November 28, 2023

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Registration for Index-Linked Annuities; Amendments to Form N-4 for Index-Linked and Variable Annuities (File Number S7-16-23); 88 Fed. Reg. 71088 (Oct. 13, 2023)

Dear Ms. Countryman:

Better Markets[1] appreciates the opportunity to comment on the above-captioned Proposed Rule ("Proposal" or "Release")[2] to require that issuers of registered index-linked annuities (RILAs) register their offerings on Form N-4. RILAs are complex investment products. Yet the Commission has not adopted a specific registration form tailored to these products. As a result, investors may not be receiving the disclosures that they need to understand whether RILAs are an appropriate investment for their financial objectives in a way that is comprehensible to them. The Proposal would ensure that investors receive specific disclosures about the features and risks of RILAs in a manner that will better enable them to evaluate an investment in a RILA.

BACKGROUND

A RILA is an annuity contract that credits interest based on the performance of an external securities index, such as the S&P 500 Index, over a specified time period. Interest calculations generally limit both positive and negative returns. Positive returns are limited by either a cap (e.g., the first 10% of positive performance) or a participation rate (a percentage of the positive performance). Negative returns are limited by either a buffer, where the insurer bears the loss up to a specific percentage, or a floor, where the insurer bears all loss in excess of a specific percentage. Investment performance over the course of a return period will depend on a contract owner's choices with respect to the index, the length of the return period, the applicable cap or participation rate, and the amount of downside protection selected in terms of a buffer or floor.[3]

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

2 88 Fed. Reg. 71,088 (Oct. 13, 2023).

3 William J. Kotapish, *Defined Outcome Investment Options for Variable Contracts*, ALI-CLE Conference on Life Insurance Company Products 2022, ALI-CLE Course Materials (Nov. 3-4, 2022).

Insurance companies developed RILAs primarily in response to the 2008 financial crisis.[4] RILAs provide wary investors with both upside market exposure and some downside protection.[5] The first RILAs were introduced in October 2010.[6] Since then, sales of RILAs have grown exponentially. Sales reached $41.1 billion in 2022, more than tripling since 2017.[7] In the first half of 2023, RILA sales were $22 billion, up 8% from the same period in 2022.[8]

In light of the explosive growth of sales of RILAs, investors need to understand whether an investment in a RILA is appropriate for them. But, currently, insurance companies register offerings of RILAs on Securities Act registration Forms S-1 or S-3 because there is no form dedicated to the registration of RILA offerings.[9] Yet the disclosure requirements on Forms S-1 or S-3 are designed for public offerings of stocks and bonds and are generally ill-fitted for insurance product offerings.[10] For example, Forms S-1 and S-3 do not include specific line-item requirements addressing disclosures about RILAs and their complex features.[11] These forms also require issuers to disclose extensive information about the registrant issuing the securities that may be less material to a RILA investor than information about the contract itself.[12] So investors may not be getting the information that they need. Indeed, the "ill-fitted nature of the disclosure framework disserves investors" by resulting in disclosures "that are immaterial."[13]

Conversely, and unlike RILAs, variable annuities are registered on Form N-4. Form N-4's disclosure requirements are tailored to these investments. They provide investors with key information relating to a variable annuity contract's provisions, benefits, and risks in a concise and reader-friendly presentation, along with targeted information about the insurance company and the offering. So, these disclosure requirements focus more on the specific features of the variable annuities than on the issuing insurance company. Form N-4 thus highlights the most important

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4 Dodie C. Kent and Ronald Coenen Jr., *The Design and Regulatory Framework of Registered Index-Linked Annuities*, ALI-CLE Conference on Life Insurance Company Products 2022, ALI-CLE Course Materials (Nov. 3-4, 2022).

5 *Id.*

6 Nicholas Carbo, David Elliot, and Ginaesan Sinnu, *The Rise of Registered Index Linked Annuity (RILA) Products*, Society of Actuaries (Aug. 2022), https://www.soa.org/sections/product-dev/product-dev-newsletter/2022/august/pm-2022-08-carbo/.

