

## Executive Compensation, Employee Benefits and ERISA Alert

June 30, 2017

### FAQs for Fund Managers Related to DOL'S Fiduciary Rule Which Became Partially Effective June 9, 2017

As stated in our May 25, 2017 [Executive Compensation, Employee Benefits and ERISA Alert](#), the Department of Labor's (DOL's) new fiduciary rule ("Fiduciary Rule") became partially applicable on June 9, 2017. Set forth below are a few questions that a typical private fund manager might have in response to the Fiduciary Rule, and our responses thereto.

We note, on June 29, 2017, the DOL issued a request for information in respect of the Fiduciary Rule. In such request, the DOL has asked a series of questions regarding the impact and implementation of the Fiduciary Rule. Although too early to predict how the DOL may react to any information submitted, the tenor of these questions seems to suggest a desire to simplify and/or modify certain provisions of the rule and the terms of the related prohibited transaction exemptions. What, if any, impact that may ultimately have on an investment fund manager and the answers to the Q&As set forth below is unknown.

#### **Q1: What should we do if we are raising a new collective investment fund?**

We recommend that subscription documents include certain representations from "benefit plan investors"<sup>1</sup> ("Benefit Plan Investors") to the effect that they are represented by a financial expert qualifying the investor for the carve-out from the Fiduciary Rule. See [here](#). Please note that given the uncertainty associated with these rules, managers should consult with us if they are considering accepting subscriptions from IRA and certain small ERISA plans (under \$50 million of assets) that cannot make these representations ("Unrepresented Accounts").

#### **Q2: Is there anything we need to do if our private equity fund is closed prior to June 9, 2017, and/or we no longer anticipate accepting new (or follow-on) subscriptions from Unrepresented Accounts?**

In general, no. Benefit Plan Investors that invested prior to June 9, 2017, should be grandfathered (this would include making subsequent capital contributions to a private equity fund in respect of a commitment). However, we recommend that the representation noted in our response to Q1 be included in any transferee documentation if the transferee is a Benefit Plan Investor. If either of the parties is an Unrepresented Account, care must be given not to make any "recommendation" that could subject the manager or its affiliates to the Fiduciary Rule.

#### **Q3: Is there anything we should do with our existing hedge fund?**

With respect to your existing investors, we recommend that a manager send a notice to all Benefit Plan Investors that contains the substance of the representations noted in our response to Q1 in the form of a negative consent. See [here](#). *If you have no current Benefit Plan Investors and are not actively marketing, there is no action that is needed.*

If you are continuing to market your hedge funds, we recommend that you obtain affirmative representations from Benefit Plan Investors that are adding additional capital contributions to your hedge fund or new investors making their first investment to your hedge fund in the form described in Q1. To facilitate obtaining these affirmative representations, a manager may either (i) obtain a stand-alone certificate, a form of which is included [here](#) or (ii) amend the hedge fund's existing subscription documents, including the additional subscription form to be used by existing Benefit Plan Investors making additional capital contributions. The representation to be added to your subscription documents can be found [here](#), and the revised additional subscription form can be found [here](#).

**Q4: Should we be concerned about investor communications?**

Until there is further clarity on these rules, it is important for managers to make certain they are not providing investment "recommendations" to either Unrepresented Accounts and/or any other Benefit Plan Investors for which they have not attained the representations described above. Materials sent by a manager to existing and prospective investors may be deemed a recommendation for purposes of the Fiduciary Rule. Accordingly, we recommend that you include in all firm marketing materials (including reporting if it contains information that can be construed as marketing) the following legend: "**The information contained in this [ ] is not intended to be, and should not be viewed as "investment advice" within the meaning of 29 C.F.R. §2510.3-21 or otherwise.**"

**Contact Information**

If you have any questions regarding this alert, please contact the Akin Gump lawyer with whom you usually work or

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<sup>1</sup> That is, “employee benefit plans” subject to the fiduciary provisions of the Employee Retirement Income Security Act of 1974, as amended; “plans” subject to Section 4975 of the Internal Revenue Code of 1986, as amended; and certain other parties whose assets are deemed to include assets of such employee benefit plans and plans.