STROOCK
SPECIAL BULLETIN

IDES OF MARCH SPECIAL: 5TH CIRCUIT ASSASSINATES DOL FIDUCIARY RULE

What's Next in this Shakespearean Saga:
"Love's (Department of) Labor's Lost"?
"All's Well That Ends Well"?
"Much Ado About Nothing"?
or
"As You Like It"?

March 19, 2018

Important Decision – But Not the End of Drama (Yet)

On March 15, 2018, the United States Court of Appeals for the 5th Circuit ***vacated in its entirety the Department of Labor's revised investment advice fiduciary rule*** (the "Fiduciary Rule") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[1] This decision has the potential to have national applicability and finality on the Fiduciary Rule. Assuming there are no challenges to the decision or other adverse authority from other circuits for cases currently open and under appeal, it is likely that the "old" 1975 rule (the "Original Rule") will be reinstated. While there has been some discussion that other recent decisions in other circuits addressing the Fiduciary Rule may now result in a "split," no decision appears more sweeping or broad concerning the underlying legality of the Fiduciary Rule than the decision from the 5th Circuit. Moreover, because of the Constitutional nature of the decision, future Administrations—regardless of party—may have difficulty resurrecting the Fiduciary Rule or similar sweeping changes to the Original Rule absent Congressional action.

On March 16, the day after the decision was released, the Department of Labor announced that it was not enforcing *any* aspect of the Fiduciary Rule pending a review of the case. Previously, as mentioned in prior *Stroock Special Bulletins*, the Department of Labor had adopted a "good faith" compliance approach with respect to the Fiduciary Rule and certain of the accompanying exemptions, pending full compliance scheduled for July of 2019. Of course, the Department of Labor's position does not necessarily impact private

[1] The case may be accessed at http://www.ca5.uscourts.gov/opinions/pub/17/17-10238-CV0.pdf.

litigants so long as the Fiduciary Rule continues to remain in effect.

As discussed further below, ***the 5th Circuit's actions are not necessarily the end of the story***—at least not yet. And there are a number of additional considerations that clients and friends will continue to need to pay attention to as described in the next sections. The Department of Labor could challenge the decision, and there are other actions that could be taken that at a minimum would prolong the process of finality. With any such delay, already taxed financial services institutions trying to change business models and compliance approaches to meet the changes occasioned by the Fiduciary Rule may feel even more under the gun.

In addition, some institutions doing business in jurisdictions where other circuit courts have weighed in on prior challenges to the Fiduciary Rule may feel compelled—rightly or wrongly—to approach the 5th Circuit decision with caution. Needless to say, the Department of Labor's next steps will help to clarify the situation.

Fiduciary Rule Still Applicable—For Now. What Happens Next?

While the 5th Circuit has vacated the Fiduciary Rule, the rule is still technically in effect as the case continues to be under the jurisdiction of the 5th Circuit until it issues a "mandate" opening a limited period during which the Department of Labor can choose to contest the decision under applicable rules of procedure. The "mandate" would generally be expected to be issued several days following the decision, which opens a window for any such challenge that is expected to close by May 7, 2018 (45 days from the 5th Circuit's decision). During that period, the decision may be appealed by the Department of Labor (either en banc, or potentially to the Supreme Court) during which time the 5th Circuit's decision may be stayed. Of course, should the Department of Labor in fact seek review by the Supreme Court, additional delays would be likely. In addition, there is a pending appeal in the District of Columbia Court of Appeals that has been "on hold" pending the outcome of this 5th Circuit case. While other circuits have upheld challenges concerning aspects of the Fiduciary Rule, most recently in the 10th Circuit, given the sweeping nature of the decision of the 5th Circuit, those cases can be distinguished and likely do not create a "split." Those earlier cases in particular likely could be regarded as having a more narrow focus than the issues addressed by the 5th Circuit case. Nevertheless, there are some competing views that may cause institutions doing business in circuits that have previously upheld challenges to aspects of the Fiduciary Rule to proceed with greater caution pending additional clarity. Rightly or wrongly (and as of this writing, we believe more wrongly) these institutions may be concerned that the Fiduciary Rule will continue to be in effect in these jurisdictions, notwithstanding the 5th Circuit's decision.

