United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

May 12, 2017

The Honorable R. Alexander Acosta
Secretary
Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Secretary Acosta:

Congratulations on your confirmation as Secretary of the Department of Labor. I look forward to working with you as Congress and the Trump Administration begin to unwind the previous Administration's burdensome over-regulation. One prime example of over-regulation is the Labor Department's so-called "fiduciary rule."[1] I respectfully draw your attention to this regulation.

During the 114th Congress, I conducted oversight of the process by which the Labor Department worked with the Securities and Exchange Commission (SEC), the Treasury Department, and other agencies to develop the fiduciary rule.[2] Based on this oversight, the Committee issued a majority staff report in February 2016 finding deficiencies in the rulemaking process.[3] I have enclosed a copy of the report with this letter.

Under the previous Administration, the Labor Department prioritized the expeditious completion of the rulemaking process at the expense of thoughtful deliberation.[4] Documents showed that the Department disregarded concerns raised by other agencies.[5] In one email, a Labor Department employee wrote to his SEC counterpart, "[w]e have now gone far beyond the point where your input was helpful to me. . . . If you have nothing new to bring up, please stop

[1] Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016).

[2] *See* Letter from Hon. Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs (HSGAC), to Hon. Thomas E. Perez, Sec'y, U.S Dep't of Labor (DOL) (Feb. 5, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Thomas E. Perez, Sec'y, DOL (Mar. 17, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Mary Jo White, Chair, Sec. & Exch. Comm'n (SEC) (Apr. 21, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Mary Jo White, Chair, SEC (May 20, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Mary Jo White, Chair, SEC (July 13, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Richard Ketchum, Chairman, FINRA (Sept. 16, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Howard Shelanski, Admin'r, OIRA (May 1, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Howard Shelanski, Admin'r, OIRA (Dec. 3, 2015); Letter from Hon. Ron Johnson, Chairman, HSGAC, to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury (Nov. 12, 2015).

[3] S. Comm. on Homeland Sec. & Governmental Affairs, The Labor Department's Fiduciary Rule: How a Flawed Process Could Hurt Retirement Savers (Feb. 24, 2016).

[4] *Id.*

[5] *Id.*

emailing me."[6] The SEC official replied that he was "utterly confused" about the goal of the rule.[7] Likewise, the Labor Department ignored the SEC's recommendation relating to a cost-benefit analysis because the analysis "would be extraordinarily difficult and would appreciably delay the project for very little return . . . ."[8] The Treasury Department similarly noted that the fiduciary rule departed from congressional intent and "seem[ed] to fly in the face of the logic."[9]

The report also noted indications that the previous Administration was predetermined to regulate the investment advice industry, seeking evidence to support its preferred policy. In emails to senior White House officials, a Labor Department employee wrote of the "challenges in completing the [regulatory impact analysis]" and of the need to identify data that "can be woven together to demonstrate that there is a market failure and to monetize the potential benefits of fixing it."[10] In a separate email, a Department employee noted the need of "building the case for why the rule is necessary."[11] These emails suggest that rather than identifying a market failure and pursuing a regulatory remedy, the previous administration's rulemaking was a solution in search of a problem.

It is generally accepted that investment advisors should act in the best interest of their clients, and many advisers abide by this standard.[12] Some industry experts criticized the rule as overly complex and burdensome, imposing compliance costs of $21.5 million and annual maintenance costs of $5.1 million.[13] Experts also warned that the rule would distort the investment advice market—pricing middle-class, small-account holders out of access to investment services.[14] Cumulatively, these investors could lose as much as $68 to 80 billion in retirement savings per year.[15] The rule also threatens small- to mid-size investment firms that cannot afford the additional compliance costs or litigation risks caused by the rule.[16]

As you begin your tenure as Secretary of Labor, I respectfully urge you to prioritize a review of the Department's fiduciary rule, consistent with President Trump's directive.[17] Without prompt action, the rule—which begins to take effect on June 9, 2017[18]—could have adverse consequences for millions of middle-income retirement savers. I hope you will review the Department's fiduciary rule and take appropriate steps to rein in the regulatory overreach of

[6] *Id.* at 11.
[7] *Id.* at 12.
[8] *Id.* at 19.
[9] *Id.* at 25.
[10] *Id.* at 31.
[11] *Id.*
[12] *Id.* at 3.
[13] *Id.* at 27 (citing Megan Milloy, Am. Action Foum, DOL's Proposed Fiduciary Rule: Not in the Best Interest of Investors (2015)).
[14] *Id.* at 30.
[15] *Id.* (citing Quantria Strategies, LLC, Unintended Consequences: Potential of the DOL Regulations to Reduce Financial Advice and Erode Retirement Readiness 1 (2015)).
[16] *Id.* at 30-31.
[17] *See* Presidential Memorandum on Fiduciary Duty Rule, 82 Fed. Reg. 9,675 (Feb. 3, 2017).
[18] Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 82 Fed. Reg. 16,902 (Apr. 7, 2017).

the previous Administration and allow more Americans to access investment advice as they prepare for retirement.

Thank you for your attention to this matter.

Sincerely,

Ron Johnson

Ron Johnson
Chairman

cc: The Honorable Claire McCaskill
Ranking Member

Enclosure

THE LABOR DEPARTMENT'S FIDUCIARY RULE: HOW A FLAWED PROCESS COULD HURT RETIREMENT SAVERS

A Majority Staff Report of the
Committee on Homeland Security and Governmental Affairs
United States Senate
Senator Ron Johnson, Chairman

February 24, 2016

EXECUTIVE SUMMARY

For millions of Americans, retirement saving is an important step in ensuring a comfortable standard of living well past employment. However, the process of saving for retirement can be difficult, confusing, and scary. To navigate the wide array of saving plans and options, individuals often turn to investment advisors for advice. A 2015 study reported that receiving investment advice significantly increases retirement savings.[1] According to the report, among individuals with $100,000 or less in annual income, individuals who receive investment advice save at least 38% more than individuals who do not receive investment advice.[2] For individuals of retirement age (65 and older), the disparity increases: advised individuals have more than double the assets of non-advised individuals.[3]

The Department of Labor issued a proposed rule ("rule," "proposed rule," or "proposal") on April 20, 2015, which would expand the definition of a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA). The Labor Department's proposed rule redefined the term "investment advice" to encompass activities that occur within pension and retirement plans, but that do not constitute investment advice under the existing definition of investment advice. The Labor Department touts its rule as a necessary reform to the investment advice industry to ensure that investment advisors avoid conflicts of interest and act in the best interest of their clients.

In February 2015, Senator Ron Johnson, Chairman of the Senate Committee on Homeland Security and Governmental Affairs, initiated an inquiry to examine the Labor Department's fiduciary rulemaking. This inquiry found that career, non-partisan professional staff at the Securities and Exchange Commission (SEC); regulatory experts at the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB); and Treasury Department officials expressed numerous concerns to the Labor Department about its proposed rule. Documents obtained by the Committee also indicate that officials at the Labor Department disregarded many of these concerns and declined to implement recommendations from the SEC, OIRA, and the Treasury Department. The majority staff found that the Labor Department frequently prioritized the expeditious completion of the rulemaking process at the expense of thoughtful deliberation. Additionally, the majority staff found indications that political appointees at the White House played a key role in driving the rulemaking process at the inception of the redrafting effort.

---

[1] OLIVER WYMAN, THE ROLE OF FINANCIAL ADVISORS IN THE US RETIREMENT MARKET 16 (2015)

[2] *Id.*; *Restricting Advice and Education: DOL's Unworkable Investment Proposal for American Families and Retirees, Hearing Before the Subcomm. on Emp't & Workplace Safety of the S. Comm. on Health, Educ., Labor & Pensions*, 114th Cong. (2015) [hereinafter Senate HELP Committee Hearing] (statement of Peter Schneider, President, Primerica, Inc.).

[3] WYMAN, *supra* note 1; Senate HELP Committee Hearing (statement of Peter Schneider), *supra* note 2.

Specifically, the report's findings include the following information:

- Despite public assurances that the Labor Department had collaborated with the SEC, emails between a Labor Department employee and an SEC expert reveal discord between the agencies about the rulemaking. The Labor Department employee wrote to his SEC counterpart: "Well, I hate to break it to you, but you're wrong," and **"We have now gone far beyond the point where your input was helpful to me. . . . If you have nothing new to bring up, please stop emailing me."** The SEC staffer responded: **"I am now also utterly confused as to what the purpose of the proposed DOL rule is** . . . ."[4]
- Career, non-partisan SEC staff identified at least 26 items of concern related to the substantive content of the proposed rule, and the Labor Department declined to fully resolve all of the concerns.[5]
- After the Labor Department sought to address to the SEC's stated items of concern, a senior SEC official emphasized to the Labor Department that concerns remained:

  > *[W]e continue to believe that commentators are likely to raise concerns that the proposal may result in reduced pricing options, rising costs and limited access to retirement advice, particularly for retail investors. Commentators also may express concerns that broker-dealers, as a practical matter, may be unlikely to use the exemptions provided and may stop providing services because of the number of conditions imposed, likely compliance costs, and lack of clarity around several provisions.*[6]

- The Labor Department rejected the SEC's recommendation and ignored the requirements of Executive Orders 12866 and 13563 to quantify the costs and benefits of alternative approaches. As a Labor Department employee explained, **"We think this would be extraordinarily difficult and would appreciably delay the project for very little return . . . ."**[7]
- Treasury officials voiced concerns that the Labor Department's proposal, by attempting to regulate IRAs through the proposed rule, "fl[ies] in the face of logic" and was contrary to Congressional intent. The Labor Department promulgated the proposed rule less than two weeks after circulating this draft, undoubtedly limiting the extent to which the Department considered the comments it received from the Treasury Department.[8]
- The Administration was predetermined to regulate the industry and sought evidence to justify its preferred action. In emails to senior White House advisors, a Labor Department official wrote of the **"challenges in completing the [regulatory impact**

[4] *Infra* Part II(a).
[5] *Infra* Part II(a).
[6] *Infra* Part II(a).
[7] *Infra* Part II(a)(iv).
[8] *Infra* Part II(d).

analysis]" and of the need to find literature and data that "can be woven together to demonstrate that there is a market failure and to monetize the potential benefits of fixing it." In another email, a Labor Department official discussed **"building the case for why the rule is necessary."**[9]

- The Labor Department rejected OIRA's recommendation to add language stating that the rule would "permit firms to continue *to rely on all* common fee and compensation practices . . . ." The Labor Department responded that "[n]ot all fee practices will be permitted by the exemptions" and that "[b]y deleting 'all' we slightly soften this by leaving it at 'common fee and compensation practices.'"[10]

Investment advisors, in general, do not dispute the importance of acting in the best interest of their clients, and many advisors already abide by a best interest standard.[11] However, experts have criticized the proposed rule as burdensome and complex,[12] and have challenged the Labor Department's claims that the rule will generate benefits for investors.[13] They contend that the Administration has reported inflated numbers for the harm that results from investors relying on "conflicted advice,"[14] with one expert opining "[y]ou don't have to be an economist to recognize the Administration's $17 billion talking point significantly overestimates the costs, if any, to investors relying on the 'conflicted advice' of brokers."[15] Experts also caution that the proposal's conditions and requirements would create uncertainty for investment advisors and would increase compliance costs and litigation risks. They warn that the Labor Department's analysis overstates the rule's benefits and that the rule could actually result in net losses to retirement savers.[16] These experts emphasize that the rule would actually harm the investors it is supposed to protect; the rule would drive up the price of investment advice and would ultimately decrease the availability of advice for low- and middle-income investors.

A 2015 report estimates that the rule will cause a loss of retirement savings of $68–80 billion per year, and will "jeopardize retirement readiness for 11.9 million IRA and retirement participants."[17] Robert Litan, an economist and attorney who served as the associate director of

---

[9] *Infra* Part IV.
[10] *Infra* Part II(c).
[11] *E.g.*, Senate HELP Committee Hearing, *supra* note 2 (statement of Robert Litan).
[12] *Id.*
[13] *Id.* (statement of Peter Schneider); QUANTRIA STRATEGIES, LLC, UNINTENDED CONSEQUENCES: POTENTIAL OF THE DOL REGULATIONS TO REDUCE FINANCIAL ADVICE AND ERODE RETIREMENT READINESS 1 (2015) (prepared for Davis & Harman).
[14] EXEC. OFFICE OF THE PRESIDENT, THE EFFECTS OF CONFLICTED INVESTMENT ADVICE ON RETIREMENT SAVINGS (2015).
[15] Craig M. Lewis, *An Inflated $17 Billion Talking Point From the DOL*, FORBES (Dec. 16, 2015, 12:30 PM), http://www.forbes.com/sites/realspin/2015/12/16/an-inflated-17-billion-talking-point-from-the-dol/#782b028439e1.
[16] QUANTRIA STRATEGIES, *supra* note 13, at 1; Senate HELP Committee Hearing, *supra* note 2 (statement of Robert Litan).
[17] QUANTRIA STRATEGIES, *supra* note 13, at 1; Senate HELP Committee Hearing, *supra* note 2 (statement of Peter Schneider).

the White House budget office in the Clinton Administration, predicts that seven million or more small investors could lose their brokers as a result of the rule.[18] This would be costly to investors, who may make worse investing decisions when they do not receive human investment advice.[19]

Some observers suggest that this is actually an *intended* effect of the rule, and that the Labor Department believes that low- and middle-income investors should receive advice primarily from robo-advisors to avoid conflicts of interest.[20] If accurate, it is alarming that the Labor Department is intentionally restricting low- and middle-income investors to robo-advice based on a presumption that those investors lack the sophistication to interact with an individual investment advisor and to understand options presented to them.

