

ICI VIEWPOINTS

AUGUST 8, 2017

DOL Fiduciary Rule Review Is Opportunity for SEC

By Paul Schott Stevens

The following ICI Viewpoints is an op-ed by Paul Schott Stevens that was [published in InvestmentNews](#) on August 7, 2017.

Securities and Exchange Commission (SEC) Chairman Jay Clayton deserves credit for his decisive action inviting public feedback on the standards of conduct for financial advisers to retail investors. He now has a critical window of opportunity to press forward and work with the Department of Labor (DOL) to establish a consistent [best-interest standard of conduct](#) that applies uniformly across retirement and non-retirement accounts, while preserving investor choice.

Developing a best-interest standard of conduct for broker-dealers would represent a culmination of the SEC's efforts over many years in this area. Success in establishing an enhanced standard for broker-dealers will immediately benefit the 28 million US households that own mutual funds and exchange-traded funds purchased through a broker-dealer. If the SEC fails to act, investors will be left with different rules governing advice on their retail investments and on their retirement accounts. Many investors—particularly those with modest account balances—also will face the risk that they will not be able to obtain the guidance, products, and services they need to meet their retirement goals.

Funds have a huge stake in getting this right. So the Investment Company Institute recommends that the SEC adopt a new, enhanced best-interest standard of conduct for broker-dealers based on the current "suitability" standard. The new rule should provide clarity and consistency, and the SEC should work in close coordination with the DOL.

The current suitability standard requires brokers to reasonably believe that the investments and strategies they recommend are suitable for their customers, considering a range of factors.

ICI would like the SEC to establish a new, clearly defined standard that includes duties of care and loyalty. The broker would have to exercise diligence, care, skill, and prudence. The SEC also should specify that brokers receive only reasonable compensation, provide specified disclosures about their services, and are prohibited from making misleading statements. These requirements would necessitate that brokers' investment recommendations align with their customers' best interests. In addition, we recommend that the fiduciary standard that applies to investment advisers—which has served investors well for more than seven decades—remain solidly in place.

Clayton is taking important steps to help the SEC assume a leadership position on future action to enhance regulation of financial advice. With telling foresight, in June he kick-started SEC action with a statement inviting public comment on a new standard. Noting that the DOL fiduciary rule may have significant effects on the universe of retail investors and entities within the SEC's broad purview and mission—including its mission of investor protection—Clayton called for the public to provide "robust, substantive input that will advance and inform the SEC's assessment of possible future action."

Simultaneous Response

Many interested parties representing key stakeholders, including ICI, are responding to Clayton's invitation. We are responding simultaneously to the DOL's request for information for its reassessment of the fiduciary rule. Clayton's swift action creates a golden opportunity for productive coordination between the SEC and DOL.

Much is at stake. If implemented in its current form, and without accompanying changes to the retail market, the DOL fiduciary rule

will bring an estimated **\$109 billion in financial harm** to retirement savers, according to an ICI analysis. Many of those harmed will be savers with small account balances left without access to financial advice as a result of the DOL fiduciary rule. ICI is advocating that the DOL rework its fiduciary rule to prevent this harm—but the regulation of financial advice will be incomplete without further action by the SEC.

New regulation shouldn't blow up the existing broker-dealer business model. ICI research shows that long-term investors—the clear majority of those who buy funds—can do better in a commission-based account than in a fee-based account if they buy and hold funds for just five years. Unfortunately, the DOL rule has already upended commission-based advice, driving the brokerage industry toward fee-based accounts. Many financial advisers are even refusing to serve small investors because of the new and significant litigation risks of advising those accounts. As a result, more than 500,000 investor accounts have already been “orphaned”—and those numbers will grow substantially if the rule is implemented in full.

Request to Delay Conditions

ICI and other industry groups also have asked the DOL to delay applying conditions of the rulemaking that are not yet in force, including the most cumbersome requirements of the best-interest-contract exemption. A postponement would allow critical time for effective SEC/DOL cooperation to achieve coordinated standards. It also would allow the DOL to adopt a revised rule that is consistent with the pending SEC standard of conduct for brokers—benefiting investors, financial professionals, and the market. Regulators should work to streamline the rules, including related prohibited-transactions exemptions, to reach those aims.

Financial advice professionals and the millions of clients they serve expect and rely on good decisions by regulators to enhance the availability and quality of financial advice. Clayton and DOL Secretary Alexander Acosta have it within their power to tackle this issue in a way that ultimately will meet the shared goal of a consistent best-interest advice standard that benefits American investors. We're confident that they can succeed.

Paul Schott Stevens was President and CEO of ICI.