

MEMO# 27739

December 4, 2013

Department of Labor Issues Updated Regulatory Agenda

[27739]

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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 RE: DEPARTMENT OF LABOR ISSUES
UPDATED REGULATORY AGENDA

The Department of Labor (Department) has issued its updated Regulatory Agenda, which includes the Department's projected dates for issuance of proposed and final regulations. [\[1\]](#) As described below, the updated Employee Benefits Security Administration (EBSA) agenda items include two new regulatory projects: Standards for Brokerage Windows and Selection of Annuity Providers – Safe Harbor for Individual Account Plans. The updated Fall 2013 Agenda includes the following items:

1. Conflict of Interest Rule – Investment Advice (formerly “Definition of Fiduciary”): The Agenda provides that the Department expects to re-issue its proposed fiduciary definition rule in August, 2014. The Department issued a proposed rule in October, 2010 to revise the existing rule on when a person will be considered to be a fiduciary under ERISA by providing investment advice. [\[2\]](#) 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. [\[3\]](#) In September, 2011, the Department announced that it would withdraw and re-propose the rule.
2. Pension Benefit Statements: The Agenda provides that in August, 2014, the Department expects to issue a Notice of Proposed Rulemaking regarding pension benefit statement contents. Part of this initiative 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. [\[4\]](#)
3. Target Date Disclosure: The Agenda provides that the Department expects to issue a final rule regarding target date disclosure in March, 2014. 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] In May, 2012, the Department re-opened the comment period in connection with an investor testing study sponsored by the SEC relating to the SEC's separate proposal on target date fund marketing materials. The Institute submitted comments to both the SEC and DOL on the SEC's study. [7]

4. **Guide or Similar Requirement for Section 408(b)(2) Disclosures:** The Agenda provides that the Department expects to issue a Notice of Proposed Rulemaking regarding a guide or similar requirement for the 408(b)(2) disclosures in January, 2014. As you may recall, at the time the Department issued the interim final 408(b)(2) rule, it sought comment on whether the final rule should include a guide or similar requirement to accompany the disclosures, to assist fiduciaries in locating disclosure information provided in multiple documents. [8] The final rule, issued in February, 2012, did not require a guide or similar requirement. The final rule reserved a place for future development of a guide or similar requirement and the Department stated that it intended to issue a separate proposal for such a guide or similar requirement in the future. [9] The Department transmitted the proposed rule to OMB's Office of Information and Regulatory Affairs for review on June 25, 2013.
5. **Standards for Brokerage Windows:** The Department expects to issue a Request for Information regarding brokerage window standards in April, 2014. This new rulemaking project will 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 alternative ("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 help 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." [10]
6. **Selection of Annuity Providers – Safe Harbor for Individual Account Plans:** The Agenda provides that the Department intends to issue a Notice of Proposed Rulemaking 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. [11] 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. The Department expects to issue the Notice of Proposed Rulemaking in October, 2014.
7. **Abandoned Plan Program:** The Agenda provides that the Department expects to issue a final rule amending the abandoned plan program regulations in April 2014. In December, 2012, the Department issued a Notice of Proposed Rulemaking with proposed amendments to the abandoned plan regulations. [12] The proposed amendments primarily focus 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 such plans and distribute benefits. The Institute submitted a comment letter in response to the proposed amendments. [\[13\]](#)

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endnotes

- [1] The Department's Fall 2013 Agency Rule List is available here: http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1200&Image58.x=39&Image58.y=5&Image58=Submit
- [2] For a description of the Department's October, 2010 proposed rule, see [Memorandum](#) to Pension Members No. 43-10 [24642], dated October 22, 2010.
- [3] 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.
- [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 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.
- [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 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).
- [8] For a description of the interim final rule, see [Memorandum](#) to Pension Members No. 29-10, Bank, Trust and Recordkeeper Advisory Committee No. 21-10, Operations Committee No. 18-10, Transfer Agent Advisory Committee No. 37-10 [24432], dated July 16, 2010. For the Institute's comment letter on the interim final rule, see [Memorandum](#) to Pension Members No. 36-10, Bank, Trust and Recordkeeper Advisory Committee No. 30-10, Transfer Agent Advisory Committee No. 52-10, Operations Committee No. 24-10 [24520], dated August 30, 2010.
- [9] For a description of the final rule, see [Memorandum](#) to Pension Members No. 8-12

[25876], dated February 7, 2012.

[10] 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.

[11] 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.

[12] 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.

[13] 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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