Steve Leimberg's Employee Benefits and Retirement Planning Email Newsletter Archive Message #689

Date:20-Mar-18

Subject: Mary E. Vandenack on In the Matter of Scottrade, Inc., Commonwealth of Massachusetts – Massachusetts' Effort to Enforce the Fiduciary Rule

"In an effort to give teeth to the Department of Labor Fiduciary Rule in a period of non-enforcement by the DOL, the Massachusetts Securities Division filed a complaint against Scottrade, Inc. alleging that its failure to enforce its internal policies designed to comply with the Fiduciary Rule resulted in violations of state securities laws. By way of response, opponents of the Fiduciary Rule provided a letter to the Fifth Circuit Court of Appeals, where an appeal was pending on a challenge to the Fiduciary Rule. The letter stated that the action by Massachusetts supports the position of those opposing the Fiduciary Rule that such rule is resulting in extensive burdens and costs advisors and institutions who are fiduciaries under the rule. The letter also suggested that mayhem may result if the Fiduciary Rule is enforced through the laws of 50 different states rather than uniform federal standards. Following the action by the Massachusetts Securities Division and prior to the publication of this commentary, the Fifth Circuit issued a decision in Chamber of Commerce V. U.S. Department of Labor vacating the Fiduciary Rule. LISI will publish more on that decision shortly."

Mary Vandenack provides members with commentary on another important development in the ongoing saga of the DOL's fiduciary rule.

Mary E. Vandenack is founding and managing member of **Vandenack Weaver LLC** in Omaha, Nebraska. Mary is a highly regarded practitioner in the areas of tax, benefits, private wealth planning, asset protection planning, executive compensation, equity fund development, business and business succession planning, tax dispute resolution, international tax, state and local tax, and tax-exempt entities. Mary's practice serves businesses and business owners, executives, real estate developers and investors, health care providers, companies in the financial industry, and tax exempt organizations. Mary is a member of the American Bar Association Real Property Trust and Estate Section where she serves as Co-Chair of the Futures Task Force, Co-Chair of the Technology and Economics of Law Practice Committee and Vice Chair of the Asset Protection Planning Committee. Mary is a frequent writer and speaker on tax, benefits, asset protection planning, and estate planning topics as well as on practice management topics including improving the delivery of legal services, technology in the practice of law, building sustainable law firms, and alternative fees for process-oriented law firms.

Here is her commentary:

EXECUTIVE SUMMARY:

In an effort to give teeth to the Department of Labor Fiduciary Rule in a period of non-enforcement by the DOL, the Massachusetts Securities Division filed a complaint against Scottrade, Inc. alleging that its failure to enforce its internal policies designed to comply with the Fiduciary Rule resulted in violations of state securities laws. By way of response, opponents of the Fiduciary Rule provided a letter to the Fifth Circuit Court of Appeals, where an appeal is pending on a challenge to the Fiduciary Rule. The letter stated that the action by Massachusetts supports the position of those opposing the Fiduciary Rule that such rule is resulting in extensive burdens and costs advisors and institutions who are fiduciaries under the rule. The letter also suggested that mayhem may result if the Fiduciary Rule is enforced through the laws of 50 different states rather than uniform federal standards. After the action of the Massachusetts Securities Division and prior to publication of this commentary, the Fifth Circuit issued a decision in *Chamber of Commerce v. US Department of Labor* vacating the Fiduciary Rule. The Fifth Circuit decision muddies the water further concerning the future of the Fiduciary Rule. LISI will publish the details of the Fifth Circuit case in a separate commentary.

FACTS:

In February, 2018, the Massachusetts Securities Division (MSD) filed an administrative complaint against Scottrade, Inc. alleging various violations of state laws.[i] The complaint is based on Scottrade failing to follow its own internal policies regarding the United States Department of Labor (DOL) Fiduciary Rule.

