

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

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

Petitioners,

v.

UNITED STATES
SECURITIES AND EXCHANGE
COMMISSION,

Respondent.

**ON PETITION FOR
REVIEW**

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

**UNOPPOSED MOTION TO FILE 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.**

Petitioners American Equity Investment Life Insurance Company, BHC Marketing, Midland National Life Insurance Company, National Western Life Insurance Company, and Tucker Advisory Group, Inc. hereby move the Court for permission to file a 5-page brief regarding the appropriate remedy in this case. The proposed brief is being filed concurrently herewith.

Respondent Securities and Exchange Commission does not oppose this motion, and Petitioner National Association of Insurance Commissioners consents to the motion. Petitioner Old Mutual neither consents to nor opposes the motion.

In support of this motion, petitioners state as follows:

1. Petitioners are five of the six industry petitioners who successfully sought review of Rule 151A of the Securities and Exchange Commission. Petitioners requested vacatur in their opening brief, reply brief, at the commencement of oral argument, and on rebuttal. *See* Pet. Open. Br. 28, 37, 39, 42, 46; Pet. Reply Br. 3 & n.1; Oral Arg. Tr. 4, 51-52; *see also* Tr. 46 (SEC counsel questioned about vacatur). However, this Court's July 21 decision remanded the rule without vacating it.

2. On September 4, the sixth industry petitioner, OM Financial Life Insurance Company ("Old Mutual"), filed a petition for rehearing that asked the Court to stay the rule's January 2011 effective date pending action by the SEC on remand. On November 6, in response to Old Mutual's petition, the Court issued an order directing briefing regarding the remedy and, specifically, whether vacatur

was appropriate. The Order began by directing “the parties” to brief the matter, but then referred specifically to a brief to be filed by Old Mutual.

3. The other five industry petitioners have at least as great an interest in the remedy as Old Mutual. Three of the petitioners are insurance companies that, like Old Mutual, offer fixed indexed annuities. The other two are “independent marketing organizations” that will experience particularly severe consequences if the rule remains in place, as explained in petitioners’ Consent Motion for Expedited Briefing and an accompanying declaration. Pet. Consent Mot. for Exp. Br. at 17-18 (filed Jan. 27, 2009); *id.* at Exh. G ¶¶ 4-14 (Declaration of K. Tucker).

5. Petitioners did not seek rehearing of the Court’s decision to remand without vacating because they were mindful that the Court generally disfavors rehearing petitions (*see D.C. Circuit Handbook of Practice and Internal Procedures* at 56), and because the subject had received attention at oral argument that caused petitioners to conclude that the Court had considered the matter to its satisfaction and would not wish to hear further argument. However, given the Court’s request for briefing regarding vacatur, petitioners request an opportunity to be heard.

6. Petitioners offered to file a joint brief with Old Mutual; Old Mutual declined that request. Old Mutual also declined petitioners’ offer to provide it a draft brief to consider as Old Mutual prepared its own brief. Old Mutual permitted petitioners to comment on its draft brief, but declined to incorporate petitioners’

suggestions. The Old Mutual brief therefore omits certain points that petitioners consider important, and petitioners seek leave to file a short brief addressing those matters. Consistent with this Court's rules, the proposed brief seeks not to repeat points made by Old Mutual and incorporates Old Mutual's argument by reference where appropriate. Fed. R. App. Proc. 28(i); *D.C. Circuit Handbook* 23.

Dated: November 23, 2009

Respectfully submitted,

/s/ Eugene Scalia

Eugene Scalia

Counsel of Record

Barry Goldsmith

Daniel J. Davis

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Ave., N.W.

Washington, D.C. 20036

Telephone: (202) 955-8500

Facsimile: (202) 467-0539

*Counsel for American Equity Investment
Life Insurance Company, BHC
Marketing, Midland National Life
Insurance Company, National Western
Life Insurance Company, and Tucker
Advisory Group, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2009, I caused to be served one true and correct copy of this Unopposed Motion To File Brief

Regarding The Remedy upon the following, by the method indicated below:

David M. Becker
Michael A. Conley
William K. Shirey
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549
(By the CM/ECF system)

Deborah Zuckerman
Michael R. Schuster
AARP
601 E Street, N.W.
Washington, D.C. 20049
*Counsel for amici
(By first-class mail, postage prepaid)

Kenneth W. Sukhia
SUKHIA LAW GROUP, PLC
2846 Remington Green Circle
Tallahassee, Florida 23308
*Counsel for amici
(By first-class mail, postage prepaid)

Michael J. Lacey
METLIFE, INC.
1095 Avenue of the Americas
New York, N.Y. 10036-6796
*Counsel for amici
(By first-class mail, postage prepaid)

Philip D. Bartz
Lawrence S. Ebner
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(By the CM/ECF system)

Rodney F. Page
Julia A. McDonough
BRYAN CAVE LLP
700 Thirteenth Street, N.W.
Washington, D.C. 20005
(By first-class mail, postage prepaid)

Stephen Hall
NASAA, INC.
750 First Street, N.E.
Suite 1140
Washington, D.C. 20002
*Counsel for amici
(By first-class mail, postage prepaid)

James F. Jorden
JORDEN BURT, LLP
1025 Thomas Jefferson St., N.W.
Suite 400 East
Washington, D.C. 20007
*Counsel for amici
(By first-class mail, postage prepaid)

/s/ Daniel J. Davis
Daniel J. Davis