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January 27, 2012

The Honorable Phyllis Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Assistant Secretary Borzi:

On November 18, 2011, we wrote to you concerning the U.S. Department of Labor's (DOL) regulatory efforts to significantly expand the definition of "fiduciary" under the *Employee Retirement Income Security Act of 1974* (ERISA).¹ On December 13, 2011, Brian V. Kennedy, Assistant Secretary for the Office of Congressional and Intergovernmental Affairs, responded to our inquiry.² However, in that response, the department failed to provide the documents we requested and did not fully respond to a number of the questions in our letter. Again, we ask you to provide the following information:

- 1) All of the underlying data used in preparation of the October 11, 2010 Notice of Proposed Rulemaking (NPRM), RIN 1210-AB32, including, but not limited to, the economic analysis and any regulatory impact analysis for this rulemaking, as well as any analysis conducted regarding the net effect on jobs.
- 2) A list of all material including, but not limited to, studies and governmental reports used to justify the October 11, 2010 NPRM. Your July 26, 2011 testimony before the Health,

¹ Letter from the Honorable John Kline, Chairman, House Committee on Education and the Workforce, et al., to the Honorable Phyllis Borzi, Assistant Secretary, Employee Benefits Security Administration ("Nov. 2011 letter"). (November 18, 2011) <http://edworkforce.house.gov/UploadedFiles/11-18-11 - Letter to Borzi - Fiduciary Text.pdf>

² Letter from the Honorable Brian V. Kennedy, Assistant Secretary of Congressional and Intergovernmental Affairs, U.S. Department of Labor, to the Honorable John Kline, Chairman, House Committee on Education and the Workforce, et al. (December 13, 2011) (on file at the House Committee on Education and the Workforce).

Employment, Labor, and Pensions Subcommittee cited a significant amount of additional research that was not disclosed in the preamble of the October 11, 2010 NPRM.³ Please

explain the extent to which this research has been reviewed by experts within DOL and other interested stakeholders. Further, explain how this additional material is being used to form a basis for the anticipated revision of RIN 1210-AB32;

- 3) Information related to the Employee Benefit Security Administration's "enforcement experience," which you have cited as primary evidence of the need for new regulation.⁴ Though Assistant Secretary Kennedy's letter provided hypothetical examples, we specifically asked you to provide the number of times enforcement efforts have 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.⁵
- 4) The number of enforcement actions by DOL against Employee Stock Ownership Plans (ESOP) trustees that have hinged on faulty valuations.⁶ List each enforcement action and provide an explanation of the outcomes and the total number of ESOP transactions over the analyzed timeframe.
- 5) A detailed list of all prohibited transaction exemptions (PTEs) under consideration for creation or revision in connection with the anticipated revision of RIN 1210-AB32 and potential new exemptions under consideration.
- 6) All information pertaining to DOL's review of the October 11, 2010 NPRM in light of Executive Order 13563, including, but not limited to, documents and communications addressing the specific factors that prompted the decision to withdraw this version of the proposal.
- 7) All documents exchanged and communications between DOL and the Office of Management and Budget (OMB) concerning RIN 1210-AB32, 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 would be re-proposed at a later date.
- 8) 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 or telephone conversations.

³ *Redefining 'Fiduciary': Assessing the Impact of the Labor Department's Proposal on Workers and Retirees: Hearing Before the House Committee on Education and the Workforce's Health, Employment, Labor, and Pensions Subcommittee* (July 26, 2011) (statement of the Honorable Phyllis Borzi, Assistant Secretary, Employee Benefits Security Administration).

⁴ *E.g., Id.*

⁵ Nov. 2011 letter, *supra* note 1, at 3.

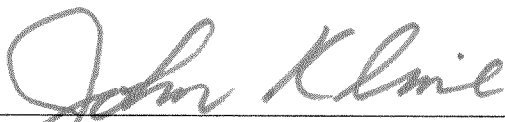
⁶ *Id.*

The Honorable Phyllis Borzi
January, 27 2012
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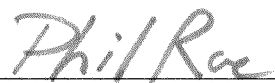
Please provide the requested information by February 10, 2012. If you are unable to provide the requested information by that date, please inform the committee in writing why you cannot meet the deadline, and the date by which you will provide the requested information.

If you have additional questions or comments, please contact Andy Banducci and Joe Wheeler of the committee staff at (202) 225-7101.

Sincerely,



JOHN KLINE
Chairman
Committee on Education and the Workforce



PHIL ROE
Chairman
Subcommittee on Health, Employment,
Labor, and Pensions

Enclosure

CC: The Honorable George Miller, Senior Democratic Member, House Committee on
Education and the Workforce
The Honorable Brian V. Kennedy, Assistant Secretary, Office of Congressional and
Intergovernmental Affairs, U.S. Department of Labor

Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i. e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one *CD*, hard drive, memory stick, thumb drive, box or folder is produced, each *CD*, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents should be delivered, one set to the Majority Staff in Room 2181 of the Rayburn House Office Building and one set to the Minority Staff in Room 2101 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.