitution “if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter.” See ICI Memorandum No. 32989 (Dec. 16, 2020), *available at* [https://www.ici.org/my\\_ici/memorandum/memo32989](https://www.ici.org/my_ici/memorandum/memo32989); see also Order under Section 26(c) of the Investment Company Act of 1940 Granting Approval of Substitutions under Section 17(b) of the Act Granting An Exemption from Section 17(a) of

the Act (Dec. 4, 2020), Investment Company Act Release No. 34129, *available at* <https://www.sec.gov/rules/ic/2020/ic-34129.pdf>.

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