

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

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 an Order
of the Securities and Exchange Commission

OM FINANCIAL LIFE INSURANCE COMPANY'S SECOND
SUPPLEMENTAL BRIEF IN SUPPORT OF ITS PETITION FOR PANEL
REHEARING

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TABLE OF CONTENTS

TABLE OF CONTENTSi

INTRODUCTION 1

ARGUMENT 2

 I. THE SEC CANNOT READILY CURE RULE 151A 3

 II. EQUITABLE CONSIDERATIONS STRONGLY FAVOR
 VACATUR 4

 A. Vacatur Is Warranted Under *Allied-Signal* 4

 B. Agency Convenience Cannot Avoid Vacatur 5

TABLE OF AUTHORITIES

Cases

Allied-Signal, Inc. v. U.S. Regulatory Comm’n, 988
 F.2d 146 (D.C. Cir. 1993)2, 4, 5

Ill. Pub. Telecomms. Ass’n v. FCC, 123 F.3d 693
 (D.C. Cir. 1997)4

INTRODUCTION

OM Financial Life Insurance Company's ("Old Mutual") Petition for Rehearing (the "Petition") requested the Court to reconsider and modify the bare remand of Rule 151A that it ordered in its July 21, 2009 decision. Following submission of the Securities and Exchange Commission's ("SEC" or "Commission") response to the Petition, in its November 6, 2009 Order the Court directed the parties to submit supplemental briefing addressing whether vacatur of Rule 151A would be appropriate. In its supplemental brief on that issue ("Supplemental Brief"), Old Mutual explained why vacatur is a superior remedy to the remand-with-stay relief requested in the Petition. In response, the SEC *consented* to entry of a two-year stay of Rule 151A's effective date following any reissuance of the Rule (i.e., to the relief sought in the Petition) and explained that the SEC had begun work on whether it should readopt the Rule. Pursuant to this Court's January 19, 2010 Order, Old Mutual addresses the SEC's stay proposal.

Because the SEC now has consented to a remand with a two-year stay, that should be the minimum relief that this Court orders. From the outset of this proceeding, however, Old Mutual has maintained that vacatur of the Rule is the appropriate remedy.

A remand of Rule 151A—which would leave the Rule in legal limbo—would continue to suggest to the fixed-indexed annuities ("FIA") industry that the

Rule likely will be readopted. That sends certain signals to the market that will necessitate competitive responses by industry members for the same reason the initial remand-without-stay did: commercial entities must plan for the future and incur costs in doing so—including the costs attendant with evaluating and preparing for securities licensure. And, of course, these signals can be used by rivals to gain competitive advantages in critical areas, such as product distribution.¹ To avoid continuing competitive disruption and harm to the FIA industry, the Court should vacate this defective Rule, which the SEC now acknowledges would take a major effort to resurrect.

ARGUMENT

The SEC states in its Supplemental Brief that “countervailing considerations often may justify allowing a rule to remain in place by remanding without vacatur to permit an agency to address a deficiency in the rule’s adoption that can be readily remedied.” SEC Supp. Br. at 3. While true, there are no considerations here that suggest remand without vacatur is appropriate. Indeed, in its latest brief, the SEC effectively shows that under both prongs of *Allied-Signal, Inc. v. U.S. Regulatory Comm’n*, 988 F.2d 146 (D.C. Cir. 1993), vacatur is required.

¹See Declaration of Brian Grigg ¶¶ 7, 19 (appended as Ex. F. to Motion for Expedited Briefing (Jan. 27, 2009)).

I. THE SEC CANNOT READILY CURE RULE 151A

The SEC claims vacatur is inappropriate because it can readily cure Rule 151A, *see* SEC Supp. Br. at 5-8, but its latest brief belies that claim. In its brief, the Commission identifies major, substantive undertakings that it must complete before it can decide the fate of Rule 151A.

First, the Commission staff has found it necessary to begin a “comprehensive survey of state insurance regulation” in order to move forward on the Rule. SEC Suppl. Br. at 4-5. The staff hopes to finish this work by the Spring of 2010, at which time it will complete its analysis and decide whether to recommend going forward with some version of Rule 151A to the Commission. *Id.* Second, based on this recommendation, the Commission will be required to determine if Rule 151A should be readopted given “the impact that Rule 151A would have on efficiency, competition, and capital formation.” *Id.* at 5. Third, if the Commission ultimately decides to go forward with some version of Rule 151A, “the staff also expects to recommend that the Commission seek public notice and comment on the efficiency, competition, and capital formation analysis.” *Id.* Finally, after taking these public comments into consideration, the Commission will finally decide whether to retain, revise or jettison Rule 151A.

Unless the SEC has pre-ordained the outcome of its new work on Rule 151A, the fate of Rule 151A is completely uncertain at this time. Given the

substantial work the SEC concedes must be done in light of this Court's decision, there is no way to predict that the Commission's new fact gathering and analysis will result in retention of Rule 151A, i.e., that it can be "readily cured." In circumstances such as these, where the agency's task is far greater than merely providing a more adequate explanation, vacatur is the proper legal remedy.²

II. EQUITABLE CONSIDERATIONS STRONGLY FAVOR VACATUR

The SEC argues in its latest brief that under *Allied-Signal* "[e]quitable considerations favor remand without vacatur." See SEC Supp. Br. at 4, § I Heading. The basis of the SEC's position appears to be twofold: (i) the SEC has consented to a two-year stay; and (ii) agency convenience. See SEC Supp. Br. at 4-5. Neither argument supports remand under the second *Allied-Signal* factor.

A. Vacatur Is Warranted Under *Allied-Signal*

In contrast to its initial brief on the Petition, where the SEC maintained that a remand-only remedy would not cause injury to the FIA industry, see SEC Resp. to Pet. for Reh'g at 10-13, the SEC's subsequent acquiescence to a two-year stay effectively acknowledges that remand-only would cause significant market injury. Under *Allied-Signal*, this concession dictates that vacatur is the appropriate

² See, e.g., *Ill. Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997) ("When this Court remands a rule to an agency for further consideration with little or no prospect of the rule's being readopted upon the basis of a more adequate explanation of the agency's reasoning, the practice of the court is ordinarily to vacate the rule").

remedy. To be sure, the SEC now attempts through its stay offer to ameliorate the adverse impact of remand, but this Court is required to apply the law, not simply fashion an equitable remedy to which the SEC has not shown a legal entitlement. This Court should provide the vacatur remedy that is required by law, and not lesser relief that would merely suit the SEC's convenience while perpetuating uncertainty and competitive harm in the FIA industry.

B. Agency Convenience Cannot Avoid Vacatur

The Commission apparently now seeks remand with stay as opposed to vacatur because the SEC would find it more convenient if the Rule were not vacated. *See* SEC Supp. Br. at 4-5. This type of consideration, however, is not recognized in *Allied-Signal*. And even if it was, the only arguable “convenience” benefit to remand with stay is that theoretically—as Old Mutual identified earlier—it would not require the SEC to engage in new notice and comment rulemaking. *See* Pet. for Reh’g at 9, n. 5. Now that the SEC has conceded it must engage in new notice-and-comment rulemaking, *see* SEC Supp. Br. at 5, that consideration no longer counsels against vacatur.

February 2, 2010

Respectfully submitted

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I hereby certify that on this 2nd day of February, 2010, I have caused to be served one true and correct copy of this Second Supplemental Brief In Support Of Its Petition for Panel Rehearing upon the following, by the method indicated below:

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