

CLIENT ALERT

Fifth Circuit Issues its “Mandate” Formally Vacating the DOL Fiduciary Rule

June 22, 2018

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On Thursday, June 21, 2018, the United States Court of Appeals for the Fifth Circuit formally vacated the U.S. Department of Labor’s fiduciary rule, including two exemptions issued specifically to address issues raised by the definition of “fiduciary” under the rule and amendments to certain existing prohibited transaction class exemptions (the “DOL Fiduciary Rule” or the “Rule”) when it issued its “mandate” following the court’s decision on March 15, 2018, in *U.S. Chamber of Commerce v. U.S. Department of Labor*.¹ The mandate is the final step industry groups and other interested parties have been waiting for in the Fifth Circuit case that challenged the DOL Fiduciary Rule. The Rule provided for a revised definition of “investment advice fiduciary” under the Employee Retirement Income Security Act of 1974 (“ERISA”), and two new exemptions (the Best Interest Contract Exemption and the Principal Transaction Exemption) as well as amendments to several existing class exemptions (including PTE 75-1, concerning transactions involving broker-dealers, reporting dealers and banks; PTE 84-24, concerning transactions involving insurance agents and brokers; and PTE 86-128, concerning executing securities transactions).

As provided in our Client Alert dated March 19, 2018 summarizing the Fifth Circuit’s decision in the *Chamber of Commerce* case,² the DOL Fiduciary Rule was issued in April 2016, and expanded the definition of “investment advice fiduciary” which resulted in broadening the circumstances in which broker-dealers, investment advisers and other intermediaries would be treated as fiduciaries with respect to ERISA plans and certain retirement arrangements covered under the U.S. Internal Revenue Code of 1986, as amended, including individual retirement accounts (“IRAs”). While the

¹ See *U.S. Chamber of Commerce v. U.S. Department of Labor*, No. 17-10238, 2018 WL 1325019 (5th Cir. Mar. 15, 2018).

² [Fifth Circuit Overturns DOL Fiduciary Rule](#)

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amended definition of “investment advice fiduciary” became final in June 2017, certain provisions of the related exemptions would have been delayed until July 1, 2019, except for compliance with the so-called Impartial Conduct Standards. Those standards required fiduciaries to act in their clients’ “best interests,” receive no more than reasonable compensation, and make no misleading statements.

In reversing the lower court that upheld the rule, the Fifth Circuit held that the U.S. Department of Labor (the “DOL”) overreached its authority by promulgating the Rule, and that the Rule itself was unreasonable. The DOL lacked the authority to enact the Rule, the court noted, which deviates unnecessarily from the common law interpretation of “fiduciary”; was inconsistent with the statutory framework of ERISA and failed to meet a statutory need under which the DOL derives the authority to implement regulations under ERISA. “A perceived ‘need’ does not empower the DOL to craft de facto statutory amendments or to act beyond its expressly defined authority,” wrote Circuit Judge Edith H. Jones in the majority opinion.

In response to *Chamber of Commerce*, the DOL issued a temporary enforcement policy, which provided that the DOL would not pursue prohibited transactions claims against investment advice fiduciaries who are working diligently and in good faith to comply with the Impartial Conduct Standards for transactions that would have been exempt under the Best Interest Contract Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules.³ The DOL’s Field Assistance Bulletin noted that investment advice fiduciaries could rely on existing exemptions to avoid prohibited transactions. Further, the DOL will not treat a fiduciary’s failure to rely on other available exemptions as resulting in a prohibited transaction if the fiduciary meets the terms of the Field Assistance Bulletin (i.e., the fiduciary works in good faith to comply with the Impartial Conduct Standards).

While the DOL Fiduciary Rule has been formally vacated, other regulators have issued their own rules to address fiduciary standards for retail investors. On April 18, 2018, the Securities and Exchange Commission (the “SEC”) published three separate but related releases containing proposals intended to harmonize the regulation of investment advisers and broker-dealers, including several proposed new rules and disclosures and a proposed interpretation. According to the SEC, if these proposals are adopted, they will enhance the requirements applicable to investment advisers and broker-dealers when they interact with retail investors and help retail investors better understand the differences between investment advisers and broker-dealers, the services they offer and their respective relationships with investors.⁴

We will continue to monitor additional developments, including the SEC’s proposals and further guidance from the DOL, including issuing class or individual exemptions, and other temporary or permanent prohibited transaction relief for investment advice fiduciaries.

³ Field Assistance Bulletin No. 2018-02.

⁴ [SEC Proposes Enhancing Requirements Affecting How Brokers and Investment Advisers Deal With Retail Investors](#)

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If you have any questions regarding this client alert, please contact the following attorney or the attorney with whom you regularly work.

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