ORAL ARGUMENT SCHEDULED FOR FRIDAY MAY 8, 2009

No. 09-1021 (consolidated with No. 09-1056)

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

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IN THE 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.

CORRECTED BRIEF OF ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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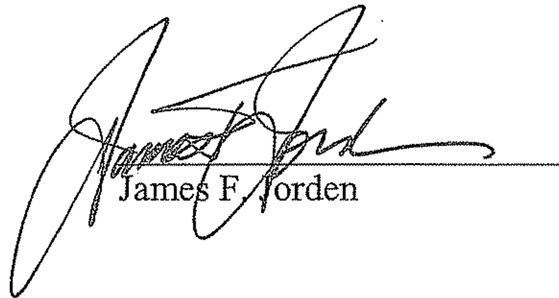
CORPORATE DISCLOSURE STATEMENT

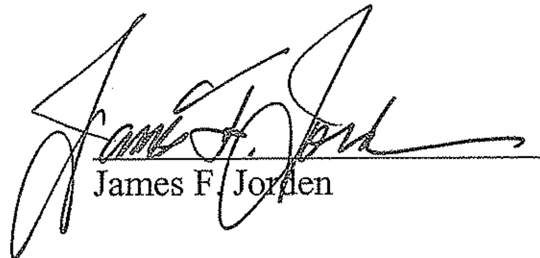
Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Rule 26.1(a) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, *amicus* Allianz Life Insurance Company of North America states that it is a wholly-owned subsidiary of Allianz of America, Inc., which in turn is a wholly-owned subsidiary of Allianz SE, a Societas Europaea.



James F. Jorden

CERTIFICATE OF SEPARATE FILING

Amicus Allianz Life Insurance Company of North America is filing this brief separately of any other *amici*. This Court should allow Allianz's argument because: (1) the issues that Allianz seeks to address have not been previously addressed by the parties or by *amici* and represent a different but important perspective and legal analysis; (2) Allianz has a strong interest in such issues, and will be significantly affected by the outcome of this case; and (3) because of Allianz's position in the annuity industry, it has specialized expertise, knowledge and experience that may be of assistance to this Court in addressing the Petitioners' case.



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IDENTITY, INTEREST AND AUTHORITY OF THE *AMICUS CURIAE*

Allianz Life Insurance Company of North America ("Allianz") files this brief as *amicus curiae* in support of the position asserted by the Petitioners, American Equity Life Insurance Company, *et al.* Allianz is a Minnesota corporation and a leading national financial service provider. Allianz designs, markets, sells and administers annuity contracts nationwide. Allianz is one of the leading writers of fixed annuities in the United States. Allianz reported on its 2008 statutory state filing, premiums of more than $8 billion, assets of more $66 billion, policy holder reserves of more than $51 billion and benefits paid of more than $5 billion.

As one of the nation's largest annuity companies, Allianz has been closely following the Securities and Exchange Commission's ("SEC") proposal, comments received in response to the proposal, and adoption of Rule 151A.

Allianz seeks to address issues that have not been fully addressed by the parties and offers its unique expertise in the annuity market to assist this Court's analysis. The disposition of this case is of paramount importance to Allianz's future annuity business and the industry as a whole. If Rule 151A is allowed to stand, it will create inefficiencies arising from the dual state and federal regulatory system, adding incalculable expense to those companies offering annuity products. Moreover, the added expense of the new federal regulation may prove to have a

chilling effect on the annuity market, driving down competition and making capital formation more difficult. In reality, the measure of Rule 151A's full negative impact on insurers issuing insurance and index annuity products may not be ascertainable for several years.

Allianz offers this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29 as well as Rule 29 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit. Allianz has received consent to file this *amicus* brief from the American Equity Life Insurance Company, *et al.,* and the National Association of Insurance Commissioners. The SEC and Allianz have agreed to electronic exchange of briefs, but the SEC has not agreed to consent. Accordingly, the Court's grant of leave will constitute Allianz's authority to file this brief.

SUMMARY OF ARGUMENT

In adopting Rule 151A, the SEC plainly contradicts three separate United States Supreme Court standards used to define whether a product is a security. The SEC additionally ignores its own statements to the Court in applying those standards. The owner of an index annuity does not assume substantial "investment risk" as defined by the *VALIC-United Benefit* standard. Any investment risk borne by the owner does not reflect the type of entrepreneurial or managerial efforts of others characteristic of a security as pronounced by the Court in the *Howey* case.

