For advisors, DOL enforcement holiday still in effect

By Wagner Law Group *Thu, May 10, 2018*

'The [Department of Labor] Field Assistance Bulletin is somewhat difficult to understand,' said the pension attorneys at Wagner Law Group in a public memo about the DOL's announcement.

Today, the Department of Labor ("DOL") issued Field Assistance Bulletin 2018-02 (FAB), which indicates that both the DOL and the IRS will continue to rely upon its previously announced temporary enforcement policy, pending the issuance of additional guidance by the DOL.

The FAB states that during the period from June 9, 2017 until after regulations or prohibited transaction exemptions or other administrative guidance have been issued, neither the DOL nor IRS will pursue prohibited transactions 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 (BIC) and Principal Transactions Exemptions, or treat such fiduciaries as violating the applicable prohibited transaction rules.

Investment advice fiduciaries may also continue to rely upon other available exemptions, but neither the IRS nor the DOL would treat an adviser's failure to rely upon such other exemptions as resulting in a prohibited transaction violation if the adviser satisfied the terms of the temporary enforcement policy.
The need for this guidance was prompted by expected issuance today of a mandate from the U.S. Court of Appeals for the Fifth Circuit effectuating its opinion vacating the entire Fiduciary Rule, the BIC Exemption, the Principal Transactions Exemption, and related amendments to existing prohibited transaction exemptions.

The DOL recognized that this decision left a number of open questions, with respect to which it intends to provide additional guidance in the future. However, as an immediate step, it wanted to provide guidance as to the breadth of the prohibited transaction exemptions that remain available for investment advice fiduciaries. Of course, with the Fiduciary Rule vacated, the number of individuals who may be investment advice fiduciaries will be significantly reduced.
The FAB does not preclude the DOL from asking the Supreme Court to review the decision of the Fifth Circuit, although that course of action now seems unlikely. Also, the temporary enforcement policy of the DOL and IRS does not affect the rights or obligations of other

parties, but, in light of the Fifth Circuit decision, actions by other parties would seem less likely. It will also be interesting to see how the DOL crafts additional guidance in a manner consistent with the Fifth Circuit decision.

The FAB is somewhat difficult to understand. As mentioned above, the DOL expects the Fiduciary Rule and related exemptions to be vacated by the Fifth Circuit May 7. Once the Fifth Circuit takes action, there will be no rule or exemptions upon which to apply a temporary enforcement policy. FAB's extension of the policy beyond today, until after "regulations or exemptions or other administrative guidance has been issued," is confusing and, if true, will be contrary to the Fifth Circuit's decision.