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A Short Telling of the Wacky History of How the SEC Came to Regulate Life Insurance Company Separate Accounts and Products

By Gary O. Cohen

The SEC held an all-day commemoration of the 75th anniversary of the Investment Company Act of 1940 and the Investment Advisers Act of 1940 at its Washington, DC headquarters on September 29, 2015.[1] Lamentably, the commemoration stopped short of covering the significant history of how the SEC came to regulate life insurance company separate accounts under those Acts and the related variable annuity contracts and variable life insurance policies under the Securities Act of 1933.[2]

This article is intended to supplement the SEC's commemoration by briefly telling that history, as well as the subsequent history of the SEC's regulation of certain fixed benefit products under the Securities Act of 1933.

This history can be said to be wacky, because, among other things, the US Supreme Court, a prominent US Supreme Court justice, and the SEC *reversed* fundamental positions each, respectively, had taken.

SEC Regulatory Difficulties

The SEC's regulation of life insurance separate accounts and products under the federal securities laws turned out to be much tougher and messier than the SEC expected. This was especially true with fitting life insurance company separate accounts under the Investment Company Act of 1940 (1940 Act) and, to a lesser degree, fitting variable annuity contracts (VAs) and variable life insurance policies (VLI)(together, variable insurance products) under the Securities Act of 1933 (1933 Act).

SEC Chairman Ray Garrett called it a "nightmare."[3] Chairman Arthur Levitt said, "square peg in a round hole,"[4] and Commissioner Phil Loomis conceded, "not always successful."[5] The US Supreme Court pronounced: "difficult" "question."[6]

And the SEC itself, on the 50th anniversary of the 1940 Act, recognized that the separate accounts and products don't "fit comfortably under investment company regulation."[7] The SEC even admitted that it still wasn't sure what the security is (contract or interests thereunder), who the issuer is (life company or separate account), or when the sale occurs (only upon initial payment or also upon subsequent payments).[8]

The SEC went so far as to seek public input on whether the SEC should continue to regulate separate accounts under the 1940 Act or whether they should be "excluded from the definition of investment company" under the Act—whether the original rationale was "still valid."[9] The SEC similarly sought input on whether the SEC should continue to regulate variable insurance products as securities

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under the 1933 Act or whether the Act should be amended to "exempt" the products.[10] The SEC then asked whether, if the SEC was to continue regulating variable insurance products and separate accounts, it should do so under a "separate statute."[11]

But, needless to say, the SEC has not pulled back from regulating life insurance company separate accounts and products, as difficult as the continuing effort has proven to be. Part of the SEC's problem was that, because of the statutory exclusions, it did not have any experience with life insurance companies and products. As Commissioner Loomis candidly observed, "the staff, including notably myself, knew very little about insurance and variable annuities."[12] The reason goes back to 1869.

Supreme Court Gets It Wrong and Reverses

The US Supreme Court (Supreme Court) held, in 1869 in *Paul v. Virginia (Paul),*[13] that the business of insurance was not subject to federal regulation under the Constitution's interstate commerce clause.

So, when Congress adopted the federal securities acts, the law of the land was "hands off" life insurance companies and their products. As a result, Congress excluded life insurance companies under Section 3(c)(3) of the 1940 Act and life insurance company products under Section 3(a)(8) of the 1933 Act (Section 3(a)(8)).

Four years after adoption of the 1940 Act and 75 years after its wacky decision in *Paul,* the Supreme Court—in *United States* v. *South-Eastern Underwriters (South-Eastern)*—reversed itself and held that "the commerce clause does include [congressional] power to regulate trading in insurance."[14]

But the Supreme Court's reversal did not eliminate the exclusions for life insurance companies and their products in the federal securities laws. Moreover, Congress promptly adopted the McCarran-Ferguson Act[15] that, in effect, prevented the SEC from *construing* the federal securities laws to apply to life insurance companies and products.

The bottom line was that for the SEC to regulate life insurance companies and their products, it would have to overcome formidable legal hurdles.

