



## *Tiblier v. Dlabal*: Investment Adviser Not an ERISA Fiduciary Because it Received Compensation From a Third Party, Rather Than the Plan

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If your investment adviser receives indirect compensation from a third party for the services it provides to your ERISA plan, the decision of the U.S. Court of Appeals for the 5th Circuit in *Tiblier v. Dlabal* (No. 13-50344, February 28, 2014) raises an interesting issue for you to consider.

In *Tiblier*, the Court held that a registered investment adviser representative was not liable for an ill-advised investment made by an ERISA plan, based on the representative's investment recommendation to the plan, because the representative was not an ERISA fiduciary to the plan in connection with the investment. The Court's conclusion that the representative was not an ERISA fiduciary was based, in part, on the fact that the representative received compensation from a third party, rather than directly from the plan.

Under ERISA Section 3(21)(A)(ii), you are a fiduciary to the extent you render investment advice for a fee or other compensation, direct *or indirect*, with respect to plan assets. DOL rules and guidance consider compensation received by an investment adviser from a third party in connection with services rendered to an ERISA plan to be indirect compensation (e.g., Schedule C of DOL Form 5500 and the rules promulgated under ERISA Section 408(b)(2)). The Court's decision in *Tiblier* is interesting because it seems to disregard this statutory and DOL authority entirely, holding that the representative was not a fiduciary under Section 3(21)(A)(ii) because it did not receive a fee from the plan in connection with the investment, stating "the only compensation that [the representative]... received came instead from a third party." In its opinion, the Court relied on 5th Circuit precedent that held that a third party commission was not a fee under Section 3(21)(A)(ii).

In light of DOL authority addressing indirect compensation and the fact that it is not uncommon for investment advisers to receive indirect compensation, ERISA plan fiduciaries subject to 5th Circuit jurisdiction should consider how this case might impact their plans' relationships with investment advisers that receive indirect compensation from third parties.

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