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Congress of the United States
Washington, DC 20515

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DEPT. OF LABOR
WASH D.C. 20210

The Honorable Hilda L. Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Timothy Geithner
Secretary of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable Douglas Shulman
Commissioner of the Internal Revenue Service
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Secretaries Solis and Geithner and Commissioner Shulman:

Recently, the Employee Benefits Security Administration ("EBSA") of the Department of Labor (the "Department") proposed to change the regulatory structure for and definition of the term "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA"). *Definition of the Term "Fiduciary."* (RIN 1210-AB32). The term fiduciary is one of the key terms of ERISA as it determines which persons and entities owe the highest level of care to pension plans and their participants and beneficiaries. We of course believe that those who provide investment advice should be thoroughly trained, professionally licensed, highly ethical, devoted to the financial best interests of their clients, and abide by the highest standards of professionalism. However, consistent with these views we also believe that any attempt to change the existing regulatory structure governing investment relationships in the retirement planning marketplace must be done carefully and prudently as to avoid uncertainty and disruption. In addition, any change must be supported by economic data and regulatory prudence to avoid duplicative or conflicting regulatory structures of other federal regulators.

The current ERISA regulatory structure requires that a person satisfy a five-part test in order to be considered a fiduciary rendering investment advice. This regulatory structure has stood for thirty-five years and has provided clarity and certainty to plan sponsors and their service providers to the benefit of pension plans and their workers and retirees. We recognize that federal agencies' regulations may be revisited from time to time to address changes and innovations in the marketplace. However, the current fiduciary definition is the basis of tens of

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thousands of service provider contracts and is relied upon by millions of individuals and their families. Thus, changes should facilitate and not hinder customer-oriented innovations and advancements, and not add to the cost to businesses and individuals of obtaining investment services.

The regulatory proposal issued by the Department completely rewrites the regulatory structure to broadly define and substantially expand who would be considered a fiduciary. In essence, this proposal completely flips the regulatory structure so that a person would be presumed to be a fiduciary. The proposal establishes this presumption by attempting to narrow the application of the broad definition of fiduciary through a list of limitations.

We are concerned that the bright-line regulatory test and guidance that has governed for the past thirty-five years is being discarded in a manner that is very likely to bring considerable disruption in the service provider and plan sponsor community. The comment letters sent to the Department in response to the proposed regulation published in the Federal Register on October 22, 2010, and testimony presented to EBSA at the hearing on March 1 and 2 present a long list of scenarios and fact patterns highlighting the ambiguity, uncertainty, and substantial burdens resulting from the proposal. After careful review of these concerns, we believe that the proposal, in its current form, is unworkable as it creates too many unanswered questions as to who is and who is not a fiduciary.

In addition, we have significant concerns that:

1) The economic analyses prepared for the proposal are significantly flawed especially as the analyses neglected to look at small business plan sponsors and others as to whether they will experience any regulatory or paperwork burdens and, as to small service providers, the proposal failed on its face to perform an adequate economic impact analysis;
2) The economic analyses did not separately address the proposal's effects on the availability, and cost, of services to individuals owning individual retirement accounts ("IRAs");
3) No thorough vetting or coordination was undertaken by the Department with other federal regulators to avoid duplicative, overlapping, or conflicting regulatory environments for service providers and others who provide services to retirement plans; and
4) The proposal raises questions about the types and forms of financial literacy and education that will be permitted.

The Regulatory Flexibility Act ("RFA") requires that federal regulatory agencies must prepare an economic analysis if a regulatory proposal has a significant economic impact upon a substantial number of small entities. The law requires an analysis of all small entities affected. In the preamble to the proposal, the Department states that the proposal would affect sponsors, fiduciaries, service providers and providers of investment and investment advice related services to plans and accounts (including individual retirement accounts). However, the Department only looked at a very small segment of service providers that are listed on filed Form 5500s.

According to the Department's own statistics, there are nearly 600,000 defined contribution plans and nearly 38,000 defined benefit plans with fewer than 100 participants. Each and every one of these plans will be affected by the change in the definition of fiduciary for service providers and each of these plans will have to enter into new contracts with new terms if and when the Department's proposal is finalized. These plans are without a doubt sponsored by small businesses. However, the Department failed to conduct any economic analysis on the effect of the proposal on these small plans.

Also, if the intent of the proposal is to expand the definition of who is a fiduciary, then the Department failed in its regulatory analyses of service providers as the Department only looked at current service providers and not those who will be affected by the proposed regulatory expansion. Furthermore, the Department minimized the number of current small service providers, even though the objective data in the Department's possession indicates that 5,170 of 5,300 affected service providers (or 97.5%) are "small" according to the Small Business Administration definition. The Department merely speculates that the number of small service providers must be less than 5,170, without any support for such speculation or even indicating how many service providers the Department would categorize as small. Finally, the Department acknowledges that small service providers will require ERISA fiduciary duty liability insurance, but makes no attempt to estimate the likely cost of the coverage, notwithstanding that there is a well-established fiduciary insurance market in the United States.

