

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

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RIN 3235-AK16

INDEXED ANNUITIES

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; withdrawal; request for comment on Paperwork Reduction Act burden estimate.

SUMMARY: We are withdrawing rule 151A under the Securities Act of 1933, which defines the terms “annuity contract” and “optional annuity contract” under the Act. On July 12, 2010, the United States Court of Appeals for the District of Columbia Circuit issued an order vacating the rule.

EFFECTIVE DATE: Rule 151A, published at 74 FR 3175 (January 16, 2009) and effective on January 12, 2011, is withdrawn as of **[INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Michael L. Kosoff, Senior Counsel, Office of Insurance Products, Division of Investment Management, at (202) 551-6795, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-8629.

SUPPLEMENTARY INFORMATION: On January 8, 2009, the Commission issued a release adopting rule 151A under the Securities Act of 1933.¹ Rule 151A defines the terms “annuity contract” and “optional annuity contract” under the Securities Act. The rule was intended to

¹ 15 U.S.C. 77a et seq.; Securities Act Release No. 8996 (Jan. 8, 2009) [74 FR 3138 (Jan. 16, 2009)].

clarify the status under the federal securities laws of indexed annuities, under which payments to the purchaser are dependent on the performance of a securities index. On July 12, 2010, the United States Court of Appeals for the District of Columbia Circuit issued an order vacating rule 151A in American Equity Investment Life Insurance Company, et al. v. Securities and Exchange Commission, No. 09-1021 (D.C. Cir.). Accordingly, the Commission hereby withdraws rule 151A, which was published at 74 FR 3175 (Jan. 16, 2009).

Paperwork Reduction Act

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995,² the Commission is soliciting comment on changes to a collection of information necessitated by the Court order vacating rule 151A. The Commission is submitting this existing collection of information to the Office of Management and Budget for change and approval.

The burdens associated with rule 151A are currently approved under the “collection of information” requirements for Form S-1 under the Securities Act of 1933 (“Form S-1” (OMB Control No. 3235-0065)). This form sets forth the disclosure requirements for registration statements that are prepared by eligible issuers. The Commission previously estimated that there would be an annual increase of 400 responses on Form S-1. In connection with this increase in expected responses, the Commission increased the estimated burden for Form S-1 by 60,000 hours of internal staff time and \$72 million of external professional costs.

Since the Commission’s adoption of rule 151A, the Commission has adopted changes to the information required by Form S-1, which have further increased the total hours and cost burden associated with the 400 additional responses that we estimated would result from the

² 44 U.S.C. 3501 et seq.

adoption of rule 151A by approximately 1,600 hours and \$1,920,000.³

As a result of the Court order, the Commission no longer expects that there will be an annual increase of 400 responses on Form S-1, and believes that the estimate of the corresponding burdens for Form S-1 should be decreased by the amount of the burden associated with those 400 responses. Accordingly, the Commission estimates that the Court order will have the effect of decreasing the estimated burden for Form S-1 by 61,600 hours of internal staff time (60,000 plus 1,600) and \$73,920,000 for external professional costs (\$72,000,000 plus \$1,920,000).

The information collection requirements related to Form S-1 are mandatory. There is no mandatory retention period for the information disclosed, and the information disclosed is made publicly available on the EDGAR filing system. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

We request comment on the accuracy of the Commission's estimate of the change in the burden for Form S-1. Persons wishing to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention Desk

³ These changes in the burden estimates are the result of the adoption of rules enhancing information provided in connection with proxy solicitations and in other reports filed with the Commission. Securities Act Release No. 9089 (Dec. 16, 2009) [74 FR 68334 (Dec. 23, 2009)]. That rulemaking assigned an incremental burden increase of 16 hours per response on Form S-1. We estimated that 25% of that burden would be carried by the company internally and that 75% of the burden would be carried by outside professionals retained by the company at an average cost of \$400 per hour. Accordingly, we estimated an incremental internal burden increase of 4 (25% of 16) hours and an incremental external cost increase of \$4800 (75% of 16 = 12 and 12 x \$400 = \$4800) for each response, including the 400 additional responses that we had expected as a result of rule 151A. Thus, the rulemaking assigned an additional burden for the 400 responses of 1600 (400 x 4) hours and \$1,920,000 (400 x \$4800). In addition, another rulemaking following the adoption of rule 151A also resulted in a change in the burden estimate for Form S-1. Securities Release No. 33-8995 (Dec. 31, 2008) [74 FR 2158 (Jan. 14, 2009)]. However, that rulemaking modified reporting requirements for oil and gas companies and did not affect the estimated burden for the additional 400 filers under rule 151A.

Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503 and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-14-08. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7-14-08, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE, Washington, DC 20549-0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication.

Procedural and Other Matters

Section 553 of the Administrative Procedure Act provides that when an agency for good cause finds that notice and public comment procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment.⁴ The Commission has determined that there is good cause for making today's withdrawal of rule 151A final without prior proposal and opportunity for comment. Because of the Court order vacating rule 151A, the Commission's action to withdraw the rule is ministerial in nature. Accordingly, the Commission for good cause finds that a notice and comment period is unnecessary.⁵

⁴ 5 U.S.C. 553(b)(B).

⁵ This finding also satisfies the requirements of 5 U.S.C. 808(2) (if a federal agency finds that notice and public comment are "impracticable, unnecessary or contrary to the public interest," a rule "shall take effect at such time as the federal agency promulgating the rule determines"), allowing the withdrawal to become effective notwithstanding the requirement of 5 U.S.C. 801.

The Administrative Procedure Act also generally requires that an agency publish an adopted rule in the Federal Register 30 days before it becomes effective.⁶ This requirement, however, does not apply if the agency finds good cause for making this action to withdraw rule 151A effective sooner. For the reason discussed above, the Commission finds that there is good cause to make withdrawal of the rule effective immediately.

The Commission considers the costs and benefits of its rules and regulations. As discussed above, rule 151A was vacated by the Court and the action the Commission takes today merely implements the Court's decision. Our action to withdraw the rule is ministerial and therefore will have no separate economic effect.

Conclusion

Therefore, for the reasons set out in the preamble, rule 151A, published at 74 FR 3175 (January 16, 2009) and effective on January 12, 2011, is withdrawn.

By the Commission.

Elizabeth M. Murphy
Secretary

October 14, 2010

No analysis is required under the Regulatory Flexibility Act. See 5 U.S.C. 601(2) (for purposes of Regulatory Flexibility Act analysis, the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking).

⁶ See 5 U.S.C. 553(d).