

Parsing the 151A Labyrinth

BY GARY COHEN

What's up with the SEC's twists and turns on proposed Rule 151A? First, we have the substantive twists and turns. The SEC has proposed a standard that, for many insurers, seems to come from out of the blue. These insurers do not believe that the SEC has adequately explained how the standard relates to Supreme Court principles.

Second, we have the procedural twists and turns. Many parties asked the SEC to extend the September 10, 2008 deadline for comments. The SEC remained silent and let the deadline pass. Then, a month later, the SEC announced a 30-day extension of the comment period.

Moreover, the SEC continued to post, on its website, comment letters dated after September 10. This process seems to undercut the September 10 deadline by suggesting that the SEC would consider comments received after the deadline. Some considered the SEC to have granted a de facto extension of the comment deadline.

And the industry has experienced its own twists and turns.

First, a number of insurers favor the proposal, while others, particularly issuers of index annuities, vigorously oppose it. So, some groups like the ACLI, NAVA and CAI may not achieve a sufficient consensus to submit comments during the extension.

Second, even insurers that support the proposal have difficulties with Rule 151A in its proposed form. These insurers believe that the proposal would sweep into its ambit unintended insurance products. The fact that the SEC did not honor requests for extension of the comment deadline generated a number of speculations. The principal speculation – for which the author has no factual foundation – is that SEC Chairman Christopher Cox wants to adopt a “do good” rule to protect seniors in order to burnish his legacy as Chairman.

Chairman Cox, a Republican, has come under withering criticism within his own ranks. The *Wall Street Journal*, for example, ran a highly critical article. Presidential candidate John McCain publicly called for the Chairman's ouster. And the SEC's Inspector General published a report faulting the SEC in connection with the current financial crisis. The SEC has publicly stated that Chairman Cox intends to leave after the end of the current administration. The SEC did not state how long “after” the end of the current administration Chairman Cox intends to leave. The expectation is that Chairman Cox will leave in February 2009.

So, one speculation is that the SEC did not extend the comment deadline in order for Chairman Cox to have sufficient time to get Proposed Rule 151A adopted before he leaves the SEC in February 2009. But the financial crisis has overtaken the Rule 151A proposal. So, the SEC may have granted the extension because it couldn't get to the proposal for another month anyway.



Is Chairman Cox feeling targeted from within?