Stradley Ronon

Investment Management Briefing

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DOL Announces Temporary Enforcement Policy for Fiduciary Rule

On March 10, the Department of Labor (DOL) issued Field Assistance Bulletin (FAB) 2017-01 (https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-01)containing a temporary enforcement policy in respect of the fiduciary rule and the related prohibited transaction exemptions (PTEs). This FAB reflects the DOL's acknowledgment that the recently proposed delay of the rule has created substantial compliance uncertainty.

The temporary enforcement policy is described in the FAB as follows:

In the event the Department issues a final rule after April 10 implementing a delay in the applicability date of the fiduciary duty rule and related PTEs, the Department will not initiate an enforcement action because an adviser or financial institution did not satisfy conditions of the rule or the PTEs during the "gap" period in which the rule becomes applicable before a delay is implemented, including a failure to provide retirement investors with disclosures or other documents intended to comply with provisions of the rule or the related PTEs.

In the event the Department decides not to issue a delay in the fiduciary duty rule and related PTEs, the Department will not initiate an enforcement action because an adviser or financial institution, as of the April 10 applicability date of the rule, failed to satisfy conditions of the rule or the PTEs provided that the adviser or financial institution satisfies the applicable conditions of the rule or PTEs, including sending out required disclosures or other documents to retirement investors, within a reasonable period after the publication of a decision not to delay the April 10 applicability date. The Department will also treat the 30-day cure period under Section IX(d)(2)(vi) of the BIC Exemption and Section VII(d)(2)(v) of the Principal Transactions Exemption as available to financial institutions that, as of the April 10 applicability date, did not provide to retirement investors the disclosures or other documents described in Section IX(d)(2)(vi) of the BIC Exemption and Section VII(d)(2)(v) of the Principal Transactions Exemption.

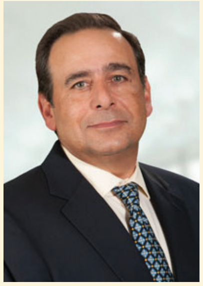
To the extent that circumstances surrounding the decision on the proposed delay of the April 10 applicability date give rise to the need for other temporary relief, including prohibited transaction relief, DOL will consider taking such additional steps as necessary.

The FAB does not address two matters. First, the FAB does not address the application of the Internal Revenue Code's prohibited transaction rules and the excise taxes imposed for violation of those rules during the period covered by the DOL's temporary enforcement policy. It seems highly unlikely, however, that the Treasury Department and Internal Revenue Service would not follow the same approach.

Second, the FAB would not necessarily have any impact on private causes of action which could be pursued in federal courts by plans subject to Title I of ERISA and their participants for violations of the ERISA prohibited transaction rules occurring during the period covered by the temporary enforcement policy.

Finally, it should be noted that the FAB does not alter the comment periods (March 17 and April 17) in respect of the proposed delay and substantive comments on the legal and economic analysis of the rule as described in our Investment Management Briefing of March 8, 2017 (http://www.stradley.com/~/media/Files/Publications/2017/03/Investment_Management_Briefing_March_8_2017.pdf).

George Michael Gerstein



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