

United States Senate

WASHINGTON, DC 20510

May 17, 2018

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

Dear Secretary Acosta,

We are writing today to express our strong concern with the Department of Labor's ("Department") decision not to defend the conflict of interest rule ensuring financial advisers are acting in their clients' best interests, following a single negative decision by an appeals court¹ on the rule, which was not consistent with the findings of other courts. We are deeply concerned that the Department's failure to defend the rule will create more confusion and uncertainty for both consumers and the financial services industry. We urge the Department to reverse course and continue defending its authority under the Employee Retirement Income Security Act of 1974 ("ERISA") to issue common-sense guidance protecting retirement savers and to stand up for individuals working hard to save for retirement by asking the U.S. Supreme Court to hear its appeal of the Fifth Circuit's decision. Everyone seeking help to plan for their financial future should be able to trust their financial adviser to put their family's best interests first, and the Department has an important role to play to make sure the industry lives up to that trust.

Though the Fifth Circuit Court of Appeals held that the Department overstepped its authority in issuing the conflict of interest rule, the Department's authority with respect to this rule has been thoroughly reviewed and upheld by numerous courts.² In fact, just days before the Fifth Circuit dealt the Department its first and only loss on the rule, the Tenth Circuit held that the Department followed the Administrative Procedure Act ("APA")³ and acted within its broad regulatory authority.⁴ Allowing the Fifth Circuit's decision alone to dictate the Department's policy sets a dangerous precedent by failing to acknowledge the clear difference of opinion among the courts of appeals regarding the Department's authorities. The Department should defend its authority and this important rule by appealing the Fifth Circuit's decision to the Supreme Court.

¹ *Chamber of Commerce of the U.S. et al v. Acosta*, No. 17-10238 (5th Cir. Mar. 15, 2018) (vacating the fiduciary rule *in toto*).

² *Chamber of Commerce of the U.S. et al. v. Hugler*, No. 3:16-cv-1476-M (N.D. Tex. Feb. 8, 2017); *Nat'l Ass'n for Fixed Annuities v. Perez*, 16-cv-1035, 2016 WL 6573480 (D.D.C. Nov. 4, 2016); *Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor*, 16-CV-4083-DDC-KGS, (D. Kan. Feb. 17, 2017); *Thrivent Financial for Lutherans v. Perez*, No. 0:16-cv-03289 (D. Minn. Sept. 29, 2016); *Mkt. Synergy Grp., Inc. v. Acosta*, No. 17-3038 (10th Cir. Mar. 13, 2018).

³ 5 U.S.C. §§ 551 *et. seq.*

⁴ *Mkt. Synergy Grp., Inc. v. Acosta*, No. 17-3038 (10th Cir. Mar. 13, 2018).

Last year you acknowledged that you had considered the record and the rulemaking process and “found no principled legal basis” to delay the core provisions of this rule.⁵ Accordingly, inaction seems inconsistent with your previous views. The Department announced a temporary enforcement policy last May,⁶ which was then extended an additional 18 months last November,⁷ ostensibly to allow the Department to “actively engag[e] in a careful analysis of the issues raised in the President’s Memorandum.”⁸ The President’s Memorandum actually charged the Department with reviewing whether the fiduciary rule was “...likely to cause an increase in litigation and an increase in the cost of retirement services.”⁹ Yet, the uncertainty stemming from both the enforcement delays due to the Department’s review and the Department’s decision not to defend the rule have actually resulted in an increase in litigation,¹⁰ with more expected due to the rise in the promulgation of state-level fiduciary rules.¹¹

The prompt implementation of the conflict of interest rule is critical to protect retirement savers, who lose approximately \$17 billion annually from conflicted advice.¹² Recent, high-profile incidents involving allegations of improper sales incentives and inappropriate recommendations regarding retirement rollovers have further exposed the dangers of leaving financial institutions unregulated in these areas. For example, Wells Fargo is under federal investigation after disclosing that it is assessing “whether there have been inappropriate referrals or recommendations, including with respect to rollovers for 401(k) plan participants, certain alternative investments, or referrals of brokerage customers to the company’s investment and fiduciary services business.”¹³ Scottrade is accused of violating the firm’s impartial conduct standard by holding sales contests involving retirement assets.¹⁴ These examples underscore the need for the Department to defend the conflict of interest rule.

Since the Fifth Circuit’s ruling, the Department has issued a Field Assistance Bulletin, including a “non-enforcement policy,” to help industry understand its obligations and to communicate the Department’s

⁵ Alexander Acosta, “Deregulators Must Follow the Law, So Regulators Will Too,” *Wall Street Journal* (May 22, 2017), <https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029>.

⁶ DOL Field Assistance Bulletin No. 2017-02, “Temporary Enforcement Policy on Fiduciary Duty Rule” (May 22, 2017).