Further, the owner of an index annuity does not assume any risk of loss, because the owner's investment is soundly protected by state insurance regulation under the *Weaver* standard.

The Court has determined that federal securities laws are unnecessary where there is protective state insurance regulation. The SEC has twice urged the Supreme Court that regulation under the 1933 Act and disclosure of financial products is not necessary or appropriate where government regulation substantially eliminates the owner's risk of loss. The SEC adopted Rule 151A without examining the protective scope of state insurance regulation applicable to index annuities.

This Court should vacate SEC Rule 151A.

ARGUMENT

I. Rule 151A Contradicts Supreme Court Standards and SEC Statements to the Supreme Court Defining What Is, and What Is Not, a Security.

The SEC's adoption of Rule 151A contradicts three different standards declared by the United States Supreme Court for determining whether a product is a security, as well as statements that the SEC has made to the Supreme Court in applying those standards.

A. Rule 151A Contradicts the Supreme Court's Standard of Investment Risk Assumption and Contradicts the SEC's Statement to the Supreme Court Applying that Standard.

Any risk that an owner may assume under a typical index annuity is not a substantial "investment risk." The insurer guarantees principal, a minimum rate of interest and credited interest and, therefore, does not shift to the owner the degree of "investment risk" that evidences a security under the Supreme Court's standard pronounced in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 71 (1959) ("*VALIC*") and *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 210 (1967).

In other words, as long as an index annuity owner maintains the annuity, the owner can never lose money. The annuity issuer bears all of the downside risk of investment loss. And, the investment risk borne by the issuer is very substantial.

The Supreme Court has said that annuities qualify under the exemption (held to be an exclusion) afforded by Section 3(a)(8) of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77(c)(a)(8), where insurers bear a "substantial investment risk-taking." *United Benefit*, 387 U.S. at 210. Insurers, under typical index annuities, bear the requisite risk, because they guarantee principal (less charges), a minimum rate of interest, and all previously credited interest. These guaranteed amounts must be paid out of the insurer's general account assets regardless of general account returns or performance, putting the insurer at substantial investment risk.

The investment risk assumed by an issuer of index annuities (and other fixed annuities) takes numerous forms. As is the case with any fixed annuity, the insurer issuing index annuities bears investment credit risk, extension and prepayment risk, and interest rate risk. In addition, index annuities typically also expose the insurer to substantial hedging risks.

The SEC has agreed and so stated to the Supreme Court, as follows:

> At least where . . . a state-regulated insurer assumes all risk with respect to principal and with respect to an adequate fixed rate of interest, and guarantees payment of all discretionary excess interest declared under the contract, the *investment-risk criterion is satisfied.*

Brief for the United States as *Amicus Curiae* Supporting Writ of Certiorari at 8-9, *Variable Annuity Life Ins. Co. v. Otto (SEC's Otto Brief)*, 486 U.S. 1026 (1988) (No. 87-600) (emphasis added) (citing *Marine Bank v. Weaver*, 455 U.S. 551 (1982)) (the brief bears the names of SEC staff officials.).

Based on this history, it is plain that Rule 151A contradicts the Supreme Court's *VALIC-United Benefit* standard as well as the SEC's statement to the Supreme Court regarding the application of the *VALIC-United Benefit* standard.

B. Rule 151A Contradicts the Supreme Court's Standard of Managerial Efforts of Others.

Any risk that an owner may assume under a typical index annuity is not an "investment risk" that reflects the entrepreneurial or managerial efforts of others and, therefore, is not the kind of risk that evidences a security under the standard

that the Supreme Court pronounced in *SEC v. W.J. Howey Co.*, 328 U.S. 202, 210 (1946).

The Supreme Court has held that "an investment contract . . . means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the *efforts of the promoter or a third party*." *Howey*, 328 U.S. at 298-99 (emphasis added). The Supreme Court has further said that the touchstone of a security is "the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the *entrepreneurial or managerial efforts of others*." *United Hous. Found., Inc. v. Forman,* 421 U.S. 837, 852 (1975) (emphasis added).

