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Investment Management Briefing

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IRS Announces Prohibited Transaction Excise Tax Relief in Conjunction with DOL Temporary Enforcement Policy for Fiduciary Rule

As noted in our Investment Management Briefing (http://www.stradley.com/insights/publications/2017/03/im-briefing-march-13-2017) of March 13, the Department of Labor (DOL) issued a Field Assistance Bulletin (FAB) on March 10 containing a temporary enforcement policy in respect of the fiduciary rule and the related prohibited transaction exemptions (PTEs), which are generally scheduled to become applicable on April 10, absent finalization of the delay proposed by the DOL on March 2. As we noted in our briefing, however, the FAB did not address the application of the prohibited transaction rules of Section 4975 of the Internal Revenue Code (Code) and the excise taxes imposed for violation of those rules during the period covered by the DOL's temporary enforcement policy.

In response to concerns raised by stakeholders following publication of the FAB about the potential application of prohibited transaction excise taxes and related reporting obligations in cases covered by the DOL's temporary enforcement policy, the Internal Revenue Service (IRS) published Announcement 2017-4 (https://www.irs.gov/pub/irs-drop/a-17-04.pdf) (Announcement) on March 28. The Announcement confirms that the IRS will not apply Section 4975 of the Code and related reported obligations with respect to any transaction or agreement to which the DOL's temporary enforcement policy, or other subsequent related enforcement guidance by the DOL, would apply.

It should be noted that neither the FAB nor the Announcement would be binding on a federal court hearing a private cause of action brought by a plan subject to Title I of ERISA or its participants for violations of the ERISA prohibited transaction rules during the period covered by the temporary enforcement policy. For example, assume that an advisor who would not be treated as an ERISA plan fiduciary absent the new definition of "fiduciary" under the Rule becomes a fiduciary under the Rule. Assume further that during the period covered by the temporary enforcement policy the advisor makes a recommendation that results in the receipt of variable or third-party compensation without complying with the requirements of one of the related exemptions. In this scenario the advisor could be exposed to a private lawsuit under Title I of ERISA alleging a violation of the Title I prohibited transaction rules.

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