
Court Overturns Fee-Based Brokerage Rule

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The US Court of Appeals for the DC Circuit ruled on Friday that the Securities and Exchange Commission (SEC) exceeded its authority under the Investment Advisers Act of 1940 when it promulgated a rule exempting certain broker-dealers providing fee-based brokerage accounts from registering as investment advisers. The lawsuit, which was brought by the Financial Planning Association against the SEC, alleged that Rule 202(a)(11)-1 (the rule) harmed consumers by formalizing two different levels of customer protection for similar services. In a 2-1 decision, the court vacated the rule in its entirety.

As a practical matter, the rule will remain in effect until the date the court issues a mandate, which we expect will occur shortly after: (1) the expiration of the period to seek rehearing (May 14, 2007), or (2) the disposition of the petition for rehearing, if rehearing is sought. It is not immediately clear what the SEC will do in response to the opinion, though we expect it will grant temporary relief to financial services firms that have fee-based brokerage programs to permit an orderly response. Broker-dealers relying on Rule 202(a)(11)-1 to offer fee-based brokerage, discretionary accounts or financial planning services should consider the impact upon their business operations.