The owner of an index annuity is not dependent upon money managers who exercise investment discretion in buying, holding and selling a portfolio of securities held in an insurer's separate account. As the SEC has recognized, "an indexed annuity specifies all aspects of the formula for computing return in advance of the period for which return is to credited" and "the computation is performed pursuant to a mathematical formula that is guaranteed in advance of the crediting periods." Indexed Annuities and Certain Other Insurance Contracts, Securities Act Release No. 8933, Exchange Act Release No. 58,022, 73 Fed. Reg. 37,752, at 37,753-54 (proposed July 1, 2008).

It follows that typical index annuities do not involve an investment in a common venture premised on a reasonable expectation of profits to be derived from the *entrepreneurial or managerial efforts of others*. Thus, Rule 151A flatly contradicts the Supreme Court's *Howey-Forman* standard.

The SEC appears to have overlooked the fact that federal courts have found no securities to be involved where profits were dependent upon the fluctuations of certain markets that are analogous to indexes of securities markets. *SEC v. Belmont Reid & Co.*, 794 F.2d 1388, 1391 (9th Cir. 1986) (holding that the "efforts of the promoter or third party" prong of the *Howey* test was not satisfied where the investor's profits were "dependent upon the fluctuations of the gold market, not the managerial efforts of [the company]"); *Noa v. Key Futures, Inc.*, 638 F.2d 77 (9th Cir. 1980) (per curiam) (holding that the sale of silver was not an investment contract because "the profits to the investor depended upon the fluctuations of the silver market, not the managerial efforts of [the third party]"). So, whatever the risks that an owner may assume under an index annuity, it is not an "investment risk" that the Supreme Court and other courts have associated with a security.

C. Rule 151A Contradicts the Supreme Court's Standard of Risk of Loss and Contradicts the SEC's Statements to the Supreme Court Applying that Standard.

Any risk that an owner may assume under a typical index annuity is not a risk of loss, because the owner's investment is protected by state insurance

regulation – including product, marketing and solvency regulation – and, therefore, is not the kind of risk that evidences a security under the Supreme Court's standard pronounced in *Marine Bank v. Weaver*, 455 U.S. 551 (1982); *see Reves v. Ernst & Young*, 494 U.S. 56 (1990).

The Supreme Court, in *Weaver*, pronounced that a financial product is not a security where the owner is comprehensively protected against loss by the existence of a regulatory scheme other than the federal securities laws. The SEC urged the Supreme Court to so hold, stating that a financial product is not a security where governmental regulation and supervision of the affected industry eliminates the risk of loss. Brief for the United States as *Amicus Curiae* Supporting Writ of Certiorari at 11, *Weaver*, 455 U.S. 551 (1982) (No. 80-1562) (the brief bears the names of SEC staff officials). The SEC, citing *VALIC* and later *United Benefit*, urged the following position to the Supreme Court:

> In *contrast* to the federal securities laws, which through disclosure of material facts enable investors to make an "informed choice" among investments, including an *assessment of the risk involved,* the regulation of the banking industry, like that of the *insurance industry*, emphasizes pervasive governmental supervision to substantially *eliminate the risk of loss*.

Id. (emphasis added).

The SEC, six years later, stated the same position to the Supreme Court, as follows:

> The relevant purpose of the securities laws is to ensure that investors in securities are fully and accurately informed about the issuer and the investment's relevant features, including its risks. This protection is not needed if, *inter alia,* the insurance company *assumes a sufficient share of the investment risk,* which reduces that risk to the participant, who is *protected by state regulation* of the insurance company.

SEC's Otto Brief at 7, 486 U.S. 1026 (No. 87-600) (emphasis added).

So, the SEC has *twice* told the Supreme Court that registration under the 1933 Act and disclosure of financial products is not necessary or appropriate where government regulation – such as that provided by state insurance law – substantially eliminates the owner's risk of loss. The Supreme Court has agreed. It follows that Rule 151A contradicts the Supreme Court's *Weaver-Reves* standard, as well as the SEC's statements to the Supreme Court regarding the application of the *Weaver-Reves* standard.

II. Rule 151A Contradicts SEC Statements and the Supreme Court's Determination that Protective State Insurance Regulation Obviates the Need for Federal Securities Law Regulation.

