

SUPPLEMENTAL BRIEF

No. 09-1021 (Consolidated with No. 09-1056)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN EQUITY INVESTMENT
LIFE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

**On Petition for Review of Final Rule of the
United States Securities and Exchange Commission**

**BRIEF REGARDING THE REMEDY BY
PETITIONERS AMERICAN EQUITY INVESTMENT LIFE INSURANCE
COMPANY, BHC MARKETING, MIDLAND NATIONAL LIFE
INSURANCE COMPANY, NATIONAL WESTERN LIFE INSURANCE
COMPANY, AND TUCKER ADVISORY GROUP, INC.**

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INTRODUCTION

“[A] reviewing court should normally strike the balance in favor of vacating the agency’s action, unless special circumstances exist.” *Illinois Public Telecomm. Ass’n v. FCC*, 123 F.3d 693, 694 (D.C. Cir. 1997) (Ginsburg, J.), quoting A.B.A. House of Delegates Res. No. 107B (Annual Mtg., Aug. 5-6, 1997). This case presents no “special circumstances,” and vacatur is called for by both prongs of *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150 (D.C. Cir. 1993), which considers “the disruptive consequences” that would result from vacating or remanding, and “the seriousness of the . . . deficiencies” in the agency’s action.¹

In all events, relief should be given from the January 2011 effective date.

I. Leaving The Rule In Place Is More Disruptive Than Vacating It.

Rule 151A will cost billions of dollars, yet the Commission failed to identify any benefits. *See Am. Equity Inv. Life Ins. Co. v. SEC*, 572 F.3d 923, 935-36 (D.C. Cir. 2009). Vacatur will thus cause no harm and will produce great savings, since otherwise steps to comply by 2011 must be taken, imposing costs on industry and consumers. *See* Pet. Mot. Exp. Br. 14-19; Old Mutual Pet. for Reh’g 6-8.

¹ Vacatur is appropriate under the terms of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A) (a court “shall . . . hold unlawful and set aside” arbitrary and capricious agency action); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting). Moreover, the SEC waived opposition to vacatur in briefing and argument before the Court. Petitioners requested vacatur in their briefs and at argument; the SEC did not respond until questioned by the Court. *See* Arg. Tr. at 4, 46.

Factors that have resulted in remand without vacatur (“RWV”) in other cases are absent here: (1) The regulatory “egg has [not] been scrambled,” nor has industry already largely incurred compliance costs. *Milk Train*, 310 F.3d at 756 (citation omitted); *NRDC v. EPA*, 489 F.3d 1250, 1266 (D.C. Cir. 2007) (Rogers, J., concurring and dissenting). Vacatur will maintain “the status quo ante.” *Milk Train*, 310 F.3d at 756. (2) Vacatur will not forfeit funds that the government could not recoup later. *Heartland Reg’l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). (3) Public health and safety are not threatened. *NRDC v. EPA*, 489 F.3d at 1265-67 (Rogers, J., concurring and dissenting). (4) Rather, extensive (in fact, superior) protections exist under state law even if the rule is vacated. *Old Mut. Supp. Br.* at 9-10. (5) Congress has not required a rule. *Allied-Signal*, 988 F.2d at 148. *See also* the factors said to justify RWV in Ronald M. Levin, “*Vacation*” at *Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 *Duke L.J.* 291, 298-304 (2003). None is present here.

II. The Commission’s Errors Were Serious.

The agency misapplied each part of a three-part test. It failed to determine that its rule provides any benefit over existing state laws, which on remand will raise the question whether the rule is even worth pursuing. The agency did not merely overlook evidence, it *purposely avoided* evidence that rebutted the proposal’s *raison d’etre*, viz., that there were widespread abuses with fixed indexed annuities (“FIAs”) that state law did not address. *See* the discussion of the

rulemaking in Pet. Op. Br. at 21-24. *And compare* Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 Admin. L. Rev. 659, 665-66 (1997) (RWV is to address “the agency’s failure to communicate or explain . . . what they are doing, not by the agency’s failure to do enough research or garner sufficient expert opinions . . .”); *and Checkosky v. SEC*, 23 F.3d 452, 464 (D.C. Cir. 1994) (Silberman, J., concurring) (RWV most appropriate when the court “remands for a fuller explanation without expressing a view as to whether the agency’s action is unlawful”). This Court vacated a rule in circumstances similar to here, where the agency

had purported to disagree with th[e] evidence, but it never provided any reasons for its disagreement. *We infer that, if it were possible to reconcile the evidence with the agency’s decision, the FCC would at least have attempted to do so.* The FCC’s failure to respond to contrary arguments based on solid data . . . leaves the court with no basis for allowing the [order] to remain in place pending further consideration on remand.

