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March 31, 2016

The Honorable Mary Jo White
Chair
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Chair White:

I am writing to bring to your attention contradictory statements that a number of corporate officials have made in the past year about the impact on their companies of the Department of Labor's (DOL's) proposed Conflict of Interest rule for retirement investment advisers. Last month I provided this information to Secretary of Labor Thomas Perez and Office of Management and Budget Director Shaun Donovan to inform their work on the DOL Conflict of Interest Rule.[1]

I am writing to you today because I am concerned that these companies' contradictory public statements may have violated securities laws – specifically, they may potentially have violated Section 17(a) of the Securities Act of 1933,[2] Section 10(b) of the Securities Exchange Act of 1934,[3] and SEC Rule 10b-5.[4] Broadly speaking, these securities laws prohibit companies from misleading investors about facts that could affect their business and their stock price.

Corporate interests have become accustomed to saying whatever they want about Washington policy debates, with little accountability when their predictions prove to be inaccurate.[5] But the information we have obtained raises questions about how, in this specific case, the companies could have knowingly provided such dramatically different public statements about the impact of the DOL Conflict of Interest Rule – in one example, saying almost simultaneously that the rule would be "unworkable" and that the rule would not be "a significant hurdle" – without misleading investors.

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[1] Letter from Ranking Member Elizabeth Warren, Subcommittee on Economic Policy, Senate Committee on Banking, Housing, and Urban Affairs, and Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, to Secretary Thomas Perez and Director Shaun Donovan (Feb. 11, 2016) (online at http://www.warren.senate.gov/files/documents/2016-2-11_Letter_to_DOL_and_OMB.pdf).

[2] 15 U.S.C. § 77q(a).

[3] 15 U.S.C. § 78j(b).

[4] 17 C.F.R. § 240.10b-5(b).

[5] See, e.g., Pew Environment Group, I*ndustry Opposition to Government Regulation* (Mar. 2010) (http://www.pewtrusts.org/~/media/assets/2011/03/industry-clean-energy-factsheet.pdf), noting that "For decades, corporations and their trade associations have opposed regulations aimed at protecting human health and the environment. Industry has repeatedly argued that the cost of complying is too high, the benefits to society don't justify the investment, or the regulations will cost jobs. When regulations have been implemented, however, the compliance costs have proved to be less and the benefits greater than industry officials predicted."

When companies make these kinds of conflicting statements, it is left to investors to unravel which statement is true and which statement is false and to determine what this means for the true value of the company and its stock. This is exactly the scenario that our securities laws are designed to prevent and precisely why compliance with these laws is so important.

Conflicting Statements from Financial Services Providers About the DOL Conflict of Interest Rule

Officials from four companies – Jackson National Life Insurance Company, Lincoln National, Prudential Financial, and Transamerica Corporation – submitted comment letters to DOL and made other public comments that indicated that the Conflict of Interest Rule would result in serious harm to their companies and the retirement advice industry. But in calls with investors made at or around the same time, officials from those companies – or their parent companies – made contradictory statements about the impact of the proposed rule.

Specifically:

- In July 2015, Dennis Glass, the president and CEO of Lincoln National said in his comment letter that the proposed rule was "immensely burdensome" and "extremely intrusive," and would be "so burdensome and unworkable that financial advisors and firms will not be able to use it."; while two months earlier, Mr. Glass told investors that he didn't "see [the proposed rule] as a significant hurdle for continuing to grow that business."

- In July 2015, the president of Jackson National Life Insurance Company said in his DOL comment letter that the proposed rule would "be very difficult, if not impossible for financial professional and firms to comply" with; then, in August 2015, the president of Jackson's parent company told investors that a similar rule in the United Kingdom actually led to an increase in retail sales and that the company was positioned to "build whatever product is appropriate under that set and adapt faster and more effectively than competitors."

- In July 2015, the president and CEO of Transamerica's Investment and Retirement Division said in a comment letter that the proposed rule was "unworkable"; then, a month later, the president of Transamerica's parent company told investors that the company had "shown . . . flexibility and . . . expect[ed], with that flexibility, [to] remain very strongly positioned in a market that is providing products that millions of customers in the U.S. continue to need."

