

MEMO# 29067

June 8, 2015

Department of Labor Issues Updated Regulatory Agenda and Delays Projected Issuance Dates of Several Significant Rulemaking Proposals

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TO: PENSION MEMBERS No. 19-15
BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 18-15
BROKER/DEALER ADVISORY COMMITTEE No. 25-15
OPERATIONS MEMBERS No. 19-15
TRANSFER AGENT ADVISORY COMMITTEE No. 25-15 RE: DEPARTMENT OF LABOR ISSUES
UPDATED REGULATORY AGENDA AND DELAYS PROJECTED ISSUANCE DATES OF SEVERAL
SIGNIFICANT RULEMAKING PROPOSALS

The Department of Labor (Department) has issued its updated Regulatory Agenda (Agenda) which includes the Department's projected dates for issuance of proposed and final regulations. [\[1\]](#) As described below, the Employee Benefits Security Administration's (EBSA) updated agenda indicates that the projected issuance date of several rulemaking actions has been delayed and reclassifies as "long-term actions" [\[2\]](#) two rulemaking projects (Guide or Similar Requirement for Section 408(b)(2) Disclosures and Standards for Brokerage Windows) that were previously included in its fall 2014 agenda. [\[3\]](#) The updated Agenda includes the following items:

1. Pension Benefit Statements: The Agenda provides that the Department expects to issue a Notice of Proposed Rulemaking (NPRM) regarding benefit statement contents in July 2015. Part of this initiative, according to the Agenda, will explore the inclusion of lifetime income stream illustrations on pension benefit statements for defined contribution plan participants. The Department issued an Advance Notice of Proposed Rulemaking (ANPRM) regarding lifetime income stream illustrations in May 2013 and the Institute submitted a comment letter in response to the ANPRM. [\[4\]](#)
2. Target Date Disclosure: The Agenda continues to include the Department's target date disclosure rulemaking project as a "long-term action" and classifies its next regulatory action as "undermined" with no projected issuance date. The Department's fall 2014 agenda classified this rulemaking project as a "long-term

action” and provided that the Department expected to issue a final rule in November 2015. The Department’s original proposal, issued in November 2010, would amend the existing rules on qualified default investment alternatives under ERISA §404(c)(5) and participant disclosure under ERISA §404(a) to require additional disclosure about target retirement date funds and similar investments. [\[5\]](#) The Institute submitted a comment letter in response to the proposal. [\[6\]](#)

The Department has re-opened the proposed rule’s comment period twice. In May 2012 the Department re-opened the proposed rule’s comment period in connection with an investor testing study sponsored by the Securities and Exchange Commission (SEC) relating to the SEC’s proposal on target date fund marketing materials. The Institute submitted comments to both the SEC and the Department on the SEC’s study. [\[7\]](#)

In June 2014, the Department re-opened the proposed rule’s comment period for 30 days in connection with the SEC’s April 2014 Notice re-opening its target date fund marketing rule proposal comment period. The SEC re-opened its comment period in response to the SEC Investor Advisory Committee’s April 2013 recommendations regarding target date funds, including a recommendation that the SEC require target date funds to include certain standardized risk information (including a “risk-based” glide path to replace or supplement the asset allocation glide path contemplated by the SEC in its 2010 proposal) in their marketing materials and/or prospectuses. The Institute submitted comments to both the SEC and the Department on the Investor Advisory Committee’s recommendations. [\[8\]](#)

3. Guide or Similar Requirement for Section 408(b)(2) Disclosures: The Agenda reclassifies the Department’s 408(b)(2) guide rulemaking project as a “long-term action” and classifies its next regulatory action as “undetermined” with no projected issuance date. The Department’s fall 2014 agenda provided that the Department expected to issue a final rule requiring a guide or similar requirement for 408(b)(2) disclosures in September 2015. As you may recall, the Department issued a proposed rule in March 2014 that would amend the final 408(b)(2) service provider disclosure regulation to require covered service providers who meet their obligations under 408(b)(2) by use of multiple or lengthy documents to furnish a guide to assist plan fiduciaries in reviewing the required disclosures. [\[9\]](#) The Institute submitted a comment letter in response to the proposed rule. [\[10\]](#) Concurrent with the issuance of the proposed rule, the Department issued an Information Collection Request (ICR) disclosing its intent to conduct a series of focus groups to explore current practices and effects of the final 408(b)(2) regulation and to gather information about the need for a guide, summary, or similar tool to help plan fiduciaries navigate and understand the disclosures and the Institute submitted a comment letter in response to the ICR. [\[11\]](#)

4. Standards for Brokerage Windows: The Agenda reclassifies the Department’s brokerage window standards rulemaking project as a “long-term action” and classifies its next regulatory action as “undetermined” with no projected issuance date. This rulemaking project will, according to the Agenda, explore whether, and to what extent, regulatory guidance on fiduciary requirements and regulatory safeguards are appropriate for individual account plan brokerage windows. As you may recall, in August 2014, the Department issued a Request for Information (RFI) regarding standards for brokerage windows in participant-directed individual account plans [\[12\]](#) and the Institute submitted a response to the RFI. [\[13\]](#)

5. Selection of Annuity Providers – Safe Harbor for Individual Account Plans: The Agenda

continues to include this rulemaking project as a “long-term action” and provides that the Department expects to issue a NPRM with proposed amendments to the safe harbor regulation for meeting ERISA’s fiduciary duties in selecting an annuity provider and contract for benefit distributions from an individual account plan in May 2016.

