

Industry Wins at Least Two Years Before SEC Rule Can Become Law

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After the US Court of Appeals remanded SEC Rule 151A for further analysis, (“2(b)” analysis), Old Mutual filed a petition requesting the Court stay or halt the effective date of Rule 151A until two years after the SEC has completed the appropriate analysis. The Court then ordered briefs on this question and on the possible legal remedies available to the court because the SEC has not conducted the “2(b)” analysis. Old Mutual argued that the appropriate remedy should be vacatur, or that the rule would be null and void. Alternatively, Old Mutual requested the Court require a two-year stay if the Court did not set aside the Rule.

On December 8, 2009, the SEC filed its brief in response and made the following arguments and statements:

The SEC argued that the Rule should not be null and void;
 the SEC said that they would perform the “2(b)” analysis requested by the Court;
 the SEC stated it has begun the analysis and expects to complete it by Spring, 2010;
 the SEC stated that if it retains Rule 151A, it expects to open its analysis to new public comment; and
 the SEC specifically consented to delay the Rule’s effective date for two years after completion of all court proceedings on remand and the final publication of the rule.

While nothing is sure until the court rules on the recent briefs, it seems clear that Old Mutual has forced the hand of the SEC on several issues which was the intent of their post-remand petition. Old Mutual had requested that the SEC reasonably provide a full 2-year postponement to comply with Rule 151A after the court accepts any SEC 2(b) analysis as satisfactory. The SEC had responded to Old Mutual dismissively to the effect of “trust us, we’ll be nice.” Apparently fearing an Appeals Court “slap-down” by granting Old Mutual vacatur or “any and all alternative remedies...,” the SEC quite effectively acceded to Old Mutual’s request. The SEC now agrees to allow a 2 year delay in Rule 151A compliance from the point at which they complete a process of exposing the 2(b) analysis for public comment. Since the SEC forecasts a Spring completion of the analysis, this effectively makes a final compliance date for 151A something like January 2013. It is still possible that the 2(b) analysis itself could be challenged.

Whether this keeps the court from vacating the decision entirely for the SEC’s delay and failure to complete or show how it can complete its legislatively-mandated 2(b) responsibilities will be decided shortly. If the court vacates the decision, the SEC must start its entire rule making process again. Whether and when this would be done would be up to them. In any case it would be hard to see implementation occurring before 2013. This time they had better do their 2(b) analysis of effects on competition, capital formation and efficiency appropriately and expose it for comment and rebuttal. If the court decides to remand along the lines that the SEC has proposed, we are still looking at 2013. Old Mutual has effectively bought the industry 2 years of securities exemption.

The industry is still pursuing a legislative fix. Many organizations and individuals throughout our industry continue to pursue the passing of the H.R. 2733 and S. 1389 --"Indexed Annuities and Insurance Products Classification Act of 2009" --legislation to repeal Rule 151A. Many of us continue to be actively engaged in a robust and effective grassroots campaign to secure its passage. This Act will specify more clearly in the 1933 Securities Act that all non-separate account products meeting state non-forfeiture laws for insurance are exempted from securities regulation under the Act. As of this writing we have over sixty sponsors in the House and a dozen key leaders in the Senate. 2010 will be focused on attaching the "Stop SEC 151A" bill to appropriate financial legislation and securing passage. We will thereby turn this two-year hiatus into the long-term principle protection of this very important principal protection product.

Mike