

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

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## Fifth Circuit Strikes Down Obama-Era Fiduciary Rule

The 5th Circuit Court of Appeals vacated as arbitrary, capricious, contrary to the law, and in excess of its authority DOL’s expanded definition of investment advice fiduciary and newly created prohibited transaction exemptions — putting the brakes on the application of the fiduciary rule in its entirety, nationwide. Two days prior, the 10th Circuit had upheld the same regulation. It is not clear how DOL will respond to the 5th Circuit’s decision.

### Background

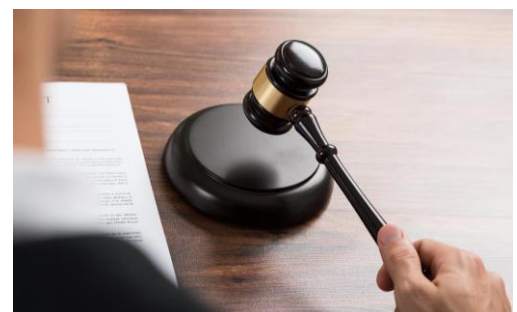
In 2016, the DOL finalized the “fiduciary rule” and thereby expanded the scope of the definition of fiduciary and impermissible conflicts of interests for employer-sponsored plans as well as certain non-ERISA investment vehicles. The rule was generally scheduled to take effect in April 2017, with certain transition rules effective in 2018.

In February 2017, however, President Trump directed the DOL to re-evaluate the effect of the rule and its likely impact on retirement savings efforts. DOL extended until July 1, 2019, the effective date for the written disclosures and fiduciary representations required under prohibited transaction exemptions to the new fiduciary rule. The rest of the regulation went into effect on June 9, 2017, but DOL announced an “enforcement lite” policy for fiduciaries working diligently and in good faith to comply. (See our [November 28, 2017 For Your Information.](#))

### Fifth Circuit Surprise

In [U.S. Chamber of Commerce v. DOL](#), the 5th Circuit Court of Appeals (which covers Texas, Louisiana, and Mississippi) vacated the rule in its entirety. After refusing last year to put the brakes on the rule pending the appeal, the 5th Circuit has now determined that DOL exceeded its statutory authority in broadening the definition of investment advice fiduciary and modifying and creating new exemptions to prohibited transactions. The 5th Circuit’s ruling invalidates the fiduciary rule on a nationwide basis.

The decision contrasts with those of several other federal courts, including the 10th Circuit’s recent decision in [Market Synergy Group, Inc. v. DOL](#), that upheld the rule.



## What's Next?

It is not clear how DOL will proceed in light of this unexpected ruling. DOL could ask the U.S. Supreme Court to hear the case or it could ask a full panel of the 5th Circuit judges to reconsider its decision. Alternatively, DOL may decide not to appeal at all, and instead leave the SEC to take the lead in proposing a new universal fiduciary standard — as it is expected to do later this year.

## In Closing

Despite informal reports that DOL will not enforce the fiduciary rule pending review, plan sponsors should consult with counsel about possible risks before shedding any compliance measures adopted in the wake of DOL's expanded fiduciary definition.

### State Fiduciary Laws

Responding to concerns about the Trump administration weakening DOL's fiduciary rule, states including Massachusetts, Nevada, New York, and New Jersey have already advanced state law-based fiduciary standards. In the wake of the 5th Circuit's decision, it is possible that more states will follow suit. It remains to be seen, however, if courts will find that ERISA preempts these types of state laws as applied to retirement plans.

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