



Old Mutual Responds to Court's Request for Additional Briefing on the Appropriate Remedy for the SEC's Failure to Consider the Effect of Rule 151A

OM Financial Life Insurance Company ("Old Mutual") has filed a brief (available [here](#)) in response to an order from the U.S. Court of Appeals for the D.C. Circuit. The order (available [here](#)) calls for additional briefing on Old Mutual's petition for rehearing to stay Rule 151A ("Rule"). The issue raised is whether the Rule should be stayed (or vacated), because the SEC has not announced if and when it intends to analyze the Rule's effect on efficiency, competition, and capital formation.

The five other original Petitioners have also submitted a brief (available [here](#)) asking the Court to stay or vacate the Rule.

The Court ordered the SEC to file a response brief by December 7, 2009 -- this coming Monday. The Court has said that it will consider "whether a stay, vacatur, or another remedy is more appropriate than the remand without vacatur provided in the order issued July 21, 2009."

A. Arguments by Old Mutual in Favor of Vacating Rule 151A

Old Mutual argues that vacatur of Rule 151A is the most appropriate remedy. In the alternative, Old Mutual requests a remand-with-stay of the Rule's effective date until two years following any reissuance of the Rule. Old Mutual did not explicitly request vacatur in its petition for rehearing. But Old Mutual now asserts that the *Allied-Signal* factors used to support its previous remand-with-stay request also support the more traditional remedy of vacatur.

1. Old Mutual Rebutts the SEC's Claim that Adverse Impact to the FIA Industry is Speculative

Old Mutual addresses the SEC's earlier assertion that because Rule 151A is "not yet effective," its claims of harm from the January 12, 2001 effective date are "speculative." Old Mutual counters that the SEC is ignoring the commercial reality that FIA issuers must take costly action now to prepare for an approaching deadline, despite the uncertainty of how the SEC will proceed.

2. Only Vacatur Will Ensure the SEC Conducts a Rigorous Section 2(b) Analysis

Old Mutual, as well as the other original Petitioners, rejects the SEC's suggestion that a §2(b) analysis may not be required. Old Mutual claims that vacating the Rule will eliminate the harm imposed by the effective date and "better serve the public interest by ensuring that Rule 151A does not go into effect unless and until the SEC conducts a proper §2(b) analysis."

Old Mutual emphasizes that a §2(b) analysis "is integrally intertwined with the issue of whether adoption of a new Rule 151A is reasonable," and therefore, only vacatur will ensure that the SEC conducts a thorough analysis. Old Mutual argues that "the SEC has not begun to address the Court's concerns, and is not inclined to conduct a rigorous §2(b) analysis." Because of these concerns, Old Mutual asks the Court to grant vacatur so the SEC may "re-examine Rule 151A from the ground up, with the §2(b) analysis serving as the integral consideration in whether the Rule should be adopted at all."

Old Mutual claims that vacatur will also provide greater certainty for the FIA industry by subjecting the §2(b) analysis and any possible change to the Rule to additional public notice-and-comment. Old Mutual, as well as the other original Petitioners, argues that there is no harm in vacating the Rule, because vacatur does not alter the current state regulatory system in place to protect investors.

B. Commentary

The Court's order requesting additional briefing suggests that the Court is seriously considering granting the remand-with-stay relief that Old Mutual originally requested. Of greater significance is the Court's statement that it will also look at whether vacating the Rule altogether or "another remedy" is more appropriate.

This change of course is surprising, given the Court's initial denial of Old Mutual's request for a stay. The change may reflect the Court's displeasure that the SEC has not announced any specific course of action. So far, the SEC has stated only that it will reissue, revise or withdraw the Rule. The SEC's brief to be filed by December 7 could announce the SEC's determination.

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