Assuming that the Fiduciary Rule is in fact extinguished on or about May 7, the Original Rule's "five part" test would be reinstated. However, returning to *status quo ante* may not be as simple as it first appears—at least in the short term. Many legal and commercial challenges would likely remain.

Explanation of Holding

The 5th Circuit's revocation includes not only the Fiduciary Rule itself, but also the new prohibited transaction exemptions that were designed to limit the scope of the rule, and changes to existing exemptions. In what can only be described as a colorful opinion, the 5th Circuit's 2-1 decision in favor of the challenge to the Fiduciary Rule brought by the Chamber of Commerce and other associated trade organizations rejected the District Court's finding that the Department of Labor's Fiduciary Rule complied with the Administrative Procedures Act ("APA"). Indeed, noting that "Congress does not hide elephants in mouseholes," and that "[w]hen Congress has acted with a scalpel, it is not for the [Department of Labor] to wield a cudgel," the 5th Circuit's opinion regarded the Fiduciary Rule as an "abuse" of the Department of Labor's authority.[2] As the court noted:

> The Fiduciary Rule conflicts with the plain text of the "investment advice fiduciary" provision as interpreted in light of contemporary understandings, and it is inconsistent with the entirety of ERISA's "fiduciary" definition. DOL therefore lacked statutory authority to promulgate the Rule with its overreaching definition of "investment advice fiduciary."

Interestingly, the court could also be seen as casting some doubt on the Department's historic position about the interpretation of the statutory definition of "rendering" of "investment advice for a fee" under the Original Rule.

> Stockbrokers and insurance agents are compensated only for completed sales ("directly or indirectly"), not on the basis of their pitch to the client. Investment advisers on the other hand, are paid fees because they render investment advice. [Emphasis supplied].

And perhaps more tellingly:

> When enacting ERISA, Congress was well aware of the distinction, explained further below, between investment advisers, who were considered fiduciaries, and stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients. The Fiduciary Rule improperly dispenses with that distinction. **Had Congress intended to include as a fiduciary any financial services provider to investment plans, it could have written ERISA to cover any person who renders "*any* investment advice for a fee."** [Italics in the original; emphasis otherwise supplied].

Finally, there is an interesting footnote in the text concerning the so-called *Chevron* defense. The *Chevron* line of cases, which established certain authoritative principles pursuant to which an agency's decisions should be respected by courts,[3] is deferential "whether the agency's answer is based on a permissible construction of the statute," so long as Congress has not spoken directly to the precise issue at question.[4] Interestingly, the 5th Circuit noted that

> [T]he *Chevron* doctrine has been questioned on substantial grounds, including that it represents an abdication of the judiciary's duty under Article III [of the United States Constitution] "to say what the law is," and thus turn over judicial power to

[2] Although this *Stroock Special Bulletin* does not go into the arguments of the case in detail, we briefly give some examples of the court's flavorful language in the opinion:

- "This is the vice in BICE";
- "DOL is occupying the Dodd-Frank turf";
- "Moreover, that it took DOL forty years to 'discover' its novel interpretation further highlights the Rule's unreasonableness";
- "[T]he Rule's status is not salvaged by the BICE, which as noted was designed to narrow the Rule's overbreadth. The Supreme Court addressed such a tactic when it held that agencies 'are not free to adopt unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.'";
- "When agencies within the Executive Branch defy Congressional limits, they lord it over the people without proper authority. . . . It is not hard to spot regulatory abuse of power when 'an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy….'" [internal citations omitted].

[3] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Chevron U.S.A., Inc. v. Echazabal,* 536 U.S. 73 (2002).

[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. (1984) at 837.