SEC Wins in Supreme Court

After the Second World War, the life insurance industry began losing market share because product benefits—like fixed annuity benefits—were in fixed dollar amounts and didn't increase with inflation as competing products did. So, in the early 1950s, life insurance companies began evolving the fixed annuity into a variable annuity.[16]

The most prominent of those companies was The Variable Annuity Life Insurance Company (VALIC). VALIC's VA invested purchase payments in equities through VALIC's *general* account, accumulating purchase payments on a variable basis and making annuity payments on a variable basis.

This put the SEC in a difficult position. If the SEC sought to declare VALIC's VAs to be securities, it would run into the exclusion for any "annuity contract" in Section 3(a)(8). If the SEC tried to declare the interests under the VAs to be securities, it would run into the McCarran-Ferguson Act's ban on *construing* the 1933 Act to apply to annuity contracts. On the other hand, if the SEC decided not to assert jurisdiction over VALIC's VA interests, the SEC would run into the Supreme Court's *South-Eastern* decision that reversed the *Paul* decision underlying the Section 3(a)(8) exclusion and, conceivably, be deemed to violate the mandate Congress imposed on the SEC to regulate securities.

So, the SEC sought to regulate VALIC and its VA interests under the federal securities laws and sued VALIC. The case, *SEC v. Variable Annuity. Life Insurance Co. of America* (*VALIC*), ascended to the Supreme Court, which held, in 1959, that VA interests were securities.[17]

The Supreme Court said that VALIC's guarantee of annuity payments for life "gives these variable annuities an aspect of insurance," but that "it is apparent, not real; superficial, not substantial."[18] On the investment risk assumed by VALIC, the

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Supreme Court said that VALIC provided "no element of a fixed return," and, so, "assume[ed] no true risk in the insurance sense."[19]

The Supreme Court, in order to reach these conclusions, divided—*or fragmented*—the VA into its insurance and investment parts and weighed each part separately rather than against each other to determine which was predominant.

Justice Harlan fiercely dissented, declaring that VALIC's assumption "of the entire risk of longevity involves nothing other than classic insurance concepts and procedures, and I do not understand how that feature can be said to be 'not substantial.' "[20] He also warned that, "analysis by fragmentization is at best a hazardous business."[21]

On the 1940 Act side, VALIC had no real insurance business other than the VA and funded the VA through its general account. The Supreme Court held VALIC to be a registrable investment company.[22]

SEC Wins Again in Supreme Court

A few years later, another company—United Benefit Life Insurance Company (United Benefit)—tried to get around the Supreme Court's decision in *VALIC* by adding more insurance elements to its VA. United Benefit's VA—like VALIC's VA—provided for *variable* accumulation, but—unlike VALIC's VA—provided for a *fixed* pay-out and a floor under the accumulation value for both surrender and annuitization.

The SEC sued, and the case (*United Benefit*) ascended to the Supreme Court. The Supreme Court held, in 1967, that United Benefit's VA interests were securities.[23]

As for the mortality risk that United Benefit assumed, the Court said that it was "subordinate" and not sufficient.[24] As for the investment risk that United Benefit assumed, the Court said that the guarantee was "low enough that the risk of not being able to meet it through investment is insignificant."[25]

To get there, the Court deemphasized the fixed pay-out—split it off, *fragmented* it from the pay-in period—saying that the pay-in and pay-out periods were "[t]wo entirely distinct promises" and "their operation is separated at a fixed point in time."[26]

This was wacky, because Justice Harlan, who wrote the dissent in *VALIC* declaring the VA interests to be insurance, turned around and wrote the unanimous opinion in *United Benefit* declaring the VA interests to be securities. Justice Harlan, who said, in *VALIC*, that assumption of the entire risk of longevity involved classic insurance concepts and that fragmentation of a product was a hazardous business, reversed himself, finding the assumption of mortality risk to be insufficient and fragmenting the pay-out period from the pay-in period, without explaining what changed his mind.

