Appendix A

Exhibit 1

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

February 5, 2015

The Honorable Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Dear Secretary Perez:

The Committee on Homeland Security and Governmental Affairs is examining the Department of Labor's reported efforts to change the fiduciary rules relating to retirement plans. I ask for your help in enabling the Committee to better understand the Department's plans and the process by which the Department intends to change the fiduciary obligations.

The Employee Retirement Income Security Act of 1974 (ERISA) establishes minimum standards for private industry pension plans and requires plan fiduciaries to act in the interest of the plan's participants.[1] A fiduciary, as currently defined in the statute, includes anyone who offers investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such a retirement plan, or has any authority or responsibility to do so.[2]

According to recent reports, the Department is poised to issue a regulation soon to expand fiduciary duties owed by investment advisers who offer advice relating to employee retirement plans and individual retirement accounts.[3] Critics of the Department's new

---

[1] Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. § 1001).

[2] *Id.* § 1002(21)(A). In 1975, the created a five-part test for "investment advice," which narrowed the meaning of "fiduciary" under the statute. The five-part test for "investment advice" includes whether a person: (i) makes recommendations on investing in, purchasing or selling securities or other property, or give advice as to their value; (ii) on a regular basis; (iii) pursuant to a mutual understanding that the advice; (iv) will serve as a primary basis for investment decisions; and (v) will be individualized to the particular needs of the plan. 29 C.F.R. § 2510.3-21(c) (1975). If an investment adviser does not meet each requirement of the five-part test each time he or she gives advice, he or she will not be treated as a fiduciary. *Id.*

[3] Kevin Cirilli, *White House Readies Crackdown on Financial Advisers*, THE HILL, Jan. 22, 2015, *available at* http://thehill.com/policy/finance/230457-white-house-readies-crackdown-on-financial-advisers (last visited Feb. 5, 2015) [hereinafter Cirilli, *White House Readies Crackdown*]; Suzanne Barlyn, *U.S. Labor Dept. Delays Unveiling of Fiduciary Plan to 2015*, REUTERS, May 28, 2014, *available at* http://www.reuters.com/article/2014/05/28/us-labor-fiduciary-idUSKBN0E81IO20140528 (last visited Feb. 5, 2015).

regulation, however, have expressed concerns that the rule could adversely affect middle to low-income Americans' access to investment advice.[4]

The Department has considered changing its rules concerning fiduciaries for years. In 2010, the Department initially proposed a new rule that would have expanded the definition of "fiduciary" under ERISA.[5] Although the Department later withdrew the proposed rule in 2011, the Department has been preparing to again release a new rule that would expand the list of those who qualify as fiduciaries.[6] The Department's plans come as the Securities and Exchange Commission (SEC) is also making plans to revise its fiduciary standard for brokers.[7]

It is widely believed that the Department will issue a notice of proposed rulemaking soon concerning fiduciary obligations under ERISA.[8] In January 2015, White House Council of Economic Advisors (CEA) Chairman Jason Furman and Betsey Stevenson, a member of the CEA, circulated a memorandum to senior advisors in the White House criticizing current regulations relating to investment advice on retirement accounts.[9] In addition, the Department recently held an unusual public hearing on whether Credit Suisse should be granted a final exemption under ERISA to continue as a Qualified Professional Asset Manager of U.S. pension fund assets.[10]

In order to assist the Committee's oversight obligations, I request that you provide the following information for the period January 1, 2010, to the present:

1. Please explain how the Department will ensure that any proposed rulemaking relating to fiduciary rules and policies on investment advisers for retirement accounts does not adversely affect middle and low-income Americans.

2. Please explain whether and how the Department plans to increase awareness and educate taxpayers about any proposed rulemaking relating to fiduciary rules and policies on investment advisers for retirement accounts.

---

[4] Mark Schoeff, *DOL Proposal of Fiduciary-Duty Rule Delayed Again*, INVESTMENT NEWS, May 28, 2014, *available at* http://www.investmentnews.com/article/20140528/FREE/140529932/dol-proposal-of-fiduciary-duty-rule-delayed-again (last visited Feb. 5, 2015) [hereinafter Schoeff, *DOL Proposal*].

[5] *Id.*

[6] Sarah N. Lynch, *U.S. Labor Dept. Offers Glimpse Into New Fiduciary Plan*, REUTERS, Mar. 12, 2014, *available at* http://www.reuters.com/article/2014/03/12/us-labor-fiduciary-idUSBREA2B23H20140312 (last visited Feb. 5, 2015).

[7] Mark Schoeff, *SEC Keeps Fiduciary Promises Vague for 2015*, INVESTMENT NEWS, Nov. 18, 2014, *available at* http://www.investmentnews.com/article/20141118/FREE/141119900/sec-keeps-fiduciary-promises-vague-for-2015 (last visited Feb. 5, 2015).

[8] Cirilli, *White House Readies Crackdown*, *supra* note 3; Schoeff, *DOL Proposal*, *supra* note 5.

[9] Memorandum from Jason Furman, Chairman, White House Council of Economic Advisers & Betsey Stevenson, Member, White House Council of Economic Advisers to White House Senior Advisors, *Draft Conflict of Interest Rule for Retirement Savings* (Jan. 13, 2015).

[10] Neil Weinberg, *Credit Suisse to Face Nader at Labor Dept. Hearing*, BLOOMBERG NEWS, Jan. 14, 2015, *available at* http://www.bloomberg.com/news/2015-01-14/credit-suisse-to-face-nader-at-labor-department-hearing.html (last visited Feb. 5, 2015).

3. Please itemize any costs that will be or have been incurred by the Department to increase awareness and educate taxpayers about any proposed rulemaking relating to fiduciary rules and policies on investment advisers for retirement accounts.

4. Please explain the Department's role in drafting or advising on the White House Council on Economic Advisors memorandum titled "Draft Conflict of Interest Rule for Retirement Savings" and dated January 13, 2015.

5. Please explain the Department's decision to convene a hearing on the Qualified Professional Asset Manager eligibility of Credit Suisse, including how the Department selected the witnesses who testified during the hearing.

6. Please produce all communications between the Department of Labor and the Securities and Exchange Commission referring or relating to changing fiduciary standards under the Employee Retirement Income Security Act.

7. Please produce all communications between the Department of Labor and the Executive Office of the President about the White House Council on Economic Advisors memorandum titled "Draft Conflict of Interest Rule for Retirement Savings" and dated January 13, 2015.

Please produce this material as soon as possible, but by no later than noon on February 19, 2015.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate "the efficiency and economy of operations of all branches of the Government."[11] Additionally, S. Res. 253 (114th Congress) authorizes the Committee to examine "the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs."[12]

For purposes of this request, please refer to the definitions and instructions in the enclosure to this letter. If you have any questions about this request, please contact Caroline Ingram of the Committee staff at (202) 224-4751. Thank you for your attention to this matter.

Sincerely,

Ron Johnson
Chairman

[11] S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).
[12] S. Res. 253 § 12, 113th Cong. (2013).

cc: The Honorable Thomas R. Carper
Ranking Minority Member

Enclosure

Exhibit 2

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

March 17, 2015

The Honorable Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Dear Secretary Perez:

The Committee on Homeland Security and Governmental Affairs is continuing its oversight of the Department of Labor's proposed rulemaking to change fiduciary obligations owed by investment advisers related to retirement accounts. In light of the Department's recent decision to send the proposed rulemaking to the Office of Management and Budget (OMB) for approval,[1] the Committee seeks to better understand the processes and considerations surrounding the Department's plan to move forward with issuing the new regulation.

I first wrote to you on February 5, 2015 seeking documents and information to understand the processes by which the Department developed its proposal to expand the fiduciary standard under the Employee Retirement Income Security Act of 1974 (ERISA) to include those who offer investment advice relating to retirement plans.[2] In that letter, I outlined requests for information necessary to understand how the Department has sought input and advice on crafting the proposed rule, as well as how the Department intends to move forward with the rulemaking.[3] I asked that you provide the requested information by February 19, 2015.[4]

The Department provided its response on February 23, 2015—hours after the President's public announcement that the Labor Department would be sending the proposed rulemaking to

---

[1] Jonnelle Marte, *Obama Calls for Higher Standards on Brokers Giving Retirement Advice*, WASH. POST, Feb. 23, 2015, *available at* http://www.washingtonpost.com/news/get-there/wp/2015/02/23/raising-the-standard-for-retirement-advice/ (last visited Mar. 17, 2015); Dave Michaels & Angela Greiling Keane, *Obama Backs Tougher Rules for Brokers on Retirement Funds*, BLOOMBERG POLITICS, Feb. 23, 2015, http://www.bloomberg.com/politics/articles/2015-02-23/obama-to-lead-push-to-toughen-broker-rules-for-retirement-funds (last visited Mar. 17, 2015).

[2] Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Feb. 5, 2015) [hereinafter Sen. Comm. on Homeland Security & Gov't Affairs Letter, Feb. 5, 2015].

[3] *Id.*

[4] *Id.*

OMB for approval.[5] In its response, however, the Department failed to fully comply with the Committee's requests.[6]

In my February 5 letter, I asked you how the Department will ensure that any proposed rulemaking does not adversely affect middle and low-income Americans.[7] In its response, however, the Department merely stated: "It is essential that any rulemaking in which we engage take into account the impact on middle and low-income Americans, and we look forward to working with you on this and other issues of importance affecting America's workers."[8] The Department did not provide any specific information on how it will ensure middle and low-income Americans are protected.[9] Additionally, I asked the Department about whether and how it plans to increase awareness and educate taxpayers about the proposed rulemaking.[10] Aside from stating that the rule would be published in the Federal Register and that the public will have an opportunity to submit written comments, the Department did not provide any specific information on how it will increase awareness of the rule.[11]

Further, the Department failed to produce a single document in response to the Committee's request for documents and material to inform the Committee's oversight.[12] Specifically, I asked the Department to itemize costs that have been or will be incurred by the Department to increase awareness of the rule and educate taxpayers.[13] Yet, in its response, the Department did not reference or elaborate on any costs incurred to educate Americans about the rule.[14] I also requested all communications between the Department and the Securities and Exchange Commission (SEC) about changing fiduciary standards under ERISA.[15] Although the Department mentioned that it will examine the proposal following OMB review to ensure it does not conflict with SEC actions, it did not address whether there were any communications between the two agencies and it produced no such communications.[16] Finally, despite stating that the Department did not have a role in drafting the White House Council on Economic Advisors memorandum relating to the fiduciary standard, the Department did not respond to the request for whether the Department had advised on the memorandum.[17] The Department likewise produced no documents or communications between the Department and the White House about the memorandum.[18]

---

[5] Ashlea Ebeling, *Obama Attacks Advisors Selling Snake Oil, Lauds New DOL Fiduciary Rule*, FORBES, Feb. 23, 2015, *available at* http://www.forbes.com/sites/ashleaebeling/2015/02/23/obama-attacks-advisors-selling-snake-oil/ (last visited Mar. 17, 2015).
[6] *See* Letter from Adri Jayaratne, Acting Asst. Sec'y, U.S. Dep't of Labor, to Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs (Feb. 23, 2015) [hereinafter Dep't of Labor Letter, Feb. 23, 2015].
[7] Sen. Comm. on Homeland Security & Gov't Affairs Letter, Feb. 5, 2015, *supra* note 2.
[8] Dep't of Labor Letter, Feb. 23, 2015, *supra* note 6.
[9] *Id.*
[10] Sen. Comm. on Homeland Security & Gov't Affairs Letter, Feb. 5, 2015, *supra* note 2.
[11] Dep't of Labor Letter, Feb. 23, 2015, *supra* note 6.
[12] Sen. Comm. on Homeland Security & Gov't Affairs Letter, Feb. 5, 2015, *supra* note 2.
[13] *Id.*
[14] Dep't of Labor Letter, Feb. 23, 2015, *supra* note 6.
[15] Sen. Comm. on Homeland Security & Gov't Affairs Letter, Feb. 5, 2015, *supra* note 2.
[16] Dep't of Labor Letter, Feb. 23, 2015, *supra* note 6.
[17] *Id.*
[18] *Id.*

The Department's letter falls short of what is needed to inform the Committee's oversight of the Department's rulemaking process. Instead, the Department's response merely provided a basic update on where the Department stands within the rulemaking process—explaining that the Department decided to move forward with the rule after meeting with a variety of stakeholders on the issue and highlighting the Department's recent action to submit a draft proposal to OMB.[19] Although the Department's response acknowledged these stakeholder meetings, it is unclear whether the Department adhered to transparency and notice requirements pertaining to how these pre-decisional meetings shaped the proposed regulation.[20]

The Department's failure to respond fully impedes the Committee's ability to conduct necessary oversight. Accordingly, I reiterate the requests for documents and information contained in my February 5, 2015 letter. Please provide responsive information and materials as soon as possible, but by no later than 5:00 p.m. on March 24, 2015. Thank you for your attention to this matter.

Sincerely,

Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

[19] *Id.*

[20] *See, e.g.*, Negotiated Rulemaking Act, 5 U.S.C. §§561-570a; Federal Advisory Committee Act, 5 U.S.C. App. II.

Exhibit 3

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

April 21, 2015

The Honorable Mary Jo White
Chair
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Dear Chair White:

The Committee on Homeland Security and Governmental Affairs is examining the Department of Labor's efforts to expand the definition of a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) to those who offer advice related to employee retirement plans and individual retirement accounts.[1] Because the Securities and Exchange Commission (SEC) has long considered issuing a uniform regulation governing retail investment advice, the Committee seeks to understand the Commission's communications with the Department of Labor about the Department's proposal.[2]

For years, the Department of Labor has deliberated changing its rules relating to when a person offering investment advice qualifies as a fiduciary under ERISA.[3] In 2010, the Department issued a Notice of Proposed Rulemaking, which drew more than 200 written comments.[4] Some of the comments received by the Department cited significant concerns about the adequacy of the Department's coordination with other Executive Branch departments and agencies, such as the SEC, because of its jurisdiction to set standards of care for retail investment advice offered by brokers and advisers.[5]

---

[1] *See* Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Feb. 5, 2015); Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Mar. 17, 2015).

[2] Jeff Mason & Sarah N. Lynch, *Obama Takes Aim at Brokers' Fees on U.S. Retirement Accounts*, REUTERS, Feb. 23, 2015, http://www.reuters.com/article/2015/02/23/us-usa-fiduciary-idUSKBN0LR0XR20150223 (last visited Apr. 21, 2015) [hereinafter Mason & Lynch, *Obama Takes Aim*].

[3] *Id.*

[4] *'Redefining Fiduciary': Assessing the Impact of the Labor Department's Proposal on Workers and Retirees: Hearing Before the H. Comm. on Education and the Workforce, Subcomm. On Health, Employment, Labor, and Pensions*, 112th Cong. (Jul. 26, 2011) (statement of Phyllis C. Borzi, Asst. Sec'y of Labor, Employee Benefits Security Admin.), *available at* http://www.dol.gov/ebsa/newsroom/ty072611.html.

[5] *Id.*; Mason & Lynch, *Obama Takes Aim*, *supra* note 1.

After facing significant criticism based, in part, on the Department of Labor's failure to conduct an economic analysis of the potential impact of the rule, the Department ultimately withdrew its proposal.[6] Stakeholders and Members of Congress applauded the Department's decision to withdraw the rule, stating that the Department should reconsider the proposal after coordinating with other agencies with rulemaking authority to set standards for investment advice, including the SEC.[7]

Since the Department of Labor first issued its proposed rule in 2010, current and former Members of Congress from both parties have called on the Department to consult with the SEC on any proposal seeking to change the fiduciary obligations to which investment advisers must adhere.[8] Because of the SEC's jurisdiction to regulate retail brokers and advisers, parallel rules disseminated by the Department of Labor and the SEC could create the potential for conflict or confusion.[9] In 2013, the debate culminated in a bill passed by the House of Representatives to delay the Department of Labor's consideration of a proposed rule until the SEC completed its own regulations.[10]

Despite calls for the SEC to proceed with its rulemaking first, the Department of Labor is poised to move forward with its proposed rulemaking.[11] On February 23, 2015, during a highly publicized media event, the President called on the Department of Labor to move forward with the proposed rule.[12] Later that day, Secretary of Labor Thomas Perez announced that the Department would be sending the proposed rule to the Office of Management and Budget (OMB) for approval—indicating that the Department could issue a Notice of Proposed

---

[6] Margaret Collins, *Labor Department Will Delay Its Fiduciary Rule, Borzi Says*, BLOOMBERG BUSINESS, Sept. 19, 2011, http://www.bloomberg.com/news/articles/2011-09-19/labor-department-will-delay-rule-on-fiduciary-duty-borzi-says (last visited Apr. 21, 2015) [hereinafter Collins, *Labor Department Will Delay*].

[7] *See, e.g.*, Letter from Rep. James A. Himes, et al., to Hilda Solis, Sec'y, U.S. Dep't of Labor (Nov. 7, 2011), *available at* http://www.politico.com/static/PPM231_solisletter.html (last visited Apr. 20, 2015); Collins, *Labor Department Will Delay*, *supra* note 5.

[8] *See, e.g.*, Letter from Sen. Roy Blunt, to Hilda Solis, Sec'y, U.S. Dep't of Labor (May 24, 2011), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-PH0076.pdf [hereinafter Letter from Sen. Roy Blunt, May 24, 2011]; Letter from Rep. Barney Frank, to Hilda Solis, Sec'y, U.S. Dep't of Labor (Sept. 15, 2011), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-PH0114.pdf; Letter from Rep. Erik Paulsen, to Hilda Solis, Sec'y, U.S. Dep't of Labor (June 24, 2011), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-PH0096.pdf; *see also* Mark Schoeff, *Insider: Barney Frank – The Financial Services Industry's Unlikely Ally*, INVESTMENT NEWS, Sept. 29, 2011, http://www.investmentnews.com/article/20110929/BLOG03/110929917/insider-barney-frank-the-financial-services-industrys-unlikely-ally (last visited Apr. 20, 2015); Sarah H. Lynch, *U.S. House Passes Bill to Delay Fiduciary Rules at SEC*, REUTERS, Oct. 29, 2013, http://www.reuters.com/article/2013/10/29/us-house-bill-fiduciary-idUSBRE99S1CE20131029 (last visited Apr. 21, 2015) [hereinafter Lynch, *U.S. House Passes Bill to Delay Rules*].

[9] *See, e.g.*, Letter from Sen. Roy Blunt, May 24, 2011, *supra* note 7; Lynch, *U.S. House Passes Bill to Delay Rules*, *supra* note 7.

[10] H.R. 2374, 113th Cong. (2013); Lynch, *U.S. House Passes Bill to Delay Rules*, *supra* note 7.

[11] Dave Michaels & Angela Greiling Keane, *Obama Backs Tougher Rules for Brokers as Fiduciary Rule Re-Proposal Head to OMB*, BLOOMBERG BNA, Feb. 24, 2015, http://www.bna.com/obama-backs-tougher-n17179923333/ (last visited Apr. 21, 2015).

[12] *Id.*

Rulemaking within months.[13] On April 14, 2015, the Department promulgated its proposed rule.[14]

Following reports that the Department would be moving forward with its proposal, SEC Commissioner Daniel Gallagher voiced skepticism about the extent to which the Department has engaged with the SEC, explaining that the Department never formally engaged him.[15] He stated: "[D]espite public reports of close coordination between the DOL and SEC staff, I believe this coordination has been nothing more than a 'check the box' exercise by the DOL designed to legitimize the runaway train that is their fiduciary rulemaking."[16] Commissioner Gallagher's comments raise significant concerns about the extent to which the SEC has consulted with the Department prior to the promulgation of the proposed rule.

In order to assist the Committee's oversight obligations, I request that you provide the following information for the period January 1, 2010, to the present:

1. Please provide the dates of any meetings between Department of Labor and SEC officials relating to changing fiduciary standards under the Employee Retirement Income Security Act, including a list of those officials who were in attendance and any minutes or notes taken during the meetings.

2. Please explain whether the SEC has communicated any concerns to the Department of Labor about the proposed rulemaking relating to changing fiduciary standards under the Employee Retirement Income Security Act, including any concerns about proposed Prohibited Transaction Exemptions.

3. Please produce all drafts of the Department of Labor's proposed rulemaking relating to changing fiduciary standards under the Employee Retirement Income Security Act reviewed by employees of the SEC, including but not limited to comments on the draft proposals and the process surrounding the proposed rulemaking.

4. Please explain whether the SEC has participated in the interagency review process, managed by the Office of Management and Budget, of the Department of Labor's proposed rule relating to changing fiduciary standards under the Employee Retirement Income Security Act. If so, please produce all documents and communications relating to this process.

5. Please explain whether the Office of Management and Budget has solicited information from the SEC on changing the rules relating to fiduciary standards under the Employee Retirement Income Security Act.

---

[13] *Id.*
[14] U.S. Dep't of Labor, Press Release, *US Labor Department Seeks Public Comment on Proposal to Protect Consumers from Conflicts of Interest in Retirement Advice* (Apr. 14, 2015).
[15] Commissioner Daniel M. Gallagher, Securities & Exchange Comm'n, *Remarks at The SEC Speaks in 2015* (Feb. 20, 2015), *available at* http://www.sec.gov/news/speech/022015-spchcdmg.html (last visited Apr. 21, 2015).
[16] *Id.*

6. Please produce all communications between employees of the Executive Office of the President and employees of the SEC referring or relating to changing fiduciary standards under the Employee Retirement Income Security Act.

7. Please produce all communications between employees of the Department of Labor and employees of the SEC referring or relating to changing fiduciary standards under the Employee Retirement Income Security Act.

Please produce this material as soon as possible, but by no later than 5:00 p.m. on May 5, 2015.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate "the efficiency and economy of operations of all branches of the Government."[17] Additionally, S. Res. 73 (114th Congress) authorizes the Committee to examine "the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs."[18]

For purposes of this request, please refer to the definitions and instructions in the enclosure to this letter. If you have any questions about this request, please contact Caroline Ingram of the Committee staff at (202) 224-4751. Thank you for your attention to this matter.

Sincerely,

Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

The Honorable Luis A. Aguilar
Commissioner
Securities and Exchange Commission

The Honorable Daniel M. Gallagher
Commissioner
Securities and Exchange Commission

[17] S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).
[18] S. Res. 73 § 12, 114th Cong. (2015).

The Honorable Kara M. Stein
Commissioner
Securities and Exchange Commission

The Honorable Michael S. Piowar
Commissioner
Securities and Exchange Commission

Enclosure

Exhibit 4

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

May 20, 2015

The Honorable Mary Jo White
Chair
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Dear Chair White:

The Committee on Homeland Security and Governmental Affairs is continuing its oversight of the Labor Department's efforts to expand the definition of a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) to those who offer advice related to employee retirement plans and individual retirement accounts.[1] Because the Securities and Exchange Commission (SEC) has long considered issuing a uniform regulation governing retail investment advice, the Committee continues to seek to understand the Commission's role and input in the Department's proposal.[2]

I wrote to you on April 21, 2015 seeking documents and information to better understand the SEC's advice and guidance provided to the Labor Department about its proposed fiduciary rulemaking, as well as the extent to which the SEC participated in the interagency review process.[3] I sought to understand how the Labor Department and the Office of Management and Budget (OMB) have sought input and advice on shaping the proposed rule from the Commission.[4] Because of the SEC's jurisdiction to regulate retail brokers and advisers, I requested the information to ensure that the SEC was given a sufficient opportunity to offer input on the Labor Department's proposed rule to eliminate the potential for conflict or confusion if the SEC proceeds with its own regulation governing retail investment advice.

Your May 5, 2015 response, however, failed to sufficiently answer the Committee's requests.[5] I asked you to explain whether the SEC has communicated any concerns to the Labor

---

[1] *See* Letter from Hon. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Feb. 5, 2015); Letter from Hon. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Mar. 17, 2015); Letter from Hon. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs, to Hon. Mary Jo White, Chair, U.S. Securities & Exchange Comm'n (Apr. 21, 2015) [hereinafter Letter, April 21, 2015].

[2] Jeff Mason & Sarah N. Lynch, *Obama Takes Aim at Brokers' Fees on U.S. Retirement Accounts*, REUTERS, Feb. 23, 2015, http://www.reuters.com/article/2015/02/23/us-usa-fiduciary-idUSKBN0LR0XR20150223 (last visited May 20, 2015).

[3] Letter, April 21, 2015, *supra* note 1.

[4] *Id.*

[5] Letter from Hon. Mary Jo White, Chair, U.S. Securities & Exchange Comm'n, to Hon. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs (May 5, 2015) [hereinafter Letter, May 5, 2015].

Department about the proposed rulemaking, including any concerns about Prohibited Transaction Exemptions.[6] In your response, you merely stated that the SEC provided "technical assistance" to the Department in connection with the proposal, explaining that during conference calls and in-person meetings with Department staff, "Commission staff shared their expertise regarding the Commission's regulation of investment advisers and broker-dealers . . . ."[7] You did not address whether Commission staff raised specific concerns about the proposal with the Labor Department.[8] Additionally, your response stated that you "discussed issues related to the rulemaking with Secretary Thomas Perez on the phone or in person on several occasions between late 2013 and early 2015."[9] Yet, you did not provide any specific information on whether you raised concerns about the proposal during those conversations.[10]

Further, despite my request for five categories of documents,[11] you did not produce a single document, aside from a list of requested meeting dates and attendees of meetings between Labor Department and SEC officials.[12] I requested that the Commission provide any minutes or notes taken during the meetings between SEC and Labor Department officials.[13] Your response made no reference to whether any minutes or notes were taken at those meetings.[14]

Additionally, I asked the SEC to produce all drafts of the Labor Department's proposed rulemaking reviewed by employees of the SEC, including comments on the draft proposals and the process surrounding the proposed rulemaking.[15] In your response, however, you produced no drafts of the proposed rulemaking.[16] I also asked that the SEC produce documents relating to the interagency review process.[17] Aside from stating that "staff from the Office of Management and Budget invited Commission staff to provide feedback on DOL's draft, and the Commission staff responded with technical comments," you produced no documents or communications relating to this process.[18] I also asked the SEC to produce all communications between the Executive Office of the President and the SEC about changing fiduciary standards under ERISA.[19] In your response, you produced no such communications.[20] Finally, I asked for all communications between employees of the Labor Department and employees of the SEC about changing fiduciary standards under ERISA.[21] You likewise produced no such communications.[22]

---

[6] Letter, April 21, 2015, *supra* note 1.
[7] Letter, May 5, 2015, *supra* note 5.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Letter, April 21, 2015, *supra* note 1.
[12] Letter, May 5, 2015, *supra* note 5.
[13] Letter, April 21, 2015, *supra* note 1.
[14] Letter, May 5, 2015, *supra* note 5.
[15] Letter, April 21, 2015, *supra* note 1.
[16] Letter, May 5, 2015, *supra* note 5.
[17] Letter, April 21, 2015, *supra* note 1.
[18] Letter, May 5, 2015, *supra* note 5.
[19] Letter, April 21, 2015, *supra* note 1.
[20] Letter, May 5, 2015, *supra* note 5.
[21] Letter, April 21, 2015, *supra* note 1.
[22] Letter, May 5, 2015, *supra* note 5.

Your response falls short of a full and complete response to the Committee and does not address each of my requests.[23] Your response provided a broad and basic overview of the Commission's interactions with the Labor Department, yet you declined to provide the detailed information that was requested.[24] In response to my request for documents in the possession of the SEC relating to the Committee's oversight, you deferred to the Labor Department on whether to produce documents that are in the SEC's possession and reflect the work product of SEC employees.[25] This action calls into question the independence of the SEC and raises questions about potential inappropriate coordination between the SEC and the Labor Department in response to congressional oversight.

Although the Committee's requests for information from the Labor Department have no bearing on the requests made to the SEC, you explained that the Labor Department "raised concerns about the deliberative, pre-decisional nature of these materials and currently is in the process of seeking to reach an accommodation with the Committee."[26] You fail to note several facts. The Labor Department continues to withhold requested documents from the Committee without any assertion of privilege.[27] The Labor Department has declined to engage in a meaningful accommodation process and has refused to inform the Committee about its particularized concerns about specific requested information. The Labor Department's cooperation with this oversight has been substandard, and I encourage you not to follow its lead.