7 Release at 71,089.

8 LIMRA, *Record-High Sales of Registered Index-Linked and Fixed Indexed Annuities Drive Overall Sales Growth in the Second Quarter 2023* (July 25, 2023), https://www.limra.com/en/newsroom/news-releases/2023/limra-record-high-sales-of-registered-index-linked-and-fixed-indexed-annuities-drive-overall-sales-growth-in-the-second-quarter-2023/.

9 Release at 71,089.

10 Kent and Coenen, *supra* note 4.

11 Release at 71,091.

12 Release at 71,091.

13 Kent and Coenen, *supra* note 4.

information for an investor in a variable annuity and limits the prospectus to those matters that a reasonable investor would consider important in deciding whether to invest.[14]

In 2022, Congress enacted Division AA, Title I of the Consolidated Appropriations Act of 2023, which directed the Commission to adopt a new registration form for RILAs. Congress required the Commission to design a form to ensure that a purchaser using the form receives the information necessary to make knowledgeable investment decisions, taking into account: (1) the availability of information; (2) the knowledge and sophistication of that class of purchasers; (3) the complexity of the RILA; and (4) any other factor the Commission determines appropriate.[15] The Proposal is a response to that congressional mandate.

SUMMARY OF THE PROPOSAL

The Proposal would amend Form N-4 so that issuers seeking to register the offering of RILAs must use that form. The Proposal would also amend Form N-4 to specifically address the features and risks of RILAs.[16] The amendments would require the insurance company to disclose on the cover page of the form an RILA's limitations on gains and potential for loss, that they are not short-term investments, and that payments under the contract are subject to the insurance company's financial strength and claims-paying ability.[17] In the body of the form, issuers would be required to further disclose the key features of index-linked options: that returns are based on an index, that investors could still lose a significant amount of money under the contract, and that there are limits on both positive and negative index performance.[18] The potential risk of loss is particularly important for investors to understand because RILAs are often presented to investors as having the benefit of offering a balance between the opportunity for growth and the reduced risk of loss relative to savings alone or more conservative investments.[19]

The amendments would also ensure that Form N-4 highlights in its "Key Information Table" the key features of a RILA contract that should be disclosed so that investors may determine whether a RILA is an appropriate investment for them—specifically, the key features of a RILA contract that may be substantially different from the features of investment products with which many investors may be more familiar.[20] For example, the Key Information Table would include the maximum amount of loss an investor could experience from negative index performance, after taking into account the minimum guaranteed limit on index loss provided under the contract (e.g.,

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14 Release at 71,092.
15 Release at 71,090.
16 Release at 71,095.
17 Release at 71,099. Because variable annuities are also complex and not short-term investments, these new disclosure requirements would apply to all Form N-4 issuers to ensure that investors in both RILAs and variable annuities receive appropriate disclosures. *Id.*
18 Release at 71,107-71,108.
19 Release at 71,117.
20 Release at 71,095.

the amount of the buffer).[21] The Key Information Table would also include disclosures regarding charges that investors may incur that would reduce the value of their investment if they make a withdrawal within a specific period after their last premium payment.[22]

The Proposal would further require that RILA issuers comply with Securities Act Rule 156, which provides guidance as to when sales literature is materially misleading under the federal securities laws.[23] The rule provides 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. Applying the rule to RILA sales literature would provide RILA issuers with guidance on ways to avoid presenting investors with materially misleading advertisements, which should help ensure that investors receive the information necessary to make informed decisions.[24]

COMMENTS

I. The Commission should adopt the Proposal's requirement that issuers register offerings of RILAs on Form N-4 rather than on Forms S-1 or S-3.

The purpose of securities disclosures is to equip investors to make informed investment decisions and to increase the accountability of the issuer and thereby protect issuers, investors, and the public.[25] But, although disclosure is the bedrock of federal securities regulation, there is considerable debate over disclosure's effectiveness. Critics argue that securities disclosures are too voluminous to be effectively digested, are too complex to be understood by most investors, and are too easily ignored by investors regardless.[26] Regulators have responded to this criticism by attempting to streamline disclosures so that, rather than leaving investors without material information by abandoning disclosure, disclosures provide investors with material information in a way that it easier for them to understand and use to make decisions.[27] The Proposal's requirement that issuers register offerings of RILAs on Form N-4 and include disclosures tailored to the features and risks of RILAs in prominent places on the form is precisely the sort of disclosure that should improve investors' ability to use the provided information to their benefit. While this reform cannot guarantee that investors considering RILAs as an investment option will receive, understand, and apply all of the information they need to make informed choices, it is a vast improvement over the status quo.

