

June 25, 2018

Fifth Circuit Issues Mandate Vacating the DOL's Fiduciary Rule

On June 21, 2018, the Court of Appeals for the Fifth Circuit issued a mandate vacating the DOL's conflict of interest rule and related exemptions (the "fiduciary rule"). As a result, the Fifth Circuit's decision from March 15, 2018 is now effective, and the fiduciary rule has ceased to apply on a nationwide basis.

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Asset managers and other financial services providers may wish to reevaluate certain policies and procedures that were either put into place or modified in order to comply with the fiduciary rule. Examples of practices that may be appropriate to reevaluate include:

- Products to be offered to IRAs, including the use of commission-based brokerage accounts;
- Compensation grids and other sales incentive programs applicable to advice for retirement investors;
- The use of signing and retention bonuses for advisors;
- Changes to compliance manuals and policies made in connection with the fiduciary rule;
- The inclusion of fiduciary rule specific language in contracts (including placement agent agreements, credit agreements, and subscription agreements) and whether action should be taken to amend such agreements;
- Negative consent letters intended to ensure reliance on the exception for recommendations to sophisticated independent fiduciaries;
- The inclusion of certain disclaimers in offering and advertising materials or on company websites; and
- Internal rules and policies on marketing activity to retirement investors.

Institutions that are considering making changes to their practices should review their written policies and procedures carefully to ensure that they reflect any revised practices. If any changes are not reflected accurately in all written compliance manuals and policies, that could create potential exposure under ERISA or applicable securities laws.

Questions on Current Fiduciary Standard. While the Fifth Circuit's mandate clearly gives effect to the prior decision vacating the fiduciary rule, it is less certain what standard now applies to determine fiduciary status with respect to investment advice. We will await further DOL guidance on whether the DOL's prior "five-part test" is again applicable in determining whether a person should be treated as a fiduciary investment advisor, and on whether any new exceptions will be available for recommendations made to sophisticated independent fiduciaries. There may also be guidance from the DOL on whether other pre-fiduciary rule guidance, including prior guidance on investment education and rollover recommendations, should be regarded as restored or whether the DOL will take further action to repromulgate or revise such guidance. Institutions should consider the possibility of future guidance or clarification from the DOL in reevaluating their practices.

DOL's Enforcement Relief. Field Assistance Bulletin 2018-02, issued by the DOL on May 7, 2018, provided that financial institutions may continue to rely on the temporary enforcement relief policy that it adopted under Field Assistance Bulletin 2017-02. This transitional relief is dependent on compliance with the "best interest" standard, receiving no more than reasonable compensation, and making no materially misleading statements. Institutions

should determine whether to continue to comply with these requirements in order to rely on this transitional relief. Based on Field Assistance Bulletin 2018-02, there may be future DOL guidance forthcoming, potentially including new prohibited transaction exemptions.

If you would like to discuss the impact that the repeal of the fiduciary rule may have on any aspect of your business, please feel free to reach out to any of the attorneys listed below.