

## SEC Adopts Rule 151A In a Controversial 4 – 1 Split Vote

At today's open meeting, the SEC adopted Rule 151A by a controversial 4 - 1 split vote. It should be noted that the passage was over the *strong objection* of Commissioner Paredes, where Commissioner Paredes specifically asked for his comments to be published in the Federal Register. Commissioner Paredes' comments were extremely well-crafted and very reflective of both statutory and case law that strongly supports the position that in adopting modified Rule 151A, the SEC is greatly overstepping its jurisdiction.

Rule 151A as adopted sets out a new definition of the terms "annuity" and "optional annuity contract" for purposes of Section 3(a)(8) under the 1933 Act. The rule retains the "perilous harbor" approach of the originally proposed rule, but purports to narrow the scope of the rule to more specifically target "traditional" indexed annuities. However, as with the proposed rule, insurers will be required to make a conclusive determination under a "more likely than not" test. In a departure from the original proposed rule, surrender charges and other charges would be taken into account in both the "amounts payable" and "amounts guaranteed" elements of the test. Nevertheless, the "more likely than not" rule will be problematic for most if not all indexed annuities. Despite the "narrowing", most observers see the minor modifications as not in fact narrowing the scope of the rule much at all. The rule, if it survives expected challenge, will become effective on **January 12, 2011**, which at least provides an additional year for affected companies to come into compliance.

As we have done since June when Rule 151A was first proposed, we will continue to keep you apprised as courses of action are set and pursued. We remain committed to the fixed indexed annuity marketplace and will pursue all available alternatives at our disposal to continue to fight implementation two years from now.

As always, we appreciate your business and your involvement in this effort. You may well be called upon again to marshal resources in this continuing battle.



Eric Marhoun  
General Counsel & SVP  
Old Mutual Financial Network  
1001 Fleet Street, 6<sup>th</sup> Floor  
Baltimore, MD 21202  
Office: 410-895-0082  
Cell: 612-859-1695  
OM Financial Life ♦ OM Financial Life of New York



John Phelps, MSM  
Senior Vice President, Life & Fixed Annuity Distribution  
Old Mutual Financial Network  
OM Financial Life ♦ OM Financial Life of New York  
1117 Perimeter Center West, Suite E-212  
Atlanta, GA 30338  
Phone: 678.281.8120  
Fax: 678.281.8198