Senator Lamar Alexander

1. **As you indicated in your response to Question 2, the Committee has heard from a variety of organizations that support your nomination. I was unable to determine whether you were involved in generating those calls and letters.**

    a. **Did you personally seek the support or endorsement from individual companies or organizations which you would regulate if confirmed as Secretary of Labor?**

    b. **Did you personally seek the support or endorsement of any parties which the Department of Justice is currently suing, has sued, has settled a lawsuit with, entered into a consent agreement or for any other reason is subject to continued Department of Justice compliance auditing?**

    c. **If the answer to either (a) or (b) is "yes", please list those individuals or organizations and describe the contacts made with them.**

After the President's announcement of my nomination, I had a number of congratulatory contacts with people I have interacted with throughout my career. I did not keep a tally of those contacts or conversations. I assure you that throughout this confirmation process, I have never promised anyone that I would take a particular position on any issue in exchange for their support for my nomination.

With regard to your question about Justice Department enforcement, I am aware that support for my pending nomination has been communicated to the Committee from a bipartisan range of organizations, including labor unions and the Maryland Chamber of Commerce, but I am unaware of any letter of support from any individual, company, or organization that is currently involved in an active matter with the Civil Rights Division.

I wholeheartedly agree with your premise that the Secretary of Labor must be independent. Throughout my career in public service, I am proud of the relationships I have built.[1] At the same time, I have always made independent enforcement decisions based only on the facts and the law. Indeed, in my current position as Assistant Attorney General and my prior position as Maryland Labor Secretary, I have made decisions that individuals and organizations that supported my nomination disagreed with on the merits.

The Labor Department administers and enforces more than 180 federal laws, covering many workplace activities for about 10 million employers and 125 million workers. It is reasonable to assume that any employer, employer association, worker, or worker advocacy organization who may have contacted the Committee in support of or in opposition to my nomination could be covered by one of those statutes, though of course

[1] For further information on the views of people in Maryland who are familiar with my work, *see* http://www.wypr.org/podcast/Thomas-perez-seen-maryland (last visited May 3, 2013) (interviewing the head of the Maryland Chamber of Commerce and a conservative political commentator).

they are not disqualified from sharing their views with the Committee.

2. **In responding to Question 4 and 5, you committed to following applicable conflict of interest laws and regulations if confirmed, and I commend that commitment.**

    a. **If you answered any part of question 1 affirmatively, please explain how the conflict of interest laws and regulations would apply if a party you sought support or endorsement from was involved in an action before the DOL?**

    b. **Do you believe the conflict of interest laws and regulations would require you to recuse yourself from any DOL action that involved an individual or organization that you sought support or an endorsement from?**

    c. **Are there other ethical obligations or considerations, beyond conflicts of interest, that are implicated when a nominee asks regulated individuals to support his or her confirmation? If yes, please describe what they are and how you would weigh them.**

As I understand it, the conflict of interest laws and regulations would relate to situations in which I have a personal financial stake in a matter. My financial disclosure forms have provided the Committee with the information needed to determine when such a conflict may arise, and I have committed to recuse myself from matters involving a small community bank in which my family owns stock.

It is my understanding that the provisions on "Impartiality in Performing Official Duties" in the Standards of Ethical Conduct for Employees of the Executive Branch address situations when there is a question about an employee's impartiality to participate in a particular matter. In accordance with this procedure, I would consult the Department of Labor's ethics officials should such a situation arise.

As I stated in my previous response, I have never promised anyone that I would take a particular position on any issue in exchange for their support or endorsement of my nomination, and my track record demonstrates my commitment to independent decision-making.

3. **As I mentioned in my questions, there are companies in Tennessee and across the country that use the independent contractor business model to provide good paying, flexible jobs for its workers. I asked you to describe your specific plans to target employers who use independent contractors. You used the term "legitimate independent contractor" several times in your answer to Question 8. Please define "legitimate" and please cite the Federal statute or regulation that provides that definition.**

I am aware that a growing number of businesses have legitimate independent contractors performing work for them. As I noted previously, independent contractors play a key role in our economy. It is important to ensure that such individuals are in fact independent contractors, as opposed to employees. Therefore, in using the term

"legitimate independent contractor," I mean an individual who is appropriately classified as an independent contractor under the Fair Labor Standards Act (FLSA).

As you know, an employment relationship under the FLSA must be distinguished from a strictly contractual one. An employment relationship must exist for any provision of the FLSA to apply to a person engaged in work. In the application of the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is economically dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts."

