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Fifth Circuit Officially Vacates Fiduciary Rule

The Fifth Circuit has issued a long-awaited mandate of its order vacating the Department of Labor's (DOL) Fiduciary Rule *in toto* on June 21, 2018. In March, a panel majority of the Fifth Circuit Court of Appeals issued an opinion finding that the Fiduciary Rule exceeded the DOL's rulemaking authority. (See prior blog post at: link.) Since that time, the Fifth Circuit denied efforts by the States of California, New York and Oregon to intervene and the Department of Justice declined to appeal the Fifth Circuit decision prior to the appeal deadline. (See prior blog post at: link.)

The Fiduciary Rule was controversial, among other things, because it expanded the concept of a "fiduciary" for purposes of ERISA beyond traditional situations where there was a special relationship of confidence and trust, including in situations where the relationship was in the nature of a salesperson and customer. The Fiduciary Rule also bootstrapped the DOL's interpretive authority over ERISA plans to regulate IRAs and broker-dealers, which was viewed by the Fifth Circuit and other critics as an encroachment on the SEC's turf.

As a result of the Fifth Circuit's mandate, the definition of a "fiduciary" for purposes of ERISA and related prohibited transaction rules applicable to IRAs under the Internal Revenue Code reverts to the "five-part test" that applied under 1975 DOL Regulations, which provided that in cases of someone who renders investment advice for a fee with respect to an ERISA plan or an IRA, only if the person: (i) renders advice as to the value of securities or other property or makes recommendations concerning the advisability of investments, (ii) on a regular basis, (iii) pursuant to a mutual understanding or agreement, (iv) that the advice will serve as a primary basis for investment decision-making, and (v) the advice is tailored to the needs of the plan.

This is a significant retreat for the DOL, which viewed its 1975 regulations as outdated. However, the SEC has issued proposed rules that are intended to supplant the Fiduciary Rule by addressing conflicts of interests of broker-dealers. (See blog post at: link.)