

MEMO# 24159

March 2, 2010

DOL Proposes PPA Investment Advice Rule; Conference Call Scheduled for Tuesday, March 16 at 3:00 PM EST

[24159]

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TO: PENSION COMMITTEE No. 4-10

PENSION OPERATIONS ADVISORY COMMITTEE No. 4-10 RE: DOL PROPOSES PPA INVESTMENT ADVICE RULE; CONFERENCE CALL SCHEDULED FOR TUESDAY, MARCH 16 AT 3:00 PM EST

The Department of Labor issued a new proposed rule to implement the investment advice provisions of the Pension Protection Act of 2006 to replace the final rules that were adopted in early 2009 and withdrawn in November 2009. [\[1\]](#)

A copy of the proposal is attached. Comments on the proposal are due May 5. The Institute has scheduled a conference call for Tuesday, March 16, 2010 at 3:00 PM Eastern Time to discuss the proposal. If you are interested in participating in the call, please complete the attached response form and fax or e-mail it to Brenda Turner at 202-326-5841 or bturner@ici.org no later than noon, Monday, March 15. To participate, please dial 1-800-369-3301 and enter passcode 68509.

With two exceptions noted below, the new proposal largely tracks the portion of the prior final rule that implemented the statutory provision, but eliminates the portion that provided an additional class exemption. [\[2\]](#) This class exemption provided additional opportunities for investment advice not available under the statutory exemption using modified versions of the computer model and fee-leveling options. The release also asks a number of

detailed questions about generally accepted investment principles, including whether DOL should define them for purpose of this rule.

First, the new proposal clarifies the fee leveling condition of the PPA exemption. The proposal states that the fee-leveling requirement applies both to the entity retained to render investment advice, and to any employee, agent or registered representative of that entity. An affiliate of the fiduciary adviser may still receive fees that vary based on the investment options selected, but DOL states in the preamble that any provision of financial or economic incentives by an affiliate or any other party to a fiduciary adviser or any individual employed by the fiduciary adviser, including a person responsible for supervising an employee providing advice, to favor certain investments would be impermissible. DOL suggests that the new proposed language regarding fee-leveling follows the language in Field Assistance Bulletin 2007-1. [\[3\]](#)

Second, the proposal adds a new condition to the requirements for computer models. The new condition states that a computer model may not “[i]nappropriately distinguish among investment options within a single asset class on the basis of factors that cannot be confidentially expected to persist in the future.” In the preamble, DOL states:

While some differences between investment options within a single asset class, such as differences in fees and expenses or management style, are likely to persist in the future and therefore to constitute appropriate criteria for asset allocation, other differences, such as differences in historical performance, are less likely to persist and therefore less likely to constitute appropriate criteria for asset allocation. Asset classes, in contrast, can more often be distinguished from one another on the basis of differences in their historical risk and return characteristics.

Finally, DOL asks for comment on a series of questions related to generally accepted investment principles, in the context of computer models. These questions include:

- What investment theories are generally accepted and should the regulation dictate the bases for model parameters such as the probability distribution of future returns?
- What historical data should be taken into account and should the regulation specify minimum standards for data used to project future performance?
- Should the regulation provide that computer models consider only the historical risks and returns of asset classes as a whole, and not a fund’s past performance relative to the average for its asset class? Under what conditions would it be appropriate to recommend a fund with superior past performance over an alternative fund in the same asset class with average performance but lower fees?
- All else being equal, should a model ascribe “different levels of risk” to passively and actively managed investment options?

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[Attachment](#)

endnotes

[1] See [Memorandum](#) to Pension Members No. 56-09 [23965], dated November 20, 2009.

[2] For a description of the previous final regulation, see [Memorandum](#) to Pension Members No. 9-09 [23239], dated February 9, 2009. Included in the proposal are the model disclosure and the separate rule allowing a single fiduciary adviser to be treated as a fiduciary with respect to the plan (section 2550.408g-2).

[3] See [Memorandum](#) to Pension Members No. 7-07 [20843], dated February 5, 2007.

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