

United States Court of Appeals

District of Columbia Circuit
Washington, D.C. 20001-2866

Fax No. (202)219-8530

FEB 10 2009
General Info (202)216-7000

RECEIVED

CHECKLIST FOR EMERGENCY MOTIONS

Type of motion: Consolidation When will it be filed (Date & Time)? 2/10/09, 4 p.m.

Disposition needed by (Date & Time): 2/13/09 Why? Additional petitioners filed new petition.

Will the motion be served by hand? Y If not, why not? _____

Date of Lower Ct/Agcy decision: 1/16/09 When will copies be provided the court? See Petition for Review, Case No. 09-1021

Status of Lower Ct/Agency Proceedings: Final Rule, Securities and Exchange Commission, 74 Fed. Reg. 3,138

Any hearings scheduled? N When? _____

Status of motion for stay/injunction pending appeal filed with lower court or agency? Withdrawn at agency request.

Is there a case pending in USCA now? Y Case No.& Caption Amer. Equity Inv. Life Ins. Co. v. SEC, No. 09-1021

When will disclosure statements be filed? See Petition for Review

If a NOA or P/R has not been filed, when will one be? _____

Brief description of case: (What is happening & when?) Petitioners issue and market fixed indexed annuities ("FIAs"). Petitioners are challenging an SEC rule that will require them to register, offer, and sell FIAs in accordance with the requirements of the Securities Act of 1933. Petitioners believe that they are substantially likely to succeed in their challenge and will be irreparably harmed if review is not expedited.

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Name of opposing counsel Michael A. Conley, Senior Special Counsel, Securities and Exchange Commission

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Comments: A petition was filed yesterday by the National Association of Insurance Commissioners, challenging the same SEC rule. The following emergency motion requests the Court to consolidate the cases in time to maintain the expedited schedule and submit opening briefs on February 17.

FOR CLERK'S OFFICE USE ONLY

Deputy Clerk _____ Date & Time _____

Who notified in LD? _____

ROUTING

____ Clerk _____ Team Leader Staff Attorney Assigned _____

____ Ch. Deputy Clerk _____ Supv/Op Unit _____ Other _____

____ LD Office _____ Intake _____

FEB 10 2009

RECEIVED IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN EQUITY INVESTMENT LIFE
INSURANCE COMPANY, *et al.*,

Petitioners,

v.

UNITED STATES
SECURITIES AND EXCHANGE
COMMISSION,

Respondent.

**ON PETITION FOR
REVIEW**

No. 09-1021

NATIONAL ASSOCIATION OF INSURANCE
COMMISSIONERS AND NATIONAL
CONFERENCE OF INSURANCE
LEGISLATORS,

Petitioners,

v.

UNITED STATES
SECURITIES AND EXCHANGE
COMMISSION,

Respondent.

**ON PETITION FOR
REVIEW**

No. 09-1056

EMERGENCY MOTION

**PETITIONERS' MOTION TO CONSOLIDATE AND TO AMEND
EXPEDITED BRIEFING ORDER**

Pursuant to Federal Rule of Appellate Procedure 3(b) and the Rules of this Court, petitioners in *American Equity Investment Life Insurance Co. v. SEC*, No. 09-1021, hereby move to consolidate that case with a related case that was filed today, *Nat'l Assoc. of Ins. Comm'rs, et al. v. SEC*, No. 09-1056 (the "NAIC/NCOIL" case). The two proceedings challenge the same rule of the Securities and Exchange Commission. Indexed Annuities and Certain Other Insurance Contracts, 74 Fed. Reg. 3,138 (January 16, 2009).

Petitioners present this motion on an emergency basis because the Court has expedited review in the *American Equity* case, with petitioners' brief due in a week. The NAIC/NCOIL petitioners consent to participation in the expedited briefing schedule established in the *American Equity* case, with a small change to accommodate their recent entry to the case.

Petitioners further request that the Court amend the expedited briefing schedule to revise the word limits for petitioners' briefs. Because the opening brief is due to the Court on February 17, ***petitioners request a ruling on this motion by February 13, 2009.***

This motion was not filed within the usual seven calendar days before court action was necessary because it was not until today that NAIC and NCOIL filed their petition and that the affect on the briefing schedule became evident.

In support of this motion, petitioners state as follows:

1. Petitioners American Equity Investment Life Insurance Company, BHC Marketing, Midland National Life Insurance Company, National Western Life Insurance Company, OM Financial Life Insurance Company, and Tucker Advisory Group, Inc, jointly filed a petition for review on January 16, 2009.

2. The Court granted petitioners' consent motion for expedited briefing on February 3, ordering the *American Equity* petitioners to file their opening brief on February 17.

3. On February 10, NAIC and NCOIL filed a separate petition for review in this Court, challenging the same Commission rule. In their *Provisional Certificate As to Parties, Rulings, and Related Cases*, the *NAIC/NCOIL* petitioners stated that they "do not wish to interfere with the Court's decision to grant expedited review" and that they will file their Opening Brief on February 17 "if necessary," but that they would prefer two additional days, until February 19.

4. Petitioners in both cases agree to consolidation and to maintaining an expedited briefing schedule, subject to the following proposed revisions to the word limits for petitioners' briefs:

American Equity et. al. Opening Brief	not to exceed 12,000 words
NAIC Opening Brief	not to exceed 8,000 words
American Equity et. al. Reply Brief	not to exceed 7,500 words
NAIC Reply Brief	not to exceed 5,500 words

5. Petitioners believe that joint briefing is not feasible because the parties have divergent interests that at times conflict: Petitioner NAIC is the association

of state insurance officials responsible for regulating the *American Equity* petitioners.

6. Petitioners recognize that the Court disfavors the filing of duplicative briefs in consolidated cases, *see* D.C. Circuit Handbook of Practice and Internal Procedures 37, and thus intend to emphasize different issues in their briefs.

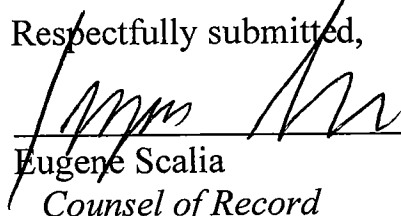
7. Respondent SEC states that at this juncture it does not consent to expedited review if the cases are consolidated, and that it will be in further contact with the Court shortly regarding this motion. The *American Equity* petitioners respectfully submit that even with entry in the case of NAIC/NCOIL, the Commission would have the same amount of time ordinarily provided by the federal rules to prepare its brief, which would be due at least 30 days after the *NAIC/NCOIL* brief, and more than 2 months after the filing of the petition for review. Indeed, any added burden for the Commission is less than would have occurred if NAIC/NCOIL had entered the case on a motion to intervene in accordance with the schedule currently in place.

CONCLUSION

For the foregoing reasons, petitioners respectfully move the Court to consolidate Case Nos. 09-1021 and 09-1056 and to modify the page limits in the briefing schedule in No. 09-1021.

Dated: February 10, 2009

Respectfully submitted,



Eugene Scalia

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Marketing, Midland National Life

Insurance Company, National Western

Life Insurance Company, OM Financial

Life Insurance Company, AND Tucker


Advisory Group, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of
Petitioners' Consent Motion for Expedited Briefing via hand delivery this 10th day
of February, 2009, upon the following:

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