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## Investment Advice Regulations “Finalized” by Department of Labor

### *Congress and Obama Administration Object*

In the waning days of the Bush Administration, the Employee Benefits Security Administration (EBSA) of the Department of Labor (DOL) attempted to publish final investment advice regulations in the *Federal Register* during the week of January 19.

However, after being sworn in January 20, the Office of President Barack Obama directed all federal government agencies to withhold final action on all pending regulations. Additionally, key members of Congress have objected to the rules. These actions have placed the fate of the investment advice regulations in Limbo.

The new rules would have been made part of the Code of Federal regulations at 29 CFR Part 2550, RIN 1210-AB13. They clarify and revise the proposed regulations issued originally issued on August 22, 2008. The final rules cover investment advice provided under the class exemption, level fee, and computer model provisions of the Pension Protection Act passed by Congress in 2007 and which NAIFA supported.

### **Background:**

The Pension Protection Act (PPA) of 2006 added an exemption from ERISA’s prohibited transaction rules to cover employer-provided investment advice under certain conditions. This means that if employers comply with certain prohibited transaction exemptions (PTEs),

employers can shield themselves from lawsuits if employees want to sue as a result of bad results from the employer-provided advice. These final regulations set out the details of rules that will protect employers from liability if they choose to provide investment advisors to their workers.

These rules are hotly controversial in some circles. The controversy centers on whether, in order to protect plan participants, investment advisors must be independent from the companies that produce the investments from which plan participants may choose. NAIFA's position is that employees and representatives of investment and insurance companies (including insurance agents) can be conflict-free even though they are compensated by the insurance or investment company that provides the investments if they are compensated as provided by the PPA and regulations. Further, this type of investment advice is considerably more cost-effective and thus better for plan participants' ability to save for retirement on a cost-effective basis.

**Caution—Rules May Not Survive:**

Even though these rules were supposed to take effect 60 to 90 days after the date of publication (the regulations were actually on the printing presses at the Government Printing Office when the Executive Order was sent), there is grave doubt that will happen. First, the DOL can withdraw the rules and open them up for more review and comment. Second, Congress can invoke the Congressional Review Act and ultimately overturn the Regulations. Third, Congress can change the law.

Key lawmakers have already vowed to take immediate steps to rescind the regulations. House Education and Labor chairman Rep. George Miller (D-CA) and Education and Labor Subcommittee on Health, Employment, Labor and Pensions chairman Rep. Rob Andrews (D-NJ) were "outraged" at the last-minute finalization of the DOL rules by the Bush Administration. Reps. Miller and Andrews have expressed the belief that the rules contravene the intent of the PPA investment advice provisions. They also claim the final rules would hurt plan participants due to their failure to prevent conflicts of interest by advisors who are compensated based on the investments chosen by plan participants. They characterize these rules as "last minute rules for special interests." As a result, there is a widely held belief that these final rules (if in fact they are final—there is a legal debate on that issue swirling around) will not take effect because, if no other course of action is identified, Congress will rescind them or change the law.

**The Rules:**

The DOL's rules combine proposed rules on a class exemption and on Prohibited Transaction Exemptions (PTE) covering advice provided when the advisor is compensated under a level-fee arrangement, and/or with use of a computer model. They include disclosure requirements, and a model form to use in providing the required disclosure. They note that no employer is required to provide investment advice to their workers who participate in employer-sponsored self-directed retirement plans. But if an employer chooses to provide investment advice to their plan participants, if the employer complies with these rules they will be shielded from liability if employees sue as a result of bad consequences from advice they were given.

Generally, the final rules note that these PTEs do not affect the general rule that employer-provided investment advice can qualify for protection from liability under the ERISA section 404(c) class exemption rules. These rules provide that prudent selection of an investment advisor (with all its qualifying elements) can shield an employer from liability for

consequences of advice the employer provided. These rules make clear that they constitute an additional way by which employers can obtain liability protection when they provide investment advice to their plan participants.