> politically unaccountable employees of the Executive Department.

Later in its opinion, the court also noted that "there is no doubt that the Supreme Court has been skeptical of federal regulations crafted from long extant statutes that exert novel and extensive power over the American economy." The court also noted that in adopting the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") during the Obama Administration, and in particular, Section 913 which specifically calls for a universal standard of care for retail investors, "Congress had to be aware of the enormous impact of IRA investors on the overall market for personalized investment advice to retail customers." Therefore, the court continues, it would be

> [u]nreasonable to presume that Congress would not have referred to—or carved out—DOL's claimed broad power over ERISA's Title II transactions. Instead, the lack of any reference or carve-out in Dodd-Frank strongly suggests Congress, like DOL itself (until after 2016) did not suppose such DOL power was hidden in the interstices of ERISA.

Background

The Fiduciary Rule became applicable, in part, in June of last year, and the entirety of the regime, including accompanying prohibited transactions, was to become fully applicable beginning in July of 2019.[5] The Fiduciary Rule has been the source of enormous controversy, and the twists and turns in this Shakespearean drama since its first proposed form in 2010 can be found in prior *Stroock Special Bulletins*.

In addition to this timetable, there have been other important developments along the way. On February 3, 2017, President Trump signed a memo that directed the Department of Labor to reconsider aspects of the Fiduciary Rule and to "prepare an updated economic and legal analysis." That analysis has yet to be completed.

Separately, on June 1, 2017, Securities and Exchange Commission ("SEC") Chair Jay Clayton issued a call for public comments from retail investors (and others) on standards of conduct on investment advisers and broker-dealers. He has more recently indicated a desire to offer an SEC version of a fiduciary, best interest or standard of conduct rule later this summer or fall.

Finally, some states have separately begun to explore the adoption of their own fiduciary types of provisions to certain financial service providers, further complicating the landscape and potentially adding a dizzying array of conflicting standards and prohibitions. And in the Commonwealth of Massachusetts, at least one financial institution was alleged to have violated policies and procedures that looked very similar to some of the more onerous elements of the Best Interest Contract ("BIC") Exemption (also referred to in the opinion as the "BICE") at a time when compliance with those provisions, at least in that stated format, may not have been required. Indeed, it is regrettable that many have jumped to the conclusion that this case is an action brought "under" the Fiduciary Rule -- even though, of course, the Commonwealth would not have such powers with respect to a Federal statute such as ERISA.

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[5] It is important to consider that the Fiduciary Rule itself is and has been applicable since June of 2017. However, some of the conditions to prohibited transaction exemptions that were designed to work with the Fiduciary Rule, and in many cases may be necessary to conduct desired business with employee benefit plans subject to ERISA and the analogous provisions of the Internal Revenue Code of 1986, as amended (the "Code") (collectively "Plans"), have only become partially applicable. The Best Interest Contract Exemption and the Principal Transaction Exemption thus require compliance only with the "Impartial Conduct Standards" through June 30, 2019, with "full" compliance coming later.

Ignoring issues of Federal preemption and the like, other organizations, such as the National Association of Insurance Commissioners ("NAIC") have also taken a page out of the Fiduciary Rulebook. The NAIC Annuity Suitability Working Group recently issued a revised version of the NAIC Suitability in Annuity Transactions Model Regulation to incorporate a "best interest" standard.

What Can Be Expected?

