

disclosed in the fund's prospectus.⁴⁴ A variable insurance product advertisement should direct investors to both the contract prospectus and the underlying fund prospectuses. Both the contract prospectus and the underlying fund prospectuses contain information relating to the product's investment objectives, risks, and charges and expenses as well as other important information.

Presentation of Explanatory Information

We are adopting, with modifications suggested by commenters, requirements that funds present certain information in their rule 482 advertisements more prominently. These prominence requirements are designed to prevent advertisements from marginalizing or minimizing the presentation of the required disclosure. The amendments will require print advertisements to present required narrative disclosures in a type size at least as large as and of a style different from, but at least as prominent as, that used in the major portion of the advertisement.⁴⁵ This requirement will apply to the required narrative disclosures about the prospectus and the performance data.⁴⁶ The amendments will also provide an exception to this requirement, which was suggested by a commenter; *i.e.*, when performance data is presented in a type size smaller than that of the major portion of the advertisement, the required narrative disclosure pertaining to the performance data may appear in a type size no smaller than that of the performance data.⁴⁷ We were persuaded that, in such cases, presenting the required performance-related narrative disclosure in a type size larger than that

of the performance data itself may be distracting.

The newly adopted type size and style requirements will apply to print advertisements. We have modified the proposed requirement, as suggested by a commenter, to clarify that if an advertisement is delivered through an electronic medium, the type size and style requirements may be satisfied by presenting the required narrative disclosures in any manner reasonably calculated to draw investor attention to them.⁴⁸ This is consistent with rule 420(b) under the Securities Act, which provides that prospectuses distributed through an electronic medium may satisfy legibility requirements applicable to printed documents by presenting all required information in a format readily communicated to investors, and where indicated, in a manner reasonably calculated to draw investor attention to the specific information.⁴⁹

We are adopting, as proposed, the requirement that radio and television advertisements give the required narrative disclosures emphasis equal to that used in the major portion of the advertisement.⁵⁰ Two commenters recommended that, with respect to television advertisements, we clarify that the required narrative disclosures need not be provided orally and that, instead, they may be provided in written text on the television screen. We do not agree that the required disclosures would have an emphasis equal to that of the major portion of the advertisement if the required disclosures are in written form, while the major portion of the advertisement is spoken. If the required disclosures appear in writing on a television screen during a spoken advertisement, we believe that they are more likely to be overlooked, and not seen as a significant part of the advertisement, than if they are included in the spoken presentation of the advertisement.

In addition, we are adopting, as proposed, a requirement that the narrative disclosures that specifically relate to fund performance be presented

in close proximity to the performance data in both print and radio and television advertisements.⁵¹ In a print advertisement, this information also would be required to appear in the body of the advertisement and not in a footnote. Rule 482 currently requires that performance advertisements identify the dates during which quoted performance occurred.⁵² We are adopting, as proposed, a requirement that this information be adjacent to, and have no less prominence than, the performance quotation itself.⁵³ These proximity requirements are intended to help investors more readily find information necessary to understand and evaluate the performance data shown, and to remind investors of the limitations of performance data.

While the newly adopted prominence and proximity requirements apply only to certain information expressly required by rule 482, we wish to emphasize that the purpose of these requirements is to encourage fair and balanced advertisements. In that regard, we encourage funds and their underwriters and dealers to review their advertisements to ensure that the format of all the information in an advertisement results in a fair and balanced presentation. For example, an advertisement that hypes extraordinary performance but contains only footnote disclosure of unusual circumstances that have contributed to fund performance may not result in a fair and balanced presentation.⁵⁴

⁴⁴ Form N-4, Item 3 [17 CFR 239.17b; 17 CFR 274.11c]; Form N-6, Item 3 [17 CFR 239.17c; 17 CFR 274.11d].

⁴⁵ 17 CFR 230.482(b)(5). The presentation requirements for rule 482 are the same as those currently required under rule 134. 17 CFR 230.134(a)(iii). The presentation requirements would replace the current rule 482 requirement that certain required disclosures be "conspicuous." Current 17 CFR 230.482(a)(3).

⁴⁶ 17 CFR 230.482(b)(1) and (3). The narrative disclosure covered by the prominence requirement will also include, if applicable, the "subject to completion" legend that will be required by rule 482(b)(2) and, if the advertisement is used with a profile under rule 498 under the Securities Act [17 CFR 230.498], disclosure advising investors to consider the fund's investment objectives, risks, and charges and expenses carefully before investing, explaining that the profile contains this and other information about the fund, describing the procedures for investing in the fund, and indicating the availability of the prospectus. 17 CFR 230.482(b)(1)(ii) and (b)(2). In addition, the prominence requirement will extend to disclosures specific to money market funds. 17 CFR 230.482(b)(4).

⁴⁷ 17 CFR 230.482(b)(5).

⁴⁸ *Id.*

⁴⁹ 17 CFR 230.420(b). Rule 420 applies to rule 482 advertisements. Note to rule 482(a) [17 CFR 230.482(a)]. See Securities Act Release No. 7289 (May 9, 1996) [61 FR 24652, 24652 (May 15, 1996)] (amending Commission rules to provide that issuer, when delivering electronic version of document, may comply with requirements prescribing physical appearance of paper document by (i) presenting the information in a format readily communicated to investors; and (ii) where legends are required to be printed in red ink or bold-face type, or in a different font size, presenting legends in any manner reasonably calculated to draw attention to them).

⁵⁰ 17 CFR 230.482(b)(5).

⁵¹ *Id.* The disclosure subject to the proximity requirement would include all of the disclosures required by paragraphs (b)(3)(i) and (ii) of rule 482. 17 CFR 230.482(b)(3)(i) and (ii). Paragraph (b)(3)(i) of rule 482 requires disclosure that the performance data quoted represents past performance; that past performance does not guarantee future results; in the case of a non-money market fund, that the investment return and principal value of an investment will fluctuate; that current performance may be lower or higher than the performance data quoted; and a toll-free telephone number or Web site where an investor may obtain month-end performance data. Paragraph (b)(3)(ii) of rule 482 requires that, if a sales load or any other nonrecurring fee is charged, the advertisement must disclose the maximum amount of the load or fee. In addition, if the sales load or fee is not reflected, the advertisement must also disclose that the performance data does not reflect its deduction, and that, if reflected, the load or fee would reduce the performance quoted. *Cf.* Proposing Release, *supra* note 7, 67 FR at 36721 n. 82 (omitting to state explicitly that disclosures of paragraph (b)(3)(ii) of rule 482 are covered by proximity requirement).

⁵² Current 17 CFR 230.482(d)(1)(i), (e)(1)(iv), (e)(2)(v), (e)(3)(iv), (e)(4)(vi), and (e)(5)(v).

⁵³ 17 CFR 230.482(d)(1)(iv), (d)(2)(v), (d)(3)(iv), (d)(4)(vi), (d)(5)(v), and (e)(1)(i).

⁵⁴ See Section II.B., "Applicability of Antifraud Provisions to Fund Advertising," *supra* (discussing Commission's concerns with inadequate disclosure in fund performance advertising of unusual circumstances contributing to performance).