In addition to the tests of mortality and investment risk assumption, the Supreme Court created a third test of marketing, declaring that products should be judged by what they're "represented to be."[27] The Supreme Court held that the VA interests were securities because they appealed to buyers not on "the usual insurance basis of stability and security," but rather on the "prospect of growth through sound investment management."[28] The Supreme Court, the year before, had used this marketing test to distinguish literature from obscenity, finding that Eros magazine was obscene, because the publisher represented it to be "erotically arousing," rather than "intellectual."[29]

SEC Wins in Third Circuit

In between the Supreme Court decisions in *VALIC* in 1959 and *United Benefit* in 1967, the Third Circuit, in 1964, in a case the Prudential Life Insurance Company (Prudential) brought against the SEC (*Prudential*), upheld[30] an SEC opinion[31] that a VA separate account of Prudential was a registerable investment company.

Unlike VALIC, Prudential's VA business was only a fraction of its general insurance business, and the Third Circuit agreed[32] with the SEC that Section 3(c)(3) of the 1940 Act excluded Prudential from the definition of investment company. But the Third Circuit also agreed with the SEC that, although

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Prudential itself was not an investment company, it was the "creator of one" in the form of a separate account and the statutory exclusion for Prudential did not carry over to the separate account.[33]

This concept became known as the "ectoplasmic theory," which Professor Louis Loss, a Harvard Law School professor, said was an "irreverent" label.[34] Some believe that the label came from the definition of "ectoplasm" in biology where the "ectoplasm" is the outer layer of an amoeba containing the inner endoplasm, just as the life company is the outer layer containing a separate account. However, others[35] believe that the theory comes from the definition of "ectoplasm" in paranormality, where a medium—a spiritual intermediary—excretes material in a spiritual or ghostly form, just as a life company "excretes" a separate account.

In any event, the Supreme Court, in *United Benefit*—three years after *Prudential*—faced the issue of whether a separate account could be an investment company. Again, the Supreme Court acted in a wacky manner. It didn't even discuss the precedent of the Third Circuit's *Prudential* opinion, but rather remanded the issue, telling the court of appeals to investigate the relationship between the separate account and the life company and the possible conflicts between state and federal regulation.[36] Professor Loss said that the Supreme Court invited the court of appeals to consider the status of a separate account as a "fresh issue," but that United Benefit "lost its stomach to pursue litigation."[37]

And so, in 1967, after a period of more than 10 years of litigation, the SEC no longer had the courts looking over its shoulder. The SEC was free to follow the "ectoplasmic theory," requiring life insurance company separate accounts to register as investment companies.

SEC Struggles with Variable Life Insurance

Not long after the Supreme Court decided *United Benefit* and the status of VAs, the life insurance industry invented variable life insurance (VLI).

The life insurance industry had to decide how to get VLI past the SEC. With VAs, the SEC had won three out of three lawsuits, two at the Supreme Court. So, no life insurance company was brave enough to start selling VLI and take a chance that the SEC would sue.

The industry, in 1971, petitioned[38] the SEC to hold a rulemaking proceeding and grant complete exemptions for VLI from all of the federal securities laws. The SEC agreed to a proceeding the next year and ordered[39] a hearing.

A number of parties intervened. The National Association of Insurance Commissioners (NAIC)[40] supported the exemptions, so that the states would continue to be exclusive regulators of life insurance. The Investment Company Institute (ICI)[41] intervened to oppose the exemptions, fearing VLI as a competitive threat to its mutual fund sponsor members. And the ICI had a group of mutual fund distributors, the Mutual Fund Distributors Group,[42] intervene to oppose the exemptions, to make sure that, if the matter got to court, the mutual fund industry would have standing. The ICI president tried to rev up the press by labelling VLI as a cross between a horse and an alligator.

The SEC's rulemaking hearing commenced in April 1972. The atmosphere was tense and the parties combative. Parties put on witnesses. There was hostile cross-examination. The hearing lasted 23 days, involving over two thousand pages of testimony and 85 exhibits.[43]

SEC Exempts VLI Separate Accounts but Reverses

Seven months after the rulemaking hearing ended, the SEC announced[44] that it would subject VLI to the 1933 Act and the Securities Exchange Act of 1934. The SEC Staff had recommended[45] that VLI separate accounts be required to register as investment companies under the 1940 Act, subject to appropriate exemptions. But the Commission rejected the Staff 's recommendation, and granted[46] VLI separate accounts a *complete* exemption from the 1940 Act.

