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Congress of the United States
House of Representatives
Washington, DC 20515–3225

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July 29, 2011

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

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EXEC. SECRETARIAT
OSEC-DOL
DEPT. OF LABOR
WASH D.C.

Dear Secretary Solis:

As you know, the Employee Benefits Security Administration (EBSA) of the Department of Labor has proposed to change the regulatory structure and definition of the term "fiduciary" under the Employee Retirement Income Security Act of 1974 (ERISA). I understand that the proposed regulation will affect much of the retirement and investment industry, and I want to ensure that any changes to the existing investment regulatory structure are done in the most cautious and practical manner.

The current ERISA regulatory structure, which has stood for 35 years, requires that an individual satisfy a five-part test in order to be considered a fiduciary who can give investment advice. Persons who meet the test of a fiduciary must refrain from engaging in certain prohibited transactions. The Department's proposed rule significantly expands the definition of who would be considered a fiduciary, flipping the regulatory structure so that an individual would be presumed a fiduciary.

The Department has been presented with many scenarios that describe the disruption this proposed rule will have to the retirement and investment community. Those concerns are centered on how the proposed definition of fiduciary would affect and limit the discussion of everyday educational information and investment tools. At a time when we are trying to encourage Americans to save for their future retirements, I share the fear detailed by both the financial services industry and other Members of Congress that the new rule may limit the access everyday Americans have to low-cost investment advice.

I also have concerns about the economic analyses that were prepared for the proposed rule. The Department is required by the Regulatory Flexibility Act (RFA) to prepare an economic analysis if a regulatory proposal has significant economic impact upon a substantial number of small entities. However, the Department looked only at a small segment of the service providers that are listed on filed Form 5500s. With 600,000 defined contribution plans and almost 38,000 defined benefit plans with fewer than 100 participants, most likely sponsored by small businesses, why has the Department not conducted any economic analysis on how the proposed rule would affect small plans?

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Finally, I share the concerns noted by the leaders of the committee of jurisdictions on this issue, that the lack of coordination between government agencies and regulators on this issue is disconcerting. I ask that the Department suspend its rulemaking process until the full impact of the proposal is determined. This should include thorough economic analyses about how a proposed regulation would affect all retirement plan sponsors, plan participants and IRA holders, including the affect the proposed rule may have on reducing access to investment tools and advice. The economic analyses should consider the impact on all of the financial services industry and should also include close coordination with other government agencies and regulatory structures.

As millions of Americans depend upon our nation's retirement system, it is crucial that any proposals seeking to change or improve the retirement system are done with the utmost caution and care. Thank you for the opportunity to weigh in on this important issue. Should you have any questions, please do not hesitate to contact my office.

Sincerely,

Ann Marie Buerkle
Member of Congress

AMB/rm