



SEC Responds to Old Mutual Petition for Two-Year Stay of Rule 151A

On September 28, 2009, the SEC filed a response asking the U.S. Court of Appeals for the District of Columbia Circuit ("Court") to deny the petition of Old Mutual Financial Life Insurance Company ("Old Mutual") to stay the effective date of Rule 151A ("Rule") for two years after the possible reissuance of the Rule.

A. Preliminary Statement

In its preliminary statement, the SEC asserted that the relief sought by Old Mutual was "premature and unwarranted," since it was "unclear at this juncture" what action the SEC will take on remand. The SEC did acknowledge, however, that such action could be any of the three posited by Old Mutual in its petition, namely, reissuance, revision, or withdrawal of the Rule. The SEC also asserted that there was no basis for Old Mutual's assumption that the SEC would refuse to extend the Rule's effective date if it were to reissue the Rule after addressing the requirements of Section 2(b) of the Securities Act. To the contrary, according to the SEC, it "has sought to accommodate the legitimate concerns" of companies that issue and sell indexed annuities "at every state of the rulemaking and subsequent challenge."

In addition, the SEC stated that in the "unlikely event" it were to reissue the Rule "without providing adequate transition time for Old Mutual or other affected companies (none of which joined in the rehearing petition)," a stay could be sought either from the SEC or the Court, which would:

- (a) allow the SEC to set an "effective date that reflects its reasoned judgment,"
- (b) avoid "premature intervention by the Court in a manner that likely will prove unnecessary," and
- (c) enable "the [SEC], the Court, and those affected by any rule that may be adopted -- to act in response to facts rather than to speculation about future actions that may never occur."

B. Arguments

The SEC's arguments focused on refuting Old Mutual's reliance on *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993) ("*Allied-Signal*") to support its remand-with-stay remedy request.

According to the SEC, neither of the *Allied-Signal* factors support vacating the Rule, "which Old Mutual argues is the basis for the hybrid 'remand-with-stay' relief it is seeking."

Regarding the first *Allied-Signal* factor, the SEC asserted that "nothing in the Court's opinion or elsewhere provides any support for Old Mutual's argument that there is substantial reason to doubt that, if the Commission proceeds with Rule 151A, it would be unable to cure the defect in its Section 2(b) analysis that led the Court to remand the [R]ule." In this regard, the SEC argued that Old Mutual "has identified no reason for concluding that there is not 'at least a serious possibility that the [SEC] will be able to substantiate its decision on remand.'" In addition, the SEC argued that Old Mutual "ignored" the alternative means identified by the Court for "rectifying" the deficiencies of its Section 2(b) analysis, namely, to explain why no Section 2(b) analysis is required.

Regarding the second *Allied-Signal* factor, the SEC argued that Old Mutual's assertion that an immediate stay is necessary to avoid the "disruptive consequences" that otherwise would occur "is unfounded and inconsistent with both basic principles of administrative and judicial procedure and the *Allied-Signal* line of authority on which Old Mutual purports to rely." In this regard, the SEC argued that the potential harms envisioned by Old Mutual were "wholly inconsistent with the way the Commission has responded throughout this rulemaking and litigation" and "unlikely to transpire." In addition, the SEC argued that Old Mutual could later seek a stay from the Court should the SEC reissue the Rule without adjusting its effective date and refuse to stay the Rule.

The SEC also argued that "for the Court to intervene now based only on potential Commission action that could result in possible competitive harm would contravene basic principles governing the relationship between courts and administrative agencies." Finally, the SEC distinguished Old Mutual's "speculative claims of harm from a rule that is not yet effective - and that the Commission has not yet decided to reissue" from "the disruption that would occur from vacating an existing comprehensive regulatory scheme that the *Allied-Signal* line of cases found significant."

C. Commentary

The SEC repeatedly emphasized that it has not yet made up its mind whether to reissue the Rule. This could be significant, but should not be overstated.

The SEC stated that it is "unlikely" that it would not provide adequate transition time for companies if it decided to reissue the Rule. The Court could find this compelling. At the same time, the SEC's "trust me" assertion may give rise to some skepticism.

The SEC's response to the motion for stay reflects the position that the SEC staff took in a meeting with insurance companies in Washington on September 15, 2009. Chairman Schapiro asked her staff to schedule the meeting as requested in a letter to the Chairman from Senator Ben Nelson. Senator Nelson is a primary sponsor of the pending Senate bill to vacate Rule 151A. Senator Nelson asked the Chairman to schedule a meeting with insurance companies, as well as with state insurance regulators, to explore the potential

for compromise. However, at the meeting, the SEC staff stated that the SEC had not determined what action to take on the remand. Consequently, the SEC staff was not in a position to discuss any potential for compromise.

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