

Has the Fiduciary Rule Lost Its Sting?

By Kerry Pechter Thu, Jul 27, 2017

"The government is no longer defending the BIC Exemption's condition restricting class-litigation waivers insofar as it applies to arbitration agreements," lawyers from the Departments of Labor and Justice wrote in a July 3 filing in a Texas federal appeals court.



In what may turn out to be a Christmas-in-July victory for financial services companies, the Trump administration appears willing to take the stinger out of the Obama Department of Labor's Fiduciary (or "conflict of interest") Rule, which went live on June 9 but isn't enforceable until at least next January 1.

In a joint [filing](#) in the U.S. Court of Appeals in Texas on July 3, the Trump Departments of Labor and Justice endorsed the whole Rule—except for a provision ensuring that IRA owners may join class-action suits against financial services companies when those companies are believed to have systematically violated the Rule's requirement that they act in their clients' "best interest."

"The government is no longer defending the BIC Exemption's condition restricting class-litigation waivers insofar as it applies to arbitration agreements," government attorneys wrote. "DOL may not interpret its... exemption authority as conferring upon it the specific power to discriminate against arbitration by withholding the BIC Exemption unless fiduciaries consent to class litigation."

This is what many financial services companies have wanted to hear from the Trump administration: that they can promise to act in the best interests of their clients (and execute commission-based sales to IRA owners) without exposing themselves to the kinds of fiduciary-violation class-action lawsuits that have roiled the 401(k) industry.

If the sentiments expressed in the Texas filing find their way into the final version of the fiduciary rule, brokerages will be able to write service contracts in which rollover IRA clients (a \$7 trillion market) waive their right to participate in potentially expensive and reputation-staining class action lawsuits against the brokerages, and settle their grievances or disputes with brokerages through private arbitration panels where industry has more control. That would be a huge win for financial services firms.

Two reasons were given in the Texas filing for the DOL and Justice Department's new position on the class-action suit issue. The new position is consistent with the position on the Federal Arbitration Act that the Trump administration's acting Solicitor General has taken in another, separate lawsuit. Also, the Texas filing said that the right to participant in class-action lawsuits was never considered essential to the Rule. It claims that the "agency would have adopted the rule without the anti-arbitration condition" and that dropping it wouldn't invalidate the rest of the rule.

(If that suggests that the class-action right wasn't important to the Obama administration, it is a notion rejected by Phyllis Borzi, the Obama administration Deputy Labor Secretary responsible for the Rule. "Of course it was important," she told *RIJ* in an interview last week. "The signed [Best Interest] contract is the primary enforcement mechanism of the rule.")

For marketers of annuities, the Texas filing didn't offer much good news. It did not send the signal that manufacturers and distributors of variable annuities or fixed indexed annuities were hoping to hear from the Trump administration. They wanted, and still hope for, a change in the rule's requirement that sellers of their products must sign the BIC pledge to act in the best interests of rollover IRA clients. They want to be regulated as lightly as are sellers of simple fixed deferred annuities (which are like CDs) and income annuities (which are like personal pensions).

It is too soon for financial services firms to celebrate a victory over the Obama DOL, however. By all accounts (by attorneys Barry Salkin of the Wagner Law Group in New York and Michael Kreps of the Groom Law Group in Washington), the Trump DOL's statements in the Texas filing don't necessarily mean that, after reading and weighing the latest round of comments on the Rule that the DOL solicited from the public and the industry) submitted this summer) the Trump DOL won't allow IRA owners to waive their right to bypass arbitration when they have grievances.

The Trump DOL's handling of the Fiduciary Rule may depend on the outcome of a case currently before the Supreme Court. In *National Labor Relations Board vs. Murphy Oil*, which tests whether an employment contract violates the federal law if it requires employees to waive their right to bring a class-action suit against an employer.

When this case was filed, the Obama Justice Department favored employees' right to sue. The Trump Justice Department recently reversed its position, and now favors employers right to require arbitration. "It is rare for the DOJ to switch positions in a Supreme Court," said a June 16 [article](#) at Politico.com.

A lot is at stake here. The fiduciary rule was always about the right of the brokerage industry to sell products to rollover IRA owners (the \$7 trillion market mentioned above) as if their savings were ordinary retail money, as opposed tax-deferred savings intended for retirement income. We're not talking about a small change, and we're not talking about small change.

If the Rule has sting in it (via the right to sue), prices on products and services for IRA owners will arguably be lower than if the Rule lacks a powerful incentive for compliance with the pro-consumer spirit of the original Rule. Billions and billions of dollars in corporate revenue (or enhanced retire savings) hang on the outcome of this legal dispute.