In addition, the Department failed to include these entities in its economic analysis prepared pursuant to Executive Order 12866. Clearly, the economic analyses conducted by the Department failed to meet the requirements of the RFA and Executive Order 12866.

We also have significant concerns with the apparent lack of interaction and cooperation between the Department and other federal regulators who oversee products and services sold to retirement plans and participants. For example, the Department clearly states that the proposal is intended to cover service providers who offer IRAs. The proposal seems to create a regulatory conundrum as to which regulatory structure would apply to financial products sold both on the retail market and to IRAs. The market confusion over the applicable fiduciary standard would create a headache for workers and their families as well as create logistical, administrative, and liability problems for plan sponsors and service providers. It also should be noted that it is unclear as to whether the Department has the statutory authority to expand its jurisdiction into retirement products and services sold through IRAs.

IRAs are not employee benefit plans, and there are many fundamental differences between IRAs and employer-sponsored retirement plans. IRA owners have greater flexibility than retirement plan participants regarding the investment and management of their accounts. Many of the provisions of ERISA and the Internal Revenue Code ("Code") that apply to retirement plans do not apply to IRAs. The unintended negative consequences of the Department's proposal for IRA owners have simply not been considered. One obvious effect of the Department's proposal, however, will be to trigger the Code's prohibited transaction excise taxes for a vastly larger population of investment professionals with no apparent corresponding benefit for IRA owners. There has been no discernible effort by the Department to assess the magnitude of the impact of the excise tax, nor is there any indication that the Internal Revenue Service ("IRS") has been

consulted about or is prepared to enforce this new wave of excise taxes. The negative consequences of this proposal to the IRA marketplace could be severe, yet the Department has wholly failed to assess or even attempt to explain those consequences.

The blurring of regulatory lines in the proposal and lack of interagency consultation are not confined to the IRS. It is clear that federal securities, banking and commodities/futures regulators, as well as FINRA and state regulators - several of which are or will be engaged in rulemaking directly relevant to or impacted by the Department's proposal - were not consulted in the preparation of this proposal. In addition, this proposal goes against the President's decree in Executive Order 13563, issued on January 18, 2011, which seeks greater coordination, simplification, and harmonization across agencies to reduce regulatory burdens, reduce costs, and simplify rules.

With respect to financial education, the Department's proposal raises significant questions as to what will be considered financial literacy and education and what will be considered investment advice. Currently, the Department's Interpretive Bulletin 96-1 outlines what is considered financial education pursuant to the current definition of fiduciary under 29 CFR 2510.3-21(c). However, the proposal appears to significantly reduce what constitutes financial education and raises the question as to whether Interpretive Bulletin 96-1 is still in effect. Further, recent hearings in Congress have shown that workers and their families are struggling to understand how to invest for their retirement. Any attempts by the Department to limit financial literacy and education are steps in the wrong direction. In fact, in this age of smartphone applications and internet social media, the Department should be putting forth efforts to enhance financial literacy and education through the development of retirement tools and applications rather than curtailing them. We are concerned that attaching a fiduciary obligation, and associated liability, to actions promoting financial literacy and education would likely discourage such activity and harm the retirement security of millions of workers and their families.

Rather than bring about certainty and clarity to our nation's retirement system, we believe that the proposal has raised many unanswered questions. In its current form, the Department's regulatory proposal is unworkable and if finalized could cause significant unintended consequences in the retirement benefits community. As such, we urge the Department to suspend its rulemaking process until questions concerning the full impact of the proposal, including its relationship to (and impact on) other federal and state regulatory efforts can be fully reconciled. If the Department decides to move forward with the proposal then we strongly believe that, at a minimum, the proposal be re-proposed for public comment before any final regulations are promulgated.

Any new proposal should be coordinated with other federal regulatory agencies and other regulators who also oversee financial products and services bought for retirement plans. In addition, any new proposal must have the appropriate economic analyses that analyze the entire scope of entities and participants affected and in particular small entities under the RFA.

Finally, we strongly believe that the Department must not issue any guidance relating to defining the term fiduciary in an interim-final rulemaking. Under the statutory requirements of the Administrative Procedure Act, there is no condition present that would warrant the issuance of

this proposal in an interim-final format. In fact, because of the number of unanswered questions, an interim-final rulemaking in this matter would be highly inappropriate.

Millions of workers and their families are dependent upon our nation's retirement system. We fully support efforts to making the system better for them. Regulatory proposals seeking to improve the retirement system must be done carefully and prudently to avoid uncertainty and disruption in the marketplace.

Sincerely,

John Kline, Chairman
Committee on Education and
the Workforce

Dave Camp, Chairman
Committee on Ways and Means

Michael B. Enzi, Ranking Member
Committee on Health, Education,
Labor and Pensions

Orrin G. Hatch, Ranking Member
Committee on Finance