

MEMO# 32665

August 7, 2020

ICI Submits Comments to DOL on Proposed Exemption Issued as Part of Fiduciary Rulemaking Package

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August 7, 2020 TO: ICI Members
Bank, Trust and Retirement Advisory Committee
Broker/Dealer Advisory Committee
Investment Adviser and Broker-Dealer Standards of Conduct Working Group
Investment Advisers Committee
Operations Committee
Pension Committee
Pension Operations Advisory Committee
SEC Rules Committee
Transfer Agent Advisory Committee SUBJECTS: Compliance
Disclosure
Distribution
Fees and Expenses
Investment Advisers
Operations
Pension RE: ICI Submits Comments to DOL on Proposed Exemption Issued as Part of
Fiduciary Rulemaking Package

The Institute sent the attached comment letter to the Department of Labor (DOL) in response to its proposed prohibited transaction exemption, *Improving Investment Advice for Workers & Retirees* ("Proposed PTE").[\[1\]](#) The Proposed PTE would permit investment advice fiduciaries to receive compensation for their advice. In conjunction with issuing the Proposed PTE, DOL also included a restatement of the five-part test ("Five-Part Test") used since 1975 to determine whether a person is an investment advice fiduciary. The preamble to the Proposed PTE, however, included a number of statements regarding DOL's interpretation of the Five-Part Test on which DOL also solicited comments.

ICI's letter generally expresses support for DOL's Proposed PTE, including DOL's intention to align the standard of care for ERISA fiduciaries providing investment advice with the conduct standards in the Securities and Exchange Commission's ("SEC") Regulation Best Interest ("Reg BI") and the fiduciary duty of registered investment advisers under securities laws.[\[2\]](#) Our letter also urges certain changes to the Proposed PTE and requests that DOL

clarify its discussion in the preamble regarding the Five-Part Test, which we explain are needed to ensure that the rulemaking package meets its intended goal.

More specifically, the letter urges DOL to make the following changes:

- Clarify the preamble discussion on the Five-Part Test to ensure alignment with SEC's Reg BI and the Fifth Circuit's holding in *U.S. Chamber of Commerce v. U.S. Department of Labor* ("Fifth Circuit Decision").^[3] The letter expresses concern that DOL's statements regarding the application of the Five-Part Test can be read to be inconsistent with the unambiguous provisions of DOL's investment advice regulation as well as the Fifth Circuit Decision, which requires a relationship of "trust and confidence" to be present for fiduciary status. The letter explains that the preamble statement that compliance with Reg BI by non-fiduciary broker-dealers could trigger fiduciary status for ERISA purposes under the Five-Part Test can be interpreted as disregarding the critical distinction the SEC made between broker-dealers and registered investment advisers. The failure to clarify DOL's preamble statements would leave the fiduciary definition plagued by many of the same concerns that the 2016 rulemaking raised.
- Make certain changes to its Proposed PTE to ensure it meets its intended purpose. These changes should include:
 - Removing the condition requiring a fiduciary acknowledgement. Such a condition is unnecessary and is not consistent with the Fifth Circuit Decision in that compliance with this condition of the Proposed PTE would effectively supplant satisfaction of the Five-Part Test.
 - Eliminating duplicative, overlapping disclosure requirements. Doing so would help to avoid investor confusion and be consistent with DOL's intent to align the Proposed PTE with other regulatory requirements.
 - Eliminating the Annual Retrospective Compliance Review and Certification or, at a minimum, making it administratively workable. The requirement that a Financial Institution's chief executive officer provide the certification is unrealistic, overly burdensome and unnecessary to achieve the desired result.
 - Eliminating the Eligibility provision, or, at a minimum, rethinking who should have the authority to decertify a Financial Institution's or Investment Professional's ability to rely on the exemption. The same officials who drafted the Proposed PTE should not be permitted to judge compliance.
 - Revising the exemption to cover robo-advice. The exclusion of robo-advice is illogical and should be reconsidered. Personalized investment advice compliant with the Impartial Conduct Standards^[4] and other conditions of the Proposed PTE could be provided through robo-advice programs.
 - Modifying the Proposed PTE to narrow the availability of compliance records to only authorized employees of DOL or Internal Revenue Service IRS (as applicable).
 - Modifying the exclusion for certain transactions involving a named fiduciary or plan administrator by raising the independence threshold to five percent and expanding the Proposed PTE's coverage to clearly permit advice in connection with Pooled Employer Plans.^[5]
 - Revising the standard for policies and procedures to require that they be "reasonably designed" rather than "prudently designed" to comply with the Impartial Conduct Standards.
 - Eliminating any implication that the requirement to correct a prohibited transaction creates a fiduciary duty owed to IRAs.

- Reevaluating the statement that certain investments can be recommended to a Retirement Investor in a manner consistent with the Best Interest Standard only where there is ongoing monitoring of the investment. This statement appears at odds with DOL's prudence regulation and imposing such a monitoring requirement should be done only through notice and comment rulemaking.
- Expanding the definition of Covered Principal Transaction to include sales to a plan or IRA of closed-end fund shares.

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[Attachment](#)

endnotes

[1] The Proposed PTE was published at 85 Fed. Reg. 40834 (August 7, 2020), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-07-07/pdf/2020-14261.pdf>. For a description of the rulemaking package, see ICI Memorandum No. 32581, dated July 6, 2020, *available at* https://www.ici.org/my_ici/memorandum/memo32581.

[2] For a summary of SEC's 2019 rulemaking package, see ICI Memorandum No. 31815, dated June 19, 2019, *available at* https://www.ici.org/my_ici/memorandum/memo31815.

[3] For a summary of the Fifth Circuit's decision, see ICI Memorandum No. 31137, dated March 16, 2018, *available at* https://www.ici.org/my_ici/memorandum/memo31137.

[4] The "Impartial Conduct Standards" include a best interest standard; a reasonable compensation standard; and a requirement to make no materially misleading statements about recommended investment transactions and other relevant matters.

[5] A Pooled Employer Plan (PEP) is an individual account plan established to provide benefits to the employees of two or more unrelated employers and is treated as a single pension benefit plan. PEPs are defined in Section 101 of the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act"), which was included as Division O of the Further Consolidated Appropriations Act, 2020 (H.R. 1865). For more background on the SECURE Act, see ICI Memorandum No. 32118, dated December 20, 2019, *available here:* https://www.ici.org/my_ici/memorandum/memo32118.