The Asset Management Industry
SERVING INDIVIDUAL INVESTORS

INVESTMENT COMPANY INSTITUTE

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ICI Testimony for DOL Hearing on Fiduciary Proposal

ICI strongly supports efforts to promote retirement security for US workers. Our members play a significant role in helping retirement savers by making available the investment products through which pension plans, defined contribution plans and IRAs invest. As fiduciaries, our members manage retirement assets to the highest standard, whether it be ERISA fiduciary standards for plan asset vehicles or as investment advisers registered under the Advisers Act, managing regulated funds and client accounts.

We support the principle underlying the proposal: that a financial adviser should put the interests of its clients first when providing advice. But there is a difference between this principle and what the proposal would appear to do, which is to impose ERISA fiduciary status on a wide range of investment communications by anyone in the financial services business. The fiduciary standard should apply only in the context of an established relationship of trust and confidence. By applying the standard too broadly, the rule as proposed will limit investors' access to needed financial information, and could ultimately raise the costs they bear while saving and investing for retirement.

Before discussing some of the specifics, I want to make a point about process. The Department has not provided ICI, our members, and the rest of the regulated community sufficient time to properly review and analyze the proposal. The 60-day comment period limits the ability to develop meaningful input on a proposal with such far-reaching implications. As we explained in our extension request, the Department had provided much longer comment periods in prior iterations of this proposal. In this case, the Department has given only 39 workdays. And holding the hearing just 6 weeks into that comment period detracts from the comment development process and limits the utility of the hearing itself.

We think the process concerns alone warrant the Department withdrawing the proposal, but I want to highlight a few other factors that weigh against proceeding with it.

First, only a few years ago the Department issued a new protective exemption, PTE 2020-02, setting parameters around advice to retirement investors. It has not provided any evidence demonstrating that the exemption is not working as intended. The Department should let the regulated community continue implementation of that exemption without prematurely making significant changes to it—and we do view the proposed changes as significant. As the Department stated just three years ago, PTE

2020-02 “provides clear regulatory standards that ensure American workers and retirees have access to high-quality, affordable investment advice.”[1]

Second, as the proposal notes, the regulatory landscape today is very different than it was even just 5 years ago. Other regulatory changes have resulted in the broader application of best interest standards. In 2019, the SEC adopted Regulation Best Interest for broker-dealers recommending securities transactions or strategies to retail customers. Firms have put substantial resources into implementing Reg BI. And in 2020, the National Association of Insurance Commissioners adopted a model best interest standard for annuity product sales, which in turn has been adopted by the vast majority of states.

These standards, particularly when added to the existing five-part test and the duties applicable to investment advisers under the federal securities law, collectively cover recommendations involving most types of investment products commonly offered to retirement investors. Consequently, any supposed benefits associated with expanding the application of the Department’s fiduciary definition are greatly and necessarily diminished compared to 2016. These supposed benefits would be outweighed by the costs of reducing access to financial information and the burdens of complying with the proposed revisions to PTE 2020-02. Despite this, the Department’s Regulatory Impact Analysis fails to comprehensively account for the significant changes that have occurred since 2016 or to provide a benefit estimate. Additionally, while estimating significant costs, the Department still significantly underestimates these costs.

Another crucial factor to consider is the recent judicial scrutiny of the Department’s prior attempts to expand the fiduciary advice definition. We believe that the proposal does not adequately account for the 5th Circuit decision and once again exceeds the trust and confidence standard. As written, the regulation’s language is no more narrowly tailored than the 2016 regulation. If this rule is finalized, its strong resemblance to the 2016 rule leaves the rule vulnerable to another successful legal challenge.

We note that this new proposal could be plagued by additional vulnerability relating to the Regulatory Impact Analysis, which as I mentioned earlier has considerable flaws. There would be a strong basis for a court to find the RIA fails to meet the standards applicable under the APA. Under the APA, it’s incumbent on the Department to show that the benefits of a proposal will outweigh the costs. But we are concerned that this RIA fails to quantify any purported benefits, while grossly underestimating the costs of the changes, in terms of both the direct costs of implementation and the costs to investors from loss of access to information and assistance. The RIA does not provide a basis for sound rulemaking that is consistent with the requirements of the APA.

If the Department moves forward with changes to the advice definition, the proposal must be narrowed and provide clearer guidelines. It must ensure that typical marketing and financial education related communications are not subject to fiduciary standards. Some of the areas that must be addressed include —

- Platform providers assisting plan sponsors with platform selection;
- RFP responses and other ”hire me” situations;
- Call center representatives responding to questions from a plan participant; and
- Communications between asset managers and financial institution intermediaries.

On that last point, while we appreciate the Department’s commentary attempting to clarify that it does not intend to cover wholesaling activities by product manufacturers, the text of the rule itself must be clearer. One way the Department might address these concerns is through the provision of clear examples in the regulation itself.

Our written comments also will address several concerns with the proposed changes to PTE 2020-02 and the other existing exemptions available in the advice context. We disagree with the Department’s stated intention of providing a one-size-fits-all (or fits-most) exemption. Exemptions are more effective at both protecting the rights of participants and beneficiaries and enabling the provision of necessary services to plans if they are tailored to apply to specific situations. The Department has used this more tailored approach for decades. Rather than leveling the playing field, the application of one set of conditions to all instances of advice (especially the broad range of activities contemplated by this definition of advice) will result in less assistance to plans, participants, and IRA owners and fewer options in the marketplace.

In conclusion, ICI strongly urges the Department to reconsider this 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.

We appreciate the opportunity to present our views.

Notes

[1] https://www.dol.gov/newsroom/releases/ebsa/ebsa20201215
