

July 21, 2015

By U.S. Mail and Email: executivesecretariat@dol.gov, e-ORI@dol.gov, e-OED@dol.gov

The Honorable Thomas E. Perez
Secretary
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Proposed Fiduciary Rulemaking

Dear Secretary Perez:

On behalf of the Investment Company Institute,¹ I write to summarize and to emphasize our concerns regarding the approach that the U.S. Department of Labor has taken in its proposed fiduciary rulemaking.² The mutual fund industry is especially attuned to the needs of retirement savers because mutual funds hold half of retirement assets in defined contribution plans and individual retirement accounts (IRAs).³ The DOL's proposal would have a dramatic impact on the ability of those retirement savers to obtain the guidance, products, and services they need to meet their retirement goals.

¹ The Investment Company Institute is a leading, global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers.

² Notice of Proposed Rulemaking – Definition of the Term “Fiduciary”: Conflict of Interest Rule – Retirement Investment Advice, 80 Fed. Reg. 21928 (April 20, 2015); Notice of Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960 (April 20, 2015).

³ ICI's U.S. fund members manage total assets of \$18.2 trillion and serve more than 90 million U.S. shareholders. The U.S. Retirement Market, First Quarter 2015 (June 2015), available at www.ici.org/info/ret_15_q1_data.xls.

In separate letters, ICI provides detailed comments on the Department's proposed rule defining the term "fiduciary,"⁴ the proposed exemptions in connection with that definition,⁵ and the Regulatory Impact Analysis justifying the Department's proposals.⁶ This letter highlights the key areas of the rule proposal that we believe make it unworkable and conveys at a high level the changes we urge the Department to make to the proposed rules.

We agree that advice providers should act in their clients' best interest. In recent testimony, you assert that the Department, in its proposals, has sought to follow a "principles-based approach [that] obligates the adviser to honor the interests of the plan participant or IRA owner, while leaving the adviser and employing firm with the flexibility and discretion necessary to determine how best to satisfy these basic standards in light of the unique attributes of their business."⁷

Had the Department adhered to a true principles-based approach, the Institute would be most supportive. Regrettably, however, the Department in fact has chosen a different path—it has proposed a set of convoluted, inflexible, and highly prescriptive rules that in no way resembles the principles-based approach described in your testimony. The unfortunate result is that, if adopted, the proposed rules will severely and negatively impact retirement savers' access to the guidance, products, and services they need to meet their retirement goals.

Our several comment letters highlight many serious flaws in the proposed rules that collectively make them simply unworkable, while also advancing numerous constructive suggestions for improving the rules as proposed. The key recommendations from our comment letters are as follows:

The Department should attach fiduciary status only where a genuine relationship of trust and confidence exists. The Department has proposed criteria for triggering fiduciary status that, in many respects, are far too intrusive and highly ambiguous. This is a matter of the deepest concern. Fiduciary status entails one of the highest obligations known to law—and carries with it commensurate liabilities. Rules governing what activities give rise to a fiduciary relationship must provide genuine clarity about who does or does not have that status.⁸ These rules must not impede commonplace

⁴ Letter from David Blass and David Abbey, ICI, regarding the proposed fiduciary rule (July 21, 2015), available at www.ici.org/pdf/15_ici_dol_fiduciary_def_ltr.pdf.

⁵ Letter from David Blass and David Abbey, ICI, regarding the proposed best interest contract exemption (July 21, 2015), available at www.ici.org/pdf/15_ici_dol_fiduciary_best_interest_ltr.pdf.

⁶ Letter from Brian Reid and David Blass, ICI, regarding the Department's Regulatory Impact Analysis (July 21, 2015), available at www.ici.org/pdf/15_ici_dol_fiduciary_reg_impact_ltr.pdf.

⁷ Statement of Thomas E. Perez, Secretary, Department, Before the Health, Employment, Labor and Pensions Subcommittee, Committee on Education and the Workforce, U.S. House of Representatives (June 17, 2015), at p. 4, available at edworkforce.house.gov/uploadedfiles/testimony_perez.pdf.

⁸ Testimony of Paul Schott Stevens before the Department (March 1, 2011), available at www.ici.org/policy/ici_testimony/11_dol_fiduciary_tmny.

financial interactions, and they must allow plans and retirement savers to obtain investments that meet their needs and to gather a range of market input on which to base decisions.

We are particularly troubled that the Department's proposal would attach fiduciary status to many common interactions that do not entail a fiduciary relationship, particularly with respect to call center, walk-in center, and website interactions. The practical consequence will be quite damaging for retirement savers, as providers may have no choice but to cease offering such services.

Our comment letter regarding the fiduciary definition provides several reasonable suggestions for avoiding this outcome. Chief among them is for the Department to return to prior guidance that draws a commonsense line between the provision of fiduciary advice and that of information and education.

