

Practice Pointer: Informal Guidance from the SEC Staff Regarding Rule 30e-3's Transition Period Requirements for Variable Insurance Products

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Overview

The staff of the Securities and Exchange Commission (SEC) has informally provided Vedder Price with key interpretive guidance clarifying the transition period disclosure requirements for issuers of variable insurance products that wish to rely on new Rule 30e-3 under the Investment Company Act of 1940, as amended.¹ Rule 30e-3 was adopted by the SEC in June 2018 and creates an optional “notice and access” method for delivering shareholder reports for underlying funds in which the separate account invests. Rule 30e-3's effective date was January 1, 2019. However, the Rule is subject to an extended transition period from the effective date to December 31, 2021 (the Transition Period), the practical effect of which is that if an insurance company or fund wants to rely on the Rule beginning on January 1, 2021, rather than waiting until January 1, 2022, it must satisfy certain Transition Period disclosure requirements. These requirements are intended to notify investors of the upcoming change in transmission format over the Transition Period and provide them an opportunity to express their shareholder report delivery preferences. The SEC staff's guidance clarifies these Transition Period disclosure obligations for variable insurance products.

Background

Recently, during the process of advising insurance company clients on the Transition Period disclosure requirements with respect to their variable insurance products, questions arose regarding certain statements in the Adopting Release and how they relate to the requirements set forth in Rule 30e-3 itself. In general, funds that choose to implement the new delivery method for shareholder reports prior to January 1, 2022 must provide prominent disclosures on the cover page or beginning of their summary prospectuses that notify investors of the upcoming change in transmission method over the course of the Transition Period before relying on the rule—temporary Transition Period disclosures that are referred to in the Rule as a “required statement,” and also referred to in the Adopting Release generally as “the cover page disclosure.” Specifically, according to the Adopting Release, open-end funds would be required to provide the cover page disclosure on at least six documents sent to investors during the Transition Period: once per year on the fund's summary prospectus or statutory prospectus, once per year on the fund's annual report to shareholders and once per year on the fund's semi-annual report to shareholders.

¹ See Optional Internet Availability of Investment Company Shareholder Reports, Investment Company Act Release No. 33115 (June 5, 2018) (the Adopting Release), available at <https://www.sec.gov/rules/final/2018/33-10506.pdf>.

In contrast, the Adopting Release states that “[v]ariable annuity and variable life insurance contracts registered on Forms N-4 and N-6, respectively, would be required to provide the cover page disclosure on at least two contract prospectuses during [the Transition Period].”² Presumably, “two contract prospectuses during this time” means one contract prospectus per year during the Transition Period. In this regard, a footnote to the Adopting Release explains that “[m]ost issuers of variable annuities and variable life insurance policies amend their registration statements annually and hence send updated prospectuses to their contract owners at least once per year.”³

Issuers of variable annuity and variable life insurance contracts that no longer amend their registration statements and do not distribute updated prospectuses to contract owners rely on the *Great-West* series of no-action letters issued by the SEC’s staff.⁴ As to “Great-Wested” contracts, footnote 272 to the Adopting Release states:

Consistent with this no-action position, such issuers may rely on rule 30e-3 prior to January 1, 2022 if **comparable notice** is provided to contract owners during the extended transition period **when providing them with prospectuses and shareholder reports** for underlying funds in which the separate account invests. (emphasis added)⁵

The foregoing footnote, at first glance, appears to require more than one “required statement” disclosure to Great-Wested contract owners per year—i.e., with both the contract prospectus and shareholder reports, with no indication that the latter is limited to annual reports only. If that is the case, it would result in an anomalous outcome whereby fewer Transition Period disclosures are required for non-Great-Wested contracts than are required for Great-Wested contracts. Moreover, although practices vary among insurance companies with respect to Great-West “supplements,” the SEC staff’s position in Great-West does not require the distribution of updated contract prospectuses.

