

**MEMO# 35492**

October 17, 2023

# SEC Proposes Amendments to Form N-4 for Registration of Index-Linked Annuities

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TO: ICI Members

Variable Insurance Products Advisory Committee SUBJECTS: Disclosure

Variable Insurance Products RE: SEC Proposes Amendments to Form N-4 for Registration of Index-Linked Annuities

On September 29, 2023, the Securities and Exchange Commission (SEC), by seriatim, issued a proposal (the "Proposal") related to registration of offerings of registered index-linked annuities (RILAs).<sup>[1]</sup> Specifically, the SEC proposed to amend Form N-4, which is the form currently used by most variable annuity (VA) separate accounts, to require issuers of RILAs to register securities offerings on that form. The SEC also proposed other amendments to Form N-4 that would apply to all issuers, including VAs, that use the form. To better facilitate these amendments and the filing of the proposed amended Form N-4, the SEC additionally proposed other amendments to rules and regulations that cross-reference or interact with Form N-4. Finally, the SEC proposed to apply to RILAs Rule 156 under the Securities Act of 1933 ("Securities Act"), which provides guidance as to when sales literature is materially misleading. If adopted, the Proposal would implement the Registered Index-Linked Annuities Act of 2022 ("RILA Act"), which directed the SEC to adopt a new registration form for RILA offerings.

Comments on the Proposal are due November 28, 2023. Please feel free to reach out to Kevin Ercoline, at [kevin.ercoline@ici.org](mailto:kevin.ercoline@ici.org), or Sarah Bessin, at [sarah.bessin@ici.org](mailto:sarah.bessin@ici.org), with any questions or comments. A summary of the Proposal is below.

## Overview of Form N-4 Amendments

The chart below outlines the items in Form N-4 that will be affected by the Proposal with the most material changes described in more detail below.<sup>[2]</sup>

Item

Description

## Substantive Changes

### Prospectus (Part A)

1

#### Front and Back Cover Pages

Adding new legends and other standardized disclosures applicable to all issuers.

2

#### Overview of the Contract

New RILA-specific disclosures; moving order of appearance up.

3

#### Key Information

New RILA-specific disclosures; changing to a question-and-answer format; moving order of appearance down; change discussion of restrictions on optional benefits to cover all benefits.

4

#### Fee Table

New contract adjustment disclosure.

5

#### Principal Risks of Investing in the Contract

Providing more detailed disclosures applicable to all issuers.

6

#### Description of the Insurance Company, Registered Separate Account, and Investment Options

New RILA-specific disclosures and new item regarding variable options.

7

#### Charges

New disclosures related to contract adjustments.

8

#### General Description of Contracts

No substantive change.

9

#### Annuity Period

No substantive change.

10

#### Benefits Available Under the Contract

No substantive change.

11

#### Purchases and Contract Value

No substantive change.

12

#### Surrenders and Withdrawals

No substantive change.

13

#### Loans

No substantive change.

14

#### Taxes

No substantive change.

15

#### Legal Proceedings

No substantive change.

16

#### Financial Statements

No substantive change (but see Item 26).

17

#### Investment Options Available Under the Contract

New RILA-specific disclosures.

#### Statement of Additional Information (Part B)

18

## Cover Page and Table of Contents

No substantive change.

19

## General Information and History

No substantive change.

20

## Non-Principal Risks of Investing in the Contract

No substantive change.

21

## Services

No substantive change.

22

## Purchase of Securities Being Offered

New disclosure of specific contract adjustment information.

23

## Underwriters

No substantive change.

24

## Calculation of Performance Data

Clarifying only applies to variable options.

25

## Annuity Payments

No substantive change.

26

## Financial Statements

Providing that RILA issuers can use the relevant instructions related to financial statements prepared in accordance with SAP; requirements relating to changes in and disagreements with accountants for RILAs.

## Other Information (Part C)

27

### Exhibits

Adding power of attorney for all issuers and accountant letters for RILA issuers as exhibits.