As the majority staff puts forward its findings, it is important to note that Chairman Johnson performed this oversight in the face of continuous obstruction from the Labor Department. In February 2015, Chairman Johnson requested documents, including communications between the Labor Department and the White House and between the Labor Department and the SEC. However, to date, the Labor Department has not fulfilled Chairman Johnson's requests. The Labor Department has produced no material responsive to Chairman Johnson request for communications between the Department and the White House. The Department initially claimed that no responsive documents existed, but refused to provide Chairman Johnson with information about how Labor Department officials searched for documents. Chairman Johnson later received, from the SEC, communications between the Department and the White House. Additionally, the Department has produced only a limited subset of self-selected communications between the Department and the SEC and provided short briefings to the Committee. These productions fall short of full compliance. Most egregiously, the Labor Department even urged the SEC to similarly hinder Chairman Johnson's oversight work by asking the SEC to reject the Chairman's separate requests to the SEC for documents in the control and possession of the SEC.

Due to the Labor Department's obstructionism, Chairman Johnson and the majority staff have not had the opportunity to review the full universe of documents and communications related to the rule. The analysis and findings in this report are based on the information received. However, the information that Chairman Johnson was able to obtain strongly suggests that the Labor Department engaged in a flawed rulemaking process to craft a rule that will hurt millions of American retirement savers.

---

[18] Senate HELP Committee Hearing, *supra* note 2 (statement of Robert Litan).
[19] *Id.*
[20] *Id.*

TABLE OF CONTENTS

I. INTRODUCTION

On April 20, 2015, the Department of Labor issued a proposed rule to expand the definition of a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA).[21] The Labor Department's proposed rule redefined the term "investment advice" to encompass activities that occur within pension and retirement plans, but do not constitute investment advice under the existing definition of investment advice.[22] The Labor Department's promulgation of this rule was the culmination of a years-long effort by the Department's Employee Benefits Security Administration (EBSA).[23]

Even before the latest proposal was announced, stakeholders began raising concerns that the rule would adversely affect access to investment advice for low- and middle-income Americans.[24] Additional questions were raised about the close involvement of the White House in shaping the proposal.[25] In light of these concerns, Senator Ron Johnson, Chairman of the Senate Committee on Homeland Security and Governmental Affairs, initiated an inquiry in early February 2015.[26]

Under Senate rules and precedent, the Committee has legislative jurisdiction over intergovernmental relations and the regulatory process of the federal government. The Committee also has specific authority to examine "the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs."[27] Chairman Johnson initiated the inquiry pursuant to these authorities.

Chairman Johnson sought to examine the Labor Department's rulemaking process to ensure that the Department solicited and fully considered advice from career, non-partisan professionals with expertise in the proposal's subject matter.[28] As part of its inquiry, Chairman Johnson requested information and documents from the Securities and Exchange Commission

---

[21] CONG. RESEARCH SERV., R44207, DEPARTMENT OF LABOR'S 2015 PROPOSED FIDUCIARY RULE: BACKGROUND AND ISSUES 1 (2015).
[22] *Id.*
[23] Mark Schoeff, *DOL Proposal of Fiduciary-Duty Rule Delayed Again*, INVESTMENT NEWS (May 28, 2014, 8:30 AM), http://www.investmentnews.com/article/20140528/FREE/140529932/dol-proposal-of-fiduciary-duty-rule-delayed-again.
[24] *Id.*
[25] *E.g.*, Melanie Waddell, *White House Getting Involved with DOL Fiduciary Redraft*, THINK ADVISOR (July 1, 2014), http://www.thinkadvisor.com/2014/07/01/white-house-getting-involved-with-dol-fiduciary-re.
[26] Appendix A, Ex. 1, Letter from Hon. Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs (HSGAC), to Hon. Thomas E. Perez, Sec'y, U.S Dep't of Labor (DOL) (Feb. 5, 2015).
[27] S. Res. 73 § 12, 114th Cong. (2015).
[28] *See* Appendix A, Ex. 1, Letter from Chairman Johnson to Sec'y Perez, DOL (Feb. 5, 2015); Appendix A, Ex. 2, Letter from Chairman Johnson to Sec'y Perez, DOL (Mar. 17, 2015).

(SEC),[29] the Financial Industry Regulatory Authority (FINRA),[30] the Office of Information and Regulatory Affairs (OIRA),[31] the Department of the Treasury,[32] and the Labor Department.[33] In response, the SEC provided three document productions to the Committee.[34] These productions, which the SEC made despite the Labor Department's attempt to persuade the SEC to reject the Chairman's requests,[35] shed significant light on the recommendations and concerns that career, non-partisan, professional staff at the SEC provided prior to the release of the proposal. The SEC documents also shed light on aspects of the recommendations and concerns offered by regulatory experts at OIRA and from Treasury Department officials. FINRA additionally provided two document productions to the Committee.[36] OIRA provided one document production, although it was largely nonresponsive to Chairman Johnson's requests.[37] Finally, the Committee received a limited subset of documents from the Labor Department regarding its communications with the SEC; however, the Labor Department continues to withhold other responsive documents from the Committee.[38]

Based on the information received by the Committee, the majority staff has found that career, non-partisan, professional staff at the SEC, regulatory experts at OIRA, and Treasury Department officials expressed concerns to the Labor Department about its proposed rule. While Chairman Johnson and the majority staff do not have access to the entirety of Labor Department records, it appears that the Labor Department ignored and rejected many concerns and recommendations by subject-matter and regulatory experts.

---

[29] Appendix A, Ex. 3, Letter from Chairman Johnson to Hon. Mary Jo White, Chair, SEC (Apr. 21, 2015); Appendix A, Ex. 4, Letter from Chairman Johnson to Chairwoman White, SEC (May 20, 2015); Appendix A, Ex. 5, Letter from Chairman Johnson to Chairwoman White, SEC (July 13, 2015).

[30] Appendix A, Ex. 6, Letter from Chairman Johnson to Richard Ketchum, Chairman, FINRA (Sept. 16, 2015).

[31] Appendix A, Ex. 7, Letter from Chairman Johnson Hon. Howard Shelanski, Admin'r, OIRA (May 1, 2015); Appendix A, Ex. 8, Letter from Chairman Johnson to Admin'r Shelanski, OIRA (Dec. 3, 2015).

[32] Appendix A, Ex. 9, Letter from Chairman Johnson to Hon. Jacob Lew, Sec'y, Treasury Dep't (Nov. 12, 2015).

[33] Appendix A, Ex. 3, Letter from Chairman Johnson to Chairwoman White, SEC (Apr. 21, 2015).

[34] Appendix A, Ex. 10, Letter from Chairwoman White, SEC, to Chairman Johnson (May 5, 2015); Appendix A, Ex. 11, Letter from Tim Henseler, Dir., Office of Leg. & Intergovernmental Affairs, SEC, to Chairman Johnson (July 27, 2015); Appendix A, Ex. 12, Letter from Tim Henseler, SEC, to Chairman Johnson (Sept. 15, 2015); Appendix A, Ex. 13, Letter from Tim Henseler, SEC, to Chairman Johnson (Nov. 25, 2015) (complete document productions on file with Committee).

[35] Appendix A, Ex. 14, Letter from Adri Jayaratne, Acting Asst. Sec'y, Office of Cong. & Intergovernmental Affairs, DOL, to Chairman Johnson (July 8, 2015).

[36] Appendix A, Ex. 15, Letter from Robert Colby, Exec. VP & Chief Legal Officer, FINRA, to Chairman Johnson (Oct. 15, 2015); Appendix A, Ex. 16, Letter from Robert Colby, FINRA, to Chairman Johnson (Oct. 29, 2015).

[37] Appendix A, Ex. 17, Letter from Admin'r Shelanski, OIRA, to Chairman Johnson (May 18, 2015); Appendix A, Ex. 18, Letter from Admin'r Shelanski, OIRA, to Chairman Johnson (Jan. 20, 2016).

[38] Appendix A, Ex. 19, Letter from Acting Asst. Sec'y Jayaratne, DOL, to Chairman Johnson (Feb. 9, 2015); Appendix A, Ex. 20, Letter from Acting Asst. Sec'y Jayaratne, DOL, to Chairman Johnson (Feb. 23, 2015);Appendix A, Ex. 21, Letter from Acting Asst. Sec'y Jayaratne, DOL, to Chairman Johnson (Mar. 23, 2015); Appendix A, Ex. 22, Letter from Acting Asst. Sec'y Jayaratne, DOL, to Chairman Johnson (Apr. 3, 2015); Appendix A, Ex. 23, Letter from Acting Asst. Sec'y Jayaratne, DOL, to Chairman Johnson (June 15, 2015); Appendix A, Ex. 14, Letter from Acting Asst. Sec'y Jayaratne, DOL, to Chairman Johnson (July 8, 2015); Appendix A, Ex. 24, Letter from Acting Asst. Sec'y Jayaratne, DOL, to Chairman Johnson (July 27, 2015).

The Department's proposal appears to be a solution in search of a problem, driven by ideology rather than a market need. As a result, some studies suggest that the proposal could result in losses to retirement savers of $68–80 billion each year and will drive smaller investment advisors out of the marketplace.[39] Experts have criticized the Labor Department's rule as burdensome and complex and caution that the rule's conditions and requirements will create uncertainty for investment advisors and drive up compliance costs and litigation risks.[40] Ultimately, the rule will likely prompt investment advisors to increase the price of services they offer to investors and to reduce the services they provide to middle-income investors.[41]

II. THE LABOR DEPARTMENT DECLINED TO INCORPORATE RECOMMENDATIONS FROM SUBJECT-MATTER AND REGULATORY EXPERTS

a. The Labor Department Declined to Incorporate Recommendations from Career Experts at the SEC into the Proposed Rule

Under the Dodd-Frank Act, the SEC has authority to regulate standards of care for broker-dealers and investment advisers.[42] Section 913 of the Dodd-Frank Act directed the SEC to examine existing regulations, evaluate their potential effects on retail customers, and to recommend fiduciary standards to govern the industry.[43] Additionally, based on the authority granted by the Investment Advisers Acts in 1940, the SEC has historically regulated the investment industry.[44] The SEC is, therefore, the proper entity with the appropriate securities law expertise, to consider issues such as requiring a best interest standard for investment advisors. The SEC has reported plans to issue a uniform regulation governing retail investment advice, which could result in "two incredibly burdensome and redundant rules"[45] disseminated by the Labor Department and the SEC.[46]

---

[39] QUANTRIA STRATEGIES, *supra* note 13, at 1.
[40] *Infra* Part III.
[41] *Infra* Part III.
[42] The Dodd-Frank Wall Street Reform and Consumer Protection Act § 913, 124 Stat. 1376 (2010).
[43] *Id.*; MEGAN MILLOY, AM. ACTION FORUM, DOL'S PROPOSED FIDUCIARY RULE: NOT IN THE BEST INTEREST OF INVESTORS (2015).
[44] Investment Advisers Act of 1940, 15 U.S.C. § 80b-1.
[45] Appendix A, Ex. 25, Letter from Daniel Gallagher, Comm'r, SEC, to Sec'y Perez, DOL (July 21, 2015).
[46] SEC Office of Mgmt. & Budget Fall Agenda, Personalized Investment Advice Standard of Conduct, *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=3235-AL27 (scheduling a notice of proposed rulemaking for October 2016); Mark Schoeff, Jr., *SEC's Mary Jo White Says Agency Will Develop Fiduciary Rule for Brokers*, INVESTMENT NEWS (Mar. 17, 2015, 12:31 PM), http://www.investmentnews.com/article/20150317/FREE/150319919/secs-mary-jo-white-says-agency-will-develop-fiduciary-rule-for.

