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November 18, 2011

The Honorable Phyllis Borzi  
Assistant Secretary of Labor  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Ave., N.W.  
Washington, DC 20210

Dear Assistant Secretary Borzi:

On July 26, 2011, you testified before the House Education and the Workforce Committee's Subcommittee on Health, Employment, Labor, and Pensions ("HELP Subcommittee") at a hearing entitled: *Redefining "Fiduciary": Assessing the Impact of the Labor Department's Proposal on Workers and Retirees*. At this hearing, a bipartisan group of lawmakers called on the U.S. Department of Labor (the "department") to abandon the current iteration of a proposed regulation to significantly expand the definition of "fiduciary" under the Employee Retirement Income Security Act of 1974. On September 19, 2011, the department announced that it would not finalize its proposed regulation, and would instead seek "additional input, review and consideration" from stakeholders and lawmakers prior to issuing a new proposal. We applaud this decision.

Our nation's retirement system provides income security for millions of workers and retirees and their families. Grave economic implications for this system could accompany a regulation greatly expanding liability for pension plan sponsors and service providers, including the loss of investment options for retirees. With so much at stake, Congress and the American people must understand both the economic and regulatory bases for the now-abandoned proposal and the regulatory principles that will shape a new proposed regulation.

Any new proposal amending the definition of "fiduciary" should be published concurrently with a full economic and regulatory analysis, addressing the proposal's interactions with rulemaking from other agencies and a complete, accurate picture of the economic and compliance costs. In its last proposal, the department failed to adequately complete a thorough economic analysis regarding the rule's effect on compliance costs. For example, the department's purported economic analysis wholly ignored the regulation's effect on the approximately 40.1 million

American households that use Individual Retirement Accounts (IRAs) to plan for retirement. An inaccuracy of such magnitude will likely draw legal scrutiny. Just this summer, the United States Court of Appeals for the District of Columbia overturned a proposed Securities and Exchange Commission (SEC) rule because the SEC failed to conduct a sufficiently thorough economic analysis.<sup>1</sup> Stakeholders and workers must know the full economic consequences of such a broad proposal before the regulation is finalized.

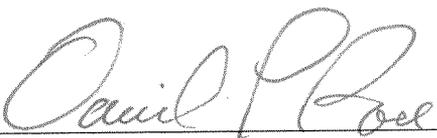
Further, any new proposal should be issued simultaneously with all intended new and revised prohibited transaction exemptions addressing, among other things, the structure of certain broker commission and fee arrangements. After publication of a revised proposed rule, all stakeholders should have ample opportunity to analyze its potential effects and enter meaningful comments into the record. Our workers and retirees deserve better than a haphazardly devised proposal that could curb investment opportunities or raise the costs of investing.

The empirical rationale for proposed changes to the regulation has not been forthcoming. Therefore, we have attached a series of questions regarding the scope of the purported problems the department wishes to remedy and the department's framework for evaluating the merits of regulatory proposals.

Please furnish answers to the attached questions by December 2, 2011. As you know, on April 14, 2011, several House Republican committee chairmen sent the department a letter on this topic. Unfortunately, your response to that letter was not received until more than three months after our letter was sent, just one hour prior to the start of the July 26 subcommittee hearing. Further, following the hearing, additional questions for the official hearing record were submitted to you for a response no later than September 14, 2011. Unfortunately, you responded a full month later than subcommittee members were expecting answers to their questions and the answers you submitted were incomplete. Timely and thorough answers to the attached questions are necessary to analyze both the purported problem and the consequences of potential revisions to department regulations.

Sincerely,

  
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JOHN KLINE  
Chairman  
Committee on Education and the Workforce

  
\_\_\_\_\_  
PHIL ROE, M.D.  
Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions

CC: The Honorable Hilda Solis, Secretary, Department of Labor

<sup>1</sup> *Business Roundtable & U.S. Chamber of Commerce v. SEC*, No. 10-1305 (D.C. Cir. July 22, 2011).