The Department should recognize that simply selling an investment product or service is not a fiduciary act. Small employers, as well as retirement savers generally, should have the option to choose among a wide range of investment products and services. Service providers should be able to provide investors with information and data about those options, both during the sales process and on an ongoing basis. As we demonstrate in our letter, there is compelling evidence that Congress did *not* intend for ERISA to disrupt the lawful functioning of the securities markets, to prevent retirement investors from accessing investments, or to turn the "ordinary functions of consultants and advisers" into fiduciary activities. The Department's proposals, at a minimum, should conform to Congress's clear intent in the underlying statute.

If the Department retains a "Best Interest Contract" exemption (BIC Exemption), it should greatly simplify that exemption. The Department suggests that the great expanse of its fiduciary definition can be narrowed substantially by its newly proposed BIC Exemption. We strongly disagree. That exemption as currently drafted is quite useless because of the multitude of ambiguous and impractical conditions to which it is subject. The very granular representations, warranties, and disclosures proposed by the Department are harmful, and in any case are wholly inconsistent with a principles-based approach.

If it actually intends the BIC Exemption to have any practical value, the Department should simplify it as follows:

- ***Take a truly principles-based approach.*** The BIC Exemption will work only if the Department strips it of excessive conditions. A starting point would be eliminating the proposed contractual warranties and representations. They are not needed to protect investors and only serve to expose firms to significant new litigation risk.
- ***Streamline the required disclosures.*** The proposed disclosures needed to qualify for the BIC Exemption are redundant, granular, costly, and unreasonable. As proposed, these disclosures would serve only to overwhelm retirement investors, in the unlikely event that

investors actually read them. The Department should revise the disclosure conditions to align them with the far more workable precedents the Department has adopted under ERISA sections 408(b)(2) and 404(a).

- ***Expand the scope of coverage of the BIC Exemption.*** The BIC Exemption contains exclusions and limitations that needlessly harm broad classes of retirement plans and savers. The BIC Exemption takes a “legal list” kind of approach—long ago abandoned by mainstream trust law—in proposing a list of certain favored investment choices and eschewing other investment choices not on the list. As a result, the proposed rules would unnecessarily and inappropriately restrict retirement investors’ choices. This is, quite simply, an altogether improper role for the Department or any other regulator, and it should have no place in a final rule. In addition, the Department must expand the BIC Exemption to cover advice provided to all small employers. There is absolutely no sound policy justification for refusing sponsors of small plans access to information and advice about the retirement plans they sponsor and administer.
- ***Eliminate compliance traps.*** The proposed written policies and procedures requirement for “material conflicts of interest” pose insuperable compliance hurdles for advice providers. The Department must clarify and simplify these requirements.
- ***Avoid retroactive application of the rules.*** The Department must modify the proposed exemption so that it does not unnecessarily harm investors by prohibiting ongoing advice on assets acquired prior to the rules’ implementation dates.

The Department’s speculation about a streamlined exemption for “high-quality low-fee” investment options poses numerous conceptual issues that preclude meaningful comment. The Department’s questions about a “streamlined” exemption from ERISA’s prohibitions for so-called “high-quality low-fee” investment products frankly are puzzling. The Department does not actually propose such an exemption; nor does it specify how such an exemption would work or indicate what investments would or would not qualify. We have grave concerns about the feasibility and wisdom of such an exemption, and the Department clearly has not provided sufficient information about this aspect of its proposal to allow the public to comment in any meaningful way.

The Department must revisit its Regulatory Impact Analysis. The Department’s Regulatory Impact Analysis is fatally flawed: it simply does not support the Department’s assertion that there is a “substantial failure of the market for retirement advice.” The Department does not, for example, consider facts that contradict its conclusions. It also does not properly consider how the proposal could limit retirement savers’ access to guidance, products, and services, or how such limits could affect savers—particularly lower- and middle-income savers with smaller account balances.

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We encourage the Department, in the strongest possible terms, to revisit the analysis to ensure that the economic justification for the proposed rules meets at least the minimum expected of regulatory agencies, for in its current form it surely does not. Doing so should lead the Department to the conclusion that a different, more targeted, and principles-based approach to fiduciary rulemaking will best serve the interest of retirement savers.

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On behalf of the Institute and all of our members, I thank you for the open, ongoing dialogue we have pursued with the Department and all of its staff throughout your consideration of new rules in this important area. Thank you for your consideration of our views, analysis, research, and the regulatory alternatives we advance. We stand ready to assist the Department in further refining its proposal so that any final rules will protect and advance the interests of retirement savers, an objective we strongly share.

Should you or your staff require any additional information or have questions regarding our comments, please contact me at 202-326-5901 or paul.stevens@ici.org, or David Blass, ICI General Counsel, at 202-326-5815 or david.blass@ici.org.

Sincerely,



Paul Schott Stevens
President & CEO
Investment Company Institute

cc: The Honorable Jeffrey Zients, Director of the National Economic Council and Assistant to the President for Economic Policy

The Honorable Phyllis Borzi, Assistant Secretary of Labor, Employee Benefits Security Administration, U.S. Department of Labor

Judy Mares, Deputy Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor

Timothy Hauser, Deputy Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor