

CLIENT ALERT

SEC Adopts New Requirements for Registered Index-Linked Annuities and Market Value Adjustment Annuities

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AUTHORS

Chip Lunde | Richard F. Jackson

On July 1, 2024, the U.S. Securities and Exchange Commission (“SEC”) voted to adopt rule and form amendments that will change how the offerings of registered index-linked annuities (“RILAs”) are registered under the federal securities laws.¹ The amendments were proposed in September 2023² and are intended, in part, to comply with legislation, enacted in 2022, directing the SEC to adopt a new registration form for RILAs.³ In addition, in a change from the proposal, the SEC extended the updated registration, filing and disclosure requirements to offerings of registered market value adjustment annuities (“MVA Annuities”), in response to comments received on the proposal.

Generally, the amendments should make it much easier for issuers to offer RILAs and MVA Annuities. Among other things, the amendments provide disclosure requirements that are tailored for RILAs and MVA Annuities. In addition, the amendments will allow issuers of RILAs and MVA Annuities to (i) use the same layered disclosure approach as variable

¹ 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, Securities Act Rel. No. 11294 (July 1, 2024) (“Adopting Release”).

² See Registration for Index-Linked Annuities; Amendments to Form N-4 for Index-Linked and Variable Annuities, Securities Act Rel. 11250 (Sept. 29, 2023) (“Proposing Release”).

³ See Consolidated Appropriations Act, 2023, Title I, Division AA, Pub. L. 117-328; 136 Stat. 4459 (Dec. 29, 2022).

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annuities, (ii) use the same registration process as variable annuities, and (iii) pay registration fees on the same basis as variable annuities.

Key Changes Moving From S-1/S-3 to N-4⁴

Currently, offerings of both RILAs and MVA Annuities are registered on Form S-1 or S-3 under the Securities Act of 1933 (“Securities Act”). The SEC’s amendments will require that RILAs and MVA Annuities be registered using Form N-4 instead.⁵ The change from registering on Form S-1 or S-3 to Form N-4 will be significant for issuers of RILAs and MVA Annuities. Key changes are discussed below.

Tailored Disclosures. Prospectuses for RILAs and MVA Annuities will no longer be required to include certain disclosures relating to the mechanics of the offering, offering participants other than the issuer, or certain details about the issuer. The prospectuses also will not be required to include management’s discussion and analysis of financial condition and results of operations, or executive compensation disclosures. Instead, prospectuses for RILAs and MVA Annuities will provide investors with key information relating to a variable contract’s provisions, benefits, and risks, along with information about the issuing insurance company and the offering.

Summary Prospectuses. The SEC amended Rule 498A under the Securities Act to permit (but not require) issuers of RILAs and MVA Annuities, as well as combination contracts offering a combination of index-linked, MVA options and variable options, to use a summary prospectus to satisfy their statutory prospectus delivery requirements. As is currently the case for variable contracts, an “initial summary prospectus” will cover contracts offered to new investors, and must include certain key information about contract features, benefits, and risks, presented in plain English in a standardized order. An “updating summary prospectus” must be provided to existing investors in RILAs, MVA Annuities and combination contracts as a condition to relying on the rule. The updating summary prospectus must 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.

Statutory Financial Statements. Form N-4 permits financial statements to be prepared in accordance with statutory accounting principles (also known as “SAP”), rather than generally accepted accounting principles (“GAAP”). RILA and

⁴ In the following discussion, we focus on the amendments pertinent to RILAs and MVA Annuities, but please note that some of the amendments adopted also apply to variable annuities that are registered on Form N-4, which are beyond the scope of this Client Alert.

⁵ The SEC noted that unlike separate accounts that register variable annuities, issuers of RILAs and MVA Annuities are not investment companies and need not be registered as such. Thus, Form N-4 will register only the offering of RILAs or MVA Annuities, not the issuers of the RILAs or MVA Annuities themselves. See Adopting Release at n.26.

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MVA Annuity issuers will be able to file SAP financial statements on the same basis as issuers of variable annuities on Form N-4.⁶

Registration Fees. Issuers of RILAs and MVA Annuities will register an indefinite number of securities and pay registration fees in arrears based on net sales on an annual basis for the life of an offering on Form 24F-2, rather than at the time of registration as is done currently under Forms S-1 and S-3.