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The SEC explained, as the NAIC and life insurance industry had argued, that: reconciliation of the [1940] Act with state regulation of insurance "would…be difficult"; "application of the [1940] Act would create complex administrative problems"; and developing needed exemptions "probably could not be done without interfering with state regulation."[47]

The ICI's Mutual Fund Distributors Group promptly sued the SEC, alleging that the SEC "exceeded its statutory authority" resulting in "an illegal abdication of regulatory responsibility" and that complete exemption from the 1940 Act would mean that "mutual funds will suffer severe economic disadvantage."[48]

Faced with litigation, the SEC got cold feet, reversed itself in 1973 by proposing[49] amendments to narrow the complete exemption from the 1940 Act, ordered[50] and held a second round of hearings, and reversed itself again in 1975 by withdrawing the proposed amendments and rescinding the complete exemption.[51] And in 1976, over three years after the Mutual Fund Distributors Group filed its lawsuit, and six years after the industry proposed a rulemaking proceeding, the SEC adopted[52] exemptive Rule 6e-2 (which served as the basis for Rule 6e-3(T)), requiring VLI separate accounts to register as investment companies.

And so, in 1976, after six years of consideration, the SEC undertook to regulate VLI in addition to VAs.

SEC Struggles with Other Life Insurance Company Products

After regulating VAs and VLI under the federal securities laws, the SEC went on to assert jurisdiction over guaranteed interest contracts (GICs) under the 1933 Act and try to assert jurisdiction over fixed *indexed* annuities[53] under the 1933 Act.

These products were funded through the general accounts of life insurance companies, rather than separate accounts. So, the application of the 1940 Act was not directly involved. However, the SEC, in the process of asserting the 1933 Act, reversed itself regarding certain components of the traditional Section 3(a)(8) status test. It follows that application of the 1940 Act to life insurance company separate accounts *could* be involved to the extent that the SEC has narrowed the traditional Section 3(a)(8) status test with the result that life insurance company products other than GICs and fixed indexed annuities would be deemed to be registrable securities and their related entities would be deemed to be registrable investment companies.

The three-component status test for life insurance company products that the Supreme Court laid down under Section 3(a)(8) was: meaningful mortality risk assumption, substantial investment risk assumption, and marketing as insurance.

But in 1986, the SEC, in trying to regulate GICs, reversed itself on the mortality risk component of mortality risk assumption, declaring[54] that mortality risk assumption was no longer required. Then, in 2008, with fixed indexed annuities, the SEC changed the investment risk component of investment risk assumption to whether it was more likely than not that the buyer would receive more than the guarantee and dropped the third component of marketing. The SEC reached these determinations over many years of fits and starts.

With GICs, the SEC, beginning in 1973, took[55] what could be described as a monitoring stance, reversed itself in 1978 to propose[56] a rule to provide guidance as to the status of GICs under the 1933 Act, reversed itself again the next year to withdraw[57] the proposed rule and issue a general statement of policy[58] setting out its views, and reversed itself still again in 1984 to propose[59] and, in 1986, adopt[60] a so-called "safe harbor" exemptive rule. Generally speaking however, life insurance companies could not meet the "safe harbor" rule's conditions for exemption and relied instead on the traditional Section 3(a)(8) test.

With fixed indexed annuities, the SEC, determined[61] in 1984 not to permit index features in its "safe harbor" exemptive rule governing GICs, reversed[62] itself in 1986 to conditionally permit

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index features, published a concept release[63] in 1997 warning that fixed indexed products may or may not be securities depending on the mix of features, revisited[64] its position in 2005, and reversed itself in 2008 in proposing[65] a rule, adopted[66] in 2009, that virtually required fixed indexed annuities to be registered as securities under the 1933 Act. However, the industry beat back the SEC assertion of jurisdiction over fixed indexed annuities, winning litigation in 2009[67] as well as legislation in 2010.[68]

In the litigation, the court of appeals, on July 21, 2009, refused[69] to uphold the SEC's rule on procedural, rather than substantive,[70] grounds and remanded[71] the matter to the SEC to cure the defect. On July 21, 2010, President Barack Obama signed the Dodd-Frank Act into law, which barred the SEC from regulating fixed indexed annuities that meet statutory conditions (and, according to the broad language of the Act, all fixed life insurance company products that meet those conditions). On the same day and one year after its original opinion, the court of appeals reissued[72] its opinion vacating the SEC's rule.

