One Minute Memo®

DOL Issues Temporary Enforcement Policy for Fiduciary Advice Rule

By Diane Dygert, Linda Haynes, and Jennifer Neilsson

On May 7, 2018, the Department of Labor (the "DOL") issued a temporary non-enforcement policy regarding its investment advice fiduciary regulation (the "Fiduciary Rule") in Field Assistance Bulletin 2018-02. This guidance was issued in response to the expected action by the Court of Appeals for the Fifth Circuit to implement its opinion vacating the Fiduciary Rule and its related exemptions. Click here for our prior alert discussing the Fifth Circuit's decision.

The DOL stated that from June 9, 2017, until additional guidance is issued, it will not pursue any actions "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 Best Interest Contract Exemption or the Principal Transactions Exemption. Further, the DOL will not treat such investment advice fiduciaries as violating the prohibited transaction rules. Investment advice fiduciaries may rely on other available exemptions not affected by the Fifth Circuit's decision, but they are not required to do so.

Finally, the DOL explained that it is continuing to consider what other types of temporary or permanent prohibited transaction relief is needed for investment advice fiduciaries. Unfortunately, the guidance does not provide any insight into how the DOL will approach the definition of investment advice fiduciary in the future. This is especially unclear given that the Securities and Exchange Commission released two proposed rules on April 18, 2018, designed to clarify the fiduciary duties that an investment adviser owes its clients under the Investment Advisers Act of 1940.

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