

MEMO# 28544

December 1, 2014

Department of Labor Issues Updated Regulatory Agenda and Delays Projected Issuance of Several Rulemaking Proposals

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TO: PENSION MEMBERS No. 48-14

BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 49-14

BROKER/DEALER ADVISORY COMMITTEE No. 55-14

OPERATIONS MEMBERS No. 21-14

TRANSFER AGENT ADVISORY COMMITTEE No. 74-14 RE: DEPARTMENT OF LABOR ISSUES
UPDATED REGULATORY AGENDA AND DELAYS PROJECTED ISSUANCE OF SEVERAL
RULEMAKING PROPOSALS

The Department of Labor (Department) has issued its updated Regulatory Agenda (Agenda) which includes the Department's projected dates for issuance of proposed and final regulations. [\[1\]](#) As described below, although the Agenda entries associated the Employee Benefits Security Administration's (EBSA) rulemaking activities indicate that the projected issuance date of several rulemaking actions has been delayed, EBSA continues to project that it will re-issue its fiduciary definition proposal in January 2015. Additionally, the EBSA fall 2014 agenda reclassifies two rulemaking projects (Selection of Annuity Providers - Safe Harbor for Individual Account Plans, and Target Date Disclosure) that were included in spring 2014 agenda [\[2\]](#) as "long-term actions," [\[3\]](#) and includes three new regulatory projects: (1) Revision of the Form 5500 Series and Implementing Related Regulations; (2) Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans - Timing of Annual Disclosure; and (3) Revisions to Form 5500 Annual Return/Report - Multiple Employer Plans. The updated Agenda includes the following items:

1. Conflict of Interest Rule - Investment Advice (formerly "Definition of Fiduciary"): The Agenda indicates that the Department's expected re-issuance of its proposed fiduciary definition rule continues to be slated for January 2015. As you know, the Department issued a proposed rule which would revise the existing rule on when a person will be considered to be a fiduciary under ERISA by providing investment advice in October 2010. [\[4\]](#) 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. [\[5\]](#) In September 2011, the Department announced that it would withdraw and re-propose the rule.

2. Pension Benefit Statements: The Agenda provides that the Department expects to issue a Notice of Proposed Rulemaking (NPRM) regarding benefit statement contents in July 2015. The Department's spring 2014 agenda provided that the Department expected to issue the NPRM in January 2015. Part of this initiative, according to the Agenda, 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. [\[6\]](#)
3. Target Date Disclosure: The Agenda reclassifies the Department's target date disclosure rulemaking project as a "long-term action" and provides that the Department expects to issue a final rule in November 2015. 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. [\[7\]](#) The Institute submitted a comment letter in response to the proposal. [\[8\]](#)

The Department has re-opened the proposed rule's comment period twice. In May 2012 the Department re-opened the proposed rule's comment period in connection with an investor testing study sponsored by the Securities and Exchange Commission (SEC) relating to the SEC's proposal on target date fund marketing materials. The Institute submitted comments to both the SEC and DOL on the SEC's study. [\[9\]](#)

In June 2014, the Department re-opened the proposed rule's comment period for 30 days in connection with SEC's April 2014 Notice re-opening its target date fund marketing rule proposal comment period. SEC re-opened its comment period in response to the SEC Investor Advisory Committee's April 2013 recommendations regarding target date funds, including a recommendation that the SEC require target date funds to include certain standardized risk information (including a "risk-based" glide path to replace or supplement the asset allocation glide path contemplated by the SEC in its 2010 proposal) in their marketing materials and/or prospectuses. The Institute submitted comments to both the SEC and DOL on the Investor Advisory Committee's recommendations. [\[10\]](#)

4. Guide or Similar Requirement for Section 408(b)(2) Disclosures: The Agenda provides that the Department expects to issue a final rule requiring a guide or similar requirement for 408(b)(2) disclosures in September 2015. As you may recall, the Department issued a proposed rule in March 2014 that would amend the final 408(b)(2) service provider disclosure regulation to require covered service providers who meet their obligations under 408(b)(2) by use of multiple or lengthy documents to furnish a guide to assist plan fiduciaries in reviewing the required disclosures [\[11\]](#) and the Institute submitted a comment letter in response to the proposed rule. [\[12\]](#) Concurrent with the issuance of the proposed rule, DOL issued an Information Collection Request (ICR) disclosing its intent to conduct a series of focus groups to explore current practices and effects of the final 408(b)(2) regulation and to gather information about the need for a guide, summary, or similar tool to help plan

fiduciaries navigate and understand the disclosures and the Institute submitted a comment letter in response to the ICR. [\[13\]](#)