The SEC has consistently stated that the federal securities laws are unnecessary where there is protective state insurance regulation. As quoted immediately above, the SEC has *twice* told the Supreme Court that registration under the 1933 Act and disclosure of financial products is not necessary or appropriate where government regulation – such as that provided by state insurance law – substantially eliminates the owner's risk of loss.

The SEC has urged the Supreme Court to establish, and the Supreme Court has in fact established, a framework for regulation of insurance products. That framework calls for SEC regulation of insurance products under the federal securities laws *only* where regulation under the state insurance laws is not adequately protective of owners against risk of loss.

This framework has been long-standing. However, the SEC adopted Rule 151A without examining, much less giving weight to, the protective scope of state insurance regulation as applicable to index annuities. Consequently, Rule 151A contradicts the SEC's position and the Supreme Court's determination, regarding state insurance regulation as discussed below.

A. Rule 151A Is Not Based on an SEC Review of Documented Complaints and Abuses Under State Insurance Regulation.

The SEC originally justified Rule 151A based on the belief that the offer and sale of index annuities had been subject to sales practice complaints and abuses. The SEC said, for example, that the growth of index annuities had been "accompanied by growth in complaints of abusive sales practices." Indexed Annuities and Certain Other Insurance Contracts, Securities Act Release No. 8933, Exchange Act Release No. 58,022, 73 Fed. Reg. 37,752, at 37,753 (proposed July 1, 2008).

However, commenters on the SEC's proposed Rule 151A, including Allianz, challenged the SEC on its assertions of sales practice complaints and abuses.

Initially, as pointed out in Allianz's comment letter, the SEC's bald assertion of abusive sales practices in the index annuity marketplace was not supported by any statistical data whatsoever. Letter from Stewart Gregg, on behalf of Allianz Life Insurance Company of North America, to SEC, at 11 (Sept. 10, 2008), *available at* http://www.sec.gov/comments/s7-14-08/s71408-1745.pdf. Further, as commenters pointed out, "there is no evidence of widespread sales practice abuse in the indexed annuity marketplace, which would suggest a need for federal securities regulation." Indexed Annuities and Certain Other Insurance Contracts, Securities Act Release No. 8996, Exchange Act Release No. 59,221, 74 Fed. Reg. 3138, at 3147 (Jan. 16, 2009) (footnote omitted).

In light of the commenters' challenge, the SEC reversed itself in adopting Rule 151A. Now, the SEC believes that the federal securities laws should apply to index products "without regard to whether there is a single documented incident of abuse." *Id.* In reaching that conclusion, the SEC made no serious effort to review and assess the effectiveness of state insurance law in protecting owners of index annuities in terms of any complaints or abuses. Accordingly, Rule 151A is not based on documented abuses and complaints that would help assess the effectiveness of regulation under state insurance law and the need for regulation under the federal securities laws.

B. Rule 151A Does Not Take into Account the Protective Nature and Broad Extent of State Insurance Regulation.

Rule 151A fails to consider the panoply of benefits afforded consumers under the existing state insurance law regulatory scheme. In addition to insurer solvency protections, state insurance laws regulate (i) the organization and licensing of insurers, (ii) the regulation of the form and content of insurance policy and contract forms, and (iii) the regulation of insurers' and producers' marketing practices (including laws relating to sales to seniors). Within the realm of marketing practices regulation, regulators pay particular attention to unfair trade practices (including unfair sales practices such as false advertising, churning and twisting), disclosure, suitability and supervision, illustrations, producer licensing, education and training, and consumer complaints. Accordingly, the primary effect of Rule 151A would not be to provide protections that are currently unavailable to consumers, but instead would be to overlay the federal regulatory scheme on top of an existing, more-comprehensive state insurance law regulatory scheme.

Allianz agrees with the arguments in the brief filed by the National Association of Insurance Commissioners ("NAIC") regarding the protective nature and broad extent of state insurance law applicable to index annuities.

