

MEMO# 28180

June 11, 2014

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

[28180]

June 11, 2014

TO: PENSION MEMBERS No. 24-14

BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 25-14

BROKER/DEALER ADVISORY COMMITTEE No. 32-14

OPERATIONS MEMBERS No. 4-14

TRANSFER AGENT ADVISORY COMMITTEE No. 34-14 RE: DEPARTMENT OF LABOR ISSUES
UPDATED REGULATORY AGENDA AND DELAYS PROJECTED ISSUANCE DATES OF SEVERAL
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. Additionally, the EBSA Agenda items include one new regulatory project: Adoption of Amended and Restated Voluntary Fiduciary Correction Program. The updated Agenda includes the following items:

1. Conflict of Interest Rule – Investment Advice (formerly “Definition of Fiduciary”): The Agenda indicates that the Department's expected re-issuance of its proposed fiduciary definition rule is now slated for January 2015. The Department's previous regulatory agenda, issued in fall 2013, provided that the Department expected to re-issue the proposed rule in August 2014. [\[2\]](#) The Department issued a proposed rule which would revise the existing rule on when a person will be considered to be a fiduciary under ERISA by providing investment advice in October 2010. [\[3\]](#) The Institute submitted a comment letter in response to the proposed rule and testified during the Department's March 2011 hearing regarding the proposed rule. [\[4\]](#) In September 2011, the Department announced that it would withdraw and re-propose the rule.
2. Pension Benefit Statements: The Agenda provides that the Department expects to issue a Notice of Proposed Rulemaking (NPRM) regarding benefit statement contents

in January 2015. The Department's fall 2013 agenda provided that the Department expected to issue the NPRM in August 2014. 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. [\[5\]](#)

3. Target Date Disclosure: Although the Department's fall 2013 agenda provided that the Department expected to issue a final rule regarding target date disclosure in March 2014, on June 3, 2014, the Department published a notice in the Federal Register re-opening the proposed rule's comment period. [\[6\]](#) In the Notice, the Department states that it is re-opening the comment period for 30 days in connection with the Security and Exchange Commission's (SEC) April 2014 Notice re-opening SEC's target date fund marketing rule proposal comment period. 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 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. [\[7\]](#) The Institute submitted a comment letter in response to the proposal. [\[8\]](#) The Department previously re-opened the proposed rule's comment period in connection with an investor testing study sponsored by the SEC relating to the SEC's proposal on target date fund marketing materials. The Institute submitted comments to both the SEC and DOL on the SEC's study. [\[9\]](#)

4. Guide or Similar Requirement for Section 408(b)(2) Disclosures: The Agenda does not include a projected date of issuance of a final rule requiring a guide or similar requirement for 408(b)(2) disclosures. 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. [\[10\]](#) Concurrent with the issuance of the proposed rule, DOL 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. The Institute submitted a comment letter in response to the ICR. [\[11\]](#)
5. Standards for Brokerage Windows: The Agenda indicates that the Department's expected issuance of a Request for Information regarding brokerage window standards is delayed for one month, from April 2014 to May 2014. 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 its revision of Field Assistance Bulletin 2012-02 (which provided answers to frequently asked questions regarding the participant-level disclosure regulation), the Department added FAQ 39 in which it confirmed that a platform or a brokerage window, self-directed brokerage

account, or similar plan arrangement in which the fiduciary did not designate any of the funds as a designated investment alternatives (“DIA”) is not a DIA. In the same FAQ, the Department reminded fiduciaries of their statutory duties of prudence and loyalty to participants who use brokerage windows and stated that it intended to “engage in discussions with interested parties to determine how best to assure compliance with these duties in a practical and cost effective manner, including, if appropriate, through amendments of relevant regulatory provisions.” [12]

6. Selection of Annuity Providers – Safe Harbor for Individual Account Plans: The Agenda provides that the Department’s 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 January 2015. [13] The Department’s fall 2013 agenda provided that the Department expected to issue the NPRM in October 2014. 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 future payments under the annuity contract.
7. 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 2014. The fall 2013 agenda provided that the Department expected to issue the final rule in April 2014. In December 2012, the Department issued a Notice of Proposed Rulemaking with proposed amendments to the abandoned plan regulations. [14] 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. [15]
8. 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 January 2015. This new 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.

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endnotes

[1] The Department’s Spring 2014 Agency Rule List is available here: http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCd=1200.

[2] For the Institute’s summary of EBSA’s fall 2013 Agenda see [Memorandum](#) to Pension Members No. 56-13, Bank, Trust and Retirement Advisory Committee No. 41.-13, Operations Committee No. 54-13, Transfer Agent Advisory Committee No. 83-13 [27739], dated December 4, 2013.

[3] For a description of the Department’s October, 2010 proposed rule, see [Memorandum](#)

to Pension Members No. 43-10 [24642], dated October 22, 2010.

[4] For the Institute's comment letter, see [Memorandum](#) to Pension Members No. 8-11 [24941], dated February 3, 2011. For a copy of the Institute's testimony at the March 1, 2011 hearing, see [Memorandum](#) to Pension Members No. 17-11 [25000], dated March 2, 2011.

[5] 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.

[6] The Federal Register notice is available here:
<http://www.gpo.gov/fdsys/pkg/FR-2014-06-03/pdf/2014-12667.pdf>.

[7] 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.

[8] For the Institute's comment letter on the DOL 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.

[9] 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 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 DOL).

[10] 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.

[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] For the Institute's memorandum regarding the revision of FAB 2012-02, see [Memorandum](#) to Pension Members No. 27-12 [26357], dated July 31, 2012.

[13] 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.

[14] 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.

[15] 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.

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