**Level Fees:**

Under the level fee PTE, the advice provided must be based on generally accepted investment theories that take into account historic returns of different asset classes over defined periods of time. The advice must also take into account fees and expenses (including advisor compensation), and personal information (unless the plan participant refuses to provide it) such as age, life expectancy, retirement age, investment risk tolerance, investment preferences and the participant's other assets and sources of income. The advisor's compensation may not vary based on the participant's choice of investment. The final rules say that bonuses paid to the advisor based on the overall profitability of the advisor's employer may not have to be levelized if the investments available to the plan participants to choose do not have a specific impact on the employer's overall profitability. Determination of whether bonuses are included in the level fee compensation rules will be made on a case-by-case basis.

**Computer model:**

This PTE encompasses the same specific requirements as the level fee rules. Generally, the final rules require that an eligible investment expert must certify that the computer model is based on generally-accepted investment theories, that it takes into account fees and expenses, personal information, and historic returns of different asset classes over defined periods of time. The computer model must use objective criteria for asset allocation and avoid recommendations that inappropriately favor investments offered by the fiduciary advisor who is using the computer model.

**Class Exemption:**

The class exemption sets out rules under which companies and advisors can generally qualify for the liability protection provided by the level fee and computer model PTEs.

**Impact on NAIFA Members:**

NAIFA members who work with companies who provide self-directed 401(k) plans and/or IRAs are impacted by these rules. The conditions under which an employer can make advice services available to employees on a basis under which the employer is protected from liability will frequently determine whether that advice is offered at all. Because these PTEs focus so intensely on fees and expenses, including compensation paid to the advisors, the specifics of the rules on how the advisors can be compensated and on the processes the advisors can use in providing advice, are of key importance to NAIFA members practicing in this market.

**Next Steps:**

If Congress succeeds in rescinding these rules or changing the law, the process of writing implementing investment advice regulations will start afresh. Appointees of President Obama will be in charge of the process and substance at the DOL and EBSA. It is unknown at this time what changes in mindset that might bring to the issues. To satisfy key Congressional critics, there will likely be more in the way of rules designed to avoid potential conflicts of interest as a result of an advisor being compensated by the firm that provides the investment vehicles from which plan participants may choose.

**NAIFA Objective:**

NAIFA's primary objective since it started working on this issue in 1997 is to make it possible for more rank and file employees to get professional advice on placing their contributions to self-directed pension plans rather than going it alone—which absent these regulations—will likely be the case. It's a plain and simple fact that most employers will not allow advisors onto their premises unless the employer is shielded from liability and they don't have to pay large sums of money to buy the advice. NAIFA will continue to press the case that the PPA and regulations will allow NAIFA members who advise their clients' plan participants can do so on a cost-effective and participant-protective basis.

**NAIFA Staff Contact:** [Michael Kerley](#), Senior Vice President – Federal Government Relations, at (703) 770-8155 or; [Dani Kehoe](#), NAIFA Outside Counsel.

## **NAIC Decides Against Easing Reserve Requirements for Life Insurance Companies**

The National Association of Insurance Commissioners (NAIC), during a joint meeting (by conference call) of the NAIC Executive Committee and Plenary on January 29, 2009, decided to reject proposed adjustments to several existing NAIC solvency framework components that impact statutory capital and surplus requirements that had been recommended to the full NAIC by the Capital and Surplus Relief Working Group.

As we reported in our [January 15 GovTalk](#), the recent work of the NAIC on this issue was the result of a request by the American Council of Life Insurers (ACLI) in November of 2008 urging state regulators to change capital and surplus reporting rules in time to affect the 2008 financial statements.

To assist the NAIC with its deliberations the Working Group has been considering the nine specific requests for changes that were submitted by the ACLI. There have been a number of written comments from interested parties on the proposals and on January 27, 2009 the Working Group held a public hearing in Washington D.C. to receive additional feedback and comment from industry and consumer representatives.

