New DOL FAB Further Delays Enforcement of Fiduciary Rule, But Does Not Undo The Rule In Its Entirety

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On May 7, 2018, the DOL issued a Field Assistance Bulletin ("FAB") addressing the Department’s enforcement policy on the fiduciary rule that was recently vacated by the Fifth Circuit. Although the DOL has elected not to continue defending the rule before the Fifth Circuit, the FAB leaves the rule’s status in a holding pattern.

Rather than scrapping the rule in toto, the FAB continues a temporary “no enforcement” policy until the DOL issues new regulations or guidance. This posture has two key consequences:

1. DOL will not enforce the fiduciary rule’s test for determining whether a service provider is a fiduciary by reason of providing investment advice for a fee. This means that fiduciary status by reason of providing investment advice for a fee will be determined based on the five-part test from DOL’s 1975 regulation.

2. The Best Interest Contract and Principal Transaction exemptions are not dead. Investment advice fiduciaries may continue to rely on those exemptions if they work diligently and in good faith to comply with the impartial conduct standards set forth in those exemptions.