

SEC Adopts Index Annuity Rule and Reporting Exemption for Insurance Companies

December 29, 2008

At a meeting on December 17, 2008, the Securities and Exchange Commission (the "Commission") adopted two new rules affecting insurance companies. One, Rule 151A under the Securities Act of 1933 (the "Securities Act"), will have the effect of subjecting most indexed annuity contracts currently offered in the market to regulation by the SEC as securities. The second, Rule 12h-7 under the Securities Exchange Act of 1934 (the "Exchange Act"), provides an exemption from required reporting under the Exchange Act for insurance companies that issue insurance products registered with the SEC, but do not issue any other registered securities.

Rule 151A establishes a definition of contracts that will not be deemed "annuity contracts" under Section 3(a)(8) of the Securities Act and will therefore be ineligible for that section's exclusion from regulation under the Securities Act. The following discussion is based on the description of the new Rule at the Commission's open meeting adopting the rule. We plan to provide further analysis when the adopting release is published.

While Rule 151A as adopted includes several modifications from the provisions originally proposed, it retains the principal features of the definition in the proposal. Thus, the definition in Rule 151A as adopted continues to provide that it will apply to contracts under which the amounts payable by the insurer are more likely than not to exceed the amounts guaranteed under the contract. The definition was modified, however, to include only contracts where the amounts payable are determined retroactively, at the end of a specified period, by reference to the performance of a specified securities index. This modification is intended, in response to comments on the proposal, to make clear that Rule 151A does not apply to other types of fixed annuities or life insurance products.

Rule 151A as adopted also modifies the proposed testing provisions. Under Rule 151A, an insurance company's reasonable determination that a contract is not covered by Rule 151A will be conclusive, provided that the methodology and assumptions used are reasonable and the calculations are accurate. Under Rule 151A as adopted, however, unlike the rule proposal, the testing needs to be conducted only once and not more than six months before the contract is first offered, rather than every three years as under the rule proposal.

Rule 151A is prospective and will be effective as of January 12, 2011.

Rule 12h-7 as adopted is substantially similar to the rule as proposed. While Rule 12h-7 as adopted retains the requirement that an insurance company relying on the rule must take steps to prevent the development of a trading market in its securities, language was

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This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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added to make clear that an insurer need not take any steps that would be prohibited by state insurance law. This change was intended to address concerns that the proposed rule's requirement for insurer approval of contract assignments would violate state law in certain states.

Rule 12h-7 as adopted would be optional. Thus, an insurance company that registers products on Form S-3 may choose to continue to do so, but it will remain subject to the reporting requirements under the Exchange Act. An insurance company desiring to rely on Rule 12h-7 is required to include a statement to that effect in its prospectuses, both to make the election and to inform investors.

The effective date of Rule 12h-7 has not yet been announced.

If you would like to discuss the new Rules, please contact Christopher S. Petito at +1 202 346 8783 or cpetito@dl.com, Lorna MacLeod at +1 202 346 8053 or lmacleod@dl.com, or your Dewey & LeBoeuf relationship partner.