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BLOG

What is the Current State of the U.S. Department of Labor's ERISA Fiduciary Rule?

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On June 21, 2018, the United States Court of Appeals for the Fifth Circuit issued a mandate, consistent with its March 15 opinion, which officially vacates the United States Department of Labor's (Department's) Fiduciary Rule. The controversial Department rule from 2016 broadly expanding the definition of an ERISA fiduciary is now off the table. In our prior blogs, Fifth Circuit Court of Appeals Vacates DOL Fiduciary Rule, Temporary Non-Enforcement Policy Issued by the Department of Labor, and DOL's Fiduciary Rule Remains in Limbo we provided you the status of the Department's Fiduciary Rule.

As a quick recap, the Department issued the Fiduciary Rule with the intent of requiring professionals who provide retirement investment recommendations or solicitations, even on a mere one-time basis, to act in the best interest of their clients. While doing so, the Fiduciary Rule expanded and modified certain prohibited transaction exemptions for investment activities based on the expanded definition of who is a fiduciary.

The Court of Appeals determined that the Department exceeded its authority under ERISA in promulgating the Fiduciary Rule because the Department's expanded definition of "investment-advice fiduciary" did not constitute a reasonable interpretation of the term "fiduciary" under ERISA. Under the Fiduciary Rule, certain service providers and broker dealers were considered ERISA fiduciaries that had not previously considered fiduciaries under ERISA's original definition.

It had not been clear whether the Department intended to appeal the Fifth Circuit Court of Appeals decision. The likelihood continued to dwindle when the Department issued its non-enforcement policy. However, it is now certain that the Department's Fiduciary Rule will not proceed given the Fifth Circuit's mandate to vacate the Fiduciary Rule.

In a related note, on April 18, 2018 the Securities and Exchange Commission (SEC) proposed a package of rulemakings to address some of the investor protection concerns behind the Fiduciary Rule. The SEC proposed its own "Best Interest" rule requiring a broker-dealer to act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving securities. In addition, the SEC proposed an interpretation to reaffirm and, in some cases, clarify its views of the fiduciary duty that investment advisers owe to their clients. The SEC proposed a new short-form disclosure document to identify the nature of a client's relationship with their investment professional. The public comment period for the SEC's proposed rules is open until July 17, 2018.

We will continue to update you as these rules move forward.

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