4. **The Energy Employees Occupational Illness Compensation Program (EEOICPA) is an important program to many Tennesseans. In attempting to learn more about your view of the issues surrounding EEOICPA, can you please describe the benefit of an external panel that would provide advice concerning the review and approval of the DOL site exposure matrix that includes experts in epidemiology, occupational medicine, toxicology and industrial hygiene as well as claimant representation?**

While I am not familiar with the actual composition of the site exposure matrix, consultation with an external panel composed of individuals who have the particular expertise in science and medicine needed to review the matrix could provide helpful suggestions that may enhance the accuracy, transparency, and utility of this tool. As in any outside or peer review process, valuable perspective can be obtained by consulting individuals who do not have a vested interest in the process and have the independence and expertise to provide an objective viewpoint.

5. **I continue to be concerned with the recent Office of Federal Contract Compliance Programs (OFCCP) proposed rule that would require federal contractors to establish "goals" of hiring a certain percentage of individuals with disabilities for every job group. Your answer to Question 12, while insightful into your position on hiring quotas, did not completely answer my question. Do you think there should be exemptions from a Final Rule? If not, please explain why.**

It is important to clarify that the aspirational "goal" contained in the proposed rule is not a quota. Before making any decisions regarding potential exemptions in the final rule, I will evaluate carefully any current exemptions from OFCCP's jurisdiction, the rationale behind the need for the exemption in the final rule, and the likely impact of granting exemptions on achieving the goal of increasing the employment opportunities of individuals with disabilities.

6. **In Question 15, I asked for your view on a recent Federal court decision ruling that the Office of Federal Contract Compliance Programs (OFCCP) has jurisdiction over three Pennsylvania hospitals, as they were found to be Federal subcontractors after they agreed to provide medical services to Federal**

employees covered by a health maintenance organization plan. I appreciate that you may not have read the judge's decision, but I am interested more in your overall view of OFCCP's jurisdiction. Do you believe that <u>all</u> Federal subcontractors are subject to OFCCP jurisdiction? Please explain your conclusion.

As I stated in my response to the Committee on this issue, it is my understanding that OFCCP has always had the authority to conduct compliance evaluations of Federal subcontractors with contracts that meet the coverage thresholds reflected in the agency's regulations and that are not expressly prohibited by federal law.

7. **I previously asked you about OFCCP's effort to develop a new data collection tool that will require Federal contractors to submit detailed private information on employees' compensation and about your concerns regarding the resulting paperwork burden in complying. You responded that you were aware that OFCCP was considering collecting pay data from federal contractors. I would appreciate if you could clarify for me your views on this important issue. Specifically, do you personally think that the compliance burden (including paperwork) federal contractors endure in the process of adhering to OFCCP directives should be considered before imposing any new data collection tools or requirements?**

As I noted in my previous response to your question on this issue, I am aware that OFCCP is considering collecting pay data from federal contractors in order to improve its ability to enforce Executive Order 11246. Beyond that, I look forward to evaluating the issue if confirmed. If OFCCP does issue a proposed rule on the matter, it will be subject to public notice and comment. I assure you that, if I am confirmed, I will carefully weigh and consider all comments and recommendations, including any concerns with burden of compliance, before any final decisions are made.

8. **Thank you for your views on compliance assistance at the Wage and Hour Division (WHD). You specifically suggest that you would welcome ideas "about ways in which we [DOL] can provide greater clarity to the employer community about their rights and responsibilities under the law." As I mentioned, I believe Opinion Letters are a useful tool by employers and employees alike. Will you commit to reinstituting the use of Opinion Letters?**

I am committed to creative approaches to compliance assistance and to seeking the views of stakeholders and others regarding other forms of guidance that may prove to be more efficient and effective in reaching the WHD requestors. If confirmed I would take into consideration a range of factors, including:

- the full range of options currently available to the WHD for providing compliance assistance;

- the most efficient way, with limited WHD resources, to provide high quality compliance assistance to the greatest number of employers;

- how Opinion Letters differ from Administrator's Interpretations; and
- the rationale behind the decision to cease the issuance of Opinion Letters.

I will investigate fully and examine the full range of compliance options if I am confirmed.

Senator Roberts

Employee Stock Ownership Plans

1. **In your response to my question concerning your views of Employee Stock Ownership Plans, you stated "I believe the Department should be taking steps to make sure that ESOPs provide the benefits they promise." Can you clarify for me what issues you see with these programs? What "steps" do you see the Department taking to ensure that the benefits of these plans are delivered to participants?**

   As I understand the way ESOPs work, they acquire stock in the sponsoring company (often with money that is borrowed) which is then, over time, allocated to workers' plan accounts. Obviously, assuring that the ESOP buys the stock at a fair market value price is the most important protection for workers. If the stock purchased was financed with a loan, it is also important that the loan terms are fair and that the stock is properly distributed to plan participants as the loan is repaid. In general, however, I think that the key concern is that the stock be properly valued when the ESOP buys, sells, and allocates stock. I think that if the department takes steps to assure that the price for the stock is correct in ESOP transactions, workers will be protected.

