

MEMO# 35570

January 4, 2024

ICI Submits Comments on DOL's Proposed Amendments to Investment Advice Fiduciary Regulation and PTEs, Urging DOL to Withdraw the Proposal

[35570]

January 04, 2024

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 on DOL's Proposed Amendments to Investment Advice
Fiduciary Regulation and PTEs, Urging DOL to Withdraw the Proposal

On January 2, 2024, ICI submitted a letter[\[1\]](#) to the Department of Labor (DOL) commenting on its recent regulatory package on fiduciary investment advice ("Proposal").[\[2\]](#) The Proposal includes proposed amendments to the regulation defining who is a "fiduciary" under section 3(21) of ERISA and section 4975(e)(3) of the Internal Revenue Code as a result of providing investment advice to a retirement investor. The Proposal also includes proposed amendments to prohibited transaction exemptions (PTEs) 2020-02, 84-24, 75-1, 77-4, 80-83, 83-1, and 86-128. As a general matter, the proposed definition of fiduciary advice sweeps very broadly, and the PTE amendments are intended to force most advice fiduciaries to rely on PTE 2020-02 to provide advice.

The letter urges DOL to withdraw the Proposal because it is unnecessary in light of other recent regulatory developments (e.g., Regulation Best Interest), has not been issued in conformance with the Administrative Procedure Act (APA), and raises the same concerns expressed by the Fifth Circuit in 2018 when it vacated the DOL's 2016 fiduciary rulemaking.

Comment Period and Hearing

DOL provided only a 60-day comment period and took the unprecedented action of scheduling a hearing for before the end of the comment period. ICI, together with 17 other organizations, submitted a joint trade letter to urge DOL to extend the comment period and to hold the hearing only after the comment period has closed.^[3] In a letter dated November 14, 2023, from EBSA Assistant Secretary Lisa Gomez, DOL declined both requests (see letter attached at the end of this memo). DOL held a hearing on December 12 and 13, 2023, and Elena Chism testified on behalf of ICI.^[4] She testified that DOL should reconsider the rulemaking in light of the changes to the regulatory framework since 2016 and the potential that finalizing the rule could introduce another round of regulatory instability.

ICI Comment Letter

ICI's letter expresses significant concerns regarding the Proposal and explains that the changes, if finalized, will have significant unintended consequences and will harm the very retirement savers the Proposal is intended to protect. If the Proposal is adopted without significant revisions, retirement savers and plan sponsors will have access to less investment information at many critical points, and retirement savers will have fewer choices for the types of investment professionals they want to work with.

The letter includes an Appendix setting forth ICI's economic analysis of the Proposal's Regulatory Impact Analysis (RIA), explaining that DOL has not provided economic evidence supporting the need for the rulemaking. The Appendix makes the following points:

- DOL fails to demonstrate any net benefit from the Proposal.
- DOL's economic analysis offers no quantitative estimated benefits—gross or net.
- The Proposal omits potential harms associated with the loss of consumer benefits when compared to the regulatory baseline.
- The Proposal's supposed "non-quantified" benefits are highly speculative.
- The cost of the Proposal, if adopted, will be quite large and vastly larger than DOL suggests.

The following is a modified version of the letter's Executive Summary:

- DOL has not shown a need for the Proposal and should withdraw it. Although well-intended, this rulemaking (i) will trigger negative, unintended, and costly consequences for retirement savers, (ii) is unnecessary due to recent regulatory changes applying best interest standards more broadly, (iii) exceeds the Department's authority and is inconsistent with the Fifth Circuit Court of Appeals' 2018 decision in *Chamber of Commerce v. United States Department of Labor*,^[5] and (iv) falls well short of applicable APA standards. DOL would introduce significant uncertainty and confusion in the marketplace if it finalizes a rule that could be overturned again, in part due to failures to identify a need for the Proposal, realistically ascertain its costs, or even attempt to quantify its benefits. As detailed in section 1, the letter urges DOL to withdraw the Proposal and reconsider the need for additional changes.
- The proposed definition of fiduciary advice is overly broad and will have negative implications. Rules governing fiduciary status must provide clarity and must not

impede commonplace financial interactions that help investors make informed decisions. To this end, fiduciary status under ERISA should only apply where, as the Fifth Circuit held, the existence of a relationship of trust and confidence is clear. The letter explains that the Proposal is not narrowly tailored to cover only relationships of trust and confidence, despite DOL's claims to the contrary.

