On May 23, 2017 the Wall Street Journal published a letter by Secretary of Labor Alexander Acosta in connection with the Department of Labor’s new “investment advice” fiduciary rule (the “Fiduciary Rule”) under the Employee Retirement Income Security Act of 1974, as amended (”ERISA”) affecting accounts subject to ERISA and certain accounts subject to the analogous provisions of Section 4975 of the Internal Revenue Code of 1986, as amended (the “Code”). In the article, the Secretary stated that notwithstanding the fact that the Department of Labor will seek additional public input, the Fiduciary Rule will go into effect as currently scheduled on June 9, 2017.

Separately, the Department of Labor issued, in Field Assistance Bulletin No. 2017-02, a notice of non-enforcement with respect to aspects of the Fiduciary Rule throughout the remainder of 2017, ostensibly to give market participants time to prepare for the final installment of the Fiduciary Rule’s applicability on January 1, 2018. Notably, this non-enforcement policy bears only on the Department of Labor’s enforcement position: it does not affect private rights of action under the Fiduciary Rule. The Department of Labor also issued a new set of frequently asked questions (“FAQs”) on the Fiduciary Rule.1

Overview

The Fiduciary Rule has been enormously controversial. The rule, while “effective” at the time of the change of the Administration, was not originally scheduled to become “applicable” until April 10, 2017. President Trump and his advisers had pledged to roll back the rule and on February 3, 2017, President Trump himself sent a memorandum to the Department of Labor with specific questions concerning the ongoing viability of the Fiduciary Rule and required the Department to “publish for notice and comment a proposed rule rescinding or revising the [Fiduciary Rule]” if any answer to any of the President’s questions was

1 Available at: https://www.dol.gov/sites/default/files/ebsa/about- ebsa/our-activities/resource-center/faqs/coi- transition-period.pdf.
“yes.” Many observers considered that there was already a strong likelihood that the answer to at least one of the posed questions already was “yes.” On April 4, 2017, the Department of Labor posted a notice in the Federal Register delaying the “applicability date” of the Fiduciary Rule by 60 days to June 9, 2017.

While acknowledging the President’s questions, the April 4, 2017 delay notice indicated that the Department had “concluded that it would be inappropriate to broadly delay application of the [Fiduciary Rule] definition and Impartial Conduct Standards for an extended period in disregard of its previous findings of ongoing injury to retirement investors” and that “the new exemptions and amendments to previously granted exemptions should become applicable on June 9, 2017, so that retirement investors will be protected during the period in which the Department conducts its examination of the Fiduciary Rule.”

Secretary Acosta’s letter makes clear that while the Fiduciary Rule “as written may not align with President Trump’s deregulatory goals,” the Secretary has “found no principled legal basis to change the June 9 date while we seek public input [to answer the questions posed by the President, and to re-examine whether the rule is aligned with the President’s goals].” The Secretary and Department of Labor ultimately concluded that the June 9th applicability date could not (and would not) be postponed. FAQ 5 specifically notes that the applicability date of June 9th allows “the Department to protect the interests of retirement investors in receiving sound financial advice by imposing the basic obligations of a best interest standard, while still honoring the President’s directive to reexamine its conclusions and to focus on potential undue burdens and unintended consequences of its prior rulemaking.”

Interestingly, the Department indicated in FAQ 4 that it is “engaging in a careful analysis of the issues raised in the President’s Memorandum and it is possible, based on the results of the examination, that additional changes will be proposed.” The Department noted its intention to issue a Request for Information (RFI) “for additional public input on specific ideas for possible new exemptions or regulatory changes based on recent public comments and market developments.” However, the Department noted that it is “aware that after the Fiduciary Rule was issued firms have begun to develop new business models and innovative market products” including specifically referring to such “promising responses” as broker’s possible use of “clean shares” and that such a development may be a “potentially powerful means of reducing conflicts of interest with respect to mutual fund recommendations and correspondingly reducing the need for heightened surveillance around adviser conflicts of interest.” The Department also made reference to the advent of “T shares” in reaction to these developments. It is unclear whether this is an indication of the Department’s desire to deal solely with exemptions to the Fiduciary Rule or whether it is willing to undertake a more fundamental review of the Fiduciary Rule itself.