Three months later, on October 14, 2010, the SEC formally withdrew[73] its rule without retracting or affirming the SEC's status test for fixed indexed annuities, explaining any impact of that status test on the SEC's administration of the traditional Section 3(a)(8) status test, or addressing the impact of the Dodd-Frank Act on the future direction of the SEC's assertion of jurisdiction over life insurance company products. Some SEC Staff officials have informally suggested that there is uncertainty and that the Staff would need further direction from the Commission.

Ultimately, the question remains whether the Supreme Court would agree with the court of appeals that the traditional Section 3(a)(8) status test laid down[74] by the Supreme Court in *VALIC* and *United Benefit* does not necessarily apply to all life insurance company products and that it is reasonable for the SEC to change the components of the Supreme Court's test in the context of individual products.

Accordingly, on the 75th anniversary of the 1940 Act, life insurance company lawyers and private practitioners continue to wrestle with open questions in rendering advice regarding the status of life insurance company products as securities under the 1933 Act and, where applicable, the status of related separate accounts as investment companies under the 1940 Act.

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NOTES

1 SEC, "75th Anniversary of the 1940 Acts" (Oct. 5, 2015), available at *http://www.sec.gov/news/otherwebcasts/2015/75th-anniversary-ica-iaa-092915-2.shtml.*

2 To his credit, Paul F. Roye, former director of the SEC's Division of Investment Management, recommended that the SEC commemoration cover this history and made a fleeting reference to the history during his remarks on one of the panels. Two

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prominent lawyers in the field, reflecting on the 75th anniversary, noted, but did not discuss, the Investment Company Act's exemption for "insurance companies." Jay G. Baris and Andrew J. Donohue, "Still Spry at 75: Reflections on the Investment Company Act and the Investment Advisers Act," *The Investment Lawyer,* Vol. 22, No. 7, at 14, 19 (July 2015) (Mr. Donohue is a former Director of the SEC's Division of Investment Management and currently SEC Chief of Staff). For more technical discussion, *see* Gary O. Cohen, "Nightmares, Square Pegs and the SEC's Fitting of Life Insurance Company Products and Entities Under the Federal Securities Laws or How I Came to Love the 'Ectoplasmic Theory,' Study Materials, ALI Conference on Life Insurance Company Products 2015 at 407 (Nov. 2015) and Paul J. Mason and Stephen E. Roth, "SEC Regulation of Life Insurance Products—on the Brink of the Universal," Conn. Law Rev., Vol. 15, at 505 (1983).

3 Ray Garrett, Jr., SEC Chairman, Address at the San Diego Mortgage Bankers Association (July 2, 1974), *quoted in* "Remarks of E. Kemp, Jr., Attorney, SEC Division of Investment Management," Proceedings of Conference on Variable Annuities and Variable Life Insurance (June 24-25, 1976) (printed in *The Business Lawyer,* Special Issue, Vol. 32 at 686 (March 1977) [hereinafter Business Lawyer Special Issue].

4 Testimony of Arthur Levitt, SEC Chairman, Concerning S. 1815, the Securities Investment Promotion Act of 1996, Before the Comm. on Banking, Housing, and Urban Affairs, US Senate (June 5, 1996) (Appendix: SEC Analysis and Recommendations on S. 1815, at 8).

5 Statement of Philip A. Loomis, SEC Commissioner, Business Lawyer Special Issue, *supra* n.3, at 686.

6 SEC v. United Benefit Life Ins. Co., 387 U.S. 202, 212 (1967)[hereinafter United Benefit].

7 *Request for Comments on Reform of the Regulation of Investment Companies,* Securities Act Release No. 6868, Securities Exchange Act Release No. 28124, Investment Company Act Release No. 17534, Investment Advisers Act Release No. 1234, International Release No. 128, at 30 (June 15, 1990).

8 *Id.* at 51-53.

