

Confusion Abounds After Fifth Circuit Decision Vacates DOL Fiduciary Rule, PlanSponsor, ft. Brendan McGarry

Brendan P. McGarry, attorney in the Kaufman Dolowich & Voluck Chicago office, was quoted in an article by John Manganaro published in *PlanAdvisor*.

The latest decision out of the Fifth U.S. Circuit Court of Appeals throws a dramatic new element of confusion into the epic regulatory saga that has been the rollout of the Department of Labor fiduciary rule.

The United States Court of Appeals for the Fifth Circuit has ruled, by a two-to-one majority, to vacate the Department of Labor (DOL) Fiduciary rule, based on arguments put forward by the U.S. Chamber of Commerce and the Securities Industries and Financial Markets Association.

This latest decision comes nearly a year a Texas district court judge roundly rejected the investment industry advocacy groups' arguments that the DOL exceeded its authority in crafting the fiduciary rule. Exactly what this latest move spells for the regulation's future under the Trump administration is yet unclear, especially given that just this week the Tenth Circuit issued an essentially opposite ruling, determining in no uncertain language that DOL's fiduciary rulemaking process has played out properly and within the confines of the regulator's broad existing authority. Experts are still grappling with the question of how the conflicting rulings should be interpreted, particularly on the point of whether an appeal to the Supreme Court could occur.

As pointed out by Brendan McGarry, attorney at Kaufman Dolowich & Voluck who advises broker/dealers and advisers, the Fifth Circuit majority uses strong language in vacating the rulemaking more or less in its entirety, "crossing over from legal arguments to fundamental arguments against the rule from a business perspective."

In explaining why it has ruled the DOL overstepped its authority in crafting and implementing the strict new conflict of interest and prohibited transaction requirements of the new fiduciary rule, the majority opinion uses terms like "burdensome" and "onerous" to describe the requirements placed on financial industry participants, which appears to signal a position stronger than one solely about the DOL's power to enact the rule as written, McGarry argues.