

Fifth Circuit: Investment Advisor Paid by a Third Party is Not an ERISA Fiduciary

March 17, 2014

The U.S. Court of Appeals for the Fifth Circuit recently held that an investment advisor was not a fiduciary for purposes of the Employee Retirement Income Security Act of 1974, as amended (**ERISA**), because he did not receive any fees from the retirement plan for his advice regarding the investment at issue in the case, but received a commission from the third-party broker/dealer used to make the investment recommended by the advisor. Under ERISA, an investment advisor is an ERISA fiduciary if, among other things, he or she renders investment advice to an ERISA plan for a fee or other direct or *indirect* compensation. The Fifth Circuit did not address whether the third-party commission was indirect compensation for the advisor providing investment advice to the retirement plan. Rather, the court relied on its own precedent, that a commission paid by a third party is not the same as a fee paid by a plan, to find that the investment advisor was not an ERISA fiduciary. *Tiblier v. Dlabal*, No. 13-50344 (5th Cir. Feb. 28, 2014).