United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510–6250

December 9, 2015

The Honorable Thad Cochran
Chairman
Committee on Appropriations
S-128 Capitol Building
Washington, D.C. 20510

The Honorable Barbara Mikulski
Vice Chairwoman
Committee on Appropriations
S-128 Capitol Building
Washington, D.C. 20510

Dear Chairman Cochran and Vice Chairwoman Mikulski:

The Committee on Homeland Security and Governmental Affairs has been examining the Department of Labor's rulemaking 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. While my Committee's inquiry continues, I am writing today concerning information that may be relevant to the important work of your Committee.

In February 2015, I initiated an inquiry into the Labor Department's rulemaking to expand the definition of a fiduciary under ERISA. I noted that concerns had been raised that the rule could harm middle- and low-income Americans' access to investment advice. I also noted that the Securities and Exchange Commission (SEC)—the entity charged by the Dodd-Frank Wall Street Reform Act to promulgate regulations related to these issues[1]—was also reportedly planning to revise its standards. Since then, my Committee has received material from the Labor Department, the SEC, and the Financial Industry Regulatory Authority (FINRA).[2]

Documents obtained by the Committee show that the Labor Department disregarded numerous concerns raised by the career, nonpartisan, professional experts at the SEC and the Office of Information and Regulatory Affairs (OIRA), as well as from officials at the Treasury Department. In several critical parts of the regulation, the proposal does not reflect critical feedback from the subject-matter experts at the SEC, OIRA, and the Treasury Department. For example, the nonpartisan staff of the SEC, who have significant expertise in the regulation of

[1] Pub. L. 111-203 § 913, 124 Stat. 1376, 1824 (2010).

[2] The Committee requested—but has not yet received—material from the Treasury Department and the Office of Management and Budget.

investment advice,[3] raised concerns about the Labor Department's failure to conduct a basic cost-benefit analysis of the proposal and the Department's failure to consider alternative approaches. The experts at the Treasury Department raised concerns that certain parts of the proposal did not reflect Congressional intent, which the Labor Department ultimately ignored. Even the regulatory analysis experts at OIRA, part of the President's Office of Management and Budget, also raised concerns about a lack of transparency about which common fee and compensation practices the proposal would allow, which the Labor Department failed to address in its proposed rule.

Upon review of the promulgated proposal, FINRA also raised several concerns, including concerns about the best interest standard[4] and the inadvertent consequences of a de minimus breach.[5] Additionally, FINRA criticized the proposed rule on the basis that it "establishes principles that employ imprecise terms with little precedent in the federal securities laws or, in many cases, ERISA" and that "[i]n some respects these principles even conflict with FINRA rules."[6]

Other documents obtained from the SEC suggest that the proposal was a solution in search of a problem. In October 2011, the White House's National Economic Council convened a series of meetings among the Labor Department, the SEC, the Treasury Department, and the White House to discuss the rule's economic analysis. In an email following one of these meetings, a Labor Department policy advisor wrote of the "challenges in completing the [Regulatory Impact Analysis]."[7] In particular, he noted "we need to determine whether the available literature, our work with RAND, and any other data we have not yet identified can be woven together to demonstrate that there is a market failure and to monetize the potential benefits of fixing it."[8] It appears that the Labor Department and the White House were more concerned about searching for evidence to weave together to justify the rule instead of considering and incorporating the feedback from the career professionals in our government that have the most knowledge about these issues.

I have been further troubled by the Labor Department's noncooperation with my Committee's inquiry. To date, the Department has failed to respond in full to my requests for documents. The Department is withholding relevant material from the Committee without asserting any claim of privilege of the documents. The Department has also declined to provide an itemized list of the withheld documents and has even refused to inform the Committee on how it identified responsive documents. Additionally, as it withheld material from the Committee, the Department also sought to pressure the SEC to thwart the Committee's oversight, urging the SEC to likewise withhold materials about the rulemaking.

[3] The Securities and Exchange Commission (SEC) regulates investment advisers under the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1, and the Dodd-Frank Wall Street Reform Act, 124 Stat. at 1824.
[4] Letter from Marcia E. Asquith, Senior Vice President & Corporate Secretary, FINRA, to Employee Benefits Security Administration, Department of Labor, at 6–8 (July 17, 2015).
[5] *Id.* at 19–20.
[6] *Id.* at 11.
[7] E-mail from Dep't of Labor official to Brian C. Deese, Exec. Office of the Pres., et al. (Oct. 25, 2011, 7:30 P.M.).
[8] *Id.*

While my Committee's work continues, I believe this information may be useful for you as you continue to develop an omnibus appropriations bill to fund the pressing issues facing our nation. I would strongly encourage you to use the appropriations bill to prohibit the Labor Department from implementing its fiduciary rule. Please do not hesitate to contact me or my staff if we can be of further assistance to you.

Sincerely,

Ron Johnson

Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

The Honorable Mitch McConnell
Senate Majority Leader

The Honorable Harry Reid
Senate Minority Leader

The Honorable Lamar Alexander
Chairman, Committee on Health, Education, Labor, and Pensions

The Honorable Patty Murray
Ranking Member, Committee on Health, Education, Labor, and Pensions