Updating Registration Statements. Issuers may update RILA and MVA Annuity registration statements by filing post-effective amendments under Rule 485 with automatic effectiveness (and may amend prospectuses via Rule 497). However, issuers using Form N-4 are not able to use the “access equals delivery” framework of Rule 172 and therefore must deliver a prospectus (or summary prospectus) to investors.

Key Disclosure Changes

Form N-4, as amended, will require issuers of RILAs and MVA Annuities to use the same disclosures required of variable annuities, subject to certain modifications intended to tailor the disclosure for investors in RILAs and MVA Annuities. Certain of the more significant Form N-4 amendments are discussed below.

Front and Back Cover Pages (Item 1). The amendments added new disclosures that will be required on the front and back cover pages. Among other things, the required disclosures will identify the types of investment options offered, cross-reference additional information provided in the prospectus appendix, and alert investors to the complexities and certain risks associated with the contract offered.

Overview of the Contract (Item 2). The SEC amended the requirements of the Overview of the Contract and moved it up to precede the Key Information Table (“KIT”). Now situated as Item 2, this part of the form requires a concise description of the contract, including its purpose, phases, investment options and primary features. The amendments require that the same disclosures be provided about RILAs and MVA Annuities, added some specific disclosures relating to RILAs generally, and added disclosure regarding any index-linked option offered under the contract, and contract adjustments. Among the required disclosures are certain information about how returns are credited to an investor’s contract value, the risk of loss, an explanation that the insurance company limits the investor’s participation in index gains or losses, if applicable, and the guaranteed minimum limits on index losses or gains.

⁶ In connection with this amendment, the SEC will withdraw or rescind, as of the compliance date, certain letters, or portions of letters, exempting insurance companies from the requirement to provide GAAP financials in connection with the registration of an offering of RILAs and MVA Annuities on Form S-1. A partial list of these letters is set out in the Proposing Release. This will not affect issuers of other annuity products that have received such letters.

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Key Information Table (Item 3). The SEC moved the KIT to Item 3 and amended it to address key features of RILAs and MVA Annuities. The KIT requires that information be disclosed in the tabular presentation reflected in the Form N-4 instructions, in the order specified, without any modification or substitution with alternate terminology of the title, headings, and subheadings for the tabular presentation, unless the instructions otherwise provide. Insurance companies can exclude any inapplicable disclosures or make certain modifications. The SEC also amended the KIT to require that information be presented in a question-and-answer format. The SEC further amended certain of the line items in the KIT, including information relating to surrender charges and contract adjustments, transaction charges, index-linked options, certain risks and certain restrictions.

Index-Linked Options and MVA Options (Items 6 and 17). Items 6 and 17 of Form N-4 constitute what the SEC refers to as the principal disclosures regarding index-linked options and MVA options available under the contract. In Item 6, as amended, the disclosures provide investors with detailed information about the index-linked options and MVA options available under the contract. The amendments to Item 6 largely retain the current requirements to concisely discuss the insurance company, registered separate account and variable options, while adding new disclosures about key aspects of any index-linked or MVA options offered under the contract. This would include information about limits on index gains and losses, the crediting period, crediting methodology, relevant indexes, maturity and other features. The amendments to Item 17 expand the scope of the required appendix to cover all investment options available under the contract. The appendix will provide investors with a summary information table that outlines the available index-linked options and MVA options, with legends highlighting risks. The SEC described the amendments as building on the existing disclosure requirements to help ensure that investors have key information about the annuity contract and available investment options, regardless of whether the contract is a variable annuity, a RILA, a registered MVA Annuity, or a combination contract offering a variety of these options.

Principal Risks (Item 5). The SEC adopted amendments to Item 5 to require disclosure of the principal risks of investing in any index-linked option offered under the contract. Item 5 retains the current requirement for registrants to explain the principal risks of purchasing a contract, with the addition of disclosure explaining the principal risks associated with market risk, including the risks of negative investment performance. Risks to be disclosed would include risks associated with the index-linked option, such as those associated with limits on index returns, crediting methodologies, the impact of contract fees, and the reallocation of contract value at the end of a crediting period, as well as risks associated with a particular index and the types of instruments included in such index. Additionally, the amendments require prominent disclosure of the maximum amount of loss an investor could experience from negative index performance after taking into account the current limits on index loss provided under the contract. Other disclosures include the risks associated with any contract benefits, the insurance company's ability to meet its guarantees under the contract, and any material reservation of rights under the contract. Contracts must disclose that they are unsuitable for short-term investment and explain the possibility of adverse tax consequences. The SEC did not include any changes specific to registered MVA Annuities, saying that the risks associated with negative contract adjustments were adequately addressed by the other amendments. The SEC also

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adopted some changes to clarify certain of the existing risk disclosure requirements, including by restructuring the principal risk disclosures into separate sub-items and consolidating certain risk disclosures relating to variable annuities elsewhere in the prospectus.

