

Memorandum

Fifth Circuit Decision Vacates DOL's Fiduciary Rule

March 20, 2018

On March 15, 2018, the U.S. Court of Appeals for the Fifth Circuit vacated the “fiduciary rule” which had been promulgated by the Department of Labor (the “DOL”) in [2016](#), finding that the DOL lacked the statutory authority to promulgate the rule re-defining who is a “fiduciary” for purposes of ERISA, and that the rule “bears the hallmarks of ‘unreasonableness’ . . . and arbitrary and capricious exercises of administrative power.” Parts of the fiduciary rule initially became effective on [June 9, 2017](#), but the applicability of the remaining aspects of the rule had previously been [delayed](#) by the DOL, under direction from the Trump Administration, until July 1, 2019.

The 2-1 Fifth Circuit decision (which reversed a 2016 Texas District Court decision) leaves the future of the entire fiduciary rule in doubt, pending a possible *en banc* rehearing to the full Fifth Circuit or possible appeal to the U.S. Supreme Court. If no “stay” is ordered on its decision, the recent judgement of the Fifth Circuit vacating the fiduciary rule is scheduled to take effect on May 7, 2018, at which point it appears that the fiduciary rule may be deemed invalid in all jurisdictions (not merely in States covered by the Fifth Circuit). In the aftermath of the decision, a DOL spokesman was quoted by CNBC on March 19, 2018 as saying that “[p]ending further review, the [DOL] will not be enforcing the 2016 fiduciary rule.”

Notwithstanding the Fifth Circuit’s recent decision and the DOL’s informal post-decision pronouncement, we would recommend that clients that have been attempting to comply with the fiduciary rule continue to do so, at least for the time being. Shortly prior to the Fifth Circuit’s decision, a unanimous decision by the Tenth Circuit Court of Appeals upheld portions of the fiduciary rule, possibly foreshadowing a U.S. Supreme Court review to resolve a perceived current or future split among the Circuit Courts. We will continue to monitor further developments in this area.

For further information regarding the DOL's fiduciary rule and related prohibited transaction exemptions, please contact a member of the Firm's Executive Compensation and Employee Benefits Practice Group.

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