Your noncompliance thus far with my requests needlessly hinders the Committee's oversight obligations. Accordingly, I reiterate each of the requests for documents and information contained in my April 21, 2015 letter. Please provide responsive information and materials as soon as possible, but by no later than 5:00 p.m. on June 3, 2015. Thank you for your attention to this matter.

Sincerely,

Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

---

[23] Letter, April 21, 2015, *supra* note 1.
[24] Letter, May 5, 2015, *supra* note 5.
[25] *Id.*
[26] *Id.*
[27] *See, e.g.* E-mail from S. Comm. on Homeland Security & Governmental Affairs Staff, to Adri Jayaratne, Acting Asst. Sec'y, Office of the Asst. Sec'y for Congressional & Intergovernmental Affairs, U.S. Dep't of Labor (Apr. 14, 2015, 5:27 p.m.) [hereinafter E-mail, April 14, 2015]; Phone Conversation with S. Comm. on Homeland Security & Governmental Affairs Staff & Adri Jayaratne, Acting Asst. Sec'y, Office of the Asst. Sec'y for Congressional & Intergovernmental Affairs, U.S. Dep't of Labor & Kate Garza, Chief of Staff, Office of the Asst. Sec'y for Congressional & Intergovernmental Affairs, U.S. Dep't of Labor (Apr. 14, 2015).

The Honorable Luis A. Aguilar
Commissioner
Securities and Exchange Commission

The Honorable Daniel M. Gallagher
Commissioner
Securities and Exchange Commission

The Honorable Kara M. Stein
Commissioner
Securities and Exchange Commission

The Honorable Michael S. Piowar
Commissioner
Securities and Exchange Commission

Exhibit 5

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

July 13, 2015

The Honorable Mary Jo White
Chair
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Dear Chair White:

The Committee on Homeland Security and Governmental Affairs is examining the Department of Labor's efforts to expand the definition of a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) to those who offer advice related to employee retirement plans and individual retirement accounts.[1] Because the Securities and Exchange Commission (SEC) has long considered issuing a uniform regulation governing retail investment advice, the Committee continues to seek to understand the Commission's role and input in the Department's proposal.[2]

I wrote to you on April 21, 2015 and again on May 20, 2015, seeking documents and information to better understand the SEC's communication with the Labor Department about its proposed fiduciary rulemaking.[3] Despite my over two-month-old request for five categories of documents within the SEC's possession,[4] you have thus far failed to produce a single document. In your letter on May 5, 2015, you explained that "in light of the issues raised by DOL [Department of Labor] in connection with its own rulemaking, we would respectfully request to await the outcome of the ongoing discussions between DOL and the Committee, which we hope will adequately meet the Committee's needs."[5] Shortly thereafter, however, Commission staff communicated to Committee staff that the Commission had begun gathering and culling

---

[1] *See* Letter from Hon. Ron Johnson, Chairman, S. Comm. On Homeland Security & Governmental Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Feb. 5, 2015); Letter from Hon. Ron Johnson, Chairman, S. Comm. On Homeland Security & Governmental Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (March 17, 2015).

[2] Jeff Mason & Sarah N. Lynch, *Obama Takes Aim at Brokers' Fees on U.S. Retirement Accounts*, REUTERS, Feb. 23, 2015, available at http://www.reuters.com/article/2015/02/23/us-usa-fiduciary-idUSKBN0LR0XR20150223 (last accessed Jul. 13, 2015).

[3] *See* Letter from Hon. Ron Johnson, Chairman, S. Comm. On Homeland Security & Governmental Affairs, to Hon. Mary Jo White, U.S. Securities & Exchange Comm'n (April 21, 2015) [hereinafter Letter April 21, 2015]; Letter from Hon. Ron Johnson, Chairman, S. Comm. On Homeland Security & Governmental Affairs, to Hon. Mary Jo White, U.S. Securities & Exchange Comm'n (May 20, 2015) [hereinafter Letter, May 20, 2015].

[4] Letter, April 21, 2015, *supra* note 3.

[5] Letter from Hon. Mary Jo White, U.S. Securities & Exchange Comm'n, to Hon. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs (May 5, 2015) [hereinafter Letter, May 5, 2015].

responsive documents for production to the Committee in response to my request.[6] At that point, Commission staff and Committee staff began an ongoing and continuing dialogue about the Commission's effort to produce responsive documents, with Commission staff assuring Committee staff that it would "endeavor to provide responsive documents as soon as the process allows."[7]

In light of the Commission's representations that it would comply with my request, the Committee agreed to accommodate the Commission by accepting a rolling production of responsive documents. Since May, the Committee has exercised tremendous patience in providing the Commission time to gather and review responsive material. Understanding that the Commission has a process by which it identifies a universe of documents, reviews the documents, and ultimately prepares an action memorandum for each commissioner to review, with a recommendation on whether to produce to the Committee the responsive documents identified, the Committee relied upon assurances made by Commission staff that it would work through its document production procedures as expeditiously as possible. Following weeks of awaiting the Commission's first document production, Commission staff informed Committee staff on June 24, 2015, that the Commission planned to provide a memorandum recommending that the Commission produce the first tranche of identified responsive documents to each of the commissioners by July 1, 2015.[8] The Committee understood that it could expect to receive the first tranche of documents shortly thereafter.

On July 8, 2015, however, the Committee received a letter from the Labor Department about the Committee's requests to the Commission for material in the possession, custody, and control of the Commission.[9] The Labor Department "asked the SEC to defer to the Department's ongoing dialogue with the Committee about the provision of the Department's deliberative materials, and while that dialogue is continuing to defer producing such materials"— indicating that the Labor Department had instructed the Commission *not* to comply with the Committee's request.[10] This directive raises significant concerns about the independence of the Commission and suggests potentially inappropriate coordination between the Commission and the Labor Department in obstructing the Committee's oversight.

Immediately following the Committee's receipt of the July 8, 2015 letter, the Committee learned that staff from the Labor Department, the Justice Department, and the Commission had already engaged in meetings about the Committee's request. These meetings have directly

---

[6] Phone Conversation with S. Comm. on Homeland Security & Governmental Affairs Staff & Keith Cassidy, Deputy Director, Office of Legislative & Intergovernmental Affairs, Securities & Exchange Comm'n (May 21, 2015); E-mail from Keith Cassidy, Deputy Director, Office of Legislative & Intergovernmental Affairs, Securities & Exchange Comm'n, to S. Comm. on Homeland Security & Governmental Affairs Staff (May 21, 2015, 5:04 p.m.) [hereinafter E-mail, May 21, 2015].

[7] E-mail, May 21, 2015, *supra* note 6.

[8] Phone Conversation with S. Comm. on Homeland Security & Governmental Affairs Staff & Tim Henseler, Director, Office of Legislative & Intergovernmental Affairs, Securities & Exchange Comm'n (Jun. 24, 2015).

[9] Letter from Adri Jayaratne, Acting Asst. Sec'y, Office of the Asst. Sec'y for Congressional & Intergovernmental Affairs, U.S. Dep't of Labor, to Hon. Ron Johnson, Chairman, S. Comm. On Homeland Security & Governmental Affairs (Jul. 8, 2015) [hereinafter Letter, Jul. 8, 2015].

[10] *Id.*

caused further delay in the Committee's receipt of responsive documents from the Commission. Because the discussions began last week and are ongoing to this day, the memorandum recommending the release of the first tranche of documents to the Committee was *never* presented to the Commissioners as planned. The Committee has since learned that the Commission staff could change its recommendation on whether to release *any* responsive documents to the Committee as a direct result of the interference from the Labor Department and the Justice Department.[11]

The Labor Department's instruction to the Commission to "defer" its production of materials, citing the Department's "ongoing dialogue" with the Committee, fails to recognize important facts.[12] To be clear, there has been *no* "ongoing dialogue" with the Committee and the Department about the production of documents. At this point, the Department has yet to engage in a good-faith process of accommodation toward satisfying the request. The Committee has made several requests for information about the Department's work to satisfy the Committee's outstanding requests, which the Department has failed to answer completely and has refused to provide any specific information about its particularized concerns with documents responsive to the Committee's request.[13]

As I stressed in my May 20, 2015 letter to the Commission, the decision to defer to the Department of Labor on whether to comply with congressional oversight raises serious questions about the SEC's independence.[14] As you have stressed, "[u]nder the law, the SEC is an independent agency."[15] This independence is built into the SEC's structure, tradition, and ethos. The Securities Exchange Act of 1934 created the SEC and required that it consist of "five commissioners . . . not more than three [of which] shall be of the same political party" and that "in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable."[16] The SEC is an independent regulatory agency in the federal government,[17] with particular processes designed to ensure its independence.[18]

---

[11] Phone Conversation with S. Comm. on Homeland Security & Governmental Affairs Staff & Tim Henseler, Director, Office of Legislative & Intergovernmental Affairs, Securities & Exchange Comm'n & Keith Cassidy, Deputy Director, Office of Legislative & Intergovernmental Affairs, Securities & Exchange Comm'n (Jul. 8, 2015).
[12] Letter, Jul. 8, 2015, *supra* note 9.
[13] *See, e.g.*, E-mail from S. Comm. On Homeland Security & Governmental Affairs Staff, to Adri Jayaratne, Acting Asst. Sec'y, Office of the Asst. Sec'y for Congressional & Intergovernmental Affairs, U.S. Dep't of Labor (Apr. 15, 2015, 3:00 p.m.); E-mail from S. Comm. On Homeland Security & Governmental Affairs Staff, to Adri Jayaratne, Acting Asst. Sec'y, Office of the Asst. Sec'y for Congressional & Intergovernmental Affairs, U.S. Dep't of Labor (Apr. 14, 2015, 5:27 p.m.) [hereinafter E-mail, Apr. 14, 2015]; Phone Conversation with S. Comm. On Homeland Security & Governmental Affairs Staff & Adri Jayaratne, Acting Asst. Sec'y, Office of the Asst. Sec'y for Congressional & Intergovernmental Affairs, U.S. Dep't of Labor & Kate Garza, Chief of Staff, Office of the Asst. Sec'y for Congressional & Intergovernmental Affairs, U.S. Dep't of Labor (April 14, 2015) [hereinafter Phone Conversation, Apr. 14, 2015].
[14] Letter, May 20, 2015, *supra* note 3.
[15] Speech by Mary Jo White, Hon. Mary Jo White, U.S. Securities & Exchange Comm'n, to 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture, Fordham Law School (Oct. 3, 2013) [hereinafter Speech, Oct. 3, 2013].
[16] 15 U.S.C. § 78d.
[17] 44 U.S.C. § 3502(5) (listing the SEC as an independent agency for the purposes of the Paperwork Reduction Act);
[18] *Id.*; Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010); *See also* Humphrey's Ex'r v. United States, 55 S. Ct. 869 (1935) (finding the "for cause" requirement, as a limit the presidential removal authority

You have stressed that the SEC has a "proud history of standing up to pressures . . . that have challenged our independence."[19] Yet, your noncompliance with the requests made by this Committee, in deference to the Labor Department, raises serious questions about the Commission's commitment to its independence. The Commission's ongoing discussions with the Labor Department and the Justice Department—which have not included any representatives of the Committee—have already caused considerable delay in the Committee's oversight effort. Further, the Commission's apparent decision to delay its production of responsive documents in the possession, custody, and control of the Commission not only erodes the Commission's independence, but it directly impedes the Committee's oversight obligations.

Accordingly, I reiterate each of the requests for documents and information contained in my April 21, 2015 letter. I request that the Commission immediately provide all responsive information and materials. If the Commission fails to immediately provide the requested documents, the Committee may consider use of the compulsory process. Further, if the Committee learns that the involvement of the Labor Department or Justice Department in the Commission's production of responsive documents to my request causes further delay, the Committee may take appropriate steps to examine and address this interference. Thank you for your attention to this matter.

Sincerely,

Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

The Honorable Luis A. Aguilar
Commissioner
Securities and Exchange Commission

The Honorable Daniel M. Gallagher
Commissioner
Securities and Exchange Commission

The Honorable Kara M. Stein
Commissioner
Securities and Exchange Commission

---

over independent agency appointees, to protect the independence of the agency); Andrew D. Orrick, Organization, Procedures and Practices of the Securities and Exchange Commission, 28 GEO. WASH. L. REV. 50, 52 (1959) (identifying the SEC as an independent regulatory agency).

[19] Speech, Oct. 3, 2013, *supra* note 15.

The Honorable Michael S. Piowar
Commissioner
Securities and Exchange Commission

Exhibit 6

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

September 16, 2015

Mr. Richard G. Ketchum
Chairman and Chief Executive Officer
Financial Industry Regulatory Authority
1735 K Street
Washington, D.C. 20006

Dear Chairman Ketchum:

The Committee on Homeland Security and Governmental Affairs is examining the Department of Labor's efforts to expand the definition of a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) to those who offer advice related to employee retirement plans and individual retirement accounts.[1] The Committee understands that the Financial Industry Regulatory Authority (FINRA) has expressed concerns with the Labor Department about the Department's plans to change the definition of a fiduciary under ERISA.[2] In light of FINRA's recent comments on the Labor Department's proposed rulemaking, I seek to better understand the nature and scope of FINRA's communications with the Labor Department about the proposal.

In public comments made to the Labor Department in July, FINRA expressed significant reservations about the Department's proposal, stating that it "does not meet some of the minimum criteria for such a standard,"[3] and that it makes only a "passing reference to the comprehensive, well-established system of regulation . . . impose[d] on brokers-dealers under the oversight of the SEC and FINRA."[4] Further, FINRA stated that the Department's proposal "**does not incorporate existing regulation and introduces new concepts that are fraught with ambiguity**."[5]

---

[1] *See* Letter from Hon. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Feb. 5, 2015); Letter from Hon. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (March 17, 2015).

[2] *See, e.g.*, Letter from Marcia E. Asquith, Senior Vice President and Corporate Sec'y, Financial Industry Regulatory Authority, to Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Dep't of Labor (Jul. 17, 2015) [hereinafter Letter, Jul. 17, 2015]; see also Mark Schoeff, *FINRA's Ketchum Criticizes DOL Fiduciary Rule*, INVESTMENT NEWS, May 27 2015 *available at* http://www.investmentnews.com/article/20150527/FREE/150529942/finras-ketchum-criticizes-dol-fiduciary-rule (last visited Sept. 16, 2015).

[3] *Id.*

[4] *Id.*

[5] *Id.* (emphasis added).

FINRA, through its role as a self-regulatory organization in the financial industry,[6] is an important voice for the protection of investors. FINRA's rule-making authority, in conjunction with the Securities and Exchange Commission (SEC),[7] necessitates that FINRA have an active role in rule proposals relating to investors and investment brokers. FINRA's reservations and criticisms about the Labor Department's proposal,[8] therefore, must be given a thorough and thoughtful review by the Department.

For years, the Labor Department has deliberated whether to change the rules relating to when an advisor offering investment advice qualifies as fiduciary under ERISA.[9] In 2010, the Department issued a Notice of Proposed Rulemaking, which drew more than 200 written comments.[10] Several of these comments raised concerns over whether the Labor Department adequately consulted with relevant agencies and organizations with the authority to create standards for retail investment advice offered by brokers and advisers.[11] In 2011, the Department withdrew its proposal, in part, due to these substantial criticisms.[12] Industry stakeholders and Members of Congress applauded the Department's decision to withdraw the rule, stating that the Department should reconsider the proposal after coordinating with relevant agencies that have rulemaking authority to set standards for investment advice.[13]

Members of Congress, as well as industry stakeholders, urged the Department to wait for the SEC to promulgate its own rule ahead of the Department's proposal to allow for proper coordination between agencies to ensure one clear rule governing all types of investor accounts.[14] Despite these requests, Secretary of Labor Thomas Perez announced on February 23, 2015, that DOL would be sending the Department's proposed rule to the Office of Management and Budget (OMB) for approval.[15] On April 14, 2015 the Department promulgated its proposed rule.[16]

---

[6] 15 U.S.C. § 78s.
[7] *Id.*
[8] Letter, Jul. 17, 2015, *supra* note 2.
[9] Jeff Mason & Sarah N. Lynch, *Obama Takes Aim at Brokers' Fees on U.S. Retirement Accounts*, REUTERS, February 23, 2015, http://www.reuters.com/article/2015/02/23/us-usa-fiduciary-idUSKBNOLROXR20150223 (last visited Sept. 16, 2015) [hereinafter Mason & Lynch, *Obama Takes Aim*].
[10] *Id.*; 'Redefining Fiduciary': Assessing the Impact of the Labor Department's Proposal on Workers and Retirees: Hearing Before the H. Comm. on Education and the Workforce, Subcomm. on Health, Employment. Labor, and Pensions, 112th Cong. (July 26, 2011) (statement of Phyllis C. Borzi, Asst. Sec'y of Labor, Employee Benefits Security Admin.) *available at*, http://www.dol.gov/ebsa/newsroom/ty0726 11.html (last visited Sept. 16, 2015).
[11] *Id.*
[12] Margaret Collins, *Labor Department Will Delay Its Fiduciary Rule, Borzi Says,* BLOOMBERG BUSINESS, Sept. 19, 2011, *available at* http://www.bloo1nberg.com/news/artic\es/2011-09-19/labor -departn1ent-will-delay-rule-on-fiduciary-dutyborzi-says (last visited Sept. 16, 2015).
[13] *See, e.g.*, Letter from Rep. James A. Himes, et al., to Hilda Solis, Sec'y, U.S. Dep't of Labor (Nov. 7, 2011), *available at* http://www.politico.co1n/static/PPM231_solisletter.html (last visited Sept. 16, 2015).
[14] Letter from Sen. Roy Blunt, to Hilda Solis, Sec'y, U.S. Dep't of Labor (May 24, 2011), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-PH0076.pdf (last visited Sept. 16, 2015).
[15] Dave Michaels & Angela Greiling Keane, *Obama Backs Tougher Rules for Brokers as Fiduciary Rule Re-proposal Heads to OMB*, BLOOMBERG BNA, Feb. 24, 2015, *available at* http://www.bna.com/obama-backs-tougher-n17179923333/ (last visited Sept. 16, 2015).
[16] U.S. Dep't of Labor, Press Release, *US Labor Department Seeks Public Comment on Proposal to Protect Consumers from Conflicts of Interest in Retirement Advice* (Apr. 14, 2015).

Concerns over the extent to which the Labor Department has coordinated with relevant rulemaking authorities have resurfaced following the Department's re-proposal. SEC Commissioner Daniel Gallagher stated in February: "[D]espite public reports of close coordination between the DOL and SEC staff, I believe this coordination has been nothing more than a 'check the box' exercise by the DOL designed to legitimize the runaway train that is their fiduciary rulemaking."[17] These comments, suggesting a lack of proper coordination with the SEC, also raise concerns over the Labor Department's consultation with other relevant rulemaking authorities, such as FINRA.

In order to assist the Committee's oversight obligations, I request that you provide the following information for the period January 1, 2010 to the present:

1. Please provide the dates of any meetings between Department of Labor and FINRA representatives relating to changing fiduciary standards under the Employee Retirement Income Security Act, including a list of those representatives who were in attendance and any minutes or notes taken during these meetings.

2. Please explain whether FINRA communicated any concerns to the Department of Labor about the proposed rulemaking prior to its promulgation relating to changing fiduciary standards under the Employee Retirement Income Security Act, including any concerns about proposed Prohibited Transaction Exemptions.

3. Please produce all drafts of the Department of Labor's proposed rulemaking relating to changing fiduciary standards under the Employee Retirement Income Security Act reviewed by employees of FINRA, including but not limited to comments on the draft proposals and the process surrounding the proposed rulemaking.

4. Please explain whether FINRA participated in the interagency review process, managed by the Office of Management and Budget, of the Labor Department's proposed rulemaking relating to changing fiduciary standards under ERISA. If so, please produce all documents and communications relating to this process.

5. Please explain whether the Office of Management and Budget has solicited information from FINRA on changing the rules relating to fiduciary standards under the Employee Retirement Income Security Act.

6. Please produce all communications between employees of FINRA and employees of the Executive Office of the President referring or relating to changing fiduciary standards under the Employee Retirement Income Security Act.

---

[17] Commissioner Daniel M. Gallagher, Securities & Exchange Comm'n, *Remarks at The SEC Speaks in 2015* (Feb. 20, 2015), *available at* http://www.sec.gov/news/speech/022015-spchcdmg.html (last visited Sept. 16, 2015).

7. Please produce all communications between employees of FINRA and employees of the Department of Labor referring to or relating to changing fiduciary standards under the Employee Retirement Income Security Act.

Please produce this material as soon as possible, but by no later than 5:00 p.m. on September 30, 2015.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate "the efficiency and economy of operations of all branches of the Government."[18] Additionally, S. Res. 73 (114th Congress) authorizes the Committee to examine "the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs."[19]

For the purposes of this request, please refer to the definitions and instructions in the enclosure to this letter. If you have any questions about this request, please contact Caroline Ingram of the Committee staff at (202) 224-4751. Thank you for your attention to this matter.

Sincerely,

Ron Johnson
Chairman

cc: Thomas R. Carper
Ranking Member

Enclosure

[18] S. Rule XXV(k); *see also*, S. Res. 445, 108th (2004).
[19] S. Res. 73 § 12, 114th Cong. (2015).

Exhibit 7

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

May 1, 2015

The Honorable Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Dear Administrator Shelanski:

The Committee on Homeland Security and Governmental Affairs is examining the Department of Labor's efforts to expand the definition of a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) to those who offer advice related to retirement accounts.[1] On February 23, 2015, Secretary of Labor Thomas Perez announced that the Department would be sending the proposed rule to the Office of Management and Budget (OMB)[2] for review by the Office of Information and Regulatory Affairs (OIRA). Fifty days later, on April 14, 2015, the Department of Labor promulgated the proposed rule[3]—signifying the completion of OIRA's review. With the Department's formal release of the proposal, the Committee seeks to better understand OIRA's review and refinement of the proposed rulemaking.

On February 23, 2015, during a highly publicized media event, the President called on the Department of Labor to move forward with a proposed rulemaking to change the standards to which advisers to employee retirement plans and individual retirement accounts must adhere.[4] In the wake of the President's announcement, Secretary Perez announced during a conference call

---

[1] *See* Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Feb. 5, 2015); Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Mar. 17, 2015); Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Mary Jo White, Chair, Securities & Exchange Comm'n (Apr. 21, 2015).

[2] Angela Greiling Keane, *Obama Backs Tougher Rules for Brokers on Retirement Funds*, BLOOMBERG POLITICS, Feb. 23, 2015, http://www.bloomberg.com/politics/articles/2015-02-23/obama-to-lead-push-to-toughen-broker-rules-for-retirement-funds (last visited May 1, 2015) [hereinafter Keane, *Obama Backs Tougher Rules*]

[3] U.S. Dep't of Labor, Press Release, *US Labor Department Seeks Public Comment on Proposal to Protect Consumers from Conflicts of Interest in Retirement Advice* (Apr. 14, 2015) [hereinafter Press Release, *Labor Department Seeks Public Comment*].

[4] Ashlea Ebeling, *Obama Attacks Advisors Selling Snake Oil, Lauds New DOL Fiduciary Rule*, FORBES, Feb. 23, 2015, *available at* http://www.forbes.com/sites/ashleaebeling/2015/02/23/obama-attacks-advisors-selling-snake-oil/ (last visited May 1, 2015)

with reporters later that day that the Department would send the proposal to OMB[5] for review by OIRA.

The Department of Labor submitted a draft of the proposed rule, as well as associated exemptions, to OIRA on February 23, 2015 so that it could conduct interagency review.[6] In correspondence with the Committee, the Department stated that the purpose of the review was to provide for "further refinement" of the proposed rule before publication and prior to soliciting public comments—explaining that the Department could revise the rule further in response to comments in connection with interagency review.[7] As part of its analysis, OIRA was also tasked to ensure the proposal did not conflict with the policies of any other Executive Branch department or agency.[8] Following the Department's submission of the proposal to OIRA, commentators predicted that the rule would likely be formally released months later[9]—explaining that OIRA would spend up to 90 days or more reviewing the rule.[10]

On April 14, 2015—50 days after the rule was sent to OIRA—the Department of Labor announced its release of the proposal.[11] OIRA's expeditious review of the proposal has left some to question whether it fast tracked its analysis, noting that OIRA required considerably less time to complete its review of the Department of Labor's proposed fiduciary rule than it has typically spent reviewing major retirement regulatory proposals over the past ten years—for which the average review period was 109 days.[12] Further, records show that OIRA officials participated in

---

[5] Keane, *Obama Backs Tougher Rules*, *supra* note 1.
[6] Letter from Adri Jayaratne, Acting Assistant Sec'y, Office of the Assistant Sec'y for Congressional & Intergovernmental Affairs, U.S. Dep't of Labor, to Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs (Apr. 3, 2015).
[7] *Id.*
[8] Letter from Adri Jayaratne, Acting Assistant Sec'y, Office of the Assistant Sec'y for Congressional & Intergovernmental Affairs, U.S. Dep't of Labor, to Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs (Feb. 23, 2015).
[9] Jeff Mason & Sarah N. Lynch, *Obama Takes Aim at Brokers' Fees on U.S. Retirement Accounts*, REUTERS, Feb. 23, 2015, http://www.reuters.com/article/2015/02/23/us-usa-fiduciary-idUSKBN0LR0XR20150223 (last visited May 1, 2015) [hereinafter Mason & Lynch, *Obama Takes Aim*]; Dave Michaels & Angela Greiling Keane, *Obama Backs Tougher Rules for Brokers as Fiduciary Rule Re-Proposal Head to OMB*, BLOOMBERG BNA, Feb. 24, 2015, http://www.bna.com/obama-backs-tougher-n17179923333/ (last visited May 1, 2015).
[10] Mark Schoeff, Jr., *Obama Directs Labor Department to Move Ahead on Fiduciary Rule*, INVESTMENT NEWS, Feb. 23, 2015, http://www.investmentnews.com/article/20150223/FREE/150229979/obama-directs-labor-department-to-move-ahead-on-fiduciary-rule (last visited May 1, 2015).
[11] Press Release, *Labor Department Seeks Public Comment*, *supra* note 3.
[12] Megan Leonhardt, *DOL Fiduciary Rule Released Publicly*, WEALTHMANAGEMENT.COM, Apr. 13, 2015, http://wealthmanagement.com/industry/dol-fiduciary-rule-released-publicly (last visited May 1, 2015); *See, e.g.*, Guide or Similar Requirement for Section 408(b)(2) Disclosures, RIN 1210-AB61 (259-day review period); Pension Benefit Statements – Lifetime Income, RIN 1210-AB20 (131-day review period); QDIA Target Date Disclosure, RIN 1210-AB38 (90-day review period); Definition of "Fiduciary", RIN 1210-AB32 (90-day review period); Improved Fee Disclosure for Pension Plans, RIN 1210-AB08 (125-day review period); Prohibited Transaction Exemption for Provision of Investment Advice to Participants in Individual Retirement Accounts, RIN 1210-AA63 (77-day review period); Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, RIN 1210-AB07 (90-day review period); Amendment of Regulation Relating to Definition of Plan Assets-Participant Contributions, RIN 1210-AB02 (90-day review period); Proposed Class Exemption for Plan Fiduciaries When Plan Service Arrangements Fail to Comply with ERISA Section 408(b)(2), RIN 1210-ZA13 (90-day review period); Selection of Annuity Provider for Individual Account Plans, RIN 1210-AB19 (83-day review period);

meetings with stakeholders four days before the Department of Labor's release of the proposed rule—raising concerns as to what extent OIRA was able to address concerns with the proposal prior to its public release.[13]

Because of the potentially significant effect that the rule will have on consumers of advice related to retirement accounts, the Committee seeks to ensure that OIRA conducted a thorough and thoughtful review of the proposal—including seeking input and incorporating suggestions from other Executive Branch departments and agencies, as well as stakeholders—and did not conclude its analysis prematurely. Further, the Committee seeks to ensure that despite OIRA's swift review and return of the proposed rule to the Department of Labor, it did not forego its role in conducting a careful and calculated examination of the proposal before returning it to the Department for release.

In order to assist the Committee's oversight obligations, I request that you provide the following information for the period February 23, 2015, to the present:

1. Please provide all drafts of the Department of Labor's proposed rulemaking relating to changing fiduciary standards under the Employee Retirement Income Security Act in the possession of the OIRA, including comments and suggestions to the drafts.

