



SEC Invites Company Input on Index Annuity Rule 151A

The SEC adopted Rule 151A under the Securities Act, which, in effect, requires issuers of index annuities to register their index annuities as securities and requires distributors to register as broker-dealers.

The SEC, in adopting Rule 151A, invited company input regarding:

- the applicability of the Rule,
- tailoring disclosure requirements, and
- tailoring accounting requirements.

Rule 151A is currently the subject of judicial challenge and may be overturned by current litigation or current legislative initiatives. So, Rule 151A may never apply.¹ In addition, litigation or legislation could be pending on the compliance date of January 12, 2011. So, the compliance date could be pushed off.

Notwithstanding these circumstances, we understand that some companies are considering submitting requests or suggestions to the SEC, even while litigation and legislation are pending.

For companies who may be doing so, the discussion below may be helpful to your analysis.

Applicability of Rule 151A

The SEC recognized that it may need to provide companies with more guidance. The SEC encouraged companies, sellers and others to submit specific requests for guidance. The SEC undertook to consider the requests during the period prior to the Rule's compliance date.

The SEC said:

While we believe that further guidance may, indeed, be helpful in response to specific questions of affected insurance companies, we note that commenters generally did not articulate with specificity the areas where they believe that further guidance is required. As a result, in order to provide guidance in the manner that would be most helpful, we encourage insurance companies, sellers of indexed annuities, and other affected parties to submit specific requests for guidance, which we will consider during the two-year period between adoption of rule 151A and its effectiveness.

Companies may want to request guidance regarding such specific matters, for example, as:

- what an insurer needs to do after the compliance date for owners of index annuities sold *prior* to the compliance date;
- the analysis companies should follow in determining the securities law status of other fixed annuities (including positive-only market value adjustment annuities) and index life insurance under the exemption afforded by Section 3(a)(8);
- the availability of "networking" as an alternative to broker-dealer registration under the Securities Exchange Act; and
- the extent to which the SEC will work with FINRA to coordinate requirements for such things as agent training and licensing and sales literature review.

Tailoring Disclosure Requirements

The SEC announced that it would consider suggestions for tailoring disclosure requirements.

The SEC said:

We acknowledge that, as a result of indexed annuity issuers having historically offered and sold their contracts without complying with the federal securities laws, the Commission has not created specific disclosure requirements tailored to these products. . . . The Commission has a long history of creating appropriate disclosure requirements for different types of securities, including securities issued by insurance companies, such as variable annuities and variable life insurance. We note that we are providing a two-year transition period for rule 151A, and, during this period, we intend to consider how to tailor disclosure requirements for indexed annuities. We encourage indexed annuity issuers to work with the Commission during that period to address their concerns.

Companies may want to make suggestions regarding such matters as:

- summary prospectuses,
- incorporation by reference to reports filed under the Securities Exchange Act (despite Rule 12h-7), and
- registration procedures to eliminate any possibility of oversale.

We understand from the SEC staff that it is drafting a registration statement form for index annuities and has orally invited industry input.

Tailoring Accounting Requirements

The SEC also stated that it would consider tailoring accounting requirements for index annuities.

The SEC said:

We acknowledge that if an indexed annuity issuer that did not currently prepare GAAP financial statements were required to do so in order to

register its indexed annuities, the one-time start-up costs could be significant. We note that, during the two-year transition period for Rule 151A, the Commission intends to consider how to tailor accounting requirements for indexed annuities.

The SEC did not expressly invite companies to submit suggestions on tailoring accounting requirements. However, the SEC's invitation to companies to work with the SEC on tailoring disclosure requirements would appear to cover accounting requirements.

Company Submissions

Timing is a question for companies that want to request guidance from, or submit input to, the SEC.

The SEC, as quoted above, says that it will consider requests and input during the period ending January 12, 2011. However, this timeline does not take into account that companies will have to have *effective* registration statements by that compliance date. So, the SEC will need to receive, consider and resolve company requests and input *far ahead* of January 12, 2011. The SEC needs time to develop, propose and adopt a registration statement form. After that, companies will need time to complete, file and get effectiveness of registration statements.

If you have any questions, please contact Gary Cohen at (202) 965-8152 or goc@jordenusa.com.

¹Jorden Burt LLP has represented entities opposing Rule 151A. The firm filed a comment letter with the SEC on behalf of the National Association for Fixed Annuities opposing proposed Rule 151A. The firm also filed an amicus curiae brief on behalf of an index annuity issuer supporting a coalition of insurers and distributors suing the SEC to have Rule 151A overturned.

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