



July 21, 2017

VIA ELECTRONIC MAIL TO FOIAREQUEST@DOL.GOV

Office of the Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Office of the Assistant Secretary for Policy
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Office of the Executive Secretariat
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of the Department of Labor (DOL), 29 C.F.R. Part 70, American Oversight makes the following request for records.

In April 2016, DOL announced a new rule—commonly known as the Fiduciary Rule or the Conflict of Interest Rule—requiring financial advisers to act in the best interest of their clients when providing investment advice.¹ Building on years of opposition to the proposed rulemaking,² the

¹ See Jonnelle Marte, *Labor Department Rule Sets New Standards for Retirement Advice*, WASH. POST, Apr. 6, 2016, https://www.washingtonpost.com/news/get-there/wp/2016/04/06/labor-department-rule-sets-new-standards-for-retirement-advice/?utm_term=.31252d960792; Elena Holodny, *The Obama Administration Has Unveiled a New Rules that Affects \$12 Trillion of Your Money*, BUS. INSIDER (Apr. 6, 2016, 11:04 AM), <http://www.businessinsider.com/dol-fiduciary-rule-retirement-savings-change-up-2016-4>.

² See Tara Siegel Bernard, *Brokers Fight Rule to Favor Best Interests of Customers*, N.Y. TIMES, June 12, 2014, <https://www.nytimes.com/2014/06/13/your-money/rule-to-make-brokers-act-in-clients-interest-still-pending-after-4-years.html>; Ashlea Ebeling, *DOL Issues Proposed Fiduciary Rule, 2015 Version*, FORBES (Apr. 14, 2015, 6:58 PM), <https://www.forbes.com/sites/ashleaebeling/2015/04/14/dol-issues-proposed-fiduciary-rule-2015-version/#446ac3d64927>; Charisse Jones, *Department of Labor to Hold Conflicts of Interest Hearing*, USA TODAY (Aug. 7, 2015, 5:55 PM), <https://www.usatoday.com/story/money/2015/08/07/hearing--next-round--blocking-conflicts--interest--retirement-advice/31303955/>; Mark Schoeff Jr., *Fiduciary Duty Bill Could Kill DOL Rule*, INVESTMENTNEWS (June 18, 2013, 4:20 PM),



final rule received immediate criticism and legal challenges from Republicans in Congress and a variety of financial and business trade groups.³ President Obama vetoed congressional attempts to overturn the rule,⁴ and several federal courts upheld the legality of it.⁵ Although the regulation became effective in June 2017,⁶ Secretary Acosta has announced DOL's intention to revise it.⁷

Requested Records

American Oversight requests that DOL produce the following within twenty business days:

<http://www.investmentnews.com/article/20130618/FREE/130619880/fiduciary-duty-bill-could-kill-dol-rule>.

³ See Tim Devaney, *House Rejects Financial Adviser Rule*, THE HILL (Apr. 28, 2016, 3:29 PM), <http://thehill.com/regulation/finance/278058-house-rejects-financial-adviser-rule>; Hazel Bradford, *Senate Rejects Fiduciary Rule; Obama Vows to Veto*, PENSIONS & INVESTMENTS (May 24, 2016, 5:40 PM), <http://www.pionline.com/article/20160524/ONLINE/160529938/senate-rejects-fiduciary-rule-obama-vows-to-veto>; Greg Iacurci, *Nine Groups File Lawsuit to Strike Down 'Capricious' DOL Fiduciary Rule*, INVESTMENTNEWS (June 2, 2016, 8:48 AM), <http://www.investmentnews.com/article/20160602/FREE/160609985/nine-groups-file-lawsuit-to-strike-down-capricious-dol-fiduciary-rule>; Greg Iacurci, *NAFA Files Second Lawsuit Against DOL Fiduciary Rule*, INVESTMENTNEWS (June 3, 2016, 9:31 AM), <http://www.investmentnews.com/article/20160603/FREE/160609970/nafa-files-second-lawsuit-against-dol-fiduciary-rule>.

⁴ Mark Schoeff Jr., *Obama Vetoes Resolution Against DOL Fiduciary Rule; Court Sets Date for NAFA's Lawsuit*, INVESTMENTNEWS (June 8, 2016, 1:57 PM), <http://www.investmentnews.com/article/20160608/FREE/160609915/%E2%80%9Chttp://www.investmentnews.com/article/20160428/FREE/160429918/house-votes-to-kill-dol-fiduciary-rule%E2%80%9D>.

⁵ See Bruce Kelly, *Federal Court Rejects NAFA Attempt to Kill DOL Fiduciary Rule*, INVESTMENTNEWS (Nov. 4, 2016, 5:18 PM), <http://www.investmentnews.com/article/20161104/FREE/161109943/federal-court-rejects-nafa-attempt-to-kill-dol-fiduciary-rule>; Sarah N. Lynch, *U.S. Court Upholds Obama-Era Retirement Advice Rule*, REUTERS (Feb. 8, 2017, 2:44 PM), <http://www.reuters.com/article/us-usa-labor-fiduciary-idUSKBN15N2HF>; Mark Schoeff Jr., *New Orleans Appeals Court Denies Emergency Injunction to Stop DOL Fiduciary Rule*, INVESTMENTNEWS (Apr. 5, 2017, 7:40 PM), <http://www.investmentnews.com/article/20170405/FREE/170409965/new-orleans-appeals-court-denies-emergency-injunction-to-stop-dol>.