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21 Release at 71,102-71,103.
22 Release at 71,101-71,102.
23 Release at 71,095.
24 Release at 71,142.
25 Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L. J. 1045, 1050, 1068 (2019).
26 Lisa M. Fairfax, *The Securities Law Implications of Financial Illiteracy*, 104 VA. L. REV. 1065, 1091-92 (2018).
27 *Id.* at 1092-93.

A. The use of Form N-4 for offerings of RILAs ensures that investors receive disclosures on a form tailored to provide information about annuity offerings.

The Proposal's requirement that issuers of RILAs register offerings on an amended Form N-4 rather than Forms S-1 or S-3 benefits investors. In most cases, the disclosure requirements of different registration forms "are tailored to the transactions for which they are prescribed."[28] But, currently, there is no form specifically tailored to RILA offerings. And, as discussed above, the Forms S-1 and S-3 on which issuers now register RILA offerings are not a good fit for such investments. Just as "registration on a form other than the form prescribed for the specific transaction may deprive public investors of the disclosure benefits of Securities Act registration,"[29] the absence of a prescribed form for a specific type of offering such as RILAs prevents investors from receiving meaningful disclosure.

Investors cannot be left to fend for themselves by trying to decipher what information disclosed on a generic form is actually material to their investment decision, especially with respect to complex products such as RILA offerings. Otherwise, disclosure is insufficient to ensure that they are adequately protected:

> The purpose of securities regulation is to promote the formation of capital, to maintain confidence in the securities markets, and ultimately to protect investors by ensuring information is available to them to make fully informed decisions. Making these informed choices can be difficult at times because of investors' unavoidably bounded rationality and their cognitive and motivational biases. Investors' overconfident optimism, and their tendency to dismiss information that does not correlate with such optimism, can make them vulnerable . . . . Effective risk disclosure can help, in part, to overcome some of the cognitive and motivational tendencies that might otherwise lead investors to rush headlong into investments without first confronting the downside potential. Cautionary language that is sufficient in form and content to catch the market's attention, maintain that attention, and turn it toward a serious consideration of the risks provides a much-needed check on the market's collective inclination to [ignore risk factors].[30]

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28 1 GUY P. LANDER, U.S. SECURITIES LAW FOR INTERNATIONAL FINANCIAL TRANSACTIONS AND CAPITAL MARKETS § 2:119 n.34 (2d ed.) (citing *Registration of Securities on Form S-8*, Securities Act Release No. 7506, Fed. Sec. L. Rep. (CCH) 86,007, at 80,185 (Feb. 17, 1998)); *see also* Note, *Federal Regulation of Municipal Securities: Disclosure Requirements and Dual Sovereignty*, 86 YALE L.J. 919, 933 n.62 (1977) ("In order to enhance the usefulness of corporate prospectuses, the SEC has created specialized disclosure forms tailored to the disclosure needs of different categories of issuers and offerings.").

29 U.S. SECURITIES LAW FOR INTERNATIONAL FINANCIAL TRANSACTIONS AND CAPITAL MARKETS § 2:119 n.34.

30 Susanna Kim Ripken, *Predictions, Projections, and Precautions: Conveying Cautionary Warnings in Corporate Forward-Looking Statements*, 2005 U. ILL. L. REV. 929, 986 (2005).

In other words, it is not sufficient to simply mandate the disclosure of information. The effectiveness of mandatory disclosure "may be undermined if the disclosure requirements and standards are unspecific."[31] Mandatory disclosures must set out specific requirements.[32] Yet Forms S-1 and S-3 do not contain any requirements specific to RILAs. The Proposal rectifies this situation by requiring the use of Form N-4 for RILA offerings and amending the form so that it requires disclosures not just about variable annuities generally but RILA offerings specifically.

Studies show that disclosures are only effective if they provide facts that people want "'in times, places, and ways that enable[] them to act.'"[33] Disclosures "must provide information in a format that individual investors can directly synthesize and utilize in their decision making."[34] The use of Forms S-1 or S-3 for RILA offerings do not accomplish these objectives.

