

COMMENT LETTER

February 15, 2019

ICI Files Comment Letter with SEC on Variable Insurance Products Summary Prospectus Proposal (pdf)

February 15, 2019 Mr. Brent J. Fields, Secretary US Securities and Exchange Commission 100 F Street, NE Washington, DC 20549-1090 Re: Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts (File No. S7-23-18) Dear Mr. Fields: The Investment Company Institute¹ strongly supports the Securities and Exchange Commission's recent proposal that would permit issuers of variable annuity contracts and variable life insurance contracts (together, VIPs) to use a summary prospectus to satisfy their statutory prospectus delivery obligations ("VIP Summary Prospectus Rule").² We believe that the simplified disclosure and delivery requirements under the VIP Summary Prospectus Rule, particularly as they relate to underlying portfolio companies that fund VIPs, would benefit investors by allowing them to receive information in a more understandable manner. We particularly support the SEC requiring VIP issuers to include in an appendix to the summary prospectus certain key information about the portfolio companies available under the contract, and providing an optional online delivery method for portfolio company prospectuses. We provide, below, several recommendations to further improve the utility of the VIP Summary Prospectus by promoting consistency with existing disclosure requirements and practices relating to underlying portfolio companies. 1 The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US\$20.7 trillion in the United States, serving more than 100 million US shareholders, and US\$7.0 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC. 2 Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts, Investment Company Act Release No. 33286 (Oct. 30, 2018), 83 Fed.Reg. 61730 (Nov. 30, 2018) ("Release"), available at <https://www.govinfo.gov/content/pkg/FR-2018-11-30/pdf/2018-24376.pdf>. Mr. Brent J. Fields February 15, 2019 Page 2 of 15 I. Background and Executive Summary ICI members include open-end registered investment companies ("mutual funds") that serve as investment options underlying VIPs (referred to in the Release as "portfolio companies"). Portfolio companies are an essential part of a VIP because they provide the means by which VIP owners participate in the market. A VIP owner's selection of portfolio companies is an

important investment decision, as the performance of those portfolio companies affects the VIP's value. The summary prospectus for mutual funds has been available for many years. We welcome the SEC's long overdue proposal to permit VIPs to also use a summary prospectus. Modernizing and revising the disclosure framework for VIPs will support the ability of VIP owners to make more informed investment decisions. Investors will benefit from clear and concise disclosure of key information and will be able to access more detailed information if they want it. Reflecting our membership, our comments, summarized below, focus on the implications of the Commission's proposal with respect to portfolio companies. We support the SEC's proposed requirement to include an appendix ("Appendix") to each initial and updating summary prospectus under proposed Rule 498A ("VIP Summary Prospectus"). We recommend that the Commission make the following additional enhancements to the Appendix, consistent with mutual fund disclosure requirements:

- Permit VIP issuers to include a statement informing investors how and where they may obtain more current portfolio company performance information;
- Permit VIP issuers to provide, in addition to performance information for each portfolio company for the past 1-year, 5-year and 10-year periods, performance information for the life of the portfolio company, if longer than 10 years;
- Permit VIP issuers to include a portfolio company's net expense ratio after any waivers and/or reimbursements; and
- Require disclosure only of those portfolio company sub-advisers that manage a significant portion of the portfolio.

We strongly support the SEC's proposal to adopt an optional delivery method for portfolio company prospectuses. Under this approach, a VIP issuer would be required to include in the Appendix certain key information about the portfolio companies available under the contract and make the summary and statutory prospectuses for the portfolio companies available online at the same website address as the VIP materials. We recommend that, consistent with its requirements for mutual fund disclosure, the SEC provide flexibility regarding the website address on which these portfolio company materials may appear.

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Apart from the Appendix, we recommend that the SEC make several modifications to its proposed disclosure requirements regarding portfolio companies:

- Confirm that VIP registrants have flexibility in describing the terms of any expense limitation arrangements;
- Confirm that an updating summary prospectus is only required to highlight, with respect to portfolio companies, changes that have affected the availability of portfolio companies under the contract; and
- Adopt, as proposed, the requirement for VIP issuers to disclose the potential for portfolio company substitutions.