Scottrade is a broker-dealer, which has a registration in Massachusetts. According to the MSD complaint, Scottrade adopted internal policies to ensure compliance with the DOL Fiduciary Rule. Such policies were adopted in anticipation of implementation of the Fiduciary Rule and prohibited quotas, appraisals, bonuses and contests for sales regarding retirement plan services.

The MSD complaint alleges that, in violation of its own internal policies, Scottrade launched sales contests between June and September 2017 and that such sales contests involved retirement plans. The MSD complaint argues that the sales contests were structured in a manner that could reasonably be expected to cause Scottrade agents to make recommendations where their own best interest would take precedence over customer best interest. The MSD complaint alleges that Scottrade violated Massachusetts securities law by engaging in dishonest and unethical activity on the part of Scottrade. The complaint also alleges failure of MSD to properly supervise.

On April 6, 2016, DOL issued the Fiduciary Rule.[ii] Such rule expanded the definition of “investment advice fiduciary” under the Employee Retirement Income Security Act of 1974 (ERISA).[iii]

On June 9, 2017, the impartial conduct portion of the fiduciary rule went into effect. The impartial conduct portion of the rule requires financial advisers who manage retirement accounts or provide retirement advice to act in a manner that places the interests of customers over the interests of the advisers.

In July 2019, the DOL announced that it would “not pursue claims against fiduciaries who were working diligently and in good faith to comply with the new fiduciary rule or treat those fiduciaries as being in violation of the fiduciary rule.”

In April, 2017, the US Chamber, Financial Services Institute, and various other organizations in the financial industry filed a motion to stay implementation of the Fiduciary Rule. That motion was denied and an appeal was filed to the Fifth Circuit.

Following the filing of the administrative complaint by MSD against Scottrade, the appellants in the case before the Fifth Circuit submitted a letter to the Clerk of the Court taking the position that the filing by MSD provides further evidence of the need to repeal the Fiduciary Rule. The letter was authored by Eugene Scalia, counsel for the Chamber of Commerce appellants in the Fifth Circuit case. In the letter, Scalia took the position that the actions of MSD confirm the concern expressed by the Appellants in the Fifth Circuit case that the Fiduciary Rule will continue to impose extensive burdens and costs and will exacerbate the risk of litigation. Scalia claims that the Fiduciary Rule is “now spawning claims that will be enforced under the splintered laws of fifty States.”

On March 15, 2018, the Fifth Circuit ruled in the *US Chambers* case that the expansion of the statutory term “fiduciary” was not permitted by ERISA and that the promulgation of the rule exhibited an arbitrary and capricious exercise of administrative power that rendered the action by the DOL unlawful.

COMMENT:

Massachusetts and several other states favor enforcement of the Fiduciary Rule as a way to protect retirees from dishonest financial advisors. States cannot enforce ERISA and are instead looking for other strategies to ultimately implement the rule. Some states, including Connecticut, Nevada, New Jersey and New York, have passed laws with provisions similar to the Fiduciary Rule. The recent Fifth Circuit decision creates a partial split among the Circuits.

Much of the financial industry opposes the Fiduciary Rule as being unduly burdensome on those in the financial industry.

The SEC seems to be moving forward with drafting a proposed fiduciary standard.

The fact that some provisions of the Fiduciary Rule are in effect but not being enforced and other provisions of the Fiduciary Rule are being phased in is creating fodder for entities other than the DOL to step in and seek ways to implement the effects of the Fiduciary Rule.

The long term fate of the Fiduciary Rule remains unclear. There remain strong supporters and staunch opponents. Until there is more clarity, those advising clients who are fiduciaries under the Fiduciary Rule should remind such clients that while some provisions of the Fiduciary Rule have been delayed, the impartial conduct standards are in currently in force. Advisors should be making good faith efforts to comply with such standards. To the extent that policies have been adopted, compliance with such policies is advisable.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Mary Vandenack

CITE AS:

CITATIONS:

---

[i] In the Matter of Scottrade, Inc., Commonwealth of Massachusetts, No. E-2017-0045.

[ii] 29 CFR 2510.

[iii] 29 US Code Chapter 18.