2. Please explain why OIRA required considerably less time to review the Department of Labor's proposed rulemaking relating to changing fiduciary standards under the Employee Retirement Income Security Act than the average review time for other Department of Labor regulatory proposals and other economically significant rules.

3. Please explain how OIRA incorporated suggestions from other Executive Branch departments and agencies, as well as stakeholders, into its review of the Department of Labor's proposed rulemaking relating to changing fiduciary standards under the Employee Retirement Income Security Act.

4. Please explain how the version of the proposed rulemaking relating to changing fiduciary standards under the Employee Retirement Income Security Act promulgated by the Department of Labor incorporated OIRA's suggestions.

5. Please explain how OIRA evaluated the Department of Labor's proposed rulemaking relating to changing fiduciary standards under the Employee Retirement Income Security

---

Revision of the Form 5500 Series and Implementing Regulations, RIN 1210-AB06 (87-day review period); Section 404 Regulation-Safe Harbor for Default Investments, RIN 1210-AB10 (99-day review period).

[13] *See* Office of Management and Budget, Office of Information and Regulatory Affairs, EO 12866 Meeting, Apr. 10, 2015, Requestor: Fidelity, http://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=false&rin=1210-AB32&meetingId=933&acronym=1210-DOL/EBSA (last visited May 1, 2015); Office of Management and Budget, Office of Information and Regulatory Affairs, EO 12866 Meeting, Apr. 10, 2015, Requestor: Financial Services Roundtable, http://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=false&rin=1210-AB32&meetingId=917&acronym=1210-DOL/EBSA (last visited May 1, 2015).

Act with respect to Executive Order 13563's requirements for coordination with other agencies and consideration of flexible approaches.

Please produce this material as soon as possible, but by no later than 5:00 p.m. on May 15, 2015.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate "the efficiency and economy of operations of all branches of the Government."[14] Additionally, S. Res. 73 (114th Congress) authorizes the Committee to examine "the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs."[15]

For purposes of this request, please refer to the definitions and instructions in the enclosure to this letter. If you have any questions about this request, please contact Caroline Ingram of the Committee staff at (202) 224-4751. Thank you for your attention to this matter.

Sincerely,

Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

Enclosure

[14] S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).
[15] S. Res. 73 § 12, 114th Cong. (2015).

Exhibit 8

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

December 3, 2015

The Honorable Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Dear Administrator Shelanski:

The Committee on Homeland Security and Governmental Affairs continues to examine the Department of Labor's efforts to expand the definition of a fiduciary, under the Employee Retirement Income Security Act of 1974 (ERISA), to those who offer advice related to retirement accounts.[1] Earlier this year, Secretary of Labor Thomas Perez sent the proposed rule to the Office of Management and Budget (OMB) for review by the Office of Information and Regulatory Affairs (OIRA).[2] Fifty days later, on April 14, 2015, the Department of Labor promulgated the proposed rule[3]—signifying the completion of OIRA's review.

The Committee previously wrote to you on May 1, 2015, requesting information and documents relating to OIRA's review of the Labor Department's proposal to ensure that OIRA conducted a thorough and thoughtful review of the proposed rulemaking package, and to understand how your office incorporated suggestions from other Executive Branch departments and agencies and from stakeholders.[4] You, however, declined to provide a full and complete response to my requests for information and did not produce any documents in response to my request for materials.[5] Accordingly, I reiterate the requests for information and documents made in my May 1, 2015 letter and ask that you provide a full and complete response to each request.

---

[1] Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Feb. 5, 2015); Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Mar. 17, 2015); Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Mary Jo White, Chair, Securities & Exchange Comm'n (Apr. 21, 2015).

[2] Angela Greiling Keane, *Obama Backs Tougher Rules for Brokers on Retirement Funds*, BLOOMBERG POLITICS (Feb. 23, 2015), http://www.bloomberg.com/politics/articles/2015-02-23/obama-to-lead-push-to-toughen-broker-rules-for-retirement-funds.

[3] U.S. Dep't of Labor, Press Release, *US Labor Department Seeks Public Comment on Proposal to Protect Consumers from Conflicts of Interest in Retirement Advice* (Apr. 14, 2015).

[4] Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Howard Shelanski, Admin'r, Office of Information & Regulatory Affairs, Office of Management & Budget (May 1, 2015).

[5] Letter from Hon. Howard Shelanski, Admin'r, Office of Information & Regulatory Affairs, Office of Management & Budget, to Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs (May 17, 2015).

Please produce your response as soon as possible, but by no later than 5:00 p.m. on December 18, 2015.

If you have any questions about this request, please contact Samantha Brennan or David Brewer of the Committee Staff at (202) 224-4751. Thank you for your attention to this matter.

Sincerely,

Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

Exhibit 9

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

November 12, 2015

The Honorable Jacob J. Lew
Secretary
U.S. Department of Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Secretary Lew:

The Committee on Homeland Security and Governmental Affairs is examining the Department of Labor's efforts to expand the definition of a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) to individuals who offer advice related to retirement accounts.[1] Earlier this year, Secretary Thomas Perez sent the proposal to the Office of Management and Budget (OMB) for review by the Office of Information and Regulatory Affairs (OIRA).[2] The Committee has learned that the Treasury Department was apparently consulted as a part of this review process and expressed concerns over several aspects of the proposal. Nonetheless, on April 14, 2015, the Labor Department promulgated the proposed rule.[3] The Committee recently became aware of additional concerns about a Treasury Department proposal concerning the transfer of "myRA" account balances to private-sector Roth IRAs governed by the Labor Department's proposed rule.[4] I write to request your assistance in better understanding these important issues.

As part of the Committee's inquiry into the Labor Department's proposal to expand the definition of a fiduciary under ERISA, I requested information from the Securities and Exchange Commission (SEC).[5] In response, the SEC produced several drafts of the Labor Department's

---

[1] *See* Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Feb. 5, 2015); Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Mar. 17, 2015).

[2] Angela Greiling Keane, *Obama Backs Tougher Rules for Brokers on Retirement Funds*, BLOOMBERG POLITICS, Feb. 23, 2015, http://www.bloomberg.com/politics/articles/2015-02-23/obama-to-lead-push-to-toughen-broker-rules-for-retirement-funds (last visited Oct. 16, 2015) [hereinafter Keane, *Obama Backs Tougher Rules*]

[3] U.S. Dep't of Labor, Press Release, *US Labor Department Seeks Public Comment on Proposal to Protect Consumers from Conflicts of Interest in Retirement Advice* (Apr. 14, 2015) [hereinafter Press Release, *Labor Department Seeks Public Comment*].

[4] Request for Public Comment on the Process for Transferring myRA Account Balances to Private Sector Roth IRAs, 80 Fed. Reg. 48417 (August 12, 2015).

[5] *See* Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Mary Jo White, Chair, U.S. Securities & Exchange Comm'n (Apr. 21, 2015); Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Mary Jo White, Chair, U.S. Securities & Exchange

proposal, including some comments on specific aspects of the proposal that appear to have originated from the Treasury Department.

In one instance, Treasury officials questioned whether an exemption in the proposal would apply to investment or distribution options that are structured in the form of annuity contracts.[6] The Labor Department's response only provided that these options would not be included in the exemption without offering justification for their exclusion.[7] In another instance, the Treasury Department officials pointed out that amendments in the proposal, while allegedly intended to reflect congressional intent related to the term "fiduciary," instead "fly in the face of logic" because the proposal did not reflect current market practices.[8] These comments from the experts in the Treasury Department echo a trend of similar concerns raised by the public and other expert reviews—that the rule proposal is replete with ambiguity and contradictions.[9] These concerns raise serious questions as to whether the process for promulgating this rule received appropriate levels of consideration and whether the Labor Department was open to considering feedback about its proposal.[10]

Separately, on August 12, 2015, Treasury issued a notice requesting public comment on the transfer of funds from a myRA account, a type of retirement savings account maintained by the federal government, to a private sector Roth IRA.[11] On October 22, 2015, Treasury received a public comment from the law firm of Davis & Harman, raising questions about whether the Labor Department's fiduciary rule applies to myRA accounts.[12] The comment noted that advice related to transfers from myRA accounts would not be subject to the fiduciary rule, but advice on private transfers to Roth IRAs would clearly fall under the proposal.[13] Further, the comment argued that there is no legal basis for the Labor Department or the Treasury Department to exclude these myRA accounts from falling under application of the fiduciary rule.[14] However, during testimony in June 2015, Secretary Perez unequivocally confirmed that "myRAs are not

---

Comm'n (May 20, 2015); Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Mary Jo White, Chair, U.S. Securities & Exchange Comm'n (Jul. 13, 2015).

[6] *See* Proposed Best Interest Contract Exemption, OMB Comments (Mar. 18, 2015), Treasury Comments (Mar. 21, 2015), & SEC Comments (Apr. 1, 2015) [hereinafter Proposed Best Interest Contract Exemption] [SEC-DOL 005002].

[7] *Id.*

[8] Proposed Amendments to Class Exemptions, Treasury Comments (Mar. 21, 2015) [hereinafter Proposed Amendments to Class Exemptions] [SEC-DOL005312].

[9] *See* Letter from Marcia Asquith, Senior Vice President and Corporate Sec'y, Financial Industry Regulatory Authority, to Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Dep't of Labor (Jul. 17, 2015); Letter from Lisa Bleier, Managing Director, Federal Government Relations, Securities Industry and Financial Markets Association, to Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Dep't of Labor. *See also* Proposed Best Interest Contract Exemption [SEC-DOL004940];

[10] See Letter from Hon. Ron Johnson, Chairman, Sen. Comm. on Homeland Security & Gov't Affairs, to Hon. Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Mar. 17, 2015); Proposed Best Interest Contract Exemption; Proposed Amendments to Class Exemptions.

[11] Request for Public Comment on the Process for Transferring myRA Account Balances to Private Sector Roth IRAs, 80 Fed. Reg. 48417 (August 12, 2015).

[12] Letter from Kent Mason, Davis & Harman LLP, to Kimberly S. Reese, Bureau of the Fiscal Service, Dep't of Treasury (Oct. 22, 2015) [hereinafter Davis & Harman Letter].

[13] Davis & Harman Letter at p.1.

[14] Davis & Harman Letter at p.2.

covered in [the fiduciary] rule" and went on to state that the Treasury Department "controls all aspects of the myRA rule."[15]

For these myRA accounts, maintained by the federal government, to receive an exemption from the burdensome requirements of the Labor Department's fiduciary rule without a corresponding exemption for its private-sector counter parts creates an appearance of the federal government providing these federally-maintained accounts with a competitive advantage over the private sector.[16] This concern is particularly alarming in light of the fact there appears to be no legal justification for these accounts to be exempt. It is critical that Congress and American retirement savers fully understand the rationale for the Treasury Department's decision and its effect on retirement planning.

To better understand these concerns, and the extent to which the Labor Department has consulted with the Treasury Department in addressing these issues, I ask that you provide the following information to the Committee:

1. Please explain the Treasury Department's statement in its comments to a draft of the Labor Department's fiduciary rule that the draft proposal "fl[ies] in the face of logic."[17] Does the Treasury Department still hold that view?

2. Please explain why the Treasury Department included its comments to a draft of the Labor Department's fiduciary rule a request for clarification for why certain exemption provisions would not apply to options structured as annuity contracts.[18]

3. Please produce all documents and communications referring or relating to the Treasury Department's legal basis for exempting myRA accounts from the requirements of the Labor Department's fiduciary rule.

4. Please produce all documents and communications between or among the Treasury Department, the Labor Department, the Executive Office of the President, or the Securities and Exchange Commission referring or relating to the applicability of myRA accounts to the Labor Department's fiduciary rule.

Please produce these materials as soon as possible, but no later than 5:00 pm on November 30, 2015.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate "the efficiency and economy of

---

[15] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees*, Before H. Subcomm. On Health, Employment, Labor and Pensions, of H. Comm on Education and the Workforce Subcomm., 114th Cong. (2015).
[16] Davis & Harman Letter at p.3.
[17] *See*, Proposed Amendments to Class Exemptions, *supra* note 9 [SEC-DOL005312].
[18] *See*, Proposed Best Interest Contract Exemption, *supra* note 7, 8 [SEC-DOL 005002].

operations of all branches of the Government."[19] Additionally, S. Res. 73 (114th Congress) authorizes the Committee to examine "the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs."[20]

For the purposes of this request, please refer to the definitions and instructions in the enclosure to this letter. If you have any questions about this request, please contact David Brewer of Committee staff at (202) 224-4751. Thank you for your attention to this matter.

Sincerely,

Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

Enclosure

[19] S. Rule XXV(K); see also S. Res. 445, 108th Cong. (2004).
[20] S. Res 73 § 12, 114th Cong. (2015).

Exhibit 10

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

THE CHAIR

May 5, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
340 Senate Dirksen Building
Washington, DC 20510

Dear Chairman Johnson:

Thank you for your April 21, 2015 letter regarding the SEC's discussions with the Department of Labor (DOL) in connection with its rulemaking to update the fiduciary standard under the Employee Retirement Income Security Act of 1974 (ERISA). This letter provides information regarding the consultation and technical assistance that Commission staff has provided during DOL's rulemaking process.

As background, the Commission and DOL have separate and distinct statutory authorities and regulatory missions. The Commission was authorized by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act to develop a uniform standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers, while at the same time specifying certain features of current business models that would not themselves be a violation of such standards. As I recently stated publicly, I believe that broker-dealers and investment advisers should be subject to a uniform fiduciary standard of conduct when providing personalized investment advice to retail investors. I have asked SEC staff to develop specific rulemaking recommendations consistent with Section 913, and I will shortly begin discussing my views and next steps with each of my fellow Commissioners.

As part of its analysis, I have asked the staff to consider, among other things, the recommendations of the SEC staff's Section 913 study,[1] potential economic and market impacts,

[1] In January 2011, the Commission submitted to Congress a staff study required by Section 913, which addressed the obligations of investment advisers and broker-dealers when providing personalized investment advice about securities to retail customers, and recommended, among other things, that the Commission exercise the discretionary rulemaking authority provided by Section 913.

and the information we received in response to a 2013 staff request for data.[2] As part of this effort, I have also asked the staff to prepare recommendations for the Commission's consideration of a program of third-party compliance reviews for investment advisers to supplement examinations conducted by the Office of Compliance Inspections and Examinations. To date, the Commission has not taken any action under either Section 913 or on third-party examinations, nor has the Commission as a whole reviewed or provided assistance to DOL on its proposed fiduciary rulemaking.

As you note in your letter, DOL recently proposed a rule under the ERISA statutory regime that would update the fiduciary standard for retail investment advice regarding employee savings plans. At DOL's request, Commission staff provided technical assistance in connection with DOL's rule proposal. Specifically, Commission staff had conference calls and in-person meetings with staff from DOL, during which Commission staff shared their expertise regarding the Commission's regulation of investment advisers and broker-dealers, including disclosure requirements and the Commission's approach to conflicts; the regulatory framework applicable to broker-dealers and investment advisers; and the potential impact of DOL's rule proposal on retail investors and the markets. The dates of meetings from mid-2013 to the present and participating SEC staff are reflected in the appendix to this letter.[3] As also reflected in the attached appendix, I discussed issues related to the rulemaking with Secretary Thomas Perez on the phone or in person on several occasions between late 2013 and early 2015, and with his predecessor on one occasion in mid-2013. In addition, on occasion Commission staff economists discussed with DOL staff economists the regulatory impact analysis forming part of the DOL's rule proposal and related issues and relevant academic literature. Finally, staff from the Office of Management and Budget invited Commission staff to provide feedback on DOL's draft, and Commission staff responded with technical comments.

In your letter, you also request that the Commission produce certain inter-agency communications regarding the pending DOL rulemaking proposal. We understand that DOL has raised concerns regarding the deliberative, pre-decisional nature of these materials and currently is in the process of seeking to reach an accommodation with the Committee. With respect to the requested materials, in light of the issues raised by DOL in connection with its own rulemaking, we would respectfully request to await the outcome of the ongoing discussions between DOL and the Committee, which we hope will adequately meet the Committee's needs.

---

[2] In March 2013, the Commission issued a public Request for Data and Other Information relating to the provision of retail investment advice and regulatory alternatives, which sought data to assist the Commission in determining whether to engage in rulemaking, and if so, what the nature of that rulemaking ought to be.

[3] Current SEC staff reviewed calendar information of meetings and conference calls to compile the information in the appendix. The appendix does not contain a listing of every conversation between SEC staff and DOL staff, and may not contain every participant in the identified meetings or conference calls. This is due in part to the fact that certain individuals involved with this issue are no longer with the SEC and a number of telephone calls between SEC staff and DOL staff were unscheduled.

Thank you again for your letter. Please do not hesitate to contact me at (202) 551-2100, or have a member of your staff contact Keith Cassidy, Deputy Director of the Office of Legislative and Intergovernmental Affairs, at (202) 551-2010, if you have any additional questions or comments.

Sincerely,

Mary Jo White
Chair

APPENDIX

SEC Staff Attendees (at one or more of the below meetings or calls)

Office of the Chair
Lona Nallengara
Nathaniel Stankard
Jennifer Porter
Jennifer McHugh
Liban Jama

Division of Trading and Markets
John Ramsay
David Blass
Thomas McGowan
Paula Jenson
Lourdes Gonzalez
Emily Westerberg Russell
Brian Baltz
John Fahey
Devin Ryan
Cindy Oh
Valentina Deng
Thomas Eady
Molly Kim
Heidi Pilpel

Division of Investment Management
David Grim
Douglas Scheidt
Daniel Kahl
Sara Crovitz
Holly Hunter-Ceci
Sarah Buescher
Rachel Loko
Parisa Haghshenas

Division of Economic and Risk Analysis
Jennifer Marietta-Westberg
Matthew Kozora

Office of the General Counsel
Robert Bagnall

In-Person Meetings or Telephone Calls With Chair White and Secretary Perez[1]

* *Staff was present at a number of the meetings or calls*

November 22, 2013
January 8, 2014
April 3, 2014
July 28, 2014
August 26, 2014
November 6, 2014
December 3, 2014
January 8, 2015
April 12, 2015

SEC Staff and DOL Staff In-Person Meeting

April 3, 2014

SEC Staff and DOL Staff Conference Calls

March 20, 2014
July 29, 2014
September 2, 2014
September 4, 2014
September 11, 2014
September 26, 2014
September 30, 2014
October 7, 2014
December 18, 2014
January 8, 2015
January 29, 2015

[1] In addition, Chair White and DOL Acting Secretary Seth Harris met on June 11, 2013.

Exhibit 11

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
LEGISLATIVE AND
INTERGOVERNMENTAL
AFFAIRS

July 27, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Johnson:

Reference is made to your April 21, 2015 letter requesting certain information relating to a Department of Labor (DOL) rulemaking to update the fiduciary standard under the Employee Retirement Income Security Act of 1974. On May 5, 2015, Chair White provided certain information in response to that letter. This letter and the accompanying documents further respond to the Committee's requests.

Consistent with communications SEC staff has had with your Committee staff, we are producing responsive documents to the Committee on a rolling basis, beginning with communications between SEC staff and DOL staff occurring between June 26, 2013 and April 21, 2015 relating to the DOL fiduciary rulemaking.

The enclosed CD contains 485 responsive documents that fall within this category. These documents are in searchable .pdf format Bates numbered SEC-DOL000001 to SEC-DOL003468. Any staff comments or views contained in the enclosed documents do not necessarily reflect the views of the Commission or any individual Commissioner.

As discussed with your staff, certain documents have been redacted to remove personal mobile phone numbers, non-public conference call numbers, and the name of a minor child.

Please note that these documents contain non-public and pre-decisional information, the public dissemination of which could reveal confidential deliberations and chill candid and frank discussion among agencies. As such, we respectfully request that the Committee and its staff maintain the confidentiality of these documents and consult with the Commission before any public disclosure of these materials.

We are continuing to work on responding to the remainder of the Committee's requests and will keep your staff apprised of the status of the Commission's response.

Please do not hesitate to contact me at (202) 551-2010 if you have any questions or comments.

Sincerely,

Tim Henseler
Director

CC: The Honorable Thomas R. Carper

Exhibit 12

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
LEGISLATIVE AND
INTERGOVERNMENTAL
AFFAIRS

September 15, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Johnson,

Reference is made to your April 21, 2015 letter requesting certain information relating to a Department of Labor (DOL) rulemaking to update the fiduciary standard under the Employee Retirement Income Security Act of 1974. On May 5, 2015 and July 27, 2015, we provided information and documents in response to that letter. This letter and the accompanying documents further respond to the Committee's requests.

Consistent with communications SEC staff has had with your Committee staff, we are producing responsive documents to the Committee on a rolling basis. Our July 27, 2015 submission to the Committee contained communications between SEC staff and DOL staff occurring between June 26, 2013 and April 21, 2015 relating to the DOL fiduciary rulemaking. The documents accompanying this letter consist of responsive communications between SEC staff and staff from the Executive Office of the President, as well as communications between SEC staff and staff from the Office of Management and Budget (OMB). These documents encompass the same date range as our earlier production.

The enclosed CD contains 67 responsive documents that fall within this category. These documents are in searchable .pdf format Bates numbered SEC-DOL003469 to SEC-DOL004770. Any staff comments or views contained in the enclosed documents do not necessarily reflect the views of the Commission or any individual Commissioner.

In addition, as discussed with your staff, there is one responsive communication (an email with its attachments) that OMB believes was provided to SEC staff inadvertently. In light of this, OMB has requested that we make these documents available for review by the Committee and its staff on an *in camera* basis, which we will work with the Committee staff to facilitate.

Please note that these documents contain non-public and pre-decisional information, the public dissemination of which could reveal confidential deliberations and chill candid and frank discussion among agencies. As such, we respectfully request that the Committee and its staff maintain the confidentiality of these documents and consult with the Commission before any public disclosure of these materials.

Please do not hesitate to contact me at (202) 551-2010 if you have any questions or comments.

Sincerely,

Tim Henseler
Director

Enclosure

Exhibit 13

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
LEGISLATIVE AND
INTERGOVERNMENTAL
AFFAIRS

November 25, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Johnson:

Reference is made to your April 21, 2015 letter requesting certain information relating to a Department of Labor (DOL) rulemaking to update the fiduciary standard under the Employee Retirement Income Security Act of 1974. On May 5, 2015, July 27, 2015 and September 15, 2015, we provided information and documents in response to that letter. This letter and the accompanying documents further respond to the Committee's requests.

Consistent with communications SEC staff has had with your Committee staff, we are producing responsive documents to the Committee on a rolling basis. Our July 27, 2015 submission to the Committee contained communications between SEC staff and DOL staff occurring between June 26, 2013 and April 21, 2015 relating to the DOL fiduciary rulemaking. Our September 15, 2015 submission contained communications relating to the DOL fiduciary rulemaking between SEC staff and staff from the Executive Office of the President, as well as communications between SEC staff and staff from the Office of Management and Budget (OMB), occurring during the same date range as our earlier production. The documents accompanying this letter consist of communications relating to the DOL fiduciary rulemaking between SEC staff and staff from DOL, the Executive Office of the President, and OMB occurring between January 1, 2010 and June 2013.

The enclosed CD contains 408 responsive documents that fall within this category. These documents are in searchable .pdf format Bates numbered SEC-DOL005322 to SEC-DOL008494. As discussed with your staff, a small number of documents contain redactions to remove personal identifying information, and personal cell phone numbers and non-public conference call numbers. In addition, the White House Counsel's office requested that we redact the email domain names of White House employees to protect their personal privacy. Any staff comments or views contained in the enclosed documents do not necessarily reflect the views of the Commission or any individual Commissioner.

Please note that these documents contain non-public and pre-decisional information, the public dissemination of which could reveal confidential deliberations and chill candid and frank discussion among agencies. As such, we respectfully request that the Committee and its staff maintain the confidentiality of these documents and consult with the Commission before any public disclosure of these materials.

Please do not hesitate to contact me at (202) 551-2010 if you have any questions or comments.

Sincerely,

P.P. Tim Henseler
Director

Enclosure

Exhibit 14

U.S. Department of Labor

Office of the Assistant Secretary for
Congressional and Intergovernmental Affairs
Washington, D.C. 20210

July 8, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
U.S. Senate
Washington, D.C. 20510

Dear Chairman Johnson:

This letter supplements the Department of Labor's June 15, April 3, and February 23 letters in response to the Committee's inquiries about the Department's coordination with the Securities and Exchange Commission (SEC) concerning the Department's proposed rule to update the fiduciary standard under the Employee Retirement Income Security Act of 1974, and updates on two aspects of the Department's response. The Committee's February 5 and March 17, 2015, inquiries requested information regarding the Department's proposed rulemaking. The Committee stated that it seeks "to understand how the Department has sought input and advice on crafting the proposed rule" from the SEC, and requested, among other things, "all communications between the Department of Labor and the Securities and Exchange Commission referring or relating to changing fiduciary standards" under that act.[1]

As Secretary Thomas E. Perez recently testified, the Department believes the proposed rule is "a reasonable, middle-ground approach that is responsive to our extensive outreach and feedback [and …] grounded in a basic principle – that investment advisers should act in their clients' best interest, not their own."[2] The proposed rule would "provid[e] greater consumer protection in a way that respects the important role played by investment advisers in helping the middle class achieve the American dream of a secure retirement."[3]

Now that we have made a substantial production of documents, we renew our offer to brief the Committee. In response to the Committee's request concerning the Department's coordination with the SEC, the Department of Labor on June 15 produced to the Committee over 800 pages of documents, representing approximately 400 separate communications over a multi-year period, and demonstrating the significant coordination that took place between the Department and the SEC in the development of the conflict of interest rule. We believe that the Department has

---

[1] Letter from the Honorable Ron Johnson, Chairman, Committee on Homeland Security and Government Affairs, U.S. Senate to the Honorable Thomas E. Perez, U.S. Department of Labor (Mar. 17, 2015).

[2] *Statement of Thomas E. Perez, Secretary, U.S. Dep't of Labor, Before The Health, Employment, Labor, and Pensions Subcommittee, Committee on Education and the Workforce, U.S. House of Representatives* (June 17, 2015) at 1.

[3] *Id.* at 6.

directly responded to the Committee's oversight interests on that topic. If you have any remaining questions about the Department's coordination with the SEC, we would like to address them in a briefing during the week of July 13, 2015; we have reached out to Committee staff to schedule a convenient time for this purpose.

We understand that the Committee has requested from both the Department and the SEC all the communications between the two agencies dealing with the proposed rule, the majority of which consist of deliberative materials that originated within the Department. In light of the executive branch institutional interests and practices that are implicated by the Committee's request, we have consulted with the Department of Justice about the request. The request to the SEC implicates the same potential privilege concerns as the communications in the custody of the Department of Labor because they are ultimately the same set of materials that informed the Department's proposed rulemaking. We have previously expressed concern to the Committee that its request for all communications between the Department and the SEC goes to the core of executive branch deliberations and that production of such materials would chill the candor that is necessary for responsible, high-quality policy making. This concern is particularly elevated at this time because the rulemaking process is ongoing; the public comment period for the proposed rule is continuing and we do not expect the rule to be finalized for some time to come. In addition, we are actively reviewing documents responsive to the Committee's inquiry to identify whether such materials may fall within the category of privilege protections as well as to identify additional documents that may be appropriate for sharing with the Committee. Production by the SEC of core deliberative materials implicating executive branch confidentiality interests at this stage would preempt and undermine the Department's continuing efforts to accommodate the Committee's oversight needs while protecting core confidentiality interests. For these reasons, we have asked the SEC to defer to the Department's ongoing dialogue with the Committee about the provision of the Department's deliberative materials, and while that dialogue is continuing, to defer producing such materials.

The Department's responses to the Committee to date, our production of documents, and our offer to provide a briefing are all part of a long-established process of accommodation during congressional oversight inquiries of the executive branch. Governing law imposes on the legislative and executive branches the obligation to "take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation" that "avoids the mischief of polarization of disputes."[4]

[4] *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977).

We look forward to working with the Committee regarding your remaining information needs in this matter. Our point of contact is Kate Garza, Senior Counselor for Congressional and Intergovernmental Affairs, U.S. Department of Labor. Ms. Garza may be reached at (202) 693-4600.

