Death of the DOL Fiduciary Rule

On April 8, 2016, the Department of Labor (the "DOL") issued a new regulation that expanded the definition of an "investment advice fiduciary" (the "Fiduciary Rule"). An "investment advice fiduciary" is subject to a heightened fiduciary standard under the Employee Retirement Income Security Act of 1974 ("ERISA"). The Fiduciary Rule was difficult to interpret and the industry struggled to determine how to apply the expanded definition to the everyday activities of investment advisers. In response to the Fiduciary Rule, many advisers revised their subscription agreements and policies and procedures and some advisers (especially those that were exempt from SEC and state registration) chose to limit new investments by IRAs.

Effective June 21, 2018, the Fifth Circuit Court of Appeals vacated the Fiduciary Rule. The court ruled that it was overly broad and inconsistent with certain provisions of ERISA and accordingly that the DOL had exceeded its authority in issuing the regulation. While there is some speculation that the Fifth Circuit's decision conflicts with a Tenth Circuit ruling issued two days earlier, the prevailing view seems to be that there is no conflict and that the Fifth Circuit decision should apply nationally.

As a result, investment advisers are no longer required to comply with two parts of the Fiduciary Rule that caused the most concern, the Best Interest Contract Exemption and the Seller's Exception, when advising retirement plans and accounts. Whether an investment adviser will be considered an "investment advice fiduciary" will once again be determined under the five-part test issued by the DOL in 1975. Under that test, a person giving investment advice is a "fiduciary" only if the advice:

1. Is as to the purchase, sale or value of securities or other property;
2. Is rendered on a regular basis;
3. Is rendered pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a plan fiduciary;
4. Will serve as a primary basis for investment decisions with respect to plan assets; and
5. Will be individualized based on the particular needs of the plan.

Actions that would have constituted "investment advice" under the vacated Fiduciary Rule, but do not under the 1975 test include:

- Recommendations to "roll over" retirement plan assets to an IRA;
- "Hire-me" pitches coupled with a specific investment recommendation; and
- Recommendations to hire a specific investment adviser.

While the Fifth Circuit ruling has voided the Fiduciary Rule, the SEC has recently proposed a rule addressing the standard of conduct for broker-dealers when recommending a

securities transaction or investment strategy to retail investors (“Regulation Best Interest”). At this stage, it is unclear whether Regulation Best Interest will significantly affect investment advisers; we will be monitoring its development.