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IRS Announcement Mirrors DOL Enforcement Policy; U.S. Chamber of Commerce Still Seeking Injunction from the Fiduciary Rule

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Following the Department of Labor's ("DOL's") announcement in Field Assistance Bulletin ("FAB") 2017-01 that it will temporarily not enforce the provisions of the final fiduciary rule, the Internal Revenue Service ("IRS") issued Announcement 2017-4 (the "Announcement") which clarifies that the IRS will not apply the excise taxes imposed by Section 4975 of Internal Revenue Code of 1986, as amended (the "Code"), or the related reporting obligations to any transaction or agreement subject to the DOL's non-enforcement policy under FAB 2017-01. The Section 4975 excise taxes are a significant enforcement tool for ERISA's prohibited transaction regime and therefore the Announcement's purpose is to conform IRS policy to that of the DOL because the governing law for each agency – ERISA and the Code – contemplates consistency in the enforcement of the prohibited transaction rules. The final fiduciary rule would broadly expand the categories of persons who would be considered fiduciaries by virtue of providing investment advice and also would apply the prohibited transaction related provisions of ERISA and the Code to an expanded segment of the investment community if the fiduciary rule becomes effective on April 10, 2017, as intended. However, it seems likely the DOL will further delay the final fiduciary rule at the invitation of the Trump Administration. In the meantime, significant confusion and uncertainty in the retirement plan marketplace exists regarding what will happen if the expected delay is not granted or is granted following the date that the regulations become applicable. FAB 2017-01 and the Announcement are intended to provide relief to retirement plan market participants during this period of confusion and uncertainty.

Despite the DOL's issuance of FAB 2017-01, sufficient confusion and uncertainty surrounding the fiduciary rule's applicability date remain such that one litigant continue to seek an injunction against the rule. The U.S. Chamber of Commerce, (the "Chamber"), is one of three litigants nationally who unsuccessfully challenged the DOL's fiduciary rule. After losing at the District Court and pending appeal before the 5th Circuit, the Chamber filed an emergency motion for an injunction pending appeal with the 5th Circuit on March 21st. The DOL highlighted the Announcement in the response it filed March 29th, arguing in relevant part that the Chamber's motion should be denied because it cannot show that its "members are likely to suffer irreparable harm in the absence of an injunction pending appeal." One strand in the DOL's argument is "the non-enforcement policies issued by the Labor and Treasury Departments further illustrate the speculative nature" of the harms the Chamber anticipates. According to the DOL, "these policies mean that plaintiffs will suffer little harm from maintaining their wait-and-see approach" until the DOL issues a final decision on the fiduciary rule.

Further, the DOL opined that none of the Chamber's arguments against the fiduciary rule were likely to succeed

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on appeal. Since the DOL's proposed temporary delay in the applicability of the fiduciary rule went to the Office of Management and Budget last week and is anticipated to be finalized shortly, the Chamber's sought injunction may become moot for at least another 60 days.