Sincerely,

Adri Jayaratne
Acting Assistant Secretary

cc: The Honorable Tom Carper
Ranking Minority Member
Committee on Homeland Security and Governmental Affairs

The Honorable Mary Jo White
Chair
Securities and Exchange Commission

Exhibit 15

FINRA
Financial Industry Regulatory Authority

Robert L.D. Colby
Executive Vice President
and Chief Legal Officer

VIA HAND DELIVERY

October 15, 2015

Chairman Ron Johnson
Committee on Homeland Security and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC 20510

Re: Request from the Committee on Homeland Security and Governmental Affairs Concerning its Examination of the Department of Labor's Efforts to Change the Definition of a Fiduciary under ERISA

Dear Chairman Johnson:

The Financial Industry Regulatory Authority, Inc. ("FINRA") is producing this letter and the information and documents referenced herein in response to items requested in your letter dated September 16, 2015 to Richard G. Ketchum, Chairman and Chief Executive Officer of FINRA. In that letter the Committee on Homeland Security and Government Affairs ("Committee") requested information for the period January 1, 2010 to the present (the "Request Period") related to the Department of Labor's ("DOL") efforts to change the definition of a fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA").[1]

As discussed during the call between FINRA and the Committee staff on September 25, 2015, FINRA will produce documents responsive to the Committee's request in two tranches. FINRA's first response includes responsive documents and information from the period of January 1, 2014 through September 22, 2015. FINRA plans to produce a second tranche of responsive documents to the Committee covering the period January 1, 2010 through December 31, 2013, by October 23, 2015.

Enclosed with this letter is an Apricorn Aegis Secure Key ("Secure Key") thumb drive that contains the documents responsive to this request. The password to the Secure Key will be provided to you in a separate communication.

* * *

[1] See Letter from Hon. Ron Johnson, Chairman, Senate Comm. on Homeland Security and Governmental Affairs, to Richard Ketchum, Chairman and Chief Executive Officer, FINRA, dated September 16, 2015.

1735 K Street, NW
Washington, DC
20006-1506

t 202 728 8484
f 202 728 8075
www.finra.org

Committee Request 1: *Please provide the dates of any meetings between Department of Labor and FINRA representatives relating to changing fiduciary standards under the Employee Retirement Income Security Act, including a list of those representatives who were in attendance and any minutes or notes taken during these meetings.*

FINRA Response: Based on a review of, among other things, electronic communications, hard copy records and interviews with relevant FINRA staff, FINRA believes that eighteen (18) meetings, including telephone calls, conference calls and in-person meetings, between DOL and FINRA representatives related in whole or in part to the changing standards under ERISA occurred during the period from January 1, 2014 through September 22, 2015.[2] A summary of those meetings and participation by FINRA and DOL staff is set forth on the chart provided below. The chart contains the following information:

- The first column contains the date of the meeting. To the extent a meeting was held in-person; it is indicated in bold font on the chart below. Otherwise, the meetings took place via conference call;

- The second column titled "FINRA Staff in Attendance" represents the FINRA staff that participated in the meeting; all staff members listed in this column, with the exception of Emily Gordy and Linda Fienberg, are current FINRA employees;

- The third column titled "DOL Staff and Non-DOL Staff in Attendance" reflects FINRA staffs' recollection of the non-FINRA meeting attendees and/or attendees listed in notes or electronic communications/calendar entries. FINRA cannot verify the accuracy of the attendance for any non-FINRA attendees included on the chart provided below; and

- The fourth column titled "Whether FINRA has Minutes or Notes to Produce" describes whether FINRA is producing notes or minutes from the meetings.

---

[2] FINRA interprets this request as seeking information on private meetings between FINRA and DOL staff. FINRA notes that there may have been public conferences or industry events in which FINRA and DOL representatives both participated, and which may have included discussions regarding the DOL's proposed change to the fiduciary standard.

Date	FINRA Staff in Attendance	DOL Staff and Non-DOL Staff in Attendance	Whether FINRA has Minutes or Notes to Produce
4/4/2014	Gerri Walsh	Lyssa Hall (DOL)	No notes from this call identified
4/30/2014	Emily Gordy	Susanna Benson (DOL)	Notes produced
6/19/2014	Jonathan Sokobin	Joe Piacentini (DOL)	No notes from this call identified
9/23/2014	Joseph Savage, Linda Fienberg, Tom Selman, and Ken Andrichik	Joe Canary, Susan Halliday, Lou Campagna, and Luisa Grill-Chope (DOL)	Notes produced
10/2/2014	Robert Colby	Lyssa Hall and Karen Lloyd (DOL)	Notes produced
10/7/2014	Tom Drogan and Matt Daugherty	David English (DOL)	Notes produced
10/22/2014	Tom Drogan and Matt Daugherty	David English (DOL)	No notes from this call identified
11/4/2014	Jim Wrona and Joseph Savage	Jeff Turner, Susan Halliday, Fred Wong, Luisa Grill-Chope, and Lou Campagna (DOL)	Notes produced
11/12/2014	**Tom Drogan**	**David English (DOL)**	**No notes from this meeting identified**
12/5/2014	**Laura Trotz**	**Joseph Sulkson and Jeffrey Archbold (DOL)**	**No notes from this meeting identified**
2/12/2015	Angela Goelzer	Susan Halliday, Lou Campagna, and Luisa Grill-Chope (DOL)	No notes from this call identified
6/12/2015	**Robert Colby, Tom Selman, Joseph Savage, and Julie Bauer**	**Tim Hauser, Phyllis Borzi, Judy Mares, Joe Canary, Lyssa Hall, Karen Lloyd and Joe Piacentini (DOL)**	**Notes produced**
7/1/2015	**Robert Colby, Tom Selman, Angela Goelzer, Dan Sibears, Joseph Savage, and Julie Bauer**	**Tim Hauser, Phyllis Borzi, Karen Lloyd, Joe Canary (DOL); Mark Iwry (United States Treasury); and Elizabeth Kelly (White House Council of Economic Advisers)[3]**	**Notes produced**
7/2/2015	**Robert Colby, Tom Selman, Angela Goelzer, Dan Sibears, Joseph Savage, and Julie Bauer**	**Tim Hauser, Phyllis Borzi, Karen Lloyd, and Lyssa Hall (DOL)**	**Notes produced**
7/6/2015	**Robert Colby, Tom Selman, Joseph Savage, Angela Goelzer, and Julie Bauer**	**Tim Hauser, Phyllis Borzi, and Karen Lloyd (DOL)**	**Notes produced**
7/17/2015	Tom Selman	Tim Hauser (DOL)	No notes from this call identified
8/21/2015	**Tom Selman**	**Tim Hauser and Judy Mares (DOL)**	**No notes from this meeting identified**
9/14/2015	**Robert Colby, Angela Goelzer, and Joseph Savage**	**Tim Hauser and Joe Canary (DOL)**	**Notes produced**

[3] Mark Iwry, Senior Advisor to the Secretary and Deputy Assistant Secretary, U.S. Treasury Department and Elizabeth Kelly, Senior Policy Advisor, National Economic Council, Executive Office of the President are noted to have possibly participated by phone.

Responsive notes and/or minutes from these meetings are contained on the Secure Key and organized in the folder titled "Request 1" by staff name and meeting date. Where indicated in the file name, staff notes cover multiple meeting dates.

Committee Request 2: *Please explain whether FINRA communicated any concerns to the Department of Labor about the proposed rulemaking prior to its promulgation relating to changing fiduciary standards under the Employee Retirement Income Security Act, including any concerns about proposed Prohibited Transaction Exemptions.*

FINRA Response: In response to this request, FINRA is producing the Secure Key to the folder titled "Request 2" files titled "DOL_Comment_Ltr_ 7 17 15.pdf" and "Ketchum Remarks 2015 Ann Conf.pdf" in which FINRA communicated its concerns to the DOL proposal, including FINRA's concerns about Prohibited Transaction Exemptions. In addition, FINRA notes that documents provided in response to Committee Requests Numbers 1, 3 and 7 may also be responsive to this request.

Committee Request 3: *Please provide all drafts of the Department of Labor's proposed rulemaking related to changing fiduciary standards under the Employee Retirement Income Security Act reviewed by employees of FINRA, including but not limited to comments on the draft proposals and the process surrounding the proposed rulemaking.*

FINRA Response: In response to this request, please refer to the response and documents provided for Committee Requests Numbers 1, 2 and 7.

Committee Request 4: *Please explain whether FINRA participated in the interagency review process, managed by the Office of Management and Budget, of the Labor Department's proposed rulemaking relating to changing fiduciary standards under ERISA. If so, please produce all documents and communications relating to this process.*

FINRA Response: During the entire Request Period, FINRA did not participate in the interagency review process and does not have any documents and/or communications responsive to this request.

Committee Request 5: *Please explain whether the Office of Management and Budget has solicited information from FINRA on changing the rules relating to fiduciary standards under the Employee Retirement Income Security Act.*

FINRA Response: During the entire Request Period, the Office of Management and Budget did not solicit information from FINRA on changing the rules relating to fiduciary standards under ERISA.

Committee Request 6: *Please produce all communications between employees of FINRA and employees of the Executive Office of the President referring or relating to changing fiduciary standards under the Employee Retirement Income Security Act.*

FINRA Response: During the meeting, which FINRA had with DOL on July 1, 2015, FINRA staff notes reflect that an employee from the Executive Office of the President might have attended the meeting by telephone. Other than this meeting, for the entire Request Period, FINRA has no documents responsive to this request because no other communications took place between employees of FINRA and employees of the Executive Office of the President referring to or relating to fiduciary standards under ERISA.

Committee Request 7: *Please produce all communications between employees of FINRA and employees of the Department of Labor referring to or relating to changing fiduciary standards under the Employee Retirement Income Security Act.*

FINRA Response: In response to this request, FINRA is producing communications between employees of FINRA and employees of the DOL between January 1, 2014 and September 22, 2015 on the Secure Key and organized in the folder titled "Request 7" by recipients name which totals 157 responsive electronic communications. FINRA eliminated duplicate emails when the sender transmitted the email by a group distribution list in which more than one FINRA staff member was a recipient. If the sender transmitted the email to individual FINRA staff members, each email is included so that duplicates exist of the email contents.

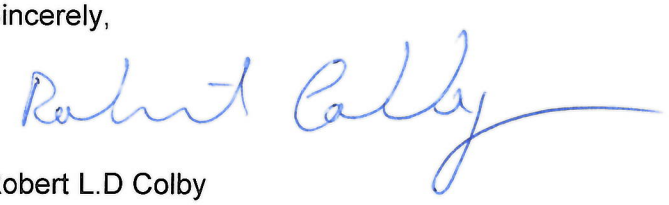
* * *

The majority of the information that FINRA is producing in response to the Committee's requests is sensitive and confidential. FINRA respectfully requests advance notice should the Committee envision releasing the information that FINRA has provided in response to these requests.

We appreciate the opportunity to provide you the information requested. Many of the documents FINRA is providing in response to this request contain non-public information, attorney work product, or otherwise contain privileged information. FINRA is not asserting any privilege with respect to any potentially responsive documents; however, FINRA does ask that the Committee maintain the confidentiality of the documents produced to the extent possible.

If you have any questions with respect to any of the information contained in this letter, please do not hesitate to contact me at 202-728-8484.

Sincerely,



Robert L.D Colby

Cc: The Honorable Thomas R. Carper
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate
346 Dirksen Senate Office Building
Washington, DC 20510
w/ Security Key enclosed

Exhibit 16

Financial Industry Regulatory Authority

Robert L.D. Colby
Executive Vice President
and Chief Legal Officer

VIA HAND DELIVERY

October 29, 2015

Chairman Ron Johnson
Committee on Homeland Security and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC 20510

Re: Request from the Committee on Homeland Security and Governmental Affairs Concerning its Examination of the Department of Labor's Efforts to Change the Definition of a Fiduciary under ERISA

Dear Chairman Johnson:

The Financial Industry Regulatory Authority, Inc. ("FINRA") is producing this letter and the information and documents referenced herein in response to items requested in your letter dated September 16, 2015 to Richard G. Ketchum, Chairman and Chief Executive Officer of FINRA. In that letter the Committee on Homeland Security and Governmental Affairs ("Committee") requested information for the period January 1, 2010 to the present (the "Request Period") related to the Department of Labor's ("DOL") efforts to change the definition of a fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA").[1]

As discussed during the call between FINRA and the Committee staff on September 25, 2015, FINRA is producing documents responsive to the Committee's request in two tranches. On October 15, 2015, FINRA produced the first tranche of responsive documents for Requests 1 – 3 and 7 that covered the period of January 1, 2014 to the present; and Requests 4, 5 and 6 for the entire review period. The second and final tranche of documents are comprised of the information and documents contained or referenced in this letter, which are responsive to Requests 1 – 3 and 7 for the period January 1, 2010 through December 31, 2013.

Enclosed with this letter is an Apricorn Aegis Secure Key ("Secure Key") thumb drive that contains the documents responsive to this request. The password to the Secure Key will be provided to you in a separate communication.

* * *

[1] See Letter from Hon. Ron Johnson, Chairman, Senate Comm. on Homeland Security and Governmental Affairs, to Richard Ketchum, Chairman and Chief Executive Officer, FINRA, dated September 16, 2015.

1735 K Street, NW
Washington, DC
20006-1506

t: 202 728 8484
f: 202 728 8075
www.finra.org

Committee Request 1: *Please provide the dates of any meetings between Department of Labor and FINRA representatives relating to changing fiduciary standards under the Employee Retirement Income Security Act, including a list of those representatives who were in attendance and any minutes or notes taken during these meetings.*

FINRA Response: Based on a review of, among other things, electronic communications, hard copy records and interviews with relevant FINRA staff, FINRA believes that thirteen (13) meetings, including telephone calls, conference calls and in-person meetings, between DOL and FINRA representatives related in whole or in part to the changing standards under ERISA occurred during the period from January 1, 2010 through December 31, 2013.[2] A summary of those meetings and participation by FINRA and DOL staff is set forth on the chart provided below. The chart contains the following information:

- The first column contains the date of the meeting. If the meeting was held in-person, it is indicated in bold font on the chart below. Otherwise, the meetings took place via a telephone call;

- The second column titled "FINRA Staff in Attendance" represents the FINRA staff that participated in the meeting; all staff members listed in this column, with the exception of Marc Menchel, Joseph McCarthy, George Walz, Michael Thomas, Gini Hall and Arash Etemad, are current FINRA employees;

- The third column titled "DOL Staff and Non-DOL Staff in Attendance" reflects FINRA staffs' recollection of the non-FINRA meeting attendees and/or attendees listed in notes or electronic communications/calendar entries. FINRA cannot verify the accuracy of the attendance for any non-FINRA attendees included on the chart provided below; and

- The fourth column titled "Whether FINRA has Minutes or Notes to Produce" describes whether FINRA is producing notes or minutes from the meetings.

---

[2] FINRA interprets this request as seeking information on private meetings between FINRA and DOL staff. FINRA notes that there may have been public conferences or industry events in which FINRA and DOL representatives both participated, and which may have included discussions regarding the DOL's proposed change to the fiduciary standard.

Date	FINRA Staff in Attendance	DOL Staff and Non-DOL Staff in Attendance	Whether FINRA has Minutes or Notes to Produce
4/13/2011	Joseph McCarthy, Christian Zrull, Timothy Miller, Saju Gopal, Thomas Mellett, Kathleen Hart, Michael Thomas, Gini Hall, Arash Etemad, Kathleen Bisaccia, Ayllen Jani and Katie Lee	Jean Ackerman, Marc Cramer, Christopher Swanson, and Robert Paine (DOL)	No notes from this meeting identified
6/7/201	Marc Menchel and Patrice Gliniecki	Karen Lloyd (DOL) Lourdes Gonzales (SEC)	No notes from this meeting identified
7/7/2011	Marc Menchel, Tom Selman, Joseph Savage, Angela Goelzer, Ola Persson and Patrice Gliniecki	Ivan Strasfeld, Lyssa Hall, Brian Shiker, Joseph Piacentini, Chris Cosby, Timothy Hauser, William Taylor, and Uchenna Evans (DOL)	Notes produced
12/1/2011	Joseph Savage	Jeffrey Turner, Suzanne Adelman and Michael Del Conte (DOL)	Notes produced
12/21/2011	Joseph Savage	Jeffrey Turner, Kristen Zarenko, Michael Del Conte, James Craig and William Taylor (DOL)	No notes from this call identified
2/9/2012	Joseph Savage and Patrice Gliniecki	Karen Lloyd (DOL)	No notes from this call identified
5/31/2012	Joseph Savage	Suzanne Adelman (DOL)	No notes from this call identified
7/18/2012	Joseph Savage, Patrice Gliniecki and Philip Shaikun	Susan Halliday, Joseph Piacentini, Lyssa Hall, Karen Lloyd, Keith Bergstresser, Chris Cosby, Lou Campagna, William Taylor and Luisa Grillo-Chope	No notes from this call identified
4/15/2013	Angela Goelzer, George Walz, Stacy Chittick	Timothy Hauser, Phyllis Borzi, Karen Lloyd, and Lyssa Hall (DOL)	Notes produced
4/18/2013	Gerri Walsh	Jane Norman, Phyllis Borzi, and Joseph Piacentini (DOL)	No notes from this call identified
5/24/2013	Stacy Chittick, Derek Linden, Mario DiTrapani, Mark Winn, Elena Shuvalov and George Walz	Joseph Piacentini, Jessica Haynes, Keith Bergstresser and Anja Decressin (DOL) Albert J. Lee, Randall Ronsberg and Eric Miller (Summit LLC)	Notes produced
7/10/2013	Joseph McCarthy, Thomas Mellett and Gerald Dougherty	John Mayers (DOL)	No notes from this meeting identified
11/18/2013	Robert Colby and Gerri Walsh	Phyllis Borzi, Timothy Hauser, Joseph Piacentini, Lyssa Hall, Judith Mares, Jane Norman and Joe Canary (DOL)	No notes from this meeting identified

Responsive notes and/or minutes from these meetings are contained on the Secure Key and organized in the folder titled "Request 1" by staff name and meeting date. Where indicated in the file name, staff notes cover multiple meeting dates.

Committee Request 2: *Please explain whether FINRA communicated any concerns to the Department of Labor about the proposed rulemaking prior to its promulgation relating to changing fiduciary standards under the Employee Retirement Income Security Act, including any concerns about proposed Prohibited Transaction Exemptions.*

FINRA Response: During the period from January 1, 2010 through December 31, 2013, FINRA did not communicate concerns relating to changing fiduciary standards under ERISA other than through those materials provided in response to Committee Requests 1 and 7.

Committee Request 3: *Please provide all drafts of the Department of Labor's proposed rulemaking related to changing fiduciary standards under the Employee Retirement Income Security Act reviewed by employees of FINRA, including but not limited to comments on the draft proposals and the process surrounding the proposed rulemaking.*

FINRA Response: In response to this request, please see FINRA's responses to Committee Requests 1, 2 and 7.

Committee Request 7: *Please produce all communications between employees of FINRA and employees of the Department of Labor referring to or relating to changing fiduciary standards under the Employee Retirement Income Security Act.*

FINRA Response: In response to this request, FINRA is producing communications between employees of FINRA and the DOL between January 1, 2010 and December 31, 2013 on the Secure Key and organized in the folder titled "Request 7". FINRA located 164 responsive electronic communications and arranged them by recipients' name. FINRA eliminated duplicate emails when the sender transmitted the email by a group distribution list in which more than one FINRA staff member was a recipient. If the sender transmitted the email to individual FINRA staff members, each email is included so that duplicates exist of the email contents.

* * *

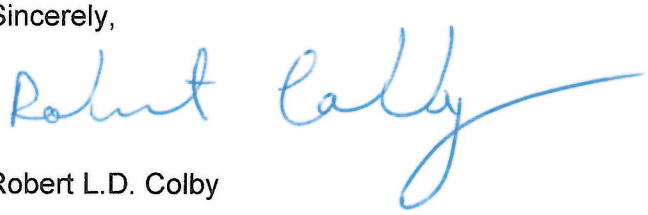
The majority of the information that FINRA is producing in response to the Committee's requests is sensitive and confidential. FINRA respectfully requests advance notice should the Committee envision releasing the information that FINRA has provided in response to these requests.

We appreciate the opportunity to provide you the information requested. Many of the documents FINRA is providing in response to this request contain non-public information, attorney work product, or otherwise contain privileged information. FINRA is not asserting any privilege with respect to any potentially responsive documents; however,

FINRA does ask that the Committee maintain the confidentiality of the documents produced to the extent possible.

If you have any questions with respect to any of the information contained in this letter, please do not hesitate to contact me at 202-728-8484.

Sincerely,



Robert L.D. Colby

Cc: The Honorable Thomas R. Carper
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate
346 Dirksen Senate Office Building
Washington, DC 20510
w/ Security Key enclosed

Exhibit 17

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

May 18, 2015

The Honorable Ron Johnson
United States Senate
Washington, DC 20510

Dear Chairman Johnson:

Thank you for your letter of May 1, 2015, about the rulemaking titled *Conflict of Interest Rule – Investment Advice* (*Conflict of Interest*). Your letter requests information about the Department of Labor's (DOL) proposed rulemaking relating to changing fiduciary standards under the Employee Retirement Income Security Act, including the Office of Information and Regulatory Affairs' (OIRA) review process of the rulemaking.

OIRA's review process for agency rulemakings was created to implement the Paperwork Reduction Act of 1980. Through this process the office develops and oversees the implementation of Government-wide policies in the areas of regulation, information collection, information policy and technology, privacy, and statistical and science policy. Specifically, OIRA conducts regulatory oversight under the authority of Executive Order (EO) 12866 ("Regulatory Planning and Review," issued on September 30, 1993), and EO 13563 ("Improving Regulation and Regulatory Review," issued on January 18, 2011). Under these EOs, OIRA's charge is to review regulations to determine, among other things, whether: (1) the benefits of rules justify their costs; (2) the rules are consistent with, and non-duplicative of the regulations and activities of other Federal agencies; (3) the rules explore reasonable alternatives and examine flexibility for small businesses; (4) the agency is using the most up-to-date scientific, technical, and other information; and (5) the rule accomplishes its goals in the least burdensome way possible. OIRA also conducts an interagency review process on the rules it reviews so that other relevant agencies in the Federal government can provide their views.

In accordance with this process, on February 23, 2015, the DOL submitted a draft of its *Conflict of Interest* proposed rule to OIRA for interagency review. OIRA devoted the time and resources necessary to ensure the review was consistent with EOs 12866 and 13563. This review included the participation of a number of relevant Executive Branch agencies. OIRA then concluded review of this draft on April 14, 2015. As background, EO 12866 provides OIRA up to 90 days to review significant regulatory actions, though the agency can request an extension. The amount of time needed to complete review on any given rule can vary, but OIRA does endeavor to complete the process as quickly as feasible while ensuring proper review.

Further, under EO 12866, members of the public can meet with OIRA to discuss any rule under OIRA review. You can search for information on DOL's Conflict of Interest proposed rule meetings, including the date and time, stakeholder and government attendees, and any written materials shared at the meetings, at the following link:

http://www.reginfo.gov/public/do/eom12866Search.

When the DOL submits a draft of the final rule to OIRA for review, it will be subject to the same guiding principles as described above, including as laid out in these EOs. Thank you again for your letter. Please do not hesitate to contact the Office of Legislative Affairs at 202-395-4790, if you have any questions.

Sincerely,

Howard Shelanski

Howard Shelanski
Administrator
Office of Information and Regulatory Affairs

Exhibit 18

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

January 20, 2016

The Honorable Ron Johnson
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Johnson:

Thank you for your follow-up letter of December 3, 2015, regarding the proposed rulemaking titled *Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice* (*Conflict of Interest*). In your letter, you requested information about the Department of Labor's (DOL) proposed rulemaking to update fiduciary standards under the Employee Retirement Income Security Act, including information about the Office of Information and Regulatory Affairs' (OIRA) review process.

In our letter of May 5, 2015, I described OIRA's review process for agency rulemakings. As described in that letter, OIRA conducts regulatory oversight under Executive Order (EO) 12866 ("Regulatory Planning and Review," issued on September 30, 1993), and EO 13563 ("Improving Regulation and Regulatory Review," issued on January 18, 2011). In accordance with those EOs, OIRA reviews, among other things, whether: (1) the benefits of rules justify their costs; (2) the rules use the best, most innovative tools to achieve their regulatory ends; (3) the rules are consistent with, and non-duplicative of the regulations and activities of other Federal agencies; (4) the rules explore reasonable alternatives and examine flexibility for small businesses; (5) the agency is using the most up-to-date scientific, technical, and other information; and (6) the rule accomplishes its goals in the least burdensome way possible. In addition to such review, OIRA also conducts an interagency review process on the rules it reviews to provide other relevant agencies in the Federal government the opportunity to offer their views and expertise. OIRA's review and the interagency review process OIRA conducts help to ensure an effective and efficient regulatory system that improves the well-being of the American people without imposing unreasonable or unnecessary costs on society.

Further to your question regarding how OIRA incorporated suggestions from stakeholders, under EO 12866, members of the public can meet with OIRA to discuss any rule under OIRA review. To promote transparency in the regulatory review process, OIRA makes available information related to these meetings in accordance with EO 12866. There were twenty one meetings with members of the public about DOL's *Conflict of Interest* proposed rule. I have included material related to these meetings with this letter.

Regarding the length of time the draft proposed rule was under review, I can assure you that OIRA devoted the time and resources necessary to ensure the review was in accordance with

EOs 12866 and 13563. The amount of time needed to complete review on any given rule varies, but OIRA endeavors to complete the process as efficiently as possible while ensuring proper review. The review of the *Conflict of Interest* draft proposed rule included the participation of relevant Federal agencies.

When the DOL submits a draft of the final rule to OIRA for review, it will be subject to the same EO guiding principles, as described above.

Finally, we are attaching the following documents reflecting the request you made in your letter about the proposed *Conflict of Interest* rule. The documents attached include the version of the preamble, regulatory text, and various new and revised prohibited transaction exemptions submitted to OIRA for review on February 23, 2015 as well as the version on which OIRA concluded review on April 14, 2015.

Comparing these documents will indicate how this rulemaking incorporated suggestions received during OIRA's review process described previously in this letter.

Thank you again for your letter. We remain committed to continuing to work with the committee in all matters, including this request. Please do not hesitate to contact the Office of Management and Budget's Office of Legislative Affairs at 202-395-4790, if you have any questions.

Sincerely,

Howard Shelanski

Howard Shelanski
Administrator
Office of Information and Regulatory Affairs

Exhibit 19

U.S. Department of Labor

Office of the Assistant Secretary for
Congressional and Intergovernmental Affairs
Washington, D.C. 20210

February 9, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
U.S. Senate
Washington, D.C. 20510

Dear Senator Johnson:

I am writing in response to your letter to Secretary Thomas E. Perez, received by the Department of Labor on February 5, 2015, regarding the Department's efforts to update the fiduciary standard, under the Employee Retirement Income Security Act of 1974, to protect retirement savings for middle class families. Please be assured that the Department endeavors to promptly respond to all inquiries from the Committee.

If you or members of your staff have any questions, please contact Kate Garza, Senior Counselor for Congressional and Intergovernmental Affairs, U.S. Department of Labor. She may be reached at (202) 693-4600.

Sincerely,

Adri Jayaratne
Acting Assistant Secretary

cc: The Honorable Tom Carper
Chairman
Committee on Homeland Security and Governmental Affairs

Exhibit 20

U.S. Department of Labor

Office of the Assistant Secretary for
Congressional and Intergovernmental Affairs
Washington, D.C. 20210

February 23, 2015

The Honorable Ron Johnson
Chairman
U.S. Senate Committee on Homeland Security and Governmental Affairs
Washington, D.C.

Dear Chairman Johnson:

I am writing in response to your February 5, 2015, letter to Secretary Thomas E. Perez regarding the Department of Labor's efforts to update the fiduciary standard under the Employee Retirement Income Security Act of 1974 to protect retirement savings for middle class families from harmful conflicts of interest. The Department appreciates the opportunity to provide you with an update on our efforts.

I am pleased to inform you that today the Department submitted a draft proposed rule to the Office of Management and Budget (OMB) for review.[1] The new proposal, which will be issued as a notice of proposed rulemaking after OMB completes its interagency review process, strikes a balanced approach in terms of protecting individuals looking to build their savings while minimizing disruptions to the many good practices and good advice that the financial services industry provides today. This new proposal aims to remove outdated regulatory loopholes that make it hard for America's workers to count on the retirement investment advice they receive being in their best interest.

