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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

DAVID P. CLEARY, STAFF DIRECTOR
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<http://help.senate.gov>

March 10, 2015

The Honorable Shaun Donovan
Director
Office of Management and Budget
1650 Pennsylvania Avenue, NW
Washington, DC 20503

Dear Director Donovan:

We write today to express concern that the U.S. Department of Labor's proposed rule to change the regulatory structure for and redefine the term "fiduciary" for purposes of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") could result in a number of unintended consequences for consumers. We believe that individuals who provide investment advice should be trained, transparent, ethical, and represent the financial best interests of their clients. However, we are concerned that the proposed rule may harm consumer access to crucial retirement education or services, ultimately diserving the very people it seeks to aid—working and middle class Americans.

ERISA articulates the circumstances under which an individual is a fiduciary with respect to an employee pension benefit plan and/or an employee welfare benefit plan.¹ One circumstance includes if "[s/]he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so."² President Obama recently announced the Department of Labor ("the Department") would update and expand the types of retirement investment advice subject to ERISA.³ While the text of the proposed rule has yet to be released, we have great concerns that the proposal may resemble the administration's contentious, and ultimately failed, proposed rule from 2010 ("2010 rule").⁴ Moreover, the Department's seeming lack of coordination with the Securities and Exchange Commission ("SEC") and industry experts in drafting the rule is troubling.⁵

¹ See Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(21)(A) (2013).

² *Id.* (emphasis added).

³ See President Barack Obama, Remarks by the President at the Am. Ass'n of Retired Persons (Feb. 24, 2015), *available at* <http://www.whitehouse.gov/the-press-office/2015/02/23/remarks-president-aarp>.

⁴ See Press Release, U.S. Dep't of Labor, US Labor Department's EBSA to re-propose rule on definition of fiduciary (Sept. 19, 2011), *available at* <http://www.dol.gov/opa/media/press/ebsa/EBSA20111382.htm>.

⁵ See Remarks, Securities and Exchange Commissioner Daniel M. Gallagher at The SEC Speaks in 2015 (Feb. 20, 2015), *available at* <http://www.sec.gov/news/speech/022015-spchcdmg.html#.VOzLqy4sAWs> [hereinafter *Gallagher Remarks*].

The Department's 2010 rule likely would have inhibited workers' access to affordable retirement planning assistance and product choices. Bipartisan congressional concern expressed that the 2010 rule "[i]nadvertently could have significantly restricted the availability of investment help to low- and middle-income individuals and small businesses"⁶ and "[i]s unworkable and if finalized could cause significant unintended consequences in the retirement benefits community."⁷ The 2010 rule may have also jeopardized workers' access to brokerage IRAs, a tax-advantaged savings method currently used by many American workers. As it was written, the failed 2010 rule may have forced IRA brokerage investors to choose among three unattractive options: (1) pay for a more expensive advisory relationship, (2) switch to a "low support" brokerage relationship, albeit with greatly reduced access to an investment professional, information, tools, and product choice, or (3) move their savings out of a tax-advantaged retirement account.⁸ The 2010 rule was an especially troubling proposal with regard to IRAs because IRAs are not employee benefit pension plans for purposes of ERISA. Further, there is significant question as to whether IRAs could be subject to Section 404 of ERISA, pertaining to fiduciary duties, as would have occurred had the 2010 rule been finalized.

The 2010 rule may have also negatively affected workers' financial literacy and resulted in Americans making retirement decisions without the best available information. Once again, bipartisan congressional concerns were raised that the rule "[w]ould have an adverse effect; ultimately limiting access to investment education and information"⁹ and "[a]ttaching a fiduciary obligation . . . to actions promoting financial literacy and education would likely . . . harm the retirement security of millions of workers and their families."¹⁰ Nonetheless, thirty-four percent of surveyed small businesses who offer retirement plans recently indicated that a re-proposed rule similar to the 2010 rule would make it at least somewhat likely that they would spend less money and time on employee education.¹¹ Moreover, a rule similar to the 2010 rule may bring an end to call centers and broker-dealer assistance that have customarily helped consumers understand what retirement savings options are available upon termination from a company.¹² Eliminating this source of financial literacy has been estimated to increase annual retirement savings withdrawals by an additional \$20 to \$32 billion.¹³

⁶ Letter from the New Democrat Coalition, to Secretary Thomas Perez, U.S. Dep't of Labor (Jan. 13, 2014) [hereinafter *2014 New Democrat Coalition Letter*].

⁷ Letter from Rep. John Kline et al., to Secretary Hilda Solis et al., U.S. Dep't of Labor (Apr. 14, 2011) [hereinafter *2011 Republican Chairmen Letter*].

⁸ See OLIVER WYMAN, ASSESSMENT OF THE IMPACT OF THE DEPARTMENT OF LABOR'S PROPOSED "FIDUCIARY" DEFINITION RULE ON IRA CONSUMERS [6, 13, 15, 20] (2011), available at <http://www.dol.gov/ebsa/pdf/WymanStudy041211.pdf>.

⁹ Letter from the New Democrat Coalition, to Secretary Hilda Solis, U.S. Dep't of Labor, Chairman Gary Gensler, U.S. Commodity Futures Trading Comm'n, & Chairman Mary L. Schapiro, Sec. & Exch. Comm'n (May 10, 2011) (emphasis added); and see generally *2014 New Democrat Coalition Letter* (expressing concerns with the Department's proposal to redefine the term "fiduciary").

