

March 21, 2018

5th Circuit Vacates DOL Fiduciary Rule

In a decision dated March 15, the Court of Appeals for the 5th Circuit vacated the “fiduciary advice rule” (the Fiduciary Rule) that became effective on June 9, 2017.

In rendering its decision, the 5th Circuit concluded that the Department of Labor (DOL) exceeded its authority by implementing the Fiduciary Rule and re-interpreting the definition of the term “investment advice fiduciary” under the Employee Retirement Income Security Act of 1974 (ERISA). (*Please see [Katten’s June 6, 2017 advisory](#) for additional information.*) The decision of the 5th Circuit is at odds with other federal court cases, which have largely upheld the Fiduciary Rule. Last week the Court of Appeals for the 10th Circuit upheld the Fiduciary Rule as applied to the sale of annuities in the insurance industry, and another similar case remains before the Court of Appeals for the DC Circuit.

In a 2–1 split decision, the court determined that the Fiduciary Rule was inconsistent with both the historical meaning of the term “fiduciary” and the legislative intent of Congress set forth in ERISA. The court found that the meaning of the term “fiduciary” historically involved a relationship of trust and confidence, which justified a beneficiary’s expectation of honesty and loyalty, and concluded that the DOL failed to take account of this essential characteristic in fashioning a test to determine fiduciary status. The court observed in this regard that at the time of the enactment of ERISA, the DOL itself noted that a broker-dealer’s receipt of fees in connection with rendering investment advice would only create a “fiduciary” relationship if the broker-dealer provided individualized investment advice on a regular basis pursuant to a mutual agreement with their client—which was the test under the DOL regulations that was modified by the Fiduciary Rule.

The court also found that while ERISA plan fiduciaries are subject to the common law duties of loyalty and prudence, fiduciaries to individual retirement accounts (IRAs) that are not subject to ERISA, but are subject to the Internal Revenue Code, are not subject to such duties. The court, therefore, found that the DOL exceeded its statutory authority by imposing a “best interest” standard on advisers to IRAs in the same manner as apply to ERISA plan fiduciaries.

Whether the decision of the 5th Circuit is the death knell of the Fiduciary Rule will be determined over the coming months. While it appears unlikely that the DOL will appeal the decision to the US Supreme Court, it is possible that the DOL will seek review by the entire bench of judges of the 5th Circuit (in what is referred to as an en banc hearing). It is also possible that an outside industry group (such as the AARP) will seek to intervene and appeal the decision.

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It has been reported that in response to the decision of the 5th Circuit, the DOL issued a statement indicating that it would not enforce the Fiduciary Rule pending further review.

Katten will continue to monitor these developments, and will provide additional information as it becomes available.

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