

MEMO# 32588

July 8, 2020

DOL Releases Spring 2020 Regulatory Agenda

[32588]

July 8, 2020 TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Releases Spring 2020 Regulatory Agenda

The Department of Labor (DOL) recently issued its updated Semi-Annual Regulatory Agenda (Agenda) which includes DOL's projected dates for issuance of proposed and final regulations.[\[1\]](#) Of particular note, the Employee Benefits Security Administration (EBSA) removed one item from its long-term agenda[\[2\]](#) (regarding lifetime income safe harbors). In addition, we can expect to see two regulatory releases (a proposed rule on proxy voting and an interim final rule on lifetime income disclosures on pension benefit statements) in the coming months.

DOL includes the following regulatory projects under EBSA on the current Agenda:

- **Proxy Voting Update.** DOL first included this project on its Spring 2019 agenda as a long-term agenda item. In the current Agenda, DOL estimates that it will issue a proposed regulation by July 2020. It describes the project as follows: "This deregulatory action would modernize fiduciary practices related to the voting rights associated with ERISA plan investments and harmonize those regulations with the requirements of other regulators. The goal of this proposal would be to protect the interests of participants and beneficiaries by: (1) addressing practices that could present conflicts of interest associated with proxy advisory firm recommendations; (2) ensuring that proxy voting decisions are based on best information; and (3) ensuring that proxy voting decisions are solely in the interest of, and for the exclusive purpose of providing plan benefits to, participants and beneficiaries." While DOL does not identify any particular regulations of other regulators with respect to which it is seeking to "harmonize," it is worth noting that the Securities and Exchange Commission (SEC) has taken significant action on proxy firms during the past year, issuing final guidance in August 2019 and proposing new requirements in November.[\[3\]](#)
- **Pension Benefit Statements—Disclosure Regarding Lifetime Income, SECURE Act.** The Setting Every Community Up for Retirement Enhancement Act ("SECURE

Act”) requires defined contribution plans to include an annual lifetime income stream estimate on participant benefit statements, setting forth the lifetime income stream equivalent of the participant’s total account balance under the plan.[\[4\]](#) The lifetime income illustration required under the bill mandates a calculation based on an annuity payout. The SECURE Act requires DOL to provide a model lifetime income disclosure, issue rules, and prescribe assumptions. This project on the Agenda is listed as a continuation of the Pension Benefit Statements project that appeared on the EBSA’s long-term agenda in Fall 2019.[\[5\]](#) DOL’s Agenda estimates that it will issue the interim final rule by December 2020; however, this project was sent to OMB for review on June 29, 2020, so we expect it to be released soon.

- **Fiduciary Rule and Prohibited Transaction Exemptions (PTEs).** As on its Fall 2019 regulatory agenda, DOL lists its fiduciary rule and PTE project, indicating that it expects to issue a proposed regulation by June 2020. DOL recently issued a proposed PTE and a final rule reinstating the five-part test definition of fiduciary and other prior guidance.[\[6\]](#) Comments on the proposed PTE are due August 6, 2020.
- **Pooled Employer Plans Under the SECURE Act.** DOL indicates that it will issue a proposal to implement the pooled employer plan provisions of the SECURE Act. Section 101 of the SECURE Act allows otherwise unrelated employers (of any size) to band together and participate in open multiple employer plan arrangements (referred to as “pooled employer plans” or “PEPs”). DOL recently issued a request for information (RFI) to gather information for this purpose. Comments on the RFI are due June 20, 2020.[\[7\]](#)
- **Financial Factors in Selecting Plan Investments.** DOL indicates it will issue a proposed rule to replace its prior sub-regulatory guidance regarding ESG investments. This is the first time this project is appearing on DOL’s Agenda. DOL published a proposal in June, and comments are due July 30, 2020.[\[8\]](#)
- **Adoption of Amended and Restated Voluntary Fiduciary Correction Program.** DOL plans to amend and restate its Voluntary Fiduciary Correction Program (VFCP), which is designed to encourage the voluntary correction of fiduciary violations by permitting persons to avoid civil actions and penalties if they take steps to correct identified violations. According to the Agenda, “[t]he amendments will expand the scope of some transactions currently eligible for correction and streamline correction procedures for certain others.” This project has remained on DOL’s regulatory agenda for a number of years, and DOL currently estimates that it will issue an interim final rule by March 2021.[\[9\]](#)

