

MEMO# 32050

November 12, 2019

ICI Sends Letter to DOL Regarding Impending Fiduciary Advice Rulemaking

[32050]

November 12, 2019 TO: Pension Committee

Pension Operations Advisory Committee RE: ICI Sends Letter to DOL Regarding Impending Fiduciary Advice Rulemaking

ICI sent the attached letter to the Department of Labor (DOL), following up on a meeting with DOL officials on October 9, 2019 to discuss the DOL's fiduciary rulemaking project. As you may know, DOL's regulatory agenda lists a new proposed rulemaking for a "Fiduciary Rule and Prohibited Transaction Exemption," targeted for December release.[\[1\]](#) The new proposal is expected to replace the 2016 final rulemaking that was vacated by the 5th Circuit in March 2018[\[2\]](#) and to align or harmonize the DOL rules with the Securities and Exchange Commission's (SEC) recent rulemaking on standards of conduct for broker-dealers and investment advisers.[\[3\]](#) ICI met with DOL officials in advance of the proposal to reiterate our recommendation that DOL should harmonize its rules with the SEC's rules.

During the meeting, DOL staff raised questions regarding the extent to which differences exist between the "best interest" standard of conduct that the SEC recently adopted in Regulation Best Interest ("Reg BI") and the investment adviser "fiduciary" standard of conduct under the Investment Advisers Act of 1940 ("Advisers Act"). Our letter clarifies the key differences between the investment adviser fiduciary standard of conduct and Reg BI and emphasizes the importance of maintaining a non-fiduciary standard of conduct for broker-dealers, reflecting the transactional nature of the broker-client relationship.

Our letter states that DOL should recognize Reg BI as a meaningful and robust standard of conduct for broker-dealers that complements—but is distinct from—the investment adviser fiduciary standard of conduct. To ensure strong investor protections while retaining access to advice for retail investors, we urge DOL to reflect in its fiduciary rulemaking the vital differences between true "fiduciary" relationships and those in which advice is provided on a "solely incidental" basis.

More specially, the letter strongly urges DOL not to equate those persons subject to the best interest standard of conduct (found in Reg BI) as fiduciaries under ERISA, because doing so would undermine both the DOL's and the SEC's stated policy goals and have detrimental implications for retirement savers and retail investors generally. Our letter recommends that, to align with Reg BI, DOL instead maintain the existing five-part test under ERISA section 3(21) and issue a streamlined exemption for those persons subject to

the requirements of Reg BI or the Advisers Act, conditioned solely on compliance with those applicable requirements.

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[Attachment](#)

endnotes

[1] A description of this item on the regulatory agenda is available at:
<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1210-AB82>

[2] *U.S. Chamber of Commerce v. U.S. Department of Labor*, No. 17-10238, 2018 WL 1325019 (5th Cir. Mar. 15, 2018) (vacating the Department's 2016 rulemaking in its entirety, holding that the Department exceeded its authority by treating as fiduciary advice interactions where there is no special relationship of trust and confidence and by imposing a standard of conduct in the non-ERISA IRA context through prohibited transaction relief). See ICI Memorandum No. 31137 (March 16, 2018), *available at* https://www.ici.org/my_ici/memorandum/memo31137.

[3] See ICI Memorandum No. 31815 (June 19, 2019), *available at* https://www.ici.org/my_ici/memorandum/memo31815.