

## DOL Fiduciary Rule on Life Support

By Edmond T. FitzGerald, Veronica M. Wissel, Charles Shi, Stefani Johnson Myrick & Timothy John Durbin on March 23, 2018

POSTED IN [DOL FIDUCIARY RULE](#), [EXECUTIVE COMPENSATION](#)

Last week, the U.S. Court of Appeals for the Fifth Circuit, in a [2-1 decision](#), vacated the DOL fiduciary rule in its entirety. The lawsuit was brought by the U.S. Chamber of Commerce, SIFMA and a number of other business groups to challenge the validity of the fiduciary rule, and the Fifth Circuit ruled in their favor, concluding that the DOL, in adopting the fiduciary rule, overreached its authority and acted in an arbitrary and capricious manner in violation of the Administrative Procedure Act.

The immediate legal implication of the Fifth Circuit decision is not completely clear at this time. The decision will not become effective until the court issues a mandate, which is expected by May 7 if the DOL elects not to challenge the decision. Alternatively, the DOL could request a rehearing or rehearing *en banc* by the Fifth Circuit, which could delay the issuance of the mandate, or appeal the decision to the U.S. Supreme Court, in which case the court's order to vacate the rule could be stayed during the pendency of the appeal. The DOL has not indicated what it plans to do next. It remains to be seen whether the DOL would expend any resources to challenge the Fifth Circuit decision, given that it is already in the process of re-examining the rule pursuant to a Presidential Memorandum from last year that cast negative views on the rule and is purportedly working with the SEC to develop a uniform fiduciary standard for all investment advisers and broker-dealers.

Another complicating factor is that the Tenth Circuit earlier last week upheld the fiduciary rule in a separate case that challenged the validity of the rule as it applies to the sale of fixed indexed annuities. While some commentators are calling this a circuit split, it should be noted that the Tenth Circuit decision was on the narrower issue of the rule's treatment of annuity products whereas the Fifth Circuit decision was on the much broader issue of whether the DOL had authority to promulgate the rule; therefore, it can be argued that the two decisions are not in conflict with each other and the Fifth Circuit decision is, for the time being, the conclusive authority regarding the validity of the rule. If the Supreme Court agrees that there is no real

circuit split, they may be less interested to hear an appeal of the Fifth Circuit decision. An additional variable is a case brought by the National Association of Fixed Annuities (NAFA) to challenge the fiduciary rule, which has been appealed to, and is currently pending before, the D.C. Circuit. It would be interesting to see what NAFA decides to do in light of the Fifth Circuit decision. Given the broad ruling of the Fifth Circuit decision, NAFA may decide to drop the case to avoid the risk of a true circuit split should the D.C. Circuit decide the other way.

Assuming that the Fifth Circuit decision is not contested and becomes effective, the entire fiduciary rule package (which includes the rule itself, the related new exemptions and amendments to certain existing exemptions) would be nullified and the definition of fiduciary investment advice would revert to the five-part test that was in place before the DOL promulgated the fiduciary rule and expanded that definition, and this effect would extend throughout the country and not be limited to the region covered by the Fifth Circuit.

Since the DOL first released the fiduciary rule nearly two years ago, financial institutions and other stakeholders have undertaken massive overhauls in their business models relating to retirement investors to comply with the rule and its exemptions. While the Fifth Circuit decision might be welcome news to many financial institutions, it would probably be premature to take any significant actions (such as undoing all the recently-implemented changes) at this time in light of the uncertainty of the DOL's next steps and the possibility of a joint-agency rule down the road on a uniform fiduciary standard. For now, stakeholders can take comfort that the DOL has stated that, pending further review, it will not enforce the fiduciary rule. This new statement of non-enforcement is arguably stronger than the moratorium that is currently in place, which stated that the DOL will not pursue claims against parties that are working diligently and in good faith to comply with the rule and its exemptions.