- DOL is repeating the same mistakes it made in 2016. The Proposal effectively sweeps in many of the same types of activities and interactions that led the Fifth Circuit to vacate DOL's 2016 fiduciary rule.[\[6\]](#) Under a plain and literal reading, the Proposal would ascribe fiduciary status to a broad array of sales activity, information, and guidance that are crucial to a functioning marketplace and that serve savers well. It strongly implies that any suggestion relating to an investment or investment strategy, communicated by someone in the business of financial services, would be fiduciary advice. In section 2, the letter explains the specific aspects of the proposed definition of fiduciary investment advice that lead to this ambiguity and to an overly broad application of fiduciary status.
 - If finalized, the Proposal could result in investors losing access to crucial investment information and guidance and having fewer choices in the marketplace. If DOL does not modify the proposed definition of fiduciary investment advice to provide clarity and exclude sales activity and informational resources, many financial services providers will have no choice but to curtail the guidance and assistance they currently make available to savers. Many investors, particularly those with smaller balances, would enjoy fewer choices for the types of investment professionals and compensation arrangements they prefer, leading to poorer results as they try to save for their retirements.
- If DOL finalizes the Proposal, it should exclude certain institutional recommendations and provide clarifying examples to illustrate its intent. The Proposal lacks important carveouts and exclusions that DOL included in the 2016 fiduciary rule, such as exceptions for arm's length institutional transactions and for platform providers. Section 2 of the letter recommends certain changes that are necessary if DOL moves forward. Among other things, DOL should clearly exclude from the rule recommendations to institutional and sophisticated investors who are well equipped to understand the limits of their interactions with investment professionals. DOL also should adopt clarifying examples in the final rule's regulatory text, as outlined in section 2.2 of the letter, to clarify the limits of the rule.
 - The proposed wholesale revisions to the prohibited transaction exemption framework for fiduciary investment advice will not benefit investors. The letter explains in section 3.1 that DOL should not shoehorn all fiduciary investment advice into one exemption, PTE 2020-02, while revoking relief under numerous long-standing exemptions such as PTE 77-4. ICI members have built substantial compliance programs around these other exemptions, in which DOL included robust conditions specifically tailored to protect investors while allowing for efficient conduct of ordinary and necessary plan transactions. DOL has not demonstrated either a need for, or a benefit from, curtailing these existing exemptions in favor of a blunt one-size-fits-all approach. Rather than leveling the playing field as DOL asserts, applying one set of conditions to all instances of a broad range of industry activities will lead to inefficiencies and higher costs.
 - The changes to PTE 2020-02 would create an unnecessarily complicated, costly, and burdensome compliance framework. The letter describes in sections 3.2 through 3.7 our concerns with proposed changes to the policies and procedures, documentation and disclosure, and retrospective review requirements, as well as the troubling

proposed expansion of the exemption's ineligibility provision. Among other things, DOL imposes unrealistic and impractical presumptions about conflict mitigation and compensation structures that could cause significant disruption to the delivery of advice to investors who seek and need it. In addition, many of the proposed changes to PTE 2020-02 appear to exceed DOL's authority. More broadly, these exemption changes would impose significant costs on the retirement industry that far exceed DOL's estimates, with no clear evaluation of the need for changes and no demonstrable benefit to investors. Furthermore, it is far too soon to overhaul an exemption that has been in use for less than three years.^[7]

- The Proposal does not comport with the Fifth Circuit's decision and exceeds DOL's authority. As explained in section 4 of the letter, the Proposal appears to ignore the Fifth Circuit's decision by arbitrarily expanding the scope of ERISA fiduciary status beyond that intended by Congress and by using its deregulatory exemptive authority to apply ERISA Title I standards of conduct on Title II fiduciaries.
 - The Proposal improperly imposes fiduciary status onto relationships in which advice is provided on a solely incidental basis. As discussed in section 4.1 of the letter, the Proposal contravenes the Fifth Circuit's holding by failing to maintain the critical distinction between brokers and investment advisers, including by treating brokers subject to the SEC's Regulation Best Interest as "fiduciaries" under ERISA. This treatment will undermine both DOL's and the SEC's stated policy goals of preserving investor choice regarding the advisory services they receive and how they pay for them, which will have detrimental implications for retirement savers and retail investors generally. At the same time DOL pays lip service to the Fifth Circuit's emphasis on the importance of an underlying relationship of trust and confidence for fiduciary status to attach, DOL flatly rejects the court's "purported dichotomy" between sales and advice in the retail market.
 - Although DOL has authority to define "investment advice fiduciary" for purposes of Title I and Title II of ERISA, the Proposal exceeds this authority by arbitrarily expanding the concept of fiduciary beyond that intended by Congress and by imposing Title I duties on Title II arrangements. Section 4.2 of the letter explains that DOL's authority over the provision of investment advice is limited to ERISA "fiduciaries," and that it cannot expand those subject to its authority by departing from the common law concept of "fiduciary." DOL also exceeds its authority by using the Proposal (particularly through the elimination of other exemptions in favor of proposed PTE 2020-02) to impose ERISA Title I duties of prudence and loyalty upon Title II arrangements (i.e., IRAs). The Fifth Circuit's 2018 decision confirmed that DOL cannot use its exemptive authority to circumvent what Congress made clear when it chose to not impose these duties under Title II.
- The Proposal has not been issued consistent with the APA. The Proposal would not meet the APA's standards for the economic analysis or notice and comment requirements, as detailed in section 4.3 of the letter.
 - DOL's RIA is deficient. It is incumbent on DOL to fully evaluate the Proposal's costs, including compliance costs, and compare them to the benefits that the Proposal would engender. DOL has not met this standard. As described in section 4.3 of the letter and the Appendix, the RIA fails to quantify any purported benefits of the Proposal, while likely grossly underestimating the costs of the changes—both the direct costs of implementation and the costs to investors from loss of access to information and assistance. It is arbitrary for an agency to

impose billions of dollars in new costs—as DOL would here—without identifying benefits that warrant such burdens, and without explaining why less costly alternatives are not being pursued instead. While DOL does list some qualitative benefits, as the Appendix details, these supposed qualitative benefits are speculative in the extreme.

