Non-Applicability of Excise Taxes Under Section 4975 To Conform With DOL Temporary Enforcement Policy on Fiduciary Duty Rule

Announcement 2017–4

This announcement provides relief from certain excise taxes under § 4975 of the Internal Revenue Code (Code), and any related reporting requirements, to conform to the temporary enforcement policy described by the Department of Labor (DOL) in Field Assistance Bulletin (FAB) 2017-01 with respect to the final fiduciary duty rule published in the Federal Register on April 8, 2016 (81 F.R. 20946), entitled "Definition of the Term 'Fiduciary'; Conflict of Interest Rule – Retirement Investment Advice" and related prohibited transaction exemptions, including the Best Interest Contract Exemption (BIC Exemption), the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption), and certain amended prohibited transaction exemptions (collectively, PTEs).

BACKGROUND

Section 4975(a) imposes an excise tax on each prohibited transaction equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. Section 4975(b) increases the tax to 100 percent of the amount involved in any cases in which an initial tax is imposed under § 4975(a) on a prohibited transaction and the transaction is not corrected within the taxable period. In each case, the tax is imposed on any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such). Section 4975(c) provides a definition of a prohibited transaction and authorizes the Department of the Treasury (Treasury Department) to grant administrative exemptions from the prohibited transaction provisions in the Code. Section 4975(c)(1)(A) through (D) prohibits the direct or indirect sale, exchange, leasing of property, or loan of money, or other extension of credit, between a plan (including an individual retirement account or individual retirement annuity (IRA)) and a disqualified person, or the direct or indirect transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan. Section 4975(c)(1)(E) and (F) prohibits fiduciaries from dealing with the income or assets of a plan in their own interest or for their own account or receiving any consideration for their own personal account from any party dealing with the plan in connection with a transaction involving the income or assets of the plan. Section 4975(d) provides a series of exemptions from the prohibitions in § 4975(c), and § 4975(e) provides a series of definitions, including the definition of a disqualified person to whom the tax may apply. Section 4975(e)(2)(A) provides that a disqualified person includes a fiduciary.

Sections 406 and 408 of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829 (1974)), as amended (ERISA), contain provisions on prohibited transactions that are substantially similar to the provisions of § 4975 of the Code, although the ERISA provisions prohibit the fiduciary from engaging in the transactions and provide for civil liability and remedies rather than imposing an excise tax. The DOL is the agency responsible for interpreting and enforcing the ERISA provisions as they apply to employee benefit plans. ERISA § 408(a) includes an authorization for the Secretary of Labor to grant administrative exemptions from ERISA's prohibited transaction provisions that parallels the similar authorization in § 4975(c) for the Treasury Department to grant administrative exemptions from the prohibited transaction provisions in the Code.

To ensure consistency in application, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1, 92 Stat. 3790, provides that the authority of the Treasury Department to issue regulations, rulings, opinions, and exemptions under § 4975 of the Code is transferred, with certain exceptions not relevant here, to the Secretary of Labor. As a result, the Internal Revenue Service (IRS) is responsible for enforcing the excise tax provisions in § 4975(a) and (b) of the Code, but generally is bound by the DOL's interpretive regulations, rulings, opinions, and exemptions in determining whether a prohibited transaction has occurred. Section 3003 of ERISA provides that the DOL and the Treasury Department are to consult with each other from time to time with respect to the provisions of § 4975 of the Code relating to prohibited transactions and exemptions in order to coordinate the rules applicable under such standards. Section 3004 of ERISA further provides that whenever the DOL and the Treasury Department are required to carry out provisions relating to the same subject matter, the agencies are required to coordinate and develop rules, regulations, and practices that, to the extent appropriate for the efficient administration of such shared provisions, are designed to reduce duplication of effort, duplication of reporting, conflicting or overlapping requirements, and burden of compliance by plan administrators, employers, and participants and beneficiaries.

