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.

On Petitions for Review of an Order of the
Securities and Exchange Commission

**SUPPLEMENTAL BRIEF OF
THE SECURITIES AND EXCHANGE COMMISSION
REGARDING THE APPROPRIATE REMEDY**

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PRELIMINARY STATEMENT

The Securities and Exchange Commission submits this Supplemental Brief in response to the Court's November 6, 2009, order requesting the parties to address the appropriate remedy in light of its conclusion that the Commission's consideration of the effect of Rule 151A, 17 C.F.R. § 230.151A, on efficiency, competition, and capital formation was arbitrary and capricious. *See Am. Equity Inv. Life Ins. Co. v. SEC*, 572 F.3d 934 (D.C. Cir. 2009).

The Commission believes that remand without vacatur is the most equitable and appropriate remedy in this case. The Commission has determined to consent to a two-year stay of Rule 151A's effective date to run from the date of publication of a reissued or retained Rule 151A in the Federal Register. Staying the effective date, as petitioner OM Financial Life Insurance Company ("OM") initially requested, would address the petitioners' concerns regarding the rule's current January 2011 effective date. On remand, the Commission can readily address the Court's concerns with its Section 2(b) analysis; indeed, the Commission staff has taken significant steps in this regard even before the Court has issued its mandate.

ARGUMENT

Because "[t]he particular fact-intensive circumstances in the cases that come before the court involving a variety of regulatory schemes may well mean that there will be no one-rule-fits-all solution" *NRDC v. EPA*, 489 F.3d 1250, 1264-65 (D.C.

Cir. 2007) (Rogers, J., concurring in part and dissenting in part), the Court has endeavored to reach the most "equitable and appropriate" remedy when invalidating a rule, *Davis County Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997). *See also NTEU v. Horner*, 854 F.2d 490, 499 (D.C. Cir. 1988) (rejecting vacatur because returning to status quo was "simply not practical"); *Md. People's Counsel v. FERC*, 768 F.2d 450, 452 (D.C. Cir. 1985) (per curiam) (finding remand without vacatur to be "the more judicious course" than vacatur vel non).

Petitioner American Equity Investment Life Insurance Company ("American Equity") asserts (Supp. Br. 1, n.1) that vacatur is required in all instances in which a rule violates the APA, but as this Court has held, "that is simply not the law." *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002). Rather, this Court's practice has been to remand without vacating an agency regulation found to have been deficient for a failure to engage in reasoned decisionmaking or because the agency failed to follow the appropriate rulemaking procedures. *See North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (noting Court's "prior practice of remanding without vacatur"); *Sugar Cane Growers*, 289 F.3d at 98 (construing circuit precedent as requiring "rare circumstances" to warrant a departure from "established administrative practice" of remanding without

vacatur); *Int'l Union, UMW v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 966-67 (D.C. Cir. 1990) ("We have commonly remanded without vacating an agency's rule or order where the failure lay in lack of reasoned decisionmaking."). [1/]

Underlying the Court's decisions in this regard is a recognition that countervailing considerations often may justify allowing a rule to remain in place by remanding without vacatur to permit an agency to address a deficiency in the rule's adoption that can be readily remedied. "[V]acatur is not necessarily indicated even if an agency acts arbitrarily and capriciously in promulgating a rule," the Court has held, "[t]he question is one of degree . . . ." *Fox Television*, 280 F.3d at 1048. To guide this determination, the Court set forth a "balancing"

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[1] For additional cases remanding a deficient rule without vacating, see, e.g., *Heartland Reg. Med. Ctr. v. Sebelius*, 566 F.3d 193, 197-98 (D.C. Cir. 2009); *NRDC v. EPA*, 571 F.3d 1245, 1276 (D.C. Cir. 2009); *La. Fed. Land Bank v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755-56 (D.C. Cir. 2002); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048-49 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 169 (D.C. Cir. 2002); *U.S. Telecom Ass'n v. FBI*, 276 F.3d 620, 627 (D.C. Cir. 2002); *Radio-Television News Dir. Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999); *Davis Cnty.*, 108 F.3d at 1459; *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1273 (D.C. Cir. 1994); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1184 (D.C. Cir. 1994); *Timpinaro v. SEC*, 2 F.3d 453, 459 (D.C. Cir. 1993); *NTEU*, 854 F.2d at 500; *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1171 (D.C. Cir. 1987); *Md. People's Counsel*, 768 F.2d at 452; *Rodway v. USDA*, 514 F.2d 809, 817-18 (D.C. Cir. 1975).

test in *UMW*, 920 F.2d at 966-67, and *Allied-Signal, Inc. v. Nuclear Regulatory Commission*, 988 F.2d 146, 151-52 (D.C. Cir. 1993), which considers "(1) the seriousness of the deficiencies of the action, that is, how likely it is the agency will be able to justify its decision on remand; and (2) the disruptive consequences of vacatur." *Heartland*, 566 F.3d at 197. In light of the equitable circumstances present here, as well as the strength of the first *Allied-Signal* factor, the most equitable and appropriate remedy is remand without vacatur.

I. EQUITABLE CONSIDERATIONS FAVOR REMAND WITHOUT VACATUR.

Remand without vacatur is the most appropriate course here because vacatur would serve no equitable purpose. The Commission consents to stay the effective date of Rule 151A for two years after completion of all proceedings on remand, to run from publication of a retained or reissued Rule 151A in the Federal Register. Such a stay would remove the current January 2011 effective date and alleviate the petitioners' concerns regarding the period within which they would need to come into compliance with a reissued rule. *See* OM Supp. Br. 5, 8-9; OM Petition for Panel Rehearing 3 n.3 ("staying the Rule's effective date would protect Old Mutual and other members of the FIA industry").

