Assessing the New DOL Fiduciary Rule: Policy and Practical Challenges

Welcome and Opening Remarks

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Good morning. I'm Paul Stevens, and it is my pleasure to welcome you to one of the first conferences to undertake a comprehensive examination of the newly adopted rule re-defining who is a fiduciary in providing advice to America's retirement savers.

We have assembled an exceptionally qualified and well-informed group of speakers and panelists today to look at the rule from every angle—business, legal, operational, and political. You'll hear from an architect of the new rule—Deputy Assistant Secretary Timothy Hauser—as well as from one of Capitol Hill's leading authorities, Representative Phil Roe, chairman of the House Health, Employment, Labor, and Pensions Subcommittee.

This conference represents the latest phase of a dialogue in which ICI has engaged for many years—a dialogue over how the investment industry can best serve the needs of Americans saving and investing for retirement. This issue has always been of vital importance to the Institute, because of the unique role that our mutual fund members play in America's retirement system.

Mutual funds hold roughly half of the retirement assets in defined contribution plans and individual retirement accounts. They offer investors the opportunity to gain long-term, diversified exposure to the stock, bond, and money markets through a comprehensively regulated vehicle at an affordable price. ICI and its members have long supported the policy and business innovations that underpin the strengths and successes of the U.S. retirement system, including 401(k) plans and IRAs.

The fund industry has also long stood for the principle that the Department of Labor has pursued: all financial advisers should be held to act in the best interests of their clients.

But the debate over defining and applying that sort of fiduciary standard has been difficult and heated, to say the least. The temperature rose markedly when the Department of Labor issued its latest proposal in April 2015. After 12 months of hearings, comment letters, speeches, and debates at every think tank in town, the Department issued its final rule this April—and now we are into the implementation phase.

I'm not going to rehash that debate. And I want to acknowledge that the Department did make certain changes during that 12-month period.

But I would be remiss if I did not outline some concerns—and lay down some challenges to the Department and its supporters.

At ICI, we still believe that the fundamental, far-reaching questions raised by defining a fiduciary standard should be addressed by Congress through legislation that could apply to *all* financial advisers for *all* accounts—not through a litigation-oriented contractual regime, imposed by regulation and applied solely to retirement savings.

We remain quite concerned that the DOL's final rule is not informed by sound, practical economic analysis, and that the rule could indeed end up costing investors billions of dollars if it deprives them of access to the advice and help that they need.

We have lingering questions about how the rule will affect fund companies' educational offerings and ability to serve investors through call centers and websites.

We still feel that commission-based advice has served millions of investors very well. We have demonstrated that repeatedly—for example, showing that investors who own funds sold with a front-end load have concentrated their assets in funds that outperform their Morningstar category. We believe that commission-based advice should still have a place for investors with smaller and less active accounts, for whom transaction-based charges make more sense—and cost less—than an ongoing asset-based fee.

With its final rule, the Department has launched, in effect, a grand experiment to see whether investment providers can continue to meet retirement savers' needs under the strictures of a novel contractual regime never anticipated by ERISA—and under the constant threat of strike-suit lawyers and class-action litigation.

None of us—in candor, not even the DOL—knows exactly how this experiment is going to play out. Our job—starting here, starting today—is to see what's needed to make this new system as beneficial as possible for the investors we serve.

Through our program today, we hope we will gain greater understanding of the legal and interpretative issues that surround the new rule.

- For example, would a simple suggestion that a prospective IRA-holder might consider investing in target-date funds be considered a "recommendation" that will trigger fiduciary status?
- Will investors still be able to interact with funds' call centers to get basic information about investing and investments without triggering a "best interest contract" requirement?

We hope that Deputy Assistant Secretary Hauser and our afternoon panel of legal experts will shed some light on these and many other questions.

Our conference also will tackle how mutual fund distribution could change under a new fiduciary paradigm. Two topics, in particular, exemplify the far-ranging implications of the new rule.

- First, will the rule effectively require dealer platforms to limit their offerings? If so, which products will survive, and how will the distribution fees be structured?
- Second, will dealer platforms and brokers offer multiple distribution models, or will products offered to taxable investors be forced to conform to the requirements that are now coming into place for retirement savers?

In our morning panel, our speakers will lay out a few of the many business and legal challenges under the rule—all the way from the logistical challenges of executing best interest contracts, through the data sources needed for point of sale and website disclosures, to the requirements for record retention and distribution in the new regime.

It's a full day, and I hope it will be a valuable one for all of you.

As I said, we are entering a new world as part of a grand experiment. Now here's the challenge that I want to lay down for the Department of Labor and all the supporters of the rule as adopted:

Approach this experiment in as honest and objective a fashion as possible.

Monitor the market closely. Measure the impact of the new arrangements on access to advice for retirement savers of all types. Maintain open minds about the results.

And—most important—have the courage to modify the new regime if it's not working as the Department and its supporters say it will.

We will do our part to assist in this process. Frankly, we all owe America's retirement savers nothing less.

We have all seen legislation and regulation that, for whatever reason, has failed to anticipate economic, financial, or social conditions and has ended up doing harm where it was intended to do good.

- The decline of defined benefit pensions in the private sector is one such example.
- The alternative minimum tax is another. Just ask any of the 4 million taxpayers who are paying a levy initially designed to catch all of 155 wealthy Americans who weren't paying taxes.

- The Basel capital standards that allowed banks to treat mortgage-backed securities as one of the safest classes of assets—that is yet another.

America’s retirement system is working now for millions of workers and retirees. We need to preserve and build upon its strengths, and not put them at risk.

Now before I introduce our keynote speaker, let me briefly describe the format of the next session.

Mr. Hauser will provide initial remarks describing for us all what the Department attempted to accomplish with the changes it incorporated in the final rule and its related exemptions.

After he offers his remarks, he will be joined here on stage by Jon Breyfogle, who will lead an open discussion between Mr. Hauser and our attendees on the rule and interpretative issues it raises.

Jon is well-known in the pensions and benefits world, both from his service at the Department of Labor and the Pension Benefit Guaranty Corporation and from his long career as a principal at the Groom Law Group. We’re pleased that he’s joined us.

Now it is my great pleasure and honor to introduce our keynote speaker.

Timothy Hauser is Deputy Assistant Secretary for Program Operations at the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor.

Mr. Hauser is the chief operating officer of an organization of roughly 1,000 employees. He oversees all of the regulatory, enforcement, and reporting activities of the agency, whose mission is to “assure the security of the retirement, health, and other workplace related benefits of America's workers and their families.” And he is, as you all know, a primary architect of the rule that is our topic today.

After graduating from Harvard Law, Mr. Hauser spent six years representing indigent clients in civil litigation in rural areas of western Missouri. He joined the Department in 1991 and has spent a quarter century in a range of legal and operational roles.

There’s no question that ICI and its members have had our differences with DOL over this issue. But we have always recognized that we share the same interest—a desire to ensure that America’s retirement savers are served well. I want to be very forthright in thanking Mr. Hauser and his colleagues today for their professionalism and engagement throughout this lengthy rulemaking process. And we are very grateful for his generosity in spending so much time with us here today.

Ladies and gentlemen, please welcome Timothy D. Hauser, Deputy Assistant Secretary of the Department of Labor.
