

As DOL Rule is Struck Down, Fears Resurface Over Investor Protection

By [Rita Raagas De Ramos](#) March 21, 2018

3/21/2018

A U.S. appeals court decision to vacate the **Department of Labor's** fiduciary rule in its entirety could trigger a chain of events that would leave investors worse off than they were before the rule was put in place, according to a staunch investor protection advocate.

If the vacate ruling stands, any efforts by the **SEC** to produce a substantial fiduciary rule to protect investors would most likely receive far less support from industry groups and other lobbyists, says **Barbara Roper**, Pueblo, Colo.-based director of investor protection at the **Consumer Federation of America**.

The "primary motivation" of industry groups in urging the SEC to act has been "to get a [watered-down standard](#) adopted under securities laws that would substitute for compliance with the DOL rule's stronger protections," she says.

Sifma, which is among the industry groups that challenged the DOL rule in court, says the SEC should now "take the lead on a clear, consistent, and workable standard that does not limit choice for investors." Sifma previously told FA-IQ it is "asking the SEC to consider a separate best-interest standard for broker-dealers, but one that would cover all products."

At a **Practising Law Institute** event in February, SEC Chairman **Jay Clayton** said the watchdog wants to bring "clarity" and "harmony" to standards of conduct of advisors and that those standards would apply to retail and retirement accounts. At a Sifma compliance and legal seminar in Orlando, Fla. on Monday he said the SEC is moving ahead with its plans, and "the sooner the better."

"Brokers and insurers are celebrating a court decision that declares them to be nothing more than salespeople."

Barbara Roper

Consumer Federation of America

Yet without a strong DOL rule in place, industry groups would be more emboldened to push for what is effectively an enhanced suitability rule that they could use "for marketing purposes" to their customers, "without actually requiring them to make any meaningful changes in the way they do business," according to CFA's Roper.

"If the SEC were to adopt the industry's empty standard, that would leave investors worse off than they are today," she says. Consumers "would be misled into believing they are receiving protections when in fact the regulations would not impose an enforceable obligation to do what is best for the customer and wouldn't do anything to rein in the toxic incentives that pervade the broker-dealer business model."

Roper says investors should recognize all the lobbying that's been done by the industry groups, which she says have spent millions of dollars, against the DOL rule.

"That tells investors everything they need to know about who to trust with their money," she says. "Brokers and insurers are celebrating a court decision that declares them to be nothing more than salespeople, with no relationship of trust and confidence between them and their customers."

Micah Hauptman, financial services counsel of the Consumer Federation of America, believes the case was "wrongly decided" by the appeals court and questions how the ruling was obtained.

"The industry opponents went forum shopping and finally found a court that was willing to buy in to their bogus arguments," he says. "This is a sad day for retirement savers."

Meanwhile Sifma says the appeals court "has ruled on the side of America's retirement savers, preserving access to affordable financial advice."

But Hauptman believes the ruling "is extreme by any measure." For him it's an attack not only on the DOL rule but on the DOL itself because "it strikes at the essence of the DOL's authority to protect retirement savers under Erisa."

The original lawsuits were separately filed by three business groups, with each group headed by the **U.S. Chamber of Commerce**: the [Financial Services Institute](#) and Sifma; the **American Council of Life Insurers** and the **National Association of Insurance and Financial Advisors**; and the **Indexed Annuity Leadership Council**. Among their contentions: the DOL rule is inconsistent with governing statutes, reaches beyond its authority, violates the First Amendment, imposes unauthorized contract terms to enforce the new regulations, and treats annuities in an arbitrary and capricious manner.

The lawsuits were later consolidated and jointly decided by the district court in Texas, which rejected the arguments of the business groups.

Overturing that district court's decision, two of the three judges of the **U.S. Court of Appeals for the Fifth Circuit** who heard the case ruled there is merit in the arguments and ordered the DOL rule vacated. The appeals court held that the DOL rule conflicts with the Erisa language and the common law understanding of the term fiduciary. The appeals court also held that the DOL rule was not a reasonable interpretation of existing law and failed to comply with the Administrative Procedures Act.



Barbara Roper

But the dissenting judge, **Carl Stewart**, said he believes the DOL rule is "a statutorily permissible and reasonable exercise of its regulatory authority." He added that the DOL "acted well within the confines set by **Congress** in implementing the challenged regulatory package" and so the DOL rule "should be maintained so long as the agency's interpretation is reasonable."

In a newsletter, the **Wagner Law Group** says a 14-day stay on the vacate ruling is in effect. The Fifth Circuit could extend the stay, particularly if the DOL appeals to the Fifth Circuit and a hearing for the appeal is scheduled, the law firm says. If the Fifth Circuit does not extend the stay, then the DOL rule is vacated in the Fifth Circuit, which includes Texas, Louisiana, and Mississippi, it adds.

However, a DOL spokesman tells FA-IQ that following the appeals court ruling and "pending further review, the department will not be enforcing the 2016 fiduciary rule."

March 21, 2018