Senator Paul

1. **You stated it is your believe the National Labor Relations Act does not "allow state to create a law that would force private sector employees into a union contract." In response to question 9.**

   Yet in your response to question 10 you say the Maryland gambling law you advocated for would have required applicants to enter into a so-called "labor peace" agreement. Isn't requiring such an agreement contrary to the NLRA?

   As I noted in my response to question 11, I was not involved in the drafting of legislation in Maryland that authorized slot machine gambling. It is my understanding that the provisions you refer to in this question are not in conflict with any provision of the NLRA.

2. **In your response to question 20 you stated "In the course of my involvement in the consideration of state voter identification laws, I do not have an independent recollection of what information, if any, was received from labor unions." What do you mean by independent recollection?**

By "independent recollection," I meant that I do not personally recall communications from labor union officials regarding state voter identification laws and do not recall whether the Department received any such communications. The Department has published *Procedures for the Administration of Section 5 of the Voting Rights Act* to govern the Attorney General's administration of Section 5. *See* 28 C.F.R. Part 51. Those procedures allow for public comment on proposed changes for which preclearance is sought. 28 C.F.R. §§ 51.29-30. A number of state voter identification laws were submitted for Section 5 review during the time period covered by your question (from October 2009 to the present), and many of those submissions generated significant public interest, including hundreds of public comments. I do not have any specific recollection if, or whether, any of those hundreds of comments included communications from labor union officials.

3. **In response to questions 19, 20 and 21 regarding your position on "card check" legislation, you stated "The NLRB has the statutory jurisdiction over the NLRA, and I defer to that agency to interpret and enforce the law." While I appreciate that the NLRB has jurisdiction over these issues, could you clarify whether, if confirmed, you will attempt to use your position as Secretary of Labor to promote or impose the provisions outlined in questions 19, 20, and 21 on private sector employers in the absence of legislation from Congress?**

   If confirmed to serve as Secretary of Labor, I would not have the authority to impose the provisions of the "card check" legislation you cite, because the NLRB has the statutory jurisdiction to enforce the NLRA.

4. **In a 2006 candidate survey for a union-controlled entity known as Progressive Maryland, you supported mandatory card check recognition for Maryland public employees, final and binding arbitration of all labor disputes by public employees, and mandatory union security clauses as well as agency fee requirements. You also stated you had assisted labor unions in ensuring that workers had the right to organize "free from employer interference" and would seek to prohibit mandatory meetings where employees listen to their employer's views about joining a union.**

   See (LINK REMOVED)

   a. **Do you still hold all those views? Given that you would be the senior labor official and many of the same provisions you supported for the public sector have been included in the card check legislation for the private sector, could you explain whether your answers to the candidate survey reflect your views for the private sector and federal government employment? If there are differences, please explain why you would differentiate among the three from a policy perspective.**

      My responses to the questionnaire you cite reflected my views about those policies for Maryland and were based on input I received while conducting outreach to the constituents in Montgomery County that I would have served had I been elected. A majority of those individuals supported that position, as was

their right to do. I value and respect Congress's role in shaping labor policy for private and public sector employees, and I would have no jurisdiction to amend, enforce, or interpret the National Labor Relations Act as the Secretary of Labor.

b. Please explain specifically what you meant by "employer interference." Do you believe the government should further limit the First Amendment rights of employers to discuss unionization with their employees beyond those limits currently imposed under the National Labor Relations Act? If confirmed, will you use your position to request or promote requirements for employer neutrality during union organizing as you did while on the Montgomery Council?

I agree that employers have the right to discuss unionization with their employees. When I was involved in issues at a local level in Maryland, I became aware of a situation where a company fired an employee because that employee was involved in a union organizing campaign. This is an example of what I believe to be unlawful "employer interference" that does not implicate First Amendment rights of employers.

If confirmed, I will fairly and independently enforce all laws that fall within the jurisdiction of the Department of Labor.

Senator Tim Scott

Question 1:

In overriding the advice of career staff and unfairly targeting S.C.'s Voter ID law as being discriminatory, S.C. was forced to unnecessarily spend over $3.5 million defending the law in federal court and produce 165,008 pages of documents.

- **I previously inquired as to how much the federal government spent litigating this case to which you replied "the Department's costs in *South Carolina v. United States* totaled approximately $278,828 in non-personnel expenses." Can you please provide a detailed estimate of all costs, not just non-personnel expenses? My understanding is that collectively the Department of Justice and the interveners had three times the attorneys working on the case than the State did.**

  With regard to your follow-up question about the Department's litigation costs in this matter, my previous response identified our best estimate of non-personnel expenses for the *South Carolina v. United States* litigation, including travel expenses, expert witness costs, deposition transcripts, and related litigation support costs. The Division's existing case management system and protocols do not track all of the remaining specific information sought by this question, including your request for personnel-related expenses.