We recommend that the Commission adopt an approach to VIP contracts that no longer are actively sold to new investors ("Discontinued Contracts") that is consistent with the VIP Summary Prospectus Rule. While we do not endorse any particular approach to Discontinued Contracts, we urge the Commission to permit VIP issuers of Discontinued Contracts to avail themselves of the VIP Summary Prospectus Rule's new delivery option for portfolio company prospectuses. We also recommend that the SEC amend exemptive rules applicable to variable life insurance contracts to permit the common practice of "mixed and shared" funding without the need for SEC exemptive relief.

II. Revise Appendix of Portfolio Companies to Enhance Effectiveness

We strongly support the proposed requirement to include an Appendix to the VIP Summary Prospectus. The Appendix is intended to provide a succinct overview of portfolio companies available under a VIP to which a VIP owner may choose to allocate purchase payments. The proposed content and format requirements for the Appendix, with our recommended changes, will ensure that VIP owners and prospective owners have the information necessary to make informed decisions regarding their investment options under the VIP. We describe below our recommendations for certain changes to enhance the effectiveness of the Appendix in delivering meaningful information to VIP owners and prospective owners.

A. Provide Information About Availability of Updated Performance

Information While we support the requirement that the Appendix include portfolio company performance information for the past 1-year, 5-year and 10-year periods as of the end of the most recent calendar year, many VIP issuers do not provide updated VIP prospectuses until approximately May 1 of each year.³ Under the VIP Summary Prospectus Rule, VIP issuers following this schedule would provide 3 Section 10(a)(3) of the Securities Act of 1933 ("1933 Act") requires that the information included in a prospectus "shall be as of a date not more than sixteen months prior to such use." Because many VIPs and portfolio companies use December 31 Mr. Brent J. Fields February 15, 2019 Page 4 of 15 initial or updating summary prospectuses dated on or about May 1, but include portfolio company performance information as of December 31 of the prior calendar year. As a result, the performance information will be at least five months old by that time. To provide access to current performance information, we recommend that, in addition to requiring the performance information proposed under the VIP Summary Prospectus Rule, the SEC permit VIP issuers to include a statement in the Appendix informing investors how and where they may obtain more current portfolio company performance information. This could include providing a hyperlink or web address where the information can be found.⁴ Accessing this information will allow investors to view the most up-to-date returns for the portfolio company, assisting them in monitoring and making more informed investment decisions regarding the underlying portfolio companies of their VIP.

B. Permit Performance Disclosure for Life of Portfolio Company Consistent with the portfolio company prospectus disclosure requirements for mutual funds under Form N-1A, the VIP Summary Prospectus Rule should permit VIP issuers to disclose in the Appendix performance information for the life of the portfolio company.⁵ The SEC proposes to require that the VIP issuer disclose performance information in the Appendix for each portfolio company for the past 1-year, 5-year and 10-year periods (or life of the portfolio company, if shorter), as of the end of the most recent calendar year. Consistent with the disclosure requirements for mutual funds, VIP issuers also should have the option to provide performance information for the life of the portfolio company, if longer than 10 years. Permitting disclosure of this performance information aligns the portfolio company disclosure requirements with the requirements for mutual funds under Form N-1A.⁶

C. Permit Disclosure of Net Expense Ratio The proposed VIP Summary Prospectus Rule requires the table in the Appendix to include a column disclosing the gross total expense ratio of each portfolio company before any waivers and/or reimbursements. Consistent with mutual fund disclosure under Form N-1A, the rule should permit as their fiscal year end, they provide updated prospectuses on May 1, which includes information from the prior fiscal year. The prospectus then covers sales made under that prospectus through May 1 of the following year, at which point the information no longer is current. ⁴ This approach would be consistent with the Commission's approach in Rule 482 under the 1933 Act. That rule requires registered investment company advertisements complying with the rule to include a legend explaining, among other things, "that current performance may be lower or higher than the performance data quoted" and identifying either a telephone number or a website where an investor may obtain current performance data. See Rule 482(b)(3)(i). See also Rule 34b- 1(b)(1)(i) under the Investment Company Act of 1940 ("1940 Act"). ⁵ See Form N-1A, Item 4(b)(2)(iii). ⁶ Permitting this disclosure also would be consistent with the Commission's approach in the investment company advertising rules. See Rule 482(d)(5) under the 1933 Act. Mr. Brent J. Fields February 15, 2019 Page 5 of 15 VIP issuers to also include a portfolio company's net expense ratio after any waivers and/or reimbursements, under the same circumstances that the portfolio company can disclose the net expense ratio in the fee table in its prospectus.⁷ As the Commission has recognized by permitting this approach in the mutual fund fee table in Form N-1A, the net expense ratio represents the true cost to investors of investing in a portfolio company. Portfolio companies that are subject to expense limitation

