

Fiduciary Rule and Dodd-Frank: Where Are We Now?

March 29, 2017

This presentation is provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal, state, and/or local laws that may impose additional obligations on you and your company.

Cisco WebEx can be used to record webinars/briefings. By participating in this webinar/briefing, you agree that your communications may be monitored or recorded at any time during the webinar/briefing.

Attorney Advertising

Presented by



Sharon L. Lippett

Member, Employee Benefits Practice

Slippett@ebglaw.com

212-351-4630



Jason Kaufman

Associate, Employment, Labor & Workforce
Management Practice

Jkaufman@ebglaw.com

212-351-4738

EPSTEIN
BECKER
GREEN

The Fiduciary Rule

What is the Fiduciary Rule?

Identifies communications that are investment advice:



Recommendations to acquire, hold, dispose of, or exchange securities or other investment property









Recommendations on how to invest securities or other property after a plan or IRA distribution



Recommendations for managing securities or other investment property

What is the Fiduciary Rule? (cont'd)

-  Establishes the types of recommendations required for fiduciary investment advice:
 -  Recommendations by persons who represent that they are fiduciaries
 -  Advice pursuant to an agreement that the advice is based on the investment needs of the advice recipient or
 -  Recommendations directed to a specific recipient regarding the advisability of a particular investment
-  Establishes when a communication would be considered a recommendation
-  Establishes exemptions that allow financial advisers to accept common types of compensation if they put their client's best interest first

Original Implementation Schedule

Applicability Date

April 10, 2017



Effective Date

June 7, 2016

**Final Implementation Date for
BIC Exemption and Principal
Transaction Exemption**

January 1, 2018

Presidential Memorandum (February 3, 2017)



Directs the DOL to examine whether:



The Fiduciary Rule has harmed investors due to a reduction in the availability of retirement savings offerings or financial advice



The anticipated April 10 applicability date has caused disruptions in the retirement services industry that may adversely affect investors or retirees and



The Fiduciary Rule is likely to cause an increase in litigation and in the prices that investors must pay to gain access to retirement services



Directs the DOL to rescind or revise the Fiduciary Rule, if the DOL's determination is affirmative or the DOL concludes that the Fiduciary Duty Rule is inconsistent with the Administration's priorities

Proposed Rule-Extension of Applicability Date (March 1, 2017)



Intended to give the DOL time to collect and consider information related to issues raised in the presidential memorandum



Delays the applicability date for 60 days, effective as of the date the final rule is published in the Federal Register

Temporary Enforcement Policy (March 10, 2017)

Delay issued after April 10

- No enforcement action because an adviser or financial institution did not satisfy the Fiduciary Rule during the “gap” period before a delay is implemented

No Delay

- No enforcement action because an adviser or financial institution did not comply with the Fiduciary Rule as of April 10, 2017
- Adviser or financial institution must satisfy the Fiduciary Rule within a reasonable period after the publication of a decision not to delay the applicability date

Where Are We Now?

Temporary Enforcement Policy does not fully protect advisers and financial institutions

Next steps, assuming:

No delay

Proceed with implementation plans

Consider proceeding with implementation plans

Delay & possible revisions

Delay and revocation

- Compliance with current fiduciary and prohibited transaction rules still required
- Consider if will incorporate portions of the Fiduciary Rule into practices

EPSTEIN
BECKER
GREEN

Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Act



On July 21, 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (2010)



Dodd-Frank amended the Sarbanes-Oxley Act, Securities Exchange Act, and Commodity Exchange Act to include new whistleblower programs



The SEC whistleblower program is codified as Section 21F of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-6 (“Securities Whistleblower Incentives and Protection”)



The SEC’s formal implementing Rules are set forth in 17 C.F.R. Pt. 240, § 240.21F-1 to § 240.21F-17 (effective date August 12, 2011)

Potential Legislative Impact



February 3, 2017, Executive Order, “Core Principles for Regulating the United States Financial System”:

“ . . . foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis . . . ”

“ . . . enable American companies to be competitive with foreign firms in domestic and foreign markets . . . ”

“ . . . make regulation efficient, effective, and appropriately tailored . . . ”



Treasury Secretary to consult with the heads of financial agencies, including the SEC and CFTC, on how to conform financial regulations to “Core Principles”

Potential Administrative Impact



Dodd-Frank established the SEC Office of the Whistleblower (“OWB”) to enforce its comprehensive whistleblower program

- Whistleblower “bounty” awards
 - Dodd-Frank mandates monetary awards for individuals who voluntarily provide original information to the SEC that results in a successful enforcement action in which the SEC collects over \$1 million
 - Over \$100 million awarded to date (over \$57 million in 2016 alone)
- SEC-commenced whistleblower retaliation lawsuits
- Prosecution of employers who use confidentiality, settlement, and other agreements that may impede communications with the SEC
 - Enforcement of SEC Rule 21F-17 (e.g., *Anheuser-Busch InBev SA/NV* (Sept. 28, 2016), *NeuStar, Inc.* (Dec. 19, 2016), *HomeStreet, Inc.* (Jan. 19, 2017))



President can appoint four out of the five SEC Commissioners in 2017

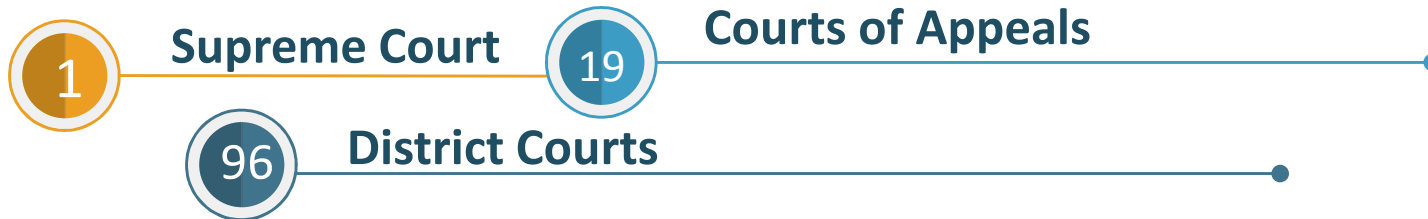


New SEC leadership is imminent and likely to impact the OWB enforcement agenda

Potential Judicial Impact



President Trump has inherited over 100 federal court vacancies:



Circuit court split: Is a person who reports an alleged securities violation internally to his or her employer, but not to the SEC, a whistleblower under Dodd-Frank’s anti-retaliation provision?



Fifth Circuit says “No” – *Asadi v. G.E. Energy (USA)*, 720 F.3d 620 (5th Cir. 2013)



Second and Ninth Circuits say “Yes” – *Berman v. Neo@Ogilvy*, 801 F.3d 145 (2d Cir. 2015); *Somers v. Digital Realty Trust Inc.*, No. 15-17352 (9th Cir. Mar. 8, 2017)

- Citing *Chevron* deference to SEC’s implementing rules



Pending before Third Circuit *Danon v. Vanguard Group*, No. 16-2881 (3d Cir.)



Will likely be resolved by the Supreme Court

Presented by



Sharon L. Lippett

Member, Employee Benefits Practice

Slippett@ebglaw.com

212-351-4630



Jason Kaufman

Associate, Employment, Labor & Workforce
Management Practice

Jkaufman@ebglaw.com

212-351-4738