

# Fifth Circuit Vacates DOL Fiduciary Rule

March 31, 2018

On March 15, the Fifth Circuit, in *Chamber of Commerce, et. al. v. United States Department of Labor*, a 46-page opinion, reversed the district court's ruling upholding the Department of Labor (DOL) fiduciary rule and vacated the rule. The fiduciary rule is a shorthand definition for a package of seven different rules promulgated by the DOL. The rules reinterpreted the definition of an "investment advice fiduciary," created two new prohibited transaction class exemptions, and significantly modified a number of existing prohibited transaction class exemptions. The Fifth Circuit's decision essentially moots the fiduciary rule and returns the law to what it was prior to April 2016 when the rule was finalized. In vacating the rule, the Fifth Circuit determined that the original DOL regulation defining "investment advice" drew an appropriate distinction between "an 'investment adviser,' who is a fiduciary regulated under the Investment Advisers Act, and a broker or dealer, whose advice is 'solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor.'" In reaching this conclusion, the Fifth Circuit determined that the rule was valid only if it was authorized by ERISA Titles I and II. After extensive analysis, the court determined that it was not. The Fifth Circuit also relied on "Step 2" of the U.S. Supreme Court's decision in *Chevron U.S.A., Inc. v. NRDC* that "if [a] statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." The Fifth Circuit found that not only was the DOL fiduciary rule unreasonable but it was also arbitrary, capricious, contrary to law, and in excess of statutory authority. As of publication, it was unclear whether the DOL would request a panel rehearing, an en banc hearing, or ask the Supreme Court to review the decision. It is also unclear what impact, if any, the decision might have on the SEC's development of its own fiduciary rule or the various state activities (both legislative and regulatory) surrounding this issue.

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