United States Senate
Committee on Health, Education, Labor, and Pensions
Nomination of Tom Perez
Questions for the Record

Senator Lamar Alexander

1. **As Labor Secretary you would have ultimate power over whistleblower claims brought under 22 separate statutes. In light of the April 15 report from the House Oversight Committee, House Judiciary Committee, and Senator Grassley which detailed your involvement in changing the Department of Housing and Urban Development's position on Mr. Newell's False Claims Act case, there is a lot of concern about your respect for the rights of whistleblowers. There is an understandable concern that you may use this power to negotiate quid pro quo arrangements for other actions you want.**

   Should the decision to support a whistleblower complaint be made on the merits of the case?

   Yes.

   What other factors, beyond the merits, will you consider when determining the Department's position on a whistleblower lawsuit?

   If confirmed, I will ensure that the Department's decisions are based on the evidence and comply with the requirements of the appropriate law.

   How will you treat whistleblowers that come to the Department of Labor for protection after exposing violations of the law?

   I will work with OSHA to ensure that all whistleblowers are treated with respect, their claims are seriously investigated, and any decisions on the merits of the claim are based on evidence.

   Would you pursue a deal to deny a whistleblower protection in exchange for a legal settlement, compliance agreement or other action that you desired?

   No.

   Do you have any plans to address the length of time it takes to resolve a whistleblower complaint?

   I am interested to learn more about the current process, particularly with regards to the amount of time it takes to reach a resolution. If confirmed, I

look forward to working with OSHA to improve administration of the program where possible.

2. **Have you personally sought support or endorsement from individual companies which you would regulate if you were confirmed as Secretary of Labor? If yes, please list all parties and contacts attempted and made.**

   I am aware that support for my nomination has been communicated to the Committee from a bipartisan range of organizations.

3. **Have you sought support or endorsement for your nomination from any parties which the Department of Justice is currently suing, has sued, has settled a lawsuit, entered into a consent agreement or for any other reason is subject to continued Department of Justice compliance auditing?**

   I have no knowledge of any organization, group, or individual who has communicated to the Committee their support for my nomination falls into any of the categories you cite.

4. **Would you recuse yourself from any DOL actions that involved one of the companies or parties you sought support or endorsement from?**

   If confirmed, I commit to following all applicable conflict of interest laws and regulations.

5. **Do you think it is appropriate to ask for favors from a group that has much to gain from your good favor if you are conformed as Secretary of Labor? Does this raise the possibility of a "quid pro quo" arrangement in your mind?**

   As noted in my response to your previous question, if confirmed, I would diligently comply with any applicable conflict of interest regulations.

6. **DOL is finalizing a rule that would greatly limit the ability of employers to consult third parties to discuss their legal rights when dealing with labor and employment issues in the workplace. Under the Labor and Management Reporting and Disclosure Act of 1959, employers must disclose their relationships with third parties when it involves "persuading" employees about their rights to join or not join a union. But, there has been a clear-line exemption for when an employer is simply seeking or receiving "advice."**

DOL's proposed rule would greatly limit the definition of "advice," putting in jeopardy the attorney-client relationship.
The American Bar Association submitted public comments opposing the proposed rule. The Tennessee Bar Association is concerned the proposed rule would force Tennessee lawyers to disclose information about their representation of clients that would otherwise be entitled to confidential treatment under our state's lawyers ethics rules and would ultimately discourage them from providing important legal counsel, and I have included a copy of their letter for your review.

The National Labor Relations Board (NLRB) under President Obama has reversed dozens of long standing precedents on many labor rules, including the size of an appropriate bargaining unit and the duties of an employer upon the expiration of a collective bargaining agreement. The unintended or intended consequence of limiting the advice exemption will be fewer employers seeking necessary legal advice, and, potentially, more violations of the law.

As an attorney, do you believe attorney-client communications and confidences should be protected?

Yes.

Do you think small businesses, who cannot afford in-house legal counsel, have a need to consult with attorneys or labor experts to ensure they are complying with the ever changing interpretation of the National Labor Relations Act (NLRA)?

Yes, I agree that small businesses may have a need to consult with attorneys or labor experts to ensure compliance with the law.

If so, should the Labor Department promulgate a rule that the American Bar Association has concluded will make it harder for those small businesses to comply with the law?

If confirmed, I look forward to learning more about the issue and working with the Members of the Committee and other stakeholders to address LMRDA reporting in a fair, legal, and balanced way.

What purpose does it serve to require employers to report relationships and confidences where no persuader activity is taking place?

I am not sure any purpose would be served by requiring employers to report relationships and confidences where no persuader activity is taking place. Under the LMRDA, as relevant here, section 203(b) requires employers and labor relations consultants to file public reports with the Department if they enter into an agreement or arrangement for the consultant to undertake activities with an object to, directly or indirectly, persuade employees about their organizing or collective bargaining rights.

Should the proposed rule apply to worker centers and other third party labor-backed groups who are also persuading employees?

I am not aware that the LMRDA, which was enacted in 1959, has ever been interpreted in this manner. If confirmed, I look forward to learning more about the issue and working with the Members of the Committee and other stakeholders to address LMRDA reporting in a fair, legal, and balanced way.

7. **The Labor and Management Reporting and Disclosure Act of 1959 does not require unions to disclose agreements covering persuader activity, but it does require unions to be transparent in disclosing financial information about how dues collections are spent. The prior Administration significantly strengthened these reporting requirements. But the Obama Administration rescinded the regulation strengthening union reporting requirements, and the number of audits of union reports has dropped by 40 percent. These audits are an important tool in protecting workers. Investigations started by such audits have caught over $107 million in fraud and embezzlement over the past decade.**

   Do you think it is appropriate to increase reporting requirements on employers who seek advice on how to comply with the law but weaken transparency requirements for union leaders that manage money deducted from employees' paychecks?

   I understand the Department proposed to revise the interpretation of the "advice" exemption to reporting by employers and labor relations consultants, by limiting the definition of what activities constitute ''advice'' under an exemption, and thus expanding those circumstances under which reporting is required of employer-consultant persuader agreements**.** If confirmed, I look forward to learning more about the issue and working with the Members of the Committee and other stakeholders to address LMRDA reporting in a fair, legal, and balanced way.

If confirmed will you commit to renew the department's efforts to protect union members from fraud and embezzlement?

If confirmed, I will work to ensure that the Department's limited resources are allocated appropriately so that DOL administers efficient and robust enforcement programs, including programs that protect union members from fraud and embezzlement.

8. **There is a small business owner outside of Nashville who owns a courier company with over 200 independent contractor drivers. An independent contractor is a worker who provides services or goods to someone else under a term or contract, and has the flexibility to contract with others. These individuals work flexible schedules based on their own personal needs. Employee misclassification occurs when an employer incorrectly classifies a worker as an independent contractor, instead of an employee. This small businessman started as a truck driver after he graduated from college and worked in several different capacities in a transportation company before branching off and starting his own business. Today, he has a diverse group of drivers, including college students, bi-vocational ministers, off-duty fire fighters, and military veterans.**
During your time as Secretary of Labor for Maryland, you supported employee misclassification legislation.

If confirmed, what are your specific plans to target employers who use independent contractors?

Legitimate independent contractors play an important role in our economy. I have no plan to target employers who use legitimate independent contractors. However, the misclassification of employees as independent contractors is a very serious issue and one which the Department is looking at very closely, because it is unfair to employers who play by the rules, results in non-payment of taxes, and is unfair to employees who are misclassified and deprived of certain benefits.

Do you believe that there are any industries that rely on independent contractors which should be exempted from employee misclassification laws? Please name them and explain your reasoning.

I support the use of legitimate independent contractors, who play an important role in our economy. Employers who illegally misclassify their workers in order to cut costs create an un-level playing field for those employers who play by the rules and obey the law. This can occur in any

industry, which is why misclassification is such a serious problem. It cheats workers, law-abiding businesses, and the taxpayers.

Have you supported exempting particular industries from employee misclassification laws or legislation to amend such laws? Please explain.

I would be interested in learning more about the rationale for exempting particular industries from misclassification laws.

9. In DOL's regulatory agenda from January 2012, the "Right to Know" regulation was moved to "long term action" agenda. The "Right to Know" proposal would require employers to provide all workers an individualized written analysis of an employee's employment status, as well as how that employee's compensation is calculated. The employer would have to provide the written analysis to the employee, and keep a copy for their records that would be turned over to the Wage and Hour Division (WHD) if the company is subject to a future investigation.

Do you have any plans to move this proposal back into active rulemaking?

Do you support requiring employers to provide individualized written analysis of their employment status and how their compensation is calculated?

If you proposed requiring employers to provide such written analysis, would you engage in a comprehensive cost-analysis of the compliance burden this would place on employers?

If confirmed, I look forward to learning more about this issue. Should the Department determine it will proceed to rule making on this issue, I look forward to working with Members of this Committee and all stakeholders in developing a balanced and comprehensive regulatory proposal, including, as with all regulations, a thorough economic analysis.

10. Last week, Senators Johanns, Burr, Coburn, Cornyn and I sent a letter to the Office of Management and Budget (OMB) on DOL's proposed rule limiting the Fair Labor Standards Act (FLSA) exemption for workers providing in-home companionship services. The proposed rule would eliminate the exemption for third party employers (i.e. agencies that hire or place individuals in private homes to provide companionship services), and narrow the duties that a companion may provide in order to be exempt under the FLSA. Our letter voiced concern with the research and analysis that DOL

used to justify the proposed rule and asked OMB to return the proposed rule to DOL for further review and analysis. DOL used Medicare data to evaluate the rule's impact on those receiving care, even though Medicare does not cover companionship services. The non-partisan National Association of Medicaid Directors (NAMD) also recently wrote to OMB requesting the rule be sent back to DOL for further review. The Medicaid Directors cited several shortfalls including the incompatibility of the proposed rule with the objectives of Centers for Medicare and Medicaid Services (CMS) and how it could jeopardize existing Medicaid delivery system models. NAMD cited the potential conflict between the proposed rule and the push by states to implement innovative home and community based care programs. Lastly, NAMD raised concerns about the lack of any comprehensive financial impact analysis of the changes for Federal and state taxpayers. In a letter to OMB, the National Council on Disabilities also expressed concern that the proposed rule jeopardizes the affordability of companionship care and the availability of publicly funded programs.

Will you commit to ensuring that DOL conducts a comprehensive review of the proposed rule that includes input from a significant number of state Medicaid directors, before finalizing the rule?

If confirmed, I look forward to learning more about the status of this proposed regulation and working with Members of the Committee as it moves forward. As you know the rulemaking process is governed by the Administrative Procedure Act, which limits agencies from discussing deliberations over the content of proposed regulations while they are still under consideration. Proposed rules are generally subjected to a thorough and complete analysis, including soliciting comments from all concerned parties and considering the impact of proposed regulations on all stakeholders.

11. **The goal of the Energy Employees Occupational Illness Compensation Program (EEOICPA) is to compensate sick nuclear workers that defended our country throughout the Cold War and their survivors if the worker is deceased. This year, the Institute of Medicine released a review of the Site Exposure Matrix (SEM) used by DOL to communicate information on the toxic substances and associated health effects to stakeholders.**

    Do you plan to implement the recent recommendations by the Institute of Medicine to validate the Site Exposure Matrix (SEM) database with supplemental information and a peer review process?

Although I am not familiar with the recommendations made by the Institutes of Medicine, I understand that OWCP took the initiative to contract for the IOM study to enhance the quality and transparency of the SEM. I recognize the value of a process for review of the SEM links and substances by a panel of scientific and medical experts. If confirmed, I will work with OWCP to evaluate the options for developing such a process.

Do you plan to update the current database with bibliographic information to increase transparency?

The public site currently lists general references to the research documents relied on. If confirmed, I will look into ways in which this could be more transparent and would welcome input from the Committee and other stakeholders.

12. **The Office of Federal Contract Compliance Programs (OFCCP) proposed a rule that would require federal contractors to establish "goals" of hiring a certain percentage of individuals with disabilities for every job group. The proposal also would require contractors to ask every applicant for employment to self-identify as an individual with a disability upon application as well as later in the hiring process, and require contractors to survey their entire workforce each year to ascertain disability status. In other words, the proposed rule would essentially impose hiring quotas on federal contractors in each of their job groups. For example, under the proposed rule a commercial airline would be required to have a certain percentage of "disabled" individuals as pilots, flight attendants, etc.**

Do you believe a blanket quota system is good policy?

Have you ever been in a position where you hired employees based on quotas?

Do you think there should be exemptions from the Final Rule?

Courts have made clear that quotas – requirements that employers hire specified numbers of individuals from particular groups without regard to their qualifications or their availability in the relevant labor pool – are unlawful. No laws enforced by the Department of Justice or the Department of Labor require or permit quotas, and I have never hired employees based on quotas. Where Department of Labor regulations provide for goals, those goals are tied to the availability of qualified candidates and are intended to be used to evaluate the presence of artificial

barriers to the employment of members of a particular group. I share employers' goals of identifying and hiring highly-qualified individuals for every job.

13. **The Americans with Disabilities Act states that "a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature and severity of such a disability."**

    Please explain how the proposed regulations, which would require contractors to ask every applicant for employment to self-identify as an individual with a disability, do not conflict with the ADA.

    As I understand it, the existing rule includes a requirement that covered federal contractors invite self-identification at the post-offer stage of the employment process. The NPRM proposed adding a requirement to invite voluntary self-identification by applicants at the pre-offer stage, and a requirement to invite self-identification by incumbent employees on an annual basis. These requirements will provide contractors and OFCCP essential data that does not now exist regarding the composition of their applicant pools and workforces. The post-offer self-identification is not in conflict with the ADA. The Equal Employment Opportunity Commission has noted that "collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act is not restricted by [the Americans with Disabilities Act and implementing regulations]." App. to 29 C.F.R. 1630.14(a). In addition, the EEOC has made clear that employers may ask applicants to voluntarily self-identify for purposes of the employer's affirmative action program if the affirmative action program is required by federal, state or local law or if the employer is using the information to benefit individuals with disabilities. See www.eeoc.gov/policy/docs/preemp.html.

14. **Independent economic analysis of the proposed rule show the costs far exceeding what the Department of Labor proposed. For example, one study found that the proposed rule would cost Federal contractors $510 million in the first year and $307 million in subsequent years. The Department of Labor estimated the rule would cost only $74 million in the first year and $49 million in subsequent years.**

Will you commit to studying these major discrepancies in costs and informing this committee on your conclusion before issuing a Final Rule?

I am not familiar with all of the economic analysis data you cited, but I understand that as a part of drafting any final rule, the agency must assess the comments received on the NPRM. Changes or adjustments may be made, if appropriate, to address concerns about the cost and burden of compliance. If confirmed, I will work with OFCCP to consider whether the cost of several proposals in the NPRM could be justified by their potential benefits, and whether alternative methods or approaches could achieve comparable or acceptable benefits for less cost or burden.

15. **Recently a Federal judge ruled that 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.**

    Do you support extending the jurisdiction of OFCCP to subcontractors?

    I am not familiar with the case you referenced, but it is my understanding that OFCCP has always had the authority to conduct compliance reviews of Federal subcontractors.

    Do you support reinstating the OFCCP Ombudsman? If not, why not?

    I am not aware of how OFCCP has used an ombudsman in the past. However, to the extent that position served to ensure the agency works closely and effectively with stakeholders such as contractors, workers and community based groups, I support that effort, regardless of title. It is my understanding that in recent years, OFCCP has expanded its outreach efforts to key stakeholder groups in an effort to ensure the effective operation of the agency.

16. **Since the implementation of OFCCP's Active Case Enforcement (ACE) in 2011, stakeholders have informed us of an overly aggressive audit schedule. In one particular case, a stakeholder was audited once per year prior to 2011, but has been audited 30 times since November 2012.**

    What results do you expect to gain from such an aggressive audit schedule?

If confirmed, will you provide this committee with the details of how many audits OFCCP conducted in the two years prior to implementing ACE and the number of audits conducted after implementation?

Will you also provide details on the average duration of such audits conducted two years prior to implementing ACE and the average duration of such audits conducted after implementation?

If confirmed, I look forward to learning more about how OFCCP, and the Department's other worker protection agencies, make strategic enforcement decisions. As I understand it, OFCCP's Federal Contractor Selection System (FCSS) is a neutral selection system that identifies federal contractor establishments for compliance evaluations. There is information on OFCCP's website with questions and answers about the FCSS.

17. Do you support OFCCP's effort to develop a new data collection tool that will require all Federal contractors to submit detailed private information on their employees' compensation?

Have you heard concerns about the paperwork burden federal contractors endure in the process of complying with OFCCP directives? Do you share this concern?

If this new tool is put into practice, do you believe there would still be a need for random on-site reviews?

I am aware that OFCCP is considering collecting pay data from federal contractors in order to improve its ability to enforce Executive Order 11246, including the ban on pay discrimination. If confirmed, I look forward to learning more about the issue.

18. You have been a very enthusiastic proponent of applying the disparate impact theory to prove discrimination in cases where there is no evidence of intent to discriminate.

Could you explain in detail how you would like to see the disparate impact theory apply to education settings?

Let me give you an example. Take a school that is funded through Impact Aid, and was therefore within the jurisdiction of the Labor Department's Office of Federal Contract Compliance Program (OFCCP). Let's say that school has a teacher evaluation system based on Department of Education parameters, but the teacher evaluations result in more white teachers getting

identified as highly effective teachers than minority teachers. There is no evidence of any intention to discriminate, in fact they followed the requirements set by the U.S. Department of Education.

Would you consider the outcome alone evidence of discrimination based on disparate impact?

If you did bring charges against this school, how would that impact their ability to draw federal funds? Under what circumstances would you consider debarring a school based on disparate impact discrimination?

The prohibition on disparate impact discrimination has been recognized by courts for decades and was codified as part of Title VII in 1991. Under disparate impact analysis, as applied by courts and by the Civil Rights Division under my leadership, the initial question is whether a facially neutral policy disproportionately excludes people of a particular race, national origin, sex or religion. Even if there is adverse impact, however, the employer will have the opportunity to demonstrate that the policy is job related and consistent with business necessity and is thus justifiable despite its disproportionate effect. If the employer makes this showing, it will be permitted to use the policy unless there is an alternative policy that would also serve the employer's business goals but eliminate or reduce the impact. Any new policy that an employer is asked to adopt would have to serve the employer's legitimate goals – in this case, providing for fair teacher accountability or complying with federal requirements. Evidence of disproportionate impact is not alone sufficient to make out a violation of the law.

