Akin Gump
STRAUSS HAUER & FELD LLP

Executive Compensation, Employee Benefits and ERISA Alert

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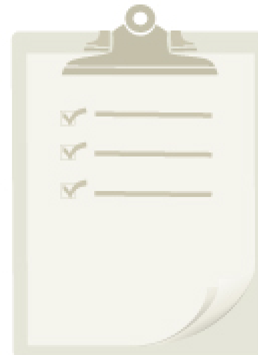

Key Points

- The Department of Labor's (DOL) new Fiduciary Rule will become partially effective on June 9, 2017, with the remainder scheduled to become effective on January 1, 2018.
- In our view, the Fiduciary Rule is likely to have little direct impact on typical hedge and private equity fund advisers. However, we recommend that fund managers seek certain representations from plan and individual retirement account (IRA) investors to help ensure that they do not become inadvertent fiduciaries under the new rules.
- In addition, care should be taken to ensure that marketing to small plans and IRAs is not so directed as to be deemed to be a fiduciary act.

DOL's Fiduciary Rule to Become Partially Effective June 9, 2017

The Fiduciary Rule, which expands the circumstances under which providers of investment advice may be considered Employee Retirement Income Security Act of 1974 (ERISA) fiduciaries, was initially published in the Federal Register on April 8, 2016, became effective on June 7, 2016, and had an original applicability date of April 10, 2017. On March 2, 2017, in response to a February 3, 2017 presidential memorandum directing the DOL to re-examine the Fiduciary Rule, the DOL published a notice proposing a 60-day delay in the applicability date of the Fiduciary Rule. On April 7, 2017, the DOL promulgated a final rule delaying the applicability date of the Fiduciary Rule by 60 days from April 10, 2017 to June 9, 2017.

The April 7, 2017 rule also introduced a transition period regarding the exemptions associated with the Fiduciary Rule. Although the exemptions would also become applicable on June 9, 2017 until January 1, 2018, fiduciaries relying upon the exemptions would have to adhere to only the "impartial conduct standard" to qualify for exemptive relief. The "impartial conduct standard" requires that advisers (i) give advice that is in the "best interest" of the retirement investor; (ii) charge no more than reasonable compensation; and (iii) make no misleading statements regarding investment transactions, compensation or conflicts of interest. In this context, "best interest" has two components: (i) prudence (i.e., meeting a professional standard of care); and (ii) loyalty (i.e., the advice must be in the interests of the customer, rather than the adviser).

Although many practitioners expected the Fiduciary Rule to be further delayed or withdrawn, in an Op-Ed published on May 22, 2017 in *The Wall Street Journal*, United States Secretary of Labor Alexander Acosta wrote that the DOL could find “no principled legal basis” to change the applicability dates of its new Fiduciary Rule. Therefore, certain provisions of the Fiduciary Rule will become applicable on June 9, 2017, with the remainder becoming applicable on January 1, 2018.

Also on May 22, 2017, the DOL issued a Field Assistance Bulletin (FAB) signaling its intention to not vigorously enforce the Fiduciary Rule prior to the January 1, 2018 applicability date. Under this FAB, the DOL states that it will not pursue claims against fiduciaries “who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions.” The FAB also notes that the Internal Revenue Service moratorium on excise taxes associated with activities subject to the Fiduciary Rule will continue until January 1, 2018.

Finally, also on May 22, 2017, the DOL issued *Conflict of Interest FAQs (Transition Period)*. These FAQs present questions regarding the application of the Fiduciary Rule during the period from June 9, 2017 through January 1, 2018. Of note, one of the FAQs discusses the carveout from the Fiduciary Rule for transactions with plan clients that the adviser reasonably believes are represented by independent fiduciaries having financial expertise (e.g., managing at least $50 million in assets). The FAQ makes clear the DOL view that the “reasonably believes” requirement can be met by the adviser obtaining representations regarding the satisfaction of the requirements from the plan client, including in the form of a negative consent. In this regard, hedge fund advisers should consider obtaining appropriate representations from their plan investors.

The FAQs also note that additional changes may be made to the Fiduciary Rule prior to the January 1, 2018 applicability date in response to comments received by the DOL. In addition, the FAQs provide that the January 1, 2018 applicability date may be further delayed.

While the Fiduciary Rule has been characterized by some as the most important rulemaking under ERISA since the enactment of ERISA, we continue to expect that the Fiduciary Rule will have limited direct impact on typical investment advisers to hedge and private equity funds. For example, almost all dealings with large plans represented by an independent fiduciary having financial expertise are excluded from the Fiduciary Rule. When dealing with small plans and IRAs, however, advisers should take care that no marketing or other communication is individualized to the extent that it would be considered an investment recommendation. This is especially important to hedge and private equity fund advisers because it is unlikely that they qualify for the exemptive relief of the “best interest contract” exemption that accompanies the Fiduciary Rule. Hedge and private equity fund advisers may also be indirectly impacted to the extent that they have relationships with platform providers who may be more directly impacted by the Fiduciary Rule.

Contact Information

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