



April 10, 2015

The Honorable John Kline
Chairman
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, D.C. 20515-6100

The Honorable Phil Roe, M.D.
Chairman
Subcommittee on Health, Employment,
Labor and Pensions

Dear Chairman Kline and Chairman Roe:

I am writing in response to your March 24, 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. The Committee, acknowledging once again that the Department has not yet published a proposed rule, has now reiterated its request for "information regarding the Department of Labor's (DOL) forthcoming rulemaking...."¹

The Department's proposed regulation, once published, 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.

You wrote to Secretary Perez on March 4, 2015, expressing concern that the rulemaking "could conflict with Securities and Exchange Commission (SEC) rulemakings authorized by the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act)," and you sought "documents and communications demonstrating the coordination between DOL and SEC regarding DOL's ongoing project" to update the fiduciary standard.² In order to address the concerns expressed in the Committee's request, the Department's March 16 response stated that we had sought technical assistance from the SEC that had "helped the Department draft a proposal that strikes a balance between protecting individuals looking to build their savings and minimizing disruptions to the many good practices and good advice that the financial services industry provides today."³ Our response detailed eight specific instances when "Secretary Perez

¹ Letter from the Honorable John Kline, Chairman, Committee on Education and the Workforce, U.S. House of Representatives and the Honorable Phil Roe, Chairman, Subcommittee on Health, Employment, Labor and Pensions to the Honorable Thomas E. Perez, U.S. Department of Labor (Mar. 24, 2015).

² Letter from the Honorable John Kline, Chairman, Committee on Education and the Workforce, U.S. House of Representatives and the Honorable Phil Roe, Chairman, Subcommittee on Health, Employment, Labor and Pensions to the Honorable Thomas E. Perez, U.S. Department of Labor (Mar. 4, 2015).

³ Letter from Adri Jayaratne, Acting Assistant Secretary, Office of Congressional and Intergovernmental Affairs, U.S. Department of Labor to the Honorable John Kline, Chairman, Committee on Education and the Workforce, U.S. House of Representatives and the Honorable Phil Roe, Chairman, Subcommittee on Health, Employment, Labor and Pensions to the (Mar. 16, 2015).

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has discussed relevant aspects of the draft proposal with SEC Chair White.” Additionally, we noted that DOL and the SEC had engaged in “collaborative discussions” that were “wide-ranging” and we assured the Committee that DOL had “made numerous changes in response to observations and issues raised by SEC staff.”⁴ Furthermore, as highlighted in the Committee’s March 4 letter, on numerous occasions, the Department and the SEC have publicly stated that we are actively consulting with each other and coordinating our efforts.⁵ We intended this response to allay concerns that we had not engaged in robust coordination with the SEC, since both the Department and the Committee believe in the necessity of such coordination.

The Committee’s March 24, 2015, letter further clarified that the Committee seeks “specific information regarding the content of these communications” and “substantive details about th[e] technical assistance” the Department received from the SEC. The Committee explained that “[t]his information is essential as Congress examines policy changes by the administration.” While the Department shares your concerns for protecting the retirement savings of lower and middle income Americans, we have serious concerns about your request. The documents you are seeking, which record the agencies’ pre-decisional 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 March 16, 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. Instead, these documents reflect the internal deliberations of an Executive Branch agency, including its numerous consultations with another such agency, and are at the core of the ongoing deliberative process.

Release of the deliberative, pre-decisional documents that you have requested and which do not necessarily reflect the Department’s final thinking would have several serious consequences. First, as your March 4 letter stated, “it is clear coordination between SEC and DOL is vital to ensure a functioning regulatory framework.” 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

⁴ *Id.*

⁵ Letter from the Honorable John Kline, Chairman, Committee on Education and the Workforce, U.S. House of Representatives and the Honorable Phil Roe, Chairman, Subcommittee on Health, Employment, Labor and Pensions to the Honorable Thomas E. Perez, U.S. Department of Labor (Mar. 24, 2015) at 2. *See also*, SEC Chair Mary Jo White testimony, U.S. House of Representatives Committee on Appropriations, Financial Services and General Government Subcommittee, “Budget Hearing – Securities and Exchange Commission” (May 7, 2013); SEC Chair Mary Jo White testimony, U.S. Senate Banking Committee Hearing, “Mitigating Systemic Risk in Financial Markets through Wall Street Reforms” (Jul. 30, 2013); SEC Chief to Break her Silence on Fiduciary in ‘Short Term’ (Feb. 20, 2015) <http://www.thinkadvisor.com/2015/02/20/sec-chief-to-break-her-silence-on-fiduciary-in-sho>.

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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.

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 Robert C. Scott
Ranking Member
Committee on Education and the Workforce