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Key Considerations for Asset Managers under the DOL's Fiduciary Rule

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On June 9, the long-anticipated compliance date for the U.S. Department of Labor's fiduciary rule arrived. As a result, many institutions and individuals, including asset managers of open- and closed-end funds, broker-dealers, and financial advisers may become fiduciaries to their retirement investors, including private pensions and IRAs. In general, any individual or institution that makes a recommendation to a retirement investor about buying, holding or selling a security or other investment property and receives a fee (direct or indirect) will be a fiduciary unless an exception applies. **This means that carrying on with business as usual may cause you to be a fiduciary, even if your interactions with clients remain unchanged.**

Many financial institutions, including asset managers, are seeking to avoid fiduciary status under the rule, but that will not always be possible. Further, even if an asset manager does not intend to be a fiduciary under the rules, it may still be deemed a fiduciary based on its activities. Fiduciaries must find an exception or exemption to rely on, such as the exception for advice to financially sophisticated independent fiduciaries or the new Best Interest Contract ("BIC") Exemption, in order to continue to advise their retirement investor clients and to be paid in connection with related investments. There is currently a transition period until January 1, 2018 (this date may be subject to change in the future), during which (1) the BIC Exemption is subject to relaxed requirements, and (2) the DOL and IRS are generally taking a non-enforcement stance towards institutions and individuals who are working diligently and in good faith to comply with the rule. The fiduciary rule is both broad in scope and highly complex, and we believe that each institution should make a determination about how it will approach the rule based on its own business practices and client base. Different considerations may apply to hedge funds, private equity funds, and funds registered under the 1940 Investment Companies Act. Some key areas for review include the following:

Item to Review	Key Steps
Marketing materials, including PPMs, pitch books and publicly facing websites	Review text to avoid phrasing that could be interpreted as a covered recommendation Consider adding additional disclaimers on fiduciary status under the rule Consider obtaining certain representations (potentially on a deemed basis) from new prospective clients
Relationship with intermediaries, distribution partners, and direct investors	Prepare representation letter for use with intermediaries and counterparties that will serve as sophisticated independent fiduciaries Consider adding new retirement plan investor representations to subscription documents (if applicable) Determine whether to obtain representations on an affirmative basis or via negative consent

Ongoing investor communications, including quarterly and annual investor letters	Consider adding additional disclaimers on fiduciary status under the rule
Train call center and sales staff	Train employees on how to avoid making investment recommendations Consider preparing sample scripts for certain common questions
Review RFP responses	Review stock RFP responses to avoid phrasing that could be interpreted as a covered recommendation Consider adding additional disclaimers on fiduciary status under the rule
Review direct sales activity with investors that are not represented by sophisticated independent fiduciaries	Review materials related to any direct sales activity to retirement accounts, such as applications included on the website that allow an individual to set up an IRA and buy fund shares directly Consider whether this activity can be carried out in a non-fiduciary capacity or if compliance with the BIC Exemption is required
Review fiduciary interactions	If any interactions with retail retirement investors will be fiduciary in nature, prepare to comply with best interest contract exemption If fiduciary interactions may include recommendations of proprietary funds, consider preparing written findings to be deemed to comply with impartial conduct standard

For details on the fiduciary rule, see our prior Alert, and our Alert on the Final Delay, and for details on the DOL FAQs, see our prior Alert on the First FAQ, Alert on the Second FAQ and Alert on the Transition Period FAQ.

If you would like to discuss the impact that the fiduciary rule may have on any aspect of your business, please feel free to reach out to any of the attorneys listed above.