28

### Directors and Officers of the Insurance Company

No substantive change.

29

### Persons Controlled or Under Common Control with the Insurance Company or the Registrant

No substantive change.

30

### Indemnification

No substantive change.

31

### Principal Underwriters

No substantive change.

31A

### Information about contracts with Index-Linked Options

New disclosure of RILA specific information.

32

### Location of Accounts and Records

No substantive change.

33

### Management Services

No substantive change.

34

### Fee Representation and Undertakings

Adding new RILA undertakings.

## **Key Information Table**

The Key Information Table (KIT) currently includes a summary of five topic areas: (1) fees and expenses; (2) risks; (3) restrictions; (4) taxes; and (5) conflicts of interest. As part of the required KIT disclosure, the SEC is proposing specific disclosure for RILAs related to how RILAs operate that would be similar to disclosure required of VAs. The SEC is also proposing three modifications to the KIT that would apply to both RILAs and VAs. In a change from current Form N-4, the KIT would be required to be presented in a question-and-answer ("Q&A") format. Second, the KIT (current Item 2) would be presented after the "Overview of the Contract" disclosures (current Item 3), thus making KIT disclosure Item 3 and Overview of the Contract disclosure Item 2. Third, Form N-4's general instruction that information included in the KIT or Overview of the Contract need not be repeated will be removed.

## **Principal Disclosure Regarding RILAs**

The SEC is proposing three primary amendments to Form N-4 to provide investors with principal disclosures regarding RILAs and available index-linked options. First, investors would receive a concise description of the basic information about any index-linked option available under the contract as well as any contract adjustments in the "Overview of the Contract" section. As part of this requirement, all contracts registered on the form, including VAs, would be required to discuss all primary contract benefits, not just optional benefits.<sup>[3]</sup> Second, investors would be provided with detailed information, including how interest is calculated and credited, about available index-linked options in the "Description of the Insurance Company, Registered Separate Account, and Investment Options" section (Item 6). Because contracts also often include fixed options, the SEC is proposing similar disclosure in this section for fixed options. Third, investors would be provided with a summary information table,<sup>[4]</sup> with legends highlighting risks, that outlines the available index-linked options and fixed options in the "Investment Options Available Under the Contract" section (Item 17). These amendments build on the existing disclosure requirements in each item to help ensure that investors have key information about the annuity contract and available investment options, regardless of whether the contract is a VA, a RILA, or combination contract offering variable, index-linked, and fixed options.

## **Principal Risks of Investing in the Contract**

Currently, Form N-4's "Principal Risks of Investing in the Contract" section (Item 5) consists of a single paragraph requiring a registrant to summarize in the prospectus the principal risks of purchasing a contract, including the following risks: (1) poor investment performance, (2) that contracts are unsuitable as short-term savings vehicles, (3) limitations on access to cash value through withdrawals, and (4) the possibility of adverse tax consequences. The SEC is proposing to retain those substantive risk disclosure requirements but would restructure the current single paragraph into separate sub-items in addition to adding new disclosure sub-items and making certain changes designed to clarify and expand existing disclosures. The proposed approach would retain the current requirement for registrants, including VAs, to explain the principal risks of purchasing a contract, but would also require an explanation of the principal risks of investing in an investment option.<sup>[5]</sup> The new disclosure sub-items would relate to 1) risk disclosure tailored to RILAs; 2) principle risks associated with any contract benefits; 3) principle risks associated with the insurance company's ability to meet its guarantees under the contract; and 4) principle risks relating to any material reservation of rights under the contract.<sup>[6]</sup>