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4 FAQ 5 of Conflict of Interest FAQs (Transition Period).
5 FAQ 4 of Conflict of Interest FAQs (Transition Period).
6 Id.
7 Id.
8 FAQ 6 of Conflict of Interest FAQs (Transition Period).
Although the continued review of the Fiduciary Rule by the Department of Labor raises questions as to what the Department will ultimately conclude, for now market participants need to operate on the understanding that, as described briefly below, although the Department of Labor has adopted a partial enforcement moratorium on the Fiduciary Rule, there are important aspects of the Fiduciary Rule itself that will be fully applicable and for which market participants may become subject to private plaintiffs’ class action lawsuits. If there is one take away from the day’s events, it is that there are no more delays.

**Non-Enforcement Period**

As mentioned above, concurrently with the FAQs, the Department also issued Field Assistance Bulletin 2017-02, in which it notes that “during the phased implementation period ending on January 1, 2018, the Department will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions.” Once again: this non-enforcement only applies to the Department of Labor’s position on enforcement. It has no bearing on the necessity of compliance with the Fiduciary Rule or the potential for litigation or other exposure to actions brought by others.

**Additional FAQs**

In addition to answering certain policy questions, the new FAQs issued by the Department explore transition relief related issues under the BIC Exemption and other prohibited transaction exemptions, such as Prohibited Transaction Class Exemption 84-24. For example, additional FAQs relate to the Department’s views on the availability of the BIC Exemption for market participants who have “plans to create new compensation systems that will effectively insulate their advisers from many or most conflicts of interest, but do not expect those systems to be fully in place during the transition period.” Clients and friends would be well advised to read carefully these questions and answers given the reading of the exemption and the potential exposure associated from private rights of action.

The FAQs also address compliance with the so-called “institutional” or “independent fiduciary” exception (also referred to as the “IFE”). Many institutional market participants (for example, money managers dealing with financial intermediaries who will now be fiduciaries under the rule) are currently attempting to obtain the protections they believe they need to establish the “reasonable reliance” predicates associated with the exception.

Those market participants that feel the need to object to or reject the deemed representation letters of the type described in FAQ 13, and those that ask for more than what they really need to obtain a sufficient level of comfort, may find themselves in a protracted “battle of the forms,” where nobody wins, and the casualties include a slowdown in commerce, access to products and services, and last but not least, a whole lot of paper cuts. Sending or sending back standard form letters may or may not be efficient depending on what is contained within them. Those institutions that design these forms reasonably and thoughtfully in a manner designed to accomplish the desired commercial goal may ultimately engender not only better feelings, but better dealings.

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9 FAQ 6 of Conflict of Interest FAQs (Transition Period).
Finally, model providers may wish to concentrate on FAQ 14 in particular, which adds some new helpful language for non-client-specific model portfolios that are not individualized to the needs of any specific plan or IRA client of the model recipient/financial intermediary, where the model provider does not contract with the end client, does not execute trades in the end client’s portfolio, does not agree with the financial intermediary to assume fiduciary status, does not have any control over whether its model is used in managing any specific client account, and does not receive any fee or compensation directly from end clients who are plans or IRAs for use of the model.

**Next Steps**

It goes without saying that for many market participants, the Fiduciary Rule is transformational. Investment managers, broker-dealers, clearing brokers, banks, futures commission merchants, mutual fund complexes, private equity funds, hedge funds, real estate funds, other alternative funds, custodians, recordkeepers, trustees, valuation agents, pension consultants, insurance companies, insurance brokers, “IMOs” and almost every other market participant dealing with the U.S. retirement market will be impacted in one way or another by this rule. Market participants should continue to confirm their level of comfort and their action plans in light of their approach and that of the market generally.  

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For More Information

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