With regard to the part of your question that addresses the availability of federal funds, if confirmed as Secretary of Labor, I would ensure that any decisions regarding federal funding were fully compliant with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulations, 29 C.F.R. Part 31, as well as with other applicable grant-making requirements.

19. **You received several very strong endorsements from organized labor union leadership. One of their highest priorities in recent years is the enactment of legislation to allow "card check" in lieu of secret ballot elections to determine whether or not employees want to unionize.**

    Do you believe that employees should always have the ability to make the important decision of whether or not to join a union through a secret ballot election?

    I support the right of employees to organize and collectively bargain with their employers, and to engage in other protected concerted activity. The NLRB has the statutory jurisdiction over the NLRA, and I defer to that agency to interpret and enforce the law.

20. Another section of the "card check" legislation that organized labor once promoted involved the imposition of higher penalties on employers who violate the National Labor Relations Act (NLRA), without any corresponding penalties for labor unions that violate the same law.

Do you believe it is fair to raise penalties on employers but not on labor unions for violations of the same law?

Would this upset the balance of rights that the NLRA protects?

The NLRB has the statutory jurisdiction over the NLRA, and I defer to that agency to interpret and enforce the law.

21. The "card check" legislation would also have imposed mandatory binding arbitration on employees and employers that do not reach a collective bargaining agreement within a specified amount of time.

Do you believe that it is appropriate for a third party to determine the work rules, terms of employment, benefits, and pay of a workplace in which they have no role?

Would you favor mandatory binding arbitration for the Department of Labor's union contracts?

The NLRB has the statutory jurisdiction over the NLRA, and I defer to that agency to interpret and enforce the law. As you may know, however, the Department of Labor's relationship with its unions is not governed by the National Labor Relations Act.

22. At the start of the Obama Administration, the Department of Labor's Wage and Hour Division (WHD) ended the longstanding practice of providing Opinion Letters that answered questions about specific applications of labor laws. These letters were viewed a useful tool by employers and employees alike.
Instead, the WHD replaced Opinion Letters with Administrator's Interpretations that only give broad opinions on a subject chosen by the agency, leaving many specific details unanswered. WHD has only issued a total of five Administrator's Interpretations.

Many employers and employees who are trying to comply with complex wage and hour laws and regulations would like to see a return to the Opinion Letters system.

Will you commit to restoring a more robust and interactive compliance assistance system so folks can spend less time trying to decipher the law and more time growing successful businesses and creating new jobs?

Enforcement alone is not sufficient to achieve the Department's mission of protecting our nation's workers. There must be a proper balance between compliance assistance and enforcement. If I am confirmed, I will ensure that education and outreach to the employer community to promote voluntary compliance will continue to be one of the agency's key strategies for protecting the workforce. If there are ideas that you have about ways in which we can provide greater clarity to the employer community about their rights and responsibilities under the law, I welcome hearing your suggestions.

23. The United States faces a significant physician shortage, particularly in poor areas where many immigrants without proficient English live.

Do you believe it is possible that the requirement that doctors must bear the cost of translation services to serve this population is a deterrent to practicing in medically underserved areas?

Do you agree that a physician who does not speak the local language is better than no doctor at all? Please explain.

Ensuring access to health care in underserved communities is an important societal priority. As I mentioned in my opening statement at my confirmation hearing, all of my siblings are doctors. Two of my siblings financed their medical school education through the National Health Service Corp, which paid their tuition. Following their graduation, they worked for a number of years in physician shortage areas, and I have learned much from their experience about how to ensure access to health care in these underserved communities.

They encountered people with limited English skills in their practice, and were able to utilize their bilingual skills to assist many of the patients. Other colleagues were not bilingual, but they recognized the critical importance of being able to effectively communicate with patients. The failure to do so can have life or death consequences.

Fortunately, federal law provides a very flexible roadmap for compliance with the obligation that recipients of federal financial assistance have to ensure that persons with limited English skills have meaningful access to health services. There is no one size fits all approach to compliance, and

I have worked with health providers and other key stakeholders to identify cost effective solutions to this challenge. For instance, many providers make use of telephonic interpretation services, while others partner with organizations to secure qualified paid or volunteer interpreters. There are many effective strategies for ensuring access to health care for people with limited English proficiency, including supporting community health workers. The federal government provides significant technical assistance in this area, and there are various federal agencies actively involved and engaged in this issue. The Department of Labor has partnered with HHS to work with Area Health Education Centers to train community health workers. AHEC programs have also focused on training health interpreters. And as HHS OCR Director, I worked with the Medicaid program to ensure that states knew that the program would provide matching funds for the costs of language assistance.

24. Will you set specific priorities for wage and hour enforcement? If so, what are they?

The Wage and Hour Division has responsibility for a broad range of labor standards statutes. That challenge alone requires that the agency establish key priorities. If confirmed, my overall objective will be to promote compliance with all the laws as efficiently and effectively as possible. I look forward to learning what strategies might best achieve that goal, and welcome input from all the agency's stakeholders.

25. The Fair Labor Standards Act (FLSA) regulations have been criticized for providing little guidance to employers or employees on the standards for exempt status under the Act. Employees exempt under the FLSA may not be subject to overtime or minimum wage. Terms like "administrative, managerial and professional" are not subject to an easy definition and the terms used to define them are often unclear.

Should the Department of Labor provide safe harbors for exemptions based on clearly understood standards?

Do you believe that it is appropriate to recognize an individual as an exempt managerial employee when that person supervises two or more other employees?

What about recognizing that a salary at some level above a storewide average can be a stand in for proof that an individual exercises independent discretion and judgment over significant matters?

If confirmed, I look forward to learning more about this important issue and working with Members of the Committee. As you know, the previous

administration finalized a comprehensive regulatory revision of the executive, administrative, and professional exemption in 2004, in which it redefined both the employee's duties that qualify for the exemptions as well as the minimum salary that must be paid to claim the exemption. As I understand it, that effort was intended to clarify and update those terms. It may be that we need to assess whether these continue to be challenging concepts for businesses and for workers, and I am certainly willing to look into this issue.

26. You have worked in different levels of government for almost your entire career, many of them as a manager or supervisor.

From your experience, do you think public sector compliance with the FLSA exceeds that of the private sector?

Do you believe employee misclassification in the public sector is as prevalent as in the private sector? Please explain your answer.

I have not studied the issue of whether public sector compliance with the FLSA exceeds private sector compliance, or whether employee misclassification in the public sector is as prevalent as the private sector. If confirmed, I look forward to learning more about these issues and any data and research that may be available to shed light on these questions.

27. Under the FLSA, the Department of Labor may impose liquidated damages on employers in the amount of unpaid wages owed to the employee, essentially allowing an employee to recover double what he or she was owed.

Do you favor imposing liquidated damages in all FLSA cases?

Under the FLSA, when an employee is not paid properly, he or she is entitled to both back wages and an equal amount of liquidated damages. Congress appropriately recognized that liquidated damages were necessary to ensure compliance with the law and that just requiring the employer to pay the back wages that should have been paid provided no deterrent to avoid future violations.

I am interested in understanding the percent of FLSA cases in which liquidated damages have actually been assessed and in which types of cases. I realize that in some instances, violations are inadvertent or unintended; however, some violations are not. So, again, I look forward to learning how this statutory provision is used.

28. My staff has been informed of several instances of overly aggressive enforcement in the field by the Department of Labor. I do not condone violations of the law, but I do believe that the Department of Labor should follow the due process procedures that are in place to ensure a fair, but efficient investigation. In one particular case, WHD issued a "hot goods" order to embargo an employer's shipment of perishable goods before he was ever told in writing what he was accused of doing. Under the FLSA, a "hot goods" order is used to hold perishable agriculture goods or commodities from shipment until allegations are resolved.

What will you do to ensure that your investigators are following proper investigative procedures and not abusing the due process rights of employers and employees?

Should the Department of Labor be able to use penalties like the "hot goods" provision to scare employers into simply paying a large monetary fine?

Do you think it's appropriate to permit a practice that leads to the destruction of the employer's product before any violation is found or before a violation is alleged?

Do you believe that employers should be able to continue to produce and ship their goods while the Department of Labor continues its investigation? If not, why not?

If confirmed, I look forward to learning more about the Wage and Hour Division's enforcement program and all the tools the laws provide for investigating and remedying violations. As you know, since its enactment in 1938, the FLSA has provided that goods produced in violation of its minimum wage, overtime, and child labor provisions should not be moved in commerce. It further granted the Department of Labor the authority to seek a federal court order stopping that movement if it was deemed necessary. Of course any producer of goods alleged to be produced in violation of the FLSA has the right to contest those allegations before a federal judge should the Department seek such a court order. The burden of proving that the goods should not be shipped because of a violation of the FLSA appropriately lies with the Department of Labor.

29. In 2010, the Department of Labor created the "We Can Help" campaign that was designed to help educate workers about their rights under the Fair Labor Standards Act (FLSA).

What are your plans to continue this campaign?

Critics of the "We Can Help" campaign argued that the Department of Labor would "deputize" employee rights groups to act on behalf of Wage and Hour Division (WHD) investigators.

Is this an appropriate way to carry out the law?

Can you ensure that if confirmed, you will not permit third party, nongovernmental groups to carry out the legal duties that Congress has delegated to the Department of Labor?

I believe that the Department should provide meaningful and comprehensive guidance and compliance assistance to the broadest number of employers and employees. I can tell from the Wage and Hour Division's web site that it has a variety of tools available to the public. I am interested in understanding which of those tools are most effective, and will look at all these materials in that light--including those materials developed as part of the effort to educate workers under the "We Can Help" banner. I also believe that the responsibilities of the Wage and Hour Division are inherently governmental law enforcement functions that should be carried out by the men and women of that agency.

30. **In 2010, the Department of Labor announced a new program in conjunction with the American Bar Association (ABA) called Bridge to Justice. The program refers Wage and Hour Division (WHD) complainants to private attorneys through the ABA-approved attorney referral hotline. The ABA then will match the complainants up to a local plaintiffs' attorney to pursue a private right of action.**

    Should the Department of Labor offer the same service to small businesses that are being investigated by WHD? If not, why not?

    What role do you see for private litigants in Fair Labor Standards Act (FLSA) enforcement?

    Should the Department of Labor assist private litigants? If so, to what extent should that assistance be given?

    If confirmed, will you review the Bridge to Justice Program to ensure that investigators are providing only the relevant information to private attorneys?

    How will you make sure that private or privileged information from an employer is protected?

If confirmed, I look forward to learning more about the Wage and Hour Division's Bridge to Justice Program including understanding its potential applicability. It appears that the WHD has a wide array of compliance assistance material on its website related specifically to the ABA-approved attorney referral process. This includes information about how the process currently works, who may seek assistance and what information will be provided to individuals requesting a referral.

Congress provided workers the private right to sue in court to collect back wages and liquidated damages under the FLSA. So the law, as originally drafted, was intended to ensure comprehensive enforcement be it by private or public means. At a minimum, the Department has a responsibility to inform workers of their private right of action when the agency does not have the resources to help them directly.

31. Do you support allowing private employers and their employees to voluntarily enter into agreements in which they may accrue paid time off in lieu of overtime pay, otherwise known as "comp time"?

I support efforts to provide increased flexibility in the workplace. There are many time pressures on modern families, and we should give serious consideration to policies that help families deal with the competing demands they face.

I would be concerned, though, about anything that would dilute the value of overtime pay. Many workers rely on overtime pay in order make ends meet. I applaud efforts of many of the Members of this Committee to address the issue of workplace flexibility. If confirmed, I look forward to working with the Committee on this important issue.

32. Under the Fair Labor Standards Act (FLSA) Federal government employees are permitted to use comp time, but not private sector employees.
Do you support the allowance of this practice for Federal government employees? Would you seek to curtail this practice in any way?

The Office of Personnel Management has responsibility for overseeing the application of the FLSA to federal employees, so I would defer to that agency in this matter.

33. Do you believe that employers and labor unions should be able to recover attorneys' fees from the Occupational Safety and Health Administration (OSHA), upon prevailing in civil actions, including administrative reviews?

I do not have enough information about this issue to have an informed opinion at this time. If confirmed, I would be interested in learning more about this issue. If you or members of the Committee have views, I look forward to hearing them.

34. In response to sequestration, the Bureau of Labor Statistics (BLS) recently announced that it was eliminating (1) further efforts to measure green jobs products, (2) the mass layoff statistics program, and (3) international labor comparisons program.

Do you support the decision to eliminate these BLS programs? If not, are there other areas in which you would eliminate programs or services?

I do not have enough information about this issue to have an informed opinion at this time. If confirmed, I look forward to learning how and why BLS made the choices it did.

35. Last year, the Department of Labor announced that it was changing its "lock-up" procedures for when it releases its monthly unemployment numbers. Under the previous procedure, credentialed media organizations were permitted to use their own electronic systems to report and transmit the latest unemployment numbers to the public, once those numbers are made public. The new procedure was criticized for putting unreasonable restraints on the media's immediate access to the economic data, which required only Department of Labor equipment to be used to report and transmit.

Do you believe it is important for the media, as well as the public, to have immediate access to BLS data?

Yes. Proper and secure "press lock-ups" can facilitate the news media's ability to enlighten the public, through informed summaries and analysis, about critical economic data concurrent with their release.

Were the restraints implemented last year necessary, and do you think they made the process more open and transparent?

Although I was not at the Department when these decisions were made, I understand that media organizations and the Department came to an effective compromise where news organizations may choose either to provide their own equipment, software and data lines, or to use those provided by the Department. I am also aware that the changes to reform long-standing protocols and procedures for press lock-ups made by the Labor Department have established DOL as a leader across the federal

government. Other agencies with press lock-ups are now looking to DOL as they contemplate whether and how to implement similar updates.

36. Under Secretary Solis, the Office of Labor-Management Standards (OLMS) rolled back regulatory initiatives seeking to require unions to disclose: (1) the identities of sellers and purchasers of assets; (2) more detailed conflict-of-interest information for union officials; and (3) the finances of labor trusts set up to provide benefits to members.

Do you support these OLMS efforts to reduce union transparency even as the Obama Administration has promised unparalleled transparency throughout the Administration?

I was not at the Department when these decisions were made; however, I look forward to learning more about the rationale and the resulting outcomes.

Do you agree that dues-paying union members have a right to know how their hard-earned money is being spent by their union?

Yes. The LMRDA is predicated on the principle that union members, officers, and the general public benefit by having access to information about labor unions, their officers and employees, employers, labor relations consultants, and surety companies. If confirmed, I look forward to learning more about OLMS's administration of its reporting and disclosure program.

37. Recently, advocacy groups known as "worker centers," many of which are funded by labor unions, have emerged ostensibly to provide services and assistance to certain sectors of the community. However, these "worker centers" often also have an objective of direct engagement with employers regarding wages, hours, and terms and conditions of employment. This effectively makes them labor organizations even when they have not been selected by a majority of workers to speak on their behalf. Congress enacted the National Labor Relations Act (NLRA) to govern certain activities of labor organizations to ensure that when they represent workers, they do so fairly and that they respect basic democratic principles in their internal governance.

What are your views on these worker centers? Will you insist that they comply with the laws applicable to labor organizations if they indeed act as such?

Do you believe it is appropriate for an advocacy group or worker center to deal directly with an employer on behalf of workers even

though the group has not been designated by a majority of the workers as their exclusive representative?

I am not familiar enough with these issues to have an informed opinion at this time but believe worker centers should comply with all applicable laws.

38. Do you support the use of criminal background checks for employment decisions? Please explain.

As noted in response to a question from Senator Isakson, the anti-discrimination laws do not bar employers from considering applicants' criminal records in making employment decisions. As the EEOC made clear in its 2012 bipartisan policy guidance, however, courts have for decades set standards to enable employers to ensure that they are not using criminal background checks in a discriminatory way. Under those precedents, an employer applying a policy that disqualifies applicants with criminal records should evaluate the nature of the crime, the time elapsed since the arrest or conviction, and the nature of the job in assessing whether its consideration of criminal records is job related and consistent with business necessity. The EEOC Guidance also calls for employers to offer an opportunity for an individual excluded by the policy to demonstrate that the policy should not be applied in his particular circumstances. These legal standards enable an employer to serve its justifiable interest in employee integrity and the safety of its workplace while ensuring that applicants are not excluded for inappropriate and unlawful reasons.

39. Should certain occupations be allowed to conduct criminal background checks? Please explain.

As noted in response to the question above, the anti-discrimination laws do not bar employers from considering applicants' criminal records in making employment decisions. The laws simply require that such policies be applied in a nondiscriminatory way. Consistent with those laws, the nature of the job is one factor that an employer can consider in applying a policy regarding background checks for job applicants.

40. Do you support the use of credit checks for employment decisions? Please explain.

The same legal standards apply to assessment of policies that use credit or criminal background checks to disqualify applicants. If an employer's use of credit checks disproportionately screens out a group of applicants, for example of a particular national origin, the employer will have the opportunity to demonstrate that the policy is job-related and consistent with business necessity despite its impact. If the employer makes this showing, it will then be allowed to use the

credit checks policy unless there is an alternative policy that would serve the employer's business goals but eliminate or reduce the impact. Evidence of disproportionate impact is not alone sufficient to make out a violation of the law. These legal standards enable an employer to serve its legitimate goals while ensuring that applicants are not excluded for inappropriate and unlawful reasons.

41. In October 2010, the Department of Labor, Employee Benefits Security Administration (EBSA) proposed regulations regarding the definition of a "fiduciary" under the Employee Retirement Income Security Act of 1974 (ERISA). The proposed rule was met with bipartisan concerns and was withdrawn in 2011. EBSA has indicated they will issue a new proposed rule as early as this summer.