The Administration met with a wide variety of stakeholders on this issue, including the financial services industry, employers and plan sponsors, consumer groups, workers, and academics to make sure we have the benefit of all view points as well as the latest independent research. After gathering all of this input, the Department has decided that we need to act to protect retirement savings for families while allowing the private sector to continue to play its important role providing advice and support to savers.

The Department is committed to providing meaningful opportunities for the public to participate in this rulemaking through an open and transparent process. Submitting the draft proposal to OMB is just an initial step in the regulatory process. Under Executive Order 12866, OMB will coordinate review of the proposed rule to ensure it is consistent with applicable laws and that the policies of one agency do not conflict with the policies or actions taken by another agency.[2] After OMB concludes review of the draft proposal, the proposed rule will be published in the Federal Register and the public will have the opportunity to submit written comments for

---

[1] The Department's Fall 2014 Regulatory Agenda indicated that a new notice of proposed rulemaking was under development. The Department's Regulatory Agenda and Regulatory Plan are available at http://www.dol.gov/asp/regs/agenda.htm.

[2] 58 Fed. Reg. 51735 (Oct. 4, 1993).

consideration by the agency.[3] The Department also plans to hold at least one public hearing in order to solicit the public's views. The proposed rule is subject to change based on feedback from interested parties, and we hope to receive extensive feedback during the public comment process.

As noted above, during OMB review, the proposal will be examined to ensure it is not in conflict with the policies or actions taken by another agency, including the Securities and Exchange Commission. The Department is committed to ensuring the proposal complements securities laws.

As reflected by the Department's Fall 2014 Regulatory Agenda and Regulatory Plan, the Department has been working to update the fiduciary standard for a long period of time. The Department did not have a role in drafting the January 13, 2015, memorandum referenced in your letter.

In addition, you asked about the separate issue of the hearing on the proposed individual exemption involving Credit Suisse. On September 3, 2014, the Department published in the Federal Register a notice of pendency of a proposed individual exemption involving Credit Suisse that generated a number of public comments.[4] As a result, on November 18, 2014, the Department issued a hearing notice on the proposal and invited interested parties to submit a request to testify. The Department granted all requests to testify and, consistent with the published notice, held the hearing on January 15, 2015.[5]

I'm sure you'd agree that all savers, regardless of their income level, deserve access to advice that is in their best interest. It is essential that any rulemaking in which we engage take into account the impact on middle and low-income Americans, and we look forward to working with you on this and other issues of importance affecting America's workers. If you or any member of your staff has questions, please contact Kate Garza in the Department's Office of Congressional and Intergovernmental Affairs. She may be reached at (202) 693-4600.

Sincerely,

Adri Jayaratne
Acting Assistant Secretary

cc: The Honorable Thomas R. Carper
Ranking Member
U.S. Senate Committee on Homeland Security & Governmental Affairs

---

[3] Administrative Procedure Act, 5 U.S.C. § 553.
[4] 79 Fed. Reg. 52365 (Sept. 3, 2014).
[5] 79 Fed. Reg. 68711 (Nov. 18, 2014). Transcript available at http://www.dol.gov/ebsa/pdf/creditsuissehearingtranscript.pdf

Exhibit 21

U.S. Department of Labor

Office of the Assistant Secretary for
Congressional and Intergovernmental Affairs
Washington, D.C. 20210

March 23, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
U.S. Senate
Washington, D.C. 20510

Dear Senator Johnson:

I am writing in response to your March 17, 2015 letter to Secretary Thomas E. Perez, requesting additional information related to the Department's February 23, 2015 response to the Committee and our efforts to update the fiduciary standard, under the Employee Retirement Income Security Act of 1974, to protect retirement savings for middle class families. Please be assured that the Department endeavors to promptly respond to all inquiries from the Committee, but will be unable to meet the Committee's request for information within the allotted seven days.

If you or members of your staff have any questions, please contact Kate Garza, Senior Counselor for Congressional and Intergovernmental Affairs, U.S. Department of Labor. She may be reached at (202) 693-4600.

Sincerely,

Adri Jayaratne
Acting Assistant Secretary

cc: The Honorable Tom Carper
Ranking Member
Committee on Homeland Security and Governmental Affairs

Exhibit 22

U.S. Department of Labor

Office of the Assistant Secretary for
Congressional and Intergovernmental Affairs
Washington, D.C. 20210

April 3, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
U.S. Senate
Washington, D.C.

Dear Chairman Johnson:

I am writing in response to your March 17, 2015, letter to Secretary Thomas E. Perez regarding the Department of Labor's efforts to update the fiduciary standard under the Employee Retirement Income Security Act of 1974 (ERISA) to protect retirement savings for middle class families from harmful conflicts of interest. You wrote to Secretary Perez on February 5, 2015, seeking information about how the Department planned to update the fiduciary standard, and the Department responded to that request on February 23, 2015. The Committee, acknowledging once again that the Department has not yet published a proposed rule, has now reiterated its request for information "to better understand the processes and considerations surrounding the Department's plan to move forward with issuing the new regulation."[1]

The Department's proposed regulation, once published in the Federal Register, will reflect our decisions about the issues involved in the proposal. Until then, however, it is difficult to further accommodate the Committee's request for information about the forthcoming proposal. Nonetheless, the Department provided information to the Committee in its February 23 letter and the March 24 and March 27 phone calls with Committee staff, and we are providing additional information in this letter in response to the concerns the Committee articulated in its March 17 letter.

The Department briefed Committee staff on April 1, 2015, about the separate issue raised in your February 5 letter regarding the hearing on the proposed individual exemption involving Credit Suisse. We trust that the additional information provided during this briefing has satisfied the Committee's interest in this matter.

---

[1] Letter from the Honorable Ron Johnson, Chairman, Committee on Homeland Security and Government Affairs, U.S. Senate to the Honorable Thomas E. Perez, U.S. Department of Labor (Mar. 17, 2015).

In addition, our February 23 letter was responsive to your request for information about the Department's involvement in drafting the January 13, 2015, memorandum. We stated in that letter that "the Department did not have a role in drafting the . . . memorandum."[2]

Your March 17 letter reiterates a request to the Department to explain its process for developing the proposed rule updating the fiduciary standard under ERISA. Section 6(a)(1) of Executive Order 12866 provides that "before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulations (including, specifically, State, local, and tribal officials)." The Department carried out its responsibilities in accordance with the Executive Order by engaging in extensive discussions with stakeholders. These consultations did not trigger the requirements of the Federal Advisory Committee Act, and we are not conducting this rulemaking under the Negotiated Rulemaking Act.[3] Once the Department publishes the notice of proposed rulemaking (NPRM) in the Federal Register and the comment period begins, we will establish a formal rulemaking record that will be open to the public and subject to the requirements of the Administrative Procedure Act (APA). We will place all comments in the rulemaking docket.

The Committee has also reiterated its request for "all communications between the Department of Labor and the Securities and Exchange Commission referring or relating to changing fiduciary standards under the Employee Retirement Income Security Act." Additionally, during a March 24, 2015 phone call your staff further explained that the Committee seeks emails between the Department and the SEC to understand the input the Department sought from the SEC about the draft proposal, the SEC's comments on the draft proposal, and how the Department has addressed the SEC's comments in the draft proposal.

The Department has serious concerns about your request because the documents you are seeking, which record the agencies' deliberative exchange about the draft proposed rule, constitute part of the Executive branch's deliberative process in the development of a regulatory action that has not yet been concluded. As we explained in detail in the Department's February 23, 2015, response to the Committee, the Department is in the initial stages of the rulemaking process. We have submitted a draft proposed rule and associated exemptions to OMB, and OMB is now conducting interagency review. The purpose of this review is to provide for further refinement of the proposal before publication and formal comment from the public. Because the Department has not finalized its proposal yet and may revise it further in response to comments received in connection with the interagency review, the documents you seek do not reflect our final thinking.

---

[2] Letter from Adri Jayaratne, Acting Assistant Secretary for Congressional and Intergovernmental Affairs, U.S. Department of Labor to the Honorable Ron Johnson, Chairman, Committee on Homeland Security and Government Affairs, U.S. Senate (Feb. 23, 2015).

[3] Letter from the Honorable Ron Johnson, Chairman, Committee on Homeland Security and Government Affairs, U.S. Senate to the Honorable Thomas E. Perez, U.S. Department of Labor (Mar. 17, 2015) at Footnote 20 citing the Negotiated Rulemaking Act, 5 U.S.C. 561-570A and the Federal Advisory Committee Act, 5 U.S.C. App. II.

Instead, these documents reflect the internal deliberations of an Executive Branch agency and are at the core of the ongoing deliberative process.

Release of deliberative, pre-decisional documents that do not necessarily reflect the Department's final thinking would have several serious consequences. First, as House Education and the Workforce Committee Chairman John Kline has stated with regard to the Department's efforts to update ERISA's fiduciary standard, "it is clear coordination between SEC and DOL is vital to ensure a functioning regulatory framework."[4] The Department agrees about the importance of this coordination. Indeed, it has played a vital role in the development of the proposal to this point. However, interagency coordination and communication must occur with the candor necessary for the free and uninhibited exchange of views. Thus, the Department is concerned about the chilling effect that would occur if Executive Branch employees knew the analysis and deliberations in which they engaged during the development of a regulation could be disclosed in a broad setting. Additionally, dissemination of these documents may raise questions as to whether the Department is taking regulatory actions in response to, or under influence from, proceedings in a legislative or public forum. Finally, making documents available before publication of the proposal could lead to confusion because the public would only have access to partial information being considered by the Department, thus leading to erroneous impressions about what the proposal might ultimately say.

The Committee has also reiterated its request that the Department explain how we will ensure any proposed rulemaking does not adversely affect middle- and low-income Americans and how the Department plans to increase awareness and educate taxpayers about any proposed rulemaking relating to the fiduciary rules and policies on investment advisers for retirement accounts. The Department's February 23, 2015, letter responded to the Committee's request by noting that "[t]he Administration met with a wide variety of stakeholders on this issue, including the financial services industry, employers and plan sponsors, consumer groups, workers, and academics to make sure we have the benefit of all view points as well as the latest independent research," in part to provide for meaningful public participation on this important issue. Indeed, as we previously noted, the public will have additional opportunities for participation as the rulemaking continues. However, for the reasons discussed above, we have significant concerns about setting forth our preliminary deliberations before we publish the proposed rule. That proposal will demonstrate the Department's final thinking on this issue after interagency review and before we receive formal comments from the public.

During a March 24, 2015 call your staff asked if there were specific studies or other concrete information that the Department has taken into account to determine the impact on middle- and low- income Americans. As required by the APA, the NPRM will include information on the Department's basis for the proposal and any studies or analyses the Department relied on in formulating its rule. Thus, the Department expects that the information the Committee seeks will be available in short order. In addition, once the Department publishes the proposal, we will make appropriate efforts to educate the public about the proposal. This approach is consistent

---

[4] Letter from the Honorable John Kline, Chairman, House Committee on Education and the Workforce to the Honorable Thomas E. Perez, U.S. Department of Labor (Mar. 24, 2015).

with the ongoing efforts of the Employee Benefits Security Administration (EBSA) over the decades to educate employers, service providers, workers, and retirees about retirement security issues, as well as the Department's public engagement activities with respect to a broad range of significant rulemakings. However, EBSA does not keep a separate accounting of actual or planned educational expenses for individual rulemaking efforts.

The Department has taken into account many viewpoints in drafting the proposal. If the Committee has continued questions about the issues raised in your letters once the proposed rule and associated exemptions are published, we would be happy to seek a mutually agreeable accommodation. If you or any member of your staff has questions, please contact Kate Garza in the Department's Office of Congressional and Intergovernmental Affairs. She may be reached at (202) 693-4600.

Sincerely,

Adri Jayaratne
Acting Assistant Secretary

cc: The Honorable Thomas R. Carper
Ranking Member
U.S. Senate Committee on Homeland Security & Governmental Affairs

Exhibit 23

U.S. Department of Labor

Office of the Assistant Secretary for
Congressional and Intergovernmental Affairs
Washington, D.C. 20210

June 15, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
U.S. Senate
Washington, D.C. 20510

Dear Chairman Johnson:

I am writing in further response to your request for information related to the Department's coordination with the Securities and Exchange Commission (SEC) in connection with efforts to update the fiduciary standard under the Employee Retirement Income Security Act of 1974, to protect retirement savings for middle class families.

This is the Department's third letter to you regarding the Committee's requests for documents and other information about the conflict of interest rulemaking. As part of the Department's ongoing efforts to accommodate the Committee's information requests, please find enclosed a CD containing documents responsive to your request.

The documents enclosed provide the Committee with over 800 pages that reflect communications about the proposed rulemaking between the Department and the SEC which span four years and the tenures of three SEC Chairs. They reflect both our work with the SEC on a wide range of aspects of the conflict of interest rulemaking and our regular practice of ongoing dialogue and consultation with the SEC on issues where the Commission has an interest. The documents show that we not only consulted extensively with the SEC about securities regulations and market dynamics, but that we also shared with the SEC for consultation every part of the rulemaking package, including the proposed rule, the exemptions, and the economic analysis and supporting data. These communications show the extensive range of topics concerning the rule which were addressed in the coordination between the Department and the SEC, including the point of sale disclosures, the low-fee safe harbor, the exemption for principal transactions, and the cost-benefit analysis. They also demonstrate that Department staff spent considerable time discussing policy and technical issues with a cross-cutting group of SEC staff. As we have said before, we are deeply grateful to the SEC staff for their advice and technical assistance. The documents provided today show plainly that meaningful coordination has taken place between the Department and the SEC.

Our review of potentially responsive documents remains ongoing and, to date, we have not determined to withhold any responsive documents. However, as we have noted in our previous correspondence with the Committee, we have serious concerns that disclosure of some of the requested records would jeopardize the unfettered exchange of candid advice and recommendations among Executive Branch agencies, which we believe is important to sound

decision making. We believe the documents enclosed clearly show that meaningful coordination has taken place between the Department and the SEC. Additionally, I would like to reiterate the Department's offer to brief the Committee to address any remaining questions.

The Department remains committed to continuing to work with the Committee to accommodate your oversight needs for information. If you have additional questions, please contact Kate Garza, Senior Counselor for Congressional and Intergovernmental Affairs, U.S. Department of Labor. She may be reached at (202) 693-4600.

Sincerely,

Adri Jayaratne
Acting Assistant Secretary

cc: The Honorable Tom Carper
Ranking Minority Member
Committee on Homeland Security and Governmental Affairs

Exhibit 24

U.S. Department of Labor

Office of the Assistant Secretary for
Congressional and Intergovernmental Affairs
Washington, D.C. 20210

July 27, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
U.S. Senate
Washington, D.C. 20510

Dear Chairman Johnson:

I am writing as part of the Department's ongoing response to your request for information related to the Department's coordination with the Securities and Exchange Commission (SEC) in connection with efforts to update the fiduciary standard under the Employee Retirement Income Security Act of 1974, to protect retirement savings for middle class families. This is the Department's fifth letter to you regarding the Committee's requests for documents and other information about the conflict of interest rulemaking, including seeking information on the communications between the SEC and the Department about the proposed rule.

On June 15, 2015, as part of the Department's efforts to accommodate the Committee's information requests, we made an initial document production, comprising approximately 400 separate communications and over 800 pages. In the letter accompanying that transmission and in numerous staff conversations, the Department offered to brief the Committee on the Department's substantive coordination with the SEC in the development of the proposed rule. To our disappointment, Committee staff, via an email sent July 8, refused that briefing. We note that in contrast, the Department, through the accommodation process, has provided the House Committee on Education and the Workforce with a staff briefing on our first document production and our extensive collaboration with the SEC. Moreover, by working through the accommodation process, the Department has provided the House Committee with additional productions, will be providing that Committee's staff with an in camera review of certain additional materials, and has offered a second briefing to address any outstanding questions they may have.

Notwithstanding the refusal by this Committee of a staff briefing, the Department remains committed to working through the accommodation process, and, today, we are enclosing a supplemental set of nearly 900 pages of documents and communications shared between the Department and the SEC resulting from that additional review. These materials were produced last week, on July 24, to the House Committee. Taken together, the Department has now produced over 1,700 pages of responsive documents to this Committee reflecting communications about the proposed rulemaking between the Department and the SEC which span four years and the tenures of three SEC Chairs. The documents detail our work with the SEC on a wide range of aspects of the conflict of interest rulemaking. The documents show that we not only consulted extensively with the SEC about securities regulations and market

dynamics, but that we also shared with the SEC for the purpose of consultation the proposed rule, the exemptions, and the economic analysis and supporting data. These communications also show that Department staff spent considerable time discussing policy and technical issues with a cross-cutting group of SEC staff. We also renew our offer to brief the Committee on the Department's extensive coordination with the SEC to the extent the Committee has any additional questions on that topic.

Our previous letters listed the dates of eight conversations or meetings Secretary Perez had with SEC Chair Mary Jo White, and noted that many of those included SEC staff as well. We also described the extensive engagement between other senior officials and staff from both agencies in collaborative discussions that were wide-ranging and included, among other topics, the regulatory impact analysis and explained that as a result of those discussions, the Department made changes to the proposed rule.

At present, the Department and the public's focus is on the merits of the proposed rule. The period for public comment on the proposed rule is not over. On August 10, the Department will begin a multi-day hearing on the proposed rule, after which the notice and comment period will reopen until approximately two weeks after the publication of the transcript of the August hearing. The Department continues to listen to stakeholder suggestions to further improve the proposed rule.

The Department remains committed to continuing to work with the Committee to accommodate your oversight interests concerning the proposed rule. If you have additional questions, please contact Kate Garza, Senior Counselor for Congressional and Intergovernmental Affairs, U.S. Department of Labor. She may be reached at (202) 693-4600.

Sincerely,

Adri Jayaratne
Acting Assistant Secretary

cc: The Honorable Tom Carper
Ranking Minority Member
Committee on Homeland Security and Governmental Affairs

Exhibit 25

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
THE COMMISSIONER

July 21, 2015

via e-mail: e-ORI@dol.gov

The Honorable Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Fiduciary Proposal

Dear Secretary Perez:

I submit this comment letter on my own behalf and representing my own views in connection with the Department of Labor's ("DOL") proposed rules addressing the definition of "fiduciary," conflict of interest requirements for retirement investment advice, and related proposed exemptions and amendments ("the Fiduciary Proposal").

It is clear to me that the DOL rulemaking is a fait accompli and that the comment process is merely perfunctory, yet I feel compelled to weigh in on the Fiduciary Proposal because I am convinced that the rule, when finalized, will harm investors and the U.S. capital markets. The proposal is grounded in the misguided notion that charging fees based on the amount of assets under management is superior in every respect and for every investor to charging commission-based fees. It brazenly dismisses both suitability as a proper standard of care for brokers and the FINRA arbitration system as a mechanism to resolve disputes between financial professionals and their clients – good for plaintiffs' lawyers, bad for investors.

Broker-dealers utilizing a commission-based fee structure will find it difficult, if not impossible, to navigate the labyrinth of prohibitions and exemptions contemplated by the proposal, and many will make the unfortunate – yet entirely rational – choice to stop servicing certain retirement accounts. High net worth broker-dealer clients will be moved into fee-based advisory accounts and will pay a premium to the existing commission structure. Less well-heeled customers will be "fired" by their brokers or jettisoned to robo-advisers. I find it very convenient that the disparate impact the proposed rule will have on low to moderate income workers has received scant attention from supporters of the proposal. Like so many other bad government policies, the DOL rule will affirmatively harm those it ostensibly sets out to help.

Proving that the nanny-state is alive and well, DOL is proposing to substitute its judgment for that of investors in deciding the type of financial professional and fee structure *all*

investors should use when investing their retirement savings. In doing so, it has ignored the benefits to investors of a disclosure-based approach to mitigating potential conflicts of interest. Investors benefit from choice: choice of products, choice in advice providers, and choice in making decisions for themselves.

Since DOL first proposed changes to its fiduciary and conflict of interest rules in 2010, the industry has been scrambling to find a workable path forward. One particularly popular notion has been that a Securities and Exchange Commission ("SEC") rulemaking under Section 913 of the Dodd-Frank Act could stave off an ill-conceived DOL rule. Indeed, many observers were delighted and encouraged by remarks made by SEC Chair Mary Jo White in March of this year announcing her view that the Commission should move forward with such a uniform fiduciary duty rule.[1]

Unfortunately, those who believe that the SEC can stave off the heavy hand of DOL are chasing fool's gold. Section 913 gives the SEC the authority to conduct rulemaking with respect to broker-dealers' standard of care when providing personalized investment advice about securities to a retail customer. Any such standard "shall be no less stringent than the standard applicable to investment advisers" and "any material conflicts of interest shall be disclosed and may be consented to by the customer." Moreover, Section 913 makes clear that commission-based fees must be permissible under any SEC rules.

Brokers could comply with an SEC rule under Section 913 while continuing to charge commissions and using disclosure to mitigate conflicts of interest. However, compliance with an SEC fiduciary rule does not mean compliance with the DOL rule. In the event that the Commission moves forward with a Section 913 rulemaking, the industry will most likely end up with two incredibly burdensome and redundant rules. It would have been possible to conduct a coordinated rulemaking process, but to date the DOL's actions, and the substance of the DOL Fiduciary Proposal, reflect a lack of concern for the Commission's views on these issues.

You have stated that you and Chair White have extensively discussed the Fiduciary Proposal.[2] DOL also maintains that the staffs of the two agencies have worked very closely throughout the drafting process.[3] As you know, I was not included in any of these conversations. From a distance – a place where a presidentially-appointed SEC Commissioner should not be in this context – it appears that any interaction between staffs at DOL and the SEC and all of these discussions with Chair White have borne no fruit. Strikingly, the Fiduciary Proposal does not contemplate or even mention potential SEC rules or the SEC's existing regime for regulating

---

[1] http://www.investmentnews.com/article/20150317/FREE/150319919/secs-mary-jo-white-says-agency-will-develop-fiduciary-rule-for.

[2] *See* Letter from Adri Jayaratne, Acting Assistant Secretary, Department of Labor, to The Honorable John Kline and The Honorable Phil Roe dated March 16, 2015, available at http://edworkforce.house.gov/uploadedfiles/2015.03.16.dol_ltr_to_ew.pdf.

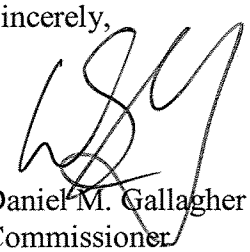
[3] *Id.*

broker-dealers and investment advisers. If the DOL were actually serious about working together with the SEC on an implementable standard, it could have – and should have – included in its proposal some type of substituted compliance mechanism, in which compliance with an SEC fiduciary standard would satisfy the DOL rules. Instead, DOL is choosing to substitute its judgement for that of the expert regulator of broker-dealers, in the process denying investors a choice in products, services, and financial professionals.

There was a different path that the DOL could have taken. In conjunction with the SEC, the DOL could have pursued a disclosure-based solution to the alleged excessive fee problem. Indeed, the Commission has employed a combination of tailored disclosure and market forces for eight decades to ensure that investors can make informed investment decisions. In the context of broker fees, fairness is usually in the eye of the beholder – i.e., the investor. Before rolling out another draconian proposal, the DOL could – and should have – engaged the SEC in a dialogue about fee disclosure. Indeed, the Commission has been debating this issue for over 12 years, and despite a failed attempt at broker point of sale disclosure in 2003, the idea of an appropriately-tailored point of sale disclosure regime is still worthy of pursuing. Perhaps if the Commission had not been so busy over the last five years rotely implementing nonsensical Dodd-Frank mandates such as the conflict mineral disclosure rule (which, it turns out, was proposed right about the same time as the 2010 DOL fiduciary proposal), the agency could have been focusing on key issues like broker fees.

DOL should scrap the Fiduciary Proposal and start working in a meaningful way with the Commission to address the DOL's concerns about broker fees for retirement accounts. The Fiduciary Proposal will harm investors, plain and simple, and an SEC rulemaking under Section 913 of Dodd-Frank will only make a bad situation worse. Let's end the rampant nanny-statism that is motivating both of these rulemakings and instead focus on a disclosure regime that empowers investors and allows brokerage firms to continue to offer a menu of services to all types of investors, not just the affluent. Despite the rancor surrounding this debate, it is my hope and belief that the DOL and SEC can find a reasonable path forward.

Sincerely,



Daniel M. Gallagher
Commissioner

Exhibit 26

Financial Industry Regulatory Authority

July 17, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Conflicts of Interest Rule
Room N-5655

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11712 and D-11713

United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Proposed Conflict of Interest Rule and Related Proposals, RIN-1210-AB32

Dear Sir or Madam:

The Financial Industry Regulatory Authority ("FINRA") welcomes the opportunity to comment on the Department's proposed amendments to the definition of "fiduciary" (the "Proposed Fiduciary Definition"),[1] the proposed Best Interest Contract Exemption (the "BICE"),[2] and the proposed Exemption for Principal Transactions in Certain Debt Securities (the "Principal Transaction Exemption")[3] (together, the "Proposal").

FINRA is the independent regulatory authority of the broker-dealer industry, established under the Securities Exchange Act of 1934 and subject to the oversight of the Securities and Exchange Commission ("SEC"). FINRA comprehensively regulates the broker-dealer industry by adopting investor protection rules, examining broker-dealers for compliance with the federal securities laws and rules of FINRA, the SEC and the Municipal Securities Rulemaking Board, and enforcing those rules.

---

[1] *See* Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice; Proposed Rule, 80 FR 21928 (April 20, 2015).

[2] *See* Proposed Best Interest Contract Exemption, 80 FR 21960 (April 20, 2015),

[3] *See* Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, 80 FR 21989 (April 20, 2015).

1735 K Street, NW
Washington, DC
20006-1506

t 202 728 8000
www.finra.org

In 2014 FINRA conducted 6,800 broker-dealer examinations and took 1,397 disciplinary actions that addressed a wide variety of misconduct. We barred 481 individuals from association with FINRA-regulated firms, suspended 705 individuals from such association, levied more than $132 million in fines, and ordered $32.3 million in restitution to customers.

1. Executive Summary

The Department of Labor has an important responsibility to protect retirement investors. FINRA applauds the Department for raising public awareness about the need to ensure that retirement investors can obtain financial advice without being subject to abusive or predatory sales practices. The Proposal reflects a sincere effort to respond to comments received on the Department's 2010 proposal. The Department is to be commended for its readiness to engage in a dialogue with regulators, investors, and other interested parties about these issues.

A. FINRA Supports a Best Interest Standard for Broker-Dealers

FINRA has publicly advocated for a fiduciary duty for years and agrees with the Department that all financial intermediaries, including broker-dealers, should be subject to a fiduciary "best interest" standard. A best interest standard would align the interests of intermediaries with those of their customers; better protect investors by providing a more consistent set of obligations across financial service providers; help ensure that intermediaries eliminate or manage conflicts of interest; and help ensure that intermediaries establish an ethical culture throughout their firms.

B. Minimum Criteria for a Best Interest Standard

At a minimum, any best interest standard for intermediaries should meet the following criteria:

- The standard should require financial institutions and their advisers[4] to:
    - act in their customers' best interest;
    - adopt procedures reasonably designed to detect potential conflicts;
    - eliminate those conflicts of interest whenever possible;
    - adopt written supervisory procedures reasonably designed to ensure that any remaining conflicts, such as differential compensation, do not encourage financial advisers to provide any service or recommend any product that is not in the customer's best interest;
    - obtain retail customer consent to any conflict of interest related to recommendations or services provided; and
    - provide retail customers with disclosure in plain English concerning recommendations and services provided, the products offered and all related fees and expenses.

[4] The terms "financial institution" and "adviser" will have the same meaning in this letter as in the Proposal.

- A best interest standard should apply to both retirement and non-retirement accounts. Most investors consider their investment portfolio to include their assets in Individual Retirement Accounts, employer plan accounts, and non-retirement accounts. This perception is rational because an investment decision should reflect the assets in all of those accounts. Imposing disparate standards on different accounts would confuse investors because it would conflict with their own logical assumption that those accounts will be treated seamlessly within their total investment portfolio.