DOL removed the following items that appeared in the Fall 2019 long-term regulatory agenda:

- **Lifetime Income Safe Harbors for Individual Account Plans.** This long-term Agenda item combines two separate items to promote lifetime income that appeared on DOL’s Spring 2019 long-term agenda: (1) Selection of Annuity Providers--Safe Harbor for Individual Account Plans[\[10\]](#), and (2) Fiduciary Relief for Investments in Qualified Default Investment Alternatives (QDIA). The Agenda lists EBSA’s next action on this project as undetermined. Regarding the QDIA rules, the agenda provides that EBSA will explore whether it should consider amendments to regulations (§ 2550.404(c)-5) to facilitate the use of lifetime income products and features as, or as part of, QDIAs.[\[11\]](#) Regarding the annuity selection rules, the Agenda states that DOL may develop proposed amendments to the annuity selection safe harbor primarily

focused on the condition in the safe harbor relating to the ability of the annuity provider to make all future payments under the annuity contract.^[12]

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endnotes

[1] DOL's Spring 2020 Agency Rule List is *available at* https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1200&Image58.x=32&Image58.y=14.

[2] "Long-term actions" are items under development for which the agency does not expect to have a regulatory action within the 12 months after publication of the current edition of the Unified Agenda.

[3] For a description of the proposals the SEC issued in November regarding proxy rules affecting proxy advisory firms and shareholder proposals, see ICI Memorandum No. 32048, dated November 11, 2019, *available at* https://www.ici.org/my_ici/memorandum/ci.memo32048.idc. For a description of the proxy-related guidance to investment advisers and proxy advisory firms that the SEC adopted in August, see ICI Memorandum No. 31916, dated August 22, 2019, *available at* https://www.ici.org/my_ici/memorandum/memo31916.

[4] For an overview of the SECURE Act, see ICI Memorandum No. 32118, dated December 20, 2019, *available at* https://www.ici.org/my_ici/memorandum/memo32118.

[5] Previously, the project related to DOL's Advance Notice of Proposed Rulemaking (ANPRM) regarding lifetime income stream illustrations in May 2013. For a description of the ANPRM, see ICI Memorandum No. 27228, dated May 8, 2013, *available at* https://www.ici.org/my_ici/memorandum/memo27228. For a description of ICI's comment letter responding to the ANPRM, see ICI Memorandum No. 27446, dated August 7, 2013, *available at* https://www.ici.org/my_ici/memorandum/memo27446.

[6] See ICI Memorandum No. 32581, dated July 6, 2020, *available at* https://www.ici.org/my_ici/memorandum/memo32581.

[7] See ICI Memorandum No. 32539, dated June 18, 2020, *available at* https://www.ici.org/my_ici/memorandum/memo32539.

[8] See ICI Memorandum No. 32552, dated June 24, 2020, *available at* https://www.ici.org/my_ici/memorandum/memo32552.

[9] For a description of the latest revision to the VFCP, see ICI Memorandum No. 20012, dated May 5, 2006, *available at* <https://www.ici.org/pdf/memo20012.pdf>.

[10] Note that the SECURE Act included a safe harbor addressing this issue.

[11] In 2018, the ERISA Advisory Council studied the topic of Lifetime Income Solutions as a

Qualified Default Investment Alternative. For a description of the Council's report, including its recommendations to DOL, see ICI Memorandum No. 31743, dated May 2, 2019, *available at* https://www.ici.org/my_ici/memorandum/memo31743. ICI testified at the August 2018 hearing. For a description of ICI's testimony, see ICI Memorandum No. 31338, dated August 16, 2018, *available at* https://www.ici.org/my_ici/memorandum/memo31338.

[12] This project is based on responses DOL received in response to its 2010 RFI Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans. For a description of the RFI, see ICI Memorandum No. 24125, dated February 2, 2010, *available at* https://www.ici.org/my_ici/memorandum/memo24125. For a description of ICI's comment letter, see ICI Memorandum No. 24278, dated May 3, 2010, *available at* https://www.ici.org/my_ici/memorandum/memo24278.

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