5. Standards for Brokerage Windows: The Agenda does not include a projected date of issuance of a proposed rule regarding brokerage window standards. This rulemaking project will, according to the Agenda, 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 August 2014, the Department issued a Request for Information (RFI) regarding standards for brokerage windows in participant-directed individual account plans [\[14\]](#) and the Institute submitted a response to the RFI. [\[15\]](#)
6. Selection of Annuity Providers – Safe Harbor for Individual Account Plans: The Agenda reclassifies this rulemaking project as a “long-term action” and provides that the Department’s expects to issue a NPRM 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 in November 2015. [\[16\]](#) The Department’s spring 2014 agenda provided that the Department expected to issue the NPRM in January 2015. 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.
7. Abandoned Plan Program: The Agenda indicates that the Department’s expected issuance of a final rule amending the abandoned plan program regulations has been delayed to July 2015. The spring 2014 agenda provided that the Department expected to issue the final rule in October 2014. In December 2012, the Department issued a NPRM with proposed amendments to the abandoned plan regulations. [\[17\]](#) The proposed amendments focus primarily 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 abandoned plans and distribute benefits. The Institute submitted a comment letter in response to the proposed amendments. [\[18\]](#)
8. Voluntary Fiduciary Correction Program: The Agenda provides that the Department expects to issue an interim final rule amending and restating the Voluntary Fiduciary Correction Program (VFCP) in March 2015. The spring 2014 agenda provided that the Department expected to issue the interim final rule in January 2015. According to Agenda, this rulemaking project will expand the scope of some transactions currently eligible for correction under the VFCP and streamline correction procedures for others. The Agenda states that EBSA intends to issue a restatement of the VFCP in its entirety and request public comments.
9. Revision of the Form 5500 Series and Implementing Related Regulations: The Agenda provides that the Department expects to issue a NPRM revising the Form 5500 and the Form 5500 implementing regulations in July 2015. According to the Agenda, this new rulemaking project is part of a long-term strategic project with the Internal Revenue Service (IRS) and Pension Benefit Guaranty Corporation to modernize and improve the Form 5500 and includes modernizing the financial and other annual reporting requirements on the Form 5500 and making the investment and other information on the Form 5500 more data mineable. In October 2013, the Institute submitted a letter to IRS recommending that IRS coordinate with the Department to harmonize the requirements of Schedule C of the Form 5500 with the 408(b)(2) service provider disclosure regulation. [\[19\]](#)

10. Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans – Timing of Annual Disclosure: The Agenda provides that the Department expects to issue a direct final rule in December 2014 amending regulation § 2550.404a-5 by making a technical adjustment to the participant-level annual disclosure timing requirements. According to the Agenda, this new regulatory project would provide plan administrators with flexibility as to when they must furnish annual disclosures to participants and beneficiaries. As you may recall, in Field Assistance Bulletin (FAB) 2013-13, the Department provided a one-time opportunity to reset the §404a-5 deadline by furnishing either the second or third round of disclosures no later than 18 months after the prior disclosures were furnished. [20] In the FAB, the Department also indicated that was considering a regulatory amendment to the regulation’s timing requirement to provide reasonable flexibility to plan administrators on a permanent basis. In December 2013, the Institute submitted a letter to the Department supporting a regulatory amendment to allow for greater flexibility in determining when to provide the annual disclosures. [21]
11. Revisions to Form 5500 Annual Return/Report – Multiple Employer Plans: The Agenda states that the Department issued an interim final rule on November 11, 2014 revising the Form 5500 to implement annual reporting changes for multiple employer plans required by the Cooperative and Small Employer Charity Pension Flexibility Act. [22] According to the Agenda, the interim final rule requires a multiple employer plan to include in its Form 5500 filing a list of participating employers and a good faith estimate of the percentage of contributions made by each participating employer during the plan year.