D.C. Insurance Commissioner Thomas Hampton, Chair of the Working Group, said at the hearing that “Each of these proposals was considered and scrutinized by teams of accounting and actuarial specialists to ensure that our basic regulatory objectives of financial solvency, conservative accounting standards and strong consumer protections continue to be met”. At the conclusion of the four hour hearing, the Working Group recommended the rejection of three proposals, and the approval of six other proposals impacting reserving requirements, reinsurance collateral and accounting procedures.

At the January 29 Executive Committee and Plenary meeting, NAIC President and New Hampshire Insurance Commissioner Roger Sevigny thanked the members of the Working Group for their excellent work on this important project. He also indicated that the decision by the Executive Committee to reject the recommendations of the Working Group were made with the protection of America's insurance consumers as its foremost priority and with the realization that the proponents of the suggested changes had failed to demonstrate to the NAIC that such a financial emergency existed for insurers that immediate action on the part of the NAIC was necessary. At the conclusion of the conference call the Working Group was charged to take the various recommendations back to the respective technical groups of the

NAIC with the admonition to develop specific implementation schedules for the various recommendations which in turn should be brought back to the Executive Committee for additional consideration.

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## **NAIFA Responds to U.S. Senate Aging Committee Request for Information on STOLI**

On January 30, 2009, NAIFA sent a letter and backup documentation to Chairman Herb Kohl (D-WI) of the U.S. Senate's Special Committee on Aging. The letter was sent in response to a request by Senator Kohl for information on NAIFA's activities regarding life settlement transactions and specifically our position on stranger-originated life insurance and our efforts to crack down on the use of STOLI transactions.

The Senate Aging Committee is a select committee established in the 1960s to study issues that impact older Americans. The Aging Committee's purview includes the ability to conduct oversight of programs, and to investigate allegations of fraud and abuse. The Committee has no legislative authority, but many members of the Committee also serve on other key committees that do have the ability to impact legislation such as the Senate Finance Committee which has jurisdiction over insurance taxation and the Senate Banking Committee which has jurisdiction over insurance regulation.

As stated in our letter, NAIFA has been at the forefront of efforts to put a stop to STOLI before it can harm seniors and other consumers. NAIFA staff has worked closely with the NAIC and NCOIL to craft anti-STOLI model legislation and NAIFA strongly supports the enactment in the states of a hybrid of those model acts. NAIFA, its state associations and their members played a major role in helping to enact anti-STOLI legislation in 13 states in 2008, and more activity is expected this year.

A major concern for NAIFA is that if STOLI is not shut down at the state level, the federal government may look to take action such as changing the federal tax definition of "life insurance" in an attempt to put a stop to STOLI. NAIFA is concerned that such a move could have unintended consequences and negatively impact all life insurance policyholders. The request for information from the Aging Committee signals possible future federal action to combat STOLI. That is why it is critical for NAIFA's state associations in those states that have not enacted NAIFA-backed STOLI legislation to redouble their efforts to combat STOLI at the state level and curb marketplace abuses that are taking place today.

View NAIFA's letter to the Senate Aging Committee at [http://www.naifa.org/advocacy/documents/Aging\\_01302009.pdf](http://www.naifa.org/advocacy/documents/Aging_01302009.pdf)

To learn more about NAIFA's anti-STOLI activities and how you can get involved, visit: <http://www.naifa.org/advocacy/stolialert/index.cfm>

**NAIFA Staff Contact:** [Gary Sanders](#), Vice President – Securities and State Government Relations at (703) 770-8192 or; [Jill Edwards](#), Assistant Vice President – Federal Government Relations, at (703) 770-8158.

## Members of Congress Call on Secretary Geithner to Create Federal Office of Insurance Expertise

In a January 23, 2009, letter to now confirmed Secretary of the Treasury Tim Geithner, seven members of the House Financial Services Committee asked him to use his authority to create an office of insurance information with the Treasury Department.

The letter, which is signed by Reps. Melissa Bean (D-IL), Ed Royce (R-CA), Dennis Moore (D-KS), Mike Castle (R-DE), Andre Carson (D-IN), John Campbell (R-CA), and John Adler (D-NJ), requests that Geithner, “either create an office within the Treasury Department or assign a high level Treasury appointee an insurance portfolio to fill a void of insurance oversight and expertise at the federal level.” The letter cites the integration of the insurance industry in the global financial marketplace and the Administration’s desire to create a new systemic regulator as the need for urgency to create such an office.

