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March 4, 2015

The Honorable Thomas E. Perez  
Secretary  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, D.C. 20210

Dear Secretary Perez:

President Obama recently directed the Department of Labor (DOL) to move forward with a repackaged rulemaking to expand fiduciary liability.<sup>1</sup> DOL's initial attempt to regulate in this area in 2010 was roundly criticized by stakeholders and by lawmakers on a bipartisan basis and subsequently withdrawn.<sup>2</sup> We continue to have strong reservations about any policy that could reduce access to retirement savings options and increase costs for lower and middle-income Americans.<sup>3</sup> Additionally, we remain concerned this project could conflict with Securities and Exchange Commission (SEC) rulemakings authorized by the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act).<sup>4</sup> Consequently, we write to request documents and communications demonstrating the coordination between DOL and SEC regarding DOL's ongoing project to expand fiduciary liability.

In anticipation of DOL's retooled proposal, SEC Commissioner Gallagher recently raised a number of substantive concerns.<sup>5</sup> Like Commissioner Gallagher, we believe "[i]nvestors benefit from choice; choice of products, and choice in advice providers." We share his concern

<sup>1</sup> *Remarks by the President at the AARP*, Feb. 23, 2015, <http://www.whitehouse.gov/the-press-office/2015/02/23/remarks-president-aarp>.

<sup>2</sup> On October 15, 2010, DOL published a notice of proposed rulemaking amending the regulatory of "fiduciary" under the *Employee Retirement Income Security Act*. 75 Fed. Reg. 65263 (Oct. 15, 2010). After receiving hundreds of comments, DOL announced it would repropose the regulation. "US Labor Department's EBSA to re-propose rule on definition of a fiduciary," Sept. 19, 2011, <http://www.dol.gov/ebsa/newsroom/2011/11-1382-NAT.html>.

<sup>3</sup> See, e.g., Letter from Rep. Kline, Rep. Camp, Sen. Enzi, and Sen. Hatch to Secretaries Solis and Geithner, and IRS Commissioner Shulman, April 14, 2011.

<sup>4</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 913, 124 Stat. 1376, 1824 (2010).

<sup>5</sup> Commissioner Daniel M. Gallagher, *Remarks at The SEC Speaks in 2015*, Feb. 20, 2015, <http://www.sec.gov/news/speech/022015-spchcdmg.html>.

that “[o]ne size fits all regulation, in practice, tends to end up as one size fits none. And when all is said and done, it means investors are presented with fewer choices and higher prices.”

As in the past, we are also concerned DOL could establish a conflicting and confusing regulatory morass harming retirement savers. For example, Section 913 of the Dodd-Frank Act directed the SEC to study the standard of care for investment advisers and broker-dealers, and it authorized SEC to promulgate rules based on the results. Policymakers have consistently warned DOL’s approach could conflict with SEC’s rulemaking — authorized by the Dodd-Frank Act — resulting in uncertainty, higher costs, and less financial information for investors.<sup>6</sup> Despite these warnings, the President has directed DOL to press ahead without regard to SEC action.

It is clear coordination between SEC and DOL is vital to ensure a functioning regulatory framework; it is unfortunately far less clear that such coordination is occurring. We are especially disappointed and alarmed by Commissioner Gallagher’s allegations that no meaningful engagement has occurred:

... [T]he DOL has not formally engaged the Commissioners, at least not this Commissioner, on its fiduciary rulemaking process and the impact it may have on investors. And despite public reports of close coordination between the DOL and SEC staff, I believe this coordination has been nothing more than a “check the box” exercise by the DOL designed to legitimize the runaway train that is their fiduciary rulemaking.<sup>7</sup>

This is inconsistent with public pronouncements from the administration. For example, in testimony before the Health, Employment, Labor, and Pensions Subcommittee, Assistant Secretary Borzi promised DOL, SEC, and others “are actively consulting with each other and coordinating our efforts.”<sup>8</sup> This pledge was echoed in the press release withdrawing the initial rule.<sup>9</sup> More recently, Assistant Secretary Borzi has publicly repeated this promise.<sup>10</sup>

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<sup>6</sup> Letter from Senator Tester, et al to The Honorable Sylvia Matthews Burwell, Director, Office of Management and Budget, Aug. 2, 2013 (“We remain very concerned that uncoordinated efforts undertaken by the agencies could work at cross-purposes in a way that could limit investor access to education and increase costs for investors, most notably Main Street investors.”)

<sup>7</sup> Gallagher, *supra* note 5.

<sup>8</sup> *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).

<sup>9</sup> “US Labor Department’s EBSA to re-propose rule on definition of a fiduciary,” *supra* note 2 (“EBSA will continue to coordinate closely with the Securities and Exchange Commission and the Commodities Futures Trading Commission to ensure that this effort is harmonized with other ongoing rulemakings.”).

<sup>10</sup> See, e.g., Sean Forbes, *Borzi Plays ‘Three Questions’ with Critics of DOL’s Expected Fiduciary Rule Re-Proposal*, BLOOMBERG BNA PENSION AND BENEFITS BLOG, March 19, 2014, <http://www.bna.com/borzi-plays-three-b17179886023/> (claiming leaders and staff have been constantly meeting each other); Emmanuel Olaoye, *INTERVIEW: U.S. Labor Department’s point person on fiduciary rule: disclaimers are not enough*, THE KNOWLEDGE EFFECT (June 24, 2013), <http://blog.thomsonreuters.com/index.php/interview-u-s-labor-departments-point-person-on-fiduciary-rule-disclaimers-are-not-enough> (“If we have a proposal we would share it with them. The economists at the SEC are consulting with the DOL.”); American Bar Association Section of Labor and

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Concern over this coordination — or lack thereof — was so grave as to warrant Congressional action. On October 29, 2013, the House of Representatives passed H.R. 2374, the *Retail Investor Protection Act*, which required DOL to delay its rulemaking until after the SEC acts.<sup>11</sup> The bill passed the House on a strong bipartisan basis.

In recognition of this concern, a revised notice of proposed rulemaking should not be issued until after Congress is satisfied sufficient coordination has occurred. So that we can better understand the coordination between DOL and SEC, please furnish all communications after September 19, 2011, between DOL and SEC regarding this rulemaking. In addition, please provide all documents and materials addressing how DOL has considered, adopted, or discarded any concerns raised by SEC as it revised its regulatory proposal.

**Please provide the requested information by March 18, 2015.** If you are unable to do so, 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 or Joe Wheeler of the Committee staff at (202) 225-7101.

Sincerely,



JOHN KLINE  
Chairman  
Committee on Education and the Workforce



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

Enclosure

CC: The Honorable Robert C. Scott, Ranking Member, Committee on Education and the Workforce

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Employment Law, *Interview with Phyllis Borzi*, Employee Benefits Committee Newsletter, Fall 2013, [http://www.americanbar.org/content/newsletter/groups/labor\\_law/ebc\\_newsletter/13\\_fall\\_ebcnews/interview.html](http://www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/13_fall_ebcnews/interview.html) (“The SEC and the Department of Labor are coordinating on our respective fiduciary projects, and we have a shared goal of ensuring that compliance with one standard will not threaten compliance with the other.”).

<sup>11</sup> H.R. 2374, 113<sup>th</sup> Cong. §2 (as passed by the House, Oct. 29, 2013). On February 25, 2015, Rep. Wagner reintroduced the bill. H.R. 1090, 114<sup>th</sup> Cong. (2015).