Contract Adjustments, Fees and Expenses (Items 4, 7 and 22). The SEC amended Items 4, 7 and 22 of Form N-4 to require disclosure regarding contract adjustments and other RILA-specific costs, including the effect of limits (e.g., caps, participation rates and other measures). The SEC stated that it designed the disclosures to provide investors with a better understanding of the mechanics of these costs and the associated potential for loss. Among other things, the SEC added a requirement to Item 4 that insurance companies include the maximum negative contract adjustment that may be imposed, to be expressed as a percentage of contract value at the start of the crediting period or the amount withdrawn, as applicable. As proposed, the SEC would have required this disclosure to appear in the transaction expenses table. However, in response to comments the SEC instead added a separate adjustments table, which follows the transaction expenses table. Insurance companies must disclose in a footnote the circumstances when investors might be subject to this cost. Other amendments affect the presentation of annual contract expenses, annual portfolio company expenses and the required example. In Item 7, the SEC adopted, as proposed, specific disclosure requirements relating to contract adjustments. Insurance companies will need to disclose (as a percentage) the maximum potential loss that could result from a negative contract adjustment, define the period during which any contract adjustment would apply, and describe all transactions subject to a contract adjustment. The SEC further amended Item 22, which will require issuers to explain fully the operation of any contract adjustment that can be applied under the contract. This more detailed explanation is intended to describe the technical, detailed aspects of the operation of the adjustment, including any formulas and an explanation of such formulas used to calculate the adjustment, and at least one numeric example to illustrate the application of the contract adjustment. This numeric example will be required to include a negative adjustment, reflect surrender charges (if applicable), and disclose the percentage change in contract value as a result of the adjustment.

Census-Type Information (Item 31A). New Item 31A will require disclosure of census-type information intended to assist the SEC and its staff in identifying trends in offerings of RILAs and MVA Annuities. This will include the name of each contract, the number of contracts outstanding, the total value of investor allocations attributable to index-linked options, the number of contracts sold during the prior calendar year, the gross premiums received during the prior calendar year, the amount of contract value redeemed during the prior calendar year and whether the contract is a “combination contract” (i.e., whether the contract offers both variable options and index-linked options). This information will be required as of the most recent calendar year-end and will generally be updated through a post-effective amendment to the Form N-4 registration statement.

Other N-4 Items. The SEC amended a number of the other existing requirements of Form N-4 to make them applicable to RILAs and MVA Annuities, without making substantive changes.

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XBRL Tagging. Form N-4 filers are required to tag certain specified disclosures in Inline XBRL. Certain of these requirements will apply to Form N-4s filed by issuers of RILAs and MVA Annuities. This requirement applies only to contracts being sold to new investors, not to contracts that are no longer being sold to new investors.

Communications Rules

The SEC amended Rule 156 under the Securities Act to require RILA and MVA Annuity issuers to comply with Rule 156, which provides guidance as to when sales literature is materially misleading under the Federal securities laws. The SEC also amended Rule 433 under the Securities Act to allow RILA and MVA Annuity issuers that meet that rule's conditions to continue to use a free writing prospectus without it needing to be preceded or accompanied by a prospectus that satisfies the requirements of section 10 of the Securities Act.

The SEC chose not to make Rule 482 advertisements available to issuers of RILAs and MVA Annuities, or to amend Rule 10b-10 under the Securities Exchange Act of 1934 to allow RILA or MVA Annuity issuers to use quarterly statements instead of immediate confirmations, which issuers of variable annuities are allowed.

Compliance Period

The effective date for all of the amendments to rules and forms is September 23, 2024. The compliance date for all amendments, other than the amendments to Rule 156, is May 1, 2026.⁷ Compliance with the amendments to Rule 156 will be mandatory as of the effective date.

⁷ The SEC also adopted certain technical amendments to Forms N-3 and N-6, not relevant here. The effective and compliance dates for those amendments is the same as that for the amendments to Rule 156.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Chip Lunde

202 303 1018

clunde@willkie.com

Richard F. Jackson

202 303 1121

rfjackson@willkie.com

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