



Final Days for the Department of Labor's Fiduciary Rule?

March 20, 2018 - The Fiduciary Rule promulgated by the Department of Labor (DOL) under the Obama administration has garnered a lot of attention since Trump took office and now may be on its way out. There have been a number of court challenges to the Rule and last week the Fifth Circuit dealt the rule a possibly fatal blow. As explained in a recent Cadwalader Cabinet article, in a split decision, the Court's majority ruled in favor of the plaintiffs and found that the Fiduciary Rule is "unreasonable," and that the DOL acted beyond its authority in promulgating the Fiduciary Rule. By way of background the DOL published final regulations on April 8, 2016, that expanded who is a "fiduciary" in the context of investment advice concerning investments in ERISA-covered plans, IRAs and other plans covered by Section 4975 of the Internal Revenue Code of 1986, as amended, broadly capturing most common sales practices for investment and insurance products, including recommendations relating to investments, distributions, and certain withdrawals. The Fiduciary Rule also created two new related exemptions - the Best Interest Contract Exemption and Principal Transaction Exemption - and made certain changes to relevant DOL prohibited transaction class exemptions. As a result of the Fiduciary Rule, certain sales and marketing activities involving plans, fiduciaries or plan participants or beneficiaries are more likely to be considered fiduciary advice and be subject to ERISA's fiduciary standards. Generally, portions of the Fiduciary Rule became applicable on June 9, 2017, but the DOL postponed the application of certain portions of important related exemptions until July 2019 pending a reexamination of the Rule and exemptions as directed by the Trump administration. The Fifth Circuit's ruling vacating the Fiduciary Rule could have national ramifications. Gibson Dunn, counsel for the plaintiffs, published an alert outlining the potential impact. Under the Administrative Procedure Act, "vacatur" is a remedy where the court sets aside an agency action that is arbitrary and capricious or otherwise outside of the agency's statutory authority - as is the case here. Gibson Dunn goes on to say "[b]ecause the effect of vacatur is, in essence, to remove a regulation from the books, its effect is nationwide." The Fifth Circuit's decision is not yet final and will not go into effect until the Court issues a mandate. The DOL has 45 days to decide to request a rehearing or file a petition for a writ of certiorari. If the DOL declines to do so, the Court's judgment is scheduled to take effect on May 7, 2018. If the judgment does take effect, there are drafting implications for both credit agreements and trading documents. Last year the LSTA revised its relevant trading documents with the intention of taking the changes pursuant to the applicable portions of the Fiduciary Rule into account, including with respect to purchases and sales of loans and any investment advice that may accompany such purchases and sales. The new language covers an exception to the expanded fiduciary definition in the Fiduciary Rule (known as the "transactions with independent fiduciaries with financial expertise exception" or "independent fiduciary exception") in connection with the provisions of advice by a person to a fiduciary of a plan or pooled fund subject to ERISA or Section 4975 of the Code who is independent of the advice provider with respect to arm's length transactions or services relating to the plan's or fund's investment in securities or other property. Additionally, the LSTA published a market advisory in September 2017 offering new and similar model ERISA representations appropriate for credit agreements. For now, market participants should continue to observe the rule. The LSTA will continue to monitor developments in this space and, once the DOL's intentions become clear, will communicate to membership updated drafting guidance.