⁷ 18-Month Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption (PTE 2016-01), 82 Fed. Reg. 56,545 (Nov. 29, 2017); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02), 82 Fed. Reg. 16,902 (Nov. 29, 2017); Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (PTE 84-24), 82 Fed. Reg. 18,902 (Nov. 29, 2017).

⁸ DOL Field Assistance Bulletin No. 2017-02, *supra* note 7.

⁹ Presidential Memorandum on Fiduciary Duty Rule, 82 Fed. Reg. 9,675 (Feb. 3, 2017).

¹⁰ Admin. Complaint, Commonwealth of Mass., Office of Sec’y of Commonwealth Securities Div., In Matter of Scottrade, Inc., Docket No. E-2017-0045 (Feb. 15, 2018).

¹¹ Kristen Ricaurte Knebel, “States Look to Help Investors, With Fiduciary Rule in Flux” *Bloomberg Benefits & Executive Compensation News* (Feb. 7, 2018) (“Connecticut, Nevada, New Jersey, and New York have passed laws or proposed regulations requiring investment advisers to disclose conflicts of interest to clients or to meet standards that their advice be in investors’ best interest....The action in the states is partially a response to the Trump administration’s delay of key provisions of the fiduciary rule until mid-2019.”).

¹² Executive Office of the President, Council of Economic Advisers, “The Effects of Conflicted Investment Advice on Retirement Savings” 2 (Feb. 2015).

¹³ Emily Glazer, “Justice Department Widens Wells Fargo Sales Investigation to Wealth Management,” *Wall Street Journal* (Mar. 16, 2018), <https://www.wsj.com/articles/justice-department-widens-wells-fargo-sales-investigation-to-wealth-management-1521215076>.

¹⁴ Lisa Beilfuss, “Massachusetts Accuses Scottrade of Fiduciary Rule Violations,” *Wall Street Journal* (Feb. 15, 2018), <https://www.wsj.com/articles/massachusetts-accuses-scottrade-of-fiduciary-rule-violations-1518741310>.

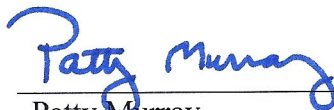
decision not to enforce key requirements of the rule and its associated prohibited transaction exemptions.¹⁵ But the Department seems to have done little, if anything, to warn retirement savers that they are now vulnerable to professionals who, according to the Department, have no obligation to put their clients' interest before their own.

We call on you once again to demonstrate your commitment to retirement savers and continue to defend the Department's authority on the conflict of interest rule by seeking further review from the U.S. Supreme Court of this one outlying court decision against the rule. In addition, we request that you provide answers to the following questions no later than June 1, 2018.

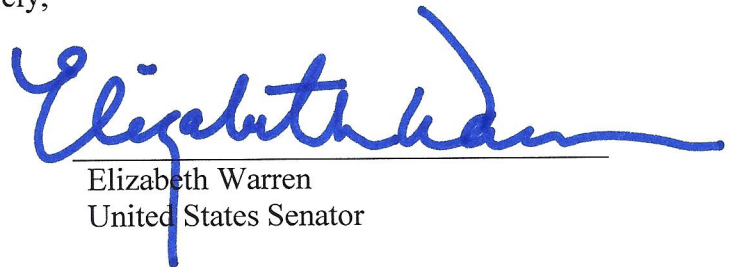
1. Since the Fifth Circuit's ruling, what has the Department done to inform savers of their lack of protections from conflicted retirement advice, now that the Department is no longer enforcing the conflict of interest rule?
2. Does the Department plan to defend its authority to protect retirement savers, as courts outside of the Fifth Circuit have affirmed, and appeal the Fifth Circuit's ruling to the Supreme Court? If not, why not?
3. If the Department does not appeal the Fifth Circuit's decision, or it is not overturned on appeal, what will the Department do in the future to protect retirement savers from conflicted advice?

Thank you in advance for your prompt attention to this matter. If you have any questions, or would like to further discuss this request, please contact Kendra Isaacson, Senate HELP Committee Senior Pensions Counsel, at (202) 224-6572.

Sincerely,



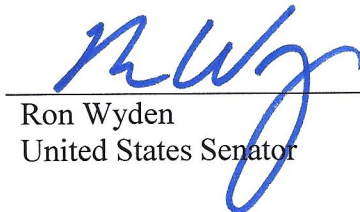
Patty Murray
United States Senator



Elizabeth Warren
United States Senator



Sherrod Brown
United States Senator



Ron Wyden
United States Senator



Cory A. Booker
United States Senator

¹⁵ DOL Field Assistance Bulletin No. 2018-02, "Temporary Enforcement Policy on Prohibited Transaction Rules Applicable to Investment Advice Fiduciaries" (May 7, 2018).