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SMALL BUSINESS

# United States Senate

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September 21, 2015

The Honorable Thomas Perez  
Secretary  
United States Department of Labor  
200 Constitution Avenue Northwest  
Washington, DC 20210

Dear Secretary Perez:

I am writing regarding the Department of Labor's (DOL) proposed rule to expand the definition of investment advice under the Employee Retirement Income Security Act of 1974 (ERISA). I share the Department's belief that financial advisors should adhere to a best interest standard when providing personalized investment advice to retirement savers. However, I am concerned that the Department's current proposed rule would prevent retirement savers from receiving the assistance they need to make educated investment decisions, even when their financial advisor is committed to working in his or her clients' best interest.

Today, few workers are covered by pension plans, and with the Social Security Trust Fund's solvency issues, workers are increasingly responsible for planning for their own retirement. During a Senate hearing, the Department indicated that we have a "retirement crisis" and that "not enough Americans are saving for retirement."<sup>1</sup> While I agree, I am concerned that the proposed rule could make it more difficult for low and middle-income families and small business owners to obtain financial advice.

## Protecting Retirement Savers' Access to Rollover Advice

According to the Bureau of Labor Statistics, workers change jobs frequently and the median tenure at a job is 4.6 years.<sup>2</sup> With job changes, workers are faced with a

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<sup>1</sup> Testimony of Thomas E. Perez, Secretary U.S. Department of Labor, Before the Employment and Workplace Safety Subcommittee Committee on Health, Education, Labor and Pensions, United States Senate, July 21, 2015 ("This Subcommittee knows too well that there is a retirement crisis in America and that not enough Americans are saving for retirement.")

<sup>2</sup> Number Of Jobs Held, Labor Market Activity, And Earnings Growth Among The Youngest Baby Boomers: Results From A Longitudinal Survey, Bureau of Labor Statistics (March 31, 2015), available at <http://www.bls.gov/news.release/pdf/nlsoy.pdf>, ("The average person born in the latter years of the baby boom (1957-1964) held 11.7 jobs from age 18 to age 48, according to the U.S. Bureau of Labor Statistics.

decision to either distribute or rollover their retirement accounts during the transition. However, I am concerned that the proposed rule could prohibit investment advisers from assisting their clients in rolling over funds from a 401(k) to an IRA.

According to a report released by Fidelity Investments, the nation's largest 401(k) provider, 35 percent of all participants who left jobs in 2013 cashed out their 401(k) balances.<sup>3</sup> Specifically, 41 percent of younger workers – those between 20 and 39 – cashed out.<sup>4</sup> Unfortunately, many retirement savers who choose to cash out when they change jobs do so without understanding the tax consequences, or realizing that they are forfeiting years of investment growth for their retirement. As many workers are not saving enough for their retirement, any rule that the Department adopts should ensure that retirement savers are provided with the education and advice they need to make informed decisions at these critical junctures in their careers.

### Helping Small Business Owners

As I visit small businesses in New Hampshire, I often hear that Washington keeps making it harder for small businesses to succeed. According to the Government Accountability Office, only 14 percent of small businesses are able to offer a retirement savings plan to their employees.<sup>5</sup> And those small business owners who are able to offer their employees some type of plan to save for retirement face numerous challenges in establishing and maintaining a plan.<sup>6</sup>

I am concerned that the seller's exemption is so limited that it could prevent financial professionals from being able to engage and advise small businesses without triggering fiduciary duties. Specifically, the seller's exemption applies only to investment advice provided to retirement plans with 100 or more participants or

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Nearly half of these jobs were held from ages 18 to 24.”); America's Young Adults At 27: Labor Market Activity, Education, and Household Composition: Results From A Longitudinal Survey, Bureau of Labor Statistics (March 26, 2014), available at <http://www.bls.gov/news.release/pdf/nlsyth.pdf>, (“Young adults born in the early 1980s held an average of 6.2 jobs from age 18 through age 26, the U.S. Bureau of Labor Statistics reported today.”); Employee Tenure in 2014; Bureau of Labor Statistics (September 18, 2014), available at <http://www.bls.gov/news.release/pdf/tenure.pdf> (“The median number of years that wage and salary workers had been with their current employer was 4.6 years in January 2014, unchanged from January 2012, the U.S. Bureau of Labor Statistics reported today.”)

<sup>3</sup> Fidelity Average 401(k) Balance Nearly Doubles Since Downturn, But Many Investors Stand to Lose Out on Potentially Significant Gains by Cashing Out 401(k)s when leaving jobs (February 13, 2014), available at <http://www.fidelity.com/inside-fidelity/employer-services/fidelity-average-401k-balance-nearly-doubles>

<sup>4</sup> *Id.*

<sup>5</sup> Retirement Security, Challenges and Prospects for Employees of Small Businesses, U.S. Government Accountability Office (July 16, 2013), available at <http://www.gao.gov/products/GAO-13-748T>

<sup>6</sup> *Id.*

with at least \$100 million in employee plan assets. With about 42 million employees working for employers with less than 100 employees, this rule could make it harder for employers of one third of private-sector employees to create or maintain retirement plans for their employees.<sup>7</sup> With no other exemption available to small business owners, these employers could be unable to obtain advice for selecting appropriate investment options for their employees, which could reduce the number of small businesses that are able to offer their employees a retirement plan.

### Preserving Access to Education

I am also concerned that low and middle-income families may lose access to affordable investment advice, even if the advice is in the retirement saver's best interest. Currently, investment advisers are able to discuss potential products and services with their clients. While this practice is widely considered educational, under the proposed rule, these conversations could be considered personalized investment advice and would require a signed contract before a conversation could take place. Even general descriptions of investment products, or the explanation of the features of an investment product, could be classified as investment advice under the proposed rule. Therefore, even conversations that are meant to be simply informative, could not occur until the retirement saver signs a contract and the fiduciary relationship is triggered. The proposed rule could limit educational materials to abstract conversations that may be more frustrating than helpful to the average investor.

In addition, the proposed rule requires broad, standardized disclosures that would greatly expand the amount of information that must be disclosed to retirement savers. Specifically, the proposed rule would require investment advisors to disclose all direct and indirect compensation for financial products, as well as alternative competing products, with projections of costs for 1, 5, and 10 year intervals. While I fully support transparency, some of these disclosure requirements conflict with existing Financial Industry Regulatory Authority (FINRA) requirements.

Any rule that the Department adopts should ensure retirement savers are able to access relevant information about specific products to help prepare them for retirement, without onerous paperwork requirements. The Department's final rule should clarify that general investment education and information about distributions falls within the education exemption and any disclosure requirements should be tailored to ensure that retirement savers benefit from these disclosures.

### Coordinating with Other Agencies

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<sup>7</sup> *Id.*

Finally, the Department, the Securities and Exchange Commission (SEC) and FINRA should work together to ensure that any resulting rules do not result in conflicting regulatory structures. I strongly urge the Department to solicit meaningful input from the SEC and the FINRA, as they are the primary regulators of Broker-Dealers and would provide valuable insight.

I fully support a best interest standard for investment advisers who provide individualized investment advice to retirement savers. However, any proposed rule should preserve the retirement savers' ability to obtain general investment education. Most importantly, we should advance policies that will help more Americans plan, invest, and save for retirement in prudent ways.

Thank you for your attention to this issue and appreciate your consideration of these issues.

Sincerely,

A handwritten signature in blue ink that reads "Kelly A. Ayotte". The signature is written in a cursive, flowing style.

Kelly A. Ayotte  
United States Senator