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endnotes

- [1] The Department’s fall 2014 Agency Rule List is available here:
http://www.reginfo.gov/public/do/eAgendaMain;jsessionid=09EAA27906929AF919D3BD251E40735C?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1200&Image58.x=42&Image58.y=4&Image58=Submit.
- [2] For the Institute’s summary of EBSA’s spring 2014 Agenda, see [Memorandum](#) to Pension Members No. 24-14, Bank, Trust and Retirement Advisory Committee No. 25-14, Broker/Dealer Advisory Committee No. 32-14, Operations Members No. 4-14, Transfer Agent Advisory Committee No. 34-14 [28180], dated June 11, 2014.
- [3] According to the Unified Agenda, “long-term actions” are items under development but for which the agency does not expect to have a regulatory action within the 12 months after publication of the current edition of the United Agenda.
- The Department’s fall 2014 Agency Rule List – Long-Term Actions is available here:
http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubId=201410&showStage=longterm&agencyCd=1200&Image58.x=32&Image58.y=15&Image58=Submit.
- [4] For a description of the Department’s October, 2010 proposed rule, see [Memorandum](#) to Pension Members No. 43-10 [24642], dated October 22, 2010.

- [5] 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.
- [6] 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.
- [7] 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.
- [8] 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.
- [9] 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).
- [10] See [Memorandum](#) to Advertising Compliance Advisory Committee No. 14-14, Pension Members No. 25-14, Pension Operations Advisory Committee No. 12-14, SEC Rules Members No. 21-14, Small Funds Members No. 12-14 [28186], dated June 12, 2014 (letter to SEC); [Memorandum](#) to Advertising Compliance Advisory Committee No. 18-14, Pension Members No. 28-14, Pension Operations Advisory Committee No. 15-14, SEC Rules Members No. 28-14, Small Funds Members No. 17-14 [28240], dated July 7, 2014 (letter to DOL).
- [11] For a description of the proposed rule, see [Memorandum](#) to Pension Members No. 10-14, Bank, Trust and Retirement Advisory Committee No. 11-14, Broker/Dealer Advisory Committee No. 12-14, Operations Committee No. 11-14 [27960], dated March 14, 2014.
- [12] See [Memorandum](#) to Pension Members No. 23-14, Bank, Trust and Retirement Advisory Committee No. 24-14, Broker/Dealer Advisory Committee No. 31-14, Operations Members No. 3-14, Transfer Agent Advisory Committee No. 33-14 [28179], dated June 11, 2014.
- [13] See [Memorandum](#) to Pension Members No. 20-14, Bank, Trust and Retirement Advisory Committee No. 21-14, Broker/Dealer Advisory Committee No. 25-14, Operations Committee No. 26-14, Transfer Agent Advisory Committee No. 28-14 [28119], dated May 13, 2014.
- [14] See [Memorandum](#) to Pension Members No. 35-14 [28348], dated August 27, 2014.
- [15] See [Memorandum](#) to Pension Members No. 46-14 [28531], dated November 20, 2014.
- [16] 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.

[17] 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.

[18] 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.

[19] See [Memorandum](#) to Pension Members No. 48-13, Operations Committee No. 50-13, Bank, Trust and Retirement Advisory Committee No. 35-13, Transfer Agent Advisory Committee No. 74-13 [27619], dated October 2, 2013.

[20] For the Institute's summary of FAB 2013-13, see [Memorandum](#) to Pension Members No. 33-13, Bank, Trust and Retirement Advisory Committee No. 22-13, Broker/Dealer Advisory Committee No. 35-13, Transfer Agent Advisory Committee No. 56-13, Operations Committee No. 34-13 [27398], dated July 23, 2013.

[21] See [Memorandum](#) to Pension Members No. 62-13, Operations Committee No. 59-13, Bank, Trust and Retirement Advisory Committee No. 45-13, Broker/Dealer Advisory Committee No. 56-13, Transfer Agent Advisory Committee No. 88-13 [27795], dated December 18, 2013.

[22] For the Institute's summary of the interim final rule, see [Memorandum](#) to Pension Members No. 44-14, Operations Members No. 19-14, Bank, Trust and Retirement Advisory Committee No. 46-14 [28516], dated November 10, 2014.