

MEMO# 31200

May 7, 2018

DOL Announces Extension of Temporary Enforcement Policy on Fiduciary Rule

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Announces Extension of Temporary Enforcement Policy on Fiduciary Rule

On May 7, 2018, the Department of Labor (DOL) issued Field Assistance Bulletin (FAB) No. 2018-02 announcing a continuation of the temporary enforcement policy regarding the fiduciary rule.^[1] The FAB stems from the Fifth Circuit Court of Appeals' recent decision to vacate the rule and notes that the Fifth Circuit is expected to issue a mandate to effectuate the decision on or about May 7.^[2] Significantly, DOL advises that it intends to provide appropriate guidance in the future regarding the fiduciary definition and the related exemptive relief following the court's order. In the meantime, to address the uncertainty regarding the breadth of the prohibited transaction exemptions that remain available and to prevent disrupting existing investment advice arrangements, DOL is extending its prior temporary enforcement policy,^[3] pending DOL's issuance of additional guidance.

The FAB sets forth the following temporary enforcement policy:

[F]or the period from June 9, 2017, until after regulations or exemptions or other administrative guidance has been issued, the Department will not pursue prohibited transactions claims against investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules. Of course, investment advice fiduciaries may also choose to rely upon other available exemptions to the extent applicable after the Fifth Circuit's decision, but the Department will not treat an adviser's failure to rely upon such other exemptions as resulting in a violation of the prohibited transaction rules if the adviser meets the terms of this enforcement policy.

FAB 2018-02 also includes an announcement that excise tax relief from the IRS will

automatically apply during this period. In March 2017, IRS issued Announcement 2017-4 in connection with DOL's FAB 2017-1.^[4] This announcement provided relief from excise taxes under Internal Revenue Code section 4975 that apply in the event of a prohibited transaction. The IRS will not apply the excise tax and related reporting obligations to any transaction to which FAB 2017-01,^[5] "or any subsequent related enforcement guidance," applies. In FAB 2018-02, DOL confirms that this new enforcement policy qualifies as subsequent related enforcement guidance. Therefore, IRS relief from excise taxes will also be in effect until DOL issues regulations or exemptions or other administrative guidance.

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endnotes

[1] FAB 2018-02 is *available at* <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-02>.

[2] See ICI Memorandum No. 31137, dated March 16, 2018, available here: https://www.ici.org/my_ici/memorandum/memo31137.

[3] The prior temporary enforcement policy was announced on May 22, 2017 in FAB 2017-02. See ICI Memorandum No. 30716, dated May 24, 2017, available here: https://www.ici.org/my_ici/memorandum/memo30716.

[4] See ICI Memorandum No. 30657, dated March 30, 2017, available here: https://www.ici.org/my_ici/memorandum/memo30657.

[5] In FAB 2017-01, DOL announced a temporary enforcement policy that would have applied if the fiduciary rule had become applicable as originally scheduled on April 10, 2017, before DOL finalized its proposed 60-day delay of the April 10 applicability date. See ICI Memorandum No. 30637, dated March 13, 2017, available here: https://www.ici.org/my_ici/memorandum/memo30637.