Congress of the United States
House of Representatives
Washington, D.C. 20515

March 15, 2011

The Honorable Hilda L. Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

The Honorable Gary Gensler
Chairman
U.S. Commodity Futures Trading Commission
1155 21st Street NW
Washington, DC 20581

Dear Secretary Solis and Chairmen Schapiro and Gensler:

When multiple government agencies propose regulations related to the same subject matter without consultation and coordination, the resulting rules often conflict, causing market confusion and economic disruption. Unfortunately, that appears to be the very path we are headed down with respect to the proper standards of care for providing personalized investment advice.

As you know, on July 21, 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203) ("Dodd-Frank Act"). On October 22, 2010, the U.S. Department of Labor ("DOL") issued a proposed rule that would change when a person providing investment advice becomes a fiduciary under the Employee Retirement Income Security Act ("ERISA") and under the parallel prohibited transaction excise tax rules under the Internal Revenue Code. This proposed rulemaking, which is very broad, seeks to impose new fiduciary responsibilities on entities and individuals, including broker-dealers, that provide investment-related services to retirement plans, Individual Retirement Accounts (IRAs), and retirement plan participants.

In the absence of coordination with the Securities and Exchange Commission (SEC) with respect to rulemaking under Title IX of the Act, the DOL rules would create inconsistent standards that would confuse and harm individuals and would substantially restrict their access to investment information. Without coordination with the Commodity Futures Trading Commission ("CFTC"), the DOL rules would directly conflict with rules recently proposed by the CFTC under Title VII of the Act.

First, Section 913 of the Act required the SEC to conduct a study to evaluate the effectiveness of existing legal and regulatory standards of care for providing personalized investment advice. The SEC staff's study, which was completed on January 21, 2011, determined that there are gaps, shortcomings, and overlaps in the standards of care for personalized investment advice and recommended that the SEC undertake rulemakings, which were expressly authorized in Section 913. Congress provided that the permissible standard is "the best interest of the customer" without regard to the financial interest of the broker, dealer, or investment adviser.

Because the DOL is undertaking its activities in the absence of the benefit of the Section 913 rulemakings, the result could be an inconsistent, and possibly conflicting, approach implemented by the SEC and the DOL that would contradict the intent of the Dodd-Frank Act to harmonize the applicable standards of care for financial professionals providing advice to retail customers.

Neither the suitability nor fiduciary standards were the cause of the financial crisis. Therefore, any rules to establish a harmonized duty of care must be supported by economic and empirical data, and the rules must explain why the new duty is absolutely necessary to impose for the benefit of investors. Additionally, we cannot support any rules that disrupt an investor's chosen relationship or reduce the products and services available to investors. Unfortunately, it appears as though the DOL and SEC are not coordinating their efforts sufficiently to prevent this possible disruption.

At the same time, the definition of a fiduciary as proposed by the DOL conflicts with a CFTC Proposed Rule, "Business Conduct Standards for Swap Dealers and Major Swap Participants," 75 FR 80174, authorized by Title VII of the Dodd-Frank Act. Under the CFTC's proposed rule, Swap Dealers and Major Swap Participants (MSPs) that enter into swaps with ERISA plans will be required to provide certain services to the plans. Those services will likely make the Swap Dealer or MSP a plan fiduciary under the DOL's proposed definition of fiduciary. However, if a Swap Dealer or MSP is a plan fiduciary, entering into swaps with the plans is a prohibited transaction under ERISA. Therefore, the CFTC's proposal would likely result in Swap Dealers or MSPs violating ERISA when they engage in swaps with plans; the result will very likely be that plans will not be able to enter into any swaps unless this conflict is resolved. This is not what was intended by the Dodd-Frank Act, and it would have a material negative impact on plans, reducing their ability to hedge and increasing their exposure to volatility.

Inconsistent regulatory standards and duties of care would likely have a negative impact on retirement savings by increasing costs to plan participants and reducing available investment options. Accordingly, we request that the DOL suspend its ERISA rulemaking until 1) the SEC completes the Section 913 rulemakings, and 2) the conflict with the CFTC can be resolved. This

suspension will allow the SEC's final rules to help inform – rather than contradict – the DOL ERISA initiative, and ensure ERISA plans are not unnecessarily precluded from engaging in the swaps market to manage risk. We would also appreciate your staff providing us with a joint briefing on these subjects before March 25, 2011.

Thank you in advance for your cooperation and coordination on this issue. We stand ready to remedy any rulemaking conflicts that could inadvertently harm the U.S. capital markets, increase investor confusion, or decrease investor participation in the marketplace.

Sincerely,

SPENCER BACHUS
Chairman
Committee on Financial Services

JOHN KLINE
Chairman
Committee on Education and the Workforce

FRANK D. LUCAS
Chairman
Committee on Agriculture