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United States Senate

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

KEITH B. ASHDOWN, STAFF DIRECTOR
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February 5, 2015

The Honorable Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Dear Secretary Perez:

The Committee on Homeland Security and Governmental Affairs is examining the Department of Labor's reported efforts to change the fiduciary rules relating to retirement plans. I ask for your help in enabling the Committee to better understand the Department's plans and the process by which the Department intends to change the fiduciary obligations.

The Employee Retirement Income Security Act of 1974 (ERISA) establishes minimum standards for private industry pension plans and requires plan fiduciaries to act in the interest of the plan's participants.¹ A fiduciary, as currently defined in the statute, includes anyone who offers investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such a retirement plan, or has any authority or responsibility to do so.²

According to recent reports, the Department is poised to issue a regulation soon to expand fiduciary duties owed by investment advisers who offer advice relating to employee retirement plans and individual retirement accounts.³ Critics of the Department's new

¹ Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. § 1001).

² *Id.* § 1002(21)(A). In 1975, the created a five-part test for "investment advice," which narrowed the meaning of "fiduciary" under the statute. The five-part test for "investment advice" includes whether a person: (i) makes recommendations on investing in, purchasing or selling securities or other property, or give advice as to their value; (ii) on a regular basis; (iii) pursuant to a mutual understanding that the advice; (iv) will serve as a primary basis for investment decisions; and (v) will be individualized to the particular needs of the plan. 29 C.F.R. § 2510.3-21(c) (1975). If an investment adviser does not meet each requirement of the five-part test each time he or she gives advice, he or she will not be treated as a fiduciary. *Id.*

³ Kevin Cirilli, *White House Readies Crackdown on Financial Advisers*, THE HILL, Jan. 22, 2015, available at <http://thehill.com/policy/finance/230457-white-house-readies-crackdown-on-financial-advisers> (last visited Feb. 5, 2015) [hereinafter Cirilli, *White House Readies Crackdown*]; Suzanne Barlyn, *U.S. Labor Dept. Delays Unveiling of Fiduciary Plan to 2015*, REUTERS, May 28, 2014, available at <http://www.reuters.com/article/2014/05/28/us-labor-fiduciary-idUSKBN0E811O20140528> (last visited Feb. 5, 2015).

regulation, however, have expressed concerns that the rule could adversely affect middle to low-income Americans' access to investment advice.⁴

The Department has considered changing its rules concerning fiduciaries for years. In 2010, the Department initially proposed a new rule that would have expanded the definition of "fiduciary" under ERISA.⁵ Although the Department later withdrew the proposed rule in 2011, the Department has been preparing to again release a new rule that would expand the list of those who qualify as fiduciaries.⁶ The Department's plans come as the Securities and Exchange Commission (SEC) is also making plans to revise its fiduciary standard for brokers.⁷

It is widely believed that the Department will issue a notice of proposed rulemaking soon concerning fiduciary obligations under ERISA.⁸ In January 2015, White House Council of Economic Advisors (CEA) Chairman Jason Furman and Betsey Stevenson, a member of the CEA, circulated a memorandum to senior advisors in the White House criticizing current regulations relating to investment advice on retirement accounts.⁹ In addition, the Department recently held an unusual public hearing on whether Credit Suisse should be granted a final exemption under ERISA to continue as a Qualified Professional Asset Manager of U.S. pension fund assets.¹⁰

In order to assist the Committee's oversight obligations, I request that you provide the following information for the period January 1, 2010, to the present:

1. Please explain how the Department will ensure that any proposed rulemaking relating to fiduciary rules and policies on investment advisers for retirement accounts does not adversely affect middle and low-income Americans.
2. Please explain whether and how the Department plans to increase awareness and educate taxpayers about any proposed rulemaking relating to fiduciary rules and policies on investment advisers for retirement accounts.

⁴ Mark Schoeff, *DOL Proposal of Fiduciary-Duty Rule Delayed Again*, INVESTMENT NEWS, May 28, 2014, available at <http://www.investmentnews.com/article/20140528/FREE/140529932/dol-proposal-of-fiduciary-duty-rule-delayed-again> (last visited Feb. 5, 2015) [hereinafter Schoeff, *DOL Proposal*].

⁵ *Id.*

⁶ Sarah N. Lynch, *U.S. Labor Dept. Offers Glimpse Into New Fiduciary Plan*, REUTERS, Mar. 12, 2014, available at <http://www.reuters.com/article/2014/03/12/us-labor-fiduciary-idUSBREA2B23H20140312> (last visited Feb. 5, 2015).

