

Two commenters also recommended that for purposes of spoken advertisements, such as those on radio and television, we clarify that the proximity requirements would not require that the required performance-related disclosures immediately follow any performance information so long as they are given emphasis equal to that of the major portion of the advertisement. In the case of spoken advertisements, we believe that the required performance-related disclosures should appear immediately after, immediately before, or briefly separated from the performance information. Our goal is that investors be readily able to understand the limitations of past performance data, and we would be concerned if performance information in a spoken advertisement were significantly separated from the required disclosures. On the other hand, we recognize that, in a relatively short, spoken advertisement, funds should have some flexibility to determine the appropriate placement of the required disclosures.

One commenter requested clarification of how the proximity requirements would apply to advertisements consisting of lists of fund performance information over multiple pages. The commenter stated that we should not interpret the amendments to require that the required disclosures be repeated on every page of such a listing, which could result in the required disclosures being viewed as boilerplate and ignored. We agree that, in the case of an advertisement that consists of a list of performance data longer than one page in length, the required performance-related disclosures may appear once, at the beginning of the list, such as on the cover page or first page, provided that the required disclosures are presented in conformity with the prominence requirements of the rule.<sup>55</sup>

Several commenters requested clarification concerning the applicability of the proximity requirements to Web site advertisements, arguing that it should be sufficient if the required performance-related disclosures appear either (i) on a screen that must be accessed prior to the investor accessing the actual performance information, or (ii) through a pop-up message or link on the screen that contains the performance information. As a general matter, we disagree with this interpretation of the

proximity requirements and would expect the required performance-related disclosures to appear on the same webpage as the performance data to which the disclosures relate and in close proximity to that data. This will provide investors who are reviewing a Web site advertisement with access to the required disclosure that is substantially equivalent to that provided through a paper advertisement that meets the proximity requirements.

We are also adopting amendments to rule 34b-1 to clarify that the newly adopted prominence and proximity requirements will apply to supplemental sales literature.<sup>56</sup>

#### *D. Reorganization of Rule 482 and Technical Form Amendments*

We are adopting, as proposed, amendments reorganizing rule 482 to make it easier to use. We are also adopting, as proposed, amendments to Forms N-1A, N-3, N-4, and N-6 to reflect the removal of the "substance of which" requirement in rule 482.<sup>57</sup> In addition, we are adopting additional technical amendments to Forms N-3 and N-4, also to reflect the removal of the "substance of which" requirement in rule 482.<sup>58</sup>

#### *E. Rule 482(a)(5)(i) Relating to Variable Insurance Products*

Rule 482 generally prohibits a rule 482 advertisement from containing or being accompanied by an application to purchase fund shares.<sup>59</sup> However, the rule contains an exception from the prohibition against applications for unit investment trusts that offer variable annuity or variable life insurance contracts.<sup>60</sup> These contracts permit investors to allocate premiums among a variety of underlying mutual funds in which the unit investment trust invests.

The contract prospectuses contain descriptions of the underlying mutual funds, which are considered rule 482 advertisements for the underlying funds.<sup>61</sup> The underlying funds are separately registered as management investment companies on Form N-1A and offer their shares through separate prospectuses. The exception from the prohibition on applications for variable insurance contracts permits an application for the contract (which provides for investor allocation of purchase payments to specific underlying funds) to accompany the contract prospectus, even though the contract prospectus constitutes a rule 482 advertisement for the underlying mutual funds and even though prospectuses for the underlying funds do not accompany the contract prospectus.<sup>62</sup>

By its terms, the exception permits a contract application to accompany a rule 482 advertisement for the underlying funds only when the rule 482 advertisement is a part of the contract prospectus itself. As we noted in the Proposing Release, in recent years, members of the variable insurance industry have argued that it should be permissible for a contract prospectus and application to be accompanied by other rule 482 advertisements for the underlying funds that are not a part of the prospectus itself.<sup>63</sup>

Advocates of this position argue that rule 482 permits either of the following: (i) delivery of a rule 482 advertisement for an underlying fund (without an application); and (ii) delivery of a contract prospectus with an application. Therefore, they argue that, under rule 482, delivery of a rule 482 advertisement for an underlying fund (without an application) could be either preceded or followed by delivery of a contract prospectus with an application. As a result, they conclude that it should be permissible for a contract prospectus and application to be accompanied by other rule 482 advertisements for the underlying funds because whether the delivery of the additional rule 482 advertisements is made together with the contract material or separately from

<sup>56</sup> 17 CFR 270.34b-1(a) and (b)(1)(i).

<sup>57</sup> See Item 21 of Form N-1A [17 CFR 239.15A; 17 CFR 274.11A]; Items 4 and 25 of Form N-3 [17 CFR 239.17a; 17 CFR 274.11b]; Items 4 and 21 of Form N-4 [17 CFR 239.17b; 17 CFR 274.11c]. The amendments delete Item 25 of Form N-6 [17 CFR 239.17c; 17 CFR 274.11d].

Form N-1A is the registration form for open-end management investment companies. Form N-3 is the registration form for separate accounts organized as management investment companies that offer variable annuity contracts. Form N-4 is the registration form for separate accounts organized as unit investment trusts that offer variable annuity contracts. Form N-6 is the registration form for separate accounts that are registered as unit investment trusts and that offer variable life insurance policies.

<sup>58</sup> See General Instruction F and Item 28 of Form N-3 and General Instruction F and Item 24 of Form N-4.

<sup>59</sup> Current 17 CFR 230.482(a)(5); newly adopted 17 CFR 230.482(c).

<sup>60</sup> Current 17 CFR 230.482(a)(5)(i); newly adopted 17 CFR 230.482(c)(1).

<sup>61</sup> See Item 5(c) of Form N-4 and Item 4(c) of Form N-6 (requiring brief description of each underlying mutual fund offered through the contract). See also Investment Company Act Release No. 14575 (June 14, 1985) [50 FR 26145, 26155 n. 48 and accompanying text (June 25, 1985)] (describing treatment of underlying mutual funds in contract prospectus as omitting prospectuses).

<sup>62</sup> See Investment Company Act Release No. 15315 (Sept. 17, 1986) [51 FR 34384, 34391 n. 60 (Sept. 26, 1986)].

<sup>63</sup> Proposing Release, *supra* note, 67 FR at 36723.

<sup>55</sup> This clarification is limited to advertisements consisting of multi-page *paper* documents. Applicability of the presentation requirements to Web sites consisting of multiple Web pages is discussed *infra*.