The Labor Department has authority under ERISA to regulate private-sector, employer-provided benefit plans. However, according to the former head of EBSA, the Labor Department has significantly departed from its traditional view of its jurisdiction by attempting to regulate compensation and conduct for *all* types of financial advisors, including registered investment advisors and registered representatives of broker dealers.[47] At a minimum, given the SEC staff's expertise in securities regulation and the potential for conflict between the two rules, the Labor Department should have ensured that its rule incorporated recommendations and addressed concerns voiced by professional experts at the SEC.

However, former SEC Commissioner Daniel Gallagher emphasized that the Labor Department did not collaborate with the SEC in the rulemaking process.[48] Commissioner Gallagher called the rulemaking a "fait accompli" and criticized the comment process for being "merely perfunctory."[49] Commissioner Gallagher dispelled Department of Labor Secretary Thomas Perez's claims that the Labor Department "met substantively" with career, non-partisan staff at the SEC, pointing out that Commissioner Gallagher was not included in any such conversations.[50] Commissioner Gallagher wrote that, in contrast to Secretary Perez's claims, "the [Labor Department's] actions, and the substance of the [Labor Department] Fiduciary Proposal, reflect a lack of concern for the [SEC's] views on these issues."[51] He continued:

> Strikingly, the Fiduciary Proposal does not contemplate or even mention potential SEC rules or the SEC's existing regime for regulating broker-dealers and investment advisers. If the DOL were actually serious about working together with the SEC on an implementable standard, it could have—and should have—included in its proposal some type of substituted compliance mechanism, in which compliance with an SEC fiduciary standard would satisfy the DOL rules.[52]

Chairman Johnson has obtained information that supports Commissioner Gallagher's position that the Labor Department failed to work in good faith with the career, non-partisan, professional staff at the SEC. For more than a year preceding the Labor Department's promulgation of the proposed rule, SEC staff received draft portions of the proposed rulemaking package, including a draft regulatory impact analysis, draft global exemption (Best Interest Contract Exemption), and background on the point of sale disclosure.[53] Communications between the Labor Department and the SEC staff reveal numerous instances in which the Labor Department requested advice from SEC staff on fundamental aspects of the proposal, but

[47] *Hearing on the Department of Labor's Proposed Fiduciary Rule Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 114th Cong. (2015) [hereinafter House Ways & Means Committee Hearing] (statement of Bradford Campbell).
[48] Appendix A, Ex. 25, Letter from Comm'r Gallagher, SEC to Sec'y Perez, DOL (July 21, 2015).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] Briefing by Staff, DOL, to Committee Staff, HSGAC (Aug. 28, 2015) (notes on file with Committee).

disagreed with the SEC's recommendations and, in doing so, disregarded the SEC staff's subject-matter expertise.

Although Secretary Perez publicly assured stakeholders that the Labor Department collaborated with the SEC and "worked extensively with colleagues throughout the government, including and especially the [SEC],"[54] documents obtained by the Committee paint another picture. A series of emails in July and August 2012 reveal disagreements between Labor Department staff and SEC staff about the type of improper activity the proposal should measure. The SEC staff suggested that the proposal should measure conflicts of interest, whereas the Labor Department sought to measure investment returns.[55] These men were apparently classmates in a PhD program—which may account for the candid tone of the emails—but the email exchange suggests that the Labor Department disregarded an SEC expert's serious concerns about the rule.[56] In one email, after a lengthy discussion of the proposal, a Labor Department staffer wrote to an SEC staffer:[57]

---

[54] Senate HELP Committee Hearing, *supra* note 2 (statement of Thomas Perez, Sec'y of Labor).

[55] Appendix B, Ex. 1, Emails between Matthew Kozora, SEC, and Keith Bergstresser, U.S. Dep't of Labor (July 2012), SEC-DOL008040–008052.

[56] The Labor Department represented to Committee staff that the Labor Department employee, Keith Bergstresser, and the SEC employee, Matthew L. Kozora, attended school together. Mr. Bergstresser received a Ph.D. in Economics from the University of Maryland, College Park, in 2009, and has been an economist at the Labor Department since June 2009. *See* Linkedin.com, Keith Bergstresser, https://www.linkedin.com/in/keith-bergstresser-10651482. He serves in the Office of Policy and Research within the Employee Benefits and Security Administration. *In re: Conflict of Interest Proposed Rule, Related Exemptions, and Regulatory Impact Analysis Hearing*, U.S. Dep't of Labor, Employee Benefits Security Admin. (Aug. 11, 2015). Mr. Bergstresser reports to the head of EBSA, Assistant Secretary Phyllis Borzi, a presidentially appointed official who has been described as the "main architect" of the fiduciary rule. Melanie Waddell, *DOL to 'Simplify and Streamline' Fiduciary Rule: Borzi*, THINKADVISOR (Oct. 20, 2015). Mr. Kozora received a Ph.D. in Finance from the University of Maryland, College Park, in 2010, and has been a financial economist at the SEC since 2010. *See* Matthew L. Kozora, Financial Economist, Office of Asset Management, SEC.gov, http://www.sec.gov/divisions/riskfin/economistbios/matthew-l-kozora.shtml. Mr. Kozora serves in the Office of Asset Management within the Division of Economic and Risk Analysis. *Id.* As the SEC's "think tank," the Division provides "detailed, high-quality economic and statistical analyses, and specific subject-matter expertise . . . ." *About the Division of Economic and Risk Analysis*, SEC.GOV, https://www.sec.gov/dera/about. Ultimately, the SEC's regulatory authority is vested in a bipartisan, five-member commission who serve staggered terms—in the words of the SEC, "ensuring non-partisanship." *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC.GOV, https://www.sec.gov/about/whatwedo.shtml. While both men possess financial expertise, the different structures of their respective agencies and the Labor Department's advocacy for the rulemaking appear to have caused the men to adopt differing opinions about the Labor Department's proposal.

[57] Appendix B, Ex. 1, Email from Keith Bergstresser, U.S. Dep't of Labor, to Matthew Kozora, SEC (July 31, 2012, 1:49 PM), SEC-DOL008057–008058.

From: Bergstresser, Keith - EBSA [redacted]@dol.gov]
Sent: Tuesday, July 31, 2012 1:50 PM
To: Kozora, Matthew
Subject: RE: question

Well, I hate to break it to you, but you're wrong. People do not respond to fees or any other costs, but they do chase returns. This and our other reasons for choosing the disclosure that we have developed are laid out in the document that we've already sent over to you (attached). You might try reading the paragraph labeled "Portfolio Returns" on page 4. And do look into the references. They are very convincing.

In a later email, Labor Department staff dismissively wrote to the SEC financial economist:[58]

From: Bergstresser, Keith - EBSA[redacted]@dol.gov]
Sent: Tuesday, July 31, 2012 3:23 PM
To: Kozora, Matthew
Subject: RE: question

See my responses below. We have now gone far beyond the point where your input was helpful to me. You keep circling back to the same statements, many of which are unsupported conjectures on your part, and most of which I have addressed even before you brought them up. Yet, your statements do not seem to even acknowledge the points that I already made (with supporting evidence) in the document we sent. If you have nothing new to bring up, please stop emailing me about this topic.

[58] Appendix B, Ex. 1, Email from Keith Bergstresser, U.S. Dep't of Labor, to Matthew Kozora, SEC (July 31, 2012, 3:22 PM), SEC-DOL008056.

The SEC financial economist responded, expressing confusion about the fundamental purpose of the Labor Department's proposal:[59]

> **From:** Kozora, Matthew [redacted]SEC.GOV]
> **Sent:** Tuesday, July 31, 2012 3:43 PM
> **To:** Bergstresser, Keith - EBSA
> **Subject:** RE: question
>
> I apologize if I have overstepped my boundaries. This is a difficult topic for sure, and I was under the impression that my opinion was a. helpful and b. wanted.
>
> I am also now utterly confused as to what the purpose of the proposed DOL rule is then, if not to limit advisor conflicts when providing retirement advice? Considering that my prior is that the DOL wants to reduce advisor conflicts, it just seems logical to me that the end result should measure advisory conflicts.
>
> Good luck with your rulemaking
>
> Matt

Finally, SEC staff expressed concern about "intent of the measure itself," and wrote that the SEC and the Labor Department "just have two opposing viewpoints on the matter."[60] Labor Department staff deferred continuing the conversation to a later date,[61] but documents the Committee received provide no indication of future discussion on this topic. The SEC staff also raised concerns about the Labor Department's reliance on psychology literature to draft the rule, which would result in comparisons that "have very little economic meaning and thus no value to consumers."[62]

---

[59] Appendix B, Ex. 1, Email from Matthew Kozora, SEC, to Keith Bergstresser, U.S. Dep't of Labor (July 31, 2012, 3:42 PM), SEC-DOL008055–008056.
[60] Appendix B, Ex. 1, Email from Matthew Kozora, SEC, to Keith Bergstresser, U.S. Dep't of Labor (Aug. 2, 2012, 11:57 AM), SEC-DOL008054–008055.
[61] Appendix B, Ex. 1, Email from Keith Bergstresser, U.S. Dep't of Labor, to Matthew Kozora, SEC (Aug. 2, 2012, 2:00 PM), SEC-DOL008054.
[62] Appendix B, Ex. 1, Email from Matthew Kozora, SEC, to Keith Bergstresser, U.S. Dep't of Labor (Aug. 2, 2012, 11:57 AM), SEC-DOL008054–008055.

From: Bergstresser, Keith - EBSA [redacted]@dol.gov]
Sent: Tuesday, July 31, 2012 4:15 PM
To: Kozora, Matthew
Subject: RE. question

I would be happy to have a phone conversation to discuss the purpose of the rule, the purpose of the exemption conditions and distinctions between the two. don't think I want to try to have that conversation via email I might have some time tomorrow, but I'm at a conference Thursday and Friday and then on vacation next week.

From: Kozora, Matthew [redacted]@SEC.GOV]
Sent: Thursday, August 02, 2012 11:57 AM
To: Bergstresser, Keith - EBSA
Subject: RE: question

Dear Keith

There is a fundamental difference between price variation and the risk investors bear For instance, prices may not change over a given period of time but yet investors might still bear much risk. There will also be problems with respect to measuring price variation with respect to illiquid securities or securities that are not traded very often (muni bonds, structured products, real estate). You are also treating systematic risk with idiosyncratic risk equally. Literature tells us (Sharpe (1964), Lintner (1965)) that such risks are not the same and should be treated much differently.

I understand you want to measure returns due to the psychology literature, however, I am quite concerned your benchmarks based on ex-post price variation will make such comparisons have very little economic meaning and thus no value to consumers. I am also concerned as to the intent of the measure itself. Do you want to "weed out" bad providers of advice by reporting performance measures? Or do you want to "protect participants from conflicts of interest" as proposed rule suggests? Those are two separate and different intents.

If/when you have a formal rule proposal that you want comments on, I will be more than happy to share my thoughts and views. Otherwise, I think we just have two opposing viewpoints on the matter.

Matt

It is evident from these emails that the SEC's expert staff had serious concerns about the rule. The financial economist at the SEC emailed Labor Department staff repeatedly and expressed serious concerns about fundamental principles of the rule. However, not only did the Labor Department dismiss the concerns, but the Department went a step further by actually demanding that the SEC expert stop emailing about the proposal.

The Labor Department restricted the Committee's review of these emails to a limited *in camera* review.[63] The Committee, however, ultimately obtained the communications from another source.

