To Our Clients and Friends

Memorandum

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ERISA Fiduciary Rule: Some Quick Action Items

Following a presidential memorandum directing the U.S. Department of Labor to re-examine the ERISA Fiduciary Rule, the DOL recently extended the Fiduciary Rule's primary applicability date to June 9, 2017. (Full compliance with the so-called "Best Interest Contract Exemption" is not required until January 1, 2018.) Please see our previous Client Memorandum, "U.S. DOL Releases Final ERISA Fiduciary Rule," for further background regarding the elements of the rule. Please also see the Department of Labor's website, which contains a number of helpful resources on the topic, including the Fiduciary Rule, relevant fact sheets and FAQs.

Even if the Fiduciary Rule is ultimately revised or repealed, it appears from this DOL extension that, absent additional action by the DOL or the Trump administration, the new definition of the term "fiduciary" will apply for some period of time beginning June 9, 2017. The principal concern for most asset managers is that marketing communications and routine performance reporting and other communications could render the manager an ERISA fiduciary with respect to a decision by an ERISA plan or IRA to invest in, continue holding or redeem from an investment product. To avoid this result, many asset managers will likely seek to comply with the so-called "Independent Fiduciary Exception" (referred to in our previous Client Memorandum as the "Seller's Carve-Out"). For the most part, the key terms of the Independent Fiduciary Exception are factual/confirmatory and do not necessarily require any additional actions by the asset manager. However, the requirement that the asset manager "fairly inform" the ERISA client that it is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, does require an affirmative notification on the asset manager's part.

Asset managers whose offerings to "benefit plan investors" focus primarily on institutional ERISA clients may, therefore, want to consider the steps noted below.

Institutional ERISA Clients.

To take advantage of the Independent Fiduciary Exception with respect to existing institutional ERISA clients, asset managers of open-ended investment funds and accounts should consider sending a notice to those clients stating that, with respect to any communications delivered on and after June 9, 2017, the asset manager is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the client's continued holding of, or redemption from, the applicable product. Alternatively, asset managers may want to take another approach, such as including that language in a legend or disclaimer on any post June 9, 2017 communications. Asset managers may also wish to consider including in any communications with the ERISA clients "deemed representations" with respect to the other elements of the Independent Fiduciary Exception.

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To take advantage of the Independent Fiduciary Exception with respect to new institutional ERISA clients (and new investments by existing institutional ERISA clients), asset managers should consider updating their subscription documents to reference all elements of the Independent Fiduciary Exception.

IRAs and Certain Other ERISA Clients.

Asset managers should assess whether any IRAs or other ERISA clients who are unable to meet the requirements of the Independent Fiduciary Exception are invested in existing products.[1] If so, asset managers should consider formulating any communications with those clients on and after June 9, 2017 so that no information contained therein could be viewed as a "recommendation" as to whether the investor should remain invested in the product(s). Further, asset managers may want to consider suspending as of June 9, 2017 new investments by IRAs and other ERISA clients who are unable to meet the elements of the Independent Fiduciary Exception, until the terms and application of the Fiduciary Rule become clearer.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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[1] Generally, an asset manager would not be able to rely on the Independent Fiduciary Exception for (i) IRA investors that are not represented by a fiduciary that is a bank (as defined in the Advisers Act), an insurance carrier, a registered investment adviser, or a broker-dealer registered under the Exchange Act, and (ii) ERISA plans that are not represented by one of the entities noted above and that do not have total assets of at least $50 million.