arrangements commonly disclose the terms of these expense waivers or fee reimbursements in a footnote to the fee table in the company's prospectus and also may provide information in other parts of the prospectus, indicating that the expense ratio provided is net of such waiver or reimbursement.⁸ Requiring a footnote in the Appendix for each portfolio company that has an expense waiver and/or fee reimbursement in place could result in lengthy disclosure that would undermine the proposed VIP Summary Prospectus Rule's goal of providing concise information. Accordingly, rather than including a separate footnote for each portfolio company subject to an expense limitation arrangement, we recommend that the rule permit VIP issuers to indicate, in the Appendix, each portfolio company subject to an expense limitation arrangement, and provide a single footnote explaining that: The [portfolio companies] indicated above and their investment advisers have entered into expense reimbursement and/or fee waiver arrangements that will continue [at least until [date]/for at least 12 months from the effective date of each portfolio company's current registration statement]. These arrangements can be terminated with respect to these [portfolio companies] only with the approval of the [portfolio company's] board of directors or trustees. Please see the [portfolio company's] prospectus for additional information regarding these arrangements. Including a portfolio company's net expense ratio in the Appendix would provide investors with a more accurate description of the costs they would incur when allocating contract value to the portfolio company. Permitting a single footnote explaining that some of the portfolio companies have entered into expense limitation arrangements will notify investors of this fact, without overwhelming them with excessive detail regarding each of these arrangements. In addition, investors will be able to access the portfolio company prospectuses for more details of these arrangements.

⁷ Under Form N-1A, mutual funds that have an expense reimbursement or fee waiver arrangement that will reduce the portfolio company's operating expenses for no less than one year from the effective date may disclose in the fee table the amount of the expense reimbursement or fee waiver and the net expenses after the reimbursement or waiver. If a portfolio company discloses this information, then it must also disclose "the period for which the expense reimbursement or fee waiver arrangement is expected to continue, including the expected termination date, and briefly describe who can terminate the arrangement and under what circumstances." See Form N-1A, Item 3(e).

⁸ See, e.g., Form N-1A, Item 3, Instruction 3(e). Mr. Brent J. Fields February 15, 2019 Page 6 of 15

D. Require Disclosure of Sub-Advisers that Manage a Significant Portion of the Portfolio We support the provision requiring VIP issuers to disclose in the Appendix the name of each portfolio company's adviser and sub-adviser, but recommend tailoring this requirement to make it consistent with the requirement for mutual fund disclosure under Form N-1A. Many sub-advised VIP portfolio companies utilize multiple sub-advisers. In contrast to the Commission's approach under Form N-1A, the proposed provision requires VIP issuers to list all of the portfolio company's sub-advisers, regardless of the percentage of the portfolio company's portfolio that a sub-adviser advises. A sub-adviser may be responsible for managing only a small portion of a portfolio company's net assets. Requiring issuers to list every sub-adviser to a portfolio company could greatly increase the length and complexity of the Appendix, without a material benefit to investors. Consistent with Form N-1A, the SEC should limit the disclosure requirement in the proposed Appendix to sub-advisers that are responsible for a significant portion of a portfolio company's net assets. The Commission permits this approach in the mutual fund summary prospectus. Instruction 5(a) of Form N-1A states: A Fund having three or more sub-advisers, each of which manages a portion of the Fund's portfolio, need not identify each such sub-adviser, except that the Fund must identify any sub-adviser that is (or is reasonably expected to be) responsible for the management of a significant portion of the Fund's net assets. For purposes of this paragraph, a significant portion of a Fund's net assets generally

will be deemed to be 30% or more of the Fund's net assets. We recommend adding a similar instruction to Forms N-3, N-4 and N-6. Doing so is consistent with mutual fund disclosure under Form N-1A and similarly would allow VIP issuers to identify only those portfolio company sub-advisers whose actions are likely to impact the fund significantly, without increasing the length and complexity of the Appendix.

