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DEVELOPMENTS IN THE REGULATION OF FIDUCIARY INVESTMENT ADVICE

Earlier this year, the SEC released extensive proposals seeking industry input on existing standards of care for investment advisers and broker/dealers serving retail investors and on the implementation of new standards. The authors describe the history and current status of the DOL fiduciary rule that the SEC proposals would replace and then turn to a detailed exploration of the proposals and the initial response to them. They close with an overview of state-level developments affecting fiduciary investment advice.

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Investment advisers and broker/dealers today are operating in an industry severely disrupted by shifting regulations and customer preferences. The fiduciary standards of the widely contested rule amendments adopted by the U.S. Department of Labor (the "DOL") in April 2016 (the "DOL Fiduciary Rule" or "the Rule") transformed the way mutual funds and other investment products and services are priced and sold by asset managers. It also introduced the complexities of the DOL's prohibited transactions and conditional exemption framework into compliance programs across the industry. Now, the Rule has been abandoned mid-implementation, and the SEC has offered an alternative regulatory structure with a reinterpretation of the existing fiduciary standards for investment advisers, new conduct standards for broker/dealers, and related disclosure and other rules proposed in April 2018 (the "SEC Proposals"). The final form of the SEC Proposals (currently weighing in at around 1,000 pages and over 1,800 footnotes) and the question of whether the SEC will eventually adopt them remain uncertain, as does the fate of the DOL Fiduciary Rule. In the background, some states have taken matters into their own hands, proposing or adopting regulations and pursuing enforcement actions around fiduciary investment advice.

This article traces the recent history of the DOL Fiduciary Rule, explores the SEC Proposals and the initial response to them, and provides an overview of state-level developments affecting fiduciary investment advice. It also suggests some ways that asset management firms might, as appropriate, proactively address these developments.

I. THE END OF THE DOL FIDUCIARY RULE?

The DOL Fiduciary Rule, adopted in April 2016 near the end of the Obama Administration, expanded the

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