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Fifth Circuit Raises New Questions by Ruling that the Fiduciary Rule Is Invalid

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On March 15, 2018, the Court of Appeals for the Fifth Circuit vacated the DOL's conflict of interest rule and related exemptions (the "fiduciary rule"). The decision exacerbates what was already significant uncertainty about the future of the rule. This Alert sets out key information for asset managers and financial services providers to consider as they plan for potential changes in the regulatory landscape on investment advice.

The Current Status of the Rule. Until the Fifth Circuit's decision takes effect, which is anticipated to occur on May 7, 2018, the fiduciary rule still applies. However, many of the requirements of the Best Interest Contract Exemption and other exemptions have been delayed from January 1, 2018 until July 1, 2019, creating a transition period. Institutions and advisers remain subject to the rule and must either continue to comply with the requirements applicable during this transition period or risk being found to be in violation of the rule by a court.

The DOL's Enforcement Relief. Before the Fifth Circuit's decision, in connection with the delay in certain requirements of the exemptions to the fiduciary rule, the DOL also extended its prior temporary enforcement relief policy under Field Assistance Bulletin 2017-03. As a result, the DOL has not been pursuing claims against or treating fiduciaries as being in violation of the rule if they have been working diligently and in good faith to comply with its requirements. Following the Fifth Circuit's decision, the DOL indicated that it will not enforce the rule at present, further broadening its non-enforcement stance.

The Future of the Rule. The DOL can ask the Fifth Circuit for an *en banc* rehearing or petition the Supreme Court to grant certiorari, and a pending appeal before the Court of Appeals for the D.C. Circuit, not procedurally affected by the Fifth Circuit decision, raises some of the same questions considered by the Fifth Circuit. However, absent prompt reversal of the Fifth Circuit decision or other action by the DOL to defend the fiduciary rule, the rule will cease to have effect as early as May 7 of this year.

What May Change if the Rule Ceases to Be Effective? If the Fifth Circuit decision stands and the DOL does not either challenge it or proceed with other cases involving the fiduciary rule, then the rules defining the scope of fiduciary status with respect to investment advice would revert to their original 1975 state. Advisers and institutions may then wish to reevaluate certain changes that were made to practices and procedures to comply with the fiduciary rule. Examples of practices that may be appropriate to reevaluate include:

- Changes to compliance manuals and polices;
- The use of commission-based brokerage accounts;
- Compensation grids and other sales incentive programs applicable to advice for retirement investors;
- The inclusion of certain disclaimers in offering and advertising materials or on company websites; and
- Rules on marketing activity to retirement investors.

Institutions that are considering making changes to their practices following any eventual expiration of the fiduciary rule should review their written policies and procedures carefully to ensure that they reflect any revised practices.

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