It is important to point out at this juncture that the 5th Circuit's decision does not necessarily provide finality on the Fiduciary Rule. First, in the short run, at a minimum it would appear that the 5th Circuit's vacating of the Fiduciary Rule is not really effective until a "mandate" under the Federal Rules of Appellate Procedure is issued and a window for appeal has closed. That timing, in turn, may depend upon whether the Department of Labor may seek for a rehearing en banc. While many may point to President Trump's pre-election rhetoric criticizing the Fiduciary Rule, and his February 3, 2017 directive to the Department of Labor to reconsider the Fiduciary Rule as an indication of what is to happen next, it is not pre-ordained that the Department of Labor will not seek a rehearing, or perhaps even a challenge to the United States Supreme Court in light of the several other circuits that have upheld challenges related to the Fiduciary Rule. In this regard, it is likely that the earlier circuit decisions should likely be best regarded as tackling somewhat narrower substantive issues and that a "split among the circuits" has not occurred. Nonetheless, in a somewhat curious (or ironic) twist, earlier on the very same day as the 5th Circuit rendered its opinion, the United States Department of Justice sent a letter to the 5th Circuit providing notice of the 10th Circuit's ***upholding*** of the Fiduciary Rule, noting that

> as with [the 5th Circuit case], the [10th Circuit case] involved an APA challenge to the Fiduciary Rule's treatment of annuity products. The Tenth Circuit unanimously held that the Fiduciary Rule's treatment was not arbitrary or capricious. ***In reaching that conclusion, the Tenth Circuit reviewed the same administrative record, and rejected arguments indistinguishable from ones that appellants*** [in the 5th Circuit case] ***have raised*** . . . [emphasis supplied].

And, as mentioned, some institutions may believe that the 5th Circuit's decision will be limited in circuits where other courts have addressed aspects of the Fiduciary Rule. Apart from the merits or beliefs of senior political appointees in the Department of Labor about the advisability of the Fiduciary Rule, it is possible that the Department of Labor may feel compelled to challenge the 5th Circuit decision in order to preserve and protect its jurisdiction for other initiatives. And potentially, as indicated above, there could be a stay on the effectiveness of this revocation pending any appeal. On the other hand, the Department of Labor's acquiescence to the decision could clear the way for the SEC to adopt a more fulsome rule that would likely have the advantage of applying more broadly across retail accounts. Such acquiescence would likely be more in line with the President's previously stated objectives about regulatory overreach generally, and the Fiduciary Rule specifically. Nevertheless, were the Department of Labor to challenge the decision in defending a regulation of the predecessor Democratic administration, it would likely need to consider that a majority of the judges on the 5th Circuit were Republican appointees.

Another case pending before the District of Columbia U.S. Court of Appeals brought by the National Association of Fixed Annuities ("NAFA") has been on temporary pause pending the outcome of this case in the 5th Circuit. It would be interesting to see what happens if NAFA simply dropped its appeal given the 5th Circuit's broad ruling. Indeed, some may wonder what stands to be gained given the breadth of the 5th Circuit holding. Most likely, such a withdrawal would leave standing the very broad ruling in the 5th Circuit without creating opportunities for further confusion.

What Happens if This is Not the End?

A Veritable *Twelfth Night* of Uncertainty?

Many financial services providers have been literally living and breathing the Fiduciary Rule for several years trying to adjust their businesses to meet the needs of regulatory challenges while trying to offer products and services that they believed were appropriate for the Plan market. This has not been easy for many. And what has made it harder has not only been the almost Herculean efforts that are required for compliance with the Fiduciary Rule and its relevant exemptions—a reality that necessitated the Department of Labor's extension of the full compliance deadline to July of 2019—but the uncertainty occasioned by the Department of Labor's required review of the Fiduciary Rule and the likelihood of a separate rule by the SEC that may, in turn, affect the Department of Labor's revised cost benefit analysis. The clock continues to tick down to a "final" compliance date of July 2019, and as many know, it is not so easy to change business lines, product offerings, intermediary distribution agreements, policies and procedures, and compliance training on a dime or to invest full steam ahead under one set of operating assumptions, only to have to change them with less time for maneuverability.

If the 5th Circuit decision is contested or stayed, what is the impact on timing? What if the NAFA appeal in the 10th Circuit is permitted to proceed on the merits? How long will that take? And what would happen if any decision created a true split on questions of legal applicability? Until these questions are addressed, the picture for the short term at least is likely to remain unclear. And regardless, many institutions may still want to consider these issues not only in the context of the outcomes with respect to the Fiduciary Rule, but also other potential rule initiatives, including that expected by the SEC later this year.