E. Revise Appendix Legend

Under the VIP Summary Prospectus Rule, a VIP issuer must include in the Appendix the following legend immediately preceding the table of information regarding portfolio companies: "[t]he performance information below reflects fees and expenses of the [Portfolio Companies], but does not reflect the other fees and expenses that your contract may charge." (emphasis added). Because all VIPs have associated fees and expenses, we recommend that the SEC substitute the phrase "your contract may charge" with "your contract charges." Mr. Brent J. Fields February 15, 2019 Page 7 of 15

III. Modify Other VIP Prospectus Disclosure Requirements Regarding Portfolio Companies

A. Revise Disclosure Regarding Expense Limitations

The VIP Summary Prospectus Rule requires registrants to include a "Total Annual Portfolio Operating Expenses" table in the initial summary prospectus outlining the minimum and maximum total operating expenses charged by the portfolio companies in which investors may invest. The Commission requests comment on whether it should make any modifications to the table. The proposed Forms N-4 and N-6 instructions to this table state that registrants may include a line item in the table reflecting expenses after any reimbursements and/or fee waiver arrangements and that registrants providing this disclosure must "also disclose the period for which the expense reimbursement or fee waiver arrangement is expected to continue, and, if applicable, that it can be terminated at any time at the option of a [p]ortfolio [c]ompany."⁹ We request confirmation that this disclosure would not require registrants to specify a particular date through which expense waivers and/or reimbursements must remain in effect. The sample footnote to the "Total Annual Portfolio Company Operating Expenses" table provided on page 10 of the "Hypothetical Initial Summary Prospectus" in the Release provides a specific date through which the expense waivers and/or reimbursements must remain in effect. We believe that, consistent with the proposed instruction, registrants should have the option to include a more general footnote describing the expense limitation, rather than requiring the specific date as is included in the SEC's sample disclosure. This approach would recognize that the portfolio companies underlying the VIP may be subject to different expense limitation arrangements, and that it is not appropriate to include the details of each of those arrangements in the VIP Summary Prospectus, as doing so could greatly increase the length of the summary prospectus. As discussed in more detail in Section II.C., above, such a footnote might explain that any waivers and/or reimbursements will remain in effect for at least 12 months from the effective date of each portfolio company's current registration statement and can only be terminated with the approval of the portfolio company's board of directors. This will provide investors with the appropriate level of information while reducing the amount of technical disclosure in the summary prospectus and thereby reducing the complexity of the document.

B. Clarify Portfolio Company Changes That Must be Identified in the Updating Summary Prospectus

The SEC should confirm that an updating summary prospectus is only required to highlight, with respect to portfolio companies, changes that have affected the availability of portfolio companies under 9 See Item 4, Instruction 17(b) to Form N-4 and Item 4, Instruction 4(b) to Form N-6, both as proposed to be amended. Mr. Brent J. Fields February 15, 2019 Page 8 of 15

the contract. Under the VIP Summary Prospectus Rule, an updating summary prospectus must include a specified list of changes made with respect to the VIP since the most recent updating summary prospectus or statutory prospectus was sent to investors, including changes that have affected the availability of portfolio companies under the contract.¹⁰ Sample changes included in the "Hypothetical Updating Summary Prospectus [Prepared by SEC Staff]" identify events such

as portfolio company liquidations, changes in name, and mergers. We support the requirement to identify these types of events, including portfolio company substitutions, that result in a change in available portfolio companies under the VIP. The SEC, however, includes a change to a portfolio company's expense ratio as an example of a change that should be described in the updating summary prospectus.¹¹ We do not believe that requiring disclosure of this type of change for each portfolio company is consistent with the SEC's stated intent to require disclosure of changes related to portfolio company availability. Such disclosure is unnecessary given that the updating summary prospectus will identify changes to the range of total annual portfolio company operating expenses, and will include in the Appendix the specific expense ratio of each portfolio company available under the VIP. Portfolio company expense ratios commonly vary from year to year based on a variety of factors, and portfolio company expense limitations may be amended from time to time. Mutual funds typically update disclosure regarding expense ratios in fund prospectuses once per year in connection with the annual update to a fund's registration statement primarily by updating the fund's fee table. They do not typically include additional narrative disclosure highlighting changes in expense ratios from year to year. The SEC should apply the same approach to portfolios companies offered through VIPs. As noted, the expense ratio of each portfolio company will be included in the Appendix, which will reflect changes since the prior year. In addition, VIPs typically offer a large number of portfolio companies as investment options under the contract. We are concerned that the proposed requirement could lead to voluminous, technical, and lengthy disclosure that would obscure information and reduce the effectiveness of the updating summary prospectus.

