

MEMO# 2325

November 13, 1990

ICI GIVES DOL RECOMMENDATIONS REGARDING 404(C) REGULATION

- 1 - November 13, 1990 TO: PENSION COMMITTEE NO. 27-90 RE: ICI GIVES DOL
RECOMMENDATIONS REGARDING 404(c) REGULATION

As you recall, the Department of Labor is considering re- proposing its regulation under ERISA section 404(c) in a form that will not provide employers with any certainty that their participant-directed individual account plans satisfy the requirements of section 404(c). (See Institute Memorandum to Pension Committee No. 25-90, dated October 22, 1990.) The re- proposed regulation would, instead, provide a foundation for the structure of a 404(c) plan which could evolve with pension industry standards and technology. In response to Assistant Secretary Ball's request for suggestions regarding the manner by which the re-proposed regulation should describe the "broad range of investment options" which must be available under a 404(c) plan, the Institute submitted the attached letter containing various recommendations. Primarily, the Institute recommended that the re-proposed regulation reflect the axiom that ERISA section 404(c) does not provide participants with protections which are less valuable than those provided to them by virtue of the general fiduciary principles of ERISA section 404(a). Therefore, with regard to the "broad range of investment options" which fiduciaries must make available under a 404(c) plan (and with regard to the frequency of transfer which must be available to participants with respect to those options), the Institute recommended that the re-proposed regulation specifically state that 404(c) will not apply unless an ERISA plan fiduciary could prudently carry out his investment duties under ERISA section 404(a) if the fiduciary were limited to the options (and transfer opportunities) available to 404(c) plan participants. The Institute recommended that the re-proposed regulation emphasize the fiduciary duties which continue to apply in the context of a 404(c) plan. These duties would require the fiduciary to monitor not only investment option performance but the overall design of the 404(c) plan: This may involve adding investment options, increasing frequency of transfer and - 2 - improving communications between the investment fund sponsors and participants. The Institute stressed the importance of adequate disclosure in terms of information about investment option policies, risks and rewards in order for participants to exercise meaningful control over their ERISA section 404(c) plan accounts. We will keep you informed of further developments. W. Richard Mason Assistant General Counsel Attachment