Areas of Continued Stress

This may mean continued uncertainty and stressors on areas such as financial representative compensation practices and financial arrangements amongst product manufacturers and distributors.

- **Financial Representative Compensation.** Many financial services providers have had to face many vexing questions about how to deal with compensation for financial services representatives that became "new" fiduciaries under the Fiduciary Rule. Structural changes to firms' compensatory arrangements and pay grids – to the extent deemed appropriate – have been a significant driver of resources, planning and concern. The BIC Exemption called for policies and procedures at the representative level that avoid "***quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives***" that are intended or would reasonably be expected to cause the representative to make recommendations that are not in the "'Best Interests' of the Plan' or are in the representative's own interests." And while the Department of Labor has indicated that until July 2019, they will look only for good faith compliance, many different market participants are at different stages of their "rollouts" to accommodate the Fiduciary Rule and compliance with the BIC Exemption or other models addressing these very thorny financial representative compensation and retention issues more comprehensively and definitively. Institutions have also had to grapple with related issues in hiring financial professionals. How will any delay impact these difficult issues?

- **Distribution and Other Relationships**. Many financial product manufacturers (*i.e.*, mutual fund complexes) have been engaged in significant negotiations with their intermediary distribution partners (*i.e.*, broker-dealers, recordkeepers, etc.) associated with pricing and fees to accommodate intermediaries' compliance with the BIC Exemptions and other commercial responses to the Fiduciary Rule. The ongoing development of "clean" and T shares is but one aspect of this complicated market-wide trend. One question is how any such delay—with the clock still ticking—will affect ongoing discussions between sponsors and intermediaries as they continue to work through these issues. Do they stop? Wait? Go full speed ahead? Reverse course or "re-trade" prior agreed upon changes by reason of the Fiduciary Rule?

- **Products and Services Permitted Under Original Rule Still On Hold?**

  FX. It is no secret that certain products and services under the Fiduciary Rule do not really "work." Indeed, many retail based Plan accounts do not have access to a number of common products and services they used to have prior to June of 2017. For example, the Fiduciary Rule has made it all but impossible for retail Plan accounts to effect even the simplest of foreign currency transactions associated with foreign denominated assets (*i.e.*, a conversion of a Canadian dollar dividend of a Canadian publicly listed company to U.S. dollars) with their financial institution.

  IPOs. Similarly, most Plans in the retail space are now effectively precluded under the Fiduciary Rule from purchasing securities in initial public offerings in which their financial institution participates.

  Financial Institution Issued Notes. Similar limitations apply to principal transactions of securities issued by the financial institution. Many Plans have historically found these to be very useful to gain exposures to assets or markets they cannot otherwise access directly with better credit backing the obligation than if they had been able to purchase the exposure directly. Nevertheless, the Fiduciary Rule and the Principal Transaction Exemption ("PrTE") effectively prohibited these types of common products. The problem has been even more pronounced for those financial institutions whose home office is located outside the United States.

  Agency Transactions in Securities for IRA "Advice" Fiduciary Relationships. Although the Fiduciary Rule expanded the universe of many fiduciaries so that many commissioned based individuals dealing with IRAs would have to consider themselves at risk of such a characterization, it limited the applicability of a prohibited transaction class exemption ("PTCE") that permits advisory IRA accounts to purchase and sell securities on an agency basis through their home institution. Instead of a more refined list of conditions of that exemption under the Original Rule and that exemption, such transactions would now likely be covered under the BIC Exemption with its many conditions.

  Private Funds. Similarly, many alternative fund sponsors have limited (or banned) participation of certain self-directed Plan accounts (including IRAs) that would have been regarded as suitable investors for the fund prior to the changes occasioned by the Fiduciary Rule. Most, if not all of these investors would be (and are) considered "sophisticated" under most regulatory standards but for the bright lines drawn by the Fiduciary Rule. Many plan investors may continue to be locked out of these arrangements.