The SEC received the full proposed rulemaking package from the Labor Department in November 2014 and exchanged edits and comments with the Labor Department in January 2015.[64] Career, non-partisan SEC staff identified at least 26 items of concern related to the substantive content of the proposed rule.[65] The SEC staff's concerns included issues of clarity in the rule's "best interest" standard, inadvertent consequences of a *de minimis* breach, conflicts with federal securities laws and FINRA rules, and a lack of cost-benefit analysis of alternatives.[66] The SEC's point of contact in transmitting these concerns to the Labor Department was Sharon Block, a Senior Counselor to the Secretary of Labor, who formerly served as a political advisor in the Obama Administration, and whom President Obama recess appointed to be a member of the National Labor Relations Board, an appointment ultimately struck down by the Supreme Court.[67] The Labor Department repeatedly provided an incomplete response, declined to accept the SEC staff's recommendations, or incorrectly implemented the SEC expert's recommendations.[68] Specifically, in response to eight recommendations, the Labor Department declined to edit the operative language of the proposal, and instead merely modified or added language in the proposal's preamble.[69] The Labor Department outright rejected the SEC's two recommendations related to providing a quantitative cost-benefit analysis of considered alternatives to the rule.[70] Finally, the Labor Department implemented incorrect or

[63] The Department of Labor provided Committee staff with an *in camera* review of a limited subset of self-selected documents on August 28, 2015. Notes are on file with the Committee.
[64] *See* Appendix B, Ex. 2, E-mail from Lona Nallengara, SEC, to Sharon Block, DOL (Jan. 26, 2015, 7:36 PM), SEC-DOL003234–003239 [hereinafter Items of Concern Chart] (attachment is a chart containing items of concern about the proposed rule).
[65] *Id.*
[66] *Id.*
[67] Edward-Isaac Dovere, *White House Pulls Controversial NLRB Pick*, POLITICO (Nov. 12, 2014), http://www.politico.com/story/2014/11/nlrb-sharon-block-lauren-mcferran-112833; Melanie Trottman, *President Obama Taps Former NLRB Recess Appointee for Board Again*, WSJ (July 11, 2014, 3:34 PM), http://www.wsj.com/articles/president-obama-taps-former-nlrb-recess-appointee-for-board-again-1405101028.
[68] Appendix B, Ex. 2, Items of Concern Chart, SEC-DOL003234–003239.
[69] *Id.*
[70] *Id.*

insufficient edits in response to at least four of the SEC's recommendations, evidenced by the SEC staff's follow-up on multiple issues of concern.[71]

Following the SEC staff's exchange of recommendations and concerns with the Labor Department, SEC experts continued to raise concerns "regarding the complexity of the proposal," and noted that the Labor Department had not fully addressed the SEC staff's enumerated issues of concern.[72] Then-SEC Chief of Staff Lona Nallengara, who has 20 years of experience in capital markets and corporate finance law,[73] explained in a January 26, 2015 email to Ms. Block:[74]

---

[71] Appendix B, Ex. 3, Email from Lona Nallengara, SEC, to Sharon Block, DOL (Jan. 26, 2015), SEC-DOL003274-003276.
[72] *Id.*
[73] Press Release, SEC, SEC Chief of Staff Lona Nallengara to Leave Agency (May 19, 2015).
[74] Appendix B, Ex. 3, Email from Lona Nallengara, SEC, to Sharon Block, DOL (Jan. 26, 2015), SEC-DOL003274-003276.

To: Nallengara, Lona[redacted]@SEC.GOV]
Cc: Hauser, Timothy - EBSA[redacted]@dol.gov], Porter, Jennifer R[redacted]@SEC.GOV]
From: Block Sharon I - OSEC
Sent: Mon 1/26/2015 7:40:58 PM
Importance: Normal
Subject: RE: EBSA responses to SEC comments

Thanks Lona. We appreciate all the time your team has put in and their thoughtful comments.

From: Nallengara, Lona[redacted]@SEC.GOV]
Sent: Monday, January 26, 2015 7:37 PM
To: Block, Sharon I - OSEC
Cc: Hauser, Timothy - EBSA; Porter, Jennifer R.
Subject: RE: EBSA responses to SEC comments

Sharon,

Thank you for sending the chart showing your responses to SEC staff comments on the rule package that we discussed with you in December.

We asked the staff to review the chart and below are a few additional thoughts from the staff on several of the items that you can consider as you prepare your proposal (the staff has identified their comments using the item numbers in your chart).

I would also like to note that although the chart shows that several changes were made to the proposal to address the potential concerns that we have discussed regarding the complexity of the proposal, we continue to believe that commenters are likely to raise concerns that the proposal may result in reduced pricing options, rising costs and limited access to retirement advice, particularly for retail investors. Commenters also may express concerns that broker-dealers, as a practical matter, may be unlikely to use the exemptions provided and may stop providing services because of the number of conditions imposed, likely compliance costs, and lack of clarity around several provisions

We hope these comments will continue to be helpful to you as you finalize the proposed rules.

- Lona

Documents received by the Committee and language in the promulgated proposed rule indicate that the Labor Department declined to resolve these outstanding concerns.

i. The "Best Interest" Standard

SEC staff recommended that the Labor Department add language to clarify the meaning of the term "best interest" in the proposal.[75] The Labor Department disregarded the recommendation, and stated that they "would prefer to see what commenters say before adding any additional explanatory language."[76]

Indeed, commentators criticized the "best interest standard" in the promulgated proposal and recommended that the Labor Department clarify the standard's requirements.[77] FINRA, the self-regulatory organization for the securities industry, focused on language requiring an investment advisor to provide advice that is in the best interest of the investor, "*without regard to the financial or other interests*" of the investment advisor.[78] FINRA explained that the "without regard to" phrase does not provide clear guidelines on limitations on compensation that varies depending on investment advice.[79]

Additionally, FINRA criticized the "best interest" standard's requirement that financial institutions and advisors act prudently, explaining that the "prudence standard" could be "interpreted to require the financial institution and adviser to provide ongoing advice to the customer."[80] FINRA recommended that the Labor Department make clear that the best interest standard does not require ongoing monitoring, and that the terms of the contract should control whether the financial institution or advisor will provide ongoing monitoring.[81]

Finally, FINRA questioned whether the Labor Department intended the best interest standard to require an investment advisor "to recommend the investment that is 'best' for the customer."[82] FINRA reasoned that the Labor Department did intend such a result, and pointed to a statement by Secretary Perez, in which he stated:

> If you're an adviser operating under a suitability standard, once you narrow the options down to those that are suitable, you can recommend the one that is most lucrative for you—even though that might mean a lower return for the client. Under a best interest standard, you would need to choose the one that is the best for the client.[83]

---

[75] Appendix B, Ex. 2, Items of Concern Chart, SEC-DOL003234–003239.
[76] *Id.*
[77] Appendix A, Ex. 26, Letter from Marcia E. Asquith, Sr. Vice President & Corp. Sec'y, FINRA, to DOL, at 6–8 (July 17, 2015) [hereinafter FINRA Comments].
[78] *Id.* at 6 (emphasis added).
[79] *Id.*
[80] *Id.* at 7.
[81] *Id.* at 8.
[82] *Id.* at 7.
[83] *Id.*

FINRA cautioned that such a standard "would impose unnecessary and untenable litigation risks on fiduciaries," and explained that reasonable investment advisors may consider different factors in evaluating products and may reach different conclusions about which product is the "best" product for the customer.[84]

ii. Accidental Forfeiture of the Best Interest Contract Exemption in Case of a de Minimis Breach

SEC staff raised a concern about language in the proposal's Best Interest Contract Exemption, which required compliance with all applicable federal and state laws.[85] SEC staff warned that this requirement "could result in loss of exemption for trivial breaches," and suggested that the Labor Department clarify that a *de minimis* breach would not disallow the exemption.[86] According to this language, if an advisor violated a state law unrelated to the contract or to the service of providing investment advice, the advisor would not be compliant with applicable state laws, which could technically result in loss of the exemption. For example, an advisor's violation of a state law requiring a handicap-accessible ramp at the entrance to the building could result in loss of the exemption. The Labor Department attempted to implement the SEC staff's suggestion,[87] but failed to resolve the problem. The SEC staff again recommended that the Labor Department make additional changes to this provision of the rule.[88] Career experts at the SEC later advised Labor Department officials that this problem had not been resolved, but the Labor Department failed to address the issue in the final proposal.[89]

Specifically, Section II(a) of the Best Interest Contract Exemption in the proposal requires that "the Advisor and Financial Institution enter into a written contract with the Retirement Investor that *incorporates the terms required by Section II(b)–(e).*"[90] Section II(d), in turn, requires that "[t]he Adviser, Financial Institution, and Affiliates will comply with all applicable federal and state laws."[91] As such, by its terms, the Section could cause an advisor to forfeit the exemption for a small breach of state contract law.

Despite feedback from career, expert SEC staff regarding the inadequate revision three months in advance of the promulgation of the proposed rule,[92] the Labor Department declined to

[84] *Id.*
[85] Appendix B, Ex. 2, Items of Concern Chart, SEC-DOL003234–003239.
[86] *Id.*
[87] *Id.* (responding that "as a result, failure to comply with law will not disallow the exemption").
[88] Appendix B, Ex. 3, Email from Lona Nallengara, SEC, to Sharon Block, DOL (Jan. 26, 2015), SEC-DOL003274–003276.
[89] *Id.*
[90] Best Interest Contract Exemption § II(a), 80 Fed. Reg. 21,960, 21,984 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550) (emphasis added).
[91] Best Interest Contract Exemption § II(d)(1), 80 Fed. Reg. at 21,984.
[92] Appendix B, Ex. 3, Email from Lona Nallengara, SEC, to Sharon Block, DOL (Jan. 26, 2015), SEC-DOL003274–003276.

update the rule. Therefore, the proposed rule contains language that requires compliance with federal and state laws for application of the exemption[93] and creates the possibility of forfeiture of the exemption in case of a trivial breach.[94]

iii. Lack of a Cost-Benefit Analysis for Alternative Approaches

The Labor Department rejected the SEC's recommendation to conduct quantitative analysis of the costs and benefits of alternative approaches to the rule, as required by Executive Orders (EOs) 12866 and 13563.[95] According to the Labor Department, expert, non-partisan, career SEC staff urged the Labor Department to "[c]onsider quantifying the costs and benefits of all the alternative approaches we considered and rejected."[96] The Department rejected the SEC expert's recommendation on the basis that its qualitative analysis sufficed:

> We think this would be extraordinarily difficult and would appreciably delay the project for very little return. The extensive *qualitative* descriptions of the bases for rejecting the alternatives included in the current [regulatory impact analysis] effectively explain the bases for rejecting the alternative approaches. We would prefer to get feedback from OMB before undertaking any additional quantitative analyses.[97]

The Labor Department informed the Committee that following OMB's review of the rule, the Department declined to complete quantitative analysis because it found the regulatory impact analysis to be sufficiently "compelling."[98]

SEC staff also recommended that the Labor Department analyze the costs and risks associated with the possibility that the rule could decrease the availability of investment advice and could drive firms to switch to registered investment advisor models from broker-dealer models.[99] The Labor Department responded that the regulatory impact analysis addressed these

[93] Best Interest Contract Exemption § II(a), II(d)(1), 80 Fed. Reg. at 21,984.
[94] Appendix B, Ex. 2, Items of Concern Chart, SEC-DOL003234–003239.
[95] Exec. Order No. 12866, 3 C.F.R. 638 (1994); Exec. Order No. 13563, 3 C.F.R. 215 (2012).
[96] Appendix B, Ex. 2, Items of Concern Chart, SEC-DOL003234–003239. From the context of the document, it appears that "we" as used in this quotation refers to the Labor Department, rather than the Labor Department and the SEC collectively. The document was prepared by the Labor Department and transmitted to the SEC. *See* Appendix B, Ex. 2, Email from Sharon Block, DOL, to Lona Nallengara, SEC (Jan. 9, 2015), SEC-DOL003234. Elsewhere in the document, the drafters used "we" to the exclusion of the SEC. *See* Appendix B, Ex. 2, Items of Concern Chart, SEC-DOL003234–003239 ("We have edited the language based on our conversations with SEC staff"; "We are confident that the language in the regulation lines up with the SEC and CFTC language, but are reaching out to the SEC regulatory team . . . ."). Nowhere in the document is the Labor Department referenced similarly in the third person. Based on this contextual evidence, it appears that the phrasing of the SEC's comments is the Labor Department's articulation of the SEC's concerns, rather than the SEC's own words.
[97] Appendix B, Ex. 2, Items of Concern Chart, SEC-DOL003234–003239 (emphasis added).
[98] Briefing by Staff, DOL, to Committee Staff, HSGAC (Aug. 28, 2015) (notes on file with Committee).
[99] Appendix B, Ex. 2, Items of Concern Chart, SEC-DOL003234–003239.

issues, but that the Department was "reviewing to see if there is anything more . . . to say on the topic,"[100] and that it might "make additional edits after getting feedback from OMB."[101] However, the Labor Department apparently did not conduct any additional follow-up work after OMB completed its review of the proposal.[102]

EOs 12866 and 13563 were enacted to improve the regulatory process. EO 12866 requires a federal agency to "assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating," and provides that the assessment should include "quantifiable measures."[103] EO 13563, which supplements EO 12866, requires a federal agency to "tailor its regulations to impose the least burden on society," to "choos[e] among alternative regulatory approaches," and to "identify and assess available alternatives to direct regulation."[104] EO 13563 also directs an agency to include "quantify[ing] anticipated present and future benefits and costs as accurately as possible."[105] EOs 12866 and 13563 permit agencies to conduct qualitative analysis in place of quantitative analysis where the costs and benefits are "difficult or impossible to quantify."[106] EO 13563 offers guidance on the types of factors that are difficult or impossible to quantify: "human dignity, fairness, and distributive impacts."[107] Here, the costs and benefits associated with the Labor Department's proposed fiduciary rule do not seem to meet the "difficult" or "impossible" threshold.

