BENJAMIN L. CARDIN
UNITED STATES SENATOR
MARYLAND

653663

United States Senate

Washington, DC 20510–2004

July 6, 2011

The Honorable Hilda Solis
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Secretary Solis:

I write today regarding the Department of Labor's (the Department) proposed regulation on the definition of a fiduciary under ERISA (Employee Retirement Income Security Act of 1974) and relevant provisions of the Internal Revenue Code. I seek your attention on behalf of the retirement plan participants, plan sponsors and individuals possibly affected by this regulation.

The current definition of a fiduciary has been in place for 35 years. I recognize the need for an update to the way a fiduciary is defined. It is important that the definition is comprehensive enough to allow advice that is tailored to meet the needs of plan participants and serve the needs of plan sponsors. However, if the definition is too broad, millions of Americans may lose needed investment education and information. An overly broad definition could also hurt plan sponsors, especially small businesses that could lose vital sources of investment information without which they would have difficulty maintaining a plan. The proposed rule must sufficiently meet the requirements of the retirement community. As a fundamental component of ERISA, it is important that a change of this significance is implemented deliberately, in a way that does not cause harm.

The Department has acknowledged the need to address the concerns and the uncertainty surrounding this issue (as expressed by members of the ERISA community.) You have received over 250 comment letters since the rule was proposed in October 2010. Acknowledgement is an important first step, but prohibited transaction exemptions and other tentatively proposed fixes might not be sufficient to address the concerns related to the sale of retirement products and related investment services. It is important that these concerns are properly addressed and fully analyzed before the final rule is issued.

I recommend that the Department suspend current efforts to propose a fiduciary definition and work to coordinate with all affected government agencies. There are issues regarding uncertainty about the effect of the proposed regulation and concerns about protecting plan participants. For example, the Securities and Exchange Commission (SEC) staff has issued a study concluding that investors are confused and harmed by receiving advice from advisors who are subject to different duties of care. The Department proposal and the SEC staff's recommendation together, could create a system where there is confusion surrounding the

Reply To:
☑ 509 Hart Senate Office Building
Washington, DC 20510–2004
(202) 224–4524
www.cardin.senate.gov

Reply To:
☐ Tower 1 Suite 1710
100 S. Charles Street
Baltimore, MD 21201
(410) 962–4436

provision of investment advice. The CFTC also has pending, relevant issues related to ERISA. The proposed "Business Conduct Standards for Swap Dealers and Major Swap Participants" authorized under the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 prohibits certain transactions for some ERISA plan participants. These varied standards could have a negative impact on retirement savings by increasing costs and reducing investment options.

I bring this proposed rule to your attention because of the possible impact on retirement savings and retirement accounts. Efforts to expand the definition of who is considered a fiduciary for retirement plans are well-intentioned, but could have unintended consequences if the final rule does not address the concerns emphasized in this letter. As we continue working to improve retirement security in our nation, it is important that these proposals have been through a careful and thorough process. Your leadership on this issue is critical because the Department has not indicated how they will resolve these issues.

I appreciate your attention to this matter and hope that under this advice the Department will consider these suggestions before issuing a final rule. It is important that we do our best to improve retirement income, increase financial education and give people the tools they need to prepare for their retirement.

Sincerely,

Ben Cardin

Benjamin L. Cardin
United States Senator

CC: Secretary Timothy Geithner, Department of Treasury
Chairman Gary Gensler, Commodity Futures Trading Commission
Secretary Jack Lew, Office of Management and Budget
Chairman Mary Schapiro, Securities and Exchange Commission
Director Gene Sperling, National Economic Council