C. Require Disclosure Regarding Possibility of Portfolio Company Substitutions The Release requests comment on whether to modify Forms N-4 and N-6 to require disclosure of the possibility that one portfolio company may be substituted for another pursuant to Section 26(c) of the 1940 Act. The SEC notes that this amendment would formalize its long-standing position that ¹⁰ See Proposed rule 498A(c)(6)(i). The SEC explains that "[a] change that has affected availability of portfolio companies (or investment options) would include changes in the portfolio companies (or investment options) offered under the contract or available in connection with any optional benefit." Release at n.229. ¹¹ Release at 61755. Mr. Brent J. Fields February 15, 2019 Page 9 of 15 investors should be put on notice of the possibility that an insurer may substitute one portfolio company for another.¹² We support amending the forms to include this disclosure requirement, as it provides investors with important information about the possibility of future substitutions.

IV. Adopt Optional Delivery Method for Portfolio Company Prospectuses with Additional Posting Options ICI strongly supports the SEC's proposed new delivery option for portfolio company prospectuses, under which a VIP issuer would include in the Appendix certain key information about the portfolio companies available under the contract, and make the summary and statutory prospectuses for the portfolio companies available online.¹³ Under the VIP Summary Prospectus Rule, this approach will satisfy the obligation to deliver a statutory prospectus for the portfolio companies if:

- An initial summary prospectus is used for each currently offered VIP described under the related registration statement;
- A summary prospectus is used for the portfolio company; and
- The portfolio company's current summary prospectus, statutory prospectus, statement of additional information (SAI), and most recent shareholder reports are posted online at the website address specified on, or in the case of an electronic copy, hyperlinked in, the cover page or beginning of the VIP summary prospectus, with a hard copy made available by request at no cost. Allowing investors to access the portfolio company prospectus documents through a website or in paper upon request allows investors to choose their preferred amount and format of information.¹⁴

¹² Release at 61785. Substitution transactions generally require the VIP issuer to obtain an SEC exemptive order under

Section 26 of the 1940 Act granting relief to permit the substitution. See, e.g., AXA Equitable Life Insurance Company, et al., Investment Company Act Release No. 33224 (Sept. 11, 2018); The Guardian Insurance & Annuity Company, Inc., et al. Investment Company Act Release No. 33003 (Feb. 7, 2018); Commonwealth Annuity and Life Insurance Company, et al., Investment Company Act Release No. 32644 (May 23, 2017). 13 This new option would be available to Form N-4 and Form N-6 registrants, but would not be available to Form N-3 registrants because they do not have underlying portfolio companies. 14 As discussed in our recent comment letter to the SEC on the fund retail investor experience, ICI supports applying a notice and access framework to registered investment company prospectuses more generally because this delivery method will produce cost savings and align much more effectively with shareholder preferences for accessing financial information online. See Letter to Mr. Brent J. Fields, Secretary, Securities and Exchange Commission, from Susan Olson, General Counsel, Investment Company Institute, dated Oct. 24, 2018. Mr. Brent J. Fields February 15, 2019 Page 10 of 15 The Release requests comment on whether the portfolio company prospectus and other materials should be made available at the same website address as the VIP materials that appear online or whether there should be flexibility regarding the website address on which the portfolio company materials appear. Rule 498, which governs portfolio company summary prospectuses, specifies that a portfolio company's summary prospectus, statutory prospectus, SAI, and most recent shareholder reports must be publicly accessible at a web address, but provides flexibility for funds to identify an appropriate website on which those materials can be posted.¹⁵ Consistent with Rule 498, the VIP Summary Prospectus Rule should provide flexibility regarding the website on which portfolio company materials can be posted. 16 Providing flexibility regarding the website on which the materials are posted also would be consistent with current industry practice. Insurance companies and portfolio companies utilize various models to allow investors to access portfolio company documents through a website, which may include using a third-party service provider to host the documents. Granting flexibility with respect to the website for posting the materials would not affect the ability of VIP owners and prospective owners to conveniently access portfolio company disclosure documents and would allow industry participants to reduce implementation and maintenance costs of the VIP Summary Prospectus Rule for the benefit of VIP owners. In addition, expanding permitted posting options may provide portfolio companies with greater control over the posting of their offering documents and allow them to reflect any amendments or stickers more efficiently, rather than requiring them to provide this information to the insurance company and requiring the insurance company to post the updates at the designated website address. V. Adopt New Approach to Discontinued Contracts Consistent with VIP Summary Prospectus Rule ICI supports the Commission's efforts to identify an appropriate approach to allow VIP issuers of Discontinued Contracts to satisfy their ongoing prospectus delivery obligations. While we do not endorse a particular approach, we urge the SEC to incorporate the optional delivery method for portfolio company prospectuses into any approach it takes to Discontinued Contracts. Doing so will allow VIP owners of Discontinued Contracts to benefit from the Commission's improved approach to delivery of portfolio company disclosure information. 15 Rule 498(e)(1). 16 Proposed Rule 498A(j)(iii) would require that "[t]he current summary prospectus, Statutory Prospectus, Statement of Additional Information, and most recent annual and semi-annual reports to shareholders under §270.30e-1 of this chapter for the Portfolio Company are publicly accessible, free of charge, at the website address specified on the cover page or beginning of the Contract Summary Prospectuses...." To implement the requested change, we recommend modifying this provision to permit VIP issuers to include in the Appendix the website addresses where this information is available. Mr. Brent J. Fields February 15, 2019 Page 11 of 15 As the Commission acknowledges, many VIP

