

March 19, 2018

FIFTH CIRCUIT VACATES LABOR DEPARTMENT'S "FIDUCIARY RULE" "IN TOTO" IN *CHAMBER OF COMMERCE OF U.S.A., ET AL. V. U.S. DEP'T OF LABOR*

To Our Clients and Friends:

On March 15, 2018, in a 2-1 opinion, the U.S. Court of Appeals for the Fifth Circuit struck down the U.S. Department of Labor's controversial "Fiduciary Rule."^[1] The Rule would have expanded who is a "fiduciary" under ERISA and the Internal Revenue Code, imposing significant new obligations and liabilities on broker-dealers and insurance agents who sell annuities to IRAs. As the Fifth Circuit's opinion explained, the Department had "made no secret of its intent to transform the trillion-dollar market for IRA investments, annuities and insurance products, and to regulate in a new way the thousands of people and organizations working in that market."^[2]

The Fifth Circuit ruled for plaintiffs—the U.S. Chamber of Commerce, the Securities Industry and Financial Markets Association ("SIFMA"), the Financial Services Institute ("FSI"), the Financial Services Roundtable ("FSR"), the Insured Retirement Institute ("IRI"), and other leading trade associations—on each of their principal arguments. Specifically, the Court reasoned that the Labor Department's new definition of "fiduciary" was inconsistent with the plain text of ERISA and the Internal Revenue Code, as well as with the common-law meaning of "fiduciary," which depends upon a special relationship of trust and confidence; that the Department impermissibly abused its authority to grant exemptions from regulatory burdens as a tool to impose expansive new duties that were beyond its power to impose; and that the rule impermissibly created private rights of action against brokers and insurance agents when Congress had not authorized those claims. The Court therefore held that the Fiduciary Rule and the exemptions adopted alongside it were arbitrary, capricious, and unlawful under the Administrative Procedure Act ("APA"), and vacated them "in toto."^[3]

Under the APA, "vacatur" is a remedy by which courts "set aside agency action" that is arbitrary and capricious or otherwise outside of the agency's statutory authority.^[4] Its effect is to "nullify or cancel; make void; invalidate."^[5] Because the effect of vacatur is, in essence, to remove a regulation from the books, its effect is nationwide. As the U.S. Court of Appeals for the D.C. Circuit has explained, "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed."^[6] The Fifth Circuit's judgment, which is scheduled to take effect on May 7, thus will effectively erase the "fiduciary" rule from the books without geographical limitation.

The Fifth Circuit's decision was the second ruling last week to address the Fiduciary Rule. On March 13, the Tenth Circuit addressed a more limited challenge to one aspect of the Rule, specifically, the procedures and reasoning followed by the Department in regulating products known as "fixed indexed

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annuities." [7] Although the Tenth Circuit rejected that challenge, it made clear it was not addressing two threshold issues that had not been presented: whether the Labor Department had authority to promulgate the Rule and whether the Rule permissibly defined the term "fiduciary." The March 15 decision of the Fifth Circuit now conclusively resolves those questions in the negative. And because the Fifth Circuit vacated the Rule on grounds the Tenth Circuit did not address, no "circuit conflict" is presented by the two decisions. [8]

Gibson Dunn represented the U.S. Chamber of Commerce, SIFMA, the FSI, FSR, and IRI, among other associations, in their successful challenge to the Fiduciary Rule. The American Council of Life Insurers and the Indexed Annuity Leadership Council filed parallel actions through separate counsel at WilmerHale and Sidley Austin, and Gibson Dunn presented oral argument before the Fifth Circuit for all three cases.

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

[2] *Id.* at 45.

[3] *Id.* at 46.

[4] 5 U.S.C. § 706(2).

[5] *Black's Law Dictionary* (online 10th ed. 2014). *See, e.g., Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 12, 17 (D.D.C. 1998) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950)) (explaining that "basic understandings of vacatur dramatize that, by definition, that which is vacated loses the ability to 'spawn[] any legal consequences'").

[6] *Nat'l Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)).

[7] *See Mkt. Synergy Grp. v. U.S. Dep't of Labor, et al.*, No. 17-3038 (10th Cir. Mar. 13, 2018)

[8] A third challenge to the Fiduciary Rule is currently being held in abeyance. *See Nat'l Ass'n for Fixed Annuities v. U.S. Dep't of Labor, et al.*, No. 16-5345 (D.C. Cir. Feb. 22, 2018) (holding case in abeyance pending joint status report within 10 days of the decision of the Fifth Circuit).



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