  Separately, and as I noted in my previous responses, the premise of this question omits the conclusion of the court majority that the Department was justifiably concerned about the legality of South Carolina's voter ID law under Section 5 of the Voting Rights Act.

See South Carolina v. United States, 2012 WL 4814094, at *21 (D.D.C. Oct. 10, 2012) (three-judge court) (Bates, J. and Kollar-Kotelly, J., concurring) ("[T]o state the obvious, Act R54 as now pre-cleared is not the R54 enacted in May 2011. It is understandable that the Attorney General of the United States . . . would raise serious concerns about South Carolina's voter photo ID law as it then stood."). The Department's position that South Carolina's voter ID law violated Section 5 of the Voting Rights Act was based exclusively on the facts and the law.

With regard to the decision-making process in matters under Section 5 of the Voting Rights Act, the Department's *Procedures for the Administration of Section 5* provide that all determinations to object under the statute are delegated exclusively to the Assistant Attorney General for Civil Rights. 28 C.F.R. § 51.3. The Division approaches its Section 5 enforcement authority with a keen awareness of the importance of ensuring that the decision-making process is fair, thorough, and independent. The Division's dedicated and experienced career personnel play a crucial role in ensuring the integrity of the review process. This had been the longstanding tradition in the Voting Section in prior administrations for decades until it was changed in 2005 to exclude career attorneys and analysts from full participation in the process. In 2009, the Civil Rights Division restored its practice of providing every person working on a submission the opportunity to express his or her views, because I believe that a robust and honest exchange of ideas is critical to effective decision-making. These principles were memorialized in a procedures memorandum that the Department has provided to Congress in response to other inquiries. Those procedures were followed in this instance, as in other Section 5 submissions we receive. Consistent with the Department's traditional position in Section 5 matters, the Department is not otherwise able to comment on the internal decision-making process.

- **In addition, I previously asked that you please identify what other states with voter identification laws, if any, had Department of Justice officials present to monitor the implementation of a Voter ID law in an election. In your response you listed a number of states where the Department had assigned staff to monitor elections; however, can you please elaborate on whether or not New Hampshire was one of these states?**

  The Department did not assign election monitors to New Hampshire in 2012. As noted in my previous response, the Department monitored elections in 24 different states in 2012, including a number of states that have enacted voter identification laws (such as Arizona, Georgia, Indiana, Louisiana, Pennsylvania, South Carolina, Tennessee, Texas, and Wisconsin, among others).

Question 4:

In our courtesy meeting on April 17, 2013 and subsequently in the April 18, 2013 hearing, you committed to spending your first 100 days as Secretary of Labor on a listening tour to better inform any future decisions you would make at the Department of Labor. Will you honor that commitment?

Yes.

While four of my questions on the proposed persuader rule were left unanswered in the first round of questions, I would like to learn more about your position on this issue and would appreciate your responses. Given the timeliness and sweeping nature of this rule, it is important for you to share your thoughts and intentions regarding the rule being that it falls under the direct jurisdiction of the Secretary of Labor.

- **Are you in favor of this regulation as it was proposed?**

  I am aware of the Department's notice of proposed rule in this area, but have not had the opportunity to study the issue in detail and to determine what steps should next be taken with regard to this rulemaking. If confirmed, I look forward to studying the issue and working with the Committee and other stakeholders to address LMRDA reporting in a fair, legal, and balanced way.

- **If not, what changes to the rule would you make if you become Secretary?**

  My response to the previous question addresses this issue.

- **What authority does the Department of Labor have to change the meaning of the word "advice" as it is used in a statute passed by Congress?**

  Under section 208 of the LMRDA, the Department is authorized to issue, amend, and rescind rules and regulations pertaining to the statute's reporting requirements. 29 U.S.C. § 438. My understanding is that the Department is proposing to revise its current interpretation of the term "advice" in LMRDA section 203, which reviewing courts have considered ambiguous in application.

- **When asked about the balance between the costs and benefits of regulations, you indicated that "examining costs and benefits of a regulation is important, but it is not intended to be determinative of whether to regulate or not." Can you please provide a threshold at which you would deem the costs on job creators to outweigh the benefits of a regulation?**

  If confirmed, I would consider the cost-benefit of each regulation on a case-by-case basis. The regulated community is not the same under each regulation, so establishing a one size fits all cost-benefit threshold would be ill-advised.