

The fiduciary rule takes a hit in the 5th Circuit.

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But, whatever its future, the rule has already changed the culture

A decision last month by the Appeals Court for the 5th Circuit concluded that the Department of Labor (DOL) overstepped its authority with its “fiduciary rule.” This rule is based on the simple premise that – when giving advice with regard to retirement funds – brokers, investment advisers, and insurance agents must act in the best interests of their clients. Before the rule, brokers had only to ensure their recommendations were “suitable,” a lower standard.

Despite the logical appeal of the underlying principle, some parts of the financial services industry have fought the new rule tooth and nail. The plaintiffs in the 5th Circuit Case included the Financial Services Institute (independent broker-dealers), Insured Retirement Institute (the annuity industry), the Securities Industry and Financial Markets Association (the securities industry), as well as the U.S. Chamber of Commerce, among others. The plaintiffs’ argument is that the fiduciary rule is too burdensome

and could make providing advice too costly, particularly for smaller investors.

The question, of course, is the future of the fiduciary rule. That depends on what the DOL decides to do, future court decisions, and the extent to which the lead shifts to the Securities and Exchange Commission (SEC).

It seems like the DOL has a dog in this fight. The Trump Administration is not a strong supporter of the fiduciary rule; the new DOL leadership said they would review the regulation and delay full implementation by 18 months. However, the rule is now partially in effect. It would seem strange for the agency to walk away completely.

The courts have produced conflicting legal opinions. While the 5th Circuit rejected the rule, the Appeals Court in the 10th Circuit upheld it. The DOL could ask the full 5th Circuit to hear the case instead of the three-judge panel that handed down the most recent decision. Alternatively, the case could make its way to the Supreme Court.

Interestingly, the SEC is now working on its own proposal for financial professionals, which would apply to securities in all investment accounts, not just those for retirement. The DOL and SEC could coordinate their efforts.

My view is that whatever the ultimate outcome of DOL's fiduciary rule, the genie is out of the bottle.

1. Many companies decided not to fight the new rule and started bragging in their advertising that they put their customers' interests first. Several brokerage firms eliminated front-end commissions in favor of an annual asset charge, and dozens of companies created a class of generally less costly mutual fund shares.

2. Several states have taken up the cause. Massachusetts is actively pursuing efforts to protect retirees; Nevada has passed its own fiduciary rule; and Connecticut, New York, Maryland, and New Jersey have fiduciary rule proposals on the table.
3. Consumers have been put on notice – the battle against the fiduciary rule confirms that many companies put their customers “second.” Consumers now know that they should be cautious when dealing with financial advisers and feel free to ask directly if their interests come first.