⁷ Mark Schoeff, *SEC Keeps Fiduciary Promises Vague for 2015*, INVESTMENT NEWS, Nov. 18, 2014, available at <http://www.investmentnews.com/article/20141118/FREE/141119900/sec-keeps-fiduciary-promises-vague-for-2015> (last visited Feb. 5, 2015).

⁸ Cirilli, *White House Readies Crackdown*, *supra* note 3; Schoeff, *DOL Proposal*, *supra* note 5.

⁹ Memorandum from Jason Furman, Chairman, White House Council of Economic Advisers & Betsey Stevenson, Member, White House Council of Economic Advisers to White House Senior Advisors, *Draft Conflict of Interest Rule for Retirement Savings* (Jan. 13, 2015).

¹⁰ Neil Weinberg, *Credit Suisse to Face Nader at Labor Dept. Hearing*, BLOOMBERG NEWS, Jan. 14, 2015, available at <http://www.bloomberg.com/news/2015-01-14/credit-suisse-to-face-nader-at-labor-department-hearing.html> (last visited Feb. 5, 2015).

3. Please itemize any costs that will be or have been incurred by the Department to increase awareness and educate taxpayers about any proposed rulemaking relating to fiduciary rules and policies on investment advisers for retirement accounts.
4. Please explain the Department's role in drafting or advising on the White House Council on Economic Advisors memorandum titled "Draft Conflict of Interest Rule for Retirement Savings" and dated January 13, 2015.
5. Please explain the Department's decision to convene a hearing on the Qualified Professional Asset Manager eligibility of Credit Suisse, including how the Department selected the witnesses who testified during the hearing.
6. Please produce all communications between the Department of Labor and the Securities and Exchange Commission referring or relating to changing fiduciary standards under the Employee Retirement Income Security Act.
7. Please produce all communications between the Department of Labor and the Executive Office of the President about the White House Council on Economic Advisors memorandum titled "Draft Conflict of Interest Rule for Retirement Savings" and dated January 13, 2015.

Please produce this material as soon as possible, but by no later than noon on February 19, 2015.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate "the efficiency and economy of operations of all branches of the Government."¹¹ Additionally, S. Res. 253 (114th Congress) authorizes the Committee 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."¹²

For purposes of this request, please refer to the definitions and instructions in the enclosure to this letter. If you have any questions about this request, please contact Caroline Ingram of the Committee staff at (202) 224-4751. Thank you for your attention to this matter.

Sincerely,



Ron Johnson
Chairman

¹¹ S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

¹² S. Res. 253 § 12, 113th Cong. (2013).

The Honorable Thomas E. Perez

February 5, 2015

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cc: The Honorable Thomas R. Carper
Ranking Minority Member

Enclosure

Instructions for Responding to a Committee Request
Committee on Homeland Security and Governmental Affairs
United States Senate
114th Congress

A. Responding to a Request for Documents

1. In complying with the Committee's request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data, or information should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization, or person denoted in the request has been or is also known by any other name or alias than herein denoted, the request should be read also to include the alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e. CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic form should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - a. The production should consist of single page Tagged Image Files (".tif"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - b. Document numbers in the load file should match document Bates numbers and .tif file names.
 - c. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - d. All electronic documents produced should include the following fields of metadata specific to each document:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

Instructions for Responding to a Committee Request

- e. Alternatively, if the production cannot be made in .tif format, all documents derived from word processing programs, email applications, instant message logs, spreadsheets, and wherever else practicable should be produced in text searchable Portable Document Format (“.pdf”) format. Spreadsheets should also be provided in their native form. Audio and video files should be produced in their native format, although picture files associated with email or word processing programs should be produced in .pdf format along with the document it is contained in or to which it is attached.
 - f. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), consult with the Committee staff to determine the appropriate format in which to produce the information.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
 7. Documents produced in response to the request should be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
 8. When producing documents, identify the paragraph in the Committee’s schedule to which the documents respond.
 9. Do not refuse to produce documents on the basis that any other person or entity also possesses non-identical or identical copies of the same documents.
 10. This request is continuing in nature and applies to any newly discovered information. Any record, document, compilation of data or information not produced because it has not been located or discovered by the return date, should be produced immediately upon subsequent location or discovery.
 11. All documents should be Bates-stamped sequentially and produced sequentially. Each page should bear a unique Bates number.
 12. Two sets of documents should be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets should be delivered to the Majority Staff in Room 340 of the Dirksen Senate Office Building and the Minority Staff in Room 346 of the Dirksen Senate Office Building.
 13. If compliance with the request cannot be made in full by the date specified in the request, compliance should be made to the extent possible by that date. Notify Committee staff as soon as possible if full compliance cannot be made by the date specified in the request, and provide an explanation for why full compliance is not possible by that date.

