

September 24, 2015

The Honorable Thomas Perez
Secretary
Department of Labor
Washington, DC 20002

Re: Conflict of Interest Rule, RIN 1210-AB32
Proposed Best Interest Contract Exemption, ZRIN: 1210-ZA25
Proposed Class Exemption for Principal Transactions in Certain Debt Securities between
Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, ZRIN 1210-ZA25

Dear Secretary Perez:

I am writing to provide you with important information about financial conflicts of interest and other questions relating to editorial and substantive content of a study on the Department of Labor's (DOL) Conflict of Interest rule produced by Dr. Robert Litan and Dr. Hal Singer.¹

On July 21, 2015, Dr. Litan testified before a Health, Education, Labor, and Pensions Committee (HELP) subcommittee hearing about recently proposed regulations from DOL designed to protect Americans' retirement savings.² Although many retirement advisers recommend investments that work best for the customer, some advisers and brokers recommend investments based on the free vacations, cars, bonuses, fees, and other kickbacks that the adviser can earn from selling a lousy product to the customer. Because of a loophole in the law, it's often perfectly legal for those advisers to push that lousy product. DOL's new rule is designed to plug that hole and ensure all advisers are working in the best interest of their clients.

Dr. Litan's testimony referenced a study he and Dr. Singer conducted which concluded that the proposed regulations could produce a net harm to consumers. Many found these

¹ Robert Litan and Hal Singer, Economists Inc., *Good Intentions Gone Wrong: The Yet-to-Be Recognized Costs of the Department of Labor's Fiduciary Rule* (July 2015) (<http://www.ei.com/wp-content/uploads/2015/07/LitanSingerFiduciary.pdf>).

² Robert Litan, Testimony at Subcommittee on Employment and Workplace Safety (July 21, 2015).

conclusions surprising because they are wildly inconsistent with studies from the Council on Economic Advisors and the Department of Labor, and independent peer-reviewed academic studies which demonstrate that customers are currently losing billions of dollars annually in retirement savings because of bad investment advice that would be curtailed under this proposal.³

Members of the financial industry have prominently featured Dr. Litan and Dr. Singer's study in their public opposition to the DOL Conflict of Interest rule.⁴ The study was highly critical of the DOL proposed rule, and Dr. Litan's testimony echoed these criticisms. The study and testimony also contained a broad – but vague - disclosure, stating that “funding for this study was provided by the Capital Group, which provides investment services worldwide.”⁵ Dr. Litan's testimony provided a similar disclosure, also noting that “Dr. Singer and I are solely responsible for the analysis and conclusions in the study.”⁶

The Capital Group has been rhetorically supportive of a conflict of interest provision, but like other financial industry groups with a major stake in preserving the status quo, has been critical of key details in the proposal, claiming that it would “upend the market for personalized investment advice,” that the “proposed best interest contract exemption does not hit the mark,” and the DOL implementation timeline is “not practical.”⁷

I was curious about the full extent of financial industry support for this study, so I asked Dr. Litan additional questions for the record following the hearing. In response, Dr. Litan provided the Committee with important information that bears directly on the credibility of his analysis.

First, Dr. Litan provided previously undisclosed specifics on the amount of the financial support of the Capital Group for his work. He told the Committee that the Capital Group commissioned Economists, Inc. to have Dr. Litan and Dr. Singer conduct the study stating that “Economists, Inc. was paid \$85,000 for us to conduct the study” and further clarified that “my

³ Council on Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings* (February 2015) (https://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf); Mullainathan, Sendhil, Markus Noeth, and Antoinette Schoar. *The Market for Financial Advice: An Audit Study*, National Bureau of Economic Research Working Paper 17929. (2012.)

⁴ See, e.g., Testimony of Felicia Smith, Financial Services Roundtable, DOL Public Hearing on Proposed Fiduciary Rule (Aug. 10, 2015); ACLI, *Concerns about the Proposed Fiduciary Rule* (Sep. 2015) (https://www.acli.com/Issues/Fiduciary%20Rule/Documents/Concerns_about_Fiduciary_Reg_090215.pdf).

