



WRNewswire Special Report

The Day the DOL Fiduciary Rule Died: 5th Circuit Decision Vacating the Rule Takes Effect May 7th, but What Does It Actually Mean for Producers?

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After all the dust from the last-minute legal wrangling settled, the ruling by the 5th Circuit Federal Court of Appeals vacating the Department of Labor (“DOL”) Fiduciary Rule (“the Rule”) finally took effect on May 7th, 2018. **The Rule, and all of its associated prohibited transactions, including the Transition Best Interest Contract Exemption (“Transition BICE”), are removed from the list of Federal regulations and no longer apply.**

As a result, the DOL’s 1975 fiduciary rule and its five-part test for fiduciary advice to ERISA plans and IRAs is again the law of the land. However, even though the “old” rule applies again, we are not going back to the ways things were three years ago. In this alert, we’ll discuss what this change means for producers right now, as well as what might be coming next.

Background: What Happened and How Did We Get Here?

Shortly after DOL finalized the Rule in 2016, many trade associations, including the U.S. Chamber of Commerce, filed several separate lawsuits against the DOL seeking to block the Rule. These lawsuits challenged the DOL on a variety of issues, asserting that the Rule exceeded DOL’s authority and misinterpreted the law. After losing in the Federal

district court, the Chamber and its fellow challengers appealed to the Fifth Circuit Court of Appeals—similar lawsuits by other trade associations were also appealed in other Circuits.

While this litigation was ongoing, the Rule went into effect on June 9, 2017. Producers and other advisors had to begin complying with its requirements, and made significant changes in response to the Rule.

On March 15, 2018, almost a year after the Rule went into effect, the 5th Circuit finally ruled in favor of the Chamber and against the DOL Rule. The DOL did not appeal this decision by April 30, so the ruling took effect on May 7th. Last minute efforts by a consumer group and three States to take DOL's place and keep fighting were denied by the 5th Circuit last week. In light of the 5th Circuit victory, which applies nationally, remaining litigation in the other circuits was dropped.

What Does This Mean for Producers?

When a court vacates a regulation, it means that the rule was never valid. Thus, the regulatory requirements go back to what they were prior to the adoption of the Rule. Under the 1975 DOL regulation, which now applies again, an advisor is a fiduciary based on a five-part test (the test is for non-discretionary advice—if discretion over the investments is exercised, the manager is a fiduciary). The non-discretionary advisor is a fiduciary if he or she:

1. Makes investment recommendations;
2. For a fee;
3. Regularly;
4. Subject to a mutual understanding with the recipient that;
5. The advice will be a primary basis of the recipient's decision-making.

However, even though the “old” rule applies again, it is likely to be interpreted differently. For example, prior to the DOL Rule, most producers would not have viewed themselves as fiduciaries to ERISA plans or IRAs even though they may have regularly provided advice—customary usage and a lack of enforcement led to the general belief that producers typically were not fiduciaries. Going forward this assumption will no longer be the case. The application of the five-part test may result in producers becoming fiduciaries, at least with respect to plan or IRA clients to whom they regularly provide

advice over long periods of time. At the same time, producers likely do not become fiduciaries at their first interaction with a plan or IRA because they have not “regularly” provided advice. Whether a producer is a fiduciary to a particular plan or IRA will depend on the specific circumstances of each situation.

The opposite is true of rollover advice—we are returning to the pre-Rule status quo. While the DOL Rule made most rollover advice become fiduciary advice, most rollover advice will not be fiduciary advice under the 1975 regulation. Most advice regarding rollovers is not “regularly” provided (it is one-time advice), so most rollover advice is no longer fiduciary advice.

Further, a DOL Advisory Opinion from 2005, which was eliminated by the Rule, appears to be “resurrected” because the Rule is vacated. This opinion says that rollover advice is only fiduciary advice when the rollover is coming from a plan to which the rollover advisor is already a fiduciary. In other words, a producer would have to be a 3(21) fiduciary advisor to the plan the participant is rolling out of to be giving fiduciary advice in connection with the rollover. Otherwise, rollover advice would generally not be fiduciary advice.

Transitional Issues

A lot of changes were required to conform with the DOL Rule, and they were not “one-size-fits-all” changes. The same will be true of the transition away from the DOL Rule—there are challenges that will affect different producers in different ways, and they will respond differently.

For example, some financial institutions and producers accepting fiduciary status under the Rule were able to do so because the Transition BICE exemption allowed them to receive compensation that would otherwise be prohibited. Producers using Transition BICE could receive certain kinds of un-level compensation, such as getting paid different commission amounts by different carriers, or receiving different compensation amounts for one type of product than another. Transition BICE was also vacated along with the Rule, and is no longer available. As a result, some financial institutions will have to transition to other exemptions, such as PTE 84-24—while others may have no ready exemption they can use.

Although DOL has announced new transition relief in Field Assistance Bulletin 2018-02, it is through an enforcement policy. While this will prevent DOL and IRS from pursuing a

prohibited transaction violation where an institution is relying on the Impartial Conduct Standards from Transition BICE, it does not apply to other regulators, such as the SEC or the States, and it does not prevent private actors from pursuing other available remedies.

The loss of Transition BICE may also impact certain rollover transactions—while most rollovers will not be fiduciary advice, those that are may result in the need for an exemption. Without Transition BICE, it may be difficult for some fiduciary advisors to be sure there is no concern about helping participants roll out of plans to which the advisor is a fiduciary.

What Should Producers Do Next?

Producers need to make sure that they are following the policies and procedures put into place by their financial institutions even if these policies currently reflect the DOL Rule. This is because failure to follow policies and procedures can be a violation by itself. For example, if a producer is selling a variable annuity as a registered representative of a broker-dealer, it must follow the broker-dealer's current policies and procedures—failure to do so is often a violation of State securities law. Until new policies and procedures are adopted, producers need to follow their existing processes.

Producers also need to recognize that it may take a little time for new answers. The 5th Circuit ruling turned everything upside down very quickly, and it was not clear whether the ruling would apply until shortly before May 7th. This is a very fluid situation, and it will take financial institutions and carriers some time to determine their next steps.

Conclusion

More change is coming. The SEC has begun proposing new regulations that would affect producers recommending securities, though it may take until next year for these rules to be completed. DOL likely will issue new guidance on transitional issues, and likely will issue new exemptions reacting to the future SEC regulations. Both DOL and the SEC may address rollover requirements in the future. Several States may adopt new standards addressing the sales of annuities. Producers are well-advised to maintain good records showing why they recommended the products they did, and why these products were appropriate for their clients. AALU will continue to advise our members as these rules and regulations develop, alongside our advocacy to ensure any rules protect consumers choice

and access to financial advice and life insurance solutions that help guarantee a secure retirement.

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Questions?

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