**QUESTIONS REGARDING PROPOSALS TO AMEND THE  
DEFINITION OF "FIDUCIARY"**

**PLEASE RESPOND BY C.O.B. DECEMBER 2, 2011.**

**I. Scope of the Purported Problem**

1. In your submitted testimony on July 26, 2011, you justified the proposal with a significant amount of academic research that did not appear in the preamble to the proposed regulation. Please list all academic studies that you believe justify rulemaking in this area. To what extent has this research been vetted and scrutinized by experts both inside and outside the Department of Labor (DOL)? Will this form a basis for potential future rulemaking? How many interested parties have addressed, either positively or negatively, this research?
2. In your July 26, 2011 testimony, you made repeated references to EBSA's "enforcement experience" as primary evidence demonstrating the need for new regulation. In how many instances have DOL enforcement efforts been thwarted for failure to meet the "regular basis" requirement of the current test by firms who acknowledged fiduciary status, only to deny being a fiduciary for any ERISA clients?
3. Similarly, how many enforcement actions have been brought against ESOP trustees that have hinged on faulty valuations? What have been the outcomes of those cases?

**II. Economic Analysis**

4. In your July 26, 2011 testimony, you stated that:

*The Department believes there is strong evidence that unmitigated conflicts cause substantial harm, and therefore is confident that the proposed fiduciary regulation would combat such conflicts and thus deliver significant benefits to plan participants and IRA holders. As noted above, this evidence is found in academic research, IRA underperformance, SEC examinations, and EBSA's own enforcement experience. While no single piece of evidence by itself directly demonstrates or provides a basis for quantifying the negative impact of conflicts on plans and IRAs, taken together the available evidence appears to indicate that the negative impacts are present and often times large"*

Of course, neither the preamble to the proposed regulation nor your testimony provided empirical support relating to the purported benefits of the rule or the purported harm suffered in the status quo. How have EBSA experts quantified the costs and benefits of the proposed regulation to participants and IRA holders? What are the estimated costs and benefits? Will this methodology be used in a future potential proposal?

5. You also indicated that broker-dealers who sell securities to Individual Retirement Accounts suffered from "misinformation" regarding the potential economic impact of the previous proposal. You stated that brokers would be permitted to earn commissions on securities and other investment products; however, Prohibited Transaction Exemption 86-128, permitting commissions on sales of securities to employee benefit plans, does not permit other types of payments. These other payments, including record-keeping fees and certain revenue sharing payments that are not strictly "commissions" are integral to the current broker-deal business model. Going forward, does DOL intend to prohibit all such non-commission payments to broker-dealers?
6. If DOL does intend to prohibit these payments, how will this affect the broker-service industry?
7. If finalized, how many jobs would be created by a proposal to amend the term "fiduciary"? Would any jobs be lost?

### III. **Additional Information Required**

8. Please provide a list of all prohibited transaction exemptions (PTEs) EBSA plans to propose or revise in connection with a potential new proposal amending the definition of "fiduciary."
9. Please provide all information pertaining to the Department of Labor's review of the previous proposal (RIN 1210-AB32) in light of Executive Order 13563, "Improving Regulation and Regulatory Review."
10. Please provide all documents exchanged and communications between U.S. Department of Labor (DOL) and the Office of Management and Budget (OMB) concerning RIN 1210-AB32, specifically including, but not limited to, all documents relating to the rulemaking's initial transmission to OMB and the September 19, 2011 announcement that RIN 1210-AB32 will be re-proposed at a later date.

11. Please provide a list of the dates, attendees, and topics for all meetings and telephone conversations between DOL and OMB relating to RIN 1210-AB32, and all documents and communications relating to such meetings.
12. Please provide a detailed description of the timing and manner by which EBSA intends to share the updated economic analysis, additional academic studies, revisions to RIN 1210-AB32, and duration of period for public comment concerning the anticipated re-proposal of this rulemaking.