Conversely, the use of Form N-4 for RILA offerings makes sense because that form is tailored for variable annuity offerings. Research shows that disclosures should be tailored "specifically and uniquely to the business of the particular company."[35] Vague and relatively uninformative statements that could apply to almost any company in any industry "are not likely to be read or cognitively registered by investors."[36] Requiring insurance companies to register RILA offerings on Form N-4 leverages the form's existing disclosure requirements since variable annuities already register on Form N-4 and the form is designed to provide investors with product-specific information about annuity contracts.[37] The use of Form N-4, along with the RILA-specific disclosures the Commission proposes to add to Form N-4, "will provide investors with the information necessary to make informed decisions about RILAs."[38]

B. The amendments to Form N-4 in the Proposal ensure that investors will receive material information about RILAs in a way designed to capture their attention and facilitate their ability to choose between investment options.

The use of Form N-4 also allows the relevant disclosures to be presented to investors in a way that is likely to be most effective. Disclosures are effective when they are "'understandable,

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31 Li-Wen Lin, *Corporate Social and Environmental Disclosure in Emerging Securities Markets*, 35 N.C. J. INT'L L. & COM. REG. 1, 30 (2009).

32 *Id.*

33 Lear Jiang, Note, *Disclosure's Last Stand? The Need to Clarify the "Informational Interest" Advanced by Campaign Finance Disclosure*, 119 COLUM. L. REV. 487, 503 (2019) (quoting Archon Fung, Mary Graham, & David Weil, Full Disclosure: The Perils and Promise of Transparency, at xiv (2007)).

34 Katherine A. Cody, *Critical Audit Matters: Improving Disclosure Through Auditor Insight*, 18 U.C. DAVIS BUS. L. J. 259, 277 (2018).

35 Ripken, 2005 U. ILL. L. REV. at 981.

36 *Id*.

37 Release at 71,096.

38 Release at 71,096.

complete, and timely.'"[39] Otherwise, disclosures made in connection with public offerings and complex transactions are "more useful to the professional investor than to most retail investors."[40] Yet RILAs are often sold to retail investors. So these principles have particular salience for RILAs.

For example, in order for warning statements to be effective, they must have "prominence in the disclosure document."[41] This is because investors "are not likely to read or process risk information that is not easy to find."[42] As a result, cautionary language must be noticeable.[43] Yet the use of registration forms meant for new equity offerings and the absence of a registration form tailored to RILA offerings means that disclosures about the risks of RILAs are often paired alongside other disclosures that are "irrelevant to the product and to prospective RILA investors."[44] The Proposal ensures that the most important disclosures about RILAs appear on the cover page of the relevant form and in the Key Information Table where investors will easily find them.[45]

The use of the Key Information Table is especially important. Disclosures "must be salient enough to attract and hold people's attention."[46] The way information is disclosed can be modified to increase the salience of the information by drawing attention to it.[47] The most usefully designed disclosures possess characteristics that make them stand out from their background.[48] A separate section devoted to the most relevant disclosures "may help investors process the risks more readily than if the cautionary statements are interspersed throughout the document."[49] Because sections that "draw attention to" the disclosures stand a greater chance of being noticed by investors,[50] it is essential that the Commission require the proposed disclosures in the Key Information Table.

"Providing investors with key information is particularly important in the context of RILAs, since their features are typically complex and their risks may not be apparent or easily understood by prospective investors absent clear disclosure."[51] "If cautionary statements are to be

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39 Troy A. Parades, *Blinded by the Light: Information Overload And Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 433 (2003) (quoting Securities & Exchange Commission, Report of the Task Force on Disclosure Simplification (Mar. 5, 1996), at http://sec.gov/news/studies/smpl.htm).

40 Securities and Exchange Commission, Report of the Task Force on Disclosure Simplification, Fed. Sec. L. Rep. ¶ 85,738 (CCH), 1996 WL 35030727 (Jan. 1, 1996).

41 Ripken, 2005 U. ILL. L. REV. at 982.

42 *Id.*

43 *Id.*

44 Thorsten Moenig, *It's RILA Time: An Introduction to Registered Index-Linked Annuities*, at 10 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797980.

45 *See* Parades, 81 WASH. U. L.Q. at 476 (advocating for the use of more charts, graphs, and tables in SEC filings because presenting important information in these formats makes it easier for investors to process).

