



Appeals Court Vacates Rule 151A

By ARTHUR D. POSTAL

Published 7/12/2010

WASHINGTON BUREAU -- A federal appeals court has sided with agents and others who want the U.S. Securities and Exchange Commission to classify indexed annuities as insurance products rather than as securities.

A 3-judge panel at the D.C. Circuit Court of Appeals has granted the plaintiffs' request for a rehearing in [American Equity vs. SEC](#) because the panel agrees with the plaintiffs' view that the SEC "failed properly to consider the effect of the rule upon efficiency, competition, and capital formation."

"The SEC argues it is likely to reissue Rule 151A but it also acknowledges it is in the midst of analyzing the effect of the rule upon the law of each state," the panel says. "As the petitioners point out, the commission cannot know whether that analysis will support reissuing Rule 151A until it has been completed."

The panel included justices David Sentelle, Douglas Ginsburg and Judith Rogers.

The decision to grant the request for a rehearing revises a decision the same panel issued in July 2009. The said then that the SEC's efforts to analyze the effects of Rule 151A on securities market efficiency, competition and capital formation were "lacking."

The SEC has been trying to split jurisdiction over indexed annuities with state insurance regulators. SEC officials have argued that indexed annuities act like securities and ought to be regulated the same way securities are; SEC critics have asserted that the products are backed by insurers' general account investments and expose holders to no risk of principal loss due to investment market fluctuations.

The SEC issued Rule 151A in January 2009, but it was not planning to enforce the rule until Jan. 12, 2011. Insurers sued to block implementation of the rule.

In July 2009, the D.C. Court of Appeals panel held that the SEC had authority to classify indexed annuities as securities, but it sent the rule back to the SEC for further work because of its conclusion that the analysis of the rule's effects had been faulty.

Old Mutual filed a petition for a rehearing in December, asking the court to stay the rule 2 years after any new rule was reissued. But, after receiving comments from the SEC on the agency's plans to conduct an analysis by this spring, the court today acted to throw out the rule entirely.

The panel says in its latest decision that the SEC "cannot justify the adoption of a particular rule based solely on the assertion that the existence of a rule provides greater clarity to an area that remained unclear in the absence of any rule."

"Whatever rule the SEC chose to adopt could equally be said to make the previously unregulated market clearer than it would be without that adoption,"

the panel says. "The fact that federal regulation of EIAs would bring 'clarity' to this area of the law is not helpful in assessing the effect Rule 151A has on competition."

Sen. Tom Harkin, D-Iowa, recently persuaded a congressional conference committee to add a provision to H.R. 4173, the financial services bill, that would classify indexed annuities governed by standards developed by the National Association of Insurance Commissioners, Kansas City, Mo., as state-regulated insurance products.

The House already has passed H.R. 4173, and Senate leaders tonight announced that they have the votes to get the completed bill through the Senate.

WHAT IT ALL MEANS

A SEC spokesman says, "Today's Court order maintains the status quo as the rule had not yet gone into effect."

The SEC "will study the court's order, as well as the legislative changes under consideration by Congress in the financial reform legislation to determine how best to proceed," the spokesman says.

Eric Marhoun, general counsel of Old Mutual Insurance Company, Baltimore, one of the leaders of efforts to fight Rule 151A, welcomed the appeals court ruling.

"Most likely this means that the SEC will drop efforts to regulate this product," Marhoun says. "We are very pleased by the court's action because it wipes the slate clean and clarifies that Rule 151A is null and void. This was a big victory both for agents and for consumers who have come to rely on the guarantees provided by FIAs, but we plan to stay vigilant until we're sure the threat has passed."

The fact that the court vacated the rule "was a nice bonus," says Phil Bartz of McKenna, Long & Aldridge, Washington. Bartz, Old Mutual's outside counsel, filed the petition on behalf of Old Mutual.

"We felt the court needed to do something to protect the agents and companies writing [indexed annuity] products, and so we conservatively asked for a 2-year implementation period," he says.

Because the court vacated Rule 151A, the SEC must completely start over. The SEC can now rethink the rule and may simply drop it, Bartz says.

<http://www.lifeandhealthinsurancenews.com/News/2010/7/Pages/Appeals-Court-Vacates-Rule-151A.aspx>