issuers currently rely on SEC staff no-action letters permitting issuers to cease filing updates to VIP registration statements and delivering updated prospectuses and other information to existing investors under certain circumstances (“existing no-action relief”).¹⁷ The existing no-action relief addresses the VIP issuer’s satisfaction of its prospectus delivery obligations in connection with continuing to receive investments under Discontinued Contracts and in connection with reallocation of contract value within such contracts, recognizing that the contracts are no longer actively sold. The SEC requests comment on a different approach to Discontinued Contracts. Under its proposed approach, the Commission would permit VIP issuers of contracts relying on existing no-action relief as of the effective date of any final VIP Summary Prospectus Rule to continue to operate in such manner. For all other VIP contracts, VIP issuers would be required to file post-effective amendments to update their registration statements and provide updated prospectuses under current regulatory requirements, but could use the summary prospectuses and optional delivery method provided by the VIP Summary Prospectus Rule. The Commission also requests comment on two alternative options: (1) permit VIP issuers relying on existing no-action relief to continue to do so with respect to existing Discontinued Contracts, and adopt rules codifying the existing no-action relief that would be applicable to future Discontinued Contracts; or (2) adopt rules codifying the existing no-action relief and apply those rules to both existing and future Discontinued Contracts. One condition of the existing no-action relief is that portfolio company prospectuses must be delivered to VIP owners of Discontinued Contracts. This may result in the delivery of several hundred pages of portfolio company prospectuses to owners of Discontinued Contracts, including prospectuses for portfolio companies in which they neither invest nor intend to invest. We believe that if the VIP Summary Prospectus Rule is adopted, this condition should no longer apply to Discontinued Contracts, as it would undermine one of the primary goals of the VIP Summary Prospectus Rule, which is to deliver portfolio company disclosure to investors in a more user-friendly manner. We therefore recommend that, regardless of which approach the Commission adopts to address the treatment of Discontinued Contracts, the Commission permit VIP issuers of Discontinued Contracts to avail themselves of the VIP Summary Prospectus Rule’s new delivery option for portfolio company prospectuses. To achieve this result, the Commission should modify the condition under the existing no-action relief with respect to delivery of portfolio company prospectuses to permit VIP issuers to provide contract owners with a document identical to the Appendix of the VIP Summary Prospectus. 17 See, e.g., Great-West Life and Annuity Insurance Company, SEC Staff No-Action Letter (pub. avail. Oct. 23, 1990); MML Bay State Life Ins. Co., SEC Staff No-Action Letter (pub. avail. Apr. 12, 1990); Transamerica Occidental Life Insurance Co., SEC Staff No-Action Letter (pub. avail. Mar. 16, 1990); Connecticut Mutual Life Insurance Company, SEC Staff No-Action Letter (pub. avail. Mar. 7, 1990). Mr. Brent J. Fields February 15, 2019 Page 12 of 15 This document would provide information about the portfolio companies available under the contract, and would refer contract owners to a website address where electronic versions of the portfolio company prospectuses and other information may be found, consistent with the requirements of the proposed VIP Summary Prospectus Rule. VIP owners of Discontinued Contracts still would be able to request paper copies of portfolio company prospectuses if they choose. Permitting VIP issuers of Discontinued Contracts to avail themselves of the new delivery option with respect to portfolio company prospectuses is consistent with the SEC’s “layered” disclosure approach in the Release and would allow VIP owners of Discontinued Contracts to enjoy key benefits of the VIP Summary Prospectus Rule, including only accessing the portfolio company prospectuses and other documents for those portfolio companies in which they invest or plan to invest. Under this approach, investors in Discontinued Contracts would receive a document identical to the Appendix with summary information about the portfolio