In addition, the Commission is working in good faith to promptly address the defect in its rule. To date, Commission staff have conducted a comprehensive

survey of state insurance regulation of indexed annuities. Based on that state-law baseline, the staff is currently analyzing the impact Rule 151A would have on efficiency, competition, and capital formation. The staff intends to complete this process and to bring a recommendation before the Commission in the Spring of 2010. If the staff recommends retaining Rule 151A, the staff also expects to recommend that the Commission seek public notice and comment on the efficiency, competition, and capital formation analysis.

In sum, the Commission consents to staying the rule's effective date for two years after completion of all proceedings on remand, and the Commission staff is diligently addressing the Section 2(b) deficiencies the Court found in its order. In these circumstances, vacatur is unwarranted.

II. REMAND WITHOUT VACATUR IS WARRANTED WHERE, AS HERE, THE AGENCY CAN READILY CURE ITS ERROR.

The Court has held that "special circumstances" (*see* American Equity Supp. Br. 1) justifying remand without vacatur include a "substantial likelihood that the agency, after further consideration, will be able to remedy its error and reach a similar overall result on a valid basis." *Heartland*, 566 F.3d at 198 (Ginsburg, J.) (citation omitted). *See id.* ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand

without vacatur."). Accordingly, the Court has, in numerous instances, remanded without vacating a deficient agency rule based solely on the redressability of the agency's error. *See Fox Television*, 280 F.3d at 1048-49 (finding that agency could justify its rule on remand and that remand without vacatur was warranted "[f]or this reason alone" even though "[i]t does not appear to us that there would be a significant disruption of the agency's regulatory program").[2/]

Here, there is, at a minimum, a substantial likelihood that the Commission will be able to address on remand the Court's concerns regarding the Section 2(b) analysis. In initially remanding without vacatur, the Court identified two alternative ways in which the Commission could remedy its deficient Section 2(b) analysis: the Commission could either (1) determine that it is not required to conduct the analysis here because it was proceeding under Section 19(a), a provision of the Act to which Section 2(b), by a plain reading of its text, does not

[2] *See also U.S. Telecom,* 276 F.3d at 626-27 (ordering vacatur for aspects of rule unlikely to be cured on remand, but not vacating those aspects of the rule that the agency was reasonably likely to fix, without discussion of second *Allied-Signal* factor); *Engine Mfrs.*, 20 F.3d at 1184 (rejecting petitioner's request for vacatur because "[w]e are willing to assume for now that the agency's error was one of form and not of substance, i.e., that it will be able to provide the information necessary to explain its cost allocation decisions"); *Timpinaro*, 2 F.3d at 458-59 (remanding without vacating because of finding that "the SEC may be able to provide factual support for the Rule"); *UMW*, 920 F.2d at 967 ("As the record affords us no basis for concluding that the deficiencies of the order will prove substantively fatal, we remand the case but do not vacate.").

apply; or, (2) undertake the analysis after first conducting a baseline analysis of efficiency, competition, and capital formation under the existing state-law regime. 572 F.3d at 936. Either approach, or both, could be followed on remand and, as shown above, the Commission staff already has taken significant steps towards addressing the Court's concerns.

Petitioners' arguments to the contrary are without merit. In disagreeing with the Commission staff's plain language interpretation of Section 2(b), the petitioners selectively quote from the statutory language—omitting the critical words "is required to . . . ." American Equity Supp. Br. 4. They also erroneously contend that the Commission promulgated the rule pursuant to Section 28 of the Act, which *does* require the Commission to consider the public interest (*id.*; OM Supp. Br. 4 n.2), rather than Section 19(a), which *does not* require the Commission to do so. Contrary to the petitioners' assertions, Section 2(b) applies only when the Commission "is required to" consider the public interest and the Commission adopted Rule 151A pursuant to Section 19(a), which has no such requirement.

Regarding the Section 2(b) analysis itself, American Equity contends (Supp. Br. 2-3) that the Commission will not be able to adequately conduct the Section 2(b) analysis on remand because, it asserts, the Commission "purposely avoided" conducting a survey of the state-law regime in promulgating Rule 151A. As the

Court recognized, however, the Commission did not conduct a baseline study of state insurance regulation of indexed annuities because it believed that the Supreme Court's holdings in *SEC v. VALIC*, 359 U.S. 65 (1959), and *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967), obviated any need to assess the current level of state-law regulation. Although the Court agreed with the Commission's reading of *VALIC* and *United Benefit*, it held that the Commission's "obligations under § 2(b) are distinct from the questions posed in *VALIC* and *United Benefit*" and that the Commission was therefore required to consider the state-law baseline in a Section 2(b) analysis in this case. 572 F.3d at 935-36.

Indeed, far from finding that the Commission could not successfully conduct such an analysis on remand, the Court noted that the Commission "obvious[ly]" believes that "imposing a federal framework on FIAs would be superior to the existing patchwork of state insurance laws." *Id.* at 936. The Court remanded Rule 151A to allow the Commission the opportunity to conduct "a more thorough review of the existing state law regime," which could lead the Commission to "decide ultimately that Rule 151A will promote competition, efficiency, and capital formation." *Id.*

CONCLUSION

For the foregoing reasons, this Court should remand the rule to the Commission without vacatur.

Respectfully submitted,

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December 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2009, I caused one copy of the SUPPLEMENTAL BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, to be served upon the following, by the method indicated below:

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