⁵ Robert Litan and Hal Singer, Economists Inc., *Good Intentions Gone Wrong: The Yet-to-Be Recognized Costs of the Department of Labor's Fiduciary Rule* (July 2015) (<http://www.ei.com/wp-content/uploads/2015/07/LitanSingerFiduciary.pdf>).

⁶ Robert Litan, Testimony at Subcommittee on Employment and Workplace Safety (July 21, 2015).

⁷ The Capital Group, Comments on Proposed Conflict of Interest Rule (July 20, 2015) (<http://www.dol.gov/ebsa/pdf/1210-AB32-2-00580.pdf>).

personal share was \$38,800.”⁸ Dr. Litan also stated that his work on the study was funded entirely by the Capital Group – and that no other entity provided financial support.⁹

I also asked Dr. Litan about whether the Capital Group provided guidance on the goals, content, or conclusions of the study. In response, he reasserted that “the conclusions are our own.”¹⁰ However, he also noted that “[t]he Capital Group provided us with feedback on our initial outline and some editorial comments, plus a few citations in the literature to follow up.”¹¹

The editorial input of the financial industry into Dr. Litan’s work, the exact amount of the sizeable financial compensation associated with the study, and the work-for-hire nature of the Capital Group’s commission for this work were not disclosed at the HELP hearing, and, so far as I can determine, have not previously been disclosed elsewhere. These disclosures are highly disturbing: the study was presented as objective academic research, but the financial and editorial arrangements raise significant questions about the impartiality of this study and its conclusions.

Approximately one week after Dr. Litan testified about his new study, other Brookings-affiliated researchers raised concerns about the findings of financial industry-funded work on the fiduciary rule – concerns that appeared to be directed at Dr. Litan’s work. Jane Dokko, the policy director for the Brookings-affiliated Hamilton Project, wrote:

To no surprise, those benefiting from current practices have paid for research to try to discredit the proposed rule. Such research claims that people don’t lose as much money from biased advice as careful, independent research has shown. Research not funded by special interest groups concludes that when they are paid to recommend certain financial products over others, advisors tilt their recommendations so that they receive higher pay. ... Independent research must generally undergo an anonymous review process before publication. Studies funded by special interests need not face such scrutiny. When it is to their advantage, they may use analytic techniques that would not be accepted in academic research, draw inaccurate inferences, use inappropriate data, or selectively report the results.¹²

⁸ Robert Litan, Responses to Questions for the Record from Subcommittee on Employment and Workplace Safety (Aug. 2015).

⁹ Robert Litan, Responses to Questions for the Record from Subcommittee on Employment and Workplace Safety (Aug. 2015).

¹⁰ Robert Litan, Responses to Questions for the Record from Subcommittee on Employment and Workplace Safety (Aug. 2015).

¹¹ Robert Litan, Responses to Questions for the Record from Subcommittee on Employment and Workplace Safety (Aug. 2015).

¹² Jane Dokko, *Caveat Emptor: Watch Where Research on the Fiduciary Rule Comes From* (July 29, 2015) (<http://www.brookings.edu/blogs/up-front/posts/2015/07/29-research-fiduciary-rule-comes-from>).

I hope that as you review incoming comments on the Conflict of Interest rule, including any comments from Dr. Litan, Dr. Singer, the Capital Group, or any other comments that cite this work, you will make note of these troubling disclosures that indicate the nature of the industry's support for, and editorial input into, Dr. Litan's and Dr. Singer's study. Families and small investors deserve access to unbiased advice about their finances and financial decisions, and it is equally important that the Department of Labor also relies on unbiased input from experts and the public about the impact of the proposed Conflict of Interest rule. Based on the newly disclosed information, Dr. Litan's and Dr. Singer's highly compensated and editorially compromised work on behalf of an industry player seeking a specific conclusion does not appear to meet this standard.