## **Other Proposed Form N-4 Amendments**

## ***Contract Adjustments and Other Fee and Expense Disclosure***

The SEC proposes to amend Form N-4 fee and expense disclosure (Item 4) to require specific disclosures regarding contract adjustments and other implicit RILA-specific costs that can result in a significant erosion of investment principal. Additional disclosure for RILAs related to contract adjustments, as well as applying certain existing disclosure, will be required in the "Charges" section (Item 7) and the "Purchases of Securities Being Offered" section (Item 22) of Form N-4. The SEC also proposes revisions to Items 4, 7, and 22, applicable to all registrants, including VAs, to clarify certain terminology and standardize certain disclosures.[\[7\]](#)

## ***Information About Contracts with Index-Linked Options***

The SEC proposes new Item 31A of Form N-4 to require census-type information regarding RILAs offered in connection with the applicable registration statement. Specifically, an insurance company would be required to provide, with respect to RILAs offered: (1) the name of each contract; (2) the number of contracts outstanding; (3) the total value of investor allocations attributable to index-linked options; (4) the number of contracts sold during the prior calendar year; (5) the gross premiums received during the prior calendar year; (6) the amount of contract value redeemed during the prior calendar year; and (7) whether the contract is a "combination contract," that is, a contract that offers variable options in addition to index-linked options. This information would be required as of the most recent calendar year-end and, accordingly, would generally be updated through a post-effective amendment to a registration statement on Form N-4.

## ***Filing, Administrative, and Technical Amendments***

The SEC proposes several other amendments that are necessary so that RILAs can use Form N-4. These include amendments to Form N-4's facing sheet, definitions,[\[8\]](#) exhibit list,[\[9\]](#) and required representations and undertakings, as well as amendments to certain Securities Act rules[\[10\]](#) that help to implement the proposal.

The SEC is also proposing several technical amendments, as well as amendments related to the filing process, for RILA issuers and Form N-4.

- **Inline XBRL Tagging:** RILA issuers would also have to tag certain of the information they would disclose in their prospectuses and SAs in a structured, machine-readable data language (Inline XBRL). RILA issuers, in addition to VA issuers whose contracts offer fixed options, would also have to tag the proposed descriptions of fixed options available under the contract. The proposed Inline XBRL requirements, like the current Inline XBRL requirements for VAs, would only apply to contracts being sold to new investors.
- **Accounting:** Financial statements filed in connection with a RILA registration statement could be prepared in accordance with statutory accounting principles (SAP) to the same extent as currently permitted for insurance companies' financial statements filed on Form N-4. RILAs, but not VAs, would also be required to provide information relating to changes in, and disagreements with, accountants on accounting and financial disclosure as well as, as an exhibit, any letter from the insurance company's former independent accountant regarding its concurrence or disagreement with the statements made by the insurance company in the registration statement concerning the resignation or dismissal of the accountant.
- **Fee Payment Method and Form 24F-2:** Insurance companies would be required to pay RILA security registration fees in the same manner as VA issuers. Specifically, issuers registering offerings of RILAs on amended Form N-4 would be deemed to be

registering an indeterminate amount of securities and would pay registration fees annually based on net sales on Form 24F-2.

- **Post-Effective Amendments and Prospectus Supplements:** Similar to other registrants that file on Form N-4, RILA issuers would use Rule 485 under the Securities Act when amending RILA registration statements. Additionally, RILA issuers would use Rule 497 under the Securities Act when appropriate to file RILA prospectuses and prospectus supplements.
- **Prospectus Delivery:** RILA issuers will be prohibited from relying on Rule 172 under the Securities Act in connection with a RILA offering. Registered investment companies, including VA separate accounts, are excluded from Rule 172 and therefore must deliver a prospectus to investors. RILA issuances will be subject to the same standard of prospectus delivery as registered investment companies.