Additionally, OIRA issued a primer on EOs 12866 and 13563 to provide guidance to federal agencies in drafting a regulatory impact analysis.[108] OIRA emphasizes the importance of providing a quantitative analysis of alternatives and provides that agencies should conduct a quantitative analysis when at all possible.[109] For factors where quantification or monetization is not possible, OIRA instructs that the agency is not exempt from providing a quantitative analysis altogether and should still "present all available quantitative information."[110] Like the Executive Orders, OIRA also provides examples of values that are not readily quantifiable, including privacy, dignity, ecological gains, improvements to quality of life, and aesthetic beauty.[111]

OIRA dedicates the large majority of the guidance to explaining, in great detail, how agencies should conduct quantitative analysis.[112] OIRA focuses in particular on factors that are

---

[100] *Id.*
[101] *Id.*
[102] Briefing by Staff, DOL, to Committee Staff, HSGAC (Aug. 28, 2015) (notes on file with Committee).
[103] Exec. Order No. 12866 § 1(a), 3 C.F.R. 638 (1994).
[104] Exec. Order No. 13563 § 1(b)(3), (b)(5), 3 C.F.R. 215 (2012).
[105] *Id.* § 1(c).
[106] *Id.*
[107] *Id.*
[108] OIRA, REGULATORY IMPACT ANALYSIS: A PRIMER.
[109] *Id.*
[110] *Id.* at 12.
[111] *Id.* at 12, 13.
[112] *See id.*

not easily quantified or monetized and on future projections and uncertainties.[113] Two full sections of the guidance are dedicated to analyzing "future benefits and costs" and "forecasts about the future."[114] OIRA instructs that while forecasts about the future may be uncertain, those uncertainties should be analyzed—agencies should specify potential scenarios, calculate the benefits and costs associated with each scenario, and construct ranges of values.[115] OIRA further emphasizes that this is the minimum agencies should do, and that agencies should assign probabilities and calculate expected values based on those probabilities, if possible.[116]

The Executive Orders and the OIRA guidance do not exempt the Labor Department from conducting a quantitative analysis simply because the analysis would involve complicated calculations and future projections. The examples provided in the Executive Orders and the OIRA guidance indicate that factors that qualify as "difficult" or "impossible" to quantify are factors with inherently intangible or subjective properties.[117] Monetary costs and benefits very clearly do not fit into this category because they are both countable and objective. The fact that determining costs and benefits may involve complex calculations and future uncertainties is a distinguishable obstacle. In fact, OIRA emphasizes the importance of providing a quantifiable analysis, even when it involves complex calculations or future uncertainties.[118] While the Labor Department might not be able to capture every potential cost and benefit of the rule, OIRA's guidance to agencies indicates that the Labor Department should have provided monetary and quantitative analysis of as many factors as possible. The Labor Department's approach of determining that it would be difficult to calculate costs and benefits, and thus abandoning the effort altogether, starkly contrasts with the guidance provided by OIRA.

More broadly, the Labor Department's dismissive response of the SEC experts' recommendation calls into question the Department's priorities in the rulemaking process and its commitment to thoughtfully considering the SEC staff's input. The Labor Department's decision to not undertake additional analysis following OMB's review is indicative of the Department's prioritization of accelerating its release of the proposal at the expense of a thorough process that appropriately reflected the input of the SEC staff.

b. The Labor Department Failed to Incorporate Principles from Existing Federal Securities Laws and FINRA Rules

FINRA—the Financial Industry Regulatory Authority—is the leading non-governmental regulator of brokerage firms and exchange markets and ensures that the security industry

[113] *See id.*
[114] *Id.* at 11, 12.
[115] *Id.*
[116] *Id.* at 14–15.
[117] *Id.* at 12, 13; Exec. Order No. 12866; Exec. Order No. 13563.
[118] OIRA, REGULATORY IMPACT ANALYSIS: A PRIMER, *supra* note 108.

operates fairly and honestly.[119] FINRA writes and enforces rules for every brokerage firm and broker in the United States, and also enforces federal securities laws and Municipal Securities Rulemaking Board (MSRB) rules.[120] FINRA has authority from the SEC to discipline brokers and brokerage firms for violations of FINRA rules, federal securities laws, and MSRB rules.[121] FINRA monitors more than 3,955 securities firms with approximately 643,320 brokers.[122]

In addition to ignoring substantive suggestions from subject-matter experts at the SEC, the Labor Department likewise apparently declined to incorporate existing federal securities laws and FINRA rules. Upon review of the proposed rule, FINRA provided critical feedback, stating that the rule "established principles that employ imprecise terms with little precedent in the federal securities laws or, in many cases, ERISA," and that "[i]n some respects these principles even conflict with FINRA rules."[123]

For example, FINRA highlighted that the proposed Best Interest Contract Exemption contains a provision that directly conflicts with FINRA rules.[124] Section III(a)(1) requires, prior to the purchase of a recommended asset, that an advisor project the total cost of investing in the asset for 1-, 5-, and 10-year periods, expressed as a dollar amount.[125] Such a projection requires the advisor to incidentally project investment performance because fees are tied to an asset's value. This requirement directly conflicts with FINRA Rule 2210, which generally prohibits broker-dealers from making performance projections to the public.[126] Thus, by requiring advisors to project the future value of assets under management, the Labor Department's rule would actually require advisors to violate FINRA rules.

The Labor Department's failure to "build upon existing principles in the federal securities laws and FINRA rules"[127] is despite SEC staff urging the Labor Department to incorporate references to and aspects of federal securities laws and FINRA rules. In September and October 2014, SEC staff provided to the Labor Department, on multiple occasions, lists of relevant laws and rules, including rules from the Securities Act, Advisers Act, Exchange Act, FINRA, the National Association of Securities Dealers (NASD), and the Municipal Securities Rulemaking Board.[128]

---

[119] News Release, FINRA, NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority—FINRA (July 30, 2007); *About FINRA*, FINRA, http://www.finra.org/about.
[120] *What We Do*, FINRA, http://www.finra.org/about/what-we-do.
[121] News Release, FINRA (July 30, 2007), *supra* note 119; *About FINRA*, *supra* note 119.
[122] *For Industry Professionals*, FINRA, https://www.finra.org/industry.
[123] Appendix A, Ex. 26, FINRA Comments, at 11.
[124] *See id.* at 14.
[125] Best Interest Contract Exemption § III(a)(1), 80 Fed. Reg. 21,960, 21,985 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2550) (emphasis added).
[126] FINRA, RULE 2210; Appendix A, Ex. 26, FINRA Comments, at 14.
[127] Appendix A, Ex. 26, FINRA Comments, at 11.
[128] Appendix B, Ex. 4, E-mail from Jennifer Porter, SEC, to Timothy Hauser, DOL (Sept. 4, 2014, 3:55 p.m.), SEC-DOL001768–001771; Appendix B, Ex. 5, E-mail from Jennifer Porter, SEC, to Timothy Hauser, DOL (Oct. 8, 2014, 10:35 a.m.), SEC-DOL001900–001901.

Additionally, SEC staff identified several items of concern relating to the Labor Department's lack of incorporation of federal securities laws and FINRA rules. For example, SEC staff recommended that the Labor Department redraft definitions in the disclosure requirements and document retention provisions so that the provisions expressly referenced SEC and FINRA definitions.[129] SEC staff reasoned that this would ensure that the Labor Department would receive complete and sufficiently comparable data from investment advisors.[130] However, the Labor Department dismissed the suggestion, instead merely including in the proposal's preamble a request for comment "as to whether the terms used and definitions are sufficient so that the information received will be reasonably comparable across different financial institutions."[131]

The Labor Department's failure to incorporate fundamental principles from federal securities laws and FINRA Rules further suggests that the Department did not thoroughly consult regulatory experts. This resulted in a rule that experts have highlighted as problematic, in part because of the conflicts it creates with existing and anticipated future regulatory frameworks.[132]

c. <u>The Labor Department Declined to Incorporate OIRA's Recommendations into the Proposed Rulemaking</u>

OIRA employs regulatory experts who carry out the office's mission as the federal government's chief review and oversight authority on Executive Branch rulemaking measures. Career, non-partisan, professional staff at OIRA conduct reviews of draft and final regulatory proposals, coordinate interagency review of proposals, consider and review comments from outside groups on proposed rulemakings, and offer guidance on how rulemakings can best achieve the intended purpose. In several instances, it appears that the Labor Department disregarded OIRA's recommendations and concerns about the Department's fiduciary rule.

The Labor Department declined OIRA's recommendation to add clarity to a particular provision of the rule. Specifically, OIRA instructed the Labor Department to add the qualifying adjective "all" to describe the types of common fee and compensation practices that the rule would preserve as exempt from ERISA's prohibited transactions rules.[133] OIRA proposed the following language: "the Department has worked to preserve beneficial models by separately proposing new exemptions from ERISA's prohibited transaction rules that will broadly permit firms to continue *to rely on all* common fee and compensation practices . . . ."[134] The Labor

[129] Appendix B, Ex. 2, Items of Concern Chart, SEC-DOL003234-003239.
[130] *Id.*
[131] *Id.*
[132] *See* Appendix A, Ex. 26, FINRA Comments, at 11.
[133] *See* Appendix B, Ex. 6, Conflict of Interest Rule, Apr. 8, 2015 Draft, EBSA Pass Back, SEC-DOL004832.
[134] *Id.*

Department rejected OIRA's changes and deleted "to rely on all," responding that "[n]ot all fee practices will be permitted by the exemptions" and explaining that, "[b]y deleting 'all' we slightly soften this by leaving it at 'common fee and compensation practices'"[135] This edit and the Department's explanation show that the Department envisioned the proposal as prohibiting some common fee and compensation packages.

The Labor Department's deletion of the word "all" raises questions about the Department's commitment to transparency. The language in the provision emphasizes that the Labor Department is committed to preserving existing models and to permitting the continuance of common fee and compensation practices. However, this language appears to be misleading because the Labor Department surreptitiously retained its ability to exclude some fee and compensation practices from the exemption. It is difficult to understand how the Labor Department sought to preserve and permit the current compensation structure in the industry when it explicitly envisioned the possibility of prohibiting some fee and compensation packages.

In another instance, OIRA questioned the Labor Department's use of the term "incidental advice" in connection with its discussion of the rule's seller's carve-out.[136] Regulatory experts at OIRA cautioned that exempting "incidental advice" could also "carve out advice given by a broker under the [guise] of being a mere order taker"[137] and noted, "[t]hat's where the SEC muddied the waters in the first place."[138] Documents received by the Committee contain no indication that the Labor Department fully responded to this concern.[139] Furthermore, this section of the preamble in the rule contains the same language as the draft rule,[140] showing that the Labor Department did not adjust the language to accommodate OIRA's concern, and further suggesting that the Labor Department did not thoroughly consider OIRA's comments.

d. <u>The Labor Department Did Not Fully Consider Concerns Raised by the Treasury Department</u>

The Treasury Department has enforcement authority over Individual Retirement Accounts (IRAs), which are a creation of the tax code, and thus the Labor Department's engagement with Treasury on the proposed rule is especially important. Given Treasury's authority and expertise in enforcing rules and regulations relating to IRAs, the Labor Department should have considered and remedied any concerns raised by Treasury officials about the proposed rule.

[135] *Id.* (emphasis added).
[136] *Id.* SEC-DOL004858.
[137] *Id.*
[138] *Id.* (emphasis added).
[139] *Id.*
[140] Conflict of Interest Rule – Retirement Investment Advice § (b)(1)(i), 80 Fed. Reg. 21,928, 21,957 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pts. 2509, 2510).

Treasury officials and other experts have raised concerns about the Best Interest Contract Exemption (BIC exemption), because it would impose new requirements on fiduciaries with respect to IRAs.[141] IRAs are governed by the Internal Revenue Code, not by ERISA. Unlike ERISA, the Internal Revenue Code "does not directly impose responsibilities of prudence and loyalty on fiduciaries."[142] The Labor Department's rule, however, would create such responsibilities by requiring fiduciaries "to act in accordance with the Impartial Conduct Standards in transactions governed by the exemptions."[143] The rule's background section acknowledges that the proposal would more significantly increase requirements for advisors with respect to IRAs than it would for advisors of accounts governed by ERISA (the Employee Retirement Income Security Act) because ERISA already requires those advisors to meet prudence and loyalty standards.

