

DOL FIDUCIARY RULE UPDATE: ENFORCEMENT OF THE RULE IS “ON HOLD” AND ITS FUTURE IS UNCERTAIN

Hodgson Russ Employee Benefit Newsletter
March 27, 2018

Practices & Industries

Employee Benefits

The DOL's new fiduciary rule continues its roller coaster ride toward possible but uncertain implementation. On March 15, the U.S. Court of Appeals for the Fifth Circuit (covering Texas, Mississippi and Louisiana) issued a ruling in which a 2-1 majority ruled that the Department of Labor's fiduciary rule should be vacated and effectively nullified *in toto* (see *U.S. Chamber of Commerce v. DOL* (5th Cir 2018)). The Fifth Circuit's decision came just days after a ruling by the U.S. Court of Appeals for the Tenth Circuit (covering Kansas, Oklahoma, Colorado, Wyoming, Utah, and New Mexico) that upheld certain aspects of the fiduciary rule (see *Market Synergy Group, Inc. v. DOL* (10th Cir. 2018)). And, in response to the Fifth Circuit's decision to vacate the fiduciary rule, it was almost immediately announced that, pending further review, the DOL will not be enforcing the fiduciary rule on a nationwide basis. Despite the “hold” placed on enforcement by the DOL, the DOL did not move to formally withdraw the rule. And whether the DOL might pursue further review of the *U.S. Chamber of Commerce* decision, either by the Fifth Circuit or by the Supreme Court, is not yet clear. But most observers agree that the legal maneuvering surrounding the fiduciary rule is not nearly done and the Supreme Court, one way or another, may be asked to weigh in on the fiduciary rule.

The Fifth Circuit majority in *U.S. Chamber of Commerce* made two principal findings in its decision to vacate the fiduciary rule. First, the majority held that the fiduciary rule does not comport with the text of ERISA (and the underlying common law principles). The majority opined that the expanded scope of the fiduciary rule under the DOL regulations is valid only if it is authorized by ERISA. The majority found that ERISA's definition of “fiduciary” is not sufficiently ambiguous to allow the DOL the latitude to expand the scope of the fiduciary rule through the promulgation of the new fiduciary regulations, particularly to those activities that are mere sales activities rather than fiduciary activities stemming from a relationship of trust and confidence. Second, even there is some ambiguity, the majority identified several bases for concluding the DOL's interpretation of ERISA is not reasonable, and constitutes an arbitrary and capricious exercise of administrative power that is inconsistent the standards of the Administrative Procedures Act.

DOL FIDUCIARY RULE UPDATE: ENFORCEMENT OF THE RULE IS “ON HOLD” AND ITS FUTURE IS UNCERTAIN

With circuit courts seemingly split on the validity of the fiduciary rule and the future of the rule likely to remain uncertain for some time to come, it would be premature for service providers to abandon efforts to comply with the fiduciary rule. And plan fiduciaries should bear in mind that neither the Fifth Circuit’s ruling in *U.S. Chamber of Commerce* nor the DOL’s current non-enforcement posture affects their fundamental ERISA duties to monitor the performance of the plan’s investment advisors.