



## DONE DEAL: The DOL Fiduciary Rule is Officially Dead

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It's finally official—the DOL Fiduciary Rule is dead. On June 21st, roughly a week after all opportunities for DOL to appeal had passed, the 5th Circuit Court of Appeals officially issued the decision it reached in March, vacating the DOL Rule in its entirety. This marks the end of a controversial regulation first proposed in 2010 that became applicable to producers on June 9, 2017. In its place, the DOL's 1975 fiduciary regulation and its five-part test for fiduciary advice to ERISA plans and IRAs is again the law of the land. Here's a quick summary of what comes next:

Instead of the very broad fiduciary definition under the DOL Rule, the 1975 regulation's five-part test determines fiduciary status. A non-discretionary advisor is a fiduciary if he or she:

1. Makes individualized 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.

While the "old" rule applies again, it is likely to be interpreted in a new way, particularly with respect to ERISA plans. Prior to the DOL rule, many producers may not have viewed themselves as fiduciaries to ERISA plans under the 1975 regulation, but that could be set to change with a stricter and more literal application of the five-part test. For example, if a producer advises a 401(k) plan on its investment lineup on a regular basis and the plan consistently follows the producer's recommendations, this will likely be fiduciary advice under the five-part test, because the advice is regularly provided and because consistently following the advice shows that it is a primary basis for the plan's decision-making. Fiduciary status is not based on the type of license the producer holds (insurance vs. securities, etc.), but on the producer's interaction with the client.

However, we likely will return to the pre-DOL Rule status quo on rollover advice. Under the 1975 regulation's five-part test and DOL guidance, rollover advice generally is not fiduciary advice because it is not "regularly" provided. The primary exception to this general rule—one of the few cases where rollover advice will be fiduciary advice—is where a producer is a fiduciary to the plan the rollover is coming from. Pre-Fiduciary Rule DOL guidance will again apply, and a fiduciary to a plan will be a fiduciary to a participant in that plan when advising on a rollover. As a result, most rollover recommendations made by producers likely will no longer be fiduciary advice, unless there is already a fiduciary relationship with the plan the rollover is coming from.

There will be some transitional bumps in the road because the DOL Fiduciary Rule was in effect for a year before the 5<sup>th</sup> Circuit decision was issued. Many financial services and life insurance firms made significant changes to comply with the DOL Rule. Because some of these changes included relying on

prohibited transaction exemptions, such as the Transition Best Interest Contract Exemption (BIC Exemption), that were vacated along with the Rule, these financial institutions will have to make some adjustments to their policies and procedures. They will also have to take into account any new guidance from DOL (such as its [enforcement policy announced on May 7th](#)). As a result, we will see compliance adjustments over the next several months from a variety of insurers, broker-dealers, and others with whom producers may work.

Finally, it is important to note that this is not the end of regulatory reform by other Federal and State entities. The New York Department of Financial Services continues to push forward with its own [best interest rule](#) that would encompass most life insurance and annuity sales in New York, and the SEC has proposed new regulations that would affect all producers recommending securities (such as variable 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, and continue our advocacy efforts to ensure any rules protect consumer choice and access to financial advice and life insurance solutions that help guarantee a secure retirement.

For a more comprehensive look at what the effects of the 5<sup>th</sup> Circuit Decision will mean, see AALU's [WRNewswire Special Report](#) from May 7<sup>th</sup>.