

WILMERHALE

June 6, 2018

David W. Ogden

Mr. Lyle W. Cayce
Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
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Re: *Chamber of Commerce of the USA v. U.S. Department of Labor*, No. 17-10238

Dear Mr. Cayce:

On behalf of ACLI/NAIFA and Chamber Appellants, I write pursuant to Federal Rule of Appellate Procedure 28(j) to bring to the Court's attention relevant regulatory guidance issued by the Department of Labor addressing Fiduciary Rule compliance. See Field Assistance Bulletin No. 2018-02, *Temporary Enforcement Policy on Prohibited Transaction Rules Applicable to Investment Advice Fiduciaries* (May 7, 2018) (attached as Exhibit A). In that guidance, the Department explains that "[o]n or about May 7, 2018," this Court "is expected to issue a mandate effectuating its opinion vacating the entire fiduciary rule." In light of that expected issuance of the mandate, the Department states that it will continue a "temporary enforcement policy" of not pursuing claims against "investment advice fiduciaries." The Department promises "to provide appropriate guidance in the future," presumably after the mandate has issued.

This Court's opinion vacating the Fiduciary Rule issued on March 15, 2018, with a docket entry noting: "Mandate issue date is 05/07/2018." The Department's time to seek rehearing *en banc* has long passed.

The mandate, however, has not issued. Notwithstanding this Court's holding that the Fiduciary Rule violates the Administrative Procedure Act, without the issuance of a mandate, the Rule remains in effect—but subject to the Department's "temporary enforcement policy" as well as the condition that it will be vacated in whole when the mandate issues.

In combination, those factors create palpable uncertainty for significant portions of the insurance and financial services industries—uncertainty that interferes with long-term planning, that risks generating consumer confusion, and that imposes ongoing compliance costs on regulated entities. Appellants therefore respectfully request that this Court issue the appellate mandate as expeditiously as possible, consistent with the Court's internal processes.

Respectfully submitted,

/s/ David W. Ogden
David W. Ogden
Counsel for ACLI/NAIFA Appellants

cc: All counsel by CM/ECF

Exhibit A

U.S. Department of Labor

Employee Benefits Security Administration
Washington, D.C. 20210**FIELD ASSISTANCE BULLETIN NO. 2018-02**

DATE: MAY 7, 2018

MEMORANDUM FOR: MABEL CAPOLONGO, DIRECTOR OF ENFORCEMENT
REGIONAL DIRECTORS

FROM: LYSSA E. HALL
DIRECTOR, OFFICE OF EXEMPTION DETERMINATIONS

SUBJECT: TEMPORARY ENFORCEMENT POLICY ON PROHIBITED TRANSACTIONS RULES
APPLICABLE TO INVESTMENT ADVICE FIDUCIARIES

Background

This document announces a temporary enforcement policy related to the Department of Labor's rule defining who is a "fiduciary" under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (Code), and the associated prohibited transaction exemptions, including the Best Interest Contract Exemption (BIC Exemption), the Class Exemption for Principal Transactions In Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption), and certain amended prohibited transaction exemptions (collectively PTEs).

The rule, entitled "Definition of the Term 'Fiduciary'; Conflict of Interest Rule -- Retirement Investment Advice," the BIC and Principal Transactions Exemptions, and the amendments to existing PTEs became applicable on June 9, 2017. The Department delayed the applicability date of certain provisions in the PTEs to provide an extended transition period through July 1, 2019, to consider possible changes or modifications to the fiduciary rule and PTEs.¹ During the extended transition period, the BIC Exemption and Principal Transactions Exemption provided broad relief from certain prohibited transactions provisions of ERISA and the Code for investment advice fiduciaries that satisfied the "impartial conduct standards."² Further, the Department adopted a temporary enforcement policy stating that it would not pursue claims against fiduciaries who were working in good faith to comply with the fiduciary rule and applicable provisions of the PTEs, or treat those fiduciaries as being in violation of the fiduciary rule and PTEs.³ In response to these developments, many financial institutions created and implemented compliance structures designed to ensure satisfaction of the impartial conduct standards.

¹ See 18-Month Extension of Transition Period and Delay of Applicability Dates, 82 FR 56545, 56548, 56550, 56552 (November 29, 2017).

² See BIC Exemption section IX(d)(1), 81 FR 44773, 44784 (July 11, 2016) (setting forth impartial conduct standards); Principal Transactions Exemption section VII(d)(1), 81 FR 44784, 44791-92 (July 11, 2016) (same).

³ See Field Assistance Bulletin 2017-02 (May 22, 2017); 18-Month Extension of Transition Period and Delay of Applicability Dates, 82 FR at 56554.

On or about May 7, 2018, the United States Court of Appeals for the Fifth Circuit is expected to issue a mandate effectuating its opinion vacating the entire fiduciary rule, the BIC Exemption, the Principal Transactions Exemption, and related amendments to existing PTEs. The Department understands that financial institutions, advisers, and retirement investors may have questions regarding the investment advice fiduciary definition and related exemptive relief following the court's order. The Department intends to provide appropriate guidance in the future. At this point, however, the Department is aware that some financial institutions may be uncertain as to the breadth of the prohibited transaction exemptions that remain available for investment advice fiduciaries following the court's order. The uncertainty about fiduciary obligations and the scope of exemptive relief could disrupt existing investment advice arrangements to the detriment of retirement plans, retirement investors, and financial institutions. Further, some financial institutions have devoted significant resources to comply with the BIC Exemption and the Principal Transactions Exemption and may prefer to continue to rely upon the new compliance structures.

Based upon these concerns, the Department has concluded that financial institutions should be permitted to continue to rely upon the temporary enforcement policy, pending the Department's issuance of additional guidance. The Department is convinced that this temporary enforcement relief is appropriate and in the interest of plans, plan fiduciaries, plan participants and beneficiaries, IRAs, and IRA owners.

Temporary Enforcement Policy

Accordingly, for the period from June 9, 2017, until after regulations or exemptions or other administrative guidance has been issued, the Department will not pursue prohibited transactions claims 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 BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules.⁴ Of course, investment advice fiduciaries may also choose to rely upon other available exemptions to the extent applicable after the Fifth Circuit's decision, but the Department will not treat an adviser's failure to rely upon such other exemptions as resulting in a violation of the prohibited transaction rules if the adviser meets the terms of this enforcement policy.

The Department is evaluating the need for other temporary or permanent prohibited transaction relief for investment advice fiduciaries, including possible prospective and retroactive prohibited transaction relief. The Department will, of course, consider any applications for additional relief.

This Bulletin is an expression of the Department's temporary enforcement policy, and it does not address the rights or obligations of other parties.

⁴ On March 28, 2017, the Treasury Department and the IRS issued IRS Announcement 2017-4 stating that the IRS will not apply § 4975 (which provides excise taxes relating to prohibited transactions) and related reporting obligations with respect to any transaction or agreement to which the Labor Department's temporary enforcement policy described in FAB 2017-01, or other subsequent related enforcement guidance, would apply. The Treasury Department and the IRS have confirmed that, for purposes of applying IRS Announcement 2017-4, this FAB 2018-02 constitutes "other subsequent related enforcement guidance."