Fifth Circuit Vacates DOL Fiduciary Rule Creating More Uncertainty For the Rule's Future

On March 15, 2018 the U.S. Fifth Circuit Court of Appeals vacated entirely the DOL's April 8, 2016 regulations redefining the term "fiduciary" in the investment advice context. (*Chamber of Commerce v. DOL*, No. 17-10238 *5th Cir. Mar. 15, 2018). Despite the lengthy and detailed majority opinion, questions remain among experts as to the effect of the court's ruling outside of the Fifth Circuit's governing territory of Louisiana, Mississippi and Texas.

The "Fiduciary Rule" regulations were issued for the purpose of expanding the definition of an ERISA "fiduciary" in the investment advice context and imposing fiduciary obligations on broker-dealers that provide investment services in the individual retirement account ("IRA") market. The DOL first released proposed regulations in 2010, but was forced to withdraw them due to fierce political pressure primarily from investment institutions. In the intervening years between 2010 and the April 8, 2016 release of the final Fiduciary Rule, the Rule continued to come under attack by financial institutions and others providing investment services, in particular, in the small group and individual retail market.

Shortly after the final regulations were released, various interested parties sued the DOL challenging its authority to modify the existing and more restrictive 1975 regulations defining the term "fiduciary" in the investment advice context. The Fifth Circuit case was one of six legal challenges and the only one to date that sided against the DOL.

In a 2-1 decision, the Fifth Circuit Court of Appeals held that the expanded definition of "investment advice fiduciary" and related exemptions went beyond the DOL's authority and conflicted with the common law understanding of "fiduciary" in the investment advice context. In its ruling, the court provided a detailed history of that understanding and posited that Congress intended to incorporate the common law understanding with its focus on a relationship of trust and confidence between an advisor and customer when it enacted ERISA. It was this relationship that the court held the DOL ignored when it expanded the definition of "investment advice fiduciary" to include sales activity in which the expectation of trust and confidence between the parties historically would be absent. The court concluded that the expansion of the definition of "fiduciary" contained in the Fiduciary Rule was an invalid exercise of the DOL's authority and vacated the Fiduciary Rule in its entirety.

Shortly after the decision was issued, a spokesman for the DOL announced that it would not be enforcing the Fiduciary Rule. This announcement is not surprising given the Trump Administration's February 2017 Presidential Memorandum instructing DOL to perform an "economic and legal analysis" of the potential impact of the rule and DOL's earlier pronouncements delaying enforcement actions until July 1, 2019.

The Fifth Circuit's decision is in stark contrast to decisions issued in the other legal challenges to the Fiduciary Rule and a decision issued two days earlier in the Tenth Circuit in which the Tenth Circuit -- on a narrower challenge -- ruled that the DOL did not violate the Administrative Procedures Act. *Market Synergy Group v. DOL,* No. 17-3038 (10^{th} Cir. 2018).

We will not know the full effect of the Fifth Circuit's ruling for some time. The DOL has three options: seek a rehearing of the matter before the full panel of Fifth Circuit judges (known as an "en banc appeal"), file a petition for review with the U.S. Supreme Court, or do nothing and let the decision stand. If DOL takes the later course, it will have to issue further guidance on what it plans to do with Fiduciary Rule. Until such guidance is issued, investment advisers should continue with good faith efforts to comply with the Fiduciary Rule.