During your nomination hearing, when questioned by Senator Isakson, you stated you look forward to "listening and learning more" about the proposed fiduciary rule. You again agreed to listen and learn when Senator Hagan questioned you on the same topic. We appreciate these efforts, but will you commit to requiring EBSA to study potential adverse impacts on low and middle income Americans prior to issuing any new fiduciary regulations? And will you commit to reporting the findings to this committee?

If confirmed, I would ensure that EBSA diligently examines the impacts its conflict of interest rule may have on retirement savings for all US families. I would also ensure that EBSA publishes its findings for public reaction together with its new proposal. I look forward to the Committee's input as part of that discussion.

42. The Securities and Exchange Commission is considering an updated fiduciary standard for broker-dealers and formally asked for a 120-day fact finding period before issuing any proposed rule. EBSA in the past has engaged in data-collections that allowed for as little as 30 days for a response. Will you commit to providing for a lengthy comment period that reflects the scope and complexity of this undertaking when the EBSA issues a new proposed fiduciary rule? How long do you think the comment period should be?

I understand that EBSA engaged in an extensive and transparent public process after it published its original proposal in October 2010. That proposal had a 90-day public comment period that was extended several times. I also understand that a public hearing was held and that the record remained open for public comments after the hearing and once again after the hearing transcript was posted on EBSA's website. In my discussions with Members of the Committee, I know

that the Department also received comments from Members of Congress. In September 2011, the Department announced its intention to consider all this public input in developing and publishing an improved proposal for further public comment. If confirmed, I can certainly commit to a similarly comprehensive and public process with a re-proposal.

43. If confirmed, you would be the Chairman of the Board of the Pension Benefit Guaranty Corporation (PBGC). What steps will you take to shore up the financial health of the PBGC? Will you support any taxpayer funded relief or bailout for the PBGC should a funding shortfall occur?

If confirmed, I would be committed to promoting policies that protect workers' employment-based pension benefits. The PBGC plays an important role in our nation's ability to secure the retirement of America's working men and women. Shaping the PBGC's future requires a balance of many, and sometimes competing, objectives. My guiding principles would be to support efforts that encourage employers and employee organizations to offer and continue pension plans, safeguard hard earned benefits for all participants and beneficiaries, and help ensure that America's workers have secure retirement savings from their employment-based pension plans. I look forward to working with Members of Congress and the various stakeholders to assure the continued financial viability of the PBGC.

Senator Michael B. Enzi

Mine Safety – Mine Dust

1. **It appears when drafting the proposed mine dust regulation that MSHA did not rely upon the most recent scientific studies. As Secretary can you commit to me that all regulatory rulemakings will use the most recent and up to date information?**

It is my understanding that the House-published Labor, Health and Human Services, Education and Related Agencies appropriations bill for fiscal year 2012 included a rider that prohibited MSHA from using any funds to implement or enforce this rule until GAO had 240 days to conduct a study and potentially issue a draft or final report. In August 2012, GAO issued its report finding that the evidence the agency relied on to support the rule was sound and that implementation of the proposed rule would reduce coal miners' risk of disease.

If confirmed, I can commit to you that all regulatory rulemakings will be done in accordance with Federal regulatory requirements and rulemaking provisions in the Federal Mine Safety and Health Act (Mine Act).

2. **Does the Department of Labor have the responsibility to ensure that its rulemakings and policies are based on the most recent and comprehensive data to ensure that they are timely, fully-informed and scientifically valid?**

   The Department of Labor has the responsibility to ensure that its rulemakings and policies are developed and issued in accordance with Federal regulatory requirements and authorizing legislation. I strongly believe that affected stakeholders have a right to fully participate in the rulemaking process, and if confirmed, I assure you that the Department's rulemaking process will be open and transparent.

3. **Do you support MSHA's proposed rule on respirable dust? If so, please explain?**

   I support common-sense efforts to protect workers from occupational diseases, but I am not familiar with the details of MSHA's proposed rule on respirable coal mine dust. If confirmed, I look forward to learning more about the issues in this proposed rule.

4. **Evidence such as Appendix O of The Upper Big Branch Internal Review and the enormous amount of information produced by the mining community in response to MSHA's Proposed Rule; Lowering Miners' Exposure to Respirable Coal Mine Dust including Continuous Personal Dust Monitor, RIN 1219-AB64, indicate that the current and proposed regulations are confusing, complicated, and contrary to what the scientific community would consider as acceptable. Would you be willing to open the dialogue with the industry and recognized experts in Industrial Hygiene to craft regulations based on sound scientific evidence and acceptable industrial hygiene practices to protect miners from respirable coal mine dust and silica?**

   I am not familiar with all of the issues and information in the rulemaking record for MSHA'S proposed rule, Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors. I am also not familiar with the details of The Upper Big Branch Internal Review, including Appendix O. However, I can commit to you that if confirmed, any further action on MSHA's proposed coal mine dust rule will be done in accordance with all Federal regulatory requirements, including rulemaking provisions in the Mine Act.

5. **Are there alternative measures that DOL could take in order to reduce the amount of coal dust in a miner?**

   I do not know enough about the issue to have an informed opinion at this time. If confirmed, I look forward to learning more about respirable coal mine dust and effective options for reducing dust exposure levels in mines.

Job Corps

6. **Wyoming is one of only two states without a Job Corps Center. The pre-solicitation bid for the Wyoming Job Corp Center was published on February 27, 2013. Are you committed to ensuring that this project moves forward so that an underserved area such as Wyoming has access to Job Corps services?**

   Yes. The Job Corps program is an example of a youth education and training program that works well. I agree with the Administration's intent to have a Job Corps Center in each state. When these deserving young people can connect to jobs in demand in their local economy, it gives them an opportunity to get a good job –one that allows them to support themselves and their families – in or near the communities that they know. It's also a benefit for every state to make sure that they are not losing that young talent so necessary for their businesses to grow.

   From the public records it appears that the Wind River Center in Wyoming is proceeding and I look forward to working with you on this project if I am confirmed.

Ergonomics

7. **Do you intend to pursue efforts to promulgate an ergonomics standard?**

   I am not aware of any efforts to promulgate an ergonomics standard.

8. **To the extent that you have not formed an opinion about pursuing efforts to promulgate an ergonomics standard, what factors would you consider in that determination, with who would you consult, and what deliberative process would you utilize?**

   If confirmed, any regulatory initiative would involve consultation with affected stakeholders, ensure robust public input, and follow the legally mandated regulatory process.

9. **In the event you at any time were to consider engaging in efforts to promulgate an ergonomics standard would you commit to coming before this**

Committee to outline your reasons for such a decision before commencing those efforts?

I look forward to working with Congress on any regulatory initiatives, if confirmed.

Proposed Fiduciary Rule

10. **In 2010, the Department proposed a very controversial rule on the definition of fiduciary. That proposal lacked economic analysis and data to support a problem and resulted in significant congressional concern and interest. Can you please talk about the steps that will be taken to ensure that appropriate economic analysis and data is considered for any new policy proposal?**

    I understand that EBSA is conducting and will issue together with its new proposal a thorough analysis of the economic impact of its initiative. If confirmed, I would ensure that their work encompasses careful examination of relevant economic literature and market data.

11. **An economic analysis is required before a proposed regulation is issued. In the case of the 2010 proposal, even though the proposal applied to IRAs, there was no economic analysis on its effect on IRAs. In light of the importance of retirement security, what steps would you take to ensure that the economic analysis of the new proposed regulation is thorough enough?**

    I understand that EBSA officials have said, and I agree, that a fuller economic analysis is called for in connection with the new proposed regulation, and I understand that they are undertaking such an analysis now. If confirmed, I would want the expanded analysis to be informed by relevant stakeholder input, as well as by consultations with other federal agencies with expertise in the area. The expanded analysis also must be published for public examination and comment along with the new proposal.

12. **When regulations are proposed by the Department of Labor, the public is given an opportunity to submit comments. What impact should these comments have on whether a regulation is finalized? When you would you ignore public comments on proposed regulations? When would you withdraw a proposed regulation in light of public comments?**

    Federal agency rulemaking activities are governed by various laws and executive orders designed to ensure that the public has notice and an opportunity to comment on significant regulations. Those same laws and executive orders also include provisions designed to require federal agencies to consider and address

public comments. Although agency policy-makers may not agree with every public comment, it would not be proper for relevant public comments to be ignored. I do not believe you can set a one-size-fits-all standard for when an agency might withdraw a proposed regulation in light of public comments, but EBSA's action to withdraw its original proposal so that it could take public input into account in developing and publishing an improved proposal for further public comment is an example of how seriously the Department takes public comments into account in developing regulations.

13. **In your view, how much uncertainty surrounding the regulation's potential costs to participants, plan sponsors, and providers is acceptable?**

    Agencies can and should diligently examine potential impacts of rules. Even the most comprehensive examination of possible future impacts will invariably be subject to some uncertainties. Public input can help inform the Agency about how a proposal will affect them, and might reduce uncertainty, but cannot eliminate it entirely.

14. **Retirement plan coverage among small businesses is far lower than among all other organizations. But under the proposed regulation, helping a small business owner choose a plan's investment options would make a financial institution a fiduciary and thus prohibited from providing this essential help. What steps would you take to ensure that no final regulation erodes coverage among small businesses?**

    I understand that EBSA's Assistant Secretary has publicly stated that she and her staff are exploring a range of appropriate regulatory options for moving forward, taking into consideration public comments submitted for the record, EBSA's economic analysis, and relevant academic research. If confirmed, I would expect the agency to carefully construct the regulation to preserve beneficial advice practices, while at the same time protecting plan participants and individual retirement account owners from abusive practices and conflicted advice.

Senator Richard Burr

1. **I understand that the Department of Justice has conceded that you have committed at least 34 separate violations of the Federal Records Act. Please describe in detail each of these 34 violations including the nature of the correspondence and the parties involved.**

   I believe that I am in compliance with the Federal Records Act. In responding to congressional inquiries, I reviewed my personal email from October 2009, when I was confirmed as Assistant Attorney General, to the present. During my review of this three-and-a-half year period, I identified 34 communications – only 5 of

which I initiated- that had not previously been sent to or from Department email accounts—and were thus not already part of the Department's records system. I forwarded these emails to the Department system and made them available to the House Oversight and Government Reform Committee staff for review.

2. **Are you provided with a mobile device from the Department of Justice that allows you to communicate official business when away from your desk using an official agency email address?**

   Yes.

3. **In general, when did you utilize your personal email account for official business?**

   Because of the press of business during the workday, it is occasionally necessary for me to periodically send documents to myself at home so that I can continue editing them or conducting analytical work after normal working hours. My practice has always been that if I make changes to these documents at home, I send the documents back to the Department's email system, ensuring that records are created within the Department. It is my understanding that this is consistent with the Federal Records Act.

4. **Utilizing personal email from a work computer for communication is often used as mechanism to evade legal or ethical scrutiny by making it more difficult to comply with the requirements of basic records and information management. Therefore, I'd like to ask if you utilized your personal email account at times and from locations when an official method was also available to you?**

   The purpose of the practice I describe in question 3 was to continue to do the important work of the Civil Rights Division after business hours, particularly when I had some difficulty accessing the Department's system remotely.

5. **The Civil Rights Division of the Department of Justice enforces federal statutes prohibiting discrimination on the basis of race, color, sex, disability, religion, familial status and national origin. Does the Civil Rights Division, in the course of its investigations, pursue the release of personal as well as official emails?**

   The Division pursues all relevant evidence in its investigations.

6. **As a lawyer with familiarity of the investigatory process, do you agree that is important to ensure that we not give investigatory targets a safe harbor from scrutiny – ie: allowing communication to occur through a hidden channel outside the access of investigators?**

Yes.

7. **In any of its litigation, has the Civil Rights Division exposed discrimination or other illegal actions by accessing evidence contained in personal email correspondence relating to the activities of governments, agencies, or individuals?**

   The Division seeks relevant evidence in its investigations and litigation, and email can be a valuable source of evidence in many cases.

8. **Are you aware that internal US Department of Labor studies have concluded that the agency produces market-sensitive economic data which could be exploited through security vulnerabilities?**

   Yes.

9. **As you seem to be a regular proponent of back-channeling information early and outside of normal procedures, why would you be an appropriate leader for an agency that needs to implement robust security measures against such activity?**

   I disagree with the assertion contained in your question. I fully recognize the need for robust security measures to ensure appropriate handling of official information. It has been my practice to take appropriate measures to safeguard any information I have handled, and I will continue to do so. If confirmed, I will continue to be an advocate for robust and appropriate security measures at the Department of Labor.

10. **Does the Civil Rights Division of the Department of Justice have an official policy, memorandum, or guidance concerning the use of a personal, non-official e-mail account to conduct official Department business? If yes, please explain this official policy, memorandum, or guidance and produce a copy of it.**

    The Civil Rights Division does not have an official policy, memorandum or guidance concerning the use of personal, non-official email accounts to conduct official business. My understanding is that the Department of Justice's policy relating to information technology systems contains no specific prohibition on forwarding emails to a personal account on a case-by-case basis. Please see attachment.

11. **During my questioning, you testified about your e-mail exchange with a *New York Times* reporter about the Department of Justice's settlement with Countrywide Financial as follows: "We reached agreements, we announced those agreements in a very transparent way." You further testified that "my recollection of that situation . . . is that there was efforts by the press office to**

announce generally that the public announcement was going to occur the next day." In response to a question about the release of non-public information, you stated: "I don't believe that was non-public information. The notice had gone out." You also testified: "My recollection is that the press people had been sending out notice to folks that there was going be this announcement the next day." Did the Department of Justice Office of Public Affairs issue an official media advisory on the evening of December 20, 2011, about the settlement with Countrywide Financial?

As I sought to make clear during the hearing, my responses to your questions reflected my best recollection at the time and without having the relevant documents before me. I have since obtained more information about the emails to which you referred.

On December 20, 2011, *Bloomberg* released a story that was headlined: "BofA Said Close to Settling Fair-Lending Probe Into Countrywide." The story said, among other things, "[a] deal [between Bank of America and the Department of Justice] could be announced as early as this week." Although the Department of Justice declined to comment for the story, this story asserted publicly that the parties were actively in negotiations and on the verge of settling the claims.

I understand that it is not unusual for the Department's Office of Public Affairs to alert reporters to an upcoming announcement for scheduling purposes. The email you cite, which is time stamped 11:13 pm on December 20, 2011, states that our press officer "was supposed to call [the reporter] late today." As the text of the email indicates, it was my understanding that the Department's Office of Public Affairs had begun to inform reporters that there would be an announcement the next day, which is the only information that I communicated in the email. The e-mail did not provide any substantive information about the content of the settlement. I also note that the reporter did not publish a news article about this matter prior to the press conference regarding the settlement.

At 10:23 am on December 21, 2011, Bank of America notified the National Community Advisory Council that a settlement for more than $300 million would be announced, effectively making public the amount of the settlement. The official Department press advisory went out at approximately noon on December 21, 2011.

12. **Alternatively, did any employee of the Department's Office of Public Affairs release information about the settlement to reporters informally? If so, who was the employee that made those disclosures?**

My response to Question #11 addresses this issue.

13. **The settlement between the Department of Justice and Countrywide Financial was publicly announced at a press conference on December 21,**

2011, at 3:00 p.m and memorialized in a Department of Justice press release dated December 21, 2011. What day and time did the Department of Justice conclude settlement negotiations with Countrywide Financial?

An agreement in principle was reached on December 11, 2011. The parties then reached an agreement as to the consent order at approximately 9:45 pm on December 20, 2011, and the relevant boards approved the settlement a little over an hour later.

14. **Given your December 20, 2011, email to the *New York Times* reporter was time stamped 11:13 PM and given that you said you had "just closed deal 15 minutes ago. Will announce tomorrow at 3," that means that the Department's Office of Public Affairs either released information about the deal between 10:58 PM and 11:13 PM, or the Office of Public Affairs knew of the deal before you had actually settled it. Is it still your testimony that you did not release non-public information to a *New York Times* reporter about the Department of Justice's settlement with Countrywide Financial?**

    My response to Question #11 addresses this issue.

15. **With respect to the email to the *New York Times* reporter regarding Countrywide, what safeguards did you have in place to ensure that those with whom you communicated via un-monitored personal email were not making investment decisions with privileged insider information?**

    I have no reason to believe that—even if it were possible to do so based on any information I provided—this well-respected reporter with the *New York Times*, who has covered the Department of Justice for many years, would trade on any information given to him in the course of covering the Department. There had already been news reports that an agreement was close at hand (see response to questions 11-12), and I believed that the information I provided to the reporter was appropriately safeguarded and would not be misused in any way**.**

16. **With respect to the email to the *New York Times* reporter regarding Countrywide, what safeguards did you personally take to ensure recipients of your emails were not circulating them more widely?**

    My response to Question #15 addresses this issue.

17. **Who gave you the authority to release information about the Countrywide settlement? Did the Attorney General give you the authorization to release information?**

    My response to Question #11 addresses this issue. Attorney General was not aware of my email.

18. Chairman Issa issued a subpoena to you on April 10, 2013, requiring you to produce all personal, non-official e-mails you used to conduct official Department of Justice business. As of today, you have not produced any e-mails responsive to the subpoena. Will you commit to fully complying with Chairman Issa's subpoena for the production of all responsive e-mails, including the approximately 1,200 e-mails identified as responsive by the Department of Justice, and providing those documents to the Senate, as well?

I have been transparent about my actions in this matter throughout the Committees' inquiry into the City of St. Paul's decision to withdraw the *Magner* case from the Supreme Court. For example, after questions about this matter were raised, the Department wrote then-Chairman Smith and Congressman McHenry stating that I would be fully prepared to answer any questions that Members had regarding *Magner* when I appeared before a Subcommittee of the House Judiciary Committee, on July 26, 2012. No Members asked me about the topic during my testimony that day. I then offered to make myself available for an interview with staff of the House Committees on more than one occasion this past winter, and finally sat down for a day-long interview conducted by House and Senate staff on March 22, 2013. Senator Grassley's staff was present and asked a host of questions about my actions in this matter.

The Department has been extremely cooperative in this matter regarding documents. The House Committees have had access to over 1,200 pages of relevant documents since last August. In another extraordinary accommodation, the Department then produced these and 200 more pages of documents—a total of more than 1,400—to House and Senate Committees in February 2013, despite the fact that these documents contained sensitive internal deliberative material that has traditionally not been produced during congressional oversight inquiries across Democratic and Republican administrations. The Department has provided the same information to the HELP Committee.

