

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**

**SECOND SUPPLEMENTAL 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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* Authorities upon which we chiefly rely.

In an Order issued November 6, this Court ordered “additional briefing addressing the appropriate remedy, including vacatur vel non, for the SEC’s failure properly to consider the effect of Rule 151A upon efficiency, competition, and capital formation.” The SEC in its brief responding to that Order committed that if it re-adopted the Rule, it would implement a “two-year stay of Rule 151A’s effective date to run from the date of publication of a reissued or retained Rule 151A in the Federal Register.” SEC Supp. Br. 1. The Court has now requested briefing addressing the SEC’s proposal from petitioner Old Mutual Financial Life Insurance Company and petitioners American Equity Investment Life Insurance Company, BHC Marketing, Midland National Life Insurance Company, National Western Life Insurance Company, and Tucker Advisory Group, Inc. (“American Equity Petitioners”). The American Equity Petitioners respond as follows:

1. The Commission’s proposal that Rule 151A not be effective for two years after its re-adoption (if it is re-adopted) is welcome and appropriate. The difficulties and costs of coming into compliance for the industry have been amply documented in the rulemaking and in this litigation, and are essentially undisputed by the Commission. For such reasons, the Commission allowed two years to come into compliance when the rule was first adopted in 2008, and consented to expedited consideration of this case by the Court. In the event the rule were re-adopted, allowing a two-year compliance period would avoid the necessity of the

industry expending compliance costs *before* the rule was re-adopted, or indeed, *in anticipation* of a rule that never was re-adopted at all. See the SEC's Supplemental Brief at 5, acknowledging that the Commission may decide not to re-adopt the rule.

2. The SEC's approach does not, however, sufficiently lift the burden under which petitioners currently operate, nor is it an appropriate or sufficient remedy given the Court's conclusion that the adoption of Rule 151A was arbitrary and capricious. For the rule to remain in place in the manner the SEC proposes would codify a presumption that Rule 151A is the law, and it is simply a matter of *when* that law will be enforced. Such uncertainty imposes costs. The distribution of fixed indexed annuities depends on a nationwide network of independent insurance agents willing to invest in the training and certification needed to sell the products. Grensteiner Decl. ¶¶ 7, 15-20 (Exh. E, Motion for Exp. Br.). Agents will be less likely to do so with a rule on the books that effectively outlaws the products' distribution through the independent agent model. Investment in all segments of the industry is similarly adversely affected by the presumption of wholesale regulatory change that accompanies remand without vacatur. See, e.g., Grensteiner Decl. ¶¶ 11-13 (Exh. E, Motion for Exp. Br.); Kevin Cloud, *Annuities Face Uncertain Future If Rule 151A Goes Through*, National Underwriter, Life & Health (Jan. 4, 2010) available at

<http://www.lifeandhealthinsurancenews.com/Issues/2010/Jan-4th-2010/Pages/Annuities-Face-Uncertain-Future-If-Rule-151A-Goes-Through.aspx>

(explaining disruption in FIA industry). Further, remanding without vacating puts a thumb on the scale of the agency re-adopting the rule rather than abandoning it, since remand “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.” Amer. Eq. Supp. Br. 5.

3. Vacatur minimizes the costs identified above, and is the presumptively appropriate remedy under the Administrative Procedure Act. *See Illinois Public Telecomm. Ass’n v. FCC*, 123 F.3d 693, 694 (D.C. Cir. 1997) (Ginsburg, J.) (“[A] reviewing court should normally strike the balance in favor of vacating the agency’s action, unless special circumstances exist.”) (citation omitted).

4. Moreover, the Commission’s brief confirms that vacatur is appropriate here. Under *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993), this Court vacates unless it appears that the agency can “readily” correct its error and the costs of vacating would be great. *See* Am. Eq. Supp. Br. at 1-3; *Heartland Reg’l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) (agency can “**readily** [] cure a defect in its explanation”) (emphasis added); *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (remanding in part because

it was thought the Commission could “readily” estimate costs). As described in the Commission’s brief, addressing the error here will take protracted work. To date it has required the Commission staff to “conduct[] a *comprehensive* survey of state insurance regulation of indexed annuities.” SEC Supp. Br. 4-5 (emphasis added). Now, the staff is “analyzing the impact Rule 151A would have on efficiency, competition, and capital formation,” and by Spring—that is, approaching a year after the Court’s July decision—the staff intends to complete its analysis and bring a recommendation to the Commission. *Id.* 5. Then, “[i]f the staff recommends retaining Rule 151A,” it intends to recommend that the Commission allow notice and comment on its analysis of efficiency, competition, and capital formation. *Id.*

For the Commission to re-adopt the rule, these steps are necessary. (The Commission’s statement that it will evaluate efficiency, competition, and capital formation renders moot its (unpersuasive) argument that it is not statutorily required to do so. *See Amer. Eq. Supp. Br. 3-4.*) But the steps the Commission describes reflect a circumstance different in kind from a minor discrepancy that can be explained by an agency on remand. *Compare Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047 (D.C. Cir. 2002) (FCC failed to explain its departure from previously expressed views); *Engine Manufacturer’s Ass’n v. EPA*, 20 F.3d 1177 (D.C. Cir. 1994) (explanation of cost schedule was in the record but was not

one “that the concerned public could understand”). None of the cases cited by the Commission involved the prospect of the agency being required to engage in “comprehensive” fact gathering, analysis, and notice and comment before determining to re-adopt a rule.

5. As to the second prong of *Allied-Signal*—the costs of vacating—the Commission’s brief confirms that they are negligible. The Commission itself proposes a hiatus in regulatory obligations that is no different from what would occur if the rule were vacated.

In sum, vacatur is the presumptively appropriate remedy and will address the costs and uncertainties that petitioners confront—while imposing no countervailing harm—in a way that remand with a delayed effective date will not.

Dated: February 2, 2010

Respectfully submitted,

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I hereby certify that on this 2nd day of February, 2010, I caused to be served one true and correct copy of this Second Supplemental Brief Regarding The Remedy upon the following, by the method indicated below:

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