- In July 2015, Prudential Financial's Executive Vice President and General Counsel wrote in a comment letter that some of the proposed rule's provisions posed a "significant challenge" that "will significantly increase" the firm's servicing expenses; that same month, another Prudential Financial official told investors that the proposed rule would not stop the company from "mak[ing] these offerings available on terms that work for everybody."

SEC Rules on Misleading Investors

U.S. securities laws establish that companies and their officials must provide complete and accurate statements about any material information that may affect the company's value.

Section 17(a) of the Securities Act of 1933 states: "It shall be unlawful for any person in the offer or sale of any securities . . . directly or indirectly to employ any device, scheme, or artifice to defraud, or to obtain money or property by any untrue statement of a material fact or any omission to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading."[6]

Section 10(b) of the Securities Exchange Act of 1934 states: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce . . .To use or employ, in connection with the purchase or sale of any security . . . . any manipulative or deceptive device or contrivance."[7]

SEC Rule 10b-5, known as the Employment of Manipulative and Deceptive Practices Rule, states: "It shall be unlawful for any person ...[t]o make any untrue statement of a material fact or to omit to state a material fact ... in connection with the purchase or sale of any security."[8]

The SEC has enforced these provisions for decades – including in instances in which company officials made misleading statements on investor calls. For example, in April 2014, the SEC entered into a $20 million settlement with CVS Caremark Corp. based in part on allegations that CVS had "misled investors on an earnings call."[9] Similarly, in 2010, after the financial crisis, the SEC entered into a $75 million settlement with Citigroup and two of its executives based in part on allegations that bank officials provided misleading information in investor phone calls about the bank's subprime mortgage exposure.[10]

Federal courts have also allowed investor claims to proceed under Rule 10b-5 based in part on allegations that companies made misleading statements in comment letters. For example, the United States District Court for the Southern District of New York recently permitted investor claims to go forward after the plaintiff alleged that a company official had made misleading statements in a comment letter filed with the Financial Industry Regulatory Authority (FINRA).[11]

Implications of Conflicting Statements by Financial Services Providers About the DOL Conflict of Interest Rule

The conflicting statements by corporate officials raise significant questions about whether they or their companies may have violated the securities laws. As these companies acknowledge in their own public statements, the outcome of the DOL Conflict of Interest Rule – which will govern how they sell and invest trillions of dollars of retirement funds – is a material concern.

The SEC need not show that investors relied on these untrue statements to prove a violation of the law; still it is clear to us that both the investor phone calls held by the companies

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[6] 15 U.S.C. § 77q(a).
[7] 15 U.S.C. § 78j(b).
[8] 17 C.F.R. § 240.10b-5(b).
[9] https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541437806.
[10] https://www.sec.gov/news/press/2010/2010-136.htm.
[11] *Strougo v. Barclays PLC*, 105 F. Supp. 3d 330, 346 (S.D.N.Y. 2015).

and the companies' comments to DOL – as well as other public comments about the rule – are read by and acted on by investors. Any rational investor seeking to understand how an important proposed rule would affect a company would almost certainly review that company's comment letter on the rule, given that it is often the company's most thorough assessment of how the rule would impact its business and the industry as a whole. Indeed, at least one industry insider has informed my staff that investors are closely scrutinizing both sets of statements – the comments to DOL and the investor phone calls - in an attempt to assess the rule's true impact on companies that offer retirement investment advice.

But both sets of industry claims – that the proposed rule will harm them and their business model, and that the proposed rule will not harm them and their business model – cannot possibly be true. And if one these public statements is materially false, it would appear to violate long-standing interpretations of our securities laws.

Request for SEC Investigation

While I am hesitant to make a direct accusation that these companies have violated the securities laws with their directly contradictory statements about the impact of the DOL Conflict of Interest rule on their business models, I believe the circumstances justify initiating a prompt and thorough SEC investigation.

I am therefore writing to request that the SEC:

1. Open an investigation into whether these companies may have violated the securities laws by making contradictory public statements about the impact of the DOL Conflict of Interest Rule on their sales and business models.

2. Provide my staff with a briefing on how the SEC interprets the securities laws with regard to companies' public statements about pending or possible rules or legislation, including official comments to government agencies and editorial and press statements.

I ask that you provide us with a response by April 11, 2016. If you have any questions, please feel free to contact Bharat Ramamurti on my staff at (202) 224-4543.

Sincerely,

Elizabeth Warren
United States Senator

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