Managers of Investment Funds: It Is Time to Consider Action to Address the DOL Fiduciary Rule

The applicability date of the new Department of Labor (DOL) fiduciary rule is less than a month away. Now is the time for investment managers of investment funds to consider taking action to address this rule as it relates to new sales of fund investments to ERISA plans and individual retirement accounts (IRAs).

Background

On April 6, 2016, the DOL released its final regulation defining “fiduciary”, which expands the circumstances under which consultants, advisers and others become fiduciaries for purposes of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the prohibited transaction provisions of the Internal Revenue Code of 1986, as amended (Internal Revenue Code), as a result of providing “investment advice.” The regulation became effective in June 2016 and was originally scheduled to become applicable on April 10, 2017. However, pursuant to a memorandum from President Trump requesting the DOL to review certain matters relating to the rule, the DOL delayed the applicability date until June 9, 2017 in order to undertake that review. Nevertheless, opponents of the rule continue to lobby to have the regulation further delayed, and, on May 4, 2017, the House Financial Services Committee passed the Financial Choice Act, which contains a provision to repeal the fiduciary rule entirely.

Assuming the regulation is not repealed, a party’s activities relating to the marketing of a fund investment to plans and IRAs, where that party receives compensation in connection with the investment, may cause the party to be a fiduciary under ERISA and the Internal Revenue Code. This is relevant to both plan assets funds and non-plan assets funds.

The regulation provides certain circumstances under which the provision of investment advice will not give rise to fiduciary status. Specifically, a person providing investment advice will not be a fiduciary if the person provides the investment advice to an “expert fiduciary” of a plan or IRA that is independent of the advice provider and certain conditions are satisfied. An “expert fiduciary” includes the following:

- a U.S.-regulated bank;
- a U.S.-regulated insurance carrier;
- a federal or state-registered investment adviser;
- a U.S.-registered broker-dealer; or
in the case of an ERISA plan (but not an IRA), any independent fiduciary that holds or has under management and control total assets of at least $50 million.

In order to avoid becoming a fiduciary in this case, the advice provider must comply with the following conditions:

- the advice provider must know or reasonably believe that the expert fiduciary can evaluate investment risks independently (and the advice provider can rely on written representations from the plan or the fiduciary to satisfy this condition);
- the advice provider must fairly inform the expert fiduciary: (a) that it is not undertaking to provide impartial investment advice or give advice in a fiduciary capacity; and (b) of the existence and nature of its financial interests;
- the advice provider must know or reasonably believe that the expert fiduciary is a fiduciary under ERISA or the Internal Revenue Code with respect to the transaction and is responsible for exercising independent judgment (and the advice provider can rely on written representations from the plan or the fiduciary to satisfy this condition); and
- the advice provider must not receive any compensation for providing investment advice in connection with the transaction.

**Action to Consider**

Managers of funds that sell interests to ERISA plans or IRAs should consider requiring ERISA plans and IRAs making new investments after June 9, 2017 to execute the attached document. For a fund with monthly subscriptions, the first subscription date to which this would apply is the July 1, 2017 subscription date. The attached document is intended to clarify that the fund manager is not acting as a fiduciary to those investors and to permit the fund manager to rely on the exception from fiduciary status described above. If the ERISA plan or IRA investor cannot execute the attached document, the fund manager may want to consult ERISA counsel to discuss the consequences or other potential alternatives. No action is necessary with respect to existing investments by ERISA plans or IRAs.

**Please click here to view a sample Subscriber Representations Relating to the DOL Advice Fiduciary Rules.**

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

Beth J. Dickstein  
Partner  
bdickstein@sidley.com  
+1 312 853 6093
Investment Funds, Advisers and Derivatives Practice

Sidley has a premier, global practice in structuring and advising investment funds and advisers. We advise clients in the formation and operation of all types of alternative investment vehicles, including hedge funds, fund-of-funds, commodity pools, venture capital and private equity funds, private real estate funds and other public and private pooled investment vehicles. We also represent clients with respect to more traditional investment funds, such as closed-end and open-end registered investment companies (i.e., mutual funds) and exchange-traded funds (ETFs). Our advice covers the broad scope of legal and compliance issues that are faced by funds and their boards, as well as investment advisers to funds and other investment products and accounts, under the laws and regulations of the various jurisdictions in which they may operate. In particular, we advise our clients regarding complex federal and state laws and regulations governing securities, commodities, funds and advisers, including the Dodd-Frank Act, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Act of 1933, the Securities Exchange Act of 1934, the Commodity Exchange Act, the USA PATRIOT Act and comparable laws in non-U.S. jurisdictions. Our practice group consists of approximately 120 lawyers in New York, Chicago, London, Hong Kong, Singapore, Shanghai, Tokyo, Los Angeles and San Francisco.

To receive Sidley Updates, please subscribe at [www.sidley.com/subscribe](http://www.sidley.com/subscribe).

Sidley and Sidley Austin refer to Sidley Austin LLP and affiliated partnerships as explained at [www.sidley.com/disclaimer](http://www.sidley.com/disclaimer).