companies and could obtain more detailed information about the portfolio companies by accessing their offering documents on a website. It would be an anomalous result to permit VIP issuers to provide investors in new VIP contracts with improved, more useful disclosure, while denying that information to existing investors under Discontinued Contracts who, instead, would continue to receive a large volume of portfolio company paper prospectuses.

VI. Amend Rules to Permit Mixed and Shared Funding for Variable Life Insurance Products

The Release requests comment on the continued utility of exemptions from rules applicable to variable life insurance (VLI) companies and asks whether such rules should be amended to reflect current legal requirements and industry practices. We recommend that the Commission amend the provisions in Rule 6e-2, which governs scheduled premium VLI contracts, and Rule 6e-3(T), which governs flexible premium VLI contracts, to remove the restrictions in paragraph (b)(15) of each rule on “mixed and shared funding.”¹⁸ The Commission and its staff have extensive experience with the operation of these rules and the practice of mixed and shared funding, including many years of the Commission issuing exemptive orders permitting the practice. This experience supports amending these rules to reflect current legal requirements and industry practices. In particular, as discussed in greater detail below, we recommend that the Commission modify the exemptions provided in paragraph (b)(15) by removing the condition that the portfolio companies offered through the VLI separate account must be offered “exclusively” under circumstances that restrict mixed and shared funding (the “exclusivity provision”).¹⁸ “Mixed funding” refers to the sale of the shares of a mutual fund to various types of offerees, such as when a fund is used as an investment option in both variable annuity contracts and VLI contracts or when a fund is used as an investment option in both VLI contracts and retirement plans. “Shared funding” refers to the sale of the shares of a mutual fund as an investment option in variable insurance contracts issued by multiple unaffiliated insurance companies. Mr. Brent J. Fields February 15, 2019 Page 13 of 15 Rule 6e-2(b)(15) and Rule 6e-3(T)(b)(15) provide exemptions to separate accounts of life insurers from the provisions of Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act.¹⁹ However, the exemptions are conditioned on restrictions on mixed and shared funding. For example, the exemptions available to a separate account under Rule 6e-2(b)(15) are available only where all of the assets of the separate account consist of the shares of one or more mutual funds that offer their shares “exclusively to variable life insurance separate accounts of the life insurer, or of any affiliated life insurance company.”²⁰ Therefore, the exemptions provided by Rule 6e-2 are not available if the portfolio companies engage in mixed or shared funding. Similarly, the exemptions available to a separate account under Rule 6e-3(T)(b)(15) are available only where all of the assets of the separate account consist of the shares of one or more registered management investment companies that offer their shares “exclusively to separate accounts of the life insurer, or of any affiliated life insurance company, offering either scheduled contracts or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company.”²¹ Rule 6e-3(T) therefore permits mixed funding for flexible premium VLI separate accounts, but does not permit “shared funding.” The exclusivity provision appears to have been the result of the Commission’s concern regarding the potential for material irreconcilable conflicts to develop among different types of investors in portfolio companies offered through VIPs. However, we are not aware of any instance in which such a conflict has arisen in the over 30 years that the restrictions have been in place. Portfolio companies that are offered under VLI contracts and wish to engage in mixed and shared funding typically do so by obtaining individual mixed and shared funding exemptive orders from the SEC. These orders grant insurance companies and their affiliates the same exemptions from Sections 9(a), 13(a), and 15(a) and (b) of the 1940 Act that are provided by the variable life insurance rules, but without the restrictions on mixed and shared funding. The orders, like