Former Assistant Secretary of Labor Bradford Campbell criticized this aspect of the rule as an effort by the Labor Department to sidestep Congress, stating that "[d]espite their simultaneous creation in 1974, Congress expressly chose not [to] apply the ERISA fiduciary standard to IRAs."[144] According to Mr. Campbell, "the Department is attempting to do something through [the proposed rule] that Congress explicitly chose not to do."[145]

Treasury officials similarly voiced concerns about the Labor Department extending the reach of the rule to IRAs. Treasury officials commented that earlier amendments were made "to reflect Congressional intent," on the basis that Congressional intent was "being undermined by rules that [were] not reflective of current market practices."[146] Treasury officials argued that this amendment, by imposing requirements with respect to accounts governed by a different statute and under the jurisdiction of a different federal agency, "seems to fly in the face of the logic . . . that these amendments are necessary to reflect Congressional intent."[147] The Labor Department responded by disagreeing and effectively dismissing the Treasury Department's concern. The Labor Department wrote:

> We think there's a difference here between the regulation and the exemptions. The purpose of the regulation expanding the definition of 'fiduciary' is to reflect Congressional intent. However, the purpose of this exemption is to say that if

[141] Appendix B, Ex. 7, Proposed Amendments to Class Exemptions, Apr. 21, 2015 Draft, Treasury Comments (Mar. 21, 2015), SEC-DOL005312.
[142] *Id.* (emphasis added).
[143] CONG. RESEARCH SERV., DOL'S 2015 PROPOSED FIDUCIARY RULE ON INVESTMENT ADVICE, IN FOCUS, IF10318, Nov. 12, 2015. The Impartial Conduct Standards require an advisor to act in the best interest of the client-investor and not to accept more than reasonable compensation.
[144] House Ways & Means Committee Hearing, *supra* note 47 (statement of Bradford Campbell).
[145] *Id.*
[146] Appendix B, Ex. 7, Conflict of Interest Rule, Treasury Comments, Mar. 21, 2015, SEC-DOL005312.
[147] *Id.*

> you're a fiduciary under the [Internal Revenue Code] (and Congressional intent), and want to receive variable compensation, then you have to comply with these conduct standards, even if they are not independently imposed by Congress.[148]

IRA advisors receive variable compensation, especially when providing advice to low- and middle-income investors.[149] Thus, IRA advisors would be subject to the rule's conduct standards. Despite Congress' intent to regulate IRA advisors under a different law, the Labor Department would regulate them using variable compensation as a proxy.

In a letter to Chairman Johnson on December 14, 2015, Treasury Department Assistant Secretary for Legislative Affairs, Anne Wall, stated that "Treasury believes that DOL appropriately considered Treasury's comments on the drafts during the OIRA process, including the comments specified in your letter" (and quoted above).[150] However, based on the documents, it is unconvincing that the Labor Department fully considered the comments of the Treasury Department experts. First, documents the Committee received provide no indication that the Departments discussed the Treasury Department's concern beyond the Labor Department's initial response to the Treasury Department, where it merely disagreed with Treasury's comment. Second, the Labor Department promulgated the proposed rule less than two weeks after circulating this draft and the accompanying comments, undoubtedly limiting the extent to which the Labor Department considered the comments it received from the Treasury Department experts on the draft. Finally, the promulgated proposal does not contain language signifying that the Labor Department edited the rule in accordance with the Treasury Department's stated concerns. For these reasons, it is difficult to conclude objectively that the Labor Department fully considered the Treasury Department's comments.

III. EXPERTS HAVE EXPRESSED CONCERNS ABOUT THE RULE'S ANTICIPATED HARM TO MIDDLE-INCOME AND SMALL BUSINESS INVESTORS

Chairman Johnson's inquiry raises concerns about both the process and the substance of the Labor Department's rulemaking. The Committee has received documents that demonstrate that the Labor Department prioritized expediting the drafting process at the expense of thoughtfully considering and addressing concerns from industry experts. In multiple instances, the Department disregarded advice from the SEC, OIRA, and Treasury, and failed to undertake a thorough cost-benefit analysis of the rule. The majority staff finds these actions especially

[148] *Id.*
[149] Appendix A, Ex. 27, Letter from Commonwealth Financial Network to DOL (July 21, 2015).
[150] Appendix A, Ex. 28, Letter from Hon. Anne Wall, Asst. Sec'y for Leg. Affairs, Dep't of the Treasury, to Chairman Johnson (Dec. 14, 2015).

troubling because of the concerns raised about the risk of the rule's anticipated harm to middle-income investors.

Generally, industry experts, including investment advisors, support a best interest standard, but have criticized the rule on the grounds that it is overly complex and burdensome. For example, Peter Schneider, the President of Primerica, testified to Congress that he "agree[s] that firms and their representatives should always act in their clients' best interests."[151] He explained that he is concerned "that the requirements and uncertainties of the [Best Interest Contract Exemption] are so complex and burdensome that the exemption is n either administratively nor operationally feasible."[152]

Similarly, former SEC Commissioner Daniel Gallagher has harshly criticized the rule, calling it a "mess," in part because advisors who adhere to a best interest standard still risk noncompliance with the rule because of its many complicated requirements.[153] Commissioner Gallagher has cautioned that the Labor Department's rule would result in the "elimination of an entire class of accounts" for investors and would subject advisors to "unlimited liability."[154] Other experts and observers have also raised concerns that the conditions and requirements the rule imposes are ambiguous and unworkable, which will increase litigation risk and regulatory costs. Experts anticipate that advisors will incur initial compliance costs of $21.5 million and annual maintenance costs of $5.1 million, resulting in increased costs for retail investment advice by 73% to 196% as a result of the Labor Department's proposal.[155]

Additionally, experts contend that the Administration has inflated the harm that results from investors relying on "conflicted advice." The White House and the Labor Department claim that conflicted advice from brokers costs investors $17 billion per year.[156] Former SEC chief economist Craig Lewis has explained that the $17 billion estimate is based on a calculation that failed to account for discrepancies in the data and that used outdated data from the 1990s

---

[151] Senate HELP Committee Hearing, *supra* note 2 (statement of Peter Schneider); *see also id.* (statement of Robert Litan) ("[T]he notion that all retirement investment advisers should be held to a best interest of client standard is not controversial.").

[152] *Id.*; House Ways & Means Committee Hearing, *supra* note 47 (statement of Judy VanArsdale, Co-Owner, enrich Private Wealth Management).

[153] Mark Schoeff Jr., *SEC Commissioner: DOL Fiduciary Rule Would Create "a Mess"*, INVESTMENT NEWS (Aug. 4, 2015, 1:18 PM), http://www.investmentnews.com/article/20150804/FREE/150809978/sec-commissioner-dol-fiduciary-rule-would-create-a-mess.

[154] *Id.*; Speech to the Chamber of Commerce, Daniel Gallagher, Comm'r, SEC (Aug. 4, 2015), *available at* https://www.uschamber.com/event/discussion-sec-commissioner-daniel-gallagher.

[155] MILLOY, AM. ACTION FORUM, *supra* note 43; *see also* DELOITTE DEVELOPMENT LLC, REPORT ON THE ANTICIPATED OPERATIONAL IMPACTS TO BROKER-DEALERS OF THE DEPARTMENT OF LABOR'S PROPOSED CONFLICT OF INTEREST RULE PACKAGE (2015) (reporting similar findings).

[156] EXEC. OFFICE OF THE PRESIDENT, THE EFFECTS OF CONFLICTED INVESTMENT ADVICE ON RETIREMENT SAVINGS (2015).

and 2000s.[157] Mr. Lewis stated, "[y]ou don't have to be an economist to recognize the Administration's $17 billion talking point significantly overestimates the costs, if any, to investors relying on the 'conflicted advice' of brokers."[158]

Experts have focused, in particular, on the negative impact that the rule will have on small-account owners—small businesses and middle-income investors. The Small Business Administration has commented that the rule "would likely increase the costs and burdens associated with servicing smaller plans . . . [which] could limit financial advisers' ability to offer savings and investment advice to clients . . . [which] could ultimately lead advisors to stop providing retirement services to small businesses."[159] Similarly, former Assistant Secretary of Labor Bradford Campbell testified that the rule "likely will harm the very retirement investors it is intended to help."[160] Mr. Campbell echoed the Small Business Administration's concerns that the rule will increase the cost and reduce the availability of advice to small plans and small-account IRA owners.[161] Finally, experts have pointed to an "advice gap" that has developed in the United Kingdom (U.K.) as a result of a 2013 rule change in the U.K. that is effectually identical to the Labor Department's rule.[162] According to ERISA experts, it is "widely accepted in the U.K." that "middle- and lower- income savers in the U.K. are being cut off from investment advice."[163] The United Kingdom government has "launched a major review of exactly that advice gap."[164]

First, the rule contains a carve-out that will not apply to small businesses. The "Seller's Carve-Out" exempts an investment advisor from fiduciary duties when the advisor sells or markets materials, as long as the advisor discloses that the advisor is paid to sell proprietary financial product and is not providing fiduciary advice.[165] However, the proposal prohibits advisors to small businesses from using the Seller's Carve-Out based on the assumption that small businesses lack financial sophistication.[166] Small businesses and ERISA experts have voiced concerns that the rule will deprive small businesses of access to guidance on investment

---

[157] Craig M. Lewis, *An Inflated $17 Billion Talking Point From the DOL*, FORBES (Dec. 16, 2015, 12:30 PM), http://www.forbes.com/sites/realspin/2015/12/16/an-inflated-17-billion-talking-point-from-the-dol/#782b028439e1.
[158] *Id.*
[159] Appendix A, Ex. 29, Letter from Claudia Rodgers, Acting Chief Counsel for Advocacy, and Dillon Taylor, Asst. Chief Counsel for Advocacy, Small Business Admin., to Hon. Phyllis Borzi, Asst. Sec'y, EBSA, DOL, at 5–6 (July 17, 2015).
[160] House Ways & Means Committee Hearing, *supra* note 47 (statement of Bradford Campbell).
[161] *Id.*
[162] KENT MASON, DAVIS & HARMAN LLP, U.K. LAUNCHES REVIEW OF "ADVICE GAP" FOR SMALL ACCOUNTS FOLLOWING A 2013 RULE CHANGE WITH EFFECTS IDENTICAL TO WHAT DOL NOW PROPOSES (2015).
[163] *Id.*
[164] *Id.*
[165] Conflict of Interest Rule—Retirement Investment Advice § (b)(1)(i), 80 Fed. Reg. 21,928, 21,957 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. pts. 2509, 2510) (Seller's Carve-Out); *id.* pmbl. § IV(C)(1)(a) at 21,941–42 (explaining the Seller's Carve-Out).
[166] Senate HELP Committee Hearing, *supra* note 2 (statement of Darlene Miller, President & CEO, Permac Industries, Board Member, U.S. Chamber of Commerce).

options that are otherwise permitted by the carve-out.[167] Small businesses have additionally refuted the Labor Department's flawed assumption that small businesses lack the requisite sophistication to engage with investment advisors without statutorily imposed protections.[168] At a hearing before the Senate Committee on Health, Education, Labor and Pensions, a small-business owner testified:

> I would not be able to run a successful business if I were not able to understand when I am involved in a sales discussion. . . . The assumption that small plans, participants and IRA owners cannot understand the difference between sales and advice does not match my real world experience. The [Labor] Department can protect participants, IRA owners and small plans with the same kind of disclosures that it requires of large plans under the large plan carve out, but without eliminating their right to choose the services and products that best fit their needs.[169]

Former Assistant Secretary Campbell similarly criticized the carve-out, stating "there is no clear basis to believe that plan size is a proxy for financial sophistication, and no basis to treat every IRA owner as if she is incapable of making informed choices."[170]

Additionally, experts have voiced concerns that the Best Interest Contract Exemption (BIC exemption) is unworkable and that firms will not use it. The BIC exemption allows certain broker-dealers and other fiduciaries to receive compensation that would otherwise be prohibited, such as commissions.[171] To take advantage of the BIC exemption, the investor and advisor must sign a contract acknowledging fiduciary status.[172] The advisor must act in the best interest of the client and must make numerous disclosures to the client and to the Labor Department.[173] Experts contend that the BIC exemption is unworkable and will increase the cost of investment advice and services and will, consequently, decrease access to investment services for small investors.[174] Experts explain that the BIC exemption imposes conditions and requirements for advisors that are ambiguous, creating uncertainty and putting advisors at risk for penalties and lawsuits, including class action lawsuits.[175] Industry participants caution that investment firms will consequently decline to use the BIC exemption.[176]

---

[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.* (statement of Bradford Campbell).
[171] CONG. RESEARCH SERV., DOL'S 2015 PROPOSED FIDUCIARY RULE ON INVESTMENT ADVICE, IN FOCUS, IF10318, Nov. 12, 2015.
[172] *Id.*
[173] *Id.*
[174] Senate HELP Committee Hearing, *supra* note 2 (statement of Darlene Miller).
[175] *Id.* (statements of Darlene Miller and Peter Schneider).
[176] *Id.*; House Ways & Means Committee Hearing, *supra* note 47 (statements of Judy VanArsdale and Bradford Campbell).