NAIFA supports efforts to create an office of insurance information at the federal level. In a letter to Congress in September 2008, NAIFA urged the passage of the Insurance Information Act which would create such an office without creating a federal regulator. Due to pressing legislative priorities associated with the market crisis, the bill was not taken up before the 110th Congress adjourned. NAIFA maintains that the market situation highlights the need for an office of insurance expertise. In the view of Reps. Bean, Royce, and the others that signed the January 23 letter, Secretary Geithner currently has the authority to create such an office without going through the legislative process.

View a copy of the letter to Secretary Geithner at [http://www.naifa.org/advocacy/documents/Geithner\\_01232009.pdf](http://www.naifa.org/advocacy/documents/Geithner_01232009.pdf)

For more information on the Insurance Information Act and efforts to create an federal office of insurance information, go to [www.naifa.org/irr](http://www.naifa.org/irr).

**NAIFA Staff Contact:** [Jill Edwards](#), Assistant Vice President – Federal Government Relations, at (703) 770-8158.

## Gender-Based Pay Discrimination Lawsuits Get Easier

In an action that may have profound implications for NAIFA members’ business clients, Congress completed work on S.181, the “Ledbetter bill,” on January 27th and President Obama then signed it into law January 29. The bill significantly expands the time in which a woman who feels she is the victim of gender-based pay discrimination can sue her employer.

S.181 reverses a Supreme Court decision (*Ledbetter vs. Goodyear Tire Co*). Under the new law, a woman can sue for pay discrimination within 180 days of receiving each allegedly discriminatory paycheck. Under the *Ledbetter* Supreme Court ruling, the 180-day limit on time to sue started at the point the employer established the discriminatory pay level.

### **Background:**

Congress has been trying to reverse the *Ledbetter* decision since it came down in May of 2007. However, Senate Republicans blocked Democratic efforts to do so in the last Congress, and President Bush said he would veto any such bill that came to his desk. This

year, with increased strength in both the House and Senate, and with a Democratic president willing to sign the legislation, the effort was successful.

The House passed a broader pay discrimination bill early in January. The House bill would have added three more anti pay discrimination provisions: putting the burden of proof on employers to show that any pay disparity was not based on gender discrimination; prohibiting employers from punishing employees who discussed compensation among themselves; and allowing for punitive as well as compensatory damages. The Senate dropped all three of these provisions. The House, by a 250 to 177 vote on January 27, approved the Senate version of the bill. The votes in both the House and Senate were largely party-line.

**Next Steps:**

Experts say the Ledbetter decision—and now the Congress' legislative reversal of it—could impact decisions to sue based on other discrimination factors (e.g., race, religion, creed or ethnicity). This could mark an important new element in employers' compensation decision-making.

NAIFA staff will monitor any further legislative developments and keep members fully informed.

**NAIFA Staff Contact:** [Dani Kehoe](#), NAIFA Outside Counsel.

## U.S. Senate Committee Holds Hearing on GAO Report and Financial Crisis

The Senate Homeland Security and Government Affairs Committee (Chairman Lieberman, I-CT) held a hearing on Wednesday, January 21, examining the federal financial regulatory system and the regulatory failures that contributed to the financial crisis.

The hearing focused on findings of a newly-released [Government Accountability Office report](#) that is critical of the current financial structure and highlights changes in financial markets that have exposed gaps and limitations on financial oversight. There appeared to be agreement among the three Senators that spoke and the three witnesses that the current system is inadequate to oversee today's complex financial marketplace, and is unable to sufficiently regulate current -- and future -- financial services products.

View a complete report of this hearing at [http://www.naifa.org/advocacy/documents/Homeland\\_Security\\_01222009.pdf](http://www.naifa.org/advocacy/documents/Homeland_Security_01222009.pdf)

For more information on insurance regulatory reform, visit [www.naifa.org/irr](http://www.naifa.org/irr).