9 *Id.*

10 *Id.* at 51.

11 *Id.* at 52-53.

12 "Statement of Philip A. Loomis, SEC Commissioner," Business Lawyer Special Issue, *supra* n.3, at 686.

13 Paul v. Virginia, 75 U.S. 168, 169 (1869)("issuing a policy of insurance is not a transaction of commerce") [hereinafter Paul].

14 United States. v. South-Eastern Underwriters, 322 U.S. 533, 539 (1944).

15 15 U.S.C. § 1012(b) (Mar. 9, 1945, ch. 20, § 2, 59 Stat. 34, July 25, 1947, ch. 326, 61 Stat. 448). The Act provided that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, … unless such Act specifically relates to the business of insurance."

16 The Supreme Court noted as follows: "The first variable annuity apparently appeared in this country about 1952 when New York created the College Retirement Equities Fund to provide annuities for teachers." SEC v. Variable Ann. Life Ins. Co. of Am., 359 U.S. 65, 69 (1959) (footnote omitted) [hereinafter *VALIC*].

17 *Id.*

18 *Id.* at 71.

19 *Id.*

20 *Id.* at 96.

21 *Id.*

22 The Supreme Court said: "The question common to the exemption provisions of the Securities Act and the Investment Company Act and to § 2(b) of the McCarran-Ferguson Act is whether respondents are issuing contracts of insurance." *Id.* at 68. The Court went on to conclude that VALIC was not issuing contracts of insurance. *Id.* at 73.

23 United Benefit, *supra* n.6, at 211 ("we hold that for purposes of the Securities Act these contracts are also to be considered nonexempt securities and cannot be offered to the public without conformity to the registration requirements of § 5").

24 *Id.* at 207-208.

25 *Id.* at 209.

26 *Id.* at 207.

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[27] *Id*. at 211.

[28] *Id*. (footnote omitted).

[29] Ginsburg v. United States, 383 U.S. 463, 470 (1966) ("Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity").

[30] Prudential Ins. Co. of Am. v. SEC, 326 F.2d 383 (3d Cir. 1964), *cert. denied*, 377 n. 953 (1964) [hereinafter Prudential].

[31] In Re The Prudential Ins. Co. of Am., Order Declaring Status and Granting and Denying Exemptions 3 (Jan. 22, 1963).

[32] Prudential, *supra* n.30, at 388 ("The order of the Commission will be affirmed").

[33] *Id*. at 385-386.

[34] *See* Louis Loss, "Fundamentals of Securities Regulation," 214, 218-219 (Little, Brown and Co.) (1983) [hereinafter Loss Treatise].

[35] Robert C. Hacker and Ronald D. Rotunda, "The SEC's Ectoplasmic Theory of an Issuer as Applied to Educational and Charitable Institutions, Bank Trustees, and Other Exempt Issuers," 65 *Cal. L. Rev.* 1181 (1977).

[36] United Benefit, *supra* n.6, at 212.

[37] Loss Treatise, *supra* n.34, at 220.

[38] "American Life Convention, Life Insurance Association of America, Petition for Issuance and Amendment of Rule and Rule-Making Proceeding Therefor" (Nov. 29, 1971).

[39] *Notice and Order for Proceeding with Respect to Petition for Issuance and Amendment of Rules Requesting Exemption of Certain Variable Life Insurance Contracts and Their Issuers from the Federal Securities Laws,* Investment Company Act Release No. 6999 (Feb. 15, 1972).

[40] National Association of Insurance Commissioners, "Petition to Intervene as Party" (Mar. 1972).

[41] Investment Company Institute, "Petition to Intervene as a Party" (Mar. 24, 1972).

[42] Mutual Fund Distributors Group, "Application to Intervene as a Party" (Mar. 23, 1972).

[43] SEC, "Variable Life Insurance and the Petition for the Issuance and Amendment of Exemption Rules, Report of the Division of Investment Management Regulation" (Jan. 1973) [hereinafter SEC Staff VLI Report].

[44] *See* Letter of William J. Casey, SEC chairman, to Robert J. Routier, Esquire, Associate General Counsel, American Life Convention, and Paul J. Mason, Esquire, Associate General Counsel, Life Insurance Association of America 2 (Jan. 31, 1973).