According to experts, the unworkability of the BIC exemption will inhibit middle-income, small-account owners' access to investment services. Experts explain that firms that do not use the exemption will likely convert their commission-based brokerage IRAs to fee-based accounts.[177] Fee-based accounts are more expensive to operate than commission-based accounts and, therefore, often require account minimums of $25,000 and higher annual fees.[178] Experts caution that these costs will inhibit access to investment services for small account owners and could result in losses in retirement savings of as much as $68–80 billion per year.[179] Even in the case of advisors who continue to provide services to small account owners, flat fees will present affordability challenges for middle-income investors who cannot afford to pay flat rates and currently rely on commission-based fees.[180]

Supporters of the rule have criticized large, publicly-traded investment firms for publicly predicting significant negative consequences, while simultaneously "assuring [investors] that the rule will have no significant impact on their companies" and that they "are well-positioned to 'adapt to any regulatory framework that emerges.'"[181]

However, these large investment firms are not the ones that will feel the most significant effects of the rule. Rather, the rule is likely to harm small- and mid-size investment firms. For example, Judy VanArsdale, the co-owner of a seven-employee wealth management company, testified before the House Committee on Ways and Means about her concerns about the rule.[182] As a small wealth management company, Ms. VanArsdale's company serves more than 2,500 accounts, with more than 800 accounts containing less than $25,000.[183] Ms. VanArsdale explained that the rule increases litigation risk because of its lack of clarity and its creation of state-law class action lawsuits.[184] Ms. VanArsdale stated that, as a small-business owner, she feels "great concern over subjecting [her] business to increased business and litigation risk."[185] According to Ms. VanArsdale, to avoid litigation risk, "small businesses . . . may not feel comfortable using the BIC exemption, and . . . would be restricted from serving retirement brokerage accounts."[186] While large firms may be better suited to withstand changes in the

---

[177] Senate HELP Committee Hearing, *supra* note 2 (statements of Darlene Miller and Peter Schneider); House Ways & Means Committee Hearing, *supra* note 47 (statement of Bradford Campbell).
[178] Senate HELP Committee Hearing, *supra* note 2 (statement of Peter Schneider); House Ways & Means Committee Hearing, *supra* note 47 (statement of Bradford Campbell).
[179] QUANTRIA STRATEGIES, *supra* note 13, at 1.
[180] Senate HELP Committee Hearing, *supra* note 2 (statement of Peter Schneider).
[181] Appendix A, Ex. 30, Letter from Hon. Elizabeth Warren, U.S. Sen., and Hon. Elijah Cummings, U.S. House of Representatives, to Sec'y Perez, DOL, and Hon. Shaun Donovan, Dir., OMB (Feb. 11, 2016).
[182] House Ways & Means Committee Hearing, *supra* note 47 (statement of Judy VanArsdale).
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*

regulatory regime, small- and mid-size investment firms—and the middle-class consumers they service—have less tolerance to weather such changes.

IV. THE ADMINISTRATION WAS PREDETERMINED TO REGULATE THE INDUSTRY AND SOUGHT EVIDENCE TO JUSTIFY ITS PREFERRED ACTION

The Labor Department refused to provide the Committee with its communications with the White House. However, the Committee obtained some of these communications from another party. The communications indicate that the Labor Department and the White House were predetermined to regulate the industry and sought evidence to justify their preferred action. The communications also suggest that the White House may have played an outsized role in the rulemaking, in conflict with the Administrative Procedure Act.

In an email to Brian Deese—a senior political advisor in the Executive Office of the President—a Labor Department policy advisor wrote of the "challenges in completing the [regulatory impact analysis]."[187] In particular, he noted, "we need to determine whether the available literature, our work with RAND, and any other data we have not yet identified can be woven together to demonstrate that there is a market failure and to monetize the potential benefits of fixing it."[188] In another email to Mr. Deese, a Labor Department policy advisor discussed plans for packaging the rulemaking re-proposal.[189] The email noted a GAO report that the Labor Department intended to use to "build[] the case for why the rule is necessary."[190]

EOs 12866 and 13563—enacted to reform and improve regulations and the regulatory process—require agencies to identify a market failure or other compelling problem that justifies regulation before the agency begins the regulatory drafting process. Specifically, EO 12866 provides that agencies should promulgate regulations only if they are "made necessary by compelling public need, such as material failures of private markets."[191] EO 12866 further provides that "in deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating."[192] However, as evidenced by these emails, the Labor Department and the White House worked

---

[187] Appendix B, Ex. 8, E-mail from Zachary A. Epstein, DOL, to Brian C. Deese, Exec. Office of the President, et al. (Oct. 25, 2011, 7:30 PM), SEC-DOL005872–005873.
[188] *Id.*
[189] Appendix B, Ex. 9, Email from Chris Cosby, DOL, to Brian C. Deese, Exec. Office of the President, et al. (Nov. 2, 2011, 5:47 PM), SEC-DOL006041–006042.
[190] *Id.*
[191] Exec. Order No. 12866 § 1(a), 3 C.F.R. 638 (1994); *see also* Exec. Order No. 13563 § 1(b), 3 C.F.R. 215 (2012) (providing that an agency must "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs").
[192] Exec. Order No. 12866 § 1(a), 3 C.F.R. 638 (1994).

backwards—they first determined that they wanted to create the rule, then searched for evidence to justify it. The way in which the Labor Department and the White House approached the regulatory impact analysis is opposite to the methodology required by executive order.

The Administrative Procedure Act vests control of a rulemaking in the agency proposing the regulation. The Executive Office of the President—including OIRA, the National Economic Council, and other entities—exists to coordinate policy broadly across the executive branch, but ultimately each agency owns its particular rulemaking. With respect to the Labor Department's fiduciary rulemaking, it appears that the White House may have played an outsized role.

Documents that the Committee received suggest that the proposal was initially driven by political appointees in the Executive Office of the President. First, the level of detail in email communications between the Labor Department and the White House indicates that White House advisors may have exceeded their coordination function in drafting the rule. For instance, in the email discussing a GAO report that the Labor Department felt could build a case for the rule, a Labor Department official provided specific page numbers and direct quotations from the report to the White House's Brian Deese.[193] Such detail suggests that Mr. Deese, and other policy advisors within the White House, were involved in crafting the basis for the rule and the regulatory impact analysis on a granular and collaborative basis.

Additionally, in October and November 2011, the White House's National Economic Council convened a series of meetings among the Labor Department, the SEC, the Treasury Department, and the White House to discuss the rule's economic analysis.[194] These discussions appear to have been more than mere coordination meetings. Rather, it seems that White House officials were involved in developing material to justify the need for the Labor Department's proposal.

Moreover, Assistant Secretary of Labor Phyllis Borzi, who has been described as the "main architect" of the fiduciary rule,[195] ranks as the twelfth most frequent visitor to the White House during the Obama Administration.[196] Since 2009, Ms. Borzi has visited the White House

[193] *Id.*
[194] Brian Deese, then-Deputy Director of the National Economic Council, and Adriana Kugler, then-Chief Economist to then-Department of Labor Secretary Hilda Solis, hosted meetings at the White House in October and November 2011. White House staff, Labor Department staff, SEC staff, and Treasury Department staff attended the meetings. *See* Appendix B, Ex. 10, Email from Jessica Schumer, Exec. Office of the President, to Brian C. Deese et al. (Oct. 12, 2011) (October 20, 2011 meeting), SEC-DOL005698; Appendix B, Ex. 11, Email from Jessica Schumer to Brian C. Deese et al. (Oct. 25, 2011) (October 27, 2011 meeting), SEC-DOL005861; Appendix B, Ex. 9, Email from Chris Cosby, DOL, to Brian C. Deese et al. (Nov. 2, 2011) (November 2, 2011 meeting), SEC-DOL006041.
[195] Melanie Waddell, *DOL to 'Simplify and Streamline' Fiduciary Rule: Borzi*, THINKADVISOR (Oct. 20, 2015)
[196] Jason Howerton, *Here Are the 25 People Who Have Visited the Obama White House the Most* (Feb. 8, 2016, 1:38 PM), http://www.theblaze.com/stories/2016/02/08/here-are-the-25-people-who-have-visited-the-obama-white-house-the-most-no-3-is-apparently-shrouded-in-mystery/.

338 times.[197] Two other senior Labor Department officials rank as the ninth and sixth most frequent White House visitors, with 369 and 376 visits, respectively.[198]

Finally, a White House memorandum entitled "Draft Conflict of Interest Rule for Retirement Savings" further illustrates the White House's significant involvement in the rulemaking process. The memorandum, circulated by White House Council of Economic Advisors Chairman (CEA) Jason Furman and CEA member Betsey Stevenson, to the President's senior advisors including John Podesta, Susan Rice, Jennifer Palmieri, and Valerie Jarrett, criticized current regulations relating to investment advice on retirement accounts.[199] The memorandum argued that aggressive regulatory action was necessary to remedy the inadequate existing consumer protections on investment advice.[200] The Department issued its proposal just four months later.

V. THE ADMINISTRATION OBSTRUCTED CHAIRMAN JOHNSON'S INQUIRY BY LIMITING THE INFORMATION THE COMMITTEE WAS ABLE TO OBTAIN

In the course of conducting oversight on the Labor Department's rulemaking, Chairman Johnson experienced tremendous opposition and noncooperation from the Administration. The Labor Department withheld documents and even went so far as to urge the SEC—an independent agency that is designed to be bipartisan—to do the same. OIRA also withheld documents. The Labor Department's and OIRA's refusals to fully cooperate with Chairman Johnson's oversight has prevented the Committee from obtaining relevant documents and has hindered the Chairman's overall inquiry.

a. The Labor Department Remains Uncooperative with Chairman Johnson's Requests for Information and Documents from February 2015

Chairman Johnson wrote a letter to the Labor Department on February 5, 2015, requesting information and documents relating to the Department's anticipated rule.[201] After the Labor Department failed to produce communications in response to his request, Chairman Johnson reiterated the requests in another letter on March 17, 2015.[202] Chairman Johnson requested communications about the Labor Department's rulemaking between the Labor

[197] *Id.*
[198] *Id.*
[199] Memorandum from Jason Furman, Chairman, White House Council of Econ. Advisors, and Betsey Stevenson, Member, White House Council of Econ. Advisors, to White House Senior Advisors (Jan. 13, 2015).
[200] *Id.*
[201] Appendix A, Ex. 1, Letter from Chairman Johnson to Sec'y Perez, DOL (Feb. 5, 2015).
[202] Appendix A, Ex. 2, Letter from Chairman Johnson to Sec'y Perez, DOL (Mar. 17, 2015).

Department and the SEC and between the Labor Department and the White House.[203] By its own admission, the Department has not produced all material responsive to Chairman Johnson's requests.[204]

Specifically, the Labor Department has not produced any material responsive to Chairman Johnson's request for communications between the Department and the White House.[205] In August 2015, Chairman Johnson signaled his objection to Adri Jayaratne's nomination to be the Labor Department's Assistant Secretary for Congressional and Intergovernmental Affairs because of the Department's failure—under Mr. Jayaratne's time as acting head of the Office of Congressional and Intergovernmental Affairs—to respond fully to the Chairman's requests. Subsequently, the Labor Department informed the majority staff that no responsive documents existed.[206] The Labor Department, however, refused to explain how the Department came to this conclusion or what type of search the Department conducted.[207] The Committee later received, from another source, some communications between the Department and the White House about the rulemaking.[208] Still, later, in December 2015, the Labor Department again refused to provide the requested materials and declined to confirm whether it had sought consent from the White House to produce the material.[209]

The Labor Department has not fully responded to Chairman Johnson's request for communications between the Department and the SEC. The Labor Department has produced only a limited subset of self-selected communications between the Department and the SEC and provided short briefings.[210] The communications the Labor Department produced are mostly

---

[203] *Id.*

[204] Chairman Johnson did not request to conduct transcribed interviews with Labor Department officials. In light of the Labor Department's repeated refusals to produce requested information and documents, its interference with the SEC's response to the Chairman's separate request to the SEC, and the Department's overall obstructive posture with respect to the Chairman's inquiry, it is likely that requests for transcribed interviews would have proved futile.

[205] Email from Committee Staff, HSGAC, to Kathryn Garza-Ahlgren, DOL (Aug. 24, 2015, 2:00 PM) (on file with Committee).

