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Client Alert

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The ERISA Fiduciary Rule – Courts Say the U.S. Department of Labor's 'Final Rule' Isn't Final After All

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The U.S. Department of Labor's (DOL) latest attempt to redefine who/what a fiduciary is for purposes of the Employee Retirement Income Security Act of 1974, as amended (ERISA), has been stayed by two U.S. district courts on two successive days. The stay applies nationwide, so pending further rulings by those courts and what will no doubt be further litigation, no matter which side prevails, the long-standing five-part test established in 1975 for determining fiduciary status under ERISA (the 1975 Fiduciary Rule) lives, at least for now.

For an in-depth look at the DOL's "final" Retirement Security Rule (the Final Rule) issued on April 23, 2024, please see our prior article. Coincident with the Final Rule, the DOL also issued amendments to certain prohibited transaction exemptions (PTEs) that would impact investment advisers. The Final Rule and related changes to the PTEs were scheduled to become effective September 23, 2024. Both the Final Rule and amendments to the PTEs have been stayed.

In short, the Final Rule is intended to expand the definition of an ERISA fiduciary by focusing on the relationship between an adviser and an investor in determining who is an "investment advice fiduciary" rather than focusing on the actual advice being provided. Under the Final Rule, an adviser will be considered an investment advice fiduciary under ERISA if the adviser provides a recommendation to a retirement investor for a fee or other compensation and either (A) represents or acknowledges that they are acting as a fiduciary under ERISA or (B) directly or indirectly "makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation:

- is based on a review of the retirement investor's particular needs or individual circumstances,
- reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and
- may be relied upon by the retirement investor as intended to advance the retirement investor's best interest."

Shortly after the Final Rule was issued, two lawsuits were filed in Texas federal courts.

On July 25, 2024, in *Federation of Americans for Consumer Choice, Inc., et al. v. the DOL*, the U.S. District Court for the Eastern District of Texas ordered a stay of the effective date of the Final Rule and amendments to PTE 84-24 (dealing with transactions involving insurance products and agents). The next day, in *American Council of Life Insurers, et al., v. the DOL*, the U.S. District Court for the Northern District of Texas issued a stay of the effective date of the Final Rule and related amendments to the PTEs, specifically noting that the Final Rule suffers from many of the same problems as the 2017 version of the DOL's fiduciary rule, which was ultimately vacated. In each opinion, the courts found that there was a high likelihood that the plaintiffs would prevail on their arguments that the DOL exceeded its legal authority with the Final Rule and that the Final Rule is unreasonable.

The decisions by both courts are not limited to the plaintiffs in their respective cases, and therefore apply nationwide. As a result, until further guidance is issued or the stays are lifted, the existing definition of an ERISA fiduciary (i.e., the 1975 Fiduciary Rule) once again prevails and remains in effect along with previously issued PTEs.

The 1975 Fiduciary Rule applies a "five-part test" to determine fiduciary status. Under that test, an adviser is considered a fiduciary if (1) the adviser makes investment recommendations (2) on a regular basis (3) pursuant to a mutual understanding with a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions and (5) the advice will be individualized to the particular needs of the plan.

Some advisers have already expended time and money in preparation for compliance with the Final Rule. Those advisers may wish to cancel those efforts, but some may also find a marketing advantage in promoting themselves as fiduciaries. The question will be whether the marketing opportunity is worth the additional fiduciary liability exposure.

The authors and other members of our ERISA team will continue to monitor and report on further developments concerning the Final Rule. It seems unlikely that the struggle over who should be an ERISA fiduciary has reached an end.

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