- FINRA respectfully urges that the federal securities laws serve as the foundation of the best interest standard that will apply to broker-dealers. To be successful, the standard must build upon existing principles under the federal securities laws rather than introducing precepts without precedent that will impede the good faith efforts of financial institutions and advisers to comply. The federal securities laws and FINRA rules comprehensively regulate all aspects of a broker-dealer's business. Among the many requirements imposed are the principles that broker-dealers deal fairly with customers, adhere to just and equitable principles of trade, and ensure that recommendations are suitable for customers. Broker-dealers also must establish rigorous systems of compliance and supervision, which are regularly examined by FINRA and the SEC.

  Using these existing requirements as the core structure of a best interest standard would reduce the costs of transitioning to a best interest requirement and provide assurance that the core structure will be enforced by the SEC and FINRA. We recognize that imposing a best interest standard requires rulemaking beyond what is presently in place for broker-dealers. We stand ready to work with the Department and the SEC to develop this additional rulemaking.

- Sufficient guidance must accompany the best interest standard to ensure that financial institutions and advisers will understand what is expected in order to comply with the best interest standard.

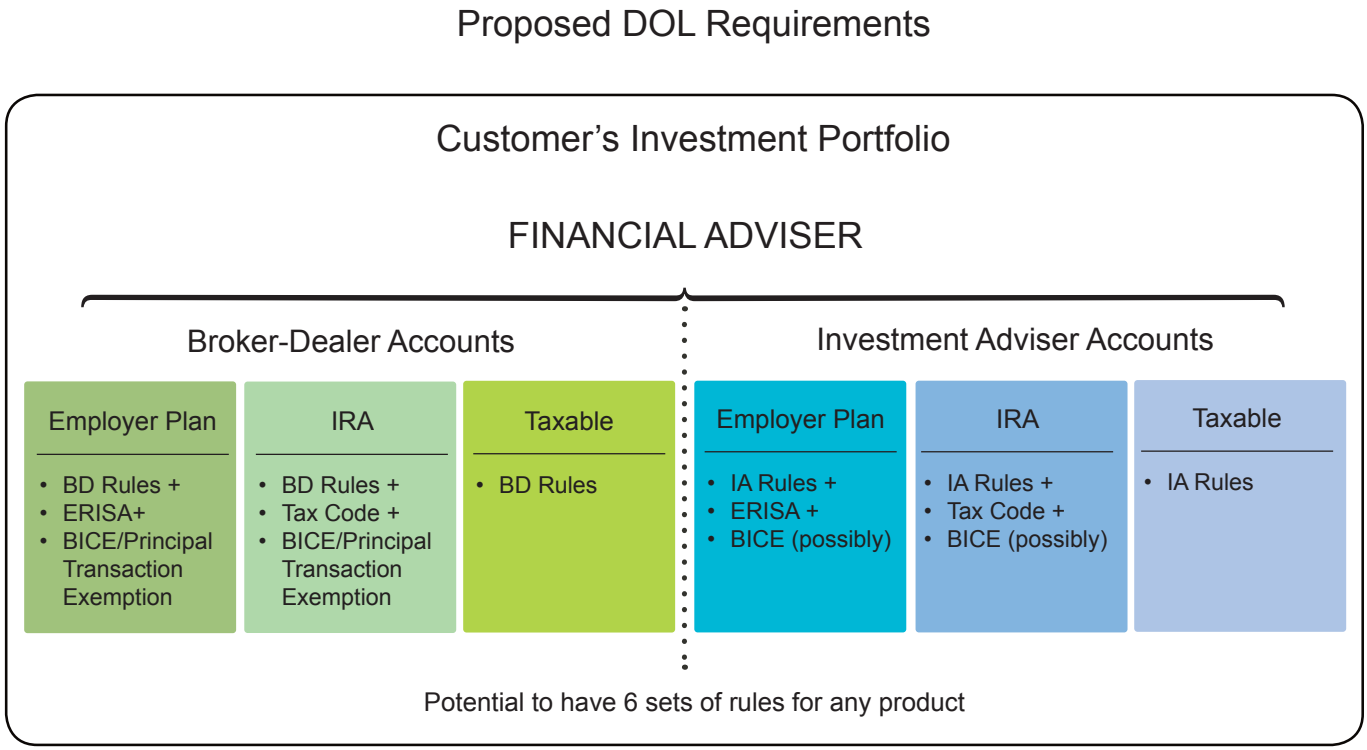
- The standard for different intermediaries, especially broker-dealers and investment advisers, must be harmonized. Approximately 87% of all investment adviser representatives are associated with a broker-dealer and many customers hold brokerage and advisory accounts with the same financial institution. The standards for the investment adviser and the broker-dealer businesses must be harmonized to provide consistent investor protection while reflecting the distinctive nature of each business model.

- Customers must have the ability to recover losses incurred as a result of a financial institution or adviser's violation of a best interest standard. The Proposal would permit customers to seek recovery of losses through the existing arbitration process or through actions in court.

C. The Proposal Does Not Meet Some Minimum Criteria

The Department should be commended for its efforts to establish a best interest standard. The Proposal, however, does not meet some of the minimum criteria for such a standard. The Proposal does not sufficiently build upon the existing regulatory system under the federal securities laws. The Preamble makes passing reference to the comprehensive, well-established system of regulation that the federal securities laws impose upon broker-dealers under the oversight of the SEC and FINRA. The Proposal does not incorporate existing regulation and introduces new concepts that are fraught with ambiguity. We urge the Department to consider that these ambiguities will frustrate the ability of a financial institution and advisers to comply with the Proposal. These ambiguities will necessitate interpretive guidance on a wide array of issues, which the Preamble does not provide. In some respects the Proposal even conflicts with existing FINRA rules and securities market trading practices.

The Proposal would impose a best interest standard on broker-dealers that differs significantly from the fiduciary standard applicable to investment advisers registered under the federal and state securities laws, and it would impose the best interest standard only on retirement accounts. This fractured approach will confuse retirement investors, financial institutions, and advisers. Below is a depiction of the panoply of regulatory regimes that will apply under the Proposal to different accounts served by the same financial adviser for a single customer.



The confusion illustrated by this graphic could be easily ameliorated if a harmonized best interest standard applied to all of the accounts, retirement and non-retirement, investment and advisory and broker-dealer. The customer and financial adviser could then properly consider the investment portfolio as a whole, subject to a single, harmonized standard.

D. FINRA Recommends Five Fundamental Improvements to the Proposal

If the Department proceeds with the Proposal, FINRA recommends five fundamental improvements.

- First, the Proposal should be amended to clarify the scope and meaning of the best interest standard.

- Second, the Proposal's treatment of differential compensation should be simplified by offering financial institutions a choice: either adopt stringent procedures that address the conflicts of interest arising from differential compensation, or pay only neutral compensation to advisers.

- Third, the Proposal should be based on existing principles in the federal securities laws and FINRA rules. In doing so, the Department would help remove many of the ambiguities that will frustrate good faith attempts at compliance, would avoid conflict with existing rules, and would better ensure that the Proposal's objectives are achieved. FINRA stands ready to engage in additional rulemaking to enhance present requirements.

- Fourth, the Department should streamline the BICE and Principal Transaction Exemption (together, the "Prohibited Transaction Exemptions" or "PTEs") so that they only impose conditions that restrict conflicts of interest, and eliminate the ambiguous conditions that will not meaningfully address those conflicts.

- Finally, the Department should clarify the effects of non-compliance with the Prohibited Transaction Exemptions and the extent that remedies can be defined in the BICE contract.

We urge the Department, at a minimum, to adopt these five recommendations in order to ensure that highly-regulated broker-dealers can continue to serve small investors. According to a 2011 study, 98% of IRA accounts with less than $25,000 are commission-based brokerage accounts.[5] Many investors are buy-and-hold customers who pay lower fees -- commissions upon purchase – than would be paid as an annual percentage of their nest egg.

---

[5] *See Assessment of the impact of the Department of Labor's proposed "fiduciary" definition rule on IRA consumers (Oliver Wyman) (April 2011)* at 2.

If the Proposal were adopted as is, many broker-dealers will abandon these small accounts, convert their larger accounts to advisory accounts, and charge them a potentially more lucrative asset-based fee. They will do so largely because of the BICE constraints on differential compensation, the ambiguities in the best interest standard, the lack of clarity concerning various conditions, the costs of compliance, and uncertainty about the consequences of minimal non-compliance.

The Department should not be sanguine about this result. Robo-advice may provide a valuable alternative for some classes of knowledgeable investors, but for many customers robo-advice is a poor substitute for a financial adviser who understands the customer's needs and guides the customer through market turbulence or life events. And private wealth clients who are converted to advisory accounts may still be subjected to conflicted advice, like the peddling of fee-based IRAs for their ERISA plan assets.

2. The Best Interest Standard Should be Clarified

The BICE and the Principal Transaction Exemption would require that a financial institution and adviser affirmatively agree to provide investment advice that is in the best interest of the retirement investor "without regard to the financial or other interests" of the financial institution, adviser, or other party.[6] This principle, borrowed from Section 913 of Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"),[7] has not been developed under ERISA or the federal securities laws and financial institutions, their advisers and their compliance officers and counsel will be forced to anticipate its intended meaning. One could interpret the principle to prohibit any investment advice that takes into account the compensation that the financial institution or adviser will earn for providing that advice. Since financial institutions and advisers are engaged in a business that will earn compensation for their services, they would not provide investment advice at all if the customer were unwilling to pay the fee. Surely this is not the Department's intent.

One could alternatively interpret the principle to prohibit the receipt of compensation that varies with an investment recommendation, but this should not be the meaning because the BICE is intended to permit this compensation. A third interpretation might be that the "without regard to" phrase merely elaborates the term "best interest." Under this interpretation, investment advice may be deemed in the customer's best interest as long as, among other matters, the amount of compensation earned was not a factor in the recommendation. It is unclear how a financial institution or adviser would demonstrate that the amount of compensation was *not* a factor in the recommendation.

---

[6] *See* BICE Section II(c)(1), 80 FR at 21984, and Principal Transaction Exemption Section II(c)(1), 80 FR at 22002.

[7] *See* Section 913(g), Dodd-Frank Act (authorizing the SEC to require broker-dealers to "act in the best interest of the customer without regard to the financial or other interest of the broker [or] dealer … providing the advice").

The "best interest" standard also demands that the financial institution and adviser act prudently. The prudence standard might be interpreted to require the financial institution and adviser to provide ongoing advice to the customer, to alert the customer to market events or other circumstances that may affect the prudence of the customer's holdings, and to recommend changes to his investments. The BICE Preamble states that, "[t]he terms of the contract, along with other representations, agreements, or understandings between the Adviser, Financial Institution and Retirement Investors, will govern whether the nature of the relationship between the parties is ongoing or not."[8] Nevertheless, we understand that ERISA plan fiduciaries must comply with a prudence standard that requires ongoing monitoring of this nature. While some broker-dealers provide different levels of monitoring, most commission-based broker-dealers do not charge for ongoing monitoring of their customers' accounts. Moreover, the Dodd-Frank Act would not impose such a duty on broker-dealers.[9] Indeed, frequent suggestions to the customer that the portfolio be changed might expose a broker-dealer to allegations that it is churning the account.

Another question is whether "best interest" requires the financial institution and adviser to recommend the investment that is "best" for the customer. Recent remarks suggest that the Department believes that it may.[10] Fiduciaries must use their best judgment when they provide financial advice, and the question of which investment meets that standard in a particular case will depend upon many factors, including the customer's investment objectives and risk profile, the various components of a specific product, and its risk correlation to other assets in the customer's portfolio. Reasonable and qualified financial advisers may reach different conclusions about which factors are more significant and which product best meets the criteria that the financial adviser believes are most relevant. Fiduciaries generally are not required to discern or recommend the "best" product among all available for sale nationwide or worldwide. Investment advisers, for example, are required to recommend suitable investments, not the "best" investment available to the customer. A requirement to recommend the "best" product would impose unnecessary and untenable litigation risks on fiduciaries. Such a standard would conflict with the Proposal itself, which permits, and even requires, a

---

[8] The Principal Transaction Exemption Preamble contains similar language. *See* BICE Preamble, 80 FR at 21969, and Principal Transaction Exemption Preamble, 80 FR at 21995-21996.

[9] *See* Section 913(g), Dodd-Frank Act ("Nothing in this section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.").

[10] Secretary Perez has stated:

> If you're an adviser operating under a suitability standard, once you narrow the options down to those that are suitable, you can recommend the one that is most lucrative for you – even though that might mean a lower return for the client. Under a best interest standard, you would need to choose the one that is best for the client.

Remarks by U.S. Secretary of Labor Tom Perez at the Brookings Institution, The Hamilton Project, Forum on Promoting Financial Well-Being in Retirement (June 23, 2015).

financial institution and adviser only to offer a limited group of investments to their customers.[11]

At a minimum, in order to address the ambiguities of the best interest standard, we respectfully recommend that the Department (1) delete the "without regard to" phrase or provide clear guidance on its meaning under as many scenarios as possible, in each PTE, (2) clarify that the best interest standard does not require that a financial institution or adviser prove that they recommended the "best investment" , (3) clarify in the rule text that no ongoing duty exists under the prudence standard in the PTEs, and (4) add a new paragraph (g) to Section II of the proposed PTEs:

> (g) Monitoring. The contract describes whether or not the Adviser and Financial Institution will monitor the Retirement Investor's investments and alert the Retirement Investor to any recommended change to those investments and, if so, the frequency with which the monitoring will occur and the reasons for which the customer will be alerted.

This contractual language would indicate to the retirement investor whether the financial institution and adviser will monitor the account. We emphasize, however, that in addition to this suggested language for the contract, the Department should clarify that the "best interest" standard itself does not impose such an ongoing duty.

3. The Approach to Differential Compensation Should be Simplified

The BICE and the Principal Transaction Exemption would require an adviser and financial institution to warrant that they do not use forms of compensation, including "differential compensation," or other "actions or incentives" that "would tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor." Both PTEs seem to permit a financial institution to receive differential compensation subject to certain conditions. The BICE appears to permit the payment of differential compensation to advisers if it "would not encourage advice that runs counter to the Best Interest of the Retirement Investor (*e.g.*, differential compensation based on such neutral factors as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments would be permissible)."[12] The Principal Transaction Exemption also appears to contemplate the payment of differential compensation to advisers, but uses language different than the BICE, which creates confusion.[13]

The BICE is made more perplexing by the statement in the Proposal that it contemplates compensation such as trail commissions, 12b-1 fees, and revenue

---

[11] *See* BICE Section IV(b), 80 FR at 21985-21986 and BICE Section VIII(c), 80 FR at 21987.

[12] *See* BICE Section II(d)(4), 80 FR at 21984.

[13] *See* Principal Transaction Exemption Section II(d)(4), 80 FR at 22002.

sharing.[14] None of these forms of differential compensation are easily demonstrated to be based upon "neutral factors such as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments." The treatment of differential compensation paid to advisers is thus complex and confusing.

We respectfully recommend a more straightforward treatment of differential compensation to advisers. The Department should offer financial institutions a choice: either implement stringent procedures to address conflicts of interest from the payment of differential compensation to advisers, in which case differential compensation may be paid to them, or pay advisers only "neutral" compensation without those procedures. The Department should offer this choice for principal and agency transactions, and should provide guidance on the types of stringent procedures that would permit the payment of differential compensation.

We therefore suggest that the Department replace Sections II(d)(2)-(4) in the BICE with the following language, and make conforming changes to the Principal Transaction Exemption (new text is underlined; deleted text is bracketed):

> (2) The Financial Institution has adopted written policies and procedures reasonably designed to identify and mitigate **[**the impact of**]** Material Conflicts of Interest and ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II(c).
>
> (3) If the Financial Institution or (to the best of its knowledge) any Affiliate or Related Entity pays any form of compensation to Advisers that varies based on the Assets that they recommend, including payouts based upon commissions, trail commissions or 12b-1 fees, ticket charge discounts, awards, or product contests, and not solely on neutral factors such as the difference in time and analysis necessary to provide prudent advice, then the written policies and procedures described in paragraph (2) must be reasonably designed to ensure that such Advisers only make recommendations that are in the Best Interest of the Retirement Investor. These policies and procedures must include procedures to mitigate, to the extent practical, the effects of these forms of compensation on an Adviser's choice of Asset, to supervise the recommendations made by those Advisers, to promptly detect possible recommendations that may not be in the Best Interest of the Retirement Investor, and to take prompt and appropriate action concerning any recommendation that is found to have not been in the Best Interest of the Retirement Investor.

The procedures that the Department suggests might include those that some broker-dealers have adopted in order help ensure compliance with FINRA rules and the federal securities laws. The procedures suggested by the Department might, for example, require financial institutions to:

[14] *See* BICE Preamble, 80 FR at 21967.

- Establish a committee to consider whether new products are appropriate for the firm's customers, especially new products that pay higher compensation.

- Establish a comprehensive system to supervise the recommendations by all advisers.

- Ensure that no adviser participates in any revenue sharing from a "preferred provider," nor earns more for the sale of a product issued by a "preferred provider" or a proprietary product than for other, comparable products, and that the adviser discloses to customers the payments that the financial institution and its affiliates have received from a preferred provider or for a proprietary product.

- Establish thresholds in the compensation structure that will require increased supervision of advisers that have approached the thresholds.

- Monitor an adviser's recommendations to determine whether products or services for which the adviser receives higher compensation are being sold improperly.

- Penalize advisers by reducing compensation, based on the receipt of customer complaints or indications that conflicts are not being carefully managed.

- Develop metrics for behavior (e.g., red flags), compare an adviser's behavior against those metrics, and base compensation in part on them.

The procedures also might include methods to reduce the disparity of compensation among different products -- without imposing a perfectly neutral compensation system:

- Some broker-dealers use "product neutral" compensation grids to reduce incentives for their financial advisers to prefer one type of product over another. Under this system, a financial adviser receives the same percentage of the gross dealer concession (GDC) no matter the product sold. The broker-dealer also may monitor recommendations of its financial advisers to determine whether any tend to be concentrated in high GDC products.

- In the context of mutual fund and variable annuity sales, some broker-dealers use "fee-capping" to reduce incentives for a financial adviser to favor one product family over another for comparable products. For example, a broker-dealer may cap at 4% the GDC for emerging market equity funds. This cap would eliminate incentives for a financial adviser to favor an emerging market equity fund that paid a higher GDC than the 4%.

.
The Department also suggests policies and procedures that seek similar goals in the BICE Preamble.[15] We would be pleased to work with the Department to develop

[15] *See* BICE Preamble, 80 FR at 21971-21972.

guidance concerning other procedures or to develop FINRA rulemaking that would help the Department achieve these goals. By incorporating existing procedures and FINRA requirements the Department would better ensure that management of conflicts of interest are subject to FINRA examination and enforcement.

By providing financial institutions with a choice of either paying differential compensation to advisers subject to strict procedures, or paying them "neutral" compensation, the Proposal would better ensure that financial institutions may pay their advisers without exposing their customers to major risks from conflicts of interest that arise from differential compensation.

4. The Proposal Should Build Upon Existing Principles in the Federal Securities Laws and FINRA Rules

In our experience, financial institutions are best able to develop successful compliance procedures in response to new standards when regulatory expectations are clear and the standards are derived from existing requirements that they understand. Unfortunately, the Proposal establishes principles that employ imprecise terms with little precedent in the federal securities laws or, in many cases, ERISA. In some respects these principles even conflict with FINRA rules. In order to better ensure that financial institutions, their advisers, and their compliance officers and counsel understand the contours of the best interest standard, we respectfully recommend that the Department incorporate well-understood terms and established principles from the federal securities laws and FINRA rules or directly rely on federal securities laws and FINRA rules, whenever possible. We provide examples below, and we would be pleased to explore other ways in which these terms and principles can be incorporated into the Proposal.

A. Example: Definition of "Recommendation"

The Proposed Fiduciary Definition would define investment advice to include a "recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property."[16] The Proposal defines "recommendation" as "a communication that, based on its content, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."[17] The Preamble requests comment on whether the Department should adopt FINRA's standards for "recommendation" under FINRA Rule 2111.[18]

Rule 2111 generally requires that a broker-dealer and a financial adviser "have a reasonable basis to believe that a recommended transaction or investment strategy

---

[16] *See* Proposed Fiduciary Definition § 2510.3-21(a)(1)(i), 80 FR at 21957.

[17] *See* Proposed Fiduciary Definition § 2510.3-21(f)(1), 80 FR at 21960.

[18] *See* Proposed Fiduciary Definition, 80 FR at 21938.

.

involving a security or securities is suitable for the customer." The meaning of "recommendation" for purposes of the suitability rule has been developed over decades of guidance and enforcement. The question of whether a recommendation exists in a particular situation depends upon the facts and circumstances, but FINRA has articulated several guiding principles that are relevant to the determination.[19] For instance, a communication's content, context and manner of presentation are important aspects of the inquiry. An important factor in this regard is whether – given its content, context and presentation – a particular communication reasonably would be viewed as a "call to action" (*i.e.*, a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy). In addition, the more individually tailored the communication is to a particular customer or customers about a specific security or investment strategy, the more likely the communication will be viewed as a recommendation. Furthermore, a series of actions that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate. It makes no difference whether the communication is initiated by a person or a computer software program. Through this guidance, together with myriad published decisions and practical experience with the rule for nearly 80 years, broker-dealers and their financial advisers, compliance officers and counsel generally understand the meaning of this term.

Reliance on these well-established concepts concerning the meaning of "recommendation" would remove the ambiguities that arise from the use of the term in the Proposal. It would better ensure that broker-dealers and their financial advisers, compliance officers and counsel correctly determine when they will be providing investment advice under the new fiduciary standard. Accordingly, FINRA respectfully recommends that the Department incorporate the meaning of "recommendation" from FINRA Rule 2111 into the Proposal.

The proposed amendments to the definition of "fiduciary" also define investment advice to include "a recommendation as to the management of securities or other property."[20] It is unclear from this language what activities the term "management" is meant to cover. The Preamble more clearly explains that the intent of this provision is to "include advice and recommendations as to the exercise of rights appurtenant to shares of stock (*e.g.,* voting proxies)."[21] We suggest revising this provision to more closely reflect the Department's intent.

Therefore, we respectfully recommend that the Department revise the definition of "recommendation" in proposed Rule 2510.3-21(f)(1) to read as follows (new text is underlined):

---

[19] *See, e.g.*, FINRA Regulatory Notice 12-25 (May 2012); Regulatory Notice 11-02 (Jan 2011); Notice to Members 01-23 (April 2001).

[20] *See* Proposed Fiduciary Definition § 2510.3-21(a)(1)(ii), 80 FR at 21957.

[21] *See* Proposed Fiduciary Definition, 80 FR at 21939.

(1) (i) "Recommendation" means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.

(ii) With respect to a Financial Institution or Adviser that recommends a transaction or investment strategy involving a security or securities, "recommendation" shall have the same meaning as in Financial Industry Regulatory Authority (FINRA) Rule 2111 (Suitability) or any successor rule, as interpreted by FINRA.

We also recommend amendments to proposed Rule 2510.3-21(a)(1)(ii) concerning the "management" of securities or other property, as follows (new text is underlined; deleted text is bracketed):

(ii) Advice or a recommendation as to the **[**management of**]** exercise of rights appurtenant to securities or other property, including [recommendations as to the management of] securities or other property to be rolled over or otherwise distributed from the plan or IRA;

B. Example: Suitability Obligation

A suitability standard is imbedded in the fiduciary duty of an investment adviser under the Investment Advisers Act of 1940[22] and the Proposal implies that it would be an element of the best interest standard. The PTEs thus state that financial institutions and advisers must provide advice that is based on the retirement investor's "investment objectives, risk tolerance, financial circumstances, and needs" – precisely the type of criteria that determine whether an investment adviser's recommendation is suitable under the Investment Advisers Act fiduciary duty and whether a broker-dealer's recommendation is suitable under FINRA Rule 2111.[23]

---

[22] The SEC staff has stated:

> As fiduciaries, investment advisers owe their clients a duty to provide only suitable advice. This duty generally requires an investment adviser to determine that the investment advice it gives to a client is suitable for the client, taking into consideration the client's financial situation, investment experience, and investment objectives. Investment Advisers Act Release No. 1406 (March 16, 1994).

General Information on the Regulation of Investment Advisers, www.sec.gov (Division of Investment Management).

[23] *See* BICE Section II(c)(1), 80 FR at 21984, and Principal Transaction Exemption Section II(c)(1), 80 FR at 22002.

We recommend that the Department make explicit its incorporation of a suitability element into the best interest standard. This change would facilitate customer enforcement of the best interest standard in many cases. Often the best interest standard will be violated because the recommended product was illiquid, presented excessive risk, or otherwise was inconsistent with the retirement investor's financial needs or condition. Including a suitability standard would simplify the customer's complaint in these cases and would provide adjudicators with a specific, well established basis upon which to find that the financial institution or adviser violated the best interest standard. It also would better ensure that an important element of the best interest standard is subject to FINRA examination and enforcement. While the suitability standard would not be the exclusive set of principles with which a financial institution and adviser would have to comply, it would simplify the inquiry for retirement investors and adjudicators in many cases.

In order to clarify that the Impartial Conduct Standards includes a suitability obligation, we respectfully recommend that the Department revise Section II(c)(1) of the BICE (and make consistent changes to the Principal Transaction Exemption) as follows (new text is underlined):

> The Adviser and the Financial Institution affirmatively agree to, and comply with, the following:
>
> (1) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor (*i.e.,* advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise <u>and that is otherwise suitable</u> based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party);

We also recommend conforming changes to the definitions of "Best Interest" in the Proposal.

C. Example: Projections of Performance

Section III(a)(1) of the BICE would require, prior to the execution of the purchase of a recommended Asset, that an Adviser furnish a chart that provides the total cost to the plan, participant or IRA holder, of investing in the Asset for one, five and ten-year periods expressed as a dollar amount, assuming an investment of the dollar amount recommended by the Adviser and "reasonable assumptions about investment performance, which must be disclosed." This requirement conflicts with FINRA Rule 2210, which generally prohibits broker-dealers from including projections of performance in communications with the public. Moreover, the meaning of a

"reasonable assumption" about investment performance is unclear. Without standardized methods of calculating the total cost, meaningful comparisons between alternative investments will be impossible.

We respectfully recommend that the Department eliminate the requirement to provide projections of performance as a basis for the estimation of future cost. We suggest that the Department substitute language based upon the instructions to Form N-1A, the SEC's form for mutual fund registration.[24] Item 3 requires a fee table in the registration statement, including an example that is meant to help investors compare the costs of investing in the registered fund with the cost of other funds. This example assumes a $10,000 original investment, a 5% annual return, and redemption of all shares at the end of one, three, five and ten year periods. The example must state that actual costs might be higher or lower.

The hypothetical nature of the example is apparent and the use of a 5% assumed rate of return should not mislead investors into believing that it is a projection of future returns. If the Department were to take a similar approach, then a retirement investor would have information concerning the cost of its investments in dollar amounts without being misled by projections that FINRA Rule 2210 is intended to prevent. Moreover, this approach would build upon existing regulatory requirements, reducing the likelihood of confusion concerning what is expected under this provision.

D. Example: Two-Quote Requirement

Sections III(d) and IV(a)(2) of the Principal Transaction Exemption would require that before each transaction, a retirement investor receive a statement that includes price quotes for the same or a similar debt security from two ready and willing counterparties that are not affiliates of the adviser, apparently in order to demonstrate that best execution was obtained. The market for debt securities can vary significantly depending on the specific fixed income product. For example, some fixed income securities may trade frequently, be highly liquid and have transparent, accessible and firm quotations available, while others do not have public quotations or frequent pricing information available, and may trade infrequently. Some fixed income securities that are less liquid also are highly fungible, meaning that they trade like other, similar securities, and the pricing in these similar securities can be used as a basis for determining prices in the original security.

Given this significant variation in trading characteristics across fixed income securities, FINRA is concerned that a strict application of a minimum quotation requirement is not practical. A specific debt security may not have been traded recently and expected interest rate movements, concerns about credit risk associated with the issuer, or other factors may have affected its value. A reference price for a "similar" debt security may be unavailable. Moreover, the requirement to obtain the two quotes may delay execution of the transaction and could affect the price that the retirement investor eventually pays.

[24] *See* Form N-1A Part A: Information Required in a Prospectus, Item 3.