## **Option to Use a Summary Prospectus**

The SEC is proposing to amend Rule 498A under the Securities Act to permit RILA issuers, as well as issuers of "combination contracts" offering a combination of index-linked options and variable options, to use a summary prospectus to satisfy statutory prospectus delivery obligations. The proposed amendments to Rule 498A would involve the use of two distinct types of summary prospectuses for RILAs, employing the same approach Rule 498A currently uses for VAs. An "initial summary prospectus," covering contracts offered to new investors, would include certain key information about the contract's most salient features, benefits, and risks, presented in plain English in a standardized order. The Proposal would also require "updating summary prospectuses" to be provided to existing investors in RILAs as a condition to relying on the Rule 498A. The updating summary prospectus would include a brief description of certain changes to the contract that occurred during the previous year, as well as a subset of the information required to appear in the initial summary prospectus.

As under current Rule 498A for VAs, the proposed use of summary prospectuses for RILAs would be voluntary. A RILA issuer relying on Rule 498A (like a VA issuer relying on the Rule), would have to make the contract's current initial summary prospectus, updating summary prospectus, statutory prospectus, and SAI available online.

## **Materially Misleading Statements in RILA Sales Literature and Rule 156**

The SEC proposes to make Rule 156 under the Securities Act applicable to RILA sales literature. Rule 156 is an interpretive rule that sets out factors to be weighed in considering whether a statement involving a material fact is or might be misleading in the specific context of investment company sales literature for purposes of the federal securities laws, including sales literature relating to the sale of VAs. The SEC believes that, like investment company sales literature generally (and VA marketing materials particularly), RILA advertisements discuss complex investment features, and RILA issuers would benefit from Rule 156's contextual analysis in considering whether a particular representation is materially misleading.[\[11\]](#) At this time, the SEC is not proposing to amend Rule 482 under the Securities Act to cover RILAs.[\[12\]](#)

## **Withdrawal of Existing SEC No-Action Letters**

If the Proposal is adopted, a number of existing SEC no-action letters (or portions thereof) would be withdrawn or rescinded as part of any final rule. The SEC's Proposal lists these no-action letters,[\[13\]](#) which generally exempt insurance companies from the requirement to provide financial statements prepared in accordance with GAAP in connection with the



registration of an offering of RILAs on Form S-1, given that the Proposal, if adopted, would permit RILAs to provide SAP financial statements, as permitted for VA issuers on current Form N-4.

## **Request for Comment on Registered Market-Value Adjustments Annuities**

In addition to RILAs, there are other non-investment company insurance products that are securities under the federal securities laws. Like RILAs, offerings of these securities are currently registered by insurance companies on Forms S-1 or S-3. For example, some annuity contracts that offer fixed investment options and apply market-value adjustment annuities ("MVAs") to amounts withdrawn from such fixed options before the end of the fixed option's term (e.g., due to contract withdrawals, transfers to other investment options, and annuitization) are required to register. Given that Congress's mandate was focused on RILAs and dictated specific timelines, the SEC does not currently propose to amend Form N-4 to allow the registration of MVAs. However, the SEC requests comment on whether it should amend Form N-4 in the future to allow for MVA registration.

## **Compliance Period and Initial and Amended Filings**

The SEC proposes to provide a six-month delayed effective date for all amendments except for the amended Form N-4, amended Rule 498A under the Securities Act, and technical amendments to Form N-6, such that all other final amendments would be effective six months after publication in the Federal Register. Thus, a registrant would be able to rely on Rule 498A to satisfy its obligations to deliver a RILA contract's statutory prospectus beginning on the effective date of the amendments, provided that the registrant is also in compliance with the amendments to Form N-4. The delayed effective date for the remaining amendments would provide the SEC time to prepare the EDGAR system to accommodate transitioning RILA offerings onto the proposed framework. The SEC proposes a compliance date one year after publication of any final amendments in the Federal Register.[\[14\]](#)

Initial registration statements for RILA offerings on Form N-4, as well as post-effective amendments that are annual updates filed after the compliance date, would be required to comply with the amendments. RILAs that have previously registered offerings of securities on Forms S-1 or S-3 would file a post-effective amendment to their registration statement pursuant to Rule 485(a) under the Securities Act at the time of their next annual update following the compliance date, using Form N-4.[\[15\]](#) In appropriate circumstances, the SEC would consider requests by registrants with respect to existing VA contracts to file post-effective amendments pursuant to Rule 485(b) when these post-effective amendments make conforming changes to comply with any final amendments to Form N-4.

