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# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

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May 12, 2017

The Honorable R. Alexander Acosta  
Secretary  
Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

Dear Secretary Acosta:

Congratulations on your confirmation as Secretary of the Department of Labor. I look forward to working with you as Congress and the Trump Administration begin to unwind the previous Administration's burdensome over-regulation. One prime example of over-regulation is the Labor Department's so-called "fiduciary rule."<sup>1</sup> I respectfully draw your attention to this regulation.

During the 114th Congress, I conducted oversight of the process by which the Labor Department worked with the Securities and Exchange Commission (SEC), the Treasury Department, and other agencies to develop the fiduciary rule.<sup>2</sup> Based on this oversight, the Committee issued a majority staff report in February 2016 finding deficiencies in the rulemaking process.<sup>3</sup> I have enclosed a copy of the report with this letter.

Under the previous Administration, the Labor Department prioritized the expeditious completion of the rulemaking process at the expense of thoughtful deliberation.<sup>4</sup> Documents showed that the Department disregarded concerns raised by other agencies.<sup>5</sup> In one email, a Labor Department employee wrote to his SEC counterpart, "[w]e have now gone far beyond the point where your input was helpful to me. . . . If you have nothing new to bring up, please stop

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<sup>1</sup> Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016).

<sup>2</sup> See Letter from Hon. Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs (HSGAC), to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (DOL) (Feb. 5, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Thomas E. Perez, Sec'y, DOL (Mar. 17, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Mary Jo White, Chair, Sec. & Exch. Comm'n (SEC) (Apr. 21, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Mary Jo White, Chair, SEC (May 20, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Mary Jo White, Chair, SEC (July 13, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Richard Ketchum, Chairman, FINRA (Sept. 16, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Howard Shelanski, Admin'r, OIRA (May 1, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Howard Shelanski, Admin'r, OIRA (Dec. 3, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury (Nov. 12, 2015).

<sup>3</sup> S. Comm. on Homeland Sec. & Governmental Affairs, *The Labor Department's Fiduciary Rule: How a Flawed Process Could Hurt Retirement Savers* (Feb. 24, 2016).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

emailing me.”<sup>6</sup> The SEC official replied that he was “utterly confused” about the goal of the rule.<sup>7</sup> Likewise, the Labor Department ignored the SEC’s recommendation relating to a cost-benefit analysis because the analysis “would be extraordinarily difficult and would appreciably delay the project for very little return . . . .”<sup>8</sup> The Treasury Department similarly noted that the fiduciary rule departed from congressional intent and “seem[ed] to fly in the face of the logic.”<sup>9</sup>

The report also noted indications that the previous Administration was predetermined to regulate the investment advice industry, seeking evidence to support its preferred policy. In emails to senior White House officials, a Labor Department employee wrote of the “challenges in completing the [regulatory impact analysis]” and of the need to identify data that “can be woven together to demonstrate that there is a market failure and to monetize the potential benefits of fixing it.”<sup>10</sup> In a separate email, a Department employee noted the need of “building the case for why the rule is necessary.”<sup>11</sup> These emails suggest that rather than identifying a market failure and pursuing a regulatory remedy, the previous administration’s rulemaking was a solution in search of a problem.

It is generally accepted that investment advisors should act in the best interest of their clients, and many advisers abide by this standard.<sup>12</sup> Some industry experts criticized the rule as overly complex and burdensome, imposing compliance costs of \$21.5 million and annual maintenance costs of \$5.1 million.<sup>13</sup> Experts also warned that the rule would distort the investment advice market—pricing middle-class, small-account holders out of access to investment services.<sup>14</sup> Cumulatively, these investors could lose as much as \$68 to 80 billion in retirement savings per year.<sup>15</sup> The rule also threatens small- to mid-size investment firms that cannot afford the additional compliance costs or litigation risks caused by the rule.<sup>16</sup>

As you begin your tenure as Secretary of Labor, I respectfully urge you to prioritize a review of the Department’s fiduciary rule, consistent with President Trump’s directive.<sup>17</sup> Without prompt action, the rule—which begins to take effect on June 9, 2017<sup>18</sup>—could have adverse consequences for millions of middle-income retirement savers. I hope you will review the Department’s fiduciary rule and take appropriate steps to rein in the regulatory overreach of

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<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *Id.* at 19.

<sup>9</sup> *Id.* at 25.

<sup>10</sup> *Id.* at 31.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 27 (citing Megan Milloy, Am. Action Foun, DOL’s Proposed Fiduciary Rule: Not in the Best Interest of Investors (2015)).

<sup>14</sup> *Id.* at 30.

<sup>15</sup> *Id.* (citing Quantria Strategies, LLC, Unintended Consequences: Potential of the DOL Regulations to Reduce Financial Advice and Erode Retirement Readiness 1 (2015)).

<sup>16</sup> *Id.* at 30-31.

<sup>17</sup> See Presidential Memorandum on Fiduciary Duty Rule, 82 Fed. Reg. 9,675 (Feb. 3, 2017).

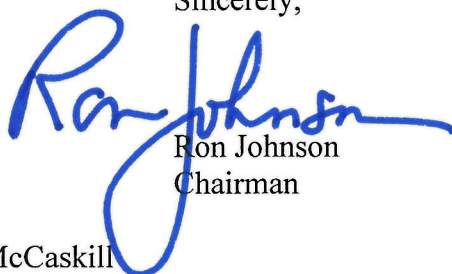
<sup>18</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 82 Fed. Reg. 16,902 (Apr. 7, 2017).

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the previous Administration and allow more Americans to access investment advice as they prepare for retirement.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Ron Johnson". The signature is written in a cursive style with a large, looping "R" and "J".

Ron Johnson  
Chairman

cc: The Honorable Claire McCaskill  
Ranking Member

Enclosure