As the NAIC brief sets out in more detail, the SEC ignored evidence of existing state insurance law and ongoing NAIC initiatives that are protective of index annuity offerees and owners. Commenters pointed out to the SEC

"significant evidence that a robust state regulatory scheme was already in place." Brief of Petitioner-Appellant at 14, *Am. Equity Inv. Life Ins. Co. v. SEC*, No. 09-1021 (D.C. Cir. Feb. 17, 2009). *See also* Letter from Jorden Burt LLP, on behalf of the National Association for Fixed Annuities, to Ms. Florence Harmon, Acting Secretary, SEC (Sept. 10, 2008), *available at* http://www.sec.gov/comments/s7-14-08/s71408-1744.pdf (including a detailed discussion of existing state insurance law and NAIC initiatives).

However, the SEC ignored these comments and proceeded to adopt Rule 151A without any evaluation of the state insurance regulatory structure or its role in regulating index annuities.

C. The SEC's Rulemaking Process Made No Effort to Determine or Evaluate Insurance Industry Practices, Such as Those of Allianz, in Response to State Regulation.

By way of example, had the SEC undertaken an evaluation of the effectiveness of state regulation over index annuity sales practices, it would have discovered that Allianz, one of the leading issuers of index annuities, already had established advanced "best practices" standards for index annuity sales. A summary of some of these measures is set forth below.

- Allianz has prepared an eLearning website that provides online training for producers who sell Allianz index annuities. The eLearning website

includes specific training modules for code of conduct, suitability, replacement and disclosure issues.

- Allianz has established a customer calling program (the "75-Plus Program") under which the Allianz Customer Care team calls all new index annuity owners age 75 or over to confirm that they have a correct understanding of key features of their annuity purchase and are satisfied with their purchase.
- Allianz conducts a "suitability" review on all index annuity transactions prior to issuing a contract. In addition, to enhance its oversight of sales practices, Allianz has over the last several years (i) expanded its Product Suitability form to facilitate producers' collection and analysis of pertinent information; (ii) implemented manual enhanced suitability reviews for offerees who are 65 years of age or older and who do not meet certain minimum liquidity or financial thresholds; and (iii) strengthened product replacement guidelines to require producers to be able to demonstrate that a replacement will offer tangible net financial benefits.
- To assure that its sales standards are implemented properly, Allianz has appointed a Chief Suitability Officer.

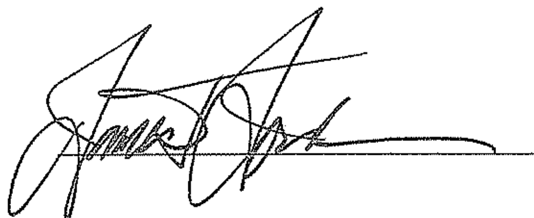
Allianz supports a strong regulatory system that protects offerees and owners of index annuities, and is on the forefront of efforts to enhance consumer protection with respect to index annuities. However, Allianz submits that Rule 151A is not warranted in light of the substantial legal protections afforded by state insurance regulation, as implemented by insurers such as Allianz, that are applicable to index annuities.

CONCLUSION

For the reasons stated above, in the Petition, and in the briefs of *amici* in support of Petitioners, this Court should vacate SEC Rule 151A.

March 5, 2009

Respectfully submitted,



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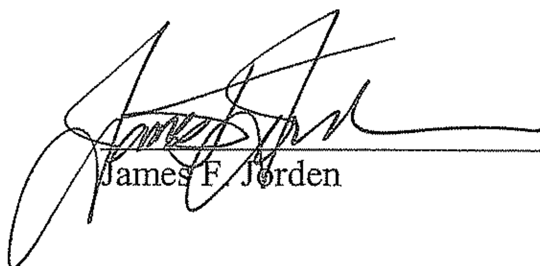
This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7(B) because this brief contains 3218 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it was prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.



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CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing Brief of Allianz Life Insurance Company of North America as *Amicus Curiae* in support of the position set forth by American Equity Life Insurance Company, *et al.*, were mailed on March 5, 2009 to:

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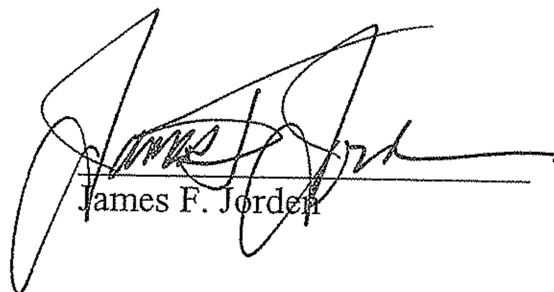

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