Sincerely,

A handwritten signature in blue ink that reads "Elizabeth Warren". The signature is fluid and cursive, with a long horizontal stroke at the end.

Elizabeth Warren
US Senator

Questions for the Record from Sen. Elizabeth Warren

July 21, 2015, HELP Subcommittee Hearing: "Restricting Advice and Education: DOL's Unworkable Investment Proposal for American Families and Retirees"

1. Mr. Litan, you testified that your study of the costs to consumers of DOL's proposed Conflicts of Interest rule was supported by the Capital Group, "one of the largest mutual fund asset managers in the United States." In the interest of full disclosure, a principle you advocate for at some length in your study, can you please tell us, for the record:

- A. The nature of and value of the "support" provided by the Capital Group.

The company commissioned us to do the study referenced in my testimony, but made clear that the conclusions were to be our own, which they are.

- B. Did the Capital Group provide guidance on the goals of, content of, or conclusions of the study?

The Capital Group provided us with feedback on our initial outline and some editorial comments, plus a few citations in the literature to follow up. However, Hal Singer and I did the research itself on our own, and the conclusions are our own. My standard practice in consulting assignments I have had during the course of my career is to be free to reach my own conclusions, and the same process was followed in this instance.

- C. How much were you paid by the Capital Group to conduct this study?

Economists, Inc was paid \$85,000 for us to conduct the study. My personal share was \$38,800.

- D. Did you receive financial support from other entities to conduct the study, and if so, how much?

No I did not.

2. Mr. Litan, as you know, economic analyses of the outcomes of events that have yet to occur necessarily rely on a series of assumptions about what might happen if the event occurs. Your findings, then, are only as reliable as the assumptions underlying them. In this case, your study relies heavily on estimates of the costs to consumers of moving from a brokerage-based account to a wrap-fee account from a 2011 Oliver Wyman study that assumes that the DOL rule will ban commissions. Since DOL's proposed rule does NOT ban commissions, why do you believe it is appropriate to include estimates based on this faulty assumption in your models?

The DOL rule only permits commissions under its Best Investment Contract Exemption, which contains a series of restrictions that many commenters on the rule suggest will mean that few brokers actually will take advantage of the exemption. Instead, either they will find it uneconomic to serve the small saver segment, depriving millions of advice, or give that advice only under a wrap fee model, which would be more expensive for small investors.

In fact, one needn't take my word (or that of my co-author word) for this happening. The economic benefits estimated by DOL for its rule are premised on a gradual phase out of broker-sold mutual funds. because the alleged under-performance of broker-sold funds is derived and calculated from the broker load, which the rule is aimed at eliminating. Accordingly, by the Department's assumption (not mine), this means that brokers either will not be serving small investors or will do so through other means (and these have traditionally been more expensive over time than the one-time front loads and small ongoing charges of broker-sold funds). Furthermore, the concern that small investors will no longer be served by human advisors on account of the proposal is also expressed in recent letters to the Secretary of Labor from multiple Democratic Senators.

3. Finally, the 2011 Oliver Wyman study, like your study, was paid for by financial services firms (Davis and Harman LLP commissioned the study at the request of "a group of 12 financial services firms that offer services to retail investors."). This study was not peer-reviewed or published in an academic journal. When do you believe it is appropriate to rely on non-peer-reviewed studies from consulting firms rather than studies from peer-reviewed, academic journals?

As the above answer indicates, even DOL itself has modeled its benefits on the *assumption* that its rule will drive broker-sold funds out of the market, so the conclusion that many brokers would leave the small saver market does not depend on the Oliver Wyman study. In any event, the Oliver Wyman study only buttresses this assumption. There are no academic studies my colleague Hal Singer and I could find on the specific subject of the impact of DOL's proposed rule on broker services provided to small savers.