[206] Phone Call between Committee Staff, HSGAC, and DOL (Aug. 5, 2015); *see also* Email from Committee Staff, HSGAC, to Nikki McKinney, DOL (Dec. 17, 2015, 1:19 PM) (on file with Committee) (referencing the phone call); Email from Committee Staff, HSGAC, to Kathryn Garza-Ahlgren, DOL (Aug. 24, 2015, 2:00 PM) (on file with Committee) (referencing the phone call).

[207] Phone Call between Committee Staff, HSGAC, and DOL (Aug. 2015); *see also* Email from Committee Staff, HSGAC, to Nikki McKinney, DOL (Dec. 17, 2015, 1:19 PM) (on file with Committee) (referencing the phone call); Email from Committee Staff, HSGAC, to Kathryn Garza-Ahlgren, DOL (Aug. 24, 2015, 2:00 PM) (on file with Committee) (referencing the phone call).

[208] The SEC produced to the Committee on November 23, 2015, documents containing communications between the Labor Department and the White House. *See* Email from Committee Staff, HSGAC, to Nikki McKinney, DOL (Dec. 17, 2015, 1:19 PM) (on file with Committee).

[209] Phone Call between Committee Staff, HSGAC, and DOL (Dec. 17, 2015); Email from Committee Staff, HSGAC, to Nikki McKinney, DOL (Dec. 17, 2015, 1:19 PM) (on file with Committee); Email from Committee Staff, HSGAC, to Nikki McKinney, DOL (Jan. 12, 2016, 12:52 PM) (on file with Committee).

[210] Appendix C, Dep't of Labor Document Production, DOL000001–002458; Emails between Committee Staff, HSGAC, and Elva Linares, DOL (Aug. 26–27, 2015) (on file with Committee). Mr. Jayaratne's staff, moreover,

related to scheduling meetings and do not address substantive aspects of the rule drafting process.[211] Moreover, the Department only produced these documents after the Chairman made a separate but similar request to the SEC for documents.[212] Additionally, during the briefings, Labor Department lawyers unilaterally limited the subject matter and timing of the briefings, leaving many questions unanswered.

Regarding the Labor Department and SEC communications, the Labor Department refused to certify that the communications produced to the Committee constituted the full universe of communications responsive to the Chairman's request.[213] Furthermore, the Labor Department refused to provide information about the total number of responsive documents, or the methods the Department used to identify responsive material.[214] The majority staff has confirmed that these communications, in fact, do *not* constitute the full universe of responsive communications. Rather, it appears that the Labor Department combed through its communications with the SEC and deliberately omitted the large majority of communications that would inform Chairman Johnson's inquiry. The Committee has obtained documents from another source that contain many communications between the Labor Department and the SEC that the Department omitted from its production. The Labor Department has acknowledged to the majority staff that additional responsive material exists, though it refuses to produce such material.[215]

In July 2015, Chairman Johnson spoke with Secretary Perez about the outstanding document requests. The majority staff has also communicated directly with Mr. Jayaratne about the Labor Department's unsatisfactory responses. Despite these interactions, and Chairman Johnson's continued objection to Mr. Jayaratne's confirmation by the Senate, the Labor Department still refuses to comply fully with the Chairman's requests. It seems that the Labor Department has only seriously engaged in discussions about fully satisfying Chairman Johnson's requests in an effort to advance Mr. Jayaratne's nomination. Ultimately, though, the Labor Department remains unwilling to produce all responsive documents to the Committee.

---

placed unilateral time and content restrictions on these briefings, refusing to answer questions that they deemed outside the scope of the briefings. Emails between Committee Staff, HSGAC, and Elva Linares, DOL (Aug. 26–27, 2015) (on file with Committee).

[211] Appendix C, Dep't of Labor Document Production, DOL000001–002458.

[212] Email from Committee Staff, HSGAC, to Adri Jayaratne, Acting Asst. Sec'y, Office of Cong. & Intergovernmental Affairs, DOL (July 8, 2015, 6:56 PM) (on file with Committee).

[213] Email from Kathryn Garza-Ahlgren, DOL, to Committee Staff, HSGAC (Aug. 21, 2015, 5:14 PM) (on file with Committee).

[214] Email from Committee Staff, HSGAC, to Adri Jayaratne, Acting Asst. Sec'y, Office of Cong. & Intergovernmental Affairs, DOL (July 8, 2015, 6:56 PM) (on file with Committee); Email from Committee Staff, HSGAC, to Kathryn Garza-Ahlgren, DOL (Aug. 24, 2015, 2:00 PM) (on file with Committee).

[215] Email from Kathryn Garza-Ahlgren, DOL, to Committee Staff, HSGAC (Aug. 21, 2015, 5:14 PM) (on file with Committee).

Finally, despite repeatedly refusing to produce responsive material, the Labor Department has not asserted any claim of privilege on the withheld material, and has refused to provide basic information about the scope, nature, and contents of the withheld material.[216] The Labor Department's stated reasons for noncompliance are all the more concerning given that its regulatory authority derives from an express grant of legislative authority from Congress to the Department. Congress—and, in particular, this Committee—retain broad oversight authority over the Labor Department's regulatory process and procedures. Ultimately, Congress also retains the authority to reject the Labor Department's rule through the Congressional Review Act.[217] Accordingly, the Committee ought to have access—and the Labor Department should be completely willing to provide access—to all documents and communications related to the rulemaking.

With little cooperation from the Labor Department, Chairman Johnson wrote to other agencies to seek information about the rulemaking. Under pressure from Chairman Johnson and after the Chairman threatened to compel production of the material,[218] the SEC ultimately provided a number of documents to the Committee that offered tremendous insight into the rulemaking. Similarly, FINRA also voluntarily assisted in providing useful information.

b. <u>The Labor Department Attempted to Interfere with the SEC's Cooperation with the Chairman's Requests</u>

In addition to withholding information from the Committee, the Labor Department admitted to Chairman Johnson that it had urged the SEC—an independent commission set up to be free of political pressure from the Executive Branch—to disregard Chairman Johnson's requests that he made separately to the SEC for documents in the SEC's possession and control.[219] Chairman Johnson made those requests to the SEC precisely because the Labor Department had declined to fully respond to his initial requests.

The Labor Department's interference with Chairman Johnson's request to the SEC was inappropriate and is indicative of the Department's overall posture in responding to the Chairman's inquiry into the rulemaking.[220] The Chairman had made a separate request to the SEC for documents in the possession and control of the SEC—a request for which the

---

[216] Email from Committee Staff, HSGAC, to Adri Jayaratne, Acting Asst. Sec'y, Office of Cong. & Intergovernmental Affairs, DOL (July 8, 2015, 6:56 PM) (on file with Committee).
[217] *See* Congressional Review Act, 5 U.S.C. §§ 801-808 (2012).
[218] Appendix A, Ex. 5, Letter from Chairman Johnson to Chairwoman White, SEC (July 13, 2015) ("If the Commission fails to immediately provide the requested documents, the Committee may consider use of the compulsory process.").
[219] Appendix A, Ex. 14, Letter from Acting Asst. Sec'y Jayaratne, DOL, to Chairman Johnson (July 8, 2015).
[220] Email from Committee Staff, HSGAC, to Adri Jayaratne, Acting Asst. Sec'y, Office of Cong. & Intergovernmental Affairs, DOL (July 8, 2015, 6:56 PM) (on file with Committee).

Department had no standing to interfere.[221] For reasons unknown to the majority staff, the Labor Department was unwilling to produce – and went out of its way to attempt to prevent others from producing—documents to the Committee about its work on this important rulemaking.

c. **OIRA Declined to Provide a Full and Complete Response to Chairman Johnson's Requests**

Chairman Johnson wrote a letter to OIRA on May 1, 2015, requesting information and documents relating to OIRA's review of the Labor Department's proposal.[222] After OIRA failed to provide a complete response, Chairman Johnson again wrote to OIRA on December 3, 2015.[223] To date, OIRA has provided non-specific, cursory responses to the Chairman's requests for information and produced limited materials that do not fully satisfy the Chairman's request for documents.[224]

Chairman Johnson's request stemmed from concern about whether OIRA conducted a thorough and thoughtful review of the rule. OIRA expedited its review, as evidence by the fact that the Labor Department promulgated the proposed rule just fifty days after OIRA received the proposal for review.[225] Chairman Johnson sought to ensure that OIRA conducted a thorough and thoughtful review of the proposed rule and to understand how OIRA incorporated suggestions from other Executive Branch departments and agencies and from stakeholders.[226] Specifically, Chairman Johnson asked OIRA to provide the following information:

1. Please provide all drafts of the Labor Department's proposed rulemaking, *including comments and suggestions to the drafts.*

2. Please explain why OIRA required considerably less time to review the Labor Department's proposed rulemaking than the average review time for other Labor Department regulatory proposals and other economically significant rules.

3. Please explain how OIRA incorporates suggestions from other Executive Branch departments and agencies, as well as stakeholders, into its review of the Labor Department's proposed rulemaking.

4. Please explain how the version of the proposed rulemaking incorporated OIRA's suggestions.

---

[221] *Id.*
[222] Appendix A, Ex. 7, Letter from Chairman Johnson to Admin'r Shelanski, OIRA (May 1, 2015).
[223] Appendix A, Ex. 8, Letter from Chairman Johnson to Admin'r Shelanski, OIRA (Dec. 3, 2015).
[224] Appendix A, Ex. 18, Letter from Admin'r Shelanski, OIRA, to Chairman Johnson (Jan. 20, 2016).
[225] Appendix A, Ex. 7, Letter from Chairman Johnson to Admin'r Shelanski, OIRA (May 1, 2015).
[226] *Id.*

5. Please explain how OIRA evaluated the Labor Department's proposed rulemaking with respect to Executive Order 13563's requirements for coordination with other agencies and consideration of flexible approaches.

OIRA's May 18, 2015 response to the Chairman provided general information about OIRA's review process that was not specific to OIRA's review of the Labor Department's proposal.[227] Regarding its review of the Labor Department's proposal, OIRA provided only vague information:

> OIRA devoted the time and resources necessary to ensure the review was consistent with EOs 12866 and 13563. This review included the participation of a number of relevant Executive Branch agencies. OIRA then concluded review of this draft on April 14, 2015. As background, EO 12866 provides OIRA up to 90 days to review significant regulatory actions, though the agency can request an extension. The amount of time needed to complete review on any given rule can vary, but OIRA does endeavor to complete the process as quickly as feasible while ensuring proper review.[228]

This answer lacked any specific information about the review process that Chairman Johnson requested.

OIRA's January 20, 2016 letter similarly lacked the specific information that Chairman Johnson requested.[229] OIRA simply stated:

> Regarding the length of time the draft proposed rule was under review, I can assure you that OIRA devoted the time and resources necessary to ensure the review was in accordance with EOs 12866 and 13563. The amount of time needed to complete review on any given rule varies, but OIRA endeavors to complete the process as efficiently as possible while ensuring proper review. The review of the *Conflict of Interest* draft proposed rule included the participation of relevant Federal agencies.[230]

Again, this response contains a conclusory statement void of any specific information about OIRA's review of the Labor Department's rule. OIRA's document production also failed to satisfy Chairman Johnson's request.[231] OIRA provided drafts of the proposal, but the drafts do not contain comments or suggestions, which Chairman Johnson had

---

[227] Appendix A, Ex. 17, Letter from Admin'r Shelanski, OIRA, to Chairman Johnson (May 18, 2015).
[228] *Id.*
[229] Appendix A, Ex. 18, Letter from Admin'r Shelanski, OIRA to Chairman Johnson (Jan. 20, 2016).
[230] *Id.*
[231] *Id.* (document production on file with Committee).

requested.[232] OIRA also provided a list of meetings it took with members of the public related to the rule, and the materials provided to OIRA at the meetings.[233] The information and productions and that OIRA provided to the Committee fail to offer any insight into OIRA's review of the Labor Department's proposal.

VI. CONCLUSION

Chairman Johnson's inquiry into the Labor Department's proposed rule has revealed that the Labor Department prioritized an expedited rulemaking process at the expense of thoughtfully considering and incorporating advice and suggestions from industry experts. Additionally, career, non-partisan, professional staff at the SEC, career, non-partisan, regulatory experts at OIRA, and Treasury Department officials expressed concerns to the Labor Department about the rule. Yet, documents that the Committee received indicate that the Department failed to implement numerous recommendations from these government officials in other agencies.

Chairman Johnson also encountered opposition and noncooperation from the Labor Department throughout its examination of the rulemaking process, calling into question the Department's commitment to transparency and accountability to Congress. From the information that the Committee was able to uncover, the Labor Department's flawed process in issuing its proposed "Conflict of Interest" rule could ultimately hurt American retirement savers. Whether intentionally or not, the proposed rule threatens to restrict access to retirement advice for those Americans who need it the most.

[232] *Id.*
[233] *Id.*