SEYFARTH SHAW

One Minute Memo®

DOL Fiduciary Advice Rule Vacated by the Fifth Circuit

By Linda J. Haynes, Jennifer Neilsson and Kelly R. Rourke

On March 15, 2018, in *Chamber of Commerce of the U.S.A., et al. v. U.S. Department of Labor*, the Court of Appeals for the Fifth Circuit invalidated the Department of Labor's ("DOL") new investment advice fiduciary regulation (the "Fiduciary Rule") in a 2-1 decision.

The DOL's Fiduciary Rule

The DOL issued the Fiduciary Rule, which re-defined who is an "investment advice fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), on April 6, 2016, after a prolonged rule making process. Click here for our prior alert discussing the Fiduciary Rule. Following the 2016 Presidential election, the Fiduciary Rule was delayed (originally it was set to take effect on April 10, 2017). See our alert. The applicability date for certain aspects of the class prohibited transaction exemptions issued in connection with the Fiduciary Rule was also extended to January 1, 2018. See our alert. In November 2017, the DOL announced a further delay of the applicable exemptions and extended temporary relief to fiduciaries working diligently and in good faith to comply with the Rule, to July 1, 2019, in order to give the Department time to review and consider changes.

Invalidated

On March 15, 2018, the Fifth Circuit vacated the Fiduciary Rule (overturning the lower court's decision). The issue addressed by the Court was whether the DOL's expansion of the definition of "investment advice fiduciary" exceeded the DOL's rulemaking authority under ERISA. The Fifth Circuit concluded that the DOL's new definition directly conflicted with ERISA because it departed from the commonly held understanding of the term "fiduciary" under the statute. Going further, the Court provided that the DOL's interpretation of "fiduciary" under ERISA was unreasonable because it arbitrarily expanded the DOL's authority over individual retirement account (IRA) fiduciaries and the concept of investment "advice" (*e.g.*, by including products that are sold by financial salespeople and/or insurance agents).

Where Do We Go From Here

With the Fifth Circuit's ruling, the fate of the Fiduciary Rule is uncertain. The DOL may request a rehearing *en banc* or petition for a writ of certiorari to the United States Supreme Court. There is a limited circuit split with the Tenth Circuit ruling in favor of the DOL on its treatment of fixed indexed annuity sales under the Fiduciary Rule. Alternatively, the DOL may take no action. If the DOL does not take further action, most practitioners believe that the Fiduciary Rule is void. In such case, presumably, the original fiduciary advice regulations, which were issued in 1975, would become effective again. The original regulations defined an investment advice fiduciary as a person rendering ongoing, individualized investment advice pursuant to a mutual agreement and which is used as the primary basis for investment decisions.

If you have any questions, please contact Linda Haynes at *lhaynes@seyfarth.com,* Jenny Neilsson at jneilsson@seyfarth.com or Kelly Rourke at *krourke@seyfarth.com*.

www.seyfarth.com