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DOL Issues Temporary Enforcement Policy on the Fiduciary Rule Following Fifth Circuit Ruling

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The Fifth Circuit's March decision vacating the Fiduciary Rule appears likely to stand. (See our prior blog post on this decision: here.) On May 22, 2018, the Fifth Circuit denied motions by the States of California, New York and Oregon to reconsider a denial of their prior motions to intervene. Earlier this month the DOL recognized that the Fifth Circuit would likely issue a mandate at any time vacating the Fiduciary Rule in its entirety, along with the related Best Interest Contract Exemption and other related exemptions.

Recognizing that the decision to vacate the Fiduciary Rule and related exemptions could create uncertainty for financial advisers and financial institutions that have worked to comply with the Fiduciary Rule and related exemptions, the DOL provided in Field Assistance Bulletin 2018-02 (FAB 2018-02) that "financial institutions should be permitted to continue to rely upon the temporary enforcement policy." (See our prior blog post on the temporary enforcement policy: here.) Until further guidance is issued, the DOL "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." The impartial conduct standards require investment advice fiduciaries to: (i) provide the best interest standard of care, (ii) accept no more than reasonable compensation, and (iii) not make materially misleading statements.

FAB 2018-02 also notes that the Treasury Department and the IRS have confirmed they will adhere to a similar temporary enforcement policy regarding the prohibited transactions excise tax.