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### **Notes**

[\[1\]](#) Registration for Index-Linked Annuities; Amendments to Form N-4 for Index-Linked and

Variable Annuities, Investment Company Act Release No. 35028, 88 Fed. Reg. 71088 (Oct. 13, 2023), available at <https://www.sec.gov/files/rules/proposed/2023/33-11250.pdf>.

[2] For RILAs, the offering of securities would be registered under Form N-4 but the insurance company offering the securities would not register, as the insurance company is not an investment company that must register.

[3] For example, a benefit under the contract, such as a non-optional guaranteed living benefit, might be characterized as a standard benefit and not currently required to be discussed but nonetheless is a key feature of the contract.

[4] For index-linked options, the table would require, in sequential columns, the identification of (1) each index by name; (2) type of index; (3) crediting period, indicating the duration of the index-linked option in years; (4) index crediting methodology; (5) limits on index loss if held to the end of the crediting period; and (6) guaranteed minimum limit on index gain. The fixed option table would include columns identifying (1) the name of the fixed option, (2) the term, and (3) the minimum guaranteed interest rate.

[5] The SEC believes that most contracts offering variable options that are currently registered on Form N-4 likely would not need to revise their risk disclosure in response to the proposed amendments to the risk disclosure requirements.

[6] This would include, if applicable, (1) the right to remove or substitute portfolio companies; (2) add or remove index-linked options and change the features of an index-linked option from one crediting period to the next; (3) stop accepting additional purchase payments; and (4) impose investment restrictions or limitations on transfers.

[7] For example, base contract expenses in the annual contract expenses table may now be expressed as a percentage of average account value or contract value.

[8] Among other definition changes, the SEC proposes to change the definition of "depositor" to "insurance company" with slight amendments because an insurance company issuing a RILA is not acting as a depositor.

[9] Amendments impacting VAs include the requirement to file powers of attorney. Additionally, the SEC proposes a technical amendment to Form N-4 and N-6 to fix the incorrect exhibit cross-references adopted in 2020 as part of the "Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets" adopting release.

[10] Rules 405, 480, 481, 483, and 484. The SEC also proposes to add a definition of "registered index-linked annuity" under Rule 405 to include an annuity or an option available under an annuity (1) that is deemed a security; (2) that is offered or sold in a registered offering; (3) that is issued by an insurance company that is the subject to the supervision of either the insurance commissioner or bank commissioner of any state or any agency or officer performing like functions as such commissioner; (4) that is not issued by an investment company; and (5) whose value, either during the accumulation period or after annuitization or both, will earn positive or negative interest based, in part, on the performance of any index, rate, or benchmark.

[11] As it relates to guidance, the SEC notes that, in its preliminary view, showing the historical performance of a specific RILA or any particular index-linked option would generally be materially misleading. This is because the terms of a RILA investment, such as

limits on gains, change frequently, making past performance irrelevant to current investors who are not able to utilize those past rates in current market conditions.

[\[12\]](#) As a result, RILA sales literature, as "free writing" prospectuses, would continue to be subject to Rules 164 and 433 under the Securities Act, as well as any other applicable rule that permits a communication notwithstanding the "gun jumping" provisions of the Securities Act.

[\[13\]](#) See Proposing Release, 88 Fed. Reg. at 71144. The SEC would not be rescinding exemptions provided in any of the letters with respect to non-RILA insurance products unaffected by the Proposal.

[\[14\]](#) This compliance period would apply for all of the amendments in this release other than the technical amendment to Form N-6.

[\[15\]](#) RILA registrants generally should be able to rely on template filing relief, in which case they would not need to file a Rule 485(a) filing for each RILA.

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