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United States Senate

WASHINGTON, DC 20510

August 26, 2011

The Honorable Jacob J. Lew
Director
Office of Management & Budget
725 17th Street, NW
Washington, DC 20503

Dear Jack:

I am writing to express my deep concerns about the Department of Labor's proposed fiduciary rule under the Employee Retirement Income Security Act (ERISA). I wish to bring to your attention several respects in which the Department's rulemaking process has deviated from the principles set forth in the executive orders on regulation that the Office of Management and Budget administers.

The Department's proposed rule would broaden the regulatory definition of a critical legal term—"fiduciary"—that the retirement planning market has relied upon for 35 years. The impact of this major rule will be felt by millions of employers, retirement plan service providers, employees, and retirees alike. A rule of this magnitude and complexity should be crafted based on sound economics and full public input, particularly in a weak economy that has left many Americans concerned about their retirement security.

Unfortunately, the rulemaking record reveals that the Department's proposed rule is the product of a flawed process. The Department's approach is inconsistent with the principles of the leading presidential directives on regulation—Executive Order 12,866 (1993) and Executive Order 13,563 (2011)—in at least three ways.

First, President Obama's January 2011 order states that agencies should endeavor to solicit public comment from affected parties "[b]efore issuing a notice of proposed rulemaking." (E.O. 13,563). In the fiduciary rulemaking, however, the Department broke with its frequent practice of asking affected parties to provide relevant information before proposing a major rule that could reshape the retirement system. One would assume that the Department dispensed with the request-for-information stage because it had all the facts necessary to produce a sound rule based on thorough economic analysis. It appears that just the opposite was true, as explained below.

Second, the Department's economic analysis was incomplete, indeterminate, and "subject to uncertainty," by its own description. In its 5-page review of benefits and costs, the Department was "unable to quantify" any of the rule's benefits. Although some intangible benefits can be difficult to evaluate, the failure to give any empirical account of the benefits of this economic regulation casts doubt on the need for the rule. It also fails to meet the goal of quantifying benefits and costs "to the fullest extent that these can be usefully estimated." (E.O. 12,866).

On the other side of the equation, the Department quantified only a narrow subset of direct costs, based exclusively on data from employer-provided plans. The Department noted several major economic uncertainties surrounding the rule's possible "large market impact"—including whether it will increase fees for plan clients and restrict retirement planning options. But even more troubling are the major costs that the Department appears to have overlooked entirely. For example, the agency's economic analysis failed even to mention the following considerations:

1. **Loss of investment education and guidance.** The Department recognized that the market for service providers may "shrink," but it did not evaluate the loss to individual investors and retirees caused by the likely withdrawal of professional investment guidance and support by some service providers. A recent study found, for example, that this proposed regulation could cause 7.2 million Individual Retirement Account holders to lose access to an investment professional, as firms change their business practices to avoid the restrictions and litigation exposure that follows from fiduciary status. This could result in higher costs, higher account minimums, lower participation, and a loss in retirement savings.[1]

2. **Loss of plan formation services.** Commenters have noted that many employers—particularly small businesses—rely on the assistance of investment professionals to set up a retirement plan and select investment options suited to their employees' needs. By raising regulatory compliance costs and risk of litigation, this rule could reduce the availability of those services and cause fewer new plans to be created.

3. **Job loss for retirement service providers.** The Department did not address the potential job-loss impact for investment professionals and employees at call centers that many investors rely on for occasional, general investment guidance. If the market for service providers shrinks, job losses are likely to follow.

In light of these and other shortcomings in the Department's analysis, there is simply no basis to conclude that the proposed rule represents a "reasoned determination that the benefits of the intended regulation justify its cost." (E.O. 12,866).

Finally, the Department has not abided by the "inter-agency integration" that Executive Order 13,563 promises. That order urges "coordination across agencies" to reduce the risk of "redundant, inconsistent, or overlapping" regulatory requirements, "thus reducing costs and simplifying and harmonizing rules." But as many commenters have noted, the Department is proceeding out-of-step with the Securities and Exchange Commission's parallel efforts to study and propose changes to the standards governing personalized investment advice. That lack of coordination could yield conflicting rules.

The defects in the Department's rulemaking cannot be cured merely by including additional analysis in the final rule. At that stage, it will be too late for affected parties to provide meaningful comments on the revised final rule and the underlying analysis. Instead, I believe the Department should be instructed to re-propose a revised rule only after it has completed a thorough economic analysis and only in coordination with the Securities and Exchange Commission's possible related rulemaking.

Thank you for your consideration of this letter. I look forward to continued dialogue on this issue.

Sincerely,

Rob Portman

Rob Portman
U.S. Senator

cc: Hon. Cass Sunstein, Administrator, Office of Information and Regulatory Affairs
Hon. Hilda Solis, Secretary, U.S. Department of Labor

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[1] Oliver Wyman Report: Assessment of the Impact of the Department of Labor's Proposed "Fiduciary" Definition Rule on OIRA Consumers (2011).