When Chairman Issa brought to my attention an email exchange on my personal email account with an attorney for the City of St. Paul, I promptly searched my personal email for responsive emails from the months leading up to the City of St. Paul's decision to withdraw its Supreme Court petition in *Magner v. Gallagher*. With its April 9, 2013 letter the Department provided the Committees the single additional email and attachment I located in that search. We have also provided that email and its attachment to the HELP Committee.

I was surprised and disappointed that Chairman Issa chose to issue a subpoena even though we were continuing to cooperate with his Committee. Nevertheless, I have reviewed my personal email from October 2009, when I was confirmed as Assistant Attorney General, to the present. The vast majority of emails I found (approximately 97%) were already on the Department's server. These emails were thus already recorded in the Department's email system I identified 34 email communications - only five of which I initiated - that that had not previously been

sent to or from Department email accounts. I then forwarded these 34 communications to a Department email system The Department made these 34 email communications available to the House Oversight and Government Reform Committee for review.

Senator Johnny Isakson

1. **According to the joint report by the Chairman of the House Oversight and Government Reform Committee and Ranking Member of the Senate Judiciary Committee, you testified repeatedly that it was St. Paul's outside counsel, David Lillehaug, who first proposed the idea of a joint resolution in which the City would withdraw the disparate impact appeal if DOJ declined to intervene in the whistleblower case. However, the report also states that Mr. Lillehaug told the Committees that it was you who first raised the possibility of a joint resolution of the cases in a November 29 meeting, and that you proposed the precise roadmap in early January 2012. A voicemail you left for Assistant U.S. Attorney Greg Brooker on January 12, 2012, also stated "we should have an answer on whether our [meaning DOJ's] proposal is a go tomorrow or Monday and just wanted to let you know that." Why did St. Paul's outside counsel reportedly tell Senate and House staff that it was your idea and why did you call it our proposal if it in fact was the City's proposal?**

   I am not able to respond to characterizations of statements Mr. Lillehaug may have made during any interview(s) with the Committees, as I was not present for any such interview. But I note the following:

   In November 2011, I wanted to start a conversation with the City of St. Paul about my concerns relating to the *Magner* case. To do so, I contacted Tom Fraser, a lawyer I knew at a private firm in Minnesota to see if he could put me in touch with someone in St. Paul with the authority to discuss the City's position in the *Magner* case.

   Mr. Fraser then connected me with his law partner, David Lillehaug. On November 22, 2011, Mr. Fraser explained in an email, a copy of which is before the Committee, that Mr. Lillehaug wanted to raise to my attention a case in which he was representing the City of St. Paul. The case—which I later learned was the Newell False Claims Act case—involved a " potential federal issue" that Mr. Lillehaug thought "might bear on the City's handling" of *Magner*. See HJC/HOGR STP 000095.

   I then had initial conversations with Mr. Lillehaug in which I explained my concerns about the *Magner* case. I recall that Mr. Lillehaug raised the possibility that the City would withdraw its *Magner* petition in the Supreme Court, but that it was also interested in addressing *Newell*, which he explained was a False Claims Act case being handled by the Department's Civil Division and the U.S. Attorney's Office in Minnesota. I had not heard of *Newell* before these conversations and—then as now—my knowledge of False Claims Act cases was limited. Mr. Lillehaug raised the prospect that the City would withdraw its petition in the *Magner* case if the Department would decline to intervene in *Newell*. I explained that responsibility for

the False Claims Act fell outside the Civil Rights Division's authority. But I agreed to explore the issue with the Civil Division, which handled False Claims Act cases for the Department.

Although I do not have a specific recollection of the voice mail your question addresses, I believe that my use of the phrase "our proposal" indicates merely that Mr. Lillehaug's proposal was under our consideration and that we were, at the time of the voicemail, prepared to accept it.

2. **In testimony cited in the report, you stated that you did not recall ever asking HUD General Counsel Helen Kanovsky to reconsider HUD's recommendation for intervention in the whistleblower case. The Report, citing the HUD General Counsel's transcribed interview, states that you did in fact ask the general counsel to reconsider HUD's recommendation and that your request was the only new factor in HUD's decision-making process between the time it initially recommended intervention and the time it recommended to not intervene. Can you please explain which version is correct?**

   As I explained in my interview with staff of the Senate Judiciary Committee and the House Judiciary Committee and Committees on Oversight and Government Reform, I recall speaking with Ms. Kanovsky and explaining the City's proposal. I remember Ms. Kanovsky telling me that she had not originally thought that the *Newell* case was a good candidate for intervention, and, given this and the importance of the disparate impact standard to HUD—as well as HUD's pending rule on disparate impact—she thought that the United States should agree to the City's proposal.

3. **According to the report, by November 2011, the whistleblower had spent over two years discussing his case with career attorneys in the Department of Housing and Urban Development, the U.S. Attorney's Office in Minnesota, and the Civil Fraud Section within the Justice Department's Civil Division. These three entities, which had each invested a substantial amount of time and resources into Newell's case, regarded this as a strong case potentially worth as much as $200 million for taxpayers and recommended that the federal government join the suit. These career attorneys even went so far as to prepare a formal memorandum recommending intervention, calling St. Paul's actions a "particularly egregious example of false certifications." If the Newell case was so weak, why did DOJ and HUD waste their resources so substantially? Why do memoranda recommending the case be taken describe St. Paul's conduct as a "particularly egregious example of false certifications." If the Newell case was so weak, why would the City of St. Paul be willing to trade a Supreme Court appeal it had probably spent millions of dollars and years litigating in order to avoid federal government involvement? Why did Mr. Lillehaug seek additional assistance from HUD after the government declined if the case was so weak? Given that the expert you cited as saying the case "sucked" is dead, can you provide documentation of that statement from another source?**

My understanding at the time, from officials in the Civil Division, the U.S. Attorney's Office, and HUD, was that the Newell case was marginal as to intervention. Ultimately, both then-Assistant Attorney General West and Ms. Kanovsky concluded that it was in the best interest of the United States not to intervene. Indeed, I understand that after personnel from the Civil Division and HUD met with representatives of the City of St. Paul on December 13, 2011, the most senior career attorney in the Civil Division at the time of these decisions—and the Department's foremost expert on False Claims Act matters—immediately and clearly conveyed his negative view of the Newell case as a candidate for intervention. And, as noted in the response to Question 2, I remember Ms. Kanovsky telling me that she had never thought Newell was a good candidate for intervention.

One document included in the production made to the Committees is the final decisional memorandum that Mr. West signed, stating the full range of factors he considered in concluding that that the government should not intervene in the Newell case. I understand that HUD has also provided to those Committees a great deal of documentation and that Ms. Kanovsky and HUD Deputy Assistant Secretary for Enforcement and Programs Sarah Pratt sat for transcribed interviews with the Committees**.**

4. **Did you inform your superiors, including the Attorney General or Mr. Perrelli before you undertook this deal with St. Paul?**

   Please see my response to Senator Scott's question 2.

5. **Shouldn't the Supreme Court have the opportunity to review questionable legal theories like disparate impact in housing law and don't you as a government lawyer have a duty to ensure that questionable theories are blessed by the Supreme Court?**

   I do not consider the disparate impact standard of discrimination to be a "questionable" theory under the Fair Housing Act. For decades disparate impact has been used to prove violations of the Fair Housing Act (FHA). The eleven federal appellate courts that have considered the issue have uniformly held that disparate-impact claims may be brought under the FHA and that the FHA prohibits housing-related practices that have an unjustified disparate impact on the basis of race, color, national origin, religion, sex, familial status or handicap (disability).

   The Department's position is consistent with the longstanding statutory interpretation adopted by the Department of Housing and Urban Development (HUD), which is the agency charged by Congress with interpreting and administering the Act.

6. **Have you ever used your personal email to communicate with any official or representative of the City of St. Paul, MN?**

Yes. In one instance, I received an email from an attorney representing the City of St. Paul on a Saturday to my personal email account, and I replied to that email. This email and the incoming attachment were produced to the Committee on April 9, 2013, among the other 1,472 pages of documents related to the *Magner* matter, all of which had previously been voluntarily produced to other congressional Committees.

7. What is DOJ's official policy for employees regarding the use of external or personal email accounts to conduct official business?

My understanding is that the Department of Justice's policy relating to information technology systems contains no specific prohibition on forwarding emails to a personal account on a case-by-case basis.

8. On May 14, 2010, you testified before the US Commission on Civil Rights. How did you prepare for your testimony before the Commission?

The Commission hearing on May 14, 2010, dealt with the *New Black Panther Party* litigation. Because I was not at the Department of Justice at the time the litigation decisions were made in the *New Black Panther Party* matter, I prepared for the Commission hearing regarding that matter by speaking with the two people who were supervising the Voting Section at the time the *New Black Panther Party* case decisions were made. I also spoke with members of the Voting Section *New Black Panther Party* case team. In addition, I reviewed court documents and some of the internal Department materials related to the case.

9. Did you speak with Christopher Coates and J. Christian Adams regarding race-neutral enforcement of the voting laws before you testified before the Commission?

Those individuals were among the *New Black Panther Party* case team members I spoke with on May 13, 2010, in advance of my Commission testimony on that matter the following day. My recollection of that meeting is that the conversation focused on the circumstances and decision that were made in the *New Black Panther Party* case.

10. The OIG stated in his report, "Perez's testimony [to the U.S. Commission on Civil Rights] did not reflect the entire story regarding the involvement of political appointees in the NBPP decision-making. . . . we believe Perez should have sought more details from King and Rosenbaum about the nature and extent of the participation of political employees in the NBPP decision in advance of his testimony before the Commission." Why didn't you seek more details about the involvement of political appointees, given that you were aware the Commission would ask you about this?

In my conversations with the two career supervisors who were responsible for directly reviewing the work of the Voting Section during the *New Black Panther Party* matter, they told me that they were the ones who had made the decision to dismiss three of the *New Black Panther Party* defendants. I had no reason to doubt those two long-time and respected career attorneys. Later, two separate investigations, one by the Office of Professional Responsibility and the other by the OIG, concluded that these representations were accurate – they were the DOJ employees responsible for the decision to "limit the case," and political leadership did not direct the outcome of the case.

11. Christopher Coates testified to the U.S. Commission on Civil Rights against your wishes. During his testimony, the following exchange took place: "Commissioner Gaziano: In that meeting you had where you were on the conference call with Mr. Perez right before he testified [to the U.S. Commission on Civil Rights] , did anyone make him aware of any kind of racial hostility to the race-neutral enforcement of the Voting Rights Act in that conversation? Mr. Coates: Yes."

Given the fact that you were informed of this hostility to race-neutral enforcement of the voting rights laws, why did you testify to the U.S. Commission on Civil Rights the very next day that you don't have people working in the Department of Justice who are opposed to race-neutral enforcement of the voting rights laws?

I believe my testimony regarding the Division's enforcement decisions was accurate. That testimony has been confirmed by the detailed reviews completed by both the Office of Professional Responsibility and the Office of the Inspector General. *See* OPR Report at 75 ("Coates and [redacted] contended that King and Rosenbaum, along with others in CRT, were opposed to the race-neutral enforcement of the Voting Rights Act, including section 11(b), and therefore were opposed to this case in which the defendants were African-American and some, but not all, of the poll worker victims were white. We found no evidence to support this allegation.").

In addition, the OIG concluded in its March 2013 report that since 2009, "the decisions that Division or Section leadership made in controversial cases did not substantiate claims of political or racial bias." OIG Report at 114.

12. Do you support the EEOC's new criminal background check policy? If so, do you support the individualized assessment portion of that policy?

In April, 2012, in a bipartisan vote, the EEOC adopted its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions*. That Guidance does not prohibit employers from using arrest or conviction records in their employment decision-making; it simply provides guidance to ensure that employers do not use that information in a discriminatory way. In providing this guidance, the EEOC applied the text of Title VII and longstanding court interpretations of disparate treatment and disparate impact. Under those precedents, an employer applying a policy that disqualifies applicants with criminal records should evaluate the nature of

the crime, the time elapsed since the arrest or conviction, and the nature of the job in assessing whether its consideration of criminal records is job related and consistent with business necessity. The Guidance also calls for employers to offer an opportunity for an individual excluded by the policy to demonstrate that the policy should not be applied in his particular circumstances.

13. Do you plan to issue persuader rules? If so, when and in what form? How will you address the concerns of employers and various bar associations that the rules will compromise attorney-client relationships? How will you ensure that the rules do not chill employers' rights under Section 8(c) of the NRLA?

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

14. The feasibility reinterpretation under the noise standard example represents several missteps by OSHA, including trying to do through a guidance approach what should have been done through a rulemaking, and not keeping the White House (through OIRA) informed of what it was doing. What is your view of whether this action was appropriate and properly supported?

I cannot speak to whether OSHA's actions were appropriate because I was not at the Department at the time. Workplace noise, however, is a serious problem causing permanent hearing loss for thousands of workers each year. If confirmed, I am looking forward to learning more about what can be done to address this problem.

15. Should OSHA be imposing the new interpretation of feasibility (anything is feasible unless it puts the company out of business) through enforcement actions even though the proposal had to be withdrawn? If yes, how are employers to know what is required, and how is OSHA justified imposing new requirements without rulemaking? If no, will you commit to reining in OSHA's enforcement so that employers are not forced to implement the new requirements absent a rulemaking?

I do not know enough about this issue to have an informed opinion at this time. If confirmed, I will evaluate OSHA's enforcement activities in order to get a better understanding of this issue.

16. If confirmed, will you withdraw the silica proposal from OIRA review and commit to a thorough audit of it before any steps are taken to publish it for notice and comment?

According to the Department's semi-annual regulatory agenda, the Occupational Exposure to Crystalline Silica NPRM is expected to be published in May 2013. If

confirmed, I assure you that any initiative will allow the public the opportunity to comment and participate in public hearings on the proposal.

17. The 2003 SBREFA panel recommended that OSHA not pursue this rulemaking citing that increasing the compliance with the current PEL would yield significant benefits without putting a wide variety of workplaces out of compliance. What value do you attach to the SBREFA small business review process?

I highly value the opinions of small businesses and the SBREFA process. If confirmed, the Department will take into account the recommendations of the SBREFA panel and of individual small businesses.

18. The OIRA review of the silica proposal has become very contentious and the target of much criticism from unions and others who want this proposal to be cleared. Several reports have been issued attacking OIRA as an obstacle to OSHA's rulemaking process. Do you believe OIRA has taken too long to clear this proposal? Do you agree that OIRA is an obstacle to OSHA advancing its regulatory agenda?

I have not been privy to the discussions surrounding this rulemaking and have not had an opportunity to study this issue in any detail. As a result, I am not able to provide an informed opinion at this time.

19. If lack of compliance with a requirement is the reason for not achieving as much benefit from a regulation as possible, is the answer to make those requirements more restrictive? Should OSHA employ more compliance assistance methods?

If confirmed, I will consider a variety of different means to ensure compliance with current OSHA standards.

20. What is your view on assisting businesses, especially small businesses, comply with regulations?

Making sure that businesses are able to understand and comply with the law is a critical part of ensuring that workers are protected, workplaces are fair and safe, and worker benefits are secure. I know that most businesses want to do the right thing by their workers, and it's important that the Department continue to help these businesses do so.

21. Programs like the Voluntary Protection Program (VPP) save the government millions of dollars and allow the department to focus their resources where they are truly needed. If confirmed, will you commit to continue supporting and strengthening this program?

I will support the VPP within the budgetary means available, if confirmed.

22. What do you think is a reasonable shelf life for economic impact analyses used by agencies to support rulemaking proposals?

I agree with the Administration's commitment to examining the cost and benefits of regulations. Agencies can and should diligently examine potential impacts of the rules they propose. I understand that as a part of drafting any final regulation, an agency must assess the comments received on the NPRM, including public submission of data, studies, costs of compliance, and the like. It is the agency's job to assess all available data and the information provided by the public and to update economic impact analysis where appropriate.

23. "Find and fix" is an extraordinarily broad concept. What should be the limits to requiring employers to "find and fix" hazards in their workplaces?

I have not examined this issue in sufficient detail at this point; as a result, I do not have a position on this issue. I look forward to familiarizing myself with OSHA's plans to issue an Injury and Illness Prevention Program Standard if confirmed.

24. Should OSHA be trying to regulate ergonomics despite a strong, bipartisan message from Congress that such a regulation is not appropriate? If so, what weight do you attach to expressions of Congress on specific regulations?

If confirmed, I will respect Congressional directives with regard to the issuance of an ergonomics standard.

25. Despite efforts by the prior Secretary and Assistant Secretary for OSHA Dr. Michaels, whistleblower claims at OSHA continue to take years to process in part because of the explosion of new rights and remedies. What will you do to try and address this problem?

I understand that OSHA's whistleblower program has added staff and made significant administrative and organizational changes that have improved the agency's ability to address whistleblower complaints. I will continue to work with OSHA to address these challenges, if confirmed.

26. In the past eighteen months, the Department of Labor, through its Administrative Review Board, has issued a host of decisions which have dramatically broadened the rights and remedies of whistleblowers. A few of those opinions reflect a complete reversal of prior DOL precedent. What is your opinion on the expansion of whistleblower rights generally and the DOL's abrupt change in position in particular?

I am not familiar with the cases you referenced, but if confirmed, I look forward to familiarizing myself with this issue.

27. Due to the mismanagement of the Department Labor (DOL) and the Employment and Training Administration (ETA) regarding Job Corps over the past two program years, there has been a buildup of distrust toward and a loss of confidence in the Department among the centers and the contractors. Part of this is the apparent lack of accountability within DOL and ETA. What steps, if any, have been or will be taken to ensure that the "serious weaknesses in ETA's and Job Corps' financial management processes" (3.22.13 letter from Asst. Sec. Jane Oates to Senator Inhofe) are rectified and that those overseeing the decisions have been and will be held accountable for those "weaknesses" or mismanagement?

If confirmed, I will make sure that I am immediately informed of the current status of the management of Job Corps and commit to you and the Committee that it will be a priority moving forward to ensure that the financial oversight and management of Job Corps is sound.