the rules themselves, typically require a portfolio company's board to continually monitor the fund for the existence of any material irreconcilable conflict among the interests of investors in the portfolio companies, and to determine what action, if any, should be taken in response to such conflicts. Preparing and submitting these exemptive applications has increased costs for portfolio company sponsors and investors, and complying with the myriad conditions imposed under the orders has imposed additional costs and burdens on portfolio companies, without a clear corresponding benefit. Similarly, processing these applications has taken limited Commission resources away from other priority areas. 19 Section 9(a) of the 1940 Act makes it unlawful for any person, and any company of which such person is an affiliated person, convicted of certain securities-related offenses within the past 10 years to serve or act in certain capacities for a registered investment company. Sections 13(a), 15(a) and 15(b) of the 1940 Act require shareholder votes on certain matters. 20 Rule 6e-2(b)(15) (emphasis added). 21 Rule 6e-3(T)(b)(15) (emphasis added).

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The SEC staff sought to address the concerns and burdens described above by issuing guidance indicating its position that portfolio companies may engage in mixed and shared funding without obtaining an exemptive order. In 2014, the SEC staff issued an IM Guidance Update in which it stated that "a mutual fund is not required to obtain a 'mixed and shared funding' order prior to offering its shares as an investment option under a variable life and/or variable annuity contract. In addition, a fund that has previously obtained a mixed and shared funding order need not comply with the terms and conditions of that order if the exemptions granted by the order are not being relied upon by any person."22 The IM Guidance Update was based on the understanding that "the exemptions are relied upon very infrequently and that there may be no instances of reliance on the exemptions granted from sections 13 and 15 of the 1940 Act."23 Notwithstanding this guidance, portfolio companies have continued to apply for and receive exemptive relief from the Commission to permit mixed and shared funding.24 While reliance on the exemptions may be infrequent, the exemptions nevertheless provide relief that addresses circumstances that hypothetically may arise, and which are unique to the VIP industry. In addition, because the exemptions are important to insurance companies, portfolio company complexes have continued to seek this relief from the Commission. We are not aware of any circumstances in which offering portfolio company shares on a mixed and shared funding basis has resulted in any material irreconcilable conflicts among, or other harm to, investors in portfolio companies offered through VIPs. Indeed, to the contrary, we believe that mixed and shared funding has resulted in enormous benefits to investors by facilitating distribution of portfolio companies to a wider range of investors. This has enabled portfolio companies to increase fund assets with corresponding benefits to VIP owners, including greater diversification and lower expense ratios through economies of scale. Accordingly, we recommend that the Commission modify paragraph (b)(15) of Rule 6e-2 and 6e-3(T) to delete the exclusivity provision and permit portfolio companies to engage in mixed and shared funding without having to seek an individual exemptive order. * * * *

22 Mixed and Shared Funding Orders, Guidance Update, Division of Investment Management, SEC, No. 2014-10 (October 2014).

23 Id. at 3. 24 See, e.g., BlackRock Variable Series Funds, Inc., et al. Investment Company Act Release No. 33145 (Jul. 3, 2018); The RBB Fund, Inc., et al., Investment Company Act Release No. 31687 (Jun. 23, 2015).

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ICI appreciates the opportunity to comment on the SEC's proposed new rule and form amendments intended to permit issuers of VIPs to use a summary prospectus and revise disclosure requirements regarding VIPs. We are committed to assist the SEC in any way that we can. If you have any questions, please contact me at (202) 326-5813, Dorothy Donohue at (202) 218-3563, or Sarah Bessin at (202) 326-5835. Sincerely, /s/ Susan Olson

Susan Olson General Counsel cc: The Honorable Jay Clayton The Honorable Robert J.

Jackson, Jr. The Honorable Hester M. Peirce The Honorable Elad L. Roisman Dalia Blass
Director, Division of Investment Management US Securities and Exchange Commission

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