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DOL Fiduciary Rule Temporary (Non)Enforcement Policy

Recognizing potential liability presented by good-faith activities to comply with a regulation that is no longer in effect, DOL issued a temporary nonenforcement policy and is evaluating the need for possible prospective and retroactive prohibited transaction relief. It appears DOL will not defend its 2016 fiduciary regulation that the 5th Circuit Court of Appeals vacated in March.

Background

DOL's 2016 "fiduciary rule" expanded the scope of the definition of fiduciary and impermissible conflicts of interests for employer-sponsored plans and certain non-ERISA investment vehicles. Previously, DOL found that a person was an investment advice fiduciary if they met all of the criteria of the following five-point test:

- The person renders advice about the value of securities or other property, or makes recommendations on the advisability of investing in, purchasing, or selling securities or other property.
- The advice is provided on a regular basis.
- The advice is provided pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary.
- It is intended that the advice will serve as a primary basis for plan asset investment decisions.
- It is intended that the advice will be individualized based on the particular needs of the plan.

The rule was originally scheduled to take effect in April 2017; in February 2017, President Trump directed the DOL to re-evaluate the rule's likely impact on retirement savings. DOL extended until July 1, 2019, the effective date for the written disclosures and fiduciary representations, but the rest of the regulation went into effect on June 9, 2017, along with an "enforcement lite" policy for fiduciaries working diligently and in good faith to comply. (See our November 28, 2017 *For Your Information.*)

Fifth Circuit Invalidation

In *U.S. Chamber of Commerce v. DOL*, the 5th Circuit Court of Appeals (which covers Texas, Louisiana, and Mississippi) vacated the fiduciary rule in its entirety, on a nationwide basis, after determining that DOL exceeded its statutory authority in broadening the definition of investment advice fiduciary and modifying and creating new exemptions to prohibited transactions. (See our March 19, 2018 *FYI Alert.*) The court's ruling became final last week after the timeframe for DOL's appeal lapsed and the court rebuffed attempts by AARP and a group of states to appeal the ruling after it became apparent that the DOL was not going to do it. The DOL has until June 13 to ask the Supreme Court to review the appeal, but all signs point to DOL opting to leave the 5th Circuit decision in place.

DOL Temporary Nonenforcement Policy for Fiduciaries

Fiduciaries under the five-point test continue to be fiduciaries with retroactive reinstatement of the old rule and exemptions, but were facing uncertainties about what standards to meet to avert prohibited transaction exposure. To the extent they sought prohibited transaction relief using the new rules (for example, the BIC exemption), that relief is retroactively void. So how can they retroactively move back into compliance with the predecessor guidance?

In Field Assistance Bulletin 2018-02, the DOL addressed this dilemma with a nonenforcement policy that says DOL will not take any enforcement action against an "investment advice fiduciary" that, for the period from June 9, 2017, until after regulations or exemptions or other administrative guidance has been issued, has been "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." The FAB confirms that IRS will follow suit and respect this nonenforcement policy for purposes of applying IRC 4975 (which provides for excise taxes relating to prohibited transactions).

The DOL is "evaluating the need for other temporary or permanent prohibited transaction relief for investment advice fiduciaries, including possible prospective and retroactive prohibited transaction relief." This will likely require formal rulemaking that is subject to notice and comment.

Nonfiduciaries (Again)

Because the 5th Circuit's ruling invalidated the regulation back to its effective date, service providers who declared fiduciary status under the rule and began good-faith compliance now face sorting out how to reposition their services and responsibilities for the future on a non-fiduciary basis. So what does this mean for those who were not fiduciaries under the old five-part test who had become fiduciaries on June 9, 2017, under the now defunct fiduciary regulation? Although the FAB does not address the rights or obligations of nonfiduciaries, it appears unlikely that DOL or IRS will take action on prohibited transactions if the nonfiduciary continues good faith compliance for the time being.

In addition to prohibited transaction concerns, many advisors may have created contractual obligations as part of their efforts to meet the good-faith compliance requirement. They will need to sort out how best to reposition their service offering in light of this regulatory reversal and how to address the possibility of any private right of action that may ensue from contractual promises. In addition, the potential SEC fiduciary requirements are on the horizon. See our April 20, 2018 *FYI Alert* on the SEC's proposal.

In Closing

Plan sponsors should be attuned to recordkeeper and other vendor requests to revisit processes and contracts that had been revised to comply with the now-defunct fiduciary definition. The current DOL response is temporary; refinements and additional guidance are expected.

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