46 Ripken, 2005 U. ILL. L. REV. at 982.

47 Parades, 81 WASH. U. L.Q. at 475.

48 Ripken, 2005 U. ILL. L. REV. at 983.

49 *Id.*

50 *Id.*

51 Release at 71,091.

effective, they need to present as complete a picture of the risks as reasonably possible."[52] The information that the Proposal requires be included in the Key Information Table, such as the maximum amount of loss an investor could experience from negative index performance, provides investors with a complete picture of the risks of RILAs in a prominent place and easily understandable format.

Meaningful disclosure also "provides investors with information enabling them to choose between potential investments that are not otherwise fungible."[53] Research shows that better disclosure makes it easier "to make comparisons across choices."[54] "When investors have both the information necessary to make informed choices and confidence in that information, they may broaden their potential purchases to investments they otherwise would have discounted or entirely forgone."[55] So, as the Commission recognizes, requiring the registration of RILAs on Form N-4 benefits investors "by facilitating not only investor comparison among RILAs, but also the comparison of index-linked options to variable options in the same annuity contract.[56] "For example, investors would be able to review summary information of all the available investment options of an annuity contract—index-linked options, variable options, and fixed options—and compare these options in one place in the prospectus appendix required by Form N-4."[57] The shift from the use of Forms S-1 or S-3 to Form N-4 for RILAs thus not only enhances the disclosures available to investors about RILAs but improves their ability to choose between annuity options.

II. The Commission should adopt the Proposal's requirement that RILA issuers comply with Securities Act Rule 156 to protect investors against misleading sales literature.

The Commission should also adopt the Proposal's requirement that RILA issuers comply with Securities Act Rule 156, which provides guidance as to when sales literature is misleading. Sales literature has the potential to mislead regardless of the type of offering at issue or an investor's level of sophistication.[58] The fact that concerns persist about the sales techniques used to sell annuities generally makes the application of Rule 156 to RILAs all the more important.[59]

The application of Rule 156 to sales literature concerning RILAs specifically is also a natural fit. Rule 156 provides that representations about past or future investment performance could be misleading where portrayals of past income, gain, or growth of assets convey an

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52 Ripken, 2005 U. ILL. L. REV. at 981.
53 Sale, 107 GEO. L. J. at 1050.
54 Parades, 81 WASH. U. L.Q. at 475.
55 Sale, 107 GEO. L. J. at 1050.
56 Release at 71,096.
57 Release at 71,096.
58 *Regulatory Developments 2013: JOBS Act Related Rulemaking*, 69 BUS. LAW. 827, 845 (2014) (citing *Amendments to Regulation D, Form D, and Rule 156*, 78 Fed. Reg. 44,806, 44,826 (July 24, 2013)).
59 Tara Siegel Bernard, *For More Certainty in Your Retirement, Consider Annuities*, N.Y. Times (Feb. 7, 2023) (discussing the fact that investors often face "an aggressive sales pitch on annuities with opaque terms and hefty commission that give brokers incentives to sell annuities that pay them the most").

impression of the net investment results achieved by an actual or hypothetical investment which would not be justified under the circumstances.[60] This is relevant to RILAs because the terms of an RILA investment, such as limits on gains, change frequently; as a result, past performance is often irrelevant to current investors who are not able to utilize those past rates in current market conditions.[61] So investors could easily be misled by sales literature regarding an RILA offering that invoked the past performance of RILAs. The application of Rule 156 to RILA offerings thus provides investors with needed protection by requiring that issuers consider the potentially misleading nature of statements about past performance in their sales literature.

The application of Rule 156 to RILA offerings also protects investors because, despite the limitations on loss, RILAs are still risky as investors can lose money.[62] Rule 156 cautions that it may be misleading in sales literature to discuss the benefits of an investment without giving equal prominence to the risks. So, the application of Rule 156 to RILA offerings protects investors by ensuring that sales literature about an offering discusses the risks of the offering appropriately.

CONCLUSION

We hope these comments are helpful as the Commission finalizes the Proposed Rules.

Sincerely,

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60 17 C.F.R. § 230.156(b)(2)(i).
61 Release at 71,143.
62 Bernard, *supra* note 59.