

## SEC Fights To Save Rule 151A

BY GARY COHEN

**T**he SEC is taking steps to save Rule 151A. It has consented to a two-year stay of the Rule's effectiveness, and will analyze the impact of Rule 151A on efficiency, competition and capital formation.

The SEC announced these steps in a brief filed in December with the U.S. Court of Appeals for the District of Columbia Circuit. OM Financial Life Insurance Company (Old Mutual) had asked the court to stay the Rule until two years after the SEC has reissued or revised the Rule. The court ordered Old Mutual and the SEC to file briefs on the motion.

The court has not yet ruled on Old Mutual's motion. It could stay or vacate the Rule, or decide on some other remedy, such as setting a deadline for the SEC to reach a determination. Meanwhile, the court has ordered Old Mutual to file a brief addressing the SEC's proposal to defer the Rule's effective date.

### Two-Year Stay

Old Mutual's motion to stay the January 12, 2011 effective date set by the SEC for Rule 151A has opened the door for the court to vacate the Rule. As a result, the SEC appears to have determined to swallow the less bitter pill of staying the Rule for two years after the original or a revised Rule is published in the Federal Register.

In the meantime, however, issuers and distributors of indexed annuities are caught in a time bind. Because of pending litigation and legislation, it is uncertain whether the Rule will ever take effect, let alone on January 12, 2011. Companies are faced with spending time and money to comply with SEC and FINRA requirements by the looming deadline when it's highly uncertain whether compliance will be required.

### Analysis of Impact

The court has found Rule 151A to be reasonable under Supreme Court precedents. However, the court remanded the Rule back to the SEC to conduct an analysis of whether the Rule will promote efficiency, competition and capital formation. The court found that the SEC had failed to undertake the analysis as required by Section 2(b) of the Securities Act.

The SEC has told the court that it will conduct 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 for its staff to complete the Section 2(b) analysis and make a recommendation to the Commissioners by Spring 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."



*Is time on the SEC's side?*