- DOL fails to meet the APA's notice and comment requirements by not allowing adequate opportunity for the public to provide meaningful input on the Proposal. The 60-day comment period, which included numerous Federal and religious holidays, was insufficient considering the complexity of the Proposal (including changes to seven different exemptions) to allow stakeholders time to adequately analyze the Proposal's implications. Additionally, DOL took the unprecedented step of holding a public hearing during the abbreviated comment period. By setting the hearing date before the close of the comment period, DOL implied that this was merely a "check the box" exercise, rather than an effort to receive meaningful feedback to inform the rulemaking process. Finally, the RIA relies on certain information that DOL did not make available to the public until mid-way through the comment period, which hindered ICI's and others' fair assessment of the Proposal.[\[8\]](#)
- The proposed effective date is wholly inadequate and unreasonable. As set forth in section 5 of the letter, an effective date only 60 days after publication of the final rule in the Federal Register would not permit sufficient time for parties to prepare for and implement the fundamental and far-reaching changes contemplated by the Proposal. Financial institutions would need significantly more time to review every aspect of their businesses—including websites, compliance programs, call center training, fund materials, support provided to intermediaries, and other arrangements with intermediaries—to determine what activities would fall under the scope of the fiduciary definition and determine whether to change or scale back those activities. For any ongoing activities determined to be fiduciary advice, firms would need to make extensive changes to their compliance programs and operating systems, and in many cases design and build brand new ones, to accommodate the expanded definition of investment advice, the numerous changes to PTE 2020-02, and the elimination of several existing advice exemptions firms have used for decades. Operating systems also must undergo testing to ensure changes are operating as intended. Extensive new training of employees would be necessary prior to the effective date, too. DOL should also consider the fact that the financial services industry will be forced to simultaneously implement several new rules adopted by other agencies such as the SEC; these rules involve many of the same employees and systems. Adding new changes to systems already facing substantial modification brings risks. DOL must allow sufficient time for an orderly implementation. Accordingly, if DOL determines to proceed with the Proposal despite its significant issues, DOL should delay the Proposal's effective date at least by 24 months.

Next Steps

As a reminder, DOL has already held its hearing on the Proposal. DOL's most recent regulatory agenda did not list any action beyond the close of the comment period (January 2, 2024).[\[9\]](#) We expect DOL to finalize the Proposal as quickly as it can.

David Cohen
Associate General Counsel, Retirement Policy

Shannon Salinas
Associate General Counsel - Retirement Policy

Notes

[1] The letter is available at <https://www.ici.org/letters/23-cl-fiduciary-definition>.

[2] For an overview of the Proposal, see ICI Memorandum No. 35508, dated November 13, 2023, available at <https://www.ici.org/memo35508>.

[3] See letter to Assistant Secretary Lisa Gomez (November 8, 2023), available at <https://www.ici.org/system/files/2023-11/35508a.pdf>.

[4] A copy of the oral testimony is available at <https://www.ici.org/testimony/23-dol-fiduciary-proposal>. DOL posted a video of the hearing along with a transcript on its website, at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02-hearing>.

[5] Chamber of Commerce, 885 F.3d 360 (5th Cir. 2018). 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.

[6] In 2016, DOL finalized a similarly broad, comprehensive rulemaking package, amending the definition of fiduciary advice, creating two new PTEs, and amending several other existing PTEs. For a summary of DOL's 2016 fiduciary rulemaking, see ICI Memorandum No. 29837, dated April 13, 2016, available at https://www.ici.org/my_ici/memorandum/memo29837.

[7] DOL finalized PTE 2020-02 in December 2020. See ICI Memorandum No. 32999, dated December 18, 2020, available at <https://www.ici.org/memo32999>.

[8] In footnote 414 of the Proposal (in the RIA), DOL references a new consultants' study, cited as an "unpublished draft" from August 2023 (Constantijn Panis & Karthik Padmanabhan, Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds, Intensity, LLC). Because this document was not made publicly available, ICI submitted a FOIA request, accompanied by a direct request to DOL, requesting the release of this study. See letter from Susan Olson and Elena Chism to Office of Regulations and Interpretations (November 28, 2023), available at <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00019.pdf>. After receiving the request, DOL sent a link to the study.

[9] For an overview of DOL's Fall 2023 Regulatory Agenda, see ICI Memorandum No. 35565, dated December 21, 2023, available at <https://www.ici.org/memo35565>.

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