



September 19, 2019

The Honorable Lamar Alexander  
Chairman  
Senate Committee on Health, Education, Labor and Pensions  
428 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Patty Murray  
Ranking Member  
Senate Committee on Health, Education, Labor and Pensions  
428 Dirksen Senate Office Building  
Washington, DC 20510

Re: Eugene Scalia's Anti-Worker, Anti-Investor Track-Record Representing the Chamber of Commerce

Dear Chairman Alexander and Ranking Member Murray:

Public Citizen, a public interest organization with more than 500,000 members and supporters, strongly opposes the nomination of Eugene Scalia as Secretary of Labor. Mr. Scalia has spent his career in private practice, representing the interests of big business at the expense of workers and investors. He is a partner at Gibson, Dunn & Crutcher, where he has cashed in on representing the Chamber of Commerce and other high-profile corporate clients since 2003. Last year he earned over \$6.2 million from the firm.<sup>i</sup> Disturbingly, he is one of the most conflicted Labor Secretary nominees in recent history.<sup>ii</sup>

After his nomination, the AP News reported, “Scalia’s record drew unqualified praise from the chamber.”<sup>iii</sup> Glenn Spencer, the Chamber’s senior vice president for employment policy, said Mr. Scalia is “an excellent choice precisely because he has the skills to issue regulations that will stand up to court challenge.”<sup>iv</sup> Based on his “successful” track-record rolling back fundamental worker and investor protections, the public should be alarmed about the power he could wield over regulations as Secretary and his inherent conflict of interest in several matters.

The following are a sampling of cases in which Mr. Scalia has represented the Chamber:

#### I. Anti-Retaliation Provision of Electronic Recordkeeping Rule

**Purpose of Rule:** OSHA’s rule to “Improve Tracking of Workplace Injuries and Illnesses”, also known as the “electronic recordkeeping rule” prohibits employers from discouraging workers from reporting an injury or illness, and it requires education around and enforcement of anti-retaliation rights. The rule’s anti-retaliation provisions went into effect in 2016.

**Actions Taken to Undermine Rule:** The Chamber and other industry groups filed a lawsuit against the Labor Department regarding the electronic recordkeeping rule, citing regulatory overreach and concerns over the anti-retaliation portion of the rule. In June, Mr. Scalia served as counsel for amici curiae the National Association of Manufacturers, Great American Insurance Company, and

Associated Builders and Contractors, in opposition to the anti-retaliation provision of the rule. As grounds for its opposition, the brief argued that it would “allow OSHA to micromanage how certain safety programs are structured” and cited in part, “the costs to employers of having to modify their programs to comply with OSHA’s newly minted restrictions.”<sup>v</sup> After he was nominated, Mr. Scalia filed a Motion to Withdraw from his role as counsel on September 10, 2019.

## II. Fiduciary Rule

**Purpose of Rule:** Under Obama, the Labor Department established this rule to ensure that individuals are legally entitled to retirement investment advice that serves their best interests. Specifically, when dealing with accounts connected to the Internal Revenue Service, it required all Wall Street specialists to prioritize client interests over their own financial interests, charge reasonable fees, and refrain from making misleading statements.<sup>vi</sup>

**Actions Taken to Undermine Rule:** On June 21, 2018, the U.S. Fifth Circuit Court of Appeals vacated the rule in a 2-1 decision. With Mr. Scalia serving as Counsel, the Chamber and leading trade associations brought the case, arguing that the rule is “arbitrary, capricious, unreasonable, and contrary to law.”<sup>vii</sup>

## III. Exchange Act Rule 14a-11

**Purpose of Rule:** In 2010, the SEC adopted Rule 14a-11, which mandated proxy access at all public companies, empowering certain shareholders to have more power over the nomination of the board of directors. Specifically, it required public companies to provide shareholders with a mechanism to nominate one or more nominees to stand for election as board director.<sup>viii</sup>

**Actions Taken to Undermine Rule:** In 2010, Mr. Scalia served as counsel for The Business Roundtable and the Chamber in opposing the rule. He argued that corporations’ opposition to proxy access has “long been linked with the fact that the most activist shareholders are union pension funds, government pension funds, and other ‘institutional interests’,” notwithstanding the fact that structural aspects of the rule made it very difficult, even illegal, for any shareholder to use this mechanism under fraudulent conditions.<sup>ix</sup> In 2011, the U.S. Court of Appeals for the DC Circuit vacated the rule on the grounds that the cost benefit analysis was inadequate.<sup>x</sup>

## IV. SEC’s Mutual Fund Governance Rule

**Purpose of Rule:** In 2004, the SEC developed the Mutual Fund Governance Rule to require mutual fund companies to put independent overseers on their boards of directors. It was part of a larger package of reforms to address abuses in the mutual fund industry.