On April 8, 2016, the DOL published a final regulation defining who is a "fiduciary" of an employee benefit plan under § 3(21)(A)(ii) of ERISA as a result of giving investment advice to a plan or its participants or beneficiaries. The final rule also applies to the definition of a "fiduciary" of a plan under § 4975(e)(3)(B) of the Code. The final rule treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan as fiduciaries in a wider array of advice relationships than was true of the prior regulatory definition. On this same date, the DOL published the PTEs, which provide two new administrative class exemptions from the prohibited transaction provisions of ERISA and the Code, as well as amendments to previously granted exemptions. The PTEs would allow, subject to appropriate safeguards, certain broker-dealers, insurance agents, and others that act as investment advice fiduciaries, as defined under the final rule, to continue to receive a variety of forms of compensation that would otherwise violate prohibited transaction rules, triggering excise taxes and civil liability.

The final fiduciary duty rule became effective on June 7, 2016, and has an applicability date of April 10, 2017. The PTEs also have an applicability date of April 10, 2017, with a phased implementation period ending on January 1, 2018, for the BIC Exemption and the Principal Transactions Exemption. The President, by Memorandum to the Secretary of Labor dated February 3, 2017, directed the DOL to examine whether the fiduciary duty rule may adversely affect the ability of Americans to gain access to retirement information and financial advice and to prepare an updated economic and legal analysis concerning the likely impact of the rule as part of that examination. On March 2, 2017, the DOL published a notice in the Federal Register (82 FR 12319) seeking public comments on (i) a proposal to adopt a 60-day delay of the April 10 applicability date described above, (ii) the questions raised in the Presidential Memorandum, and (iii) general questions of law and policy concerning the fiduciary duty rule and the related PTEs. The March 2 notice stated that, if adopted as a final rule, the proposed 60-day delay would be effective on the date of publication in the Federal Register of a final rule delaying the April 10 applicability date.

The DOL issued FAB 2017-01 on March 10, 2017, to announce a temporary enforcement policy related to its proposal to extend for 60 days the applicability date of the fiduciary duty rule and the related PTEs. The policy provides that:

A. In the event the DOL issues a final rule after April 10 implementing a delay in the applicability date of the fiduciary duty rule and related PTEs, the DOL will not initiate an enforcement action because an adviser or financial institution did not satisfy conditions of the rule or the PTEs during the "gap" period in which the rule becomes applicable before a delay is implemented, including a failure to provide retirement investors with disclosures or other documents intended to comply with provisions of the rule or the related PTEs.

B. In the event the DOL decides not to issue a delay in the fiduciary duty rule and related PTEs, the DOL will not initiate an enforcement action because an adviser or financial institution, as of the April 10 applicability date of the rule, failed to satisfy conditions of the rule or the PTEs, provided that the adviser or financial institution satisfies the applicable conditions of the rule or PTEs, including sending out required disclosures or other documents to retirement investors, within a reasonable period after the publication of a decision not to delay the April 10 applicability date.

Field Assistance Bulletin 2017-01 provides that, to the extent circumstances surrounding its decision on the proposed delay of the April 10 applicability date give rise to the need for other temporary relief, including retroactive prohibited transaction relief, the DOL will consider taking such additional steps as necessary with respect to the arrangements and transactions covered by the DOL temporary enforcement policy and any subsequent related DOL enforcement guidance. Following the issuance of the FAB, stakeholders have raised concerns about the potential application of excise taxes under § 4975 and related reporting obligations in cases covered by the DOL's temporary enforcement policy.

TRANSITION RELIEF

Because the Code and ERISA contemplate consistency in the enforcement of the prohibited transaction rules by the IRS and the DOL, as further reflected in and facilitated by the statutory Reorganization Plan, the Treasury Department and the IRS have determined that it is appropriate to adopt a temporary excise tax non-applicability policy that conforms with the DOL's temporary enforcement policy described in FAB 2017-01. Accordingly, the IRS will not apply § 4975 and related reporting obligations with respect to any transaction or agreement to which the DOL's temporary enforcement policy, or other subsequent related enforcement guidance, would apply.