U.S. CHAMBER OF COMMERCE

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February 5, 2015

The Honorable Thomas Perez
Secretary
U.S. Department of Labor
200 Constitution Ave NW
Washington DC 20210

The Honorable Jeffrey Zients
Director
National Economic Council
The White House
Washington DC 20500

Dear Secretary Perez and Mr. Zients:

The U.S. Chamber of Commerce, along with several of our plan sponsor and service provider members, appreciate the opportunity to meet with you and your staff on November 14 to share our expertise and discuss concerns regarding the U.S. Department of Labor's ("DOL") anticipated re-proposal of the Definition of Fiduciary regulation.

The Chamber believes that regulation of our financial markets is most effective when it both enables ample well-disclosed choices for investors and ensures adequate investor protections. This is particularly true of retirement savings. We strongly believe no approach by DOL will successfully achieve both of these goals unless it is considered in the context of the broader regulatory and enforcement regimes impacting these services.

For example, investors benefit from expanded robust protections for retirement savers in individual retirement accounts regulated by Financial Industry Regulatory Authority ("FINRA"), the Securities and Exchange Commission ("SEC") and other regulators of financial services providers. Under FINRA regulations, registered financial representatives must undergo a rigorous licensing process that requires substantial preparation. Moreover, principals must actively supervise the activities of registered representatives to ensure compliance with rules, including the suitability standard.

Member firms take these rules seriously, requiring representatives to receive ongoing training as well as closely monitoring call center discussions and activities. Importantly in the context of what DOL is considering, FINRA has been much more active in the rollover space since the issuance of guidance such as Notice 13-45 in 2013. That rule imposes severe consequences for improper behavior, including substantial fines when violations are found, as well as providing a pathway for an aggrieved customer to seek recourse through mandatory customer arbitration with public representation on arbitration panels. Often, arbitration is a quicker and easier path to remediation for investors than filing a lawsuit.

Similarly, the SEC has made protection of investors saving for retirement one of its examination priorities for 2015. Other types of financial services providers are subject to rules that their primary regulator has determined are appropriate for the types of products and services offered by those providers.

In this context, we are troubled by the possibility of a rule with an overly broad application and significant reliance upon administrative prohibited transaction exemptions ("PTEs") to mold the definition of a fiduciary under the Employee Retirement Security Act of 1974 ("ERISA"). Under this approach, everything is prohibited unless DOL specifically allows it. Almost by definition, this will create a rigid one-size-fits-all regulatory approach that will make it harder to serve current investors, particularly in smaller accounts.

Historically, DOL has used administrative PTEs to address very fact specific transactions with respect to which relief is often conditioned on accommodating a one-size-fits-all approach and/or business model to permissibly enter into the defined transaction. We are concerned that efforts to use administrative PTEs to "shape" the definition of a fiduciary will unnecessarily complicate, and increase costs attendant to, the provision of much needed services to plans and their participants, as well as to IRA beneficiaries. In addition, the DOL will likely have to devote significant resources to this process as PTEs often take several rounds of drafting to ensure that they are workable. More importantly, even if the exemptions effectively address concerns today, the market for financial products and services is continually evolving. Exemptive relief that is sufficient today may well become obsolete constraining innovation in the marketplace.

Fashioning the rule in this manner will create an unworkable regime that is inconsistent with the regulatory principles set forth by Executive Orders 12866 and 13563, relating to the need to consider, as part of the rulemaking process, the most cost-effective manner to achieve the regulatory objective, avoidance of regulations that are inconsistent or duplicative of other Federal agencies (e.g., SEC, FINRA), and the cumulative effects of rules.

We further note that both the substance of Executive Order 13563 and the accompanying guidance from then-Administrator Cass Sunstein, dated March 20, 2012, encourages early engagements with affected stakeholders, including the use of Requests for Information and Advance Notices of Proposed Rulemakings to obtain public input on rulemakings that may have significant cumulative effects on the affected stakeholders. Section 2, paragraph (c) of Executive Order 13563, specifically provides that:

> Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.

Given the foregoing and the significance of any regulatory changes to the definition of "fiduciary" under ERISA, including, especially, new or amended prohibited transaction exemptions, we believe that the DOL, consistent with the Administration's regulatory guidance, is required to issue any new proposals, including exemptions, in the form of advance notices of proposed rulemakings. Such a process would not only be compliant with the letter of the Administration's directive to the agencies, but also the spirit of that guidance by better ensuring consideration of regulatory approaches that reduce burdens and maintain flexibility and freedom of choice, as well as consideration of the interactive and cumulative effects of multiple regulations.

Although we understand that the DOL believes it can address many of the concerns it has heard through the use of yet unseen PTEs, for the reasons outlined above, we remain concerned this approach will simply not achieve the desired objectives. We therefore believe that investors, regulated service providers, and the DOL itself would all benefit if the DOL were to issue an advanced notice of proposed rulemaking, including possible PTEs, before it proposes a rule.

This approach could also help ensure that changes to the definition of a fiduciary under ERISA are surgically and narrowly tailored to avoid a plethora of potentially overly complex and unusable rules or PTEs.

We thank you again for your time and consideration. As we move forward, we hope to continue this dialogue, and we hope that we can be a resource for you.

Sincerely,

Randel Johnson
Senior Vice President
Labor Immigration and
Benefits

David Hirschmann
President
Center for Capital Markets Employee
Competiveness

cc: The Honorable Sharon Block, U.S. Department of Labor
Ms. Judy Mares, U.S. Department of Labor
Ms. Lily Batchelder, National Economic Council
Ms. Sameera Fazili, National Economic Council