MEMO# 29129

June 26, 2015

ICI Draft Comment Letters on DOL Definition of Fiduciary Rule and Best Interest Contract Exemption - Comments Requested by July 8, 2015

[29129]

June 26, 2015

TO: PENSION COMMITTEE No. 10-15
PENSION OPERATIONS ADVISORY COMMITTEE No. 8-15
SEC RULES COMMITTEE No. 20-15 RE: ICI DRAFT COMMENT LETTERS ON DOL DEFINITION OF FIDUCIARY RULE AND BEST INTEREST CONTRACT EXEMPTION - COMMENTS REQUESTED BY JULY 8, 2015

Attached for your review are two draft comment letters: one responding to the Department of Labor's (the "Department") proposed Definition of the Term Fiduciary; Conflict of Interest Rule – Retirement Advice ("Proposed Rule"), and one responding to the Department's proposed Best Interest Contract Exemption and other exemption proposals and modifications. [1]

A brief thematic overview of each of the draft comment letters is provided below. Please note that the drafts are intended to be used to solicit further discussion and comment and no final decision has been made on any position or request for modification specified in either letter. We would appreciate your comments and feedback on the draft letters, and, in particular, the recommended modifications described therein. We have also bracketed certain paragraphs and sentences containing points on which we would appreciate your particular attention and comment. We kindly ask that you provide any comments to David Abbey (david.abbey@ici.org or 202.326-5920), and Howard Bard (howard.bard@ici.org or 202.326-5810) by Wednesday, July 8, 2015. The Institute will be holding a call on Tuesday, July 7, 2015 to discuss the comment letters. Details regarding the call will be distributed in the near future.

In addition to the comment letters on the Proposed Rule and Best Interest Contract Exemption, the Institute will be submitting a separate comment letter on the Department's Regulatory Impact Analysis. Our comment letter will generally follow the outline of ICI Chief Economist Brian Reid's June 17, 2015 testimony before the U.S. House of Representatives, Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor, and Pensions. For your reference, a copy of the written testimony is attached.

The Proposed Rule

The draft letter on the Proposed Rule expresses concern that the Proposed Rule will have significant unintended consequences and will harm the very persons it is designed to protect – small employers and retirement savers. The letter argues that the Proposed Rule is overly broad and the availability and scope of the provided carve-outs is too limited, and, as a result, the activities that trigger when a service provider will be considered a fiduciary would be contrary to the expectations of plan sponsors and retirement investors, and in many instances, significantly unclear. The letter further states that it is critical that service providers are able to structure their products and services with reasonable certainty about whether they will be considered "fiduciary activities" and that, without such certainty, service providers cannot reasonably avoid unintentionally and unwillingly becoming fiduciaries and engaging in prohibited transactions.

Accordingly, the draft letter makes specific recommendations to the Department for refining its approach so that any final rule provides clarity on the activities covered, sufficiently exempts ordinary practices like education, marketing and selling investment products and services, and does not impede retirement investor choice over products and services more appropriate to their needs.

The Proposed Best Interest Contract Exemption

The draft letter on the proposed Best Interest Contract Exemption states that the Institute strongly supports a "best interest" standard that applies with respect to retirement investors, and would be supportive of the Best Interest Contact Exemption if it was carefully designed to implement such a standard in a manner that served the best interests of those it is designed to protect. The letter expresses concern that – rather than focusing on a principles-based best interest standard – the Department has added a multitude of additional conditions and exclusions that make the exemption unworkable.

The letter outlines and explains the critical changes the Institute believes are necessary to make the Best Interest Contract Exemption and other proposed exemptions (including modifications to existing exemptions) of any value for ensuring the provision of necessary services to retirement investors.

The letter also addresses the Department's "streamlined" exemption for so-called "high-quality low-fee" investment products. The letter notes that the Department does not actually propose such an exemption and fails to specify with any detail how such an exemption would work, or what investments would qualify. Accordingly, the letter expresses concerns about the feasibility of such an exemption, and states that the Department has not provided the public with enough information about the "streamlined" exemption that would allow it to finalize such an exemption without proposing a specific approach and seeking public comment.

Howard Bard
Assistant General Counsel

Attachment

endnotes

[1] Both letters respond to the Department's request for comments in connection with the Department's April 2015 issuance of a proposed regulatory package regarding the definition of "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") as a result of providing investment advice to an employee benefit plan, plan fiduciary, plan participant or beneficiary, IRA or IRA holder. In addition to the Proposed Rule, the regulatory package of materials issued by the Department included (1) two new proposed prohibited transaction class exemptions ("PTEs"): a "Best Interest Contract" Exemption and a "Principal Transactions" Exemption, (2) amendments to several other existing PTEs, and (3) a separate Regulatory Impact Analysis. For the Institute's summary of the Proposed Rule, proposed new exemptions, and proposed amendments to existing exemptions, see Memorandum to Pension Members No. 15-14, 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.