¹⁰ *Republican Chairmen Letter*.

¹¹ See GREENWALD & ASSOCIATES, THE IMPACT OF THE UPCOMING RE-PROPOSED DEPARTMENT OF LABOR FIDUCIARY REGULATION ON SMALL BUSINESS RETIREMENT PLAN COVERAGE AND BENEFITS [15] (2014), available at http://ushcc.com/wp-content/uploads/2014/05/survey_0029436_embargoed_002095743.pdf.

¹² See QUANTRIA STRATEGIES, LLC, ACCESS TO CALL CENTERS AND BROKER DEALERS AND THEIR EFFECTS ON RETIREMENT SAVINGS [4] (2014), available at http://quantria.com/DistributionStudy_Quantria_4-1-14_final_pm.pdf.

¹³ See *id.*

Finally, concern stems from a White House Council of Economic Advisors memorandum¹⁴ and White House report¹⁵ lacking an indication of coordination with the SEC. In fact, SEC Commissioner Gallagher recently stated the Department “has not formally engaged the Commissioners, at least not this Commissioner”¹⁶ in this process. Commissioner Gallagher proceeded to identify concerns with the White House memorandum and conflicts with SEC jurisdiction, including: (1) an assertion that investment advice consumer protections are inadequate, while failing to address the comprehensive regulatory oversight of the SEC and the Financial Industry Regulatory Authority (FINRA); and (2) so-called perverse incentives for financial advisors to provide investors with high-cost products or recommend excessive churning, while failing to acknowledge the SEC and Self-Regulatory Organization (SRO) rules regulating and prohibiting such practices.¹⁷

To help us better understand the impact of the Department’s proposed rule, we respectfully request that you consider the following concerns during OMB’s regulatory review process:

1. Consider whether there is a systemic problem, or any real-world examples of concerns, this proposed rule intends to address.
2. Consider whether, and by how much, costs for professional investment guidance, education, and/or advice may increase if the proposed rule is adopted.
3. Consider how the proposed rule would impact retirement savings generally and whether consumer and/or plan sponsor access to guidance, education, and/or advice would be affected.
4. Consider what percentage of workers may cash out their retirement savings when switching jobs or retiring due to a lack of retirement planning assistance if the proposed rule is adopted.
5. Consider whether investment advisers would no longer offer services for employee retirement plans and/or IRAs if the proposed rule is adopted.
6. If the proposed rule drives advisers to a fee-based model and is adopted, consider whether advisers who adopt a fee-based model will actually increase costs for a “buy and hold” investor (i.e., an investor with an account that is not actively traded) as compared to a commission-based model.

¹⁴ See Memorandum from Jason Furman, Chair, and Betsey Stevenson, Member, White House Council of Economic Advisors, to White House Senior Advisors (Jan. 13, 2015), *available at* <http://www.scribd.com/doc/253449711/WH-DOL-memo>.

¹⁵ See White House Council of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings* (Feb. 23 2015) *available at* http://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.

¹⁶ Gallagher Remarks.

¹⁷ See *id.*

7. Consider how many IRA investors may no longer qualify for an advisory account if the proposed rule is adopted.
8. Consider the percentage of small businesses with a retirement plan that may reduce their contribution match, offer fewer investment options, increase fees charged to plan participants, or drop their retirement plan altogether if the proposed rule is adopted.
9. Consider whether small business plan sponsors and others will experience any regulatory or paperwork burdens if the proposed rule is adopted.
10. Consider working with the SEC and other federal agencies, including independent agencies, and non-governmental organizations authorized by Congress (e.g., FINRA), to avoid regulation that "may be redundant, inconsistent and/or overlapping."¹⁸
11. Consider taking into account the SEC's oversight and rulemaking authority in this area, especially in light of the authority provided to the SEC pursuant to the Dodd-Frank Act.¹⁹

If you have any questions, please have your staff contact Gregory Proseus or Molly Conway with the Health, Education, Labor, and Pensions Committee at (202) 224-6770. We appreciate your prompt time and attention to this important matter.

Sincerely,



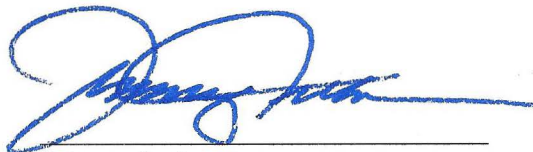
Lamar Alexander
Chairman



Mike Enzi
U.S. Senator



Richard Burr
U.S. Senator



Johnny Isakson
U.S. Senator

¹⁸ Improving Regulation and Regulatory Review, Exec. Order No. 13,563, 3 Fed. Reg. 76 (Jan. 18, 2011).

¹⁹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, § 913, 124 Stat. 1824-30 (2010).

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A handwritten signature in blue ink, reading "Mark Kirk".

Mark Kirk
U.S. Senator

A handwritten signature in blue ink, reading "Tim Scott".

Tim Scott
U.S. Senator

A handwritten signature in blue ink, reading "Orrin Hatch".

Orrin G. Hatch
U.S. Senator

A handwritten signature in blue ink, reading "Pat Roberts".

Pat Roberts
U.S. Senator

A handwritten signature in blue ink, reading "Bill Cassidy, M.D.". The signature is written in a cursive style.

Bill Cassidy, M.D.
U.S. Senator