I look forward to seeing the report of the Office of Inspector General that I understand from the Senate hearing this spring will be completed in May. I expect the OIG report will provide suggestions for improvement in the Job Corps processes, and I look forward to working with the Committee on the implementation of those suggestions moving forward.

28. Further adding to the loss of confidence is the current Job Corps management structure with three divisions managing one program. This structure has made it difficult for regional offices and contractors to get straight and consistent answers. There is confusion as to who is authorized to make what decisions causing frustration and confusion. What, if anything, will ETA and DOL do to streamline this system and resolve communication and decision-making issues?

I will make the current management of the Job Corps program an early and top priority if I am confirmed. The roles of procurement, contract management, and program management are complementary. There should be a consistent, transparent process for contractors who are trying to get an answer. Under my leadership, if confirmed, that customer service will be standard procedure.

29. Job Corps has had a history of strong public and private partnerships; however, due to the mismanagement of the program in recent years, many of the private partners feel that this relationship has eroded. Despite contractors working on contract modifications and trimming budgets, the Department has continually "moved the football" in regards to shortfall amounts and has been less than forthcoming with information regarding the modification approval process. What steps, if any, are being or will be taken to make this partnership strong again? Will the Department and ETA meet with Job Corps associations, contractors, and other stake holders and ensure open communication in regards

to future problems? Will the Department and ETA reach out to these stake holders to resolve any future problems before making decisions which will negatively affect students, staff, and communities (e.g., across-the-board reduction in capacity and center closures)? Will DOL and ETA provide more transparency as to why future problems have occurred and the steps DOL and ETA are considering to deal with the problem?

I will make the management of the Job Corps program a top priority if I am confirmed. I will make improvements in communication with the contactor community a focus in our efforts to ensure that the program is back on track.

30. DOL has suggested that cost-reimbursable contracts were partly to blame for Job Corps' shortfalls. Even though Job Corps has used these contracts for decades without issue, is the Department considering using a different contract vehicle? If so, when would this be implemented?

Based upon my experience, cost-reimbursable contracts lack the certainty of fixed price contracts, and in times of scarce resources, we should be looking at all contracting vehicles that could provide greater predictability. If confirmed, I will utilize the expertise of other government agencies that may have ideas on other contracting models as well solicit the ideas of the contractor community about other useful procurement methods.

31. The Department has clearly experienced significant difficulty developing, monitoring and managing an accurate budget for Job Corps. Part of this is likely due to the fact that the officials that now oversee the program's budget are relatively new to Job Corps and its complex budget situation. Will you be willing to temporarily engage outside expertise that has volunteered to the Department by former federal officials with knowledge of the program to help fix the Department's systems and controls of the Job Corps program?

If confirmed I will utilize every option in order to provide greater stability in the financial management of Job Corps. We need to examine both the best of past and current practices while exploring new ways to do business to provide the best opportunities to support the young people who come to the Job Corps program.

32. Do you agree that the Labor Secretary has a duty to execute congressional intent when carrying out ERISA?

Yes, federal agencies have an obligation to faithfully administer and enforce the federal laws as enacted by Congress.

33. If confirmed as Labor Secretary, would you permit the Department to disrupt the commission-based brokerage services as they apply to non-ERISA assets like mutual funds in an IRA, disregarding express Congressional intent?

I understand that the Department has had extensive discussions with industry groups about the impact of a conflict of interest standard on commission-based fee arrangements. I understand that IRAs are a type of retirement plan for purposes of getting tax advantages not available to other retail investment accounts and that most IRA assets today are attributable to rollovers from ERISA plans. I also understand that EBSA's Assistant Secretary has publicly stated that she is considering regulatory exemptions for beneficial practices. If confirmed as Secretary, I would be interested in learning more about this issue and steps EBSA is considering to address it.

34. The Department of Labor's proposed fiduciary regulation caused so much concern that the Department of Labor announced in 2011 that it would withdraw the proposal and issue a new proposal, which is expected to be issued this summer. What steps would you take to ensure that the economic analysis of the new proposed regulation is thorough enough?

I understand that EBSA officials in public discussion of the 2010 proposal agreed that a fuller analysis is called for at this point, and that they are undertaking such an analysis now. If confirmed, I would want the expanded analysis to be informed by relevant stakeholder input, as well as by consultations with other federal agencies with expertise in the area. The expanded analysis must also be published for public examination and comment along with the new proposal.

35. There were very disturbing reports that concluded that the effect of the 2010 proposal would be to cut off many small investors from access to an investment professional and thus result in far less retirement savings. In fact, one study concluded that DOL's proposed regulation would cause (a) over 7 million Americans to lose access to services for starting and/or maintaining IRAs, and (b) as many as 360,000 fewer IRAs to be opened annually. What steps will you take to ensure that any new proposals will not result in fewer Americans creating IRAs to save for retirement? How will you work with interested stakeholders to receive their thoughts before releasing a new proposal?

If confirmed, I would have the Department carefully study these reports and arguments. The Department's goal, of course, is to promote and not impede retirement savings. The Department will consider relevant evidence in developing its new proposal. I can assure you that the rulemaking process of notice and comment will continue to ensure stakeholder input.

Senator Rand Paul

1. There was a 34% jump in hours spend on Official Time at the Department of Labor last year. How would you handle Official Time at DOL? Would you curb the practice to save costs, or even to stem growth of it in the agency?

Official time is governed by the contracts between DOL and the three unions representing its workers. As I understand it, the increase in official time last year was due to the successful negotiation and ratification of a five year contract with the largest of these unions, that representing field staff. If confirmed, I will abide by the terms of those agreements.

2. **The Mine Safety and Health Administration has proposed a nationwide rule on respirable coal mine dust premised on the following claim: "Based on recent data from the National Institute for Occupational Safety and Health (NIOSH), the prevalence rate of black lung is increasing." Data from NIOSH CWP prevalence rates from 2000 through 2011 clearly show CWP rates are significantly declining, contrary to MSHA's premise for the rule. It appears that silicosis may be the real concern, yet the proposal doesn't address it. Do you plan to revisit the rule based upon this data and the fact that the data runs counter to MSHA's claimed reason for the rule?**

   I look forward to learning more about the issues in MSHA's proposed coal mine dust rule, including the issues you raise related to silicosis and data from NIOSH on CWP prevalence rates. If confirmed, I will ensure that rulemaking on these issues complies with the Mine Act and other Federal rulemaking requirements, including careful consideration of public comments, and is based upon the best available evidence.

3. **Do you agree with the Department of Labor's Wage Appeals Board ruling that the practice of deducting union dues from employee wages and returning them to an employer through union job targeting programs on Davis-Bacon Act prevailing wage jobs, is unlawful conduct under the anti-kickback provisions of the Davis-Bacon Act?**

   I am not familiar with the Wage Appeals Board ruling that you reference, nor am I familiar with job targeting programs or the anti-kickback provisions of the David Bacon Act, therefore I cannot commit to any particular position on this issue. If confirmed I will assess these issues mindful that there are " anti-kickback" provisions in the Davis Bacon Act.

4. **Unlike your predecessor, do you intend to enforce the Davis-Bacon Act provisions that bar the "kickback" of any portion of a worker's Davis-Bacon wages to an employer from a union-sponsored job target fund?**

   I am unaware of any action or inaction taken by former Secretary with regard to the anti-kickback provisions of the Davis Bacon Act. I am not familiar with job targeting programs and therefore am presently unable to form an informed opinion on the issue of whether such programs violate the Davis Bacon Act.

5. **Do you agree that union job target funds weaken competition as the Department of Labor's Wage Appeals Board indicated?**

I am not familiar with job targeting programs and therefore am presently unable to form an opinion as to their effect on competition.

6. **While Maryland Secretary of Labor, did you use your position to modify wage and hour definitions and regulations in order for you to more easily allow Maryland independent contractors in the childcare profession to be forced into unions?**

   No. The last wage and hour regulatory change in Maryland was initiated in 2005 and took effect in 2006. I was neither working in state government at the time nor involved in this matter in any way.

7. **As Maryland Secretary of Labor, did you collude, coordinate or work with Service Employees International (SEIU) and/or American Federation of State, County and Municipal Employees (AFSCME) union officials or middlemen to formulate a strategy to bring forced unionism to parents and grandparents and others who provided childcare or home care?**

   No.

8. **How much money has the SEIU, AFSCME, National Education Association (NEA), United Food and Commercial Workers (UFCW), other unions and/or union affiliates, associated 527 committees and their Political Action Committees (PACs) given to you and your campaigns, both directly and indirectly, over the past 25 years?**

   When I ran for Montgomery County Council in 2002 and Maryland Attorney General in 2006, I received the endorsements of some labor unions. However, I do not have the necessary information that would enable me to determine how much direct and indirect support I received from those organizations.

9. **You claim to have been a key advisor to Governor Martin O'Malley, particularly regarding his plans to expand gambling in Maryland. You supported a Maryland Bill that "includes language to ensure that slots jobs are union." Do you believe that the National Labor Relations Act would allow a state to create such a law against private sector employees, forcing them into a union contract by law?**

   I do not believe the National Labor Relations Act would allow a state to create a law that would force private sector employees into a union contract.

10. **Please provide the specific language that you referred to when you said the law "includes language to ensure that slots jobs are union."**

    During my tenure as Secretary of the Department of Labor, Licensing and Regulation in Maryland, there were a number of legislative proposals introduced

regarding whether to allow some form of gaming in Maryland. This was one of the most hotly contested issues in the Maryland General Assembly for years. At the Governor's direction, I visited gaming facilities in the neighboring states of Delaware, Pennsylvania and West Virginia, studied the economic impact of gaming in these states, and prepared a report for the Governor that outlined, among other findings, the hundreds of millions of dollars that Marylanders were spending on gaming in neighboring states.

As I recall, the Maryland law authorizing slot machine gambling contained a so-called "labor peace" agreement. This agreement required applicants for slot machine licenses who have unions actively engaged in representing or attempting to represent their employees, to have a provision that prohibits picketing, stop work actions, boycotts, or other economic interference with the facility's operation within the first five years.

11. Explain specifically how this language "ensure[s] that slots jobs are union." Did you draft this language?

I was not involved in the process of drafting the legislation that was ultimately enacted into law. It is my understanding that the law does not contain language requiring that private sector employers have a unionized workforce.

12. Do you consider forcing people to have union representation pernicious?

As you know the issue of union representation is in the jurisdiction of the NLRB. My understanding is that unions are certified as the exclusive bargaining representative when a majority of the workers choose to be represented by a union or when the employer voluntarily recognizes that the union is supported by a majority of the workers.

13. Do you consider forcing people to have to pay union fees just to get or keep a job to be pernicious?

Again, this issue is in the jurisdiction of the NLRB, not DOL. My understanding is that when workers choose to be represented by a union, the union is required to fairly represent all workers whether they are members of the union or not. Workers may only be required to pay a fee for their fair share of the cost of representing them in collective bargaining.

14. During a Communications Workers of America (CWA) union's attempt to organize Montgomery County Comcast cable employees, did you use your elected position as a Montgomery County Board Member in an attempt to influence, intimidate or otherwise pressure the employer on behalf of CWA union officials?

I always acted appropriately during my service on the Montgomery County Council. As I recall, a number of concerned citizens approached me expressing concerns that Comcast was intimidating employees who were involved in a process to determine whether to become unionized. Comcast's actions included the termination of an employee, apparently because he was involved in the union organizing campaign.

I made a request to Comcast that it remain neutral during the organizing process so that employees could make an informed choice about whether or not to unionize. Other employers have taken similar pledges of neutrality during organizing campaigns. Comcast responded by issuing a subpoena to me demanding information. When Comcast realized its subpoena was without legal basis, Comcast withdrew it and apologized to me.

15. **Did you establish the "five-member commission to assist residents with service and, billing disputes involving Comcast" to create another method to bring pressure on Comcast to force its employees into the CWA union? What means already existed for consumers to complain in Montgomery County?**

    I did not sit on the Council Committee that passed the law establishing the Commission that oversaw cable companies, including Comcast. In response to the numerous complaints about customer service, the Council put into place a series of accountability measures designed to ensure that Comcast, which had significant market control in much of the county at the time, improved its customer service.

16. **Did you collude, coordinate, or work with CWA union officials or middlemen to formulate a strategy to force Comcast to unionize its employees?**

    My response to Question #14 addresses this issue.

17. **At what time during this CWA organizing campaign did you become aware that the "Comcast maintenance technician concerned about the company" was in reality a trained union organizer, a CWA union official, the "son of a union president, and spouse of a union executive," before or after you became involved in the Comcast unionization?**

    My response to Question #14 addresses this issue.

18. **Have you ever helped protect any individual from intimidation, harassment, violence or bullying by a labor union or its employees? If so, please provide details.**

    I do not recall having such an incident brought to my attention.

19. You have given and overseen grants to labor unions for job training funds. Can you list any successful ones? How would you describe a successful job training program? Will you increase auditing or investigations into job training funds that are underperforming as Secretary of Labor?

A successful job training program (1) meets the local employers need for skilled workers; (2) provides opportunities for workers to develop the skills and competencies required to enter or re-enter the job market at the earliest opportunity; (3) leads to an industry recognized credential, and (4) results in a good job that provides family sustaining wages. Job training programs have different goals and strategies customized to industry requirements and the population the program is trying to serve. There is no one size fits all approach to a successful job training program. A veterans program may have different goals and strategies than a program serving migrant and seasonal workers.

It is always important to take the necessary measures to ensure every dollar spent on job training is a dollar well spent, and I look forward to evaluating the effectiveness of programs at the Department of Labor if confirmed. I also would welcome the opportunity to work with the Committee, if confirmed, on the reauthorization of the Workforce Investment Act, which provides a great opportunity to ensure accountability and effective operation of job training programs across America.

20. Since serving in the Obama Justice Department, have you ever been approached by labor union officials regarding state voter identity laws? If so, provide the details about the contact regarding the time, place and contents of the conversations.

In the course of our review of the numerous voter identification laws that have been passed in a number of states, we receive information from a wide array of interested individuals, organizations and government officials. The Civil Rights Division encourages interested parties to provide potentially relevant information to us, and let us know their views. We often receive voluminous amounts of information, depending on the specific circumstances of the law. 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.

21. Are you aware of any unions that have pushed for undocumented voting in U.S. elections? Did the knowledge that your political supporters were opposed to state voting integrity laws influence your actions to influence state laws that prohibited undocumented voting?

I am unfamiliar with the term "undocumented voting." To the extent that this term means voting by undocumented immigrants, I am unaware of any labor

unions who have advocated that undocumented immigrants be given the right to vote.

22. Do you believe that union representational elections should be undocumented?

Again, this issue is in the jurisdiction of the NLRB, not DOL. I believe that what is most important is that workers are able to make their own free and fair choice about whether to join or form a union. My understanding is that this has been done for years by both secret ballot elections and by card check.

23. Do you think representational elections, the consequences of which could last someone's entire career, should be carried by secret ballot?

My response to the previous question addresses this issue.

24. Do you think that undocumented voting and/or no secret ballot should be allowed in union internal elections? Do you think the Labor-Management Reporting and Disclosure Act (LMRDA) allows such undocumented elections? Do you think the LMRDA prohibits contested elections to be decided without a secret ballot?

My response to Question #23 addresses this issue.

25. The codified LMRDA unambiguously states that, "Employer means any employer or any group or association of employers engaged in an industry affecting commerce (a) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees …" excluding only "… the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof." As Secretary, will you enforce the LMRDA and correct regulations that have been written to erroneously exempt labor organizations from reporting their labor persuader activities through middlemen and organizations like Wake-Up Walmart, Justice for Janitors, ACORN and similar organizations? Will you enforce labor persuader reporting by the aforementioned union labor persuaders?

I am not aware of any pending rulemaking where the Department has proposed such an interpretation. I do not believe that the LMRDA, since its enactment in 1959, has ever been interpreted in this manner. If confirmed, I look forward to learning more about the issue and working with the Members of the Committee and other stakeholders to address LMRDA reporting in a balanced way.

26. Have you ever been a member of a labor organization? Have you made a loyalty oath to a labor organization? If so, have you disavowed your oath?

I have never been a member of a labor union.

27. Unions represent only a small fraction of private sector employees. With this in mind, do you plan to continue to make labor union officials the major source of your appointments bench?

If confirmed, I intend to continue my longstanding practice of hiring the best qualified candidate for the position. This has always been my practice, and it has served me and the organizations where I have worked well.

28. As Maryland Labor Secretary, one of your high profile appointees was James R. "Ron" DeJuliis to Commissioner of Labor and Industry. He was the president of the Baltimore Building and Construction Trades Council and a former International Union of Operating Engineers business manager. Is this the type of appointment we should expect from you at U.S. Department of Labor?

Mr. Ronald DeJuliis, the Commissioner of Labor and Industry in Maryland, has extensive relevant experience and is a well-respected leader in the community.

29. Are you going to allow the Inspector General to vet and have veto power over any of your possible future appointees at DOL?

I plan to follow the current process for political appointees at DOL.

30. Title VII of the Civil Rights Act of 1964, protects employees from employer and union discrimination on the basis of, among other things, religion. The only way in which an employee can claim their rights under Title VII is to first file a charge with the Equal Employment Opportunity Commission (EEOC). In your capacity as Assistant Attorney General for Civil Rights in the Justice Department, you signed on to the Obama Administration's brief in the Hosanna-Tabor case. Many would say that brief turned a remarkably blind eye towards the protection of religious faith. Explain your view of the rights of religious objectors to association with unions under both Title VII and the First Amendment.

The issue in the *Hosanna-Tabor* was whether a church, acting as an employer, was free to retaliate against an employee – in this case, a teacher in a religious school who taught a mix of secular and religious subjects – for alleging she suffered discrimination based on her disability. The government's brief in the case, which was submitted by the Solicitor General of the United States, and followed long-standing precedent on the appropriate approach to constitutional analysis in urging the Court to take a case-by-case approach to resolving the important constitutional issues related to the application of federal nondiscrimination laws to religious organizations in their capacity as employers. The brief acknowledged the statutory hiring exemptions that religious

organizations have enjoyed for decades under Title VII, the Americans with Disabilities Act and other federal civil rights statutes.

