



Fifth Circuit Vacates ERISA "Fiduciary Rule": Future Uncertain

On March 15, 2018, in a 2–1 decision, the Fifth Circuit vacated all parts of the Department of Labor's so-called "Fiduciary Rule" in *Chamber of Commerce, et. al. v. Acosta*, No. 17-10238 (5th Cir. March 15, 2018). The Labor Department has 45 days to decide whether to file a petition for rehearing. If it does not, the Fifth Circuit will thereafter issue a mandate within seven days officially vacating the Fiduciary Rule. Accordingly, if the Labor Department takes no action, the prior regulatory definition of "fiduciary" for investment advice purposes, which was struck as part of the Fiduciary Rule, will be reinstated by Monday, May 7, 2018. The Department has not announced whether it plans to challenge the decision, but the press has reported a Department spokesperson as stating that, "pending further review," the Department would not enforce the Fiduciary Rule.

The Fiduciary Rule was promulgated in 2016 and became effective in part on June 9, 2017. It broadened the definition of "fiduciary" services to capture investment "recommendations." This acted to increase the number of entities regulated under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), including the related prohibited transaction and excise tax provisions of the Internal Revenue Code. The Fiduciary Rule was accompanied by various administrative exemptions designed to permit otherwise prohibited conduct, albeit subject to new and varied requirements. Many sectors of the financial services and investment industries adjusted their practices and procedures in response to the rule, and several significant companies withdrew entirely from the brokerage and retirement investor market.

The Fifth Circuit held that the Fiduciary Rule "fatally conflicts" with the statutory text of ERISA, departing from the long-standing common-law standard defining a fiduciary relationship as one of trust and confidence, and that the Department "exploited an exemption provision into a comprehensive regulatory framework" that constituted "backdoor regulation." It found, and vacated, all parts of the Fiduciary Rule as arbitrary and capricious under the Administrative Procedures Act. This finding will be applicable after the time periods outlined above if the Department does not seek rehearing or file a motion for a stay of the court's order.

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