**NAIFA Staff Contact:** [Jill Edwards](#), Assistant Vice President – Federal Government Relations, at (703) 770-8158.

## Terri Vaughan Named NAIC'S New CEO

Therese M. (Terri) Vaughan, Ph.D., was named Chief Executive Officer of the National Association of Insurance Commissioners (NAIC) effective February 18, 2009.

Terri replaces Cathy Weatherford who left NAIC in July 2008. Andy Beal, who served as acting executive vice president and CEO in the interim, has been promoted to Chief Operations Officer.

Prior to joining the NAIC, Vaughan was the Robb B. Kelley Distinguished Professor of Insurance and Actuarial Science at Drake University, a position she had held since January 2005, following 10 years as Iowa Insurance Commissioner. She was the longest serving commissioner in Iowa's history and served under administrations of both major parties. Vaughan was very active with the NAIC during her tenure as commissioner and served as NAIC President in 2002.

Vaughan earned a Ph.D. in risk and insurance at the University of Pennsylvania and a B.B.A. in insurance and economics at the University of Iowa. She is a CPCU, and Associate of the Society of Actuaries, an Associate of the Casualty Actuarial Society, and a Member of the American Academy of Actuaries. She is the co-author of two college textbooks on insurance: *Essentials of Insurance* and *Fundamentals of Risk and Insurance*.

Vaughan was a strong leader during her tenure as Iowa Commissioner and her involvement with the NAIC. She focused the NAIC on financial convergence issues, international affairs, and regulatory modernization efforts. She was heavily involved in the passage of the Gramm-Leach-Bliley Act representing the NAIC before Congress and federal banking regulators. Vaughan also served as President of the National Insurance Producer Registry (NIPR) for a number of years and supported increasing producer representation on NIPR's Board from one to three members, an effort spearheaded by NAIFA Senior Vice President Bill Anderson.

In her new role as NAIC CEO, Vaughan will be the primary representative and chief spokesperson in Washington, D.C. and she will reach out to federal governmental entities, state government associations, and consumer and industry representatives. She will also oversee the launch of NAIC's new Center for Insurance Information, which will make the NAIC information and resources more accessible to members of Congress and other federal agencies.

NAIFA has worked closely with Vaughan in the past. We welcome her back and are looking forward to an ongoing and productive relationship with Vaughan at the helm of the NAIC.

**NAIFA Staff Contact:** [Bill Anderson](#), Senior Vice President – State Government Relations, at (703) 770-8193.

## **The Hartford's Neal Wolin Accepts Position as Obama's Deputy Counsel**

Neal Wolin, president and Chief Operating Officer of The Hartford Financial Services Group's Property and Casualty Operations, on January 28 accepted the position of White House Deputy Counsel to the President for Economic Policy and Deputy Assistant to the President.

Wolin began his tenure with The Hartford in 2001, when he was hired as Executive Vice President and General Counsel. In 2007, he was promoted to president and Chief Operating Officer of Property and Casualty Operations. Prior to joining The Hartford, Wolin held positions in several government agencies, including the Department of the Treasury, and the

National Security Council. Wolin received his J.D. from Yale Law School, his M.Sc from the University of Oxford, and his bachelor's degree from Yale University.

NAIFA congratulates Mr. Wolin on his new position, and we look forward to working with him and all other members of the new Administration.

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## Look What People Are Saying:

*"I appreciate your timely reporting. It's to the point and easy for me and my clients to understand. Thanks for keeping us informed."*

Have you found ways in which NAIFA GovTalk, GovWatch, and GovAlert publications have been helpful to you and your clients? Can you think of ways in which these communications tools can be more effective for you? Let us know.

Contact us at [governmentrelations@naifa.org](mailto:governmentrelations@naifa.org) with you thoughts and comments today!

## Did You Know?

Did you know that you can find up-to-date information on the state and federal legislative issues NAIFA's Government Relations staff is following on NAIFA's website? Visit the Advocacy section of NAIFA today at <http://www.naifa.org/advocacy/>.