The Court's ruling is the law of the land, and one that I will faithfully execute.

With regard to the rights of religious objectors to association with unions, the EEOC has made clear that "absent undue hardship, Title VII requires employers and unions to accommodate an employee who holds religious objections to joining or financially supporting a union." *EEOC Compliance Manual, Section 12: Religious Discrimination*. This is a case-by-case determination.

Senator Orrin Hatch

1. **I have some serious concerns about the Civil Rights Division's efforts to enforce the Freedom of Access to Clinic Entrances (FACE) Act. As you know, the FACE Act prohibits the physical obstruction, intimidation, or the use or threat of force outside of abortion clinics. However, the statute – not to mention the First Amendment – expressly protects the right of "expressive conduct," which includes peaceful demonstrations. Under your leadership, it appears that the Civil Rights Division, on several occasions, used FACE Act complaints to intimidate peaceful protestors outside of abortion clinics. And, as it turns out, the courts haven't taken too kindly to this approach.**

   In one such case, filed against a peaceful protestor named Susan Pine, DOJ prosecutors presented no evidence that the defendant had violated the statute. The federal judge remarked that the Department of Justice lawyers' actions in the case were "negligent, and perhaps even grossly negligent." Furthermore, the judge wondered "whether this [prosecution] was the product of a concerted effort between the Government and the [clinic], which began well before the date of the incident at issue, to quell Ms. Pine's activities rather than to vindicate the rights of those allegedly aggrieved by Ms. Pine's conduct." This was not an isolated incident, indeed, in several other FACE prosecutions filed under your leadership, judges have not only refused to issue injunctions or grant motions for summary judgment but cautioned that the Civil Rights Division's aggressive approach actually threatened the freedom of speech.

   In some of your writings, you touted your efforts to increase the number of complaints filed under the FACE Act. What standards – strength of evidence, egregiousness of conduct, etc. – did you have in place at the Civil Rights Division to determine whether to bring a complaint under the FACE Act? Was there, to your knowledge, any instance in which Civil Rights Division attorneys brought FACE Act cases for the purpose of intimidating protesters and discouraging peaceful demonstrations outside of abortion clinics?

Federal law protects the right of people to safely obtain and provide reproductive health care. Under the Freedom of Access to Clinic Entrances (FACE) Act, patients have the right to access reproductive health care free from force, threats of force, or physical obstruction. The law also bars the use or threat of force to intimidate or interfere with those seeking to obtain or provide reproductive care, as well as intentional damage to facilities that provide reproductive health services. The FACE Act contains both criminal and civil provisions. The Department has filed nine civil FACE cases between 2009 and 2012. Only one civil FACE case was filed from 1999 through 2008. Of the nine cases filed since 2009, seven settled in the Department's favor resulting in either permanent buffer zones for defendants or money damages paid to victims (and one is still pending). On the criminal front, the Division brought 11 cases, convicting nine defendants. One of these criminal prosecutions is still pending, and there has been one acquittal.

The case you reference, *Holder v. Pine* was based in part on a police officer's account that Defendant was obstructing traffic to the entrance of the clinic. The obstruction lasted long enough for the police officer to observe Defendant's actions, park his car, walk 200 feet to where Defendant was obstructing, and ask her to stop under threat of violating state law against obstructing traffic; only at that point did Defendant move and allow the driver to drive into the clinic parking lot. The police report and other evidence fully supported the Division's determination that the Defendant's conduct constituted a FACE violation. It should be noted that during her deposition, the Defendant did not deny obstructing traffic and instead claimed that she could not recall anything about the incident.

Holder v. Pine is the sole FACE case, civil or criminal, out of twenty brought during my tenure to be dismissed by a court. The Division brings complaints where the evidence suggests a violation of the statute. That is the sole basis used to determine whether or not to bring a FACE case. While I have been AAG, Division attorneys have never brought any case, with respect to any statute, to intimidate protesters or discourage peaceful demonstrations.

2. **According to news reports, at the conclusion of the unsuccessful FACE Act lawsuit against Susan Pine, the Department of Justice agreed to pay Ms. Pine $120,000 in attorneys' fees. In how many instances did the Civil Rights Division pay attorneys' fees, costs, or settlement fees over its involvement in a case? Please provide details on all such instances since January 20, 2009.**

Since January 2009, the Civil Rights Division has paid attorney's fees in only one case involving the Division's enforcement of the civil rights laws under its jurisdiction:

- *Holder v. Pine* (S.D. Fla.) (the Department of Justice (DOJ) filed a complaint under the Freedom of Access to Clinic Entrances Act alleging

one act of physical obstruction; summary judgment was granted in favor of the defendant in January 2012; DOJ paid $120,000 in "attorney's fees and costs" to the defendant in March 2012 under a joint stipulation that the parties filed with the district court).

During the same period, the Division paid costs in five cases involving the post-January 2009 enforcement of civil rights laws under the Division's jurisdiction. The assessment of costs is a routine matter that occurs in most civil cases.

- *South Carolina v. United States* (D.D.C.) (the State of South Carolina filed a complaint against the United States in February 2012 seeking preclearance under Section 5 of the Voting Rights Act for the State's new photo voter identification requirement; judgment was entered partially in favor of the State and partially in favor of the United States in October 2012; costs of $53,980.05 were assessed against the United States in January 2013).

- United States v. Board of Education of the City of Chicago (N.D. Ill.) (complaint and consent decree filed by United States to desegregate school district in 1980; court ordered judgment for defendant on motion for unitary status and other grounds; costs assessed against United States in December 2009 ($22,681.25)).

- *United States v. Henry County* (C.D. Ill.) (the United States filed a complaint alleging that the defendant violated Title VII of the Civil Rights Act of 1964 by subjecting a woman to a hostile work environment; the jury returned a verdict for the defendant; costs of $2,530.54 were assessed against the United States in March 2011).

- *United States v. Hurt* (E.D. Ark.) (DOJ filed a complaint in March 2009 alleging that the defendants engaged in a pattern or practice of sex discrimination in violation of the Fair Housing Act; the jury returned a verdict in favor of defendants in November 2010; costs of $16,008.51 were assessed against the United States in March 2011).

- *United States v. Texas* (5th Cir.) (in 2008, the district court found that defendants denied students with limited English proficiency equal educational opportunities, in violation of the Equal Educational Opportunities Act; the United States argued as appellee that the district court's findings were not clearly erroneous; the court of appeals ruled in favor of the defendants; costs of $878.85 were assessed against the United States in May 2010).

In three other cases, the Division paid costs after January 2009 related to litigation that occurred prior to that date:

- *Northwest Austin Municipal Utility District Number One v. Gonzales* (D.D.C.) (a complaint was filed against DOJ in 2006 seeking bailout and challenging the constitutionality of Section 5 of the Voting Rights Act; bailout was granted in November 2009; costs of $6,221.47 were assessed against DOJ in July 2010).

- *Rothe Development Corp. v. U.S. Department of Defense* (W.D. Tex. & Fed. Cir.) (plaintiff challenged the constitutionality of a Department of Defense program aimed at increasing contracting with small businesses owned by minorities and other socially and economically disadvantaged individuals; DOJ successfully defended the constitutionality of the DOD program in the district court, but the Federal Circuit held in November 2008 that the program was unconstitutional; in August 2009, the district court awarded costs of $38,996.54 to the plaintiff as the prevailing party in the Federal Circuit appeal).

- *United States v. Shanrie* (S.D. Ill.) (in 2005, DOJ filed a complaint alleging that defendants engaged in a pattern or practice of disability discrimination by failing to design and construct multifamily housing in compliance with the Fair Housing Act; the jury returned a verdict in favor of one defendant in May 2008; the district court awarded $6,337.02 in costs against the United States in October 2008, and the costs were paid to the defendants in June 2009).

3. **As you know, in *Hosanna-Tabor v. EEOC,* the Supreme Court unanimously held that the First Amendment protects churches or religious organizations from lawsuits over the hiring or firing of their ministers. This is the so-called ministerial exception that had been recognized by federal appeals courts for more than forty years. As I noted during the confirmation hearing, you signed a brief opposing any such constitutional protection for churches and religious organizations.**

   In your expert legal opinion, did the Supreme Court decide the case wrongly? Do you personally believe the government should be able to sue churches over their hiring and firing decisions with regard to clergy?

   As noted in response to a question from Senator Paul, it is a foundational principle of our democracy that the Supreme Court states what the law is. The Court's authoritative ruling that the ministerial exemption exists, and that the exemption is embedded in the religion clauses of the First Amendment, is the law of the land. I respect that ruling and will faithfully execute it should it be applicable in the course of my duties.

4. **As you may be aware, the Employee Benefit Security Administration (EBSA) within DOL is expected to propose sweeping reforms this year that will dramatically impact the way IRAs are marketed and distributed to investors**

putting many existing IRA providers out of business. The expected proposed regulations covering Individual Retirement Accounts (IRAs), commonly referred to as the "definition of fiduciary" regulation, is expected to impose a broader pension plan–based fiduciary standard on those who market and distribute IRAs. In the meantime, the SEC has recently issued a Request for Information regarding a possible different fiduciary standard for retail investments as contemplated by the Dodd-Frank legislation. IRA investors are individual, retail investors.

A. Why should IRAs be subject to burdensome, institutional pension plan fiduciary standards rather than the SEC standard to be applied to all other retail investment accounts?

I understand that the Department has stated that it believes there is strong evidence that unmitigated conflicts cause substantial harm, and is confident that a conflict of interest regulation would combat such conflicts and deliver significant benefits to plan participants and IRA holders. I further understand that EBSA officials have publicly stated that they have been and will continue to work closely with the SEC to address practical differences. If confirmed, I would look forward to learning more about this issue and EBSA's proposed approaches to it.

B. Keep in mind that many investors use the same investment advisor for investment advice related to investments in both their IRA and non-IRA accounts, often discussing these investments at the same meeting. Why subject investors and their advisors to two separate fiduciary standards for obtaining investment advice in this situation, needlessly increasing burdens and costs?

My response to the previous question addresses this issue as well. If confirmed, I would make certain that the Department works with the SEC to ensure that any future fiduciary - conflict of interest requirements applicable to investment advisers and broker-dealers under the applicable laws are properly harmonized.

C. On March 15 eight members of the House Financial Services Committee sent the acting Secretary of Labor a letter saying that the proposed expansion of the fiduciary standard could cause many brokers who serve IRA accounts to exit the market and, if that happened, make IRA services unattainable by many retirement savers in the African-American community. Isn't this also a good reason to allow the SEC to determine the appropriate fiduciary standard for retail investment advice, including for IRA accounts? Please explain.

I understand that the Department is examining evidence regarding the validity of that assertion. I am certainly interested in learning more about that question.

D. A "wrap account" is a professionally managed investment account that includes investment commissions, management fees and other expenses in a single annual charge, usually two percent or three percent of the account balance. Is it EBSA's intention through promulgation of the "definition of fiduciary" regulation to force all IRA owners into wrap account arrangements and, as a practical matter, to end commission-based investment advice for IRA owners?

I understand, and agree, that any EBSA rule in this area should be written with an objective of preserving business models that are beneficial to workers who have retirement plans and IRA accounts.

E. Many brokers will not accept wrap account customers unless the account is large enough to justify the annual fees. If the "definition of fiduciary" regulation is implemented, where will IRA owners with small accounts go for investment advice?

My responses to previous questions address this issue.

5. In recent years, there have been a number of instances wherein Executive Branch regulations have, in the views of many Members of Congress, either appeared to conflict with the intent of Congress or exceeded an agency's statutory authority. Do you agree that there are boundaries on the Department of Labor's rulemaking authority? Aside from statutes and executive orders, what limitations do you believe exist on the Department of Labor's authority to promulgate regulations? In your view, what is the status of a rule that exceeds these limitations?

A regulatory agency's authority is bound by statutes and executive orders. These statutes and executive orders however, are not prescriptive and give agencies discretion in interpreting their broad requirements. I am not aware of any rule that exceeds these limitations.

6. To what extent should the economic cost of implementing a new regulation be a factor in determining whether the Department of Labor should issue a regulation? In your view, when embarking upon a rulemaking, how thorough should the Department of Labor be in its cost-benefit analysis? For example, should the DOL:

A. Conduct focus groups to better determine costs of compliance?

B. Follow "best practices" in its economic analysis?

C. Rely upon unscientific studies from third parties to substantiate a position?

If confirmed, I will ensure that the Department complies with all statutory obligations and executive orders when promulgating regulations, including Executive Orders 12866 and 13563, which require that agencies ensure that the benefits justify the costs when issuing regulations.

Consistent with EOs 12866 and 13563, I will ensure that the Department's rulemaking process is open and transparent and, where appropriate, accommodate hearings, focus groups, public submission of data, studies, costs of compliance, and the like.

7. Under the current economic climate – with slow overall growth and lagging job creation – should the Department of Labor refrain from issuing regulations that may impact job growth? Why or why not?

EO 12866 requires that every regulation have a Regulatory Impact Analysis, which focuses on the monetized costs and benefits of regulations and also generally report the impact of the regulation on employment. The Department's regulatory approach must strike a balance between the benefits and any untendered consequences as well as adherence to the statutory requirements it is charged to uphold.

8. As you know, when regulations are proposed by the Department of Labor, the general public is given an opportunity to submit comments. What impact should these comments have on whether a regulation is finalized? Under what circumstances would you ignore the public's comments on proposed regulations? Under what circumstances would you withdraw a proposed regulation in light of public reaction?

The rulemaking process is required to be open and transparent and invite public participation. It is the agency's job to assess the information and determine whether to regulate and if so, the best regulatory approach.

9. Last year, the Department of Labor proposed revisions to the "advice exemption" for the Labor-Management Reporting and Disclosure Act's "persuader activity" regulations. Specifically, it expanded the range of activities that would be considered as "persuader activity" to include any advice – including legal advice – given to an employer for the purpose of persuading employees with regard to union organizing. Under the proposed rule, all such advice would have to be reported. In addition, any attorney or law firm providing such advice to one client would have to disclose all labor-

related services provided to all clients, even if the services did not involve persuader activity.

This proposed regulation would overturn decades of regulatory practice wherein advice from attorneys or advisors that did not include direct contact with employees was exempt from LMRDA disclosure requirements. It has been extremely controversial, receiving more than 7,000 comments from the public and condemnation from various corners of the legal and business community.

A. Are you aware of the Department of Labor's proposed regulation to all but eliminate the "advice exemption" from LMRDA reporting requirements? What are your views regarding this proposed regulation?

B. In your view, what purpose does the "advice exemption" serve? What was Congress's intent in expressly carving out this exception from the LMRDA reporting requirements?

C. The American Bar Association has asserted that the proposed revisions would violate Rule 1.6 of the Model Rules of Professional Responsibility by forcing attorneys to breach their ethical obligations to maintain attorney-client confidences. The ABA also has asserted that the proposed revisions will make it more difficult for clients to retain attorneys for what, before the proposed revision, would have constituted "advice" exempt from reporting. Thus, the proposed revisions would make it more likely that lawyers will violate attorney-client confidences and more difficult for employers to establish attorney-client relationships. Do you agree with these assessments from the ABA? Why or why not?

D. When a lawyer's obligation under state bar association disciplinary rules – subject to sanction or disbarment – to maintain client confidences conflicts with reporting obligations under the LMRDA, which could lead to criminal prosecution for failure to report, which rules should the lawyer follow? Should the lawyer expose himself to discipline and disbarment by reporting or criminal prosecution by not reporting?

As I understand it, the Department's proposed persuader rule would expand when employers and consultants are required to report when consultants are hired to "persuade" employees not to organize. Currently, if the "persuader" is giving "advice" they need not report, and anything a consultant does or says is considered "advice" unless the consultant is directly interacting with the employees. This regulation would limit the statutory "advice" exemption to the natural definition of advice. Pure advice would not trigger disclosure requirements, but a consultant who directs supervisors on anti-union efforts,

shares anti-union literature, or develops personnel policies in order to discourage unionization would**.**

I am aware of the notice of proposed rulemaking but have not had time to study the issue in great detail. If confirmed, I look forward to learning more about the issue and working with the Members of the Committee and other stakeholders to address LMRDA reporting in a fair, legal, and balanced way.

As I understand it, under the proposed rule a lawyer would not have to choose between his or her duty to maintain client confidences and his duty to report under the LMRDA. I agree that a lawyer should not be placed in such a situation.

10. One of the concerns I have is the impact of the proposed revisions to the persuader activity regulation will have on small businesses. Typically, small businesses do not have in-house labor relations or legal expertise which many larger companies do. It's precisely at the time when a small employer receives a petition for representation - and thereafter during the union organizing campaign, the election, and bargaining for a first contract - that small businesses are most in need of the very "advice" that would require disclosure and reporting under the proposed revisions. Left uncounseled, many small businesses might say or do something that constitutes unfair labor practices under the National Labor Relations Act, especially given the changing rules and reversal of long-standing precedents from recent NLRB decisions.

Many labor law firms will likely not be willing to provide advice covered by the proposed revisions if it means the law firm would be compelled to report all other labor relations services for all clients, even if the services do not include persuader activity. As a result, it will likely be more difficult for employers - especially small businesses - to find legal advice.

When the economy is still struggling, is it appropriate for the government to be proposing burdensome and costly regulations which would make it more difficult for small businesses to comply with the law, and more difficult to operate, compete, and create jobs? Please explain.

I am aware of the notice of proposed rulemaking, but have not had time to study the issue in great detail and to determine what steps should next be taken with regard to this rulemaking. If confirmed, I look forward to learning more about the issue and working with the Members of the Committee and other stakeholders to address LMRDA reporting in a balanced way.

11. The recent Inspector General report on the Voting Rights Section described a number of problems in the Section. Have you disciplined the employees

who were found to be abusive, misusing government resources, leaking information and/or gave misleading statements to the IG?

I take very seriously any evidence that Department employees have engaged in improper behavior. Although I cannot disclose individual personnel decisions, the Division is continuing to review the Inspector General's report and will respond appropriately with regard to individuals who are still employed by the Department.

