

MEMO# 35671

April 10, 2024

ICI Urges OMB Not to Approve DOL's Final Fiduciary Investment Advice Package

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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 Urges OMB Not to Approve DOL's Final Fiduciary Investment Advice Package

On April 8, 2024, a group of ICI staff participated in a telephone meeting with representatives from the White House's Office of Management and Budget (OMB) and the Department of Labor (DOL) to discuss DOL's fiduciary investment advice package.[\[1\]](#) As a reminder, on March 8, 2024, DOL sent its final package relating to fiduciary investment advice under ERISA to OMB for review. The OMB must complete an interagency review of the final package before public release, which could take up to 90 days, although we expect release of the rule by or before the end of May.[\[2\]](#)

The meeting was a listening session only, and the OMB and DOL representatives did not provide any comments or information about the rule, nor ask any questions about the points we made.

In the meeting, we urged OMB not to approve the final package, for reasons explained in our comment letter to DOL.[\[3\]](#) At a high level, we noted that the rule is effectively quite

similar to the 2016 DOL rule that was vacated by Fifth Circuit,[\[4\]](#) that it exceeds applicable statutory authority, and that therefore it is susceptible to another judicial rebuke. We then explained more specifically why DOL's rulemaking process in this case has not met certain standards and principles set forth in Executive Orders 12866 and 13563 governing agency rulemaking:

- As described in the appendix to ICI's comment letter, DOL did not adequately assess the costs and benefits of the regulation or make a reasoned determination that the benefits of the regulation justify its costs before proposing it. Nor did DOL base its decisions on the best available information about the need for and consequences of the regulation.
 - Our review of DOL's regulatory impact analysis (RIA) finds that it fails to factor in the significance of developments in the retirement and fund markets over the past two decades which negate the need for DOL's proposal.
 - The RIA does not contemplate that the proposal may harm retirement investors, the very investors DOL seeks to protect.
 - DOL declines to quantify any benefits of the proposal.
 - By DOL's own assessment, the costs of the current proposal included in the RIA would be quite significant, totaling roughly 220 million dollars per year into the foreseeable future. Still, DOL's figures are likely greatly understated.
 - Based on a few modest and reasoned adjustments to DOL's key assumptions, we find that first-year costs of the proposal could easily exceed 2.9 billion dollars, more than 10 times DOL's \$253 million estimate.
- DOL did not harmonize its rules with related regulations or attempt to avoid regulation that is inconsistent, incompatible, or duplicative of other agency rules. For example, for broker-dealers, DOL's expansive fiduciary rule (including the changes to PTE 2020-02) and the SEC's Reg BI would result in the application of two completely separate compliance regimes on the same business activity. Significantly, Reg BI is not a fiduciary standard—the SEC intentionally adopted a standard of conduct for broker-dealers that is distinct from the fiduciary standard that applies to investment advisers under the Advisers Act.[\[5\]](#) This was in recognition of the key differences in the ways broker-dealers and investment advisers engage with retail investors and how investors pay for those services. The SEC was concerned that imposing a fiduciary standard on broker-dealers could limit choice for investors and increase costs to both investors and financial service providers. The DOL rule will impede the goals of the SEC by generally applying a fiduciary standard to traditional brokerage activity with respect to retirement accounts.
- DOL's proposal (and presumably the final package) does not meet the EO 12866 requirement that an agency must draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty. As we detailed in our comment letter, there is a high potential for confusion and uncertainty in interpreting the definition as drafted.
- DOL followed a flawed rulemaking process that denied the public meaningful participation. The comment period was too short for such a complex and far-reaching regulatory project, and the hearing was held too early—before stakeholders had time to fully develop their comments.

We explained that it is unlikely DOL was able to adequately address all these shortcomings in the short period of time between when comments were due (January 2) and when DOL sent the rule to OMB (March 8).

Finally, we noted our view of the comment letter submitted by Morningstar, which

estimated perceived potential benefits or "savings" to retirement investors in an attempt to justify the rule.^[6] To ward against OMB mistakenly believing that Morningstar's estimates provided real support for the rule, we explained that Morningstar presented implausible estimates of "savings," considered no costs, and therefore had not established a net benefit of the proposal.

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Associate General Counsel - Retirement Policy

Notes

[1] For an overview of the package as proposed, see ICI Memorandum No. 35508, dated November 13, 2023, available at <https://www.ici.org/memo35508>. As a reminder, DOL released the long-awaited regulatory package on fiduciary investment advice on October 31, 2023. 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.

[2] OMB has been holding meetings with several other stakeholders. Currently, the last meeting is scheduled for April 15, so we can assume the final package will not be issued before then.

[3] The comment letter is available at <https://www.ici.org/letters/23-cl-fiduciary-definition>. For an overview of the comment letter, see ICI Memorandum No. 35570, dated January 4, 2024, available at <https://www.ici.org/memo35570>.

[4] For an overview of the Fifth Circuit decision, see ICI Memorandum No. 31137, dated March 16, 2018, available at <https://www.ici.org/memo31137>.

[5] We have urged DOL to retain the vital differences between true "fiduciary" relationships and those in which advice is provided on a "solely incidental" basis, as permitted by SEC and FINRA rules for broker-dealers. This distinction was also a critical component of the 5th Circuit's U.S. Chamber of Commerce decision.

[6] Morningstar's comment letter is available here: <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00290.pdf>. The Morningstar letter was mentioned during the February 15, 2024, hearing on Protecting American Savers and Retirees from DOL's Regulatory Overreach, held by the US House Committee on Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions. For ICI's statement for the hearing record, see ICI Memorandum No. 35637, dated February 29, 2024, available at <https://www.ici.org/memo35637>.

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