Illinois Public Telecomm. Ass’n v. FCC, 123 F.3d 693, 694 (D.C. Cir. 1997).

The foregoing indicates that the Commission’s error is not easily fixed, as does the fact that this is the third time the Commission has failed to sustain its evaluation of efficiency, competition, and capital formation (“ECCF”) in this Court. *See Chamber of Commerce v. SEC*, 412 F.3d 133, 144-45 (D.C. Cir. 2005); *Chamber of Commerce v. SEC*, 443 F.3d 890, 908-09 (D.C. Cir. 2006).

It is immaterial whether an analysis of ECCF was statutorily-required. This Court will vacate a rule when the agency misapplies an analysis of its own

devising. *See Illinois Public*, 123 F.3d at 694. The Commission considered ECCF in this rulemaking as it regularly does in rulemakings, including for rules under the section of the Securities Act it invoked here. 74 Fed. Reg. 10836, 10837-38 (Mar. 13, 2009) (final rule). A departure from that precedent cannot be assumed by the Court. *Cf.* SEC Resp. to Pet. for Reh'g at 2 (the Court should “act in response to facts rather than to speculation about future actions”). Such a departure from its precedent would require substantial explanation by the Commission, *Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006), which may think the better of “curing” a controversial rule by refusing to evaluate its effects on competition and efficiency.

In any event, consideration of ECCF *is* legally required. Section 2(b) of the Securities Act provides that when the Commission determines whether an action is “necessary or appropriate in the public interest,” it must consider whether the action will “promote” ECCF. 15 U.S.C. § 77b(b). Section 28 of the Act authorizes the Commission to “exempt” securities from the Act “to the extent that such exemption is necessary or appropriate in the public interest.” 15 U.S.C. § 77z-3. Rule 151A is an exemptive determination that triggers these sections.

Specifically, the Commission exercised its discretion to determine which securities fall within Section 3(a) of the Act, titled “*Exempted securities.*” For the Commission to explore the parameters of Section 3(a) is by definition to determine

which securities should be exempt and which should not; Congress indicated in Section 28 that such determinations should include consideration of ECCF.²

III. The Court Should Not Stay Its Vacatur Order; In All Events, It Should Give Petitioners Relief From The Rule’s Effective Date.

The Court should vacate the rule without staying its mandate. The Commission cannot make the showing needed to stay vacatur. *Supra* 1-2. The Commission allowed a two-year hiatus before the rule went into effect; there can be no harm in an additional waiting period.

If the rule is not vacated, the effective date should be stayed. *See* Pet. Mot. Exp. Br. 14-19; Old Mutual Pet. for Reh’g 6-15. Sometimes when remanding a rule this Court sets a deadline by which the agency must act, but a stay of the effective date is more appropriate here because the industry would continue to incur compliance costs otherwise. Moreover, a remand with a deadline puts a thumb on the scale in favor of regulation: It pressures the agency to act, which makes it harder for the agency to do what agencies ordinarily do when they choose not to regulate—allow the matter to fade quietly, without a formal announcement.

² The text of Rule 151A confirms that the Commission exercised discretion to determine which annuities to exempt. The rule contains a test for determining whether “amounts payable” on an FIA “are more likely than not to exceed the amounts guaranteed under the contract.” 17 C.F.R. § 230.151A(a)(2). If the guarantee is likely to be exceeded, the annuity is non-exempt. If the guarantee is not likely to be exceeded, the annuity is *exempt*. *Id.* § 230.151A(b).

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Respectfully submitted,

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