**Actions Taken to Undermine Rule:** In 2005 and 2006, Mr. Scalia represented the Chamber on two challenges to the rule. Specifically, it challenged provisions that required the boards of mutual fund companies to have an independent chair and 75 percent independent membership. It argued in part that the SEC did not have the authority to regulate “corporate governance” and that it did not undertake a rigorous review of the costs. Although the U.S. Court of Appeals for the DC Circuit held in 2005 that the SEC had the authority to promulgate the rule, it remanded the case to the SEC to seek additional public comments on the rule’s costs, and in 2006 the court vacated the rule.<sup>xi</sup>

## V. OSHA High Injury/Illness Rate Targeting and Cooperative Compliance Program

**Purpose of Rule:** Established in 1997, the High Injury/Illness Rate Targeting and Cooperative Compliance Program, established by a directive, was aimed at reducing workplace injuries and illnesses by focusing on site-specific data. OSHA sought to leverage its limited resources by focusing on establishments with high illness and injury rates. Those employers that adopted a comprehensive safety and health program would qualify for placement on a lower priority inspection targeting list.<sup>xii</sup>

**Actions Taken to Undermine Rule:** In 1998, Mr. Scalia was part of a legal team for the Chamber that challenged the rule under the Administrative Procedure Act. Notwithstanding that an employer's participation in the program was strictly voluntary, the Chamber argued that OSHA should have conducted a notice and comment rulemaking proceeding prior to issuing the directive. In 1999 the U.S. Court of Appeals for the DC Circuit agreed and vacated the directive.<sup>xiii</sup>

These cases reflect Mr. Scalia's long track-record of putting corporate interests above worker and investor rights. Regrettably, his nomination is just the latest in the Trump administration's efforts to advance the Chamber's deregulatory agenda and systematically dismantle fundamental health and safety protections, and to undermine the very agency tasked with safeguarding America's workforce. Mr. Scalia cannot be trusted to lead the Labor Department, and we strongly urge your Committee to reject his nomination. If you have any questions about our position, please contact Shanna Devine, Worker Health and Safety Advocate for Public Citizen's Congress Watch Division, at 202.454.5168 or sdevine@citizen.org.

Sincerely,

Public Citizen

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<sup>i</sup> Dan Packel, *Labor Appointee Eugene Scalia Earned \$6.2M as Gibson Dunn Partner*, LAW.com (Aug. 30, 2019), <https://bit.ly/2kGHkde>.

<sup>ii</sup> Eugene Scalia's Corporate Client List Makes Him the Most Conflicted Labor Secretary in Recent History, Allied Progress (Aug. 8, 2019), <https://bit.ly/2kU1VL5>.

<sup>iii</sup> Mark Sherman, et. al., *Labor nominee Scalia has long record of opposing regulations*, AP (Jul. 19, 2019), <https://bit.ly/2klSYK8>.

<sup>iv</sup> Mark Bocchetti, *Scalia, Skilled at Upending Rules, May Soon Write Them at the Department of Labor*, ROLL CALL (Aug. 5, 2019), <https://bit.ly/2mnDOFO>.

<sup>v</sup> *Brief of Amici Curiae, The National Association of Manufacturers, Great American Insurance Company, And Associated Builders and Contractors in Support of Plaintiffs' Motion for Summary Judgment*, No. CIV-17-0009-PRW (OK Western District Court, Jun. 12, 2019).

<sup>vi</sup> Press Statement, Bart Naylor, Public Citizen, *Fiduciary Rule Would Stop Financial Advisors from Misleading Americans Saving for Retirement* (Apr. 5, 2016), <https://bit.ly/2kpnc5o>.

<sup>vii</sup> *U.S. Chamber of Commerce et. al. v. U.S. Department of Labor*, No. 17-10238 (5<sup>th</sup> Circuit Court of Appeals Jul. 20, 2017), <https://bit.ly/2ksKLE8>.

<sup>viii</sup> *Business Roundtable and Chamber of Commerce v. Securities and Exchange Commission*, No. 10-1305 (D.C. Circuit Court of Appeals Jul. 22, 2011), <https://bit.ly/2kpLPbT>.

<sup>ix</sup> *Business Roundtable and Chamber of Commerce v. Securities and Exchange Commission*, No. 10-1305 (D.C. Circuit Court of Appeals Nov. 30, 2011), <https://bit.ly/2klktxW>.

<sup>x</sup> *Business Roundtable and Chamber of Commerce v. Securities and Exchange Commission*, No. 10-1305 (D.C. Circuit Court of Appeals Jul. 22, 2011), <https://bit.ly/2kpLPbT>.

<sup>xii</sup> The Federalist Society, *Eugene Scalia*, <https://bit.ly/2mk20rD>; *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Circuit 2005), and *Chamber of Commerce v. SEC*, 443 F.3d 890 (D.C. Circuit 2006), <https://bit.ly/2m3t7Hf>.

<sup>xiii</sup> U.S. Department of Labor, *OSHA Instruction* (Nov. 25, 1997), <https://bit.ly/2kJhp4D>.

<sup>xiv</sup> *U.S. Chamber of Commerce v. U.S. Dep't Labor*, 174 F.3d 206 (D.C. Circuit 1999), <https://bit.ly/2kTah5E>.