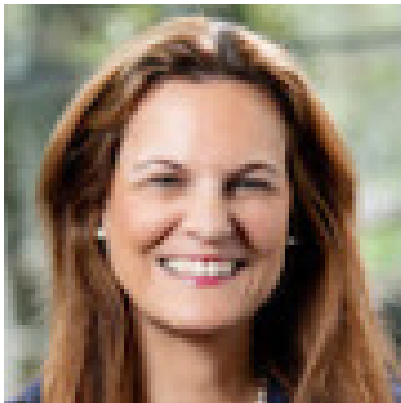


What the Divergent DOL Rulings Mean: Wagner

By Editorial Staff Fri, Mar 16, 2018

'Even though there is not a clear conflict among the Circuits, this case will likely be heard by the Supreme Court,' said ERISA attorney Marcia Wagner after judges in two federal appeals courts ruled differently on challenges to the DOL fiduciary rule.



With two federal appellate courts this week producing apparently divergent opinions in cases involving financial industry challenges to the Department of Labor's Fiduciary Rule, *RIJ* turned to ERISA specialist Marcia Wagner of the Boston-based Wagner Law Group for an interpretation of the results.

RIJ: The Fifth and Tenth circuits came up with opposite decisions on the DOL this week, right? Does that mean a "circuit split" has occurred, and that the matter will have to go to the U.S. Supreme Court for resolution?

Wagner: The decisions of the Tenth Circuit and the Fifth Circuit were only in conflict to a limited extent, because the Tenth Circuit opinion did not consider whether the DOL had authority to revise the Fiduciary Rule in the manner that it did or to issue the Best Interest Contract Exemption.

The Tenth Circuit opinion only addressed three issues under the Administrative Procedure Act:

- (i) Did the DOL provide adequate notice of its intention to exclude fixed indexed annuities from Prohibited Transaction Exemption 84-24?
- (ii) Did the DOL adequately consider the economic impact of its decision?
- (iii) Was it arbitrary and capricious for the DOL to treat fixed indexed annuities differently than other fixed annuities?

The Tenth Circuit rejected all of these claims [i.e., that DOL failed to meet its duties]. Those specific issues were not before the Fifth Circuit. Rather, the Fifth Circuit opinion invalidated the Fiduciary Rule and the BICE Exemption. The Fifth Circuit only discussed fixed indexed annuities towards the end of its opinion.

While it held that the DOL's treatment of fixed indexed annuities was unreasonable (and to that extent its decision is in conflict with the Tenth Circuit), its holding that the DOL overstepped its authority would have been the same had there been no discussion of fixed indexed annuities.

Even though there is not a clear conflict among the Circuits, however, this case will likely be heard by the Supreme Court (although the DOL might ask the Court of Appeals for the Fifth Circuit to hear the matter before the entire Fifth Circuit, rather than just before the 3 Judges who initially decided the case.)

Even though the Trump Administration is not a supporter of the rule, it is expected that they will continue to defend it, except with respect to the class action waiver issue. In the interim, the DOL will continue with

its review of the Fiduciary Rule and the related prohibited transaction exemptions.

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