

A Closer Look at the 5th Circuit Decision Vacating the Fiduciary Rule

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On March 15, the Court of Appeals for the Fifth Circuit vacated, in its entirety, amendments to Rule 29 C.F.R. § 2510.3-21 ("Fiduciary Rule"), codifying the Obama-era's expansive definition of the term "investment advice fiduciary" as applied under Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code.¹ The Fifth Circuit held that the Department of Labor's Fiduciary Rule was arbitrary, capricious and exceeded the agency's regulatory authority under ERISA.² Two days prior to the decision in the Fifth Circuit, the Court of Appeals for the Tenth Circuit upheld the rule on a more narrow set of challenges, including that the agency had not provided sufficient notice of the rule change.³ The District Court of Washington, DC also upheld the Fiduciary Rule; however, the appeal of that decision was held in abeyance pending the Fifth Circuit's decision and then voluntarily dismissed after the Fifth Circuit opinion was handed down.⁴

After the Fifth Circuit's ruling, a number of US law firms issued client advisories concerning the impact of the Fifth Circuit's decision on the rule. There has been some confusion as to whether the Fifth Circuit's ruling had a nationwide effect or, in light of the decisions upholding the rule, was limited to the jurisdiction of the Fifth Circuit (Louisiana, Mississippi, and Texas). This split of "authority" prompted Katten's further review of the issue regarding the scope of a Circuit Court's decision striking a federal regulation in binding other Circuits.

It appears the Fifth Circuit's ruling will apply nationwide because under the Administrative Procedure Act (APA), courts have the power to "set aside agency action" by issuing a *vacatur*.⁵ Vacaturs strike the regulation from the Code of Federal Regulations and nullify any potential legal consequences the regulations may have.⁶ The plaintiffs in the Tenth Circuit did not challenge the Department's statutory authority under ERISA to redefine the term "investment advice fiduciary," and, accordingly, such authority was not in question in that decision. While the Tenth Circuit upheld the rule under the APA, the court reviewed a more narrow set of questions, including whether the Department of Labor provided sufficient notice and procedures in regulating "fixed indexed annuities." It did not address the initial threshold issue of whether the action to redefine the term "investment advice fiduciary" was a proper exercise of the Department of Labor's power.⁷ The plaintiffs in the Fifth Circuit, however, did directly challenge the Department's statutory authority, and the Fifth Circuit determined that the action to redefine the term "investment advice fiduciary" exceeded the Department of Labor's power under

ERISA.⁸ Because the Fifth Circuit's decision turned on the Department of Labor's fundamental statutory authority, an issue which the Tenth Circuit did not review, Katten believes the Fifth Circuit's decision to vacate the regulation will not create a split with the Tenth Circuit and will be of nationwide effect.

The Department of Labor has not announced whether it will exercise its right to seek *en banc* review by the Fifth Circuit or petition the Supreme Court for certiorari. In the interim, the Department of Labor has indicated that pending further review it will not enforce the Fiduciary Rule.⁹

¹ *Chamber of Commerce of the U.S.A. v. U.S. Dep't of Labor*, No. 17-10238, slip op. 46 (5th Cir. Mar 15, 2018).

² *Id.* at 45-46.

³ *Mkt. Synergy Grp. V. U.S. Dep't of Labor*, No 17-3038 (10th Cir. Mar. 13, 2018).

⁴ *Nat'l Ass'n for Fixed Annuities v. U.S. Dep't of Labor*, No. 16-5345, joint stipulation of dismissal (D.C. Cir. Mar. 26, 2018).

⁵ 5 U.S.C. § 706(2); *see also*, *Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 12, 17 (D.D.C.1998).

⁶ *See United States v. Munsingwear, Inc.* 340 U.S. 36, 41 (1950) (explaining that that which is vacated loses the ability to "spawn[] any legal consequences").

⁷ *See Mkt. Synergy Grp. V. U.S. Dep't of Labor*, No 17-3038, op. 5 n. 6 (10th Cir. Mar. 13, 2018).

⁸ *Chamber of Commerce of the U.S.A. v. U.S. Dep't of Labor*, No. 17-10238, slip op. 46 (5th Cir. Mar 15, 2018) (quoting 5 U.S.C. § 706(2)(A), (C)).

⁹ *See* "Labor Department Won't Enforce Investor Protection Rule after Court Decision," Sarah O'Brien, CNBC (Mar. 19, 2018), available [here](#).