



DOL Rule – Critical Highlights and Status

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April 2018



Overview

- Historical Background
- The 5th Circuit Decision
- Where We Are Now
- Impact On Other Regulators
- Frequently Asked Questions
- Next Steps



Historical Background

- 2010 Fiduciary Proposal
- 2015 Fiduciary Proposal
- April 6, 2016 Final Fiduciary Rule

Historical Background

- Four Suits Challenged The Validity Of The Fiduciary Rule:
 - *Chamber of Commerce* (Texas)
 - *Thrivent* (Minnesota)
 - *Market Synergy* (Kansas)
 - *National Association for Fixed Annuities* (DC)

The 5th Circuit Decision

- Fifth Circuit Decision – March 15, 2018
- What It Means – In Brief
 - Rule is “Vacated”
 - Department of Labor is not enforcing the 2016 Fiduciary Rule



The 5th Circuit Decision

- Behind The 5th Circuit's Reasoning
 - DOL defined "fiduciary" too broadly and erased line between "fiduciaries" and "salespeople" that is recognized in common law and ERISA
 - DOL's new definition of "investment advice" conflicts with the text the statute

The 5th Circuit Decision

- Behind The 5th Circuit's Reasoning
 - Use of exemptive authority to impose best interest contract requirements in IRA space was an abuse of authority
 - DOL's creation of a private right of action violates Supreme Court precedent that only Congress can create rights of action
 - 2016 Fiduciary Rule inconsistent with Dodd-Frank in multiple ways

The 5th Circuit Decision

- Behind The 5th Circuit's Reasoning
 - Congress didn't intend to hide an elephant in a mouse hole
 - 2016 Fiduciary Rule failed both parts of the test courts apply to determine whether a court should be deferential to a regulator's interpretation of a statute

Where We Are Now

- On May 7, the Fifth Circuit is expected to issue the mandate to vacate the Fiduciary Rule
 - Petition for rehearing deadline (both panel or en banc) is 45 days
 - If a petition is not filed, the mandate is issued seven days later
 - If a petition is filed, the mandate is issued after the petition is denied



Where We Are Now

- For the moment, the Fiduciary Rule remains technically in effect
- Vacatur effectively nullifies the rule as if it had never taken effect

Where We Are Now

- Four Options
 - File Cert Petition
 - Seek Panel Rehearing
 - Seek En Banc Review
 - Let The 5th Circuit Decision Stand

Let the Ruling Stand

- DOL Pros:
 - Trump Administration can move on to its own priorities
 - Possibly part of “deregulatory” agenda
 - Likely quickest resolution
- DOL Cons:
 - DOL’s institutional interest in being able to regulate is constrained
 - Intervenors may try to step in to defend Fiduciary Rule. It is unlikely that the Court would grant an intervenor request this late in the case

Request En Banc Rehearing

- DOL Pros:
 - Possibly could allow for a circuit split to develop
 - If one developed, maybe the case would be more attractive to SCOTUS
 - More judges involved than just the three from the panel
 - Possible path to DOL retaining more regulatory authority
 - Dissent likely means that at least one judge would vote for en banc rehearing
 - If granted, opinion is vacated and mandate is stayed
- DOL Cons:
 - Trump Administration still defending Obama era rule
 - Unlikely that a majority of active judges would vote to rehear en banc
 - Only 3% of en banc requests are granted
 - Make up of Fifth Circuit not favorable 10 appointed by Republicans and only 5 by Democrats

Immediate Cert Petition

- DOL Pros:
 - Quickest way to resolution out of the possible litigation strategies.
 - Possible path to DOL retaining more regulatory authority
- DOL Cons:
 - Trump Administration still defending Obama era rule
 - Unlikely SCOTUS would take case:
 - No real circuit split yet
 - DOL win in Supreme Court wouldn't lead to ultimate DOL win as Fifth Circuit then need to address First Amendment argument
 - *Chevron v. National Resources Defense Council* validity not squarely presented.
 - *NLRB v. Murphy Oil* issue not squarely presented
 - Unattractive case because outcome does not turn on a single issue
 - Does not necessarily stay the mandate

Request Panel Rehearing

- DOL Pros:
 - Path if DOL wants to have the case take as long as possible
 - Possible path to DOL retaining more regulatory authority
 - Stays the mandate until resolution
- DOL Cons:
 - Trump Administration still defending Obama era rule.
 - Same judges
 - Almost zero chance panel would agree to rehear the case
 - Not only was the opinion forceful, but the majority ordered DOL to pay costs
 - If panel agreed to re-hear case, almost zero chance the outcome would change

If DOL Gives Up, Can Someone Intervene?