More generally, most of the instances of unprofessional conduct examined in the recent OIG Report occurred in the period from 2004 to 2007, including some instances from nearly ten years ago. To the extent that the OIG Report identifies issues relating to current staff, we are taking appropriate steps to address these issues and to prevent their recurrence where possible. In addition, as the OIG Report acknowledges, the Division has already taken significant steps to address instances of improper or unprofessional conduct. *See* OIG Report 133-34. These measures include implementing annual training on anti-discrimination and anti-harassment obligations for all staff, developing and posting policies on prohibited personnel practices, and routinely reminding all employees of their obligations to conduct themselves in a professional manner at all times. Under my leadership, the Division has also adopted policies that are designed to ensure that career attorneys can express their views as part of the process of deciding on the Division's position on objections under Section 5 of the Voting Rights Act; these policies respond to prior decisions that excluded career attorneys from the process and led to friction in the Section. In response to the OIG Report, moreover, the Division will again reiterate for all staff their professionalism obligations, including the prohibition on harassment based on perceived political ideology. The OIG Report has identified additional measures that may allow the Division to accomplish its mission even more effectively in the future, and the Department will of course consider those recommendations.

12. **The recent IG report indicated that the Voting Rights Section, under your leadership, hired almost exclusively individuals with either Democratic Party or liberal political affiliation. While the IG determined there was insufficient evidence to conclude that this was intentional, the results were that individuals with either conservative or no affiliation were not hired in proportion to their level of application.**

    Given that you are a strong proponent of the use of disparate impact in many areas of the law, wouldn't it have been appropriate for the Civil Rights Division's hiring programs to avoid a disparate impact upon conservative or non-affiliated attorneys?

    The OIG Report did not conclude that individuals with conservative affiliations were not hired in proportion to their level of application. The OIG report found that only 2% of the applicant pool had Republican or conservative affiliations,

Report at 205; only one applicant with Republican or conservative affiliations was "highly qualified academically," Report at 213; and none of the conservative-affiliated applicants had voting rights litigation experience. Report at 208.

If a disparity had existed, which the data do not show, remedying it would have required inquiry into and consideration of applicants' political affiliation. This practice is prohibited by federal law and Department policy and I have scrupulously refrained from inquiring into the political or ideological affiliation of any applicant or employee. As the OIG Report discusses, the Civil Service Reform Act of 1978 "prohibits consideration of political affiliation in hiring for career positions." In addition, "The use of political affiliation as a criterion for considering applicants for career attorney appointments may violate several prohibited personnel practices." Report at 182. Under my leadership, the Civil Rights Division has made it a priority to restore merit-based, non-partisan hiring. The report stated: "The [current] hiring policy also emphasized that hiring in CRT is based on merit-based principles and should never involve discrimination based on race, age, political affiliation, or other prohibited factors. Members of CRT hiring committees are required to attend training on merit system principles, prohibited personnel practices, and hiring and interviewing policies, and must certify that they will comply with applicable requirements." Report at 192. The OIG Report vindicated the new policies and procedures that we have put into place to ensure merit-based hiring.

Lastly, I note that working for civil rights organizations does not necessarily correlate with a "liberal" political ideology. Attorneys from across the ideological spectrum have historically worked for and supported the work of a variety of civil rights organizations. I believe it is incorrect to suggest that a person must be affiliated with only one political party to have worked in a civil rights organization.

13. In its FY 2014 budget request, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) requested a $1.1 million funding increase. OFCCP's priorities include reducing wage disparities between men and women, and monitoring the construction trades to "eradicate gender, racial and ethnicity-based discrimination." Do you support application of disparate impact theory to compliance evaluations of federal contractors?

OFCCP has enforced Executive Order 11246 since its inception by applying Title VII principles – that is the way courts and other federal agencies interpret and apply Title VII of the Civil Rights Act of 1964. For four decades, this has included the principle that an employment practice may be neutral on its face but cause an illegal disparate impact against women, minorities or other protected groups. OFCCP has and should continue to address any form of discrimination by federal contractors, whether it takes the form of disparate treatment, disparate impact or failure to accommodate, to ensure that contractors live up to their contractual promise of equal opportunity.

14. The Bureau of Labor Statistics indicate that since 2002 there has been a persistent gender gap in median weekly wage for full-time, union employees. Last year, this was a $120 difference between wages paid to men and women. At the same time, OFCCP Director Patricia Shiu recently announced plans to boost the proportion of women working in trade jobs for federal contractors from 2.6 percent to 6.9 percent.

To the extent that the President has encouraged agencies to adopt Project Labor Agreements (PLAs) for federal construction contracts, would it be reasonable to expect OFCCP to extend its compliance evaluations to include labor unions? Would you support the use of disparate impact theory in this context?

I understand that the use of PLAs has led to an increase in the representation of women and minorities in various construction projects in some instances. However, OFCCP's jurisdiction covers federal contractors and subcontractors, not labor unions.

15. According to public documents, in *United States* v. *AIG Federal Savings Bank and Wilmington Finance,* AIG was to pay "a minimum of $1,000,000 to qualified organization(s) to provide credit counseling, financial literacy, and other related educational programs." In *United States v. Sterling,* the Department of Justice ordered that any remaining funds after payments from a $2.625 million lawsuit settlement to those harmed go to "qualified" organizations."

During your tenure at the Civil Rights Division, how many settlements or consent agreements has the Civil Rights Division entered into with similar provisions? How did DOJ define qualified organization? Who decided what organizations met those criteria? How did they make that decision? Please provide a list of all qualified organizations (or other third-party beneficiaries of such agreements) and the amounts paid to them from January 20, 2009 through April 18, 2013.

In many of the Department's settlements of pattern or practice discrimination cases a victim fund is established to compensate any victims identified post-settlement. When this occurs, the Department's goal is to find and compensate as many victims of discrimination as possible. After the notice period ends and all located victims have been compensated, the court may order that any unclaimed money be paid to non-profit organizations dedicated to purposes set forth in the consent order. These organizations must have the requisite qualifications and expertise in the areas specified in the consent order. Consent orders that allow any remaining funds to be disbursed to qualified organizations have

been filed under previous Administrations as well. For example, during the second Bush Administration 26 consent decrees had provisions that unspent victim funds would be disbursed to organizations.

Under my tenure, there have been 23 consent orders that allow remainders to be paid to qualified organizations. All require that the defendants propose or agree to the selection of the organizations; all but one also requires that the court approve the selection of the organization and the disbursement of funds to the organization.

In addition, there was one settlement agreement to resolve allegations that Wells Fargo violated the Americans with Disabilities Act, where Wells Fargo agreed to make a charitable contribution to non-profit organizations "to be used for the purpose of assisting veterans with disabilities resulting from injuries sustained while serving in Iraq or Afghanistan to live independently in the community." Under that settlement agreement, Wells Fargo proposed the organizations to receive funds and the organizations receiving funds had to be acceptable to the Division. Furthermore, there have been two consent orders and one settlement agreement involving redlining or similar claims where defendants were required to provide money to community or governmental organizations for financial literacy and similar activities as part of the injunctive relief under the settlement rather than as part of a provision related to a victim fund. In all cases, the defendants proposed the organizations. Similar provisions were in three redlining settlements reached during the second Bush Administration.

The Department does not have the authority under these agreements to unilaterally determine which organizations receive funds. From January 20, 2009 to April 18, 2013, the Civil Rights Division entered into 17 settlements in which victim fund money not paid to victims was to revert to the defendants and 23 settlements in which victim fund money not paid to victims was to be disbursed to organizations.

The following organizations received funds under decrees or settlement agreements entered from January 20, 2009 to April 21, 2013:

- Injured Marine Semper Fi Fund ($100,000)
- Canine Companions for Independence ($125,000)
- Disabled American Veterans ($100,000)
- Homes for our Troops ($125,000)
- Hope for the Warriors ($100,000)
- Southeastern Guide Dogs ($125,000)
- Puppies Behind Bars ($100,000)
- Paralyzed Veterans of America ($125,000)
- Sentinels of Freedom ($100,000)

- Housing Rights Center ($24,000)
- National Urban League ($422,790.97)
- Operation Hope ($422,790.98)
- American Financial Services Associated Education Foundation ($422,790.98)
- Georgia Legal Services Fair Housing Law Training Program ($30,000)
- National Ass'n of Real Estate Brokers ($73,900.95)
- Women's Council of NAREB ($33,000)
- Houston Area Urban League ($30,000)
- Urban League of Greater Dallas ($22,000)
- Business and Community Leaders of Texas ($22,000)
- East Dallas Community Organization ($22,000)
- North Texas Housing Coalition ($22,000)
- Fifth Ward Community Redevelopment Corp. of Houston, TX ($22,000)
- Downtown Housing Improvement Corp. of Raleigh, NC ($22,000)
- Consumer Education Services, Inc. of Raleigh ($22,000)
- CCCS, A Division of Triangle Family Services, Inc. of Raleigh ($22,000)
- Avenue Community Development Corp. of Houston ($11,000)
- Gulf Coast Community Services Association of Houston ($11,000)
- Credit Coalition of Houston ($11,000)
- Raleigh Area Development Authority, Inc. ($11,000)
- Telamon Corp. of Raleigh ($11,000)
- National Community Reinvestment Coalition ($15,000)
- Metropolitan Milwaukee Fair Housing Council ($15,000)
- Army Emergency Relief ($1,469.279.89)
- Air Force Aid Society ($239.599.20)
- Navy Marine Corps Relief Society ($225,546.20)
- Coast Guard Mutual Assistance ($10,910.71)
- Detroit Non-Profit Housing Inc. ($1,500)
- Family Tree ($1,500)
- Young Detroit Builders ($1,000)
- New Hope Community Development, Inc. ($1,000)
- Abayomi ($1,000) (Community Development Corporation based in Detroit)
- Live Midtown ($3,000)
- Community Resource Forum-No Family Left Behind ($4,000)
- U SNAP BAC ($4,000)
- National Faith Homebuyers ($4,000)
- Mission of Peace ($4,000)

16. As of March 2013, the overall unemployment rate was 7.6 percent, with 11.7 million Americans out of work and more and more discouraged Americans giving up their search for employment. For teenagers, the employment situation is even worse. The unemployment rate for individuals aged 16-19 is 24.2 percent. African-American teenagers face an unemployment rate of 30.9 percent, while Hispanic teenagers face a 28.1 percent unemployment rate. If confirmed, what actions will you take to address this youth unemployment crisis?

I share your concern about unacceptably high youth unemployment, particularly for youth of color. While the Department of Labor's programs such as the Workforce Investment Act youth formula funded program, Job Corps, and YouthBuild continue to provide services and support to many of the Nation's disadvantaged, low income youth, I will explore, if confirmed, administrative, programmatic, and legislative ways to improve the outcomes for these youth. I believe we need to support new, promising service models and build evidence about what best addresses the problems faced by these youth. I think that this is an area where public-private partnerships with foundations and business could provide immediate solutions. I look forward to working with you and Members of the Committee to help improve the education, employment and other key outcomes for disadvantaged, low income youth should I be confirmed.

17. Recently the Senate held a hearing entitled, "Job Corps Budget Shortfall: Safeguarding Workforce Training for America's Disconnected Youth." The hearing examined financial mismanagement at Job Corps, which has resulted in budget shortfalls of tens of millions of dollars and, most recently, a temporary suspension of new student enrollments in the program. What specific steps would you take to address the problems at Job Corps, including any program restructuring, management changes, and requests for additional funding, and the like?

If confirmed I would begin immediately by getting fully briefed on the procurement, budgeting and programmatic components of Job Corps. While I am well aware of the importance of the Job Corps program, from my prior work as Labor Secretary in Maryland, I have not been involved at a national level. As a result, I look forward to learning about the entirety of the Job Corps operation.

Initially I also look forward to receiving the upcoming reports from the Office of Inspector General. His office is scheduled to complete the audit of the PY11 and early PY12 programs in May, so I believe that work will provide valuable information on how to make sure that the program is on solid ground moving forward. I also will look at the previous work that the OIG has done to see how the agency has responded or resolved any earlier weaknesses that were evidenced.

I am pleased, as is the whole Job Corps community, that the stop work order on Outreach and Admissions contractors was lifted on April 11, 2013, and that the

freeze on enrollments was lifted on Monday, April 22, 2013. The first step to strengthening this program is to start enrolling students.

18. **The Senate HELP Committee recently held a hearing examining Senator Harkin's proposal (S. 460) to raise the minimum wage to $10.10 per hour, a 39 percent increase over its current level. It is well-established that minimum wage increases lead to a "substitution effect," whereby higher-skilled, more experienced or efficient workers replace lower-skilled, less experienced or efficient workers. Indeed, Christina Romer, President Obama's former Chair of the Council of Economic Advisers, argued precisely that in a recent *New York Times* column. Do you support proposals to increase the minimum wage despite its tendency to price younger, less-experienced workers out of the labor market? If you support increasing the minimum wage, how will you compensate for any resulting decrease in entry-level job opportunities available to younger workers?**

    The President supports raising the minimum wage because it would directly boost wages for millions of workers and reduce poverty and inequality. A range of economic studies show that modestly raising the minimum wage increases earnings and reduces poverty without jeopardizing employment. Around 60 percent of workers benefiting from a higher minimum wage are women. Less than 20 percent are teenagers. These factors show that raising the minimum wage directly helps parents make ends meet and support their families.

    Creating pathways to work and to good jobs for all Americans is one of the most important things we can accomplish as public servants, and I welcome the opportunity to work with the Member of the Committee to realize that objective, if confirmed.

19. **While serving as Secretary of Maryland's Department of Labor, Licensing and Regulation you supported "living wage" legislation requiring certain private service and maintenance contractors to pay their employees elevated hourly rates for work on government contracts. Those rates currently stand at $12.91 per hour for more urban areas and $9.70 for more rural areas of Maryland. Meanwhile, Maryland follows the federal minimum wage of $7.25. Do you support a federal living wage law and, if so, at which precise hourly rate would you set the wage? What process would you suggest to set an appropriate wage level?**

    The federal government already has laws that reflect the policy goal of protecting prevailing wages, the Davis-Bacon Act and the Service Contract Act are two such examples. We also have a federal minimum wage law. The President has proposed an increase in the minimum wage, and I support the President's initiative.

Senator Pat Roberts

1. **The Labor Department has indicated its wishes to publish a final rule at the end of April revisiting its interpretation of the "advice" exemption from reporting requirements under the Labor Management Reporting Disclosure Act (LMRDA). This proposed rule would narrow the scope of the advice exemption which applies to advice given by counsel as long as there is no direct interaction with employees.**

    a. **The LMRDA helps to enforce transparency equally to employees and employers. Mandating the reporting of legal advice sought by employers to educate themselves on labor options may deter counsel from accepting these inquiries. Do you believe this narrowing of exemption would take away the resources employers have to obtain informed, educated, legal options?**

    b. **Do you believe this places an unfair difficulty on employers who wish to seek informed legal options?**

    I am aware of the notice of proposed rulemaking, but have not had time to study the issue and to determine what steps should next be taken with regard to this rulemaking. If confirmed, I look forward to learning more about the issue and working with the Members of the Committee and other stakeholders to address LMRDA reporting in a balanced way.

2. **As you know, one of the Occupational Safety and Health Administration's (OSHA) top priorities for this year is mandating employers to implement an Injury and Illness Prevention Program (I2P2).**

    a. **Do you not believe the authority that OSHA's administers currently has significantly contributed to the declination of work-related injuries?**

    There is ample evidence that the work of OSHA has contributed substantially to the decline of workplace injuries. Yet every year, there are still thousands of workers killed in the workplace each year, and another 4 million are injured. I am interested in learning more about what we can do to ensure safe and healthy workplaces, and I look forward to working with Congress on this important priority.

    b. **What universal mandates do you believe would reduce workplace injuries and illnesses without significant cost or burden to the employer?**

    Employers are required by the OSH Act to provide a safe and healthy workplace. If confirmed, I will work to ensure that all

OSHA standards effectively reduce injuries and illnesses without putting an undue burden on employers.

3. **DOL plans to strengthen the affirmative action requirements for federal contractors through the proposed rule by the Office of Federal Contracting Compliance Programs (OFCCP) in late April. Specifically, mandating additional data collection. This rule creates additional burdensome regulations on contractors and subcontractors that could be blamed for potential losses in federal contacts once implemented. Do you believe this expanded scope of OFCCP's authority is worth the cost-benefit to contractors and in the end, the taxpayers?**

   Although Section 503 regulations have been in place for decades, the current unemployment rate for people with disabilities is 13%, 1.5 times the rate of those without disabilities. A diverse array of stakeholders has worked vigilantly to increase employment opportunities for people with disabilities. For instance, the National Governor's Association has been particularly active as has the Chamber of Commerce in working to promote policies designed to increase the number of individuals who are employed over the next five years.

   I am aware that OFCCP is considering an update to the affirmative action requirements for federal contractors. However, I have not had time to study the issue in depth and to determine what steps should be taken with regards to this rulemaking. If confirmed, I look forward to doing so.

4. **What regulations in process have you reviewed since you have been posted to an office inside the Department of Labor?**

   I have not been "posted" to an office inside of the Labor Department at any time since my nomination. In preparation for my confirmation hearing, I did review public materials relating to some of the items of the Department's regulatory agenda.

5. **Do you have plans to initiate new rulemaking if you are confirmed? Please list and describe new regulations you would promulgate.**

   I have not formulated any plan at this juncture regarding new rulemaking.

6. **Will you submit DOL's semi-annual regulatory agenda on time? Do you believe such agendas are helpful to the public and serve the President's goal of an open and transparent government?**

   The DOL semi-annual regulatory agenda is not published independently by DOL. DOL's agenda is a part of the government-wide semi-annual regulatory agenda. The agenda is extremely useful in informing the public of the Department's plans and is consistent with the President's goal of an open and transparent government.

7. **How closely do you plan to work with the White House to determine the timing of releasing new regulations? Will you comply with specific White House requests to pursue or not pursue certain regulatory agenda items?**

   If confirmed, I will adhere to any established procedures that may be required of Cabinet agencies.

8. **In general, do you think DOL should conduct more or less notice and comment rulemaking?**

   I plan to consult with DOL program agency leadership to gather information about their rulemaking plans in order to determine the appropriate course of action, if confirmed.