Instructions for Responding to a Committee Request

14. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
15. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
16. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents which would be responsive as if the date or other descriptive detail were correct.
17. In the event a complete response requires the production of classified information, provide as much information in unclassified form as possible in your response and send all classified information under separate cover via the Office of Senate Security.
18. Unless otherwise specified, the period covered by this request is from January 1, 2009 to the present.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

B. Responding to Interrogatories or a Request for Information

1. In complying with the Committee's request, answer truthfully and completely. Persons that knowingly provide false testimony could be subject to criminal prosecution for perjury or for making false statements. Persons that knowingly withhold requested information could be subject to proceedings for contempt of Congress. If you are unable to answer an interrogatory or information request fully, provide as much information as possible and explain why your answer is incomplete.
2. In the event that any entity, organization, or person denoted in the request has been or is also known by any other name or alias than herein denoted, the request should be read also to include the alternative identification.
3. Your response to the Committee's interrogatories or information requests should be made in writing and should be signed by you, your counsel, or a duly authorized designee.

Instructions for Responding to a Committee Request

4. When responding to interrogatories or information requests, respond to each paragraph in the Committee's schedule separately. Clearly identify the paragraph in the Committee's schedule to which the information responds.
5. Where knowledge, information, or facts are requested, the request encompasses knowledge, information or facts in your possession, custody, or control, or in the possession, custody, or control of your staff, agents, employees, representatives, and any other person who has possession, custody, or control of your proprietary knowledge, information, or facts.
6. Do not refuse to provide knowledge, information, or facts on the basis that any other person or entity also possesses the same knowledge, information, or facts.
7. The request is continuing in nature and applies to any newly discovered knowledge, information, or facts. Any knowledge, information, or facts not provided because it was not known by the return date, should be provided immediately upon subsequent discovery.
8. Two sets of responses should be delivered, one set to the Majority Staff and one set to the Minority Staff. When responses are provided to the Committee, copies should be delivered to the Majority Staff in Room 340 of the Dirksen Senate Office Building and the Minority Staff in Room 346 of the Dirksen Senate Office Building.
9. If compliance with the request cannot be made in full by the date specified in the request, compliance should be made to the extent possible by that date. Notify Committee staff as soon as possible if full compliance cannot be made by the date specified in the request, and provide an explanation for why full compliance is not possible by that date.
10. In the event that knowledge, information, or facts are withheld on the basis of privilege, provide a privilege log containing the following information: (a) the privilege asserted; (b) the general subject matter of the knowledge, information, or facts withheld; (c) the source of the knowledge, information, or facts withheld; (d) the paragraph in the Committee's request to which the knowledge, information, or facts are responsive; and (e) each individual to whom the knowledge, information, or facts have been disclosed.
11. If a date or other descriptive detail set forth in this request is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, provide the information that would be responsive as if the date or other descriptive detail was correct.
12. In the event a complete response requires the transmission of classified information, provide as much information in unclassified form as possible in your response and send all classified information under separate cover via the Office of Senate Security.
13. Unless otherwise specified, the period covered by this request is from January 1, 2009 to the present.

Instructions for Responding to a Committee Request

C. Definitions

1. The term “document” in the request or the instructions means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” in the request or the instructions means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face to face, in meetings, by telephone, mail, telex, facsimile, email (desktop or mobile device), computer, text message, instant message, MMS or SMS message, regular mail, telexes, discussions, releases, delivery, or otherwise.
3. The terms “and” and “or” in the request or the instructions should be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” in the request or the instructions mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, businesses or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify” in the request or the instructions, when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; and (b) the individual’s business address and phone number.

Instructions for Responding to a Committee Request

6. The terms “referring” or “relating” in the request or the instructions, when used separately or collectively, with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” in the request or the instructions means agent, borrowed employee, casual employee, consultant, contractor, de fact employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee or subcontractor.
8. The terms “you” and “your” in the request or the instructions refer to yourself; your firm, corporation, partnership, association, department, or other legal or government entity, including all subsidiaries, divisions, branches, or other units thereof; and all members, officers, employees, agents, contractors, and all other individuals acting or purporting to act on your behalf, including all present and former members, officers, employees, agents, contractors, and all other individuals exercising or purporting to exercise discretion, make policy, and/or decisions.

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