

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.

STATUS REPORT OF THE
SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission submits this Status Report regarding a development concerning Rule 151A, which the Court remanded to the Commission in its July 21, 2009, opinion in this case. Rule 151A clarifies the status under the federal securities laws of certain indexed annuities.^{1/}

In its July 21 decision, the Court held that the Commission's determination that certain indexed annuities are non-exempt securities was reasonable but

^{1/} Rule 151A provides that indexed annuities that are “more likely than not” to pay a return based on the uncertain future performance of a fluctuating index of securities (such as the Standard & Poor's 500 Index) are not “annuity contracts” under Section 3(a)(8) of the Securities Act and therefore are not eligible for the exemption from regulation as securities.

concluded that the Commission had erred by not assessing existing state insurance law in considering (under Section 2(b) of the Securities Act) whether Rule 151A would promote efficiency, competition, and capital formation. *See American Equity Investment Life Ins. Co. v. SEC*, 572 F.3d 923, 929-34, 934-36 (D.C. Cir. 2009). The Court reasoned that such an assessment was necessary to establish a baseline against which to determine the impact on efficiency, competition, and capital formation of subjecting indexed annuities to federal regulation. In its decision, the Court instructed the Commission to “address the deficiencies with its § 2(b) analysis” and explained that it could do so in either of two ways: by assessing whether the rule will promote efficiency, competition, and capital formation in light of existing state regulation of indexed annuities, or by explaining why Section 2(b) “does not govern this rulemaking.” *Id.* at 936.

On September 4, 2009, Old Mutual, one of the industry petitioners, filed a petition for rehearing requesting a stay of Rule 151A “until two years after the Commission’s completion of a new § 2(b) analysis and possible reissuance, revision, or withdrawal of the rule in light of that analysis.”^{2/} At the direction of the Court, Old Mutual and the remaining industry petitioners subsequently filed

^{2/} The remaining petitioners did not join the petition for rehearing or otherwise file a separate petition for rehearing.

supplemental briefs in which they renewed the request for a stay but also asserted that vacatur of Rule 151A is the more appropriate remedy.

In a supplemental brief, the Commission consented to staying the rule's effective date for two years "from the date of publication of a reissued or retained Rule 151A in the Federal Register." Supplemental Brief of the Securities and Exchange Commission Regarding the Appropriate Remedy (Dec. 8, 2009) at 1. In doing so, the Commission explained that its "staff is diligently addressing the Section 2(b) deficiencies the Court identified," the Commission expects to consider a staff recommendation "in the Spring of 2010," and "[i]n these circumstances, vacatur is unwarranted." *Id.* at 5.

The Court has not ruled on either the petitioners' suggestion that this Court should vacate the rule or the Commission's to consent to a stay. In light of the Spring 2010 anticipated date for Commission consideration of a staff recommendation, however, the Commission believes that it is appropriate to advise the Court of the following: Over the past several weeks, there have been Congressional proposals that could significantly affect Rule 151A. *See, e.g.*, Attachment A hereto. At the June 17, 2010, hearing of the House-Senate Conference on the Wall Street Reform and Consumer Protection Act, it was announced that a vote on one such proposal would be forthcoming over the next

several days. We are monitoring what is happening in the Congress relating to Rule 151A, and we will update the Court regarding significant developments in the legislative process.

Respectfully submitted,

s/ Michael A. Conley

MICHAEL A. CONLEY

Deputy Solicitor

Securities and Exchange Commission

100 F Street, N.E.

Washington, D.C. 20549-8010

(202) 551-5127

June 18, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2010, I caused one copy of the STATUS REPORT OF THE SECURITIES AND EXCHANGE COMMISSION, to be served upon the following, by the method indicated below:

Philip D. Bartz
Lawrence S. Ebner
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20036
(Via the CM/ECF system)

Eugene Scalia
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave, N.W.
Washington, D.C. 20036
(Via the CM/ECF system)

Rodney F. Page
BRYAN CAVE LLP
700 Thirteenth St., N.W.
Washington, D.C. 20005
(Via first-class mail, postage prepaid)

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

s/ Michael A. Conley
MICHAEL A. CONLEY

Attachment A

Restoring American Financial Stability Conference Amendment

1 On page 1342 of the conference base text of H.R.
2 4173, after line 25, insert the following:

3 **SEC. 989G. FURTHER PROMOTING THE ADOPTION OF THE**
4 **NAIC MODEL REGULATIONS THAT ENHANCE**
5 **PROTECTION OF SENIORS AND OTHER CON-**
6 **SUMERS.**

7 (a) IN GENERAL.—The Commission shall treat as ex-
8 empt securities described under section 3(a)(8) of the Se-
9 curities Act of 1933 (15 U.S.C. 77e(a)(8)) any insurance
10 or endowment policy or annuity contract or optional annu-
11 ity contract—

12 (1) the value of which does not vary according
13 to the performance of a separate account;

14 (2) that—

15 (A) satisfies standard nonforfeiture laws or
16 similar requirements of the applicable State at
17 the time of issue; or

18 (B) in the absence of applicable standard
19 nonforfeiture laws or requirements, satisfies the
20 Model Standard Nonforfeiture Law for Life In-
21 surance or Model Standard Nonforfeiture Law

ALB10560

S.L.C.

2

1 for Individual Deferred Annuities, or any suc-
2 cessor model law, as published by the National
3 Association of Insurance Commissioners; and
4 (3) that is issued—

5 (A) on and after June 16, 2013, in a
6 State, or issued by an insurance company that
7 is domiciled in a State, that—

8 (i) adopts rules that govern suitability
9 requirements in the sale of an insurance or
10 endowment policy or annuity contract or
11 optional annuity contract, which shall sub-
12 stantially meet or exceed the minimum re-
13 quirements established by the Suitability in
14 Annuity Transactions Model Regulation
15 adopted by the National Association of In-
16 surance Commissioners in March 2010;
17 and

18 (ii) adopts rules that substantially
19 meet or exceed the minimum requirements
20 of any successor modifications to the model
21 regulations described in subparagraph (A)
22 within 5 years of the adoption by the Asso-
23 ciation of any further successors thereto;
24 or

1 (B) by an insurance company that adopts
2 and implements practices on a nationwide basis
3 for the sale of any insurance or endowment pol-
4 icy or annuity contract or optional annuity con-
5 tract that meet or exceed the minimum require-
6 ments established by the National Association
7 of Insurance Commissioners Suitability in An-
8 nuity Transactions Model Regulation (Model
9 275), and any successor thereto, and is there-
10 fore subject to examination by the State of
11 domicile of the insurance company, or by any
12 other State where the insurance company con-
13 ducts sales of such products, for the purpose of
14 monitoring compliance under this section.

15 (b) RULE OF CONSTRUCTION.—Nothing in this sec-
16 tion shall be construed to affect whether any insurance
17 or endowment policy or annuity contract or optional annu-
18 ity contract that is not described in this section is or is
19 not an exempt security under section 3(a)(8) of the Secu-
20 rities Act of 1933 (15 U.S.C. 77c(a)(8)).