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## Spotlight on 151A

BY GARY COHEN

The focus of the fight over Rule 151A has shifted from the SEC to the courts.

A group of insurers filed a lawsuit against the SEC asking the Court of Appeals for the District of Columbia to hold the Rule unlawful. The group includes the American Equity Investment Life Insurance Company, BHC Marketing, Midland National Life Insurance Company, National Western Life Insurance Company, OM Financial Life Insurance Company, and Tucker Advisory Group, Inc.



Subsequently, the National Association of Insurance Commissioners (NAIC) and the National Conference of Insurance Legislators (NCOIL) filed a similar lawsuit, and AARP joined the coalition's lawsuit.

The parties filed briefs with the court on February 17, 2009. Oral arguments are set for May 8, 2009.

The insurers argued as follows. Index annuities are exempt from regulation as securities, because they “are subject without exception to state [insurance] laws” and “are not marketed or valued according to the investment management of the issuer.” The “terms of Rule 151A conflict with the Supreme Court’s decisions [in VALIC and United Benefit] and the statutory text [of Section 3(a)(8) of the Securities Act].” The Rule’s “invalid terms result from the Commission’s use of a definition of investment risk that conflicts with the governing caselaw and common parlance.”

The NAIC and NCOIL argue as follows. The SEC ignored the McCarran-Ferguson Act that commits insurance regulation to the states. Rule 151A is “arbitrary, capricious and contrary to law.” The SEC failed to consider evidence that there was no “widespread abuse and complaints.” The SEC did not consider the protections already provided by the state regulatory system. The SEC failed to engage in the required analysis of “the inefficiencies created by a dual regulatory system.”

The insurer’s brief notes that Commissioner Troy A. Paredes dissented from the SEC’s adoption of the Rule. As Commissioner Paredes requested, his dissent is set out in the Federal Register along with the SEC’s adopting release.

With the Rule not effective until January 12, 2011, there seems to be time for the court to consider the lawsuits challenging the Rule. Nevertheless, the insurers asked the court for, and received, an expedited briefing schedule.

Despite the lawsuits, the SEC staff has indicated that it intends to push ahead with implementing the Rule. The staff has further indicated that it will begin work on tailoring disclosure and accounting requirements to fit index annuities.

For further Rule 151A coverage, please see *Uncertain Times for Index Annuities* on page 12.