

Congress of the United States
Washington, DC 20515

September 2, 2020

Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Acting Assistant Secretary Wilson:

We commend the Department of Labor (the “Department”) for reversing its initial decision to forgo a public hearing¹ on the Department’s recently proposed prohibited transaction exemption (“PTE”) entitled, “Improving Investment Advice for Workers and Retirees.”² However, we are concerned about the rushed and restrictive manner in which the Department is proceeding with the public hearing. Amidst a pandemic and an economic crisis, it remains as important as ever for the Department to take the necessary time to listen to stakeholders and consider their views. That is why we write to request that the Department reopen the comment period following the public hearing. Doing so would be consistent with past precedent and ensure that new developments or insights relating to the hearing testimony are appropriately considered and incorporated into the final PTE.

The Notice of the Hearing was proposed on Friday, August 21, 2020, and was only officially published in the Federal Register on Tuesday, August 25, 2020.³ Pursuant to the notice, those who wish to present testimony must submit a written request by Friday, August 28, 2020, only a week after being notified of the hearing. In contrast, when the Department conducted a similar rulemaking in 2015, requests to testify were due over a month following the notice of hearing. This allowed interested parties ample time to prepare and submit outlines.⁴ In August 2015, the Department also held three and a half days of public hearings.⁵

¹ Letter from Joe Wheeler, Deputy Assistant Secretary for Congressional and Intergovernmental Affairs to Senator Murray (Aug. 4, 2020).

² Dep’t of Labor, “Improving Investment Advice for Workers and Retirees,” 85 FR 40834 (July 6, 2020) <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/proposed-regulations/investment-advice-fiduciaries/improving-investment-advice-for-workers-and-retirees.pdf>.

³ Dep’t of Labor, “Hearing on Improving Investment Advice for Workers & Retirees,” 85 Fed. Reg. 52292 (to be codified at 29 C.F.R. pt. 2550) (Aug. 25, 2020) <https://www.federalregister.gov/documents/2020/08/25/2020-18716/hearing-on-improving-investment-advice-for-workers-and-retirees>. [hereinafter referred to as Notice of Hearing on Improving Investment Advice for Workers & Retirees].

⁴ Dep’t of Labor, Notice of Hearing and Extension of Comment Period on the Definition of the Term ‘Fiduciary’, 80 Fed. Reg. 38469 (to be codified at 29 C.F.R. pts. 2509, 2510, 2550) (June 18, 2015) <https://www.federalregister.gov/documents/2015/06/18/2015-14921/hearing-on-definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>.

⁵ Dep’t of Labor, “Public Hearing Agenda: Conflict of Interest –Definition of Fiduciary Investment Advice,” <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/proposed-regulations/1210-AB32-2/hearing-agenda>.

Unfortunately, in this instance, the Department has scheduled a single day for a hearing, September 3, 2020, and has offered an additional date “if necessary.”⁶ The Department acknowledges the hearing confers only “limited time,” such that it “may need to limit the number of those testifying.”⁷ In fact, it encourages “parties with similar interests . . . [to] select a common representative to testify on their behalf” in order to receive “preference” for testifying at the hearing.⁸ There are substantive limitations on participation as well. Only those who submitted a comment on the proposed PTE or requested a hearing may request to testify at the hearing. Any other interested parties are automatically excluded. Outlines submitted must contain fresh arguments and factual material and may not duplicate assertions made in the comment letter. Those “whose outlines identify only issues of law” also are excluded from testifying.⁹

To put this in perspective, those who wish to present testimony on this proposed rule must have done the following in the span of one week: (1) submitted a comment letter in advance of knowing a hearing would even be held, (2) been notified of the hearing, (3) submitted outlines describing the “material factual issues” ensuring their testimony meets the outlined requirements, and (4) banded together with others and appointed a common representative to speak on their behalf in order to receive “preference” for testifying at the hearing. All of this represents a tall order to complete within a week’s time under normal circumstances, but it is especially challenging during an ongoing pandemic that continues to impact workplaces in a variety of ways. The manner in which the public hearing is structured would cause an unbiased observer to conclude the Department is more concerned with curtailing engagement with the public than receiving feedback from them.

Finally, substantial debate is sure to arise as a result of this hearing. As you may recall, when the Department conducted a similar rulemaking in 2015, it reopened the comment period for another 14 days following its three and a half days of public hearings.¹⁰ We call on the Department to do the same here and give the public the same opportunity that was provided by the Obama Administration five years ago for a similar rule.

If you have questions, please contact us or Kevin McDermott, Senior Labor Policy Advisor for the House Committee on Education and Labor, at (202) 225-3725 or kevin.mcdermott@mail.house.gov and Kendra Isaacson, Senior Pensions Counsel for the Senate Committee on Health, Education, Labor, and Pensions, at (202) 224-6572 or kendra_isaacson@help.senate.gov.

⁶ Notice of Hearing on Improving Investment Advice for Workers & Retirees.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Cyril Tuohy, “DOL Releases Transcript from Fiduciary Rule Hearing,” (Sept. 9, 2015) <https://insurancenewsnet.com/innarticle/dol-releases-transcript-from-fiduciary-rule-public-hearing>.

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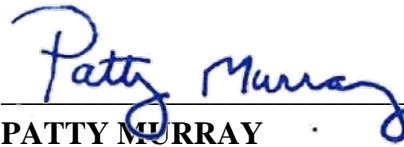
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Thank you for your attention to this matter. We look forward to your response.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Chairman
House Committee on Education and Labor



PATTY MURRAY
Ranking Member
Senate Committee on Health, Education,
Labor, and Pensions