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From the Rule 151A Task Force of Jorden Burt

SEC Decides To Proceed with Rule 151A Analysis, But Subject to a Two-Year Stay

The SEC has consented to a two-year stay of Rule 151A and undertaken to conduct an analysis of whether the Rule will promote competition, efficiency and capital formation. The SEC has stated that its staff is expected to complete its analysis and make a recommendation to the Commissioners in the Spring of 2010.

SEC Brief

The SEC made these statements in a Supplemental Brief filed late yesterday with the U.S. Court of Appeals for the District of Columbia Circuit ("Court").

The brief comes in response to an order from the Court requesting additional briefing on the appropriate remedy for the SEC's failure to consider the effects of Rule 151A under Section 2(b) of the Securities Act of 1933 ("Section 2(b)"). The SEC argues that a remand-without-vacatur is the most appropriate remedy and that the two-year stay will address the petitioners' concerns regarding the January 2011 effective date. The two-year stay would run from the date a retained or reissued Rule 151A is published in the Federal Register.

The SEC also commits to conducting a Section 2(b) analysis. In its brief, the SEC states that the staff has "taken significant steps" to "diligently" address the deficiencies the Court found in the SEC's Section 2(b) analysis of the proposed Rule. The SEC says that its staff has "conducted a comprehensive survey of state insurance regulation of indexed annuities."

The SEC intends to complete the Section 2(b) analysis and bring forth a recommendation by the Spring of 2010. The SEC states that "if the staff recommends retaining Rule 151A, the staff also expects to recommend that the SEC seek public notice and comment on the efficiency, competition, and capital formation analysis."

Commentary

The Court, of course, will rule on the matter. The Court's ruling could be different from the SEC's approach.

The SEC says it will support Rule 151A with a Section 2(b) analysis (even though the SEC asserts that the analysis is not required). The two-year stay means that issuers and distributors will not have to take steps to comply with Rule 151A by January 12, 2011.

The SEC does not state definitively what it will ultimately do with Rule 151A. However, the SEC's statements can be read to say that the SEC has decided not to abandon Rule 151A, but rather to proceed to further consider regulating indexed annuities. Looking ahead, the SEC's process *could* be as follows:

- The staff will complete a study of state insurance regulation of indexed annuities.
- Based on that "state-law baseline," the staff will complete an analysis of the "impact Rule 151A would have on efficiency, competition and capital formation."
- The staff will make a "recommendation" to the Commissioners "in the Spring of 2010."
- The Commissioners will decide whether to abandon, retain or reissue Rule 151A.
- If the Commissioners decide to retain or reissue Rule 151A, the SEC will publish notice in the Federal Register to "seek public notice and comment on the efficiency, competition, and capital formation analysis."
- Following the SEC's receipt of public comments, it will determine whether and how to proceed with its proposal.
- If the SEC proceeds with Rule 151A in its original or revised form, the SEC will publish its decision in the Federal Register.
- Companies would have two years from that publication date to comply with Rule 151A. However, companies could sue the SEC on the grounds that the SEC's final decision is arbitrary and capricious.

Companies will need to wait for the Court's decision. The Court could stay or vacate Rule 151A. The Court also could decide on some other remedy, such as setting a deadline for the SEC to reach a determination.

If you have questions, please contact James Jorden at (202) 965-8135 or jfj@jordenusa.com, Gary Cohen at (202) 965-8152 or goc@jordenusa.com or Kristin Shepard at (202) 965-8129 or kas@jordenusa.com.