Written Testimony of
U.S. Chamber of Commerce

Before

The U.S. Senate Committee on Appropriations
Subcommittee on Labor, Health and Human Services, and Education

Hearing on Fiscal Year 2016 Appropriations

April 3, 2015

Chairman Blunt and Ranking Member Murray, thank you for the opportunity to provide written testimony regarding FY 2016 appropriations for the U.S. Department of Labor ("Labor Department" or "DOL"). The U.S. Chamber of Commerce is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Our members range from "mom-and-pop" shops and local chambers to leading industry associations and large corporations.

Businesses play an exceedingly important role in ensuring that Americans are able to enjoy a financially secure retirement. As private employers, businesses of every size seek to maintain a long-held commitment to providing voluntary benefits, such as defined benefit and defined contribution plans, that support the welfare of their workers. Financial sector businesses have also over the past several decades innovated in ways making access to tax-deferred investment vehicles—notably the individual retirement account ("IRA")—a reality for millions of American households. This private sector system has contributed significantly to the retirement needs of millions of seniors, and the Chamber and its members are committed to continuing the success of the system and ensuring the long-term retirement security of Americans.

It is precisely because of our commitment to protecting the retirement security of America's workers that we have such serious concerns about the Labor Department's impending rule re-proposal that would expand the definition of a "fiduciary" under the Employee Retirement Income Security Act ("ERISA") of 1974. We are concerned that the DOL's regulatory initiative will significantly increase costs and reduce access to much-needed financial education and advice for millions of workers and retirees.

It is hard to overstate the scope of the Labor Department's original proposal in 2010. As the Chamber and many other commenters noted at the time, the 2010 proposal would have seriously inhibited the ability of plan participants to obtain valuable investment education, and would have also had a particularly harmful impact on the IRA market. Specifically, the rule would have made it either impossible or cost prohibitive for a large number of investors with moderate retirement assets to open or maintain an IRA, and to be able to work with a financial professional on an ongoing basis. The limited information currently available from the White House and the Labor Department suggests that the re-proposed regulation will be similarly broad, and will likely elicit many of these same concerns.[1]

The Chamber believes that the DOL and the Administration have failed to properly take into consideration the effectiveness of the existing regulatory regime for broker-dealers and others who provide retirement products and services to workers and retirees. Of particular concern to us are the contents of an internal White House memo that was recently made public, in which senior Administration officials argue that "consumer protections for investment advice in the retail and small plan markets are inadequate and…the current regulatory environment creates perverse incentives that ultimately cost savers billions of dollars a year."[2] Many of these same arguments were recycled in the President's recent comments.

The Chamber fundamentally disagrees with the conclusions reached in the White House memo regarding current regulation of market participants, in particular broker-dealers who play a large role in the IRA market. Indeed, we believe that the DOL and White House have failed to take into account the important roles played by the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA") in their oversight of broker-dealers. A recent report lays out in detail the current comprehensive regulatory regime that oversees broker-dealers and other financial professionals.[3]

Despite the long-established roles of the SEC, FINRA, banking, and insurance regulators to govern the conduct of financial professionals, and of the Internal

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[1] *See, e.g.,* White House Fact Sheet, "Strengthening Retirement Security by Cracking Down on Backdoor Payments and Hidden Fees," February 23, 2015 and "FAQs: Conflicts of Interest Rulemaking" at http://www.dol.gov/featured/ProtectYourSavings/faqs.htm

[2] *See* White House memo from Council of Economic Advisers members Jason Furman (Chair) and Betsey Stevenson http://www.scribd.com/doc/253449711/WH-DOL-memo

[3] *See* white paper from Morgan Lewis: "Department of Labor Retirement Initiative Fails to Consider Current Regulatory Regime, Which Comprehensively Protects Investors, Including IRA Investors, and Preserves Investor Choice." March 2015 http://www.morganlewis.com/~/media/files/publication/morgan%20lewis%20title/white%20paper/im_whitepaper_dolretirementinitiative_march2015.ashx

Revenue Service ("IRS") to enforce IRA requirements, the DOL on its own seeks to fundamentally alter the rules governing how investment advice is provided with respect to <u>nearly $15 trillion in capital</u>, roughly half of which is held in IRAs. On behalf of our members and their employees, we have serious doubts that the Department of Labor is the proper regulatory agency to attempt such broad regulation of financial services, especially for retail investors in IRAs.