[45] SEC Staff VLI Report, *supra* n.43 at 19a.

[46] *Adoption of Rule 3c-4 Under the Investment Company Act of 1940 (14 U.S.C. 80a-1 et. seq.) to Define a Separate Account Established by a Life Insurance Company to Fund Certain Types of Variable Life Insurance Contracts as an Insurance Company so as to Exempt such Separate Account from the Provisions of the Investment Company Act and Adoption of Rule 202-1 Under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et. seq.) to Exempt from that Act an Insurance Company or an Affiliated Company Thereof to the Extent It Performs Advisory Services Incidental to the Issuance of Variable Life Insurance*, Securities Act Release No. 5360, Securities Exchange Act Release No. 9972, Investment Company Act Release No. 7644, Investment Advisers Act Release No. 359 (1973).

[47] *Id*. at 4.

[48] "Petition of Wellington Management Company For Review Of Orders Of The Securities and Exchange Commission," Wellington Management Co., Petitioner v. SEC (Feb. 20, 1973) [hereinafter Mutual Fund Industry Lawsuit].

[49] *Notice of Proposal to Amend Rule 3c-4 Under the Investment Company Act of 1940 and Rule 202-1 Under the Investment Advisers Act of 1940 to Condition the Exemptions Afforded by Those Rules for Insurance Company Separate Accounts Issuing Variable Life Insurance Contracts and Their Advisers on a Determination by the Commission that Applicable State Laws or Regulations Provide Protections Substantially Equivalent to Relevant Protections Afforded by the Investment Company Act and the Investment Advisers Act,* Investment Company Act Release No. 8000, Investment Advisers Act Release No. 391 (Sept. 20, 1973).

[50] *Id*. at 5.

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51 *Notice of: (1) Withdrawal of the Proposed Amendment to Rule 3c-4 Under the Investment Company Act of 1940 Which Defines as an Insurance Company a Separate Account Established by a Life Insurance Company to Fund Certain Variable Life Insurance Contracts and Therefore Exempts Such Separate Account From the Provisions of the Investment Company Act; (2) Withdrawal of the Proposed Amendment to Rule 202-1 Under the Investment Advisers Act of 1940 Which Exempts from that Act an Insurance Company or an Affiliated Company Thereof to the Extent it Performs Advisory Services Incidental to the Issuance of Variable Life Insurance Contracts; and (3) Proposal to Rescind Rule 3c-4 and Rule 202-1,* Investment Company Act Release No. 8690, Investment Advisers Act Release No. 439 (Feb. 27, 1975).

52 *Separate Accounts of Life Insurance Companies Funding Certain Variable Life Insurance Contracts*, Investment Company Act Release No. 9982 (Oct. 18, 1976).

53 The term "fixed" is used to distinguish indexed products that are not registered with the SEC as securities under the 1933 Act from index-linked products that are so registered. This article does not discuss the SEC's efforts to regulate certain life insurance company products such as fixed indexed life insurance and certain product features such as market value adjustments.

54 *Definition of "Annuity or Optional Annuity Contract,"* Securities Act Release No. 6645 at 8 (May 29, 1986) (adopting Rule 151) ("the Commission has determined not to include a mortality risk assumption requirement as a separate element of rule 151") [hereinafter SEC Release Adopting Rule 151]. This SEC determination reversed the SEC's previous position that "[a] contract which does not place upon the issuing insurance company a meaningful mortality risk cannot be regarded as 'life insurance' or an 'annuity' for purposes of the federal securities laws." *General Statement of Policy Regarding Exemptive Provisions Relating to Annuity and Insurance Contracts*, Securities Act Release No. 6051 at 2 (Apr. 5, 1979) [hereinafter SEC General Statement of Policy]. The SEC, in reversing its previous position, stated that "the Commission recognizes that there is authority for the proposition that the assumption of mortality risk by an insurer is a necessary feature of insurance under the federal definition," citing, among other things, the author's law review article, Milton P. Kroll and Gary O. Cohen, "The Insurance-Security Identity Crisis," *The George Washington Law Review,* Vol. 46, No. 5 at 790, 800 (Aug. 1978) (Manuel F. Cohen, In Memoriam, an issue published in the memory of the former SEC Chairman). *Definition of "Annuity or Optional Annuity Contract,"* Securities Act Release No. 6558 at 7 n.12 (Nov. 21,1984)(proposing Rule 151) [hereinafter SEC Release Proposing Rule 151].

