GROOM LAW GROUP

Publications

It’s Over! Fifth Circuit Issues Mandate Vacating Fiduciary Rule

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On June 21, 2018, the United States Court of Appeals for the Fifth Circuit issued its mandate officially vacating *in toto* the U.S. Department of Labor’s 2016 Fiduciary Rule, including the Best Interest Contract or “BIC” Exemption, and the DOL’s other related 2016 prohibited transaction exemptions. The mandate is the final step following the Fifth Circuit’s March 15, 2018 judgement in *U.S. Chamber of Commerce v. DOL*, where the court held that the Fiduciary Rule was invalidly promulgated.

This brings to a close the legal battle over the Fiduciary Rule as the deadline for a party to request that the Supreme Court take the case lapsed after June 13, 2018. What this means is that the “Five Part Test” from 1975 has sprung back to life, and Advisory Opinion 2005-23A (the “Deseret Opinion”) has likely been restored. Over the past three months, service providers have prepared for this shift that largely brings about a restoration of the pre-Fiduciary Rule legal structure. That being said, regulators at both the state and federal level are paying closer attention to the retirement space.

In the short term, many financial institutions that had relied on the transition portion of the BIC Exemption are considering their next steps. One option that is being considered is retreating from fiduciary status. A second alternative is reliance on Field Assistance Bulletin 2018-02 (the “FAB”). Under the FAB, DOL has taken the position that, until after regulations, exemptions, or other administrative guidance are issued, it will not pursue prohibited transaction claims against fiduciaries “who are working diligently and in good faith to comply with the impartial conduct standards for transactions that would have been exempted” had the Fiduciary Rule and related exemptions not been struck down.

Looking further ahead, financial institutions will likely need to reengage with regulators. The SEC has proposed a slate of rules that would cover the retirement space. The retirement industry has a role to play first in ensuring that any new regulations are workable and second in seeking coordination between the SEC and DOL. Separately, financial institutions that achieved BIC Exemption compliance may seek new exemptions that provide broad relief for advice fiduciaries. Finally, consumer groups are likely to continue to push for additional consumer protection regulations at both the state and federal level. When there is a change in administration, it is possible that legislation or new regulatory efforts could commence.

After two years and twenty days of litigation, this is a significant development for the retirement industry. Click here for a copy of the mandate.

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