[\[14\]](#) The Department’s fall 2014 agenda provided that the Department expected to issue the NPRM in November 2015. The Agenda states that the proposed amendments will focus primarily on the condition in the safe harbor regulation relating to the ability of the annuity provider to make all future payments under the annuity contract.

6. Abandoned Plan Program: The Agenda indicates that the Department’s expected issuance of a final rule amending the abandoned plan program regulations has been delayed to October 2015. The Department’s fall 2014 agenda provided that the Department expected to issue the final rule in July 2015. In December 2012, the Department issued a NPRM with proposed amendments to the abandoned plan regulations. [\[15\]](#) The proposed amendments focus primarily on the ability of a chapter 7 bankruptcy trustee to act as a Qualified Termination Administrator and utilize the existing abandoned plan program to terminate abandoned plans and distribute benefits. The Institute submitted a comment letter in response to the proposed amendments. [\[16\]](#)
7. Voluntary Fiduciary Correction Program: The Agenda provides that the Department expects to issue an interim final rule amending and restating the Voluntary Fiduciary Correction Program (VFCP) in September 2015. The fall 2014 agenda provided that the Department expected to issue the interim final rule in March 2015. According to Agenda, this rulemaking project will expand the scope of some transactions currently eligible for correction under the VFCP and streamline correction procedures for others. The Agenda states that EBSA intends to issue a restatement of the VFCP in its entirety and request public comments.
8. Revision of the Form 5500 Series and Implementing Related Regulations: The Agenda provides that the Department expects to issue a NPRM revising the Form 5500 and the Form 5500 implementing regulations in September 2015. The Department’s fall 2014 agenda provided that the Department expected to issue the NPRM in July 2015. According to the Agenda, this rulemaking project is part of a long-term strategic project with the Internal Revenue Service (IRS) and Pension Benefit Guaranty Corporation to modernize and improve the Form 5500 and includes modernizing the financial and other annual reporting requirements on the Form 5500 and making the investment and other information on the Form 5500 more data mineable. In October 2013, the Institute submitted a letter to IRS recommending that IRS coordinate with the Department to harmonize the requirements of Schedule C of the Form 5500 with the 408(b)(2) service provider disclosure regulation. [\[17\]](#)
9. Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans – Timing of Annual Disclosure: The Agenda states that the Department issued a direct final rule in March 2015 amending regulation § 2550.404a-5 by making a technical adjustment to the participant-level annual disclosure timing requirements. [\[18\]](#) As you may recall, in Field Assistance Bulletin 2013-13, the Department provided a one-time opportunity to reset the §404a-5 deadline by furnishing either the second or third round of disclosures no later than 18 months after the prior disclosures were furnished and indicated that it was considering a regulatory amendment to the regulation’s timing requirement to provide reasonable flexibility to plan administrators on a permanent basis. [\[19\]](#) In December 2013, the Institute submitted a letter to the

Department supporting a regulatory amendment to allow for greater flexibility in determining when to provide the annual disclosures. [20]

10. Conflict of Interest Rule – Investment Advice (formerly “Definition of Fiduciary”): Finally, the Agenda states that the Department re-issued its fiduciary definition NPRM on April 20, 2015. [21]

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endnotes

[1] The Department’s spring 2015 Agency Rule List is available here:
http://www.reginfo.gov/public/do/eAgendaMain;jsessionid=09EAA27906929AF919D3BD251E40735C?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1200&Image58.x=42&Image58.y=4&Image58=Submit.

[2] According to the Unified Agenda, “long-term actions” are items under development but for which the agency does not expect to have a regulatory action within the 12 months after publication of the current edition of the United Agenda.

The Department’s spring 2015 Agency Rule List – Long-Term Actions is available here:
http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubId=201504&showStage=longterm&agencyCd=1200&Image58.x=47&Image58.y=11&Image58=Submit.

[3] For the Institute’s summary of EBSA’s fall 2014 Agenda, see [Memorandum](#) to Pension Members No. 48-14, Bank, Trust and Retirement Advisory Committee No. 49-14, Broker/Dealer Advisory Committee No. 55-14, Operations Members No. 21-14, Transfer Agent Advisory Committee No. 74-14 [28544], dated December 1, 2014.

[4] For the Institute’s comment letter, see [Memorandum](#) to Pension Members No. 35-13 [27446], dated August 7, 2013. For a detailed description of the ANPRM, see [Memorandum](#) to Pension Members No. 22-13 [27228], dated May 8, 2013.