Rather than applying a minimum quote standard, we respectfully recommend that the Department replace the two quote requirement with a standard that would permit transactions that meet the requirements of FINRA's best execution rule (Rule 5310). This rule uses a "facts and circumstances" analysis by requiring that a firm dedicate reasonable diligence to ascertain the best market for the security and to buy or sell in such market so that the price to the customer is as favorable as possible under prevailing market conditions. A key determinant in assessing whether a firm has met this reasonable diligence standard is the character of the market for the security itself, which includes an analysis of price, volatility, and relative liquidity.

Rule 5310 also addresses instances in which there is limited quotation or pricing information available. The rule requires a broker-dealer to have written policies and procedures that address how the firm will determine the best inter-dealer market for such a security in the absence of pricing information or multiple quotations and to document its compliance with those policies and procedures. For example, a firm would be expected to analyze pricing information based on other data, such as previous trades in the security, to determine whether the price to the customer is as favorable as possible under prevailing market conditions. If pricing information related to that security is unavailable, a firm may also consider previous trades in a similar security, if that security and those previous trades constitute a reliable basis for comparison. Although a firm should generally seek out other sources of pricing information or potential liquidity when little or none is otherwise available, which may include obtaining quotations from other sources (e.g., other firms with which the broker-dealer previously has traded in the security), in other instances obtaining quotations from multiple sources could adversely affect execution quality due to delays in execution or other factors.

Accordingly, we suggest that Section III(d) be amended to add the following sentence to the end of this section:

> An Adviser or Financial Institution will not be required to obtain price quotes from two ready and willing counterparties that are not Affiliates provided that the purchase or sale of the Debt Security complies with the requirements of FINRA Rule 5310 (Best Execution and Interpositioning) or any successor rule, as interpreted by FINRA.

E. Example: Disclosure of Markups and Markdowns

Section IV(a)(2) and Section IV(b) of the Principal Transaction Exemption would require pre-transaction and confirmation disclosure of the markup, markdown or other payment to the adviser, financial institution or affiliate in connection with the principal transaction. Broker-dealers already are subject to FINRA's markup policy under Rule 2121, which prohibits a broker-dealer from entering into a transaction with a customer "at any price not reasonably related to the current market price of the security."[25] Moreover, FINRA

[25] In 1994 the SEC solicited comment on a proposal to require mark-up and mark-down disclosure on the customer confirmation for riskless principal transactions. The proposal was not adopted and the federal

recently solicited comment on a related initiative that would bring additional pricing transparency to customers through the customer confirmation.[26]

We respectfully recommend that the requirement for disclosure of markups and markdowns be deleted from Section IV(a)(2) and Section and IV(b) and that the following language be added to Section IV as a separate condition:

> Markups and Markdowns. The Adviser and Financial Institution comply with the markup policy of FINRA Rule 2121 or any successor rule and to any applicable FINRA rules concerning the disclosure of pricing information related to principal transactions, as interpreted by FINRA.

We also suggest addition of the following at the end of the first sentence in Section IV(a)(2):

> (if applicable).

F. Example: Definition of "Reasonable Compensation"

The BICE would require the financial institution and adviser to affirmatively agree that it will not recommend an investment if the total amount of compensation anticipated to be received in connection with the purchase, sale or holding of the investment "will exceed reasonable compensation in relation to the total services" provided to the retirement investor.[27] The Principal Transaction Exemption would require that the purchase or sales price of debt securities not be "unreasonable under the circumstances."[28] The meaning of "reasonable" or "unreasonable" compensation for purposes of these provisions is unclear. For example, the Department has not stated whether a broker-dealer may consider the compensation that is normally charged in the broker-dealer industry for similar transactions in determining whether compensation is "reasonable." Even if such a comparison is permissible, the parameters of the comparison are undefined. Which products would provide the basis for comparison? The comparison may be particularly difficult when analyzing the reasonableness of compensation related to a "hold" recommendation.

We respectfully recommend that the Department incorporate existing FINRA rules that are familiar to broker-dealers, their advisers, and their compliance officers and counsel. NASD Rule 2830(d) imposes specific caps concerning investment company securities that broker-dealers may sell. Since mutual funds are commonly found in IRA accounts

---

securities laws do not require that a confirmation statement include the amount of the markup or markdown, nor do they require pre-transaction disclosure.

[26] *See* FINRA Regulatory Notice 14-52 (November 17, 2014).

[27] *See* BICE Section II(c)(2), 80 FR at 21984.

[28] *See* Principal Transaction Exemption Section II(c)(2), 80 FR at 22002.

and employer plans, reliance on these caps would best ensure that the compensation received by financial institutions and advisers is reasonable. FINRA Rule 2121 requires broker-dealers to charge only fair prices and commissions. FINRA Rule 2122 requires broker-dealers to impose only reasonable charges for their services.

We respectfully recommend that the Department add the following language to the end of Section II(c)(2) of the BICE and the Principal Transaction Exemption:

> , provided that an Adviser or Financial Institution will be deemed to have complied with this condition if the recommendation complies with FINRA rules concerning the reasonableness, type and amount of compensation or fees, as interpreted by FINRA.

5. The PTEs Should be Streamlined to Address Specific Conflicts

FINRA respectfully recommends that the Department ensure that the conditions in the BICE and the Principal Transaction Exemption address the conflicts of interest presented by differential compensation and principal transactions, and that the Department eliminate those conditions that will not incrementally strengthen the PTEs by mitigating those conflicts in a meaningful way. The PTEs are designed to permit, subject to conditions, legitimate business activities that otherwise would constitute prohibited transactions under ERISA or the Internal Revenue Code. Some conditions would not incrementally mitigate the conflicts of interest given the other conditions in the PTEs. Moreover, these unnecessary conditions often employ terms with imprecise meanings that will be difficult for financial institutions, compliance officers and advisers to interpret without extensive guidance from the Department.

For example, the BICE would require a financial institution to maintain a public webpage that discloses material compensation "payable" to the financial institution, its advisers and affiliates for services in connection with each retirement asset, the source of compensation, and how it varies among assets. Much of this information would not be useful even to a customer of the financial institution, who will not hire most of the firm's advisers and who may not purchase many of the assets that are listed. Disclosure of this nature would not meaningful reduce, mitigate or eliminate any of the conflicts that arise from the payment of differential compensation given the existing requirements of the BICE.

Similarly, the limitation of permitted assets seems unjustified for the full range of retirement investors. We agree that conflicts of interest can arise with respect to the differential compensation paid for the sale of some products. Nevertheless, these conflicts should be addressed through the policies and procedures and other conditions of the PTEs, not by limiting the choice of investments available to all retirement investors. As a final example, the BICE and the Principal Transaction Exemption would require a financial institution and adviser to affirmatively warrant that they and their affiliates "will comply with all applicable federal and state laws regarding the rendering of investment advice, the purchase, sale and holding of the Asset, and the payment of

compensation related to the purchase, sale and holding of the Asset."[29] Compliance with the law by a financial institution or adviser is a reasonable expectation, but it need not be related to the conflict of interest that arises from the receipt of differential compensation or from principal transactions.

While these conditions do not address the conflicts of interest, they do create ambiguity. The Department will be called upon to answer a host of interpretative questions. What types of compensation is "material" and "payable"? What types of laws are the subject of the warranty? When does a law regard the rendering of investment advice? Must the warranty to one customer cover violations of laws applicable to the investment advice provided to other customers?

FINRA respectfully recommends that the Department streamline the PTEs by eliminating those conditions that do not incrementally address the conflicts of interest at issue in a meaningful fashion. By way of example, we recommend that the Department eliminate Section II(d)(1) of the BICE and the Principal Transaction Exemption, Section III(c) of the BICE, and the limitation on permitted assets.[30] We would be pleased to discuss proposed changes concerning the other conditions that create ambiguity without meaningfully addressing the conflicts of interest.

6. The Effects of Non-Compliance and the Remedies Should be Clarified

Financial institutions and advisers may avoid relying on the PTEs if the effects of non-compliance, even for minor infractions, are ambiguous. Moreover, it is unclear whether the parties to the BICE contract may designate the remedies that will be available in the case of a breach.

A. Effects of Non-Compliance

The consequences of non-compliance with the PTEs are unclear. The BICE Preamble, for example, states that "the exemption is not conditioned on compliance with" the warranties concerning compliance with law and adoption of policies and procedures.[31] We are uncertain, however, whether the BICE or the Principal Transaction Exemption

---

[29] *See* BICE Section II(d)(1), 80 FR at 21984, and Principal Transaction Exemption Section II(d)(1), 80 FR at 22002.

[30] If the Department determines to retain Section II(d)(1), then at a minimum the Department should clarify that this warranty only covers compliance with applicable federal and state laws as they apply to the retirement investor that is a party to the contract, as follows:

> (1) The Adviser, Financial Institution and Affiliates will comply with all applicable federal and state laws regarding the rendering of investment advice to the Retirement Investor, the purchase, sales and holding of the Retirement Investor's Asset, and the payment of compensation related to the purchase, sale and holding of [the] such Asset;

Similar changes would have to be made to Section II(d)(1) of the Principal Transaction Exemption.

[31] *See* BICE Preamble, 80 FR at 21970.

are conditioned on the warranty concerning differential compensation and other arrangements that would tend to encourage recommendations that are not in the customer's best interest. The Preamble implies that this warranty is considered to be part of the "policies and procedures" warranty, in which case the exemption might not be conditioned on compliance with that warranty.[32] On the other hand, the warranty itself states that it "does not prevent" the financial institution from paying advisers differential compensation that is neutral.[33] This language implies that failure to comply with the terms of the warranty *would* "prevent" the financial institution from paying differential compensation, apparently because it would constitute a prohibited transaction under ERISA.

Moreover, it is possible that a financial institution or adviser operating in good faith that fails to meet a specific requirement would be deemed to have engaged in a prohibited transaction in violation of ERISA. We respectfully recommend that the Department clarify that the receipt of differential compensation by a financial institution or adviser or the execution of a principal transaction that failed to comply (1) with all aspects of the warranties or to provide all of the disclosures required by the BICE and the Principal Transaction Exemption or (2) in an insignificant way with a condition of a PTE, would not by itself constitute a prohibited transaction in violation of ERISA. For example, the Department could add a new provision to the BICE and the Principal Transaction Exemption that provides:

> Notwithstanding any other provision to the contrary, the availability of this exemption is not conditioned upon compliance with the warranties required by Section II(d) or providing the disclosures in Section II(e) and the failure to comply with any term, condition or requirement of this exemption will not result in the loss of the exemption if the failure to comply was insignificant and a good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements.

We also recommend that the Department provide guidance on the types of failures that would be considered insignificant. They might include the following (to the extent that the Department determines to adopt the relevant conditions):

- Minor errors in transaction or annual disclosure, including errors in calculating total costs;
- Inadvertent exclusion of an asset from the annual list required to be provided to each retirement investor; and
- Inadvertent problems with the required webpage disclosure, such as unavailability of the webpage for a period of time for technical reasons.

[32] *See* BICE Preamble, 80 FR at 21970-21971.

[33] *See* BICE Section II(d)(4), 80 FR at 21984.

B. Remedies

The BICE would establish a private right of action for breach of contract, without indicating what remedies should be made available to the customer. Could the financial institution include a liquidated damages provision in the contract, limiting the amount of recovery available to the customer? Could the customer demand rescission rights for the securities that have been sold, in which case the contract would effectively constitute a "put" or a guarantee on all transactions that it covers? We respectfully recommend that the Department clarify how much latitude the financial institution and the customer have in drafting provisions in the contract related to the available remedies and damages for breach of contract. We suggest that financial institutions should not be permitted to include a provision for liquidated damages, but that they should be allowed to preclude a right of rescission. The Department could revise Section II(f)(2) of the BICE to read as follows (new text is underlined):

> (f) Prohibited Contractual Provisions. The written contract shall not contain the following:
>
> * * *
>
> (2) A provision under which the Plan, IRA or Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution, or agrees to an amount representing liquidated damages for breach of the contract; provided that the parties may agree to limit damages to an amount equal to the return an investor would have earned from an investment that met the best interest standard at the time of the recommendation and the return that the investor actually earned, and to preclude the right to rescind any transaction the rescission of which is not otherwise contemplated by federal law.
>
> * * *

Thank you again for the opportunity to comment on the Proposal. FINRA would be pleased to discuss any of our comments in this letter or other issues related to the Proposal, at the convenience of the Department staff.

Sincerely,

Marcia E. Asquith

Senior Vice President and Corporate Secretary

cc: The Honorable Thomas E. Perez, Secretary of Labor

Exhibit 27

COMMONWEALTH *financial network*

VIA ELECTRONIC MAIL

July 21, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN 1210-AB32
Regulatory Definition of the Term "Fiduciary" as it Relates to Investment Advice

To Whom It May Concern:

In its notice of proposed rulemaking dated April 20, 2015, the Department of Labor ("Department") published its proposed regulation regarding the definition of a "fiduciary" of an employee benefit plan[1] under the Employee Retirement Income Security Act of 1974 ("ERISA") and proposed updated prohibited transaction exemptions (collectively, the "Proposal"). The Department's Proposal also applies the definition of a "fiduciary" of a plan (including an individual retirement account ["IRA"]) under section 4975 of the Internal Revenue Code of 1986 ("Code") to persons who provide investment advice to a plan, its participants or beneficiaries, or an IRA owner.

The Proposal's expanded definition of a "fiduciary" would result in a monumental change for the financial services industry and fundamentally alter how millions of investors receive guidance about their retirement savings.

Commonwealth Financial Network® ("Commonwealth") is an independent broker/dealer and an SEC-registered investment adviser with home office locations in Waltham, Massachusetts, and San Diego, California, and more than 1,600 registered representatives ("RRs") and investment adviser representatives ("IARs") who are independent contractors conducting business in all 50 states (collectively, "Advisors"). Virtually all of Commonwealth's Advisors work with qualified retirement plans or IRAs and will be affected by the Proposal.

Commonwealth appreciates the opportunity to comment on the proposal. Although we support the Department's intention to clarify the definition of a "fiduciary," we have concerns about the details of the Proposal, and the included "prohibited transaction" exemptions, and we believe that if the regulations were adopted as proposed, the result would be a major disruption to the financial industry, ultimately increasing costs to investors and decreasing participation in retirement savings plans by consumers.

[1] 80 FR 21928 et seq.

29 Sawyer Road
Waltham, MA 02453-3483
800.237.0081
781.736.0793 fax

110 West A Street, Suite 1800
San Diego, CA 92101-3706
877.347.1982
619.471.9701 fax

commonwealth.com Member FINRA/SIPC

Executive Summary

Commonwealth recognizes that the current 5-part test[2] to determine whether a person is acting as a "fiduciary" with respect to an ERISA plan has its shortcomings. Commonwealth supports a well-thought-out and uniform fiduciary standard of care applicable to persons who provide individualized investment advice to plan sponsors, plan participants and beneficiaries, and IRA owners. Advisors who are fiduciaries to a retirement plan (including IRAs) have a duty to avoid material conflicts of interest and to disclose conflicts of interest that cannot be avoided to plan sponsors and participants. The Department must create meaningful and practical "prohibited transaction" exemptions that allow advisers[3] to continue to work with participants and investors so long as the advisers disclose material conflicts of interest. To that end, the Department should craft "rules of the road" for retirement plan advisers that are simple, easy to follow, and not so expensive that they drive up compliance costs, which will ultimately be borne by investors.

The Proposal's extension of the applicability of the definition of "fiduciary" to IRAs is a profound change to the current retirement savings landscape. The change is concerning because of the strict nature of the category of "prohibited transaction" rules involving conflicts of interest related to variable compensation received by "fiduciaries."[4] Absent an exemption from the "prohibited transaction" rules, a "fiduciary" that engages in a transaction with an IRA investor and receives any compensation is subject to steep excise taxes and other liability. The Department's proposed solution, the Best Interest Contract Exemption ("BICE"), is too complex and burdensome to be an effective solution and should therefore be revised before the Department finalizes the regulations.

Another troubling issue is the change to the Department's Interpretive Bulletin 96-1 ("IB 96-1"), which provides a safe harbor for advisers who want to limit their services to investment education and not trigger fiduciary status. The Proposal removes the ability for advisers to identify specific investments as part of hypothetical asset allocation models used to educate participants. This change will only serve to confuse plan participants and provide them with less information about their investment options. The Department should leave the safe harbor created by IB 96-1 unchanged.

As drafted, the BICE "prohibited transaction" exemption would require firms relying on the exemption to disclose potential conflicts of interest at an unprecedented level of detail. Financial firms would need to build entirely new systems to provide the initial and ongoing disclosures. The costs to create these systems would totally outweigh any benefit such detailed disclosures would provide. Instead, BICE should require only general disclosures about conflicts of interest and the fees and expenses associated with an IRA, with links or other sources to more detailed information upon request. In addition, the condition that contracts pursuant to BICE include language that would require disputes to be litigated in state courts under the vagaries of state law would create an uncertain and chaotic dispute-resolution landscape. The current dispute-resolution system is well

---

[2] 29 CFR 2510.3-21(c)

[3] "Adviser," as the Department uses the term in the Proposal, is not limited to investment advisers registered under the Investment Advisers Act of 1940 or similar state law. As used herein, adviser refers to an individual or entity who can be, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker/dealer. See 80 FR 21928, footnote 1.

[4] Code §4975(c)(1)(E)-(F)

equipped to handle investor complaints, including those related to alleged breaches of fiduciary duties by advisers.

Commonwealth questions the data and assumptions in the Regulatory Impact Analysis. The Department has grossly overstated the "harm" to investors that would occur without the Proposal and grossly underestimated the costs of complying with the disclosure and reporting requirements of BICE.

The Proposal does not sufficiently address existing relationships with plans and IRA clients. If, under the final regulation, firms will need to execute agreements to continue servicing existing clients, then firms should be allowed to obtain negative consent to avail themselves of BICE. Otherwise, the process of obtaining BICE via positive consent will be impractical, and the costs associated with "repapering" existing client accounts will be astronomical, leaving enormous numbers of existing clients without the personalized financial advice they are accustomed to receiving and desperately need.

The Department must continue working with the Financial Industry Regulatory Authority ("FINRA") and the Securities and Exchange Commission ("SEC") to ensure that a uniform standard of care applies across industries. In addition, the Department must choose a realistic effective date for the new regulations, giving time to firms to implement major policy and procedure changes and systems upgrades.

I. Commonwealth supports a uniform fiduciary standard of care

Commonwealth acknowledges the need to update the 40-year-old test used to determine whether a person is acting as a fiduciary to a plan. Rather than change the entire definition with a completely new—and somewhat confusing—test, the Department should simply broaden the test by removing two of the elements and including language that applies to plan participants. Concurrently, the Department should work with FINRA and the SEC to create a uniform fiduciary duty and standard of care applicable to the financial services industry that is based on long-standing common-law principles. These simple changes will go a long way to address the Department's concerns about advisers who are acting as fiduciaries or providing fiduciary advice to retirement plans or plan participants, or offering conflicted advice that is in the adviser's best interest, not the best interest of the client.

Commonwealth proposes the following test to determine whether an adviser is acting as a fiduciary to a plan:

> A person will be deemed a fiduciary if, for a direct or indirect fee, the person:
>
> i. Renders advice as to the value of securities or other property or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property
> ii. Pursuant to a mutual agreement, arrangement, or understanding, written or otherwise, with the plan, a plan fiduciary, or a plan participant that

iii. Is individualized based on the particular needs of the plan or a plan participant.

These simple changes would expand the scope of activities by advisers deemed "fiduciary" in nature and address the Department's concerns that advisers may take advantage of the narrowness of the existing 5-part test to offer conflicted advice without being held to a fiduciary standard. At the same time, the language above is not so specific as to create additional loopholes. Furthermore, by using three of the existing elements of the 5-part test, the above-referenced 3-part test is founded on well-established concepts and will be easily adopted by the financial services industry.

II. Applying the fiduciary standard to IRAs

Applying the definition of "fiduciary" to IRAs will create a uniform fiduciary duty applicable to advisers who service retirement plan participants and IRA investors whether the adviser is an RR or an IAR. The problem is that the Proposal would adversely impact how RRs can be compensated for working with IRA clients. Currently, RRs who provide investment advice to IRA clients are exempt from registering as investment advisers under the Investment Advisers Act of 1940, as amended, if the advice is solely incidental to the conduct of business as a broker/dealer.[5] These RRs are not currently deemed fiduciaries and therefore may receive variable compensation depending on the investment product the IRA investor purchases.

These variable compensation structures offer IRA clients, especially clients with smaller account balances, meaningful choices on how to pay for the essential services RRs provide. These variable compensation structures could, however, create a conflict of interest for RRs to recommend products that pay higher compensation. Without practical exemptive relief, these conflicts of interest would create a "prohibited transaction" under the Code.

The Proposal's solution, BICE, would require a huge investment in technology to administer the disclosure requirements. In many cases, RRs will be forced to cease working with IRA clients with modest account balances (e.g., less than $50,000) because it would no longer be worth the expense of complying with BICE. The result is an unfair bias against RRs to the detriment of investors.

The Department must be careful not to discount the essential function RRs serve in the retirement savings marketplace, providing professional guidance and investment services to millions of Americans. RRs encourage working individuals to save for retirement and assist investors, once retired, in finding suitable investments designed to meet investors' investment objectives and goals. The Department must make sure the final regulation is not so onerous that it favors IARs over RRs or limits their ability to perform their crucial role in the retirement savings marketplace.

III. Investment education safe harbor

Since ERISA was enacted in 1974, the retirement marketplace has shifted from plan sponsor-directed defined-benefit plans to participant-directed defined-contribution plans. It has never been more important for participants to have access to investment education so they can make informed

[5] See Investment Advisers Act of 1940, section 202 (a)(11)(C).

decisions about plan participation and retirement savings. The safe harbor created by the Department's IB 96-1 exempts investment education from the definition of "investment advice" under ERISA, thereby allowing advisers to provide investment-related information to participants without becoming fiduciaries. This safe harbor gives plan sponsors the flexibility and choice to work with RRs to whom the plan sponsor might not otherwise have access.

The four general categories of information within the safe harbor are:

1. *Plan information*. The benefits of plan participation, the effects of contributions and withdrawals on retirement income, eligibility, and other information about the operation of the plan.
2. *General Financial or Investment Information*. General concepts such as risk and return, diversification, dollar cost averaging, compounding return, tax-deferred investing, historical rates of return for different asset classes, the effects of inflation, estimating retirement income needs, determining time horizons, and assessing risk tolerance.
3. *Asset Allocation Models*. Hypothetical models of individuals with different time horizons and risk profiles (including specific investment alternatives in model asset allocations).
4. *Interactive Investment Materials*. Questionnaires, worksheets, software, and related materials to help participants estimate future retirement income needs and assess the impact of different asset allocation models on retirement income.

This safe harbor is essential for many small plans to receive professional investment services. In this context, the adviser is providing investment education and may receive variable, commission-based compensation. There is no expectation that the RR is providing individualized investment advice to any particular client.

Notably, the safe harbor allows RRs to identify specific investment alternatives within asset allocation models. The ability to name which specific investments within a retirement plan fit into a particular asset allocation model is essential investment education participants desperately need. The current regime under IB 96-1 works well and should remain unchanged.

Amazingly, the Proposal would remove an adviser's ability to discuss particular investments and remain within the investment education safe harbor. This change is unwarranted and will only serve to provide participants with less information. It makes no sense for an adviser to create hypothetical asset allocation models without being able to indicate which investments in a plan's fund lineup correspond to the asset classes in the models.

IV. Best Interest Contract Exemption

If the Department is intent on expanding the scope of the "fiduciary" definition, it is critical that the Proposal includes a practical exemption that allows advisers to receive variable direct and indirect compensation for their services. BICE, in its current form, is far from practical.

Commonwealth supports the goal of disclosing material conflicts of interest to retirement investors. The Proposal, however, is entirely impractical in the level of detail and specificity required to comply with BICE. The administrative and operational burdens, and the hard dollar costs required

to develop the necessary systems to comply with BICE, far outweigh the incremental benefit to investors over a more generalized disclosure.

The Proposal would require financial institutions to create systems to calculate the 1-, 5-, and 10-year total costs for the point-of-sale disclosure and create a year-end report duplicating much of the same information.[6] In addition, financial institutions would need to create and maintain a public website detailing the costs to investors, compensation to the firm, and compensation to the adviser of all investments sold in the last 365 days or currently available.[7] The Department does not appear to appreciate the scope of financial products offered to investors and completely underestimates the operational and administrative burdens of maintaining all of the required information, not to mention the exorbitant costs for information systems upgrades.

The Department should instead create a model BICE disclosure form that provides general disclosures based on general product types. The model disclosure should be concise and include a brief description of the different types of advisers (i.e., RRs, IARs, and insurance agents), a brief description of available product types, and a general description of how advisers are compensated, with links to sources such as prospectuses and revenue sharing disclosure websites where retirement investors can find more detailed information if they are so inclined.

The Proposal also narrowly defines "Assets" that may be sold to a retirement investor under BICE. Curiously, the definition of "Assets" in the Proposal excludes nontraded real estate investment trusts ("NTRs") and business development companies ("BDCs"), two products on which high-net-worth investors rely to diversify their retirement portfolios. Apparently, the Department's opinion is that these alternative investments are too risky for unsophisticated investors and therefore should not even be an option. Rather than ban products in a paternalistic overreach of authority, the Department should recognize that FINRA, and many state securities regulators, have established strict suitability rules with regard to liquidity and net-worth requirements for investors in alternative investments such as NTRs and BDCs. Many states also limit the total amount of these alternative investments in a portfolio to 10% of an investor's liquid net worth. These suitability rules are designed to ensure that only those investors with the appropriate risk tolerance and financial status purchase these alternative investments. The Proposal should be revised to allow investors access to a broad range of "Assets," including NTRs and BDCs.

The Proposal would create a private right of action for breach-of-contract claims without defining what remedies should be available. The Proposal would subject advisers to state court contract enforcement cases without providing state courts any guidance on appropriate remedies. The private right of action in the Proposal would displace FINRA and SEC authority over customer disputes and subject financial institutions to a variety of state laws. FINRA arbitration is a well-established dispute-resolution process, and FINRA arbitrators are competent to apply the fiduciary standard of care to customer claims in FINRA arbitration. The addition of the private right of action requirement in BICE is merely the Department's roundabout solution to its lack of statutory authority to enforce ERISA's fiduciary duties with respect to IRAs. Instead of inserting a bad procedure, the Department should remove the private right of action requirement from BICE.

[6] 80 FR 21960 et seq.
[7] Id.

V. Regulatory Impact Analysis is based on flawed assumption

The Department's economic analyses are based on studies that are questionable at best. The data was criticized by Brian Reid, chief economist of the Investment Company Institute, at a hearing before the United States House of Representatives Committee on Education and the Workforce.[8] The Department's assertion that mutual funds that pay a commission "underperform" other funds in the same asset class is unfounded. In fact, according to Reid, investors who purchased funds with front-end loads actually outperformed the average return for their fund category.[9] The Department's analysis implies that advisers are simply out to fleece investors and provide no value to investors whatsoever. The Department fails to recognize the critical role advisers play in assisting their clients to financially prepare for retirement and grossly underestimates the valuable services advisers provide to investors that encourage retirement savings participation and help investors create diversified portfolios that match investors' goals and investment objectives.

VI. Grandfathering existing accounts

If the ultimate solution addressing conflicts of interest in commission-based IRAs is BICE, firms should be able to utilize a negative consent process for obtaining BICE relief. Obtaining affirmative consent would be a prohibitive, costly, and time-consuming process, and firms would never achieve 100% compliance. The result will be that countless investors will be suddenly left without access to the financial guidance that they have come to expect and desperately need from their trusted advisers. Commonwealth suggests that the Department allow firms to satisfy the BICE disclosure requirements for existing commission-based IRAs via negative consent. This would allow firms to satisfy their disclosure requirements without undue expense and without disrupting the services provided to existing IRA investors.

VII. Department should work more closely with FINRA and the SEC when it revises the Proposal

With the Proposal's application to IRAs, the Department is moving into an area already heavily regulated by FINRA and the SEC. Based on FINRA's comment letter to the Proposal,[10] it is clear the Department and FINRA are not on the same page. The Department must rely on the expertise of the SEC and FINRA to create a uniform fiduciary standard applied across all retirement vehicles. It is imperative that the rules do not create an uneven playing field or a bias toward certain products or compensation structures.