This concern is especially significant given that many of the primary financial regulators are already focusing on areas in which the White House and DOL claim there are regulatory shortcomings, notably in the IRA rollover market. For example, FINRA issued new guidance less than 15 months ago expanding the requirements for determining the suitability of a rollover to an IRA.[4] SEC Chair Mary Jo White recently announced that the SEC could soon begin promulgating a regulation to harmonize the suitability and fiduciary standards under the securities laws, as authorized in the Dodd-Frank law.[5] The Labor Department is not acting to fill a void where there is insufficient regulation—rather, it is promulgating a regulatory standard that could well conflict with, or even trump, the actions of other regulators.

Indeed, SEC Commissioner Dan Gallagher expressed significant reservations about the DOL regulatory process in a recent speech, saying the reported coordination between SEC and DOL on DOL's fiduciary rule "…has been nothing more than a 'check the box' exercise by DOL designed to legitimize the runaway train that is their fiduciary rulemaking."[6] The DOL response to the Education and the Workforce Committee's letter requesting the Department specifically document its coordination efforts with the SEC did little to dispel this concern.[7] The DOL response indicated merely that Secretary Perez and SEC Chair White have had a handful of telephone calls and meetings over the past year and a half to discuss the DOL rule, and that staff have had "numerous" phone calls and meetings.[8]

We are deeply concerned that the approach taken by the Labor Department in the 2010 proposal, and presumably in the re-proposal, relies on the prohibited transaction exemptions ("PTEs") under ERISA and the Tax Code. These extremely blunt regulatory tools are ill-suited for nuanced regulation that preserves access to valuable investment advice while preventing abuse.

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[4] *See* FINRA Regulatory Notice 13-45, https://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf
[5] "SEC's Mary Jo White Says Agency Will Develop Fiduciary Rule Brokers" *Investment News* March 17, 2015.
[6] Speech of Commissioner Daniel M. Gallaher at "The SEC Speaks in 2015," February 20, 2015.
[7] March 4, 2014 letter to Secretary Perez from Chairman Kline and Subcommittee Chairman Roe.
[8] March 16, 2015 response from Assistant Secretary Jayaratne to Chairman Kline and Subcommittee Chairman Roe.

The Chamber recently issued a report entitled "*Using PTEs to Define a Fiduciary Under ERISA: Threading the Needle with Rope*" that discussed these concerns in detail.[9] The reality is that the prohibited transaction regime administered by the DOL is a very difficult and often unworkable method to effectively address the issues that arise with an overly broad rule. While the Labor Department and the Administration assure us that the re-proposal will provide some narrow "principles-based" exemptions to these rules,[10] real-world experience with PTEs suggests that these narrow exemptions will not prevent workers and investors from being denied access to advice.

For example, the DOL finalized prohibited transaction exemptions in 2011 that were intended to improve access to investment advice by retirement plan participants. However, the DOL's own economic analysis showed that even after the exemptions were adopted, participants would still lose approximately $100 billion every year due to investments errors from a lack of advice.[11] Even if the White House's dubious estimates are correct that "conflicted" advice results in $8-$17 billion of losses per year,[12] the economic harm to American workers and retail investors of being denied access to investment advice is five to ten times greater, a figure that would increase even further if the expanded fiduciary definition further restricts the availability of advice.

In summary, Mr. Chairman, we are deeply concerned that the Department of Labor's regulatory effort to expand the definition of a fiduciary may ultimately harm the very working Americans it purports to help by further limiting their access to, and choice of, investment advice providers. We ask that the Committee use its authority to require the Labor Department to provide detailed information on its coordination with the SEC as a condition of receiving the funding necessary to continue its work. On their current course, the DOL and SEC could very well end up promulgating regulations that are duplicative or conflict with one another. Additionally, given that the DOL will likely require a significant amount of funding in order to enforce an expanded definition of fiduciary, the Committee should also seek answers as to whether the DOL will require additional resources in future years in order to enforce these new rules. Active Congressional oversight of these regulatory processes will be essential to ensure American workers continue to benefit from our private retirement system.

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[9] The Chamber's report can be found at: http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/White-Paper-Using-PTEs-to-Define-a-Fiduciary-Under-ERISA-2.19.15-FINAL.pdf

[10] White House Fact Sheet, "Strengthening Retirement Security by Cracking Down on Backdoor Payments and Hidden Fees," February 23, 2015.

[11] *See* Investment Advice—Participants and Beneficiaries, 76 FR 66,136, 66,151-153 (October 25, 2011)

[12] Fact Sheet, February 23, 2015.