

**MEMO# 31137**

March 16, 2018

## **Fifth Circuit Vacates DOL Fiduciary Rule**

[31137]

March 16, 2018 TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: Fifth Circuit Vacates DOL Fiduciary Rule

On March 15, 2018, the Fifth Circuit Court of Appeals issued its long-awaited decision in the lawsuit against the Department of Labor (DOL) regarding its fiduciary rulemaking.[\[1\]](#) The court, in a 2-1 decision, ruled to vacate (or, essentially, nullify) the fiduciary rule in its entirety.

### **Background**

As a reminder, a number of industry groups, including the US Chamber of Commerce, Financial Services Institute, Financial Services Roundtable, Insured Retirement Institute, Securities Industry and Financial Markets Association, American Council of Life Insurers, and National Association of Insurance and Financial Advisors, filed suit in US District Court in the Northern District of Texas. The plaintiffs argued that the rule was inconsistent with the governing statutes, DOL exceeded its authority, DOL imposed unauthorized contract terms to enforce the regulations, the rule violated the First Amendment, and the rule was arbitrary and capricious. The district court upheld the rule, siding with DOL on all issues raised.

On appeal in the Fifth Circuit, the case was heard by a three-person panel. Two judges issued the majority opinion, ruling in favor of the plaintiff-appellants. In the opinion, the judges find that the rule conflicts with the underlying statutes (ERISA section 3(21)(A)(ii) and Internal Revenue Code section 4975(e)(3)(B)) and that the rule fails the reasonableness test of Chevron and the Administrative Procedure Act (APA). In deciding to vacate the rule in its entirety, the court noted the following: "DOL makes no argument concerning severability of the provisions making up the Fiduciary Rule and BICE exemption apart from the illegal arbitration waiver. In any event, this comprehensive regulatory package is plainly not amenable to severance." The third judge on the panel issued a dissenting opinion.

Other courts that have reviewed the rulemaking have reached holdings arguably at odds with the Fifth Circuit, but the only case adjudicated at the appeals court level dealt with a more remote and limited aspect of the rulemaking. On March 13, 2018, the Tenth Circuit Court of Appeals issued an opinion upholding the fiduciary rulemaking.[\[2\]](#) The Tenth Circuit

lawsuit, however, deals exclusively with the rulemaking's application to fixed indexed annuity (FIA) sales.[3]

There is also an ongoing appeal in the District of Columbia Circuit Court of Appeals. The National Association for Fixed Annuities (NAFA) filed a lawsuit in the US District Court in the District of Columbia similar in breadth to the lawsuit filed in Texas. Like the district court in Texas, the district court in the District of Columbia ruled in favor of DOL on all issues. On November 14, 2017, the District of Columbia Circuit Court granted a motion by NAFA to delay the oral arguments in the appeal until a decision is made in the Fifth Circuit.[4]

Finally, there is also a case in US District Court in the District of Minnesota regarding a narrow issue—the Best Interest Contract (BIC) exemption's requirement that a financial institution not restrict an investor's right to sue in court.[5]

## **What Now?**

The decision does not immediately void the rule; the decision will take effect once the court issues a "mandate." We understand that DOL will have 45 days to request a rehearing en banc (by the full panel of judges in the Fifth Circuit), during which time there will be a stay of the decision. Absent a request for an extension of the stay, the court would issue the mandate seven days after the 45-day period (by May 7). DOL could also decide to appeal the decision to the Supreme Court, but it is not certain that the Supreme Court would grant the appeal given the lack of a clear split in the circuits. We understand that if the decision goes into effect, it would be as if the DOL had never issued its rule (i.e., the fiduciary definition would go back to the 5-part test, and its application would not be limited to the Fifth Circuit).

As previously reported, various states, including Nevada and Connecticut, have enacted, or are considering enacting, laws that impose a fiduciary duty or enhanced disclosure requirements on financial professionals.[6] We can expect the Fifth Circuit decision to accelerate this activity.

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## **endnotes**

[1] The opinion is *available at* <http://www.ca5.uscourts.gov/opinions/pub/17/17-10238-CV0.pdf>.

[2] The opinion is *available at* <https://www.ca10.uscourts.gov/opinions/17/17-3038.pdf>.

[3] The lawsuit was brought by Market Synergy Group, Inc. (MSG) in US District Court in the District of Kansas. In the rulemaking, DOL amended Prohibited Transaction Exemption (PTE) 84-24 to no longer cover FIAs. MSG argued that DOL failed to provide adequate notice of its intention to exclude transactions involving FIAs from PTE 84-24, DOL arbitrarily treated FIAs differently from other fixed annuities, and DOL did not adequately consider the detrimental economic impact of its exclusion of FIAs from PTE 84-24. The district court ruled in favor of DOL. The appeals court upheld the district court's decision.

[4] According to the order, which was extended on February 22, 2018, the case will remain in abeyance until further order of the court.

[5] The district court in Minnesota granted a preliminary injunction applicable only to Thrivent Financial for Lutherans and granted DOL's motion to stay the case. See ICI Memorandum No. 30939, dated November 7, 2017, available here:

[https://www.ici.org/my\\_ici/memorandum/memo30939](https://www.ici.org/my_ici/memorandum/memo30939).

[6] See e.g., ICI Memorandum No. 30834, dated August 14, 2017, available here:

[https://www.ici.org/my\\_ici/memorandum/memo30834](https://www.ici.org/my_ici/memorandum/memo30834).

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