

Will the Department of Labor (DOL) Add to the Fiduciary Murk?

A recent [Majority Staff Report](#) from the Senate Committee on Homeland Security and Governmental Affairs raises some concerns. Some of my concerns relate to the state of our federal government. (Should congressional staff spend time composing philippics against an executive department? Does the prospect of exposure of inter-agency emails have a chilling effect on communications? Why has the Senate conjoined homeland security with governmental affairs?) More significantly, an email exchange cited in the report challenges my understanding of fiduciary law. **Exhibit 1: A Dialogue between the DOL and SEC** [Appendix B](#) to the Report consists of a series of email exchanges between staff members of the DOL and the SEC. Emails between two economists during the summer of 2012 form Exhibit 1. At the beginning of the exchange, the DOL's economist states:

I think that ultimately, investors are more concerned about maximizing their returns (for a given risk level) than about whether there is a conflict of interest. Disclosing conflicts of interest may not help investors make better decisions and in fact may make matters worse (see attached paper).

I acknowledge the unfairness of criticizing statements out of context. But, assuming the truth of these statements, what possible relevance could they have to fiduciary regulation? (Apart from imagining a judge's reaction to a defense that a fiduciary failed to disclose a conflict of interest for the client's own good.) **Whom Is DOL Trying to Regulate?** The continuation of the exchange between the economists suggests that "better decisions" refers to an investor's decision to employ a fiduciary. For example, DOL's economist notes:

People do not respond to fees or any other costs, but they do chase returns.

DOL appears concerned that people will give undue weight to historical performance when selecting a fiduciary. As every securities attorney knows, past performance does not guarantee future results. But fiduciary law regulates the conduct of fiduciaries—not their clients. Helping people "make better decisions," may protect investors, but it's not fiduciary regulation. Unless a fiduciary relationship creates an obligation to prevent a client from "chasing returns," DOL should leave investor protection to the SEC. **Another Fiduciary Grey Area?** I cannot tell from the email exchange whether what the DOL economist was proposing might be grounded in a fiduciary relationship. What is clear from the emails is that neither economist seems aware of a demarcation between the objectives of regulating fiduciaries and the goal of increasing market efficiency. Nor should they—such line drawing is the province of attorneys, not economists. I remain skeptical of coopting fiduciaries to further socially (much less politically) desirable ends. This has the inevitable effect of blurring already smudged lines regarding fiduciaries and their unique duties. In some cases, this results from [tagging an ordinary commercial relationship as fiduciary](#). In this case, DOL may impose duties that would not naturally arise in a fiduciary relationship. In light of all that we might do to increase retirement security, how would there ever be an end to such duties?

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