

May 8, 2018

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DOL Provides Stopgap Prohibited Transaction Relief Amidst Fiduciary Rule Uncertainty



The Department of Labor (DOL) issued Field Assistance Bulletin (FAB) 2018-02 (<https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-02>), which states that the DOL and Internal Revenue Service (IRS) will not bring an enforcement action against firms for non-exempt prohibited transactions that arise from providing fiduciary investment advice to plans and IRA holders when they exercise reasonable diligence and act in good faith in complying the impartial conduct standards. This non-enforcement policy binds only the DOL and IRS; state regulators and private plaintiffs could potentially seek to bring an action for alleged non-compliance with the impartial conduct standards.

The impartial conduct standards are already familiar to many service providers because they were originally set forth in the Best Interest Contract Exemption, which (along with the rest of the DOL's 2016 Fiduciary Rule) was vacated by the Fifth Circuit Court of Appeals. For the past year, service providers have been eligible for "transition relief" by complying with the impartial conduct standards, which relief is essentially encapsulated by the DOL in FAB 2018-02. This means that service providers can continue with their existing compliance approach in connection with the impartial conduct standards.

The DOL most likely issued FAB 2018-02 because of the confusion over the Fiduciary Rule's iterations. What was designed as a sweeping and, to many, draconian, rule has since morphed into an ever narrower and more flexible slate of compliance obligations through a series of supplemental guidance

issued by the DOL post-election. Uncertainty over how to comply with the Fiduciary Rule has been as much a hallmark of the rulemaking as the rule's own conditions. FAB 2018-02 seeks to alleviate some of this confusion by allowing firms to continue the compliance approach firms have been taking since last June. The DOL then and now affords firms flexibility to fashion compliance with the impartial conduct standards in ways they determine in good faith satisfies the standards while taking into account the organization's unique preferences and resources.

FAB 2018-02 provides relief for prohibited transactions that arise from non-discretionary investment advice. Because the DOL Fiduciary Rule was vacated by the Fifth Circuit, the test for when one becomes a fiduciary in the first place, and, therefore, needs a prohibited transaction exemption, is set forth in the original 1975 five-part test. FAB 2018-02 does not resuscitate the Fiduciary Rule or somehow indirectly continue to impose the expansive ways in which one can become an investment advice fiduciary. Rather, FAB 2018-02 appears designed to preserve existing compliance methods for securing prohibited transaction relief for these advisers who are fiduciaries under the old five-part test until the DOL issues formal guidance (likely through the proposal of a new exemption) in the future. One should first determine if they continue to constitute an investment advice fiduciary now that we are back to the much narrower five-part test and, if so, whether they have undertaken reasonably diligent and good faith efforts to satisfy the impartial conduct standards or otherwise comply with a different prohibited transaction exemption.

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