

Fifth Circuit Court of Appeals Vacates DOL Fiduciary Rule

MARCH 21, 2018

On March 15, 2018, the Court of Appeals for the Fifth Circuit reversed a district court judgment and vacated the U.S. Department of Labor's (the "Department") "Fiduciary Rule" *in toto* in a 2-1 split decision.

In the way of background, the Department issued the Fiduciary Rule with the intent of requiring professionals who provide retirement investment recommendations or solicitations, even on a mere one-time basis, to act in the best interest of their client. In doing so, the Fiduciary Rule expands and modifies certain prohibited transaction exemptions for investment activities based on the expanded fiduciary definition.

The Court of Appeals' majority decision primarily rests on a determination that the Department exceeded its authority under ERISA in promulgating the Fiduciary Rule because the Department's expanded definition of "investment-advice fiduciary" does not constitute a reasonable interpretation of the term fiduciary under ERISA. Under the Fiduciary Rule, certain service providers and broker dealers are considered ERISA fiduciaries that were not previously considered fiduciaries under ERISA's original fiduciary definition.

In a dissenting opinion, Fifth Circuit Chief Judge Stewart wrote that "the statutory definition of 'fiduciary' does not unambiguously foreclose the Department's updated regulatory definition of 'investment-advice fiduciary,'" and concluded that the Department acted well within its regulatory authority in expanding the definition. The Chief Judge's dissent is consistent with the decisions of the U.S. Court of Appeals for the Tenth Circuit and the U.S. District Court for the District of Columbia, both of which upheld the Department's implementation of the expanded fiduciary definition.

It is not yet clear whether the Department will appeal the Fifth Circuit Court of Appeals decision, let alone the lasting impact of the decision. News outlets are reporting that the Department has stated that it will not enforce the Fiduciary Rule pending further review. We will continue to monitor the status of the Fiduciary Rule and the Department's guidance on compliance to keep our clients informed.

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