Conclusion

It is important that the Department does not inadvertently limit investor access to professional guidance by creating regulations that are too restrictive or that serve to stifle investor choice. The Proposal, as currently drafted, would create numerous unintended consequences that would limit

---

[8] See e.g., Oral Testimony of Brian Reid, Chief Economist, Investment Company Institute, Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, United States House of Representatives, June 17, 2015, https://www.ici.org/govaffairs/testimony/15_house_fiduciary_oral.

[9] Id.

[10] See http://www.finra.org/sites/default/files/FINRACommentLetter_DOL_07-17-15.pdf.

investor access to the investment advice they currently receive from their advisers, which is vital to helping them meet their retirement savings goals. The Proposal should be revised to define a simpler test to determine whether a person is acting as a fiduciary and a revised BICE narrowly tailored to address material conflicts of interest. These changes would address the Department's concerns about conflicted advice without confusing investors or limiting investors with modest account balances from accessing quality professional guidance. In addition, the effective date of the new regulations must give firms enough time to update policies and procedures and make technological updates. Firms should have at least two years to comply once the regulations are finalized.

Thank you for the opportunity to comment on the Proposal. If you have any questions regarding our comments or concerns, please call me at 781.736.0700.

Sincerely,
Commonwealth Financial Network

/s/ Brendan Daly
Legal and Compliance Counsel

Exhibit 28

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

December 14, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and
Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Johnson:

I am writing in response to your recent letter to Secretary Lew regarding the Committee's examination of the Department of Labor's (DOL) rulemaking on investment advice regarding retirement plans and the definition of a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA). Your letter seeks information from the Department of the Treasury (Treasury) on (1) its review of DOL's proposed fiduciary rule, and (2) the intersection between the proposed fiduciary rule and Treasury's *my*RA program.

Treasury reviewed drafts of DOL's proposed rule as part of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) review process, as your letter notes. The OIRA process, which is designed to ensure that a draft proposal is consistent with applicable laws and does not conflict with the policies or practices of another agency, offered Treasury opportunities to comment on DOL's draft proposed rule, including DOL's related draft exemptions. Treasury believes that DOL appropriately considered Treasury's comments on the drafts during the OIRA process, including the comments specified in your letter.

Treasury's *my*RA program is a simple, safe, no-fee starter retirement savings option designed for individuals without access to an employer-sponsored retirement plan. In general, the program allows individuals to establish a Roth IRA that is invested exclusively in Treasury retirement savings bonds that safely earn interest at the same rate as the Government Securities Fund (G Fund). As *my*RA account holders grow their savings, they have the option to transfer to a private-sector Roth IRA with diverse investment options at any time, or transfer to a private-sector Roth IRA once they reach the maximum *my*RA balance of $15,000. The structure of the *my*RA program does not include referral fees or third-party payments as inducements for opening an account, nor is there any revenue sharing from the bond that is the sole investment choice.

While Treasury administers *my*RA, DOL would determine whether and to what extent any transaction relating to the *my*RA program would be subject to DOL's proposed fiduciary rule.[1] Accordingly, questions about application of the proposed rule, including any specific inquiries regarding the proposed rule's application to *my*RA transfers, should be directed to DOL. Please note, however, that Treasury's policy regarding *my*RA transfers is currently under development.

We appreciate the opportunity to address these issues. If you have additional questions, please contact me or have your staff contact Ahmed Bhadelia, Office of Legislative Affairs, at (202) 622-1900.

Sincerely,

Anne Wall

Anne Wall
Assistant Secretary for Legislative Affairs

Identical letter sent to:
The Honorable Thomas R. Carper

[1] Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978).

Exhibit 29

July 17, 2015

VIA ELECTRONIC SUBMISSION

The Honorable Phyllis C. Borzi
Assistant Secretary of Labor
Employee Benefits Security Administration
Department of Labor
200 Constitution Ave., NW
Washington, DC 20210
www.regulations.gov

Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule--Retirement Investment Advice (RIN 1210-AB32)

Dear Assistant Secretary Borzi:

The Office of Advocacy (Advocacy) offers the following comment to the Employee Benefits Security Administration (EBSA) in response to the above-referenced rulemaking issued on April 14, 2015.[1] The proposed rule would expand the definition of "fiduciary" of an employee benefits plan. Advocacy thanks EBSA staff for participating in our small business employee benefits roundtable to discuss this rulemaking with small business stakeholders. At the roundtable, small business owners and representatives expressed concern that the proposed rule would be burdensome for small businesses that offer retirement services. Based on input from small business stakeholders, Advocacy is concerned that the Initial Regulatory Flexibility Analysis (IRFA) contained in the proposed rule lacks essential information required under the Regulatory Flexibility Act (RFA)[2]. Specifically, the IRFA does not adequately estimate the costs of the proposal or the number of small entities that would be impacted by it. For example, small business stakeholders advise Advocacy that the proposed rule would likely increase the costs associated with servicing smaller plans sponsored by small business employers. They observe that the proposed rule could even limit their ability to offer savings and investment advice to clients. Based on this feedback, Advocacy encourages EBSA to consider ways to decrease the potential small business burdens of the proposed rule, including expanding the scope of exemptions contained in the proposal. For these reasons, Advocacy recommends that EBSA republish for public comment a Supplemental IRFA before proceeding with this rulemaking.

[1] 80 Fed. Reg. 21927.
[2] 5 U.S.C. § 601 et seq.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),[3] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[4] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[5] The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.[6]

Advocacy performs outreach through roundtables, conference calls and other means to develop its position on important issues such as this one. Advocacy held roundtables with small entities on this issue on August 31, 2011 and June 10, 2015. Advocacy has also spoken with other small business stakeholders about this rulemaking.

Background

On October 22, 2010, EBSA published a proposed rule that would have amended a 1975 regulation that defines when a person providing investment advice becomes a "fiduciary" under ERISA.[7] The proposed rule would have expanded the scope of that definition to subject investment advisers to fiduciary requirements such as required disclosures and to prohibit advisers from engaging in certain transactions.[8]

In response to the 2010 proposal, EBSA received numerous public comment letters stating that the proposal would have made it impermissible for investment advisers to engage in certain transactions that were common practices under the commission-based model. In 2011, EBSA announced that it planned to withdraw the proposed rule, and that the agency would start over to draft a new proposal to update the definition of fiduciary.[9]

On April 14, 2015, EBSA re-issued the proposed rule that would expand the definition of fiduciary of an employee benefit plan under ERISA.[10] The 2015 proposal would extend the fiduciary standard of care to all advisers of workplace retirement plans and IRAs. The proposed rule would require these

---

[3] 5 U.S.C. § 601 et seq.
[4] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).
[5] Small Business Jobs Act of 2010 (PL 111-240) § 1601.
[6] Id.
[7] 75 Fed. Reg. 65263-02, Oct. 22, 2010.
[8] Id.
[9] http://www.dol.gov/opa/media/press/ebsa/EBSA20111382.htm. .
[10] 80 Fed. Reg. 21927.

advisers to disclose any potential conflicts of interests and the proposal would again prohibit advisers from engaging in certain transactions.

The 2015 proposed rulemaking also includes a package of proposed exemptions that would allow advisers to continue to receive payments that could create conflicts of interest if certain conditions are met.[11] Two exemptions have received particular attention from the public: (1) the "best interest contract exemption," and (2) the "seller's carve-out."

The best interest contract exemption would be available to advisers who make investment recommendations to individual plan participants, IRA investors, and small, non-participant-directed plans with fewer than 100 participants.[12] The exemption would require retirement investment advisers to formally acknowledge fiduciary status and enter into a contract with their customers in which they commit to fundamental standards of impartial conduct.[13]

The seller's carve-out would exempt fiduciary advice made to a plan in an "arm's length transaction."[14] The seller's carve-out would only be available for employee benefit plans that have 100 or more participants.[15]

In the RFA analysis of the proposal, EBSA defines a small business based on the SBA size standard for businesses in the Financial Investments and Related Activities Sector: a business with up to $38.5 million in annual receipts.[16] Because EBSA lacks data on revenue to precisely measure the number of firms which meet this size standard by type of firm (such as broker dealer or registered investment advisor), the agency does not integrate this definition into any of its analyses. Instead, EBSA consulted with staff and reviewed analyses from the Securities and Exchange Commission (SEC) as well as public comments to a SEC request for information to calculate the number of small entities that would be impacted by the proposal.[17] EBSA conservatively and generally estimates that up to 2,440 small broker dealers (BDs), 15,100 small registered investment advisers (RIAs), and 2,300 other small service providers to ERISA plans would experience additional costs imposed by the proposed rule.[18]

In the proposal's Regulatory Impact Analysis (RIA), EBSA describes two different cost scenarios to estimate the potential costs of the proposal on small entities. EBSA concludes that small BDs on average could spend approximately $53,000 (Scenario B) or $242,000 (Scenario A) in the first year and approximately $21,000 (B) or $97,000 (A) in subsequent years; small RIAs will spend approximately $5,300 in the first year and $500 in subsequent years; and small service providers will spend approximately $5,300 in the first year and $500 in subsequent years.[19]

---

[11] Id.
[12] Id.at 21929.
[13] Id.
[14] Id. at 21941.
[15] Id.
[16] Regulatory Impact Analysis for Fiduciary Investment Advice proposal , p. 181, available at http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.
[17] Id. at 2.
[18] Id. at 182.
[19] Id.

EBSA bases these cost estimates on SEC information received in response to a 2013 Request for Data and Other Information (RFI) relating to the benefits and costs that could result from various alternative approaches regarding the standards of conduct and other obligations of BDs and RIAs.[20] EBSA focused on two comment letters in response to the SEC RFI. The first from the Securities Industry and Financial Markets Association (SIFMA) provided estimated costs that would be incurred by BDs if the SEC promulgated a regulation establishing a uniform fiduciary standard.[21] The second comment letter from the Investment Adviser Association (IAA) approximated costs that are incurred by its RIA members to comply with SEC rules based on a recent survey of investment advisers.[22]

The Proposed Rule's IRFA is Deficient

Under the RFA, an IRFA must contain: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimated number of regulated small entities (based on the North American Industry Classification System (NAICS)); (4) a description and estimate of compliance requirements, including any differential for different categories of small entities; (5) identification of duplication, overlap, and conflict with other rules and regulations; and (6) a description of significant alternatives to the rule.[23] Advocacy is concerned that because the proposed rule's IRFA is deficient, the public has not been adequately informed about the possible impact of the proposal on small entities, and EBSA has not effectively weighed less burdensome significant alternatives to the proposed rule that would meet the EBSA's objectives.

Primarily, EBSA does not clearly state what constitutes a small business in the analysis for this rulemaking. Although EBSA uses a NAICS Code to define a small business, this definition does not figure into EBSA's estimate for affected entities because the agency states that it lacks data on revenue.[24] Instead, EBSA relies on a combination of SEC and EBSA data to estimate the total number of BDs, RIAs, and ERISA plan service providers in the market. The agency then proceeds to divide firms into small, medium, and large size categories based on an allocation methodology that is not fully explained, as it draws on a combination of data sources and unstated assumptions.[25] The agency's methodology for eliminating non-ERISA/IRA firms from the affected firm count suffers from a similar lack of transparency and clarity. For these reasons, it is uncertain whether the IRFA contained in the proposed rule accurately takes into account all of the potential small business impacts of the proposal.

Additionally, EBSA based its cost estimates for the proposal on information provided by SIFMA and IAA. However, while these comment letters provide citations to broader summaries of surveys conducted by the commenter, there is little to no information about these surveys. EBSA should provide more information on these surveys as they play a critical role in its IRFA. Key

---

[20] Id.at 157.
[21] Id.
[22] Id.
[23] 5 USC § 603.
[24] It is worth noting that Advocacy's firm-size data has revenue data on the NAICS code that EBSA employs in its definition.
[25] See Regulatory Impact Analysis for Fiduciary Investment Advice proposal, p. 159, available at http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.

information omitted includes the demographic makeup of the surveys' samples, response rates, sampling procedures, and surveying procedures to name a few.

Without more information on the data sources and methodologies on which it relies in its IRFA, EBSA runs the risk of misapplying data from the comment letters. This is particularly problematic in the use of the "IAA ratio" to determine the number of small businesses potentially affected by this proposed rule because it is not clear whether the IAA's data is representative of all small firms which would be necessary to allow for such a broad extrapolation.

Given all of these questions regarding the underlying data used in its estimates, EBSA rightfully acknowledges the shortcomings in some of its data sources, estimates, and methodologies in its IRFA. However, EBSA does not actually do anything in its analysis that would take this uncertainty into account. For example, EBSA should consider both obtaining additional information on small entities as well as providing cost estimates in ranges and running multiple sensitivity analyses to see how the costs of the rule might change if some of the factors considered by EBSA are different than its assumptions.

As the proposal contains an IRFA with inadequate cost and small business estimates, the public will not be fully informed as to the possible impact of the proposed rule on small entities. Moreover, because the estimates provided by the IRFA appear to be flawed, it is uncertain how EBSA could accurately evaluate alternatives to the proposed rule which would reduce the burdens on small businesses. As an example, a number of small business owners and representatives have been in contact with Advocacy to express concern that the proposed rule underestimates the burdens it would impose and that the proposal could even limit their ability to offer savings and investment advice to client. Without a more accurate understanding of the regulatory burden on small businesses, EBSA will not be able to understand both the extent of the costs of the rule as well as the efficiency and effectiveness of potential alternatives to help small entities. As described in more detail below, small business stakeholders report to Advocacy that EBSA does not fully consider and evaluate certain alternatives in the proposal that could help reduce these costs and burdens on small entities.

Small Business Feedback

Advocacy has performed outreach and heard from a number of small business owners and representatives about this proposal. On August 31, 2011, Advocacy hosted a small business roundtable to provide an opportunity for small business owners and representatives to discuss the 2010 proposal with EBSA staff. On June 10, 2015, Advocacy hosted a small business roundtable on the EBSA re-proposed rule at which time EBSA staff made a presentation to small business representatives about the rulemaking. EBSA staff also received feedback from small business stakeholders at the roundtable. Since the roundtable, Advocacy has continued to receive feedback from small business owners and representatives.

Much of the input that Advocacy has received comes from small business owners who provide administrative services to small pension plans of less than 100 participants that are sponsored by small business employers. These small business stakeholders report that the proposed rule would likely increase the costs and burdens associated with servicing smaller plans sponsored by small

business employers. Small business owners expressed concern that the proposal could limit financial advisers' ability to offer savings and investment advice to clients, such as suggesting options for an IRA rollover. These small business stakeholders report that the proposal could ultimately lead advisers to stop providing retirement services to small businesses.

To help reduce the burdens associated with the proposed rule, small business owners and representatives suggest expanding the scope of two exemptions contained in the proposal: (1) the best interest contract exemption, and (2) the seller's carve-out. Small business stakeholders suggest that the best interest contract exemption should be extended to participant-directed plans. Small business owners reported to Advocacy that most small plans are participant-directed. Therefore, under the current proposal, small business advisers to small plans would not be able to take advantage of this exemption.

Small business representatives also observe that EBSA should consider extending the "seller's carve-out" to interactions with smaller plans of less than 100 participants. Small business stakeholders indicated that smaller plans with less than 100 participants usually operate similarly and have a level of sophistication similar to larger plans. Not being able to take advantage of the seller's carve-out would discourage small business advisers from working with smaller plans.

Recommendation

Advocacy recommends that EBSA republish a Supplemental IRFA for additional public comment before proceeding with this rulemaking. The Supplemental IRFA should provide a more accurate estimate of the small entities impacted by proposal. Specifically, EBSA should be more transparent about its process for allocating firms into various size categories based on distribution percentages derived from previous reports. EBSA should also better explain, and provide evidence to justify, its approach for dividing ERISA plan service providers into small, medium, and large size categories.

Advocacy also suggests that EBSA provide in its Supplemental IRFA a more accurate estimate of the costs of the proposal. Because of the lack of clarity and small entity data, Advocacy recommends that EBSA conduct multiple sensitivity analyses on its assumptions and use ranges as opposed to point estimates wherever possible.

Advocacy also recommends that the Supplemental IRFA also take into account the suggestions of small business owners and representatives to expand the scope of the best interest contract exemption and the seller's carve-out. Advocacy encourages EBSA to continue to conduct outreach with small business stakeholders to help develop additional alternatives and exemptions in the proposed rule that would make it less burdensome and costly for small businesses. By republishing a Supplemental IRFA and giving full consideration to additional regulatory alternatives, EBSA will gain further valuable insight into the effects of the proposed rule on small business and be more transparent in explaining and justifying the choices that it made in the proposal. Advocacy stands ready to assist EBSA in these efforts.

Advocacy again thanks EBSA for participating in its small business roundtable and encourages the agency to adopt these recommendations. If you have any questions or require additional information please contact me or Assistant Chief Counsel Dillon Taylor at (202) 401-9787 or by email at Dillon.Taylor@sba.gov.

Sincerely,

Claudia Rodgers
Acting Chief Counsel for Advocacy

Dillon Taylor
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Howard Shelanski, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

Exhibit 30

Congress of the United States

Washington, DC 20510

February 11, 2015

The Honorable Thomas Perez
Secretary
Department of Labor
Washington, DC 20002

The Honorable Shaun Donovan
Director
Office of Management and Budget
Washington, DC 20201

Dear Secretary Perez and Director Donovan:

In April 2015, the Department of Labor (DOL) issued a proposed Conflict of Interest rule to ensure that retirement investment advisers act in the best interests of their clients. In response, many of the country's largest insurance and financial companies, in their official comments to the Department of Labor and in other public forums, opposed the proposed rule and predicted dire consequences if it was finalized.

However, new information obtained by our staff indicates that some of these same companies are providing very different assessments to their own investors, assuring them that the rule will have no significant impact on their companies. In contrast to their public doomsday predictions, industry leaders have told their own investors that they "don't see this as a significant hurdle,"[1] "will once again respond to marketplace or regulatory changes effectively,"[2] and that they are well-positioned to "adapt to any regulatory framework that emerges."[3]

Publicly traded companies are rarely held accountable for the assertions they make when lobbying in Washington, even if these assertions are untrue. But when communicating with investors, publicly traded companies are required by law to provide full and accurate information

---

[1] *Lincoln National's (LNC) CEO Dennis Glass on Q1 2015 Results—Earnings Call Transcript,* Seeking Alpha (May 2, 2015) (online at http://seekingalpha.com/article/3131306-lincoln-nationals-lnc-ceo-dennis-glass-on-q1-2015-results-earnings-call-transcript?part=single).

[2] *Lincoln's (LNC) CEO Dennis Glass on Q2 2015 Results—Earnings Call Transcript,* Seeking Alpha (July 30, 2015) (online at http://seekingalpha.com/article/3378035-lincolns-lnc-ceo-dennis-glass-on-q2-2015-results-earnings-call-transcript?part=single).

[3] *Prudential Financial (PRU) John R. Strangfeld on Q2 2015 Results—Earnings Call Transcript,* Seeking Alpha (Aug. 6, 2015) (online at http://seekingalpha.com/article/3410836-prudential-financial-pru-john-robert-strangfeld-on-q2-2015-results-earnings-call-transcript?page=2).

about any material matters that may affect their business models or stock valuations.[4] The information companies provide to their investors must represent their true and accurate assessments of the impact of the proposed rule or they would be in violation of federal securities law.

We are writing to provide you with this new information about the financial industry's more sanguine view of the Conflict of Interest rule and to urge you to quickly finalize this rule in order to protect Americans and their retirement savings.

Doomsday Predictions of Financial Firms

On December 14, 2015, leaders at nine of the largest insurance companies in the country—including Jackson National Life Insurance Company, Lincoln National, Prudential Financial, and Transamerica Corporation—published an article entitled "Department of Labor: Don't Make it Harder for Americans to Gain Guaranteed Income in Retirement." They were critical of the proposed rule, warning of the "potentially devastating impact" it could have on "hardworking Americans" and claiming that it would "make it more challenging for low- and middle-income workers to purchase annuities" because it would "force many Americans ... to pay more for financial products." They asserted that "it is difficult to overstate the detrimental impact" of the proposed rule on middle-class Americans.[5]

The same companies reiterated these negative predictions about the rule's impact in the comment letters they submitted to DOL on the proposed rule. The proposals "are bad for investors and for America," wrote Jackson National Life Insurance Company president James Sopha, and "it will be very difficult, if not impossible for financial professionals and firms to comply with the requirements."[6] Dennis Glass, President and CEO of Lincoln National, called the rule "immensely burdensome" and "extremely intrusive" and claimed that its provisions would be "so burdensome and unworkable that financial advisors and firms will not be able to use it."[7] Prudential Financial's Executive Vice President and General Counsel, Susan Blount, criticized the rule's recordkeeping and disclosure requirements, arguing that they posed a

---

[4] *See* S.E.C. Rule 10b-5, at 17 C.F.R. 240.10b-5 (online at www.gpo.gov/fdsys/pkg/CFR-2015-title17-vol4/xml/CFR-2015-title17-vol4-sec240-10b-5.xml).

[5] Walter White, et al., *Department of Labor: Don't Make It Harder for Americans to Gain Guaranteed Income in Retirement*, Morning Consult (Dec. 14, 2015) (online at https://morningconsult.com/opinions/department-of-labor-dont-make-it-harder-for-americans-to-gain-guaranteed-income-in-retirement/).

[6] Letter from James R. Sopha, President, Jackson National Life Insurance Company, to the Department of Labor (July 21, 2015) (online at www.dol.gov/ebsa/pdf/1210-AB32-2-00688.pdf).

[7] Letter from Dennis R Glass, President and CEO, Lincoln Financial Group, to the Department of Labor (July 21, 2015) (online at http://www.dol.gov/ebsa/pdf/1210-AB32-2-00643.pdf).

"significant challenge," could lead to "increased compliance costs," and "will significantly increase" firms' servicing expenses.[8] Finally, Kent Callahan, President and CEO of Transamerica's Investment and Retirement Division, criticized the proposal's "harmful impact" and called the design of the proposed conflict of interest standard "unworkable."[9]

Statements to Investors

In contrast to the doomsday predictions they make in Washington op-eds and comment letters to the Department of Labor about the Conflict of Interest rule, these companies are providing their investors with a much more sanguine view of the impact of the rule, explaining that it will have few, if any, negative impacts on their financial advisers, their clients, or their bottom line, and may even create new business opportunities.

Lincoln National

In May 2015, the CEO of Lincoln National, Dennis Glass, told investors: "Lincoln, because of our scale, broad set of product offerings and strong and diverse distribution franchises with a proven ability to pivot in response to market or regulated changes will be able—will therefore be able to navigate through whatever comes down the road." Despite calling the proposed rule "unworkable" in his comment letter to DOL, Glass told investors that "we don't see this as a significant hurdle for continuing to grow that business."[10]

Similarly, during an investor call in July 2015, Mr. Glass told investors that he is "confident we will once again respond to marketplace or regulatory changes effectively."[11]

Prudential Financial

In May 2015, Stephen Pelletier, the Executive Vice President and COO of Prudential Financial, explained to investors the potential impact of the proposed rule:

---

[8] Letter from Susan L. Blount, Executive Vice President and General Counsel, Prudential Financial, Inc., to the Department of Labor (July 21, 2015) (online at http://www.dol.gov/ebsa/pdf/1210-AB32-2-00687.pdf).

[9] Letter from Kent Callahan, President and CEO, Transamerica Investment and Retirement Division, to the Department of Labor (July 20, 2015) (online at http://www.dol.gov/ebsa/pdf/1210-AB32-2-00583.pdf).

[10] *Lincoln National's (LNC) CEO Dennis Glass on Q1 2015 Results—Earnings Call Transcript,* Seeking Alpha (May 2, 2015) (online at http://seekingalpha.com/article/3131306-lincoln-nationals-lnc-ceo-dennis-glass-on-q1-2015-results-earnings-call-transcript?part=single).

[11] *Lincoln's (LNC) CEO Dennis Glass on Q2 2015 Results—Earnings Call Transcript,* Seeking Alpha (July 30, 2015) (online at http://seekingalpha.com/article/3378035-lincolns-lnc-ceo-dennis-glass-on-q2-2015-results-earnings-call-transcript?part=single).

> [A]ll the factors I just mentioned give us the basis for doing that work with our partners to achieve the very important goal of ensuring that their clients have continued access to high-quality retirement income options, very much including the guaranteed lifetime income that is really distinctive to the annuities industry, and that we'll be able to make these offerings available on terms that work for everybody.[12]

In August 2015, Mr. Pelletier, stated that Prudential's "market position, our mix of businesses, and the strength of our franchise will help us to adapt to any regulatory framework that emerges." Similarly, CEO of Prudential Financial John Strangfeld assured investors that officials at Prudential "remain confident that we will successfully navigate whatever the ultimate outcome may be."[13]

Jackson National Life Insurance Company

In March 2015, Mike Wells, the CEO of Jackson's parent company, Prudential U.K., assured investors that the company was "better situated than any of our competitors to address" changes from the potential rule "quickly and effectively."[14]

In August 2015, Mr. Wells promised investors that Prudential would "come out on the other side, advantaged again." Although Jackson's comment letter to DOL said that it would be "very difficult, if not impossible" for companies to comply with the proposed rule, Mr. Wells cited a previous instance in which a "material change in the retirement market of the UK" led to an increase in retail sales, and argued that Prudential and Jackson "like minor disruptions in markets." Mr. Wells stated that his company, adjusting to a final rule, would "build whatever product is appropriate under that set and adapt faster and more effectively than competitors."[15]

Transamerica Corporation

---

[12] *Prudential Financial (PRU) John R. Strangfeld on Q1 2015 Results—Earnings Call Transcript,* Seeking Alpha (May 7, 2015) (online at http://seekingalpha.com/article/3156536-prudential-financial-pru-john-r-strangfeld-on-q1-2015-results-earnings-call-transcript?part=single).

[13] *Prudential Financial (PRU) John R. Strangfeld on Q2 2015 Results—Earnings Call Transcript,* Seeking Alpha (Aug. 6, 2015) (online at http://seekingalpha.com/article/3410836-prudential-financial-pru-john-robert-strangfeld-on-q2-2015-results-earnings-call-transcript?page=2).

[14] *Prudential's (PUK) CEO Tidjane Thiam on Full Year 2014 Results—Earnings Call Transcript* (Mar. 10, 2015) (online at http://seekingalpha.com/article/2989986-prudentials-puk-ceo-tidjane-thiam-on-full-year-2014-results-earnings-call-transcript?part=single).

[15] *Prudential's (PUK) CEO Mike Wells on Q2 2015 Results—Earnings Call Transcript* (Aug. 11, 2015) (online at http://seekingalpha.com/article/3430866-prudentials-puk-ceo-mike-wells-on-q2-2015-results-earnings-call-transcript?part=single).

In August 2015, Alex Wynaendts, the CEO of Transamerica's parent company, Aegon N.V., told investors that the company has a "track record of being able to adjust" in order to deal with the proposed rule. Although Transamerica called the proposed rule "unworkable" in its comment letter to DOL, Wynaendts told investors that "we've shown … flexibility and we expect to be able, with that flexibility, [to] remain very strongly positioned in a market that is providing products that millions of customers in the U.S. continue to need."[16]

Conclusion

Contrary to their dire and unsupported public predictions and official comments to the Department of Labor about the impact of the proposed Conflict of Interest rule, insurers and financial firms provide much more optimistic assessments when they speak to their own investors and are required by law to provide accurate reports of material information. As you work to finalize the rule, we hope that you will make careful note of these statements.

The Council of Economic Advisers estimates that financial adviser conflicts of interest like those targeted by the proposed rule currently cost American families $17 billion annually in lost retirement savings.[17] The American people deserve access to the best financial advice possible from their retirement advisors—free from any conflicts of interest—and we urge you to finalize the rule as quickly as possible.

Sincerely,

Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives

Elizabeth Warren
Ranking Member
Subcommittee on Economic Policy
Committee on Banking, Housing, and Urban Affairs
U.S. Senate

---

[16] *Edited Transcript: AGN.AS – Q2 2015 Aegon NV Earnings Call,* Thomson Reuters (Aug. 13, 2015).

[17] Council of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings* (February 2015) (online at www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf).