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DOL Announces Temporary Enforcement Policy in Response to Fifth Circuit Decision

Today, the Department of Labor (“DOL”) issued Field Assistance Bulletin 2018-02 (the “FAB”) announcing a non-enforcement policy for certain prohibited transactions that may arise because of the provision of fiduciary investment advice. Because of the Fiduciary Rule, many service providers put in place investment advice programs that relied on the Best Interest Contract (“BIC”) Exemption and/or the Principal Transactions Exemption. However, the Fifth Circuit is expected to issue a mandate this week vacating both the Fiduciary Rule and the related exemptions, so DOL issued the FAB to allow service providers to continue to offer fiduciary advice programs in the absence of the BIC Exemption and Principal Transactions Exemption, provided the providers make good faith efforts to comply with the impartial conduct standards.

Under the FAB, DOL states that it “will not pursue prohibited transaction claims against investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules.” In a footnote, DOL indicated that the Treasury Department and the IRS have confirmed that a similar non-enforcement policy will apply with respect to the prohibited transaction excise tax provisions under Internal Revenue Code section 4975.

Although the vacatur of the Fiduciary Rule (and the reinstatement of the five-part test for fiduciary status) may mean that some service providers are no longer fiduciaries under the Employee Retirement Income Security Act of 1974 (“ERISA”), DOL recognized in the FAB that the loss of the BIC Exemption for those who would remain fiduciaries “could disrupt existing investment advice arrangements to the detriment of retirement plans, retirement investors, and financial institutions.” Additionally, the loss of exemptive relief would prejudice the “many financial institutions [that] created and implemented compliance structures designed to ensure satisfaction of the impartial conduct standards.” The FAB seeks to reduce the possibility of these disruptions by allowing providers to continue current practices.

DOL notes in the FAB that the non-enforcement policy does not address the rights or obligations of other parties. The risk of private litigation is greatly diminished because of the repeal of the Fiduciary Rule. However, financial institutions providing advice to ERISA-covered retirement plans may still be liable for fiduciary breaches. Although there generally is not a private right of action to enforce the prohibited transaction rules with respect to IRAs, service providers should be aware that the law is still unsettled as it relates to recommendations to roll-over from an ERISA plan to an IRA.

Importantly, the FAB invites the regulated community to seek new forms of prohibited transaction exemptive relief. DOL specifically notes that it will “consider any applications for additional relief” and indicates that it is evaluating the potential prospective and retroactive prohibited transaction relief.