Intervention as of right –

- A court must permit a party to intervene when the party “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest”. FRCP 24(a)(2)
 - Decision not to appeal by an original party to action can constitute inadequate representation of another party’s interest, for purposes of entitling other party to intervene as of right, but...
 - Decision to not file a cert petition does not result in “inadequate representation
- An entity seeking to intervene now, after the Fifth Circuit has entered judgement would face an uphill battle to convince court that their interests had been “inadequately represented.”
- Even if intervention were granted, for the reasons discussed on prior slides, intervenor would face additional challenges both at a panel rehearing or an en banc rehearing



Impact On Other Regulators

- The SEC
 - SEC has indicated it is trying to get its own rule out before the end of the second quarter

Impact On Other Regulators

- The States
 - Nevada, Connecticut, and others have passed their own statutes governing investment advice
 - States are likely to continue bringing state law actions



Impact On Other Regulators

- The Insurance Commissioners
 - NAIC has proposed a new “best interest suitability” rule as has the New York Department of Financial Services

Impact On Other Regulators

- Congressional Democrats
 - Senator Warren and others are likely to propose legislation that would in effect codify the Fiduciary Rule
 - Depending on outcomes of 2018 and 2020 elections, codification could become likely

Frequently Asked Questions

- So if the Fiduciary Rule dies, what will be the rule?
 - We'll go back to the old five part test
- Can you remind me of what the five part test says?
 - A person renders advice to the plan as to the value of or advisability of buying, selling, or investing in securities or other property
 - On a regular basis
 - Pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between the plan or plan fiduciary
 - ... that the services will serve as a primary basis for investment decisions
 - The advice will be individualized to the plan based on the particular needs of the plan regarding such matters as investment policies or strategy, overall portfolio composition and diversification

Frequently Asked Questions

- And what happens to the exemptions?
 - They go back to how they were before the Fiduciary Rule
 - For example, PTE 84-24 will cover fixed indexed and variable annuities
- And the Best Interest Contract Exemption?
 - Gone
- The Impartial Conduct Standards?
 - Gone as well
- Wait, but I've been relying on "Transition BIC"?
 - A different exemptive relief strategy will be needed, if fiduciary status continues under the five part test

Frequently Asked Questions

- Should I start making changes right now?
 - We'd suggest that you wait until all appeal options have expired
 - But not too soon to begin inventorying advice activities and to begin strategizing about their post-vacatur status (fiduciary or non-fiduciary) and alternative exemptive relief strategies for any that will remain fiduciary
- Am I stuck always being a fiduciary, I said to customers that I'm a fiduciary?
 - No. But any past fiduciary acknowledgments should be withdrawn/corrected
- Is rollover advice fiduciary advice?
 - If you aren't otherwise a fiduciary, then one time rollover advice isn't fiduciary advice. However, if you are already a fiduciary for other purposes, you've raised an interesting question which we'll get to on our next slide

Next Steps

- The change from life under the 2016 Fiduciary Rule to life under the 1975 Rule has its own transition challenges
- We'll need to work with DOL on guidance related to:
 - Transitional and retroactive relief for fiduciaries who have been relying on the invalidated Best Interest Contract Exemption
 - Will new 408(b)(2) notices be required?
 - Moving away from the IFE representations, especially the fiduciary acknowledgments
 - The validity of advisory opinions like *Deseret* (Adv. Op. 2005-23A). Is it all back? Did DOL wrongly conclude that rollover advice could ever give rise to a fiduciary breach?
 - Can DOL issue guidance expanding investment education in light of what it had wanted to do in the Fiduciary Rule?



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