Flashpoint: DOL Fiduciary Rules: Where the Heck Are We Now?

As we discussed in our FlashPoint entitled, "Did the 5th Circuit Kill the Fiduciary Rule?" on March 15, 2018, the 5th Circuit Court of Appeals vacated the Department of Labor's (DOL) fiduciary regulations and the related prohibited transactions in relation to investment advice. (For purposes of this FlashPoint, we will call these the "New Rules.")

In the nearly two months since that time, experts in the industry have argued the effect of this decision (local to the 5th Circuit or national?), whether it leaves us all without guidance or with reliance on the 1975 version of the DOL regulations (which we will continue to refer to as the "1975 Rules"), and whether the DOL will continue to pursue its eight-year agenda of broadening the definition of who is an investment fiduciary or just (to quote "Frozen"), Let it Go. Not coincidentally, the SEC has finally released a proposed fiduciary regulation, which ostensibly represents their first thoughts on this issue (and which several of the SEC commissioners have said are so half-baked that they cannot yet support them).

For those keeping score, the decision does have national impact. Nonetheless, the DOL noted in a Field Assistance Bulletin issued on May 7, 2018 (FAB 2018-02), that practitioners and financial institutions have spent a great deal of time and energy trying to comply with the now defunct New Rules. While these rules made fiduciaries out of those who previously did not have that status, they also provided exemptions from certain prohibited transactions that permitted financial advisors to safely engage in activities that were previously fraught with possible liability.

Most notably among those perilous activities was the ability of a plan fiduciary investment advisor or manager to advise participants on rollover decisions. Under the 1975 Rules, an advisor who is a fiduciary to the plan could be considered to be "self-dealing," which is prohibited, in giving such advice (whereas an advisor unrelated to the plan could do so freely). Under the New Rules, the Best Interest Contract Exemption (BICE) provided relief from these self-dealing rules when the advisor was receiving level compensation from both the plan and the rollover IRA. With the death of the New Rules, advisors must question again whether the rollover advice produces potential liability.

The DOL provided some relief in FAB 2018-02. Noting the significant investment of time and money spent by the benefits community to comply with the New Rules and its exemptions, FAB 2018-02 provides that the DOL will not pursue prohibited transaction claims against advisors who continue to work diligently and in good faith to comply with the New Rules and exemptions. A footnote assures readers that the IRS concurs with this approach. Therefore, an advisor who is giving rollover advice but complies with the impartial conduct standards of BICE (i.e., acts in the participants' best interests, charges reasonable fees, and does not misrepresent his/her fiduciary status) will not be subject to enforcement action by the DOL. FAB 2018-02 also reminds practitioners that fiduciaries can rely on other available exemptions that still apply after the 5th Circuit decision.

Finally, FAB 2018-02 states that the DOL is figuring out what additional guidance is needed for investment fiduciaries in the post-5th Circuit decision world.

So, the answer to the question of "where the heck are we now?" is that no one knows, but we can keep paddling safely all the same.

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