

# FIDUCIARY RULE UPDATE

*Hodgson Russ Employee Benefits Newsletter*  
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## Practices & Industries

Employee Benefits

There have been a number of significant recent developments regarding the ongoing efforts by multiple federal agencies to establish new fiduciary rules and standards of conduct for those who provide investment advice and recommendations to retirement plans.

First, on April 18, the Securities and Exchange Commission (SEC) published a proposed package of guidance that establishes a standard of conduct for broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities; clarifies the standard of conduct for investment advisers; and requires new disclosures by investment advisers and brokers that includes information regarding the services offered, the required standard of conduct and the fees and costs associated with those services, identifies certain conflicts of interest, and discloses whether the firm and its financial professionals currently have reportable legal or disciplinary events. The SEC has requested comments on the new guidance – the comment period will remain open until August 7, 2018.

Second, as we reported in our March newsletter, the Court of Appeals for the Fifth Circuit decided that the Department of Labor's (DOL's) fiduciary rule should be effectively nullified and vacated (see *U.S. Chamber of Commerce v. DOL* (5th Cir 2018)). On or about May 7, 2018, absent further proceedings, the Fifth Circuit was expected to issue a mandate making effective its opinion vacating the entire fiduciary rule. Following the Fifth Circuit's ruling, the DOL immediately announced that, pending further review, it was suspending enforcement of the fiduciary rule. The DOL had the option until as late as April 30 to ask the Fifth Circuit to reconsider its decision. The DOL, however, opted not to file a petition for rehearing by the April 30 deadline. Whether the DOL's decision not to petition for rehearing might be tied to the SEC's issuance of its own set of proposed standards of conduct on April 18 is not entirely clear, but it should be noted that the DOL still has the option (until June 13) to formally appeal the Fifth Circuit's decision to the Supreme Court.

Third, on May 7, the DOL issued Field Assistance Bulletin (FAB) 2018-02 in which the DOL announced it is further delaying its enforcement of the fiduciary rule (i.e., it 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 Best Interest Contract Exemption and Principal Transactions Exemption, or treat such fiduciaries

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as violating the applicable prohibited transaction rules). The DOL believes the temporary enforcement relief is appropriate and in the interest of plans, plan fiduciaries, plan participants and beneficiaries, IRAs, and IRA owners given the uncertainty about fiduciary obligations and the scope of exemptive relief in the wake of the Fifth Circuit's decision in *U.S. Chamber of Commerce*. The FAB does not go as far as to fully withdraw the DOL's new fiduciary rule, so the rule technically remains in effect. But the combination of the issuance of the SEC guidance, the DOL's decision not request rehearing in *U.S. Chamber of Commerce*, and the DOL's extended non-enforcement posture raises significant questions about whether the DOL will continue its efforts to uphold its new fiduciary rule.