

**MEMO# 24246**

April 19, 2010

## **Draft Comment Letters on DOL Investment Advice Proposal**

ACTION REQUESTED

[24246]

April 19, 2010

TO: PENSION COMMITTEE No. 9-10  
PENSION OPERATIONS ADVISORY COMMITTEE No. 8-10    RE: DRAFT COMMENT LETTERS  
ON DOL INVESTMENT ADVICE PROPOSAL

Attached for your review are two draft comment letters on the Department of Labor's investment advice proposal. [\[1\]](#) The first letter is the Institute's comment letter. In our draft we make the following points:

- The final rule should remove or modify the proposed requirement that suggests that computer models cannot consider historical performance in distinguishing among investment options in an asset class. Historical performance is considered routinely in evaluating investment managers and products and its relevance is recognized in the PPA exemption itself and a number of the Department's rules.
- The Department should not embark on a process to determine or define the generally accepted investment theories under which plan assets should be invested, which would have implications for the investment of assets of any plans subject to ERISA.
- The final rule should clarify the fee leveling condition in two respects - (1) to state that any compensation that a fiduciary adviser receives when a participant implements an investment recommendation cannot vary based on the investment (removing the suggestion that the adviser cannot receive any compensation based on an investment) and (2) to reiterate that bonus programs based on the organization's overall profitability, where participant investments constitute a negligible portion of the profitability or revenue, do not violate the level fee condition.
- The final rule should clarify that an advice program is not required to seek from participants all of the information that the PPA says may be included in the relevant

information about participants that the program takes into account.

- The final rule should retain the provision of the proposal that preserves Department guidance on programs not relying on the PPA exemption.
- The final rule should clarify that IRAs that offer a wide range of investment options would be treated under the rule as similar to brokerage windows in 401(k) plans.

The second draft letter attached is a joint letter we plan to file with the American Benefits Council and the American Council of Life Insurers. The letter is designed to highlight the agreement of these organizations on key issues, especially to express significant concern that the Department will seek to define generally accepted investment theories or favor particular investment styles.

Please let the undersigned (mhadley@ici.org or 202-326-5810) know by April 27, 2010 if you have comments on either letter.

Michael L. Hadley  
Associate Counsel

[Attachment](#)

**endnotes**

[1] See [Memorandum](#) to Pension Committee No. 4-10 and Pension Operations Advisory Committee No. 4-10 [24159], dated March 2, 2010.

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