[5] For a description of the proposed rule, see [Memorandum](#) to Pension Members No. 57-10, SEC Rules Members No. 131-10, Small Funds Members No. 79-10, Advertising Compliance Advisory Committee No. 6-10, Transfer Agent Advisory Committee No. 79-10, Bank, Trust and Recordkeeper Advisory Committee No. 51-10, Operations Committee No. 38-10 [24754], dated December 2, 2010.

[6] For the Institute’s comment letter on the Department’s proposal, see [Memorandum](#) to Pension Members No. 5-11, SEC Rules Members No. 8-11, Advertising Compliance Advisory Committee No. 2-11, Transfer Agent Advisory Committee No. 6-11, Bank, Trust and Recordkeeper Advisory Committee No. 6-11, Operations Committee No. 3-11 [24878], dated January 14, 2011.

[7] See [Memorandum](#) to Pension Members No. 22-12, SEC Rules Members No. 42-12, Small Funds Members No. 15-12 [26185], dated May 23, 2012 (letter to the SEC); [Memorandum](#) to Pension Members No. 26-12, SEC Rules Members No. 58-12, Small Funds Members No. 24-12 [26287], dated July 10, 2012 (letter to the Department).

[8] See [Memorandum](#) to Advertising Compliance Advisory Committee No. 14-14, Pension Members No. 25-14, Pension Operations Advisory Committee No. 12-14, SEC Rules Members No. 21-14, Small Funds Members No. 12-14 [28186], dated June 12, 2014 (letter to SEC); Memorandum to Advertising Compliance Advisory Committee No. 18-14, Pension Members No. 28-14, Pension Operations Advisory Committee No. 15-14, SEC Rules Members No. 28-14, Small Funds Members No. 17-14 [28240], dated July 7, 2014 (letter to the Department).

[9] For a description of the proposed rule, see [Memorandum](#) to Pension Members No. 10-14, Bank, Trust and Retirement Advisory Committee No. 11-14, Broker/Dealer Advisory Committee No. 12-14, Operations Committee No. 11-14 [27960], dated March 14, 2014.

[10] See [Memorandum](#) to Pension Members No. 23-14, Bank, Trust and Retirement Advisory Committee No. 24-14, Broker/Dealer Advisory Committee No. 31-14, Operations Members No. 3-14, Transfer Agent Advisory Committee No. 33-14 [28179], dated June 11, 2014.

[11] See [Memorandum](#) to Pension Members No. 20-14, Bank, Trust and Retirement Advisory Committee No. 21-14, Broker/Dealer Advisory Committee No. 25-14, Operations Committee No. 26-14, Transfer Agent Advisory Committee No. 28-14 [28119], dated May 13, 2014.

[12] See [Memorandum](#) to Pension Members No. 35-14 [28348], dated August 27, 2014.

[13] See [Memorandum](#) to Pension Members No. 46-14 [28531], dated November 20, 2014.

[14] 29 CFR§2550.404a-4. For the Institute's summary of the final safe harbor regulation, see [Memorandum](#) to Pension Members No. 65-08 [22989], dated October 10, 2008.

[15] For a description of the proposed amendments, see [Memorandum](#) to Pension Members No. 38-12, Bank, Trust and Retirement Advisory Committee No. 61-12, Transfer Agent Advisory Committee No. 80-12 [26799], dated December 20, 2012.

[16] See [Memorandum](#) to Pension Members No. 12-13, Operations Committee No. 11-13, Bank, Trust and Retirement Advisory Committee No. 6-13, Transfer Agent Advisory Committee No. 21-13 [27050], dated February 26, 2013.

[17] See [Memorandum](#) to Pension Members No. 48-13, Operations Committee No. 50-13, Bank, Trust and Retirement Advisory Committee No. 35-13, Transfer Agent Advisory Committee No. 74-13 [27619], dated October 2, 2013.

[18] For the Institute's summary of the direct final rule, see [Memorandum](#) to Pension Members No. 11-15 [28859], dated March 26, 2015.

[19] For the Institute's summary of FAB 2013-13, see [Memorandum](#) to Pension Members No. 33-13, Bank, Trust and Retirement Advisory Committee No. 22-13, Broker/Dealer Advisory Committee No. 35-13, Transfer Agent Advisory Committee No. 56-13, Operations Committee No. 34-13 [27398], dated July 23, 2013.

[20] See [Memorandum](#) to Pension Members No. 62-13, Operations Committee No. 59-13, Bank, Trust and Retirement Advisory Committee No. 45-13, Broker/Dealer Advisory Committee No. 56-13, Transfer Agent Advisory Committee No. 88-13 [27795], dated December 18, 2013.

[\[21\]](#) For the Institute's summary of the Department's April 2015 fiduciary definition re-proposal, see [Memorandum](#) to Pension Members No. 15-15, Operations Members No. 15-15, Small Funds Members No. 19-15, Bank, Trust and Retirement Advisory Committee No. 11-15, Broker/Dealer Advisory Committee No. 16-15, Transfer Agent Advisory Committee No. 18-15 [28939], dated April 29, 2015.

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