

MEMO# 10687

February 1, 1999

DOL RELEASES PROPOSED RULE ON ELECTRONIC COMMUNICATION AND RECORDKEEPING

1 The Internal Revenue Service issued proposed guidance in December, 1998. See Institute Memorandum to Pension Members No. 77-98, dated December 21, 1998. [10687] February 1, 1999 TO: PENSION COMMITTEE No. 5-99 PENSION OPERATIONS ADVISORY COMMITTEE No. 7-99 RE: DOL RELEASES PROPOSED RULE ON ELECTRONIC COMMUNICATION AND RECORDKEEPING

The Department of Labor has released for comment a proposed rule addressing standards for the disclosure of employee benefit plan information through electronic media and for the maintenance and retention of employee benefit plan records in electronic form. The issuance of the proposed rule is in response to a statutory directive in the Taxpayer Relief Act of 1997 directing both the Department and the Internal Revenue Service to issue guidance in this area.¹ Written comments must be received by the Department of Labor on or before March 29, 1999. The Institute will be scheduling a conference call to discuss developing comment letters to address this proposal and the recent IRS proposal. The Department's proposal would (1) establish a safe harbor pursuant to which all pension and welfare benefit plans may satisfy their obligations to furnish summary plan descriptions (SPDs), summaries of material modification (SMMs), and summary annual reports (SARs) using electronic media; and (2) provide standards concerning the use of electronic media, including electronic storage and automatic data processing (ADP) systems, for the maintenance and retention of records required under ERISA sections 107 and 209.

Proposed Disclosure Standards The proposed disclosure rule would permit all employee benefit plan administrators to furnish SPDs, SMMs and SARs via electronic media under the same standards already established for group health plans. Specifically, the rule would permit the furnishing of these documents electronically if (1) the administrator takes appropriate measures to ensure that the system for furnishing documents results in actual receipt by participants, such as by using a return-receipt electronic mail feature or periodically reviewing the delivery system to assure its integrity; (2) the furnished documents are in a manner consistent with the style, format and content requirements set forth in applicable existing regulations; and (3) the administrator provides a notice through electronic means or in writing to inform participants that disclosure documents will be furnished electronically, indicate the significance of the documents and inform them of their right to request and receive a paper copy of the documents free of charge. Fourth, administrators may deliver these documents electronically only to participants that have the ability to effectively access the documents at their worksite. Expansion of this rule to include retirement plans is

2 See Institute Memorandum to Pension Committee No. 13-97,

dated May 22, 1997. consistent with Institute comments to the Department asking that the rule for group health plans be so expanded.² The Department has invited comment on the relative costs and benefits of the obligation in the proposed regulation to furnish paper copies of documents at participant request in light of the regulation's requirement that all participants must have access to the documents electronically at their workplace. Additionally, the Department has requested public comment on issues relating to the use of new technologies that are not addressed by the proposed rules. Specifically, the Department has raised the following questions: (1) should the standards proposed be expanded to other plan disclosures, such as individual benefit statements, QDROs, etc.; (2) do time-sensitive disclosures require additional safeguards; (3) under what circumstances would it be appropriate for electronic media to be used at places other than worksites, for example, to deliver information to spouses and other beneficiaries such as alternative payees under QDROs; (4) under what standards could electronic media be used for making ERISA section 104(b)(2) materials available to participants and beneficiaries; and (5) is guidance on the use of electronic media needed under any other provisions of Title I of ERISA? Electronic Recordkeeping The Department has proposed adopting standards concerning the use of electronic media to retain records required to be retained under ERISA sections 107 and 209. The proposal would permit the use of electronic media, including electronic storage and ADP systems, for record retention provided that (1) the recordkeeping system has reasonable controls to ensure integrity, accuracy, authenticity and reliability; (2) the electronic records are maintained in reasonable order, in a safe and accessible place, and in a manner so they may be readily inspected or examined; (3) the electronic records must be able to be readily converted into legible and readable paper copy; and (4) adequate records management practices must be established and implemented. The proposed regulation also provides guidance on when original records may be discarded after they have been transferred to electronic media. Russell G. Galer Senior Counsel Attachment