A review of the text of Rule 30e-3 raised further questions. Rule 30e-3(i)(1)(ii) states that a company may rely on the Rule to transmit a shareholder report “if the Company has included the required statement on each prospectus, summary prospectus, annual report to shareholders, and semi-annual report to shareholders, as applicable, required to be delivered or transmitted to shareholders for a period of two years or January 1, 2022, whichever comes first.”

In sum, the questions presented are:

- Is an insurance company seeking to rely on Rule 30e-3 only required to provide the cover page disclosure during the Transition Period for its product prospectuses with respect to non-Great-Wested contracts?
- If so, what “comparable notice” needs to be provided to Great-Wested contract owners?
- Is notice also required when insurance companies comply with Rule 30e-2⁶ by transmitting underlying fund shareholder reports to contract owners (whether generally or to comply with the corresponding conditions of the Great-West line of no-action letters)? If so, what form should such notice take?

² Adopting Release at 81.

³ Adopting Release at n. 272.

⁴ See *Great-West Life & Annuity Insurance Co.*, SEC Staff No-Action Letter (pub. avail. Oct. 23, 1990). In *Great-West*, the SEC staff stated it would not recommend enforcement action if post-effective amendments were not filed under the Securities Act of 1933, as amended, and the 1940 Act and if updated prospectuses were not distributed to existing contract owners, subject to certain conditions. The conditions included that no new contracts would be offered to the public and the following material would be provided to all existing contract owners: (i) annual and semi-annual reports of the underlying fund portfolios in which the sub-accounts of the separate account invest, current prospectuses for the investment portfolios, proxy statements and voting instructions, and other shareholder materials pertaining to the investment portfolios; (ii) confirmations of policy transactions, including transfers among the investment options, withdrawals, reduction of insurance, reinstatement, loan repayments and due and unpaid loan interest added to loan principal; (iii) within 120 days after the close of the fiscal year, audited financial statements for the registrant (and the depositor for variable life insurance contracts); and (iv) at least once a year, a statement of the number of units and values in each contract owner’s accounts.

⁵ Adopting Release at n. 272.

⁶ Rule 30e-2 under the 1940 Act provides that if substantially all of the assets of a unit investment trust (UIT) consist of shares of a management investment company, then the UIT at least semi-annually must transmit that company’s shareholder report (or a report containing equivalent information) to its (the UIT’s) shareholders, within the same 60-day period specified in Rule 30e-1 (i.e., within 60 days after the close of the applicable period).

The SEC Staff's Informal Guidance

We contacted the SEC staff to request clarification on the respective responsibilities of insurance companies and underlying funds as to disclosure during the Transition Period. The staff has advised us as follows:

Insurance companies may comply with the Transition Period disclosure requirements of Rule 30e-3 by:

- including the required disclosure on the cover page of their contract prospectuses that they will use for non-Great-Wested contract purchasers and/or contract owners on or around May 1, 2019; and
- including “comparable notice” when transmitting underlying fund prospectuses to Great-Wested contract owners as required under the Great-West line of no-action letters, on or about May 1, 2019. This notice could take the form of a “buckslip” included with those underlying fund prospectuses, notice included on the cover page of those underlying fund prospectuses or notice included on the cover page of Great-West “supplements,” if used by a particular insurance company. No other Transition Period disclosure is required. In this regard, the SEC staff indicated that there was no intention to impose greater disclosure requirements on Great-Wested contracts, as compared to non-Great-Wested contracts.

As a general matter, the SEC staff encouraged insurance companies that seek to take advantage of Rule 30e-3 to notify contract owners “early and often.”

Finally, the SEC staff indicated that they may issue “formal” interpretive guidance addressing the foregoing.

If you have any questions regarding the topics discussed in this article, please contact **W. Thomas Conner** at +1 (202) 312-3331 or **Nathaniel Segal** at +1 (312) 609-7747 of Vedder Price's Investment Services group or any Vedder Price attorney with whom you have worked.

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