55 *See* "In re Ideal National Insurance Company, Letter of John Heneghan, Deputy Chief Counsel, SEC Division of Corporation Finance, to John S. Boyden, Boyden & Kennedy (May 7, 1973); Form of Letter from Burton M. Leibert, Special Counsel, SEC Division of Investment Management, to unnamed addressee" (Dec. 17, 1976); and *Request for Submission of Views with Respect to the Offer and Sale of Certain Contractual Arrangements Issued by Life Insurance Companies,* Securities Act Release No. 5838 at 1 (June 22, 1977).

56 *Proposed Rule*, Securities Act Release No. 5933 at 1 (May 17, 1978) (proposing Rule 154).

57 *Withdrawal of Proposed Rule,* Securities Act Release No. 6050. (Apr. 5, 1979)(withdrawing proposed Rule 154).

58 SEC General Statement of Policy, *supra* n.54.

59 SEC Release Proposing Rule 151, *supra* n.54.

60 SEC Release Adopting Rule 151, *supra* n.54.

61 SEC Release Proposing Rule 151, *supra* n.54, at 11 n.19 (an insurer that uses an index feature " 'externalizes' its discretionary excess interest rate, shifts to the contract owner all of the investment risk regarding fluctuations in that rate").

62 SEC Release Adopting Rule 151, *supra* n.54, at 29.

63 *Equity Index Insurance Products,* Securities Act Release No. 7438 (Aug. 27, 1997).

64 *See* Form of Letter from Susan Nash, Associate Director, SEC Division of Investment Management, to unnamed addressee (undated).

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[65] *Indexed Annuities and Certain Other Insurance Contracts*, Securities Act Release No. 8933 and Securities Exchange Act Release No. 58022 (June 25, 2008) (proposing Rule 151A).

[66] *Indexed Annuities and Certain Other Insurance Contracts,* Securities Act Release No. 8996 and Securities Exchange Act Release No. 59221 (Jan. 8, 2009) (adopting Rule 151A).

[67] American Equity Inv. Life Ins. Co. v. SEC, 572 F.3d 923 (D.C. Cir. 2009) [hereinafter American Equity Original 2009 Opinion], *amended by* 613 F.3d 166 (D.C. Cir. July 12, 2010) [hereinafter Am. Equity Revised 2010 Opinion].

[68] Wall Street Reform and Consumer Protection Act (commonly referred to as the Dodd-Frank Act), Title X., Section 989J (1910) (commonly referred to as the Harkin Amendment).

[69] American Equity Original 2009 Opinion, *supra* n.67, at 933 ("We hold that the Commission's consideration of the effect of Rule 151A on efficiency, competition, and capital formation [as required by Section 2(b) of the 1933 Act] was arbitrary and capricious").

[70] *Id*. ("the SEC's interpretation of 'annuity contract' was reasonable").

[71] *Id*. at 936 ("Having determined that the SEC's § 2(b) analysis is lacking, we conclude that this matter should be remanded to the SEC to address the deficiencies with its § 2(b) analysis").

[72] American Equity Revised 2010 Opinion, *supra* n.67, at 179 ("We therefore order that Rule 151A be vacated").

[73] *Indexed Annuities,* Securities Act Release No. 9152 (Oct. 14, 2010) ("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").

[74] The Supreme Court said that "[w]e deal, however, with federal statutes where the words 'insurance' and 'annuities' are federal terms," and "the meaning of 'insurance' or 'annuity' under these Federal Acts is a federal question:" VALIC, *supra* n.16, at 69. The Supreme Court went on to say that "[w]e realize that life insurance is an evolving institution" and that "we would not undertake to freeze the concepts of 'insurance' or 'annuity' into the mold they fitted when these Federal Acts were passed." *Id*. at 71.

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