



## BREAKING NEWS

# Court Tosses SEC Rule On Procedural Grounds

By [ARTHUR D. POSTAL](#)

WASHINGTON BUREAU -- A federal appeals court panel today required the U.S. Securities and Commission to reconsider a regulation that would have classified indexed annuities as securities -- but it said the SEC can regulate the annuities as securities.

The 3-judge federal court panel at the U.S. Court of Appeals for the D.C. Circuit called indexed annuities “fixed indexed annuities,” or FIAs.

The panel held that the SEC was being reasonable when it said it had the authority to create a regulation, Rule 151A, that would classify an FIA as an “annuity contract” and put FIAs under SEC jurisdiction, because a Supreme Court precedent gives federal agencies the flexibility to interpret their own regulations.

The panel concluded, however, that the SEC had failed to properly consider the effect of the rule upon efficiency, competition, and capital formation.

“Accordingly, we remand the rule for reconsideration,” Chief Judge David Sentelle writes in an opinion for the court concerning the case, *American Equity Investment Life Insurance Company et al., Petitioners, vs. Securities and Exchange Commission*, No. 09-1021.

In a statement, the National Association of Fixed Annuities, Milwaukee, expressed disappointment about the decision, and it said it will now turn to Congress to ensure that indexed annuities remain state-regulated.

NAFA believes the ruling “leaves it open for the SEC to promulgate rules it deems necessary at any time in the future,” says NAFA Executive Director Kim O'Brien.

“This is why the NAFA sought a legislative repeal of Rule 151A,” O'Brien says. “The House-sponsored bill, H.R. 2733, and Senate-sponsored bill, S. 1389, are critical to [ensuring] that fixed indexed annuities are not subject to duplicative, bureaucratic, and not-necessarily efficient oversight by the SEC.”

The court decision makes it “more important than ever” that NAFA members support a “fly-in” to Washington, O'Brien says.

NAFA members who participate in the fly-in, set to take place July 29, will lobby their members of Congress to back legislation that can keep the SEC from asserting jurisdiction over indexed annuities, O'Brien says.

The SEC is "pleased that the court validated the Commission's interpretation regarding equity indexed annuities, which would subject them to the important investor protections of the federal securities laws," SEC spokesman Kevin Callahan says. "We will continue to consider the procedural issue identified in the opinion."

When the SEC published the final version of Rule 151A in January, the agency said it would take effect Jan. 12, 2011. But, it added, FIAs issued before Jan. 12, 2011, would not be subject to additional legal responsibilities even after the new rule became effective.

The rule also addresses the manner in which a determination will be made regarding whether amounts payable by the insurance company under a contract are more likely than not to exceed the amounts guaranteed under the contract.

Callahan was not available to comment on whether ultimate oversight of FIAs by the agency might be delayed by the need to conduct a comprehensive examination of Rule 151A's impact on capital formation and competition.

The annuity industry, joined by the National Association of Insurance Commissioners, Kansas City, Mo., and the National Council of Insurance Legislators, Troy, N.Y., filed suit in late January, and won expedited hearing of the case.

Oral arguments were held in May.

In remanding the case, the court panel said the SEC failed to rigorously analyze the impact as required by law, but it backed the SEC's basic argument that the agency believes its regulation would be better than a patchwork of state laws.

"After a more thorough review of the existing state law regime, the Commission may decide ultimately that (the regulation) Rule 151A will promote competition, efficiency, and capital formation," the panel says in its decision.

The panel has rejected industry and regulator arguments that the SEC has overstepped its authority in seeking to regulate FIAs.

The panel says the SEC meet the Supreme Court test that allows an agency to interpret an ambiguous law, because the underlying statute is ambiguous, or at the very least silent, on whether the term "annuity contract" encompasses all forms of contracts that may be described as annuities.

"Had the statute been unambiguous, the Court need not have undertaken such an exhaustive inquiry in determining whether the two products at issue in those cases were

annuities under Section 3(a)(8) of the act,” the panel says. Section 3(a)(8) reserves to the states the authority to oversee the underwriting and sale of fixed annuities.

In sending Rule 151A back for reconsideration based on the industry’s Administrative Procedures Act argument, the panel says, “The SEC purports to have analyzed the effect of the rule on competition, but does not disclose a reasoned basis for its conclusion that Rule 151A would increase competition.”

The SEC concluded that enacting the rule would resolve the present uncertainty prevailing over the legal status of FIAs, and that the rule “will bring about clarity in what has been an uncertain area of law,” the panel says.

“This reasoning is flawed,” the panel says.

The lack of clarity resulting from the “uncertain legal status” of the financial product is only another way of saying that there was not a regulation in place prior to the adoption of Rule 151A, the panel says.

“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,” the panel concludes.

[A copy of the opinion is available here.](#)