Complementary and Open Architecture Platforms. And of course, many institutions have concluded that offering both proprietary and third party products and services—even in a complementary fashion—poses risks that are very difficult to manage under the BIC Exemption. The special disclosure rules that require justifications for proprietary versus third party "recommendations" and the "could affect best judgment as a fiduciary" aspects of the BIC Exemption have served as a disincentive for maintaining or enhancing previously desired "open architecture" platforms on a commission based model.

Annuities. The concerns associated with variable annuity and certain indexed annuities products and the changes to PTCE 84-24 have been pronounced. The Department of Labor revoked relief under PTCE 84-24 for IRA and ERISA Plan transactions involving variable annuity contracts, contracts that constitute securities under federal securities laws, and transactions involving the receipt of commissions by mutual fund principal underwriters in connection with the purchase of mutual fund shares. In addition, the permissible sales commissions covered under PTCE 84-24 were substantially narrowed.

IRA and Other Rollovers. The Fiduciary Rule makes it very hard for most ordinary course discussions about rollovers from qualified plans to IRAs (or distributions of any kind) to escape the taint of investment advice fiduciary status. This change itself was a major departure from established practice and has been enormously controversial. Market participants will have to continue to think about their approaches to IRA rollovers during any continued period of uncertainty.

Investment Education. Historically, the Department of Labor has sought to distinguish between investment education and investment advice. Internal Bulletin ("IB") 96-1 generally permitted the furnishing of (1) Plan information, (2) general financial, investment and retirement information, (3) asset allocation models, and (4) interactive investment material by a Plan sponsor to its participants (but has been commonly applied more broadly in the marketplace, an approach both confirmed originally by the Department of Labor). The investment education exception under the Fiduciary Rule has been observed to be significantly more confining. Institutions will need to consider how to address investment education types of information during any such period of continued uncertainty.

- **Policies, Procedures, Training and Documentation**. An additional stressor, of course, is the continued need to provide appropriate policies, procedures, training, documentation and oversight. If the business models or approaches remain subject to the vagaries of continued legal uncertainty, important resources will continue to be expended. This is all the more the case in light of the appearance of state actors—notably the Commonwealth of Massachusetts—that may be looking for "gotcha" language crafted in response to, but not necessarily intended to be effective yet in light of, the Fiduciary Rule as it is designed to be in full effect in July 2019.

And If This is the End? "*As You Like It*"?

If indeed the 5th Circuit's decision signals the death knell of the Fiduciary Rule, it would likely be a gross understatement to assume that a return to *status quo ante* would be effortless. To be sure, differing financial institutions would have different issues and considerations to address, but it is our view that there would still be significant dislocation and expenses for many firms. This ignores, of course, considering other potential regulation that may be in the offing from the SEC or others.

- ***Plus ça change, plus c'est la même chose?*** Those that have invested enormous resources into changing their business models will have to consider what direction they wish to take, and at what speed. While it is true that some institutions have openly embraced the Fiduciary Rule, some behind the scenes have done so more enthusiastically than others. And in many of those cases, the costs to the retirement plan universe has been demonstrable if only with respect to making unavailable many products and services that had previously been able to be offered under the Original Rule.

- **Those Who Embraced or Adopted Fee Based Models.** Many institutions that have already taken the "plunge" either begrudgingly or opportunistically to change pre-existing commission based brokerage relationships to fee based fiduciary relationships may find it a challenge to return to *status quo ante* – at least in the short run. One can only speculate about the impacts this dynamic will have over the longer term for institutions' business design and product availability.