⁶ Brian Menickella, *DOL Fiduciary Rule Implementation Finally in Sight*, FORBES (June 8, 2017, 4:39 PM), <https://www.forbes.com/sites/brianmenickella/2017/06/08/dol-fiduciary-rule-implementation-finally-in-sight/#76af11997a56>.

⁷ Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too*, WALL ST. J. (May 22, 2017, 7:00 PM), <https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029>; see also Lisa Beilfuss, *Labor Department Seeks More Input on Fiduciary Rule*, WALL ST. J., (June 30, 2017, 1:54 PM) <https://www.wsj.com/articles/labor-department-seeks-more-input-on-fiduciary-rule-1498845283>.

1. All calendar entries for any meetings pertaining to the development, implementation, consideration, evaluation, reconsideration, or re-evaluation of the “Fiduciary Rule” or “Conflict of Interest Rule,” 29 C.F.R. § 2510.3-21. For calendar entries created in Outlook or similar programs, the documents should be produced in “memo” form to include all invitees, any notes, and all attachments. Please do not limit your search to Outlook calendars—we request the production of any calendar—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how these individuals allocate their time on agency business.
2. All meeting agendas and lists of attendees for any meetings held pertaining to the development, implementation, consideration, evaluation, reconsideration, or re-evaluation of the Conflict of Interest Rule.
3. All lists of attendees for any meetings held pertaining to the development, implementation, consideration, evaluation, reconsideration, or re-evaluation of the Conflict of Interest Rule.
4. Any materials distributed by DOL or provided by non-DOL attendees at any meetings attended by persons not employed by the executive branch and held pertaining to the development, implementation, consideration, evaluation, reconsideration, or re-evaluation of the Conflict of Interest Rule.
5. All emails reflecting requests for meetings with non-DOL parties to discuss the development, implementation, consideration, evaluation, reconsideration, or re-evaluation of the Conflict of Interest Rule.
6. Copies of all correspondence pertaining to the development, implementation, consideration, evaluation, reconsideration, or re-evaluation of the Conflict of Interest Rule. This includes any official correspondence to or from DOL, including correspondence to or from other federal agencies, as well as correspondence with or by any non-governmental person or entity.

Please provide all responsive records from January 20, 2017, to the date the search is conducted.

Your search for responsive records should include the Office of the Secretary (OSEC), the Office of the Assistant Secretary for Policy (ASP), the Employee Benefits Security Administration (EBSA), and the Executive Secretariat. For EBSA, the search can be limited only to political appointees and career SES staff.

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If DOL uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they

conducted searches, we also request any such records prepared in connection with the processing of this request.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.⁸ **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**⁹

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered DOL’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.**¹⁰ Furthermore, agencies that have adopted the National Archives and

⁸ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

⁹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

¹⁰ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians' files. For example, a custodian may have deleted a responsive email from his or her email program, but DOL's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOL use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”¹¹ If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”¹² Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”¹³ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹⁴

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹⁵ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, DOL is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an

¹¹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹² *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹³ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹⁴ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹⁵ *Mead Data Central*, 566 F.2d at 261.

opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and DOL can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 29 C.F.R. § 70.41(a), American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to public understanding of those operations.¹⁶ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁷

American Oversight requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding” of government operations.¹⁸ The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how officials conduct the public’s business. The Conflict of Interest Rule has been the subject of considerable public attention, from its first iteration in Mr. Obama’s first term¹⁹ through the promulgation of the final rule²⁰ to Mr. Acosta’s recent efforts to revise the rule.²¹ Disclosure of the requested information will contribute to the public’s understanding of how the rule is evolving, influences on the evolution of the rule, and how the public’s input is being taken into account.

This request is primarily and fundamentally for non-commercial purposes.²² As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight’s financial interest. American Oversight’s mission is to promote transparency in government, to educate the public about government

¹⁶ 29 C.F.R. § 70.41(a)(1)(i).

¹⁷ 29 C.F.R. § 70.41(a)(1)(ii).

¹⁸ 29 C.F.R. § 70.41(a)(1)(i); 29 C.F.R. § 70.41(a)(2)(i)-(iv).

¹⁹ Timothy Inklebarger, *Pros, Cons of DOL’s Fiduciary Proposal Debated*, PENSIONS & INVESTMENTS (Mar. 1, 2011, 5:23 PM), <http://www.pionline.com/article/20110301/ONLINE/110309982/pros-cons-of-dols-fiduciary-proposal-debated>; Florence Olsen, *Labor Department Will Withdraw, Re-Propose Rule Expanding Definition of Plan Fiduciary*, BLOOMBERG BNA, Sept. 26, 2011, <https://www.bna.com/labor-department-withdraw-n12884903598/>.

²⁰ See Bernard, *supra* note 2; Ebeling, *supra* note 2; Holodny, *supra* note 1; Jones *supra* note 2; Marte, *supra* note 1; Schoeff, *supra* note 2.

²¹ Acosta, *supra* note 7; see also Beilfuss, *supra* note 7.

²² 29 C.F.R. § 70.41(a)(1)(ii); 29 C.F.R. § 70.41(a)(3)(i)-(ii).

activities, and to ensure the accountability of government officials. American Oversight will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website and promote the availability on social media platforms, such as Facebook and Twitter.²³ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney, American Oversight promptly posted the records to its website²⁴ and published an analysis of what the records reflected about DOJ's process for ethics waivers.²⁵ Additionally, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.²⁶

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with DOL on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Cerissa Cafasso at foia@americanoversight.org or (202) 869-5246. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,



Austin R. Evers
Executive Director
American Oversight

²³ American Oversight currently has approximately 11,100 page likes on Facebook, and 33,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 21, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 21, 2017).

²⁴ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

²⁵ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

²⁶ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.