9. **The National Center for Employee Ownership (NCEO) estimates that there are currently almost 11,000 Employee Stock Ownership Plans (ESOPs) and stock bonus plans covering over 10 million employees. Analysis indicates that participation in ESOPs can help provide employees with considerable income security during retirement, as ESOP participants tended to have almost three times the retirement assets as workers in comparable non-ESOP companies. According to a 2010 NCEO analysis of ESOP company government filings in 2008, the average ESOP participant receives about $4,443 per year in company contributions to the ESOP and has an account balance of $55,836. What will be your commitment to ensuring that the benefits of ESOP participation remain a high priority for the Department?**

   A critical mission for the Department of Labor is to promote and protect the retirement security of America's workers. While I agree that a well-run ESOP can provide meaningful benefits to participating workers, just as with other employment based retirement plans, I believe the Department should be taking steps to make sure that ESOPs provide the benefits they promise.

Senator Lisa Murkowski

Job Corps

During the HELP Committee hearing on April 18, 2013, I asked several questions regarding Job Corps. Please follow up with the appropriate responses and information as requested below.

1) **The Job Corps program is operated by the Employment Training Administration (ETA) within the DOL. There has been program mismanagement causing budget shortfalls for the past 2 Program Years leading to freezing current new enrollments. I am not the only Senator concerned about**

this program and the CR passed in March includes transfer authority for additional $30 million for the Job Corps program. Despite this additional funding, the enrollment suspension is currently still in effect.

a. **What will you do, if confirmed, to ensure that the Job Corps program is efficiently managed? Specifically, how will you hold members within your department responsible for mismanaging taxpayer dollars? What will you do to improve and prevent systemic accounting problems within the Department to ensure those that need the Job Corps program most are not adversely affected by Departmental mismanagement?**

I share your concerns and those of the other Members of Congress about the unacceptably negative impact on the lives of deserving young people caused by the enrollment freeze. I was glad to see that the stop work order for outreach and admissions contractors was lifted on April 11, 2013, and that the enrollment freeze was ended on April 22, 2013. This is at least a step in the right direction.

If confirmed I plan to make Job Corps management an early priority. While I am very familiar with the tremendous opportunity that Job Corps provides to deserving young people from my work in Maryland, I intend to do my own internal look at the Job Corps program. I also anticipate a report from the Inspector General in May that I am confident will provide further information not only on the causes of the current financial problems but suggestions on building a stronger internal program for Job Corps.

b. **Currently, the waitlist for our local Job Corps Center is at 300 because of the enrollment freeze. Current "On Board Strength" (OBS) allows for 250 students at the Alaska Center. However, new limitations being imposed by the Department will only allow the Alaska Job Corps Center 196 slots for students. It is my understanding that the Department is imposing these "right-sizing" student reduction policies on all Job Corps Center operators before it will lift the enrollment freeze despite the additional funding provided to ETA for the remainder of this program year. If confirmed, what will you do to address Job Corps waitlists?**

If confirmed, my goal will be to eliminate wait lists, if possible, and to seek to ensure that every available person has an opportunity to benefit from this critical program. If confirmed, part of my internal listening sessions will focus on the student slots at centers and how those decisions

were made. I also will look at current Job Corps policies, such as the definition of homeless youth that may lack the appropriate alignment with other federal definitions. Job Corps serves students who already face many barriers to their success; our goal should be reducing those barriers not adding additional complication.

c. **The President's recently released FY2014 budget actually increases administration expenses for federal staff salaries while reducing operations expenses for the federal contractors who actually operate the Job Corps Centers around the country. The overall FY2014 budget request is less than this year's budgeted amount. I am concerned, based on the recent budget problems within ETA that we will see this problem repeat itself and I'm not sure that throwing more dollars at administrative oversight is the problem. If confirmed, what will you do to reduce the unnecessary increase in administrative expenses and restore student capacity so that students can benefit from the important job training and education opportunities?**

If confirmed, my first step will be to get up to speed on Job Corps financial and program management and budget functions. Included in this will be a discussion on the formulation of the FY 2014 budget request. As you know, the budget is a multi-step process and I look forward to engaging with the appropriate Congressional Committees on Job Corps' FY 2014 budget.

I share your commitment to serve as many students as the appropriated dollars allow in the Job Corps program.

d. **If confirmed, will you commit to maintaining at least one Job Corps Center in every state?**

I agree with the Administration's desire to operate at least one Job Corps Center in each state.

e. **Job Corps programs also provide opportunities for homeless teens. The definition of homeless historically applied by Job Corps includes students "living in uninhabitable conditions or staying in a shelter." This narrow definition nearly prevented the Alaska Job Corps Center from assisting a homeless teen because that individual was not actually in a homeless shelter nor living in uninhabitable conditions. A solution was found, but in Alaska, and I'm sure in many other less**

urban areas around the country, homelessness is a real problem regardless of the availability of and access to shelters. Other problems also arise – such as shelters that do not allow young people under 18 when the Job Corps program allows students between the ages of 16 and 24. If confirmed, will you commit to change the Job Corps admissions criteria for our homeless young people so that it is not so narrowly defined as to require staying at a shelter? For example, to align it with the McKinney-Vento definition applied by schools and other educational programs, which takes homeless shelters into consideration but is not a required.

I appreciate your concern about Job Corps eligibility definitions. If confirmed, I will look at current Job Corps policies, like their definition of homeless youth that may lack the appropriate alignment with other federal definitions. Job Corps serves students who already face many barriers to their success; our goal should be reducing those barriers not adding additional complications.

H2B Visa Program

During the HELP Committee hearing on April 18, 2013, I asked several questions regarding H2B Visas. Please follow up with the appropriate responses and information as requested below.

1) **In January 2011, DOL promulgated a rule that increased labor costs for employers utilizing H-2B workers by initiating 1) a "wage rule" methodology that determines what the appropriate wage should be and 2) a "comprehensive rule" that alters domestic recruitment requirements. The wage rule was to go into effect in FY12, and the comprehensive rule was to go into effect in FY13. A bipartisan group of Senators supported language in the FY12 consolidated appropriations bill to delay the wage rule, and a bipartisan group of Senators supported an across the board freeze of both rules for all industries in the Senate's FY13 LaborHHS Appropriations bill. If confirmed, will you respect these bipartisan Congressional concerns?**

   If confirmed, I will respect Congressional directives with regard to the H-2B program.

2) **I have concerns regarding the impact of recent federal court rulings on the ability of the Department of Labor to continue to process H-2B visa applications which are critical to seafood businesses in Alaska and in the lower 48. Processing companies need quick action by the Department to**

ensure that workers are available for the upcoming seasons. It is my understanding that the Department has indicated that it will proceed with issuing labor certifications for a small number of employers, including those using acceptable private wage surveys, in accordance with the court order. If confirmed, will you commit that the Department of Labor will move ahead expeditiously with the processing of H-2B visa applications?

If confirmed, I will ensure the Department moves ahead with the processing of H-2B applications as expeditiously as possible, consistent with all applicable court rulings.

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.

- **How much did the federal government spend litigating this case?**

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, as with all enforcement decisions during my tenure as Assistant Attorney General. The opinion of the court made clear that the Department's position in the South Carolina case was justified based upon the facts at the time the Department brought the case. Indeed, the court recognized that the Department was rightly concerned about the legality under Section 5 of South Carolina's ID law was enacted. The court actually blocked the ID law from going into effect in 2012, and only held that it could be implemented in future elections based on a series of conditions imposed by the court and concessions made by the state before and during trial that mitigated the law's impact. As two of the judges on the panel wrote in a concurring opinion: "[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." *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).

With regard to your question about the government's litigation costs, the Department's costs in *South Carolina v. United States*, No. 12-cv-203 (D.D.C.), totaled approximately $278,828 in non-personnel expenses.

With regard to the state's litigation expenditures, the Department's attorneys litigated the case professionally and responsibly. The Court repeatedly made clear that any delays in the case resulted from the state's actions. In one order, for example, the Court majority noted that "South Carolina's own inexplicably dilatory conduct has largely created the difficult situation the Court and the parties now face." Order, *South Carolina v. United States*, No. 12-cv-203, Doc. No. 64 at 13 (D.D.C. Apr. 26, 2012) (three-judge court) (Bates, J. and Kollar-Kotelly, J., concurring).

- **What assurances can you give that the decision to go after S.C. is not indicative of a larger pattern of targeting certain states and politicizing enforcement, especially given the other states that had similar laws pre-cleared by the Department of Justice?**

  The recent report by the Department's Office of the Inspector General, entitled *Review of the Operations of the Voting Section of the Civil Rights Division*, examined the Division's enforcement of the federal voting rights laws over time and concluded that since 2009, "the decisions that Division or Section leadership made in controversial cases did not substantiate claims of political or racial bias." Report at 114.

  In addition, as noted above, the concurring opinion of two judges in the South Carolina matter noted the appropriateness of the objections raised by the United States, and further explained: "The Section 5 process here did not force South Carolina to jump through unnecessary hoops. Rather, the history of Act R54 demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *South Carolina v. United States*, 2012 WL 4814094, at *22 (D.D.C. Oct. 10, 2012) (three-judge court) (Bates, J. and Kollar-Kotelly, J., concurring). As with all laws submitted to the Department for review under Section 5 of the Voting Rights Act, the Department individually assesses each voter ID law that is submitted, based on the relevant facts.

- **Can you please identify what other states with voter identification laws, if any, had Department of Justice officials present to monitor the implementation of the law in an election. In any potential instances where elections were in fact monitored, did the state prevail in federal court? What was the magnitude of these elections?**

  Each year the Department sends federal observers from the Office of Personnel Management, along with personnel from the Department of Justice, into the field to monitor elections around the country and throughout the election calendar, for federal, state, and local elections. The job of personnel who are deployed as observers is to monitor for violations of federal voting rights laws.

In calendar year 2012 alone, the Department assigned more than 1200 OPM observers and Department staff to monitor 101 elections, in 69 different jurisdictions, in 24 states. Those monitoring assignments included a number in states that have enacted voter identification laws, including Arizona, Georgia, Indiana, Louisiana, Pennsylvania, South Carolina, Tennessee, Texas, and Wisconsin, among others.

Question 2:

How would you characterize litigation decisions that were made at the Department of Justice under you? Would you say that they were in the best interests of the U.S.?

- **How do you explain the unprecedented nature of your involvement in two cases that were not under your jurisdiction at the Civil Rights Division and the decisions that resulted?**

- **Would you say that in declining to intervene in Fredrick Newell's whistleblower complaint as part of the quid pro quo with the City of St. Paul, the Department of Justice gave up an opportunity to recover as much as $200 million?**

- **Furthermore, what kind of message does dismissing a whistleblower case in an effort to essentially uphold a particular legal theory send to future whistleblowers who act courageously, and often at great personal risk, to fight fraud and identify waste on behalf of federal taxpayers?**

As Assistant Attorney General for the Civil Rights Division, I am charged with leading the Division of the Department of Justice that enforces the civil rights laws, including the Fair Housing Act. When the Supreme Court granted certiorari in Magner v. Gallagher, I became concerned that this case presented a poor vehicle in which to consider the disparate impact standard because of the factual context in which the case arose. The disparate impact standard is important to our civil rights enforcement efforts, and it has long been endorsed by courts of appeals across the country, as well as by the Department of Housing and Urban Development.

For this reason, I reached out to the City of St. Paul to determine whether, in light of these concerns, the City might reconsider its position in Magner. Following my initial conversation with the City of St. Paul's representatives—in which they raised the prospect of linking the Magner and Newell (a False Claims Act case overseen by the Civil Division) cases—I took a number of actions. At the outset, I wanted to be sure that any potential agreement between the Department and the City of St. Paul would be fully consistent with all ethical and professional

responsibility guidelines. In this regard, my primary focus was on the fact that in linking the *Magner* and *Newell* cases the City's private counsel sought to engage me in conversations about matters which, in part, fell outside my authority as head of the Civil Rights Division. To address this concern, my staff and I sought ethical and professional responsibility advice consistent with Department procedures. We were informed that there would be no concerns so long as I had permission from the Civil Division to engage in these conversations, because the Civil Division had decision-making authority over the *Newell* case. I was also informed that because the United States is a singular client and entitled to act in its overall best interests, there was no prohibition on linking matters as the City's privately retained attorney had suggested. I also spoke to Tony West, then the head of the Civil Division, and explained my conversation with the City's privately retained attorney, and Mr. West expressed no reservations about my having conversations with the City's attorneys regarding the Newell case in relation to the City's proposal.

I believe that the litigation decisions made by the Department in these matters were in the best interests of the United States and were consistent with the Department's legal, ethical, and professional responsibility obligations. As noted above, the Civil Division had decision-making authority over whether to intervene in *Newell*. I understand that after personnel from the Civil Division and HUD met with representatives of the City of St. Paul on December 13, 2011, the most senior career attorney in the Civil Division at the time of these decisions—and the Department's foremost expert on False Claims Act matters—immediately and clearly conveyed his negative view of the Newell case as a candidate for intervention. According to the Civil Division's final decision memorandum, the factors they considered included an evaluation of: potential evidence and witnesses, litigation risks, the lack of agency support, and policy considerations, including the City's anticipated withdrawal of Magner, which would aid the Department's civil rights enforcement efforts.[1]

Question 3:

In 2011, Lafe Solomon, Acting General Counsel to the NLRB issued a complaint against Boeing, the nation's largest exporter, which would have forced the company to close down a new plant in Charleston, SC. This was an issue that gained an immense amount of national media coverage, as well as attention on Capitol Hill.

- **What were your impressions of the complaint?**

[1] I understand that the United States only intervenes in approximately 22% of qui tam lawsuits. The federal government's decision not to intervene does not end a case, however. Rather, the private citizen (or "relator") may continue to pursue the lawsuit even if the United States declines to intervene, as the relator did in *Newell*. In addition, I will note that the Department has had unprecedented success fighting fraud and has recovered more than $13 billion over the past four years in False Claims Act cases—the most in any four-year period in the Department's history.

- **While I recognize this was an NLRB decision, and therefore outside of the purview of the Secretary of Labor, do you believe complaints such as these inject uncertainty into the marketplace that presumably discourage employers or potential job creators from taking risks or making investments necessary to grow the economy and increase hiring?**

- **The complaint issued by the NLRB's Acting General Counsel was widely denounced by legal experts and Members of Congress. Do you – as a lawyer and one who is knowledgeable in labor issues – agree with the complaint's detractors or support the action taken against Boeing?**

  I have not studied the complaint and my knowledge of the case is very limited. I certainly know from news accounts that this was a contentious issue. Reasonable people can have strong disagreements about policy.

- **Do you believe it is improper when a union files a complaint with a Department of Labor (DOL) agency, against a company it is currently in negotiations with, or trying to organize? What role do you see certain DOL enforcement agencies, such as Wage and Hour or OSHA, playing when unions are involved in their contract negotiations and discussions?**

  I know DOL takes very seriously its mission to enforce our nation's labor laws; to do that fairly and independently and to make the most efficient use of limited resources to that end. That certainly will be my approach if I am confirmed as Secretary.

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.

- **What are your intentions regarding the so-called persuader 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?**

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

- **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?**

- **Are you aware that more than 6,000 comments were submitted concerning this rule, and many lawyers and law firms have said that they could be forced to stop providing labor relations advice in connection with a union organizing drive should it be implemented?**

  I am aware of the notice of proposed rulemaking, but have not had time to study the issue and to determine what steps should be taken with regard to this rulemaking. If confirmed, I look forward to learning more about the issue and working with the Members of the Committee and other stakeholders to address LMRDA reporting in a balanced way.

- **Regulators have the responsibility to carefully balance requirements so that the costs do not exceed the benefits. To what extent should the costs of implementing a new regulation be a factor in determining the final regulation? Should a regulation be implemented if the cost is significant, such as more than $100 million annually?**

  Consistent with the Executive Orders, I believe it's very important that agencies ensure that the benefits justify the costs when issuing regulations and that they select the least burdensome alternatives consistent with obtaining regulatory objectives. Examining costs and benefits of a regulation is important, but it is not intended to be determinative of whether to regulate or not. The purpose is to identify and use the least costly option for obtaining the regulatory objective. If confirmed, I will work to maintain a common-sense balance between our obligation to protect the health and safety of Americans and our commitment to promoting economic growth, job creation, and innovation.

Question 5:

In one of your speeches, you discussed the Civil Rights Division's filing of an *amicus curiae* brief in the District of Columbia Circuit case of *Equal Rights Center v. Post Properties*. You argued that "fair housing groups who divert resources to combat discrimination they have discovered" should have Article III standing to sue. The District of Columbia Circuit rejected your argument. Is it your view that private community organizations should be empowered to enforce our nation's civil rights laws on equal footing with the Department of Justice?

- **Having lost the standing argument in the District of Columbia Circuit during your tenure at the Department of Justice, have you respected the court's ruling and abandoned the argument, or have you continued pursuing it in other courts?**

  In the case you are referring to, *Equal Rights Center v. Post Properties*, the United States Court of Appeals for the District of Columbia Circuit in fact agreed

with the Department's position in its amicus brief when it reaffirmed that organizations have standing to sue if they divert resources to counteract housing discrimination. The court of appeals stated that "ERC's alleged diversion of resources to programs designed to counteract the injury to its interest in promoting fair housing could constitute [the requisite] injury." *Equal Rights Center v. Post Properties*, 633 F.3d 1136, 1141 (D.C. Cir. 2011). The Department's argument was entirely consistent with the decision of the court of appeals, as well as the Supreme Court's holding in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). However, the court appeals noted that the specific plaintiff in the case before the court (to which the United States was not a party) did not establish that it had suffered the requisite injury to confer standing.

- **Do you believe that private community organizations should have the authority and standing to sue to enforce labor and employment laws and regulations falling within the purview of the Department of Labor, such as the Fair Labor Standards Act?**

  Decisions about who has authority to sue under statutes rest with Congress and the courts, not the Labor Department. The ability of private community organizations to sue to enforce laws and regulations should be determined pursuant to Congressional intent and the Supreme Court's standing doctrine.

- **If confirmed as Secretary of Labor, will you pursue a policy of encouraging community organizations to sue private employers for alleged violations of labor and employment laws subject to Department of Labor enforcement actions?**

  My response to the previous question addresses this issue.