- **Those That Have Adopted BIC**. Perhaps most fundamental is the question of how institutions that have decided to utilize the BIC Exemption will be able to operate in an Original Rule world. Many institutions may discover that what can work under the BIC Exemption may not necessarily work as effectively under the Original Rule given ERISA's broad statutory provisions. We believe market participants may underestimate the legal issues associated with this aspect. Complying with the BIC Exemption may or may not suffice under the Original Rule, and many financial institutions that have already invested substantial amounts of time, energy, resources and pain in developing their business models may be forced to reconsider these adaptations again.

- **Orphaned or Terminated Accounts**. Because of the Fiduciary Rule and the BIC Exemption, many institutions felt the need to convert existing commission based accounts to fee based arrangements. The challenges of dealing with smaller retirement accounts—many of which may only have a handful of inexpensive trades in a given year—under the BIC Exemption has been a source of significant concern. Worse, a switch to a fee based arrangement for these accounts may be more expensive and many institutions had considerable challenges in concluding that it would be in the best interest of the client. Some institutions have walled off communications with these accounts for fear of being tainted in being an investment advice fiduciary under the Fiduciary Rule simply for sharing market color. Others terminated or strongly urged those accounts to migrate to other platforms. How these institutions may seek to re-engage and re-establish contact with these clients will remain a commercial as well as legal burden. Assets and clients in motion will likely continue as a result.

- **Changes to Other Exemptions**. Many prohibited transaction exemptions were modified by the Fiduciary Rule. Some required the imposition of the so-called Impartial Conduct Standards. Others were significantly curtailed (for example, the use of PTCE 86-128 for advisory IRAs for agency transactions in securities effected through the advisor's institution or its affiliate with limited conditions) or outright circumscribed (i.e., PTCE 84-24 for many types of common insurance products). How will institutions reconsider the use of such exemptions and when?

- **Investment Education**. The Fiduciary Rule contained significant changes to the definition of investment education as opposed to investment advice. These changes represented a major departure from long established principles going back to the 1990s. How does the revocation of the Fiduciary Rule impact this landscape? And how will market participants respond in terms or practice?
- **Distribution and Pricing**. As noted above, many financial product manufacturers (*i.e.*, mutual fund complexes) have been engaged in significant negotiations with their intermediary distribution partners (*i.e.*, broker-dealers, recordkeepers, etc.) associated with pricing and fees to accommodate intermediaries' compliance with the BIC Exemptions and other commercial responses to the Fiduciary Rule. What happens now? Do they stop? Reverse course or "re-trade" previously agreed upon arrangements effected in response to the Fiduciary Rule? Who leads this "dance"?
- **Compensation for Investment Professionals**. As noted above, many different market participants are at different stages of their "rollouts" to accommodate the Fiduciary Rule and compliance with the BIC Exemption or other model. Institutions have also had to grapple with related issues in hiring financial professionals. Depending on what had been communicated and how far along an institution is in the process of altering its compensation models, how difficult will it be to change, or incorporate elements of the "*ancien regime*" if so desired?
- **Application to Policies, Procedures, Training and Documentation**. Many institutions may find that they will need to quickly and methodically address those policies, procedures, protocols and training that they have adopted thus far in response to the Fiduciary Rule to the extent that any adjustments are desired. Careful planning and holistic thinking must be combined with an attention to detail especially in light of some new State actors' (notably the Commonwealth of Massachusetts) desire to make hay with "gotcha" investigations resulting from unanticipated consequences of earlier responses to the rule that may no longer be relevant.

Conclusions

The 5th Circuit's case represents a major new development on the years' long saga associated with the Department of Labor's investment advice fiduciary rule. The impacts of those changes, and the evolutions which have followed have been felt throughout the financial industry. Nevertheless, this latest decision does not necessarily mark the end of the story—yet. In true Shakespearean fashion, at some point we will all hopefully be able to say, *All's Well that Ends Well*. It may now, however, end sooner than previously thought. If so, while other regulatory initiatives (*i.e.*, SEC) may take a more prominent role in adopting investor based protections, fewer opportunities may arise to resurrect the Fiduciary Rule in any similar form under the current or any future administration absent Congressional action.

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