Department of Labor Extends Transition Period for Exemptions Under the Fiduciary Rule

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Michael D. Dorum
Partner / New York
212.735.3595
michael.dorum@skadden.com

Jeffrey A. Lieberman
Counsel / New York
212.735.2734
jeffrey.lieberman@skadden.com

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

On November 27, 2017, the U.S. Department of Labor (DOL) extended the transition period for its conflict of interest regulation (commonly referred to as the "fiduciary rule") until July 1, 2019.

The fiduciary rule became applicable on June 9, 2017, although certain requirements of the new best interest contract exemption (BICE), the principle transactions exemption (PTCE 2016-02), and the exemption for certain annuity and fund sales (PTCE 84-24) had previously been delayed for a transition period, which would have expired at January 1, 2018. Under the fiduciary rule, without an applicable exception, any person providing "investment advice" with respect to employee benefit plans and arrangements covered by Title I of the Employee Retirement Security Act (ERISA) or Section 4975 of the Internal Revenue Code (the Code), including IRAs, will be considered a fiduciary with respect to such plan or arrangement. As described in our April 25, 2016, client alert ("Labor Department Redefines 'Fiduciary' for ERISA and Internal Revenue Code Purposes"), "advice" is broadly defined for these purposes and includes many communications that would not have been considered investment advice under the prior regulations.

The DOL's November 27 release will not change the requirements of the BICE and other class exemptions that have been applicable since June 9, 2017 (see our April 7, 2017, client alert "DOL Finalizes Delay of Conflict of Interest Rule"). The stated purpose of the extended delay is to give the DOL time necessary to consider public comments under the criteria set forth in the president's memorandum of February 3 (see our February 6, 2017, client alert "Trump Directs Department of Labor to Review Fiduciary Rule"), which directed the DOL to consider whether the fiduciary rule (and related exemptions) should be revised or repealed.

Following the president's memorandum, on April 7, 2017, the DOL announced that the implementation of the fiduciary rule would be delayed by 60 days, until June 9, 2017, and that a transition period would apply to certain requirements under the BICE and other exemptions. Subsequently, the DOL requested public comments regarding certain aspects of the fiduciary rule and the related exemptions, as well as to the advisability of extending the transition period (in whole or in part) beyond 2018. The DOL received approximately 60,000 comments in response to that request, expressing a wide range of views. On August 31, the DOL published a proposal to further extend the transition period for 18 months, but requested public input as to the delay generally and as to other possible approaches to a delay.

Following the DOL's November 27 release, open questions remain as to how any conflict of interest rule that may be promulgated by the Securities and Exchange Commission might differ from the approach taken by the DOL in the fiduciary rule and as to the potential combined effects of the two sets of regulations.

The DOL and the Internal Revenue Service had previously announced that through 2017 neither agency would seek enforcement (including, in the case of the IRS, for excise taxes) in connection with violations of the fiduciary rule against parties who are "working diligently and in good faith" to comply with the rule. The November 27 release confirmed that the DOL and IRS non-enforcement policies would continue until the end of the extended transition period, on July 1, 2019.