United States Senate
COMMITTEE ON FINANCE
WASHINGTON, DC 20510–6200

August 1, 2017

The Honorable Steven Mnuchin
Secretary, Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary Mnuchin,

I appreciate the Treasury Department's decision to wind down the savings scheme called "my Retirement Account," or *my*RA®, a low-yielding Roth Individual Retirement Account (IRA) with only one investment option, designed to help some to save for retirement. While perhaps well intended, the scheme has not been a net benefit to savers and American taxpayers, and was set up through executive overreach to sidestep the Congress.

In 2014, responding to an Executive Order by President Obama, Treasury created the *my*RA® scheme which, in part, made use of a permanent, indefinite appropriation provided to Treasury to pay for services of Financial Agents (FAs). The authority provided to Treasury to use the appropriated taxpayer resources was granted by Congress in order to overcome some inefficiencies associated with prior practices involving use of "compensating balances."[1] Using appropriated funds to hire FAs and pay fees to FAs for account maintenance of retirement accounts was not what Congress intended when a permanent, indefinite appropriation, and authorization to use the appropriated taxpayer resources, was enacted into law.

Rather, the previous administration made a unilateral decision to construct the *my*RA® scheme citing Congress's refusal to enact President Obama's budget proposal regarding IRAs in a brazen sidestepping of Congress and misuse of the authority to use American taxpayer funds in the FA permanent, indefinite appropriation. The sidestepping means, in effect, that the previous administration unilaterally decided to use hard-earned American taxpayer resources to pay fees to a large financial institution in order to set up within Treasury a retirement program for private-sector workers.

In laying the groundwork for the *my*RA® program, Treasury solicited an opinion from the Obama Administration's Department of Labor (DOL) on aspects of the program. Specifically, opinion was solicited on whether employers who would facilitate and encourage participation of employees in the *my*RA® scheme would be establishing or maintaining an "employee pension benefit plan" within the meaning of section 3(2) of ERISA. In response to the solicitation, a DOL official issued opinions and an accompanying discussion in a letter dated December 15, 2014 (hereafter, DOL letter).

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[1] Transportation, Treasury, and Independent Agencies Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, § 218, 118 Stat. 279, 321 (2004).

The DOL letter essentially argued that *my*RA® activities are immune from application of ERISA requirements, because "...we do not believe Congress intended in enacting ERISA that a federal government retirement program created and operated by the U.S. Department of the Treasury would be subject to the extensive reporting, disclosure, fiduciary duty, or other requirements of ERISA...." The opinion and accompanying discussion by the DOL official, in my view, are deeply flawed along many dimensions. Moreover, since the opinion was rendered, DOL finalized a rule—the so-called DOL "Fiduciary Rule"—to expand the "investment advice fiduciary" definition under ERISA (Federal Register/Vol. 81, No. 68/Friday, April 8, 2016/Rules and Regulations). With application of that rule, and with ERISA and the Internal Revenue Code (Code), employers, officials of the Treasury Department, and innocent American taxpayers faced unacceptable risks.

Employers were at risk, in that an employer who promoted a *my*RA® Roth IRA program to employees is at risk of being an ERISA fiduciary. The DOL letter argues that such a risk does not exist. However, the analysis upon which the DOL letter's conclusion is based is unconvincing, inexplicitly discounts existing legal precedent and, I believe, deeply flawed.

Private sector firms were at risk, in that the promotion by any firm of its Roth IRA services and advice that a *my*RA® Roth account holder transfer account balances to the firm's Roth IRA might have subjected the firm to the risk of having made fiduciary investment advice and having become a fiduciary providing investment advice. The DOL letter does not address this risk.

Officials at the Treasury Department were at risk, in that the Treasury Department faced a risk of being an IRA service provider as a result of its provision of *my*RA® Roth IRA services to *my*RA® Roth IRA account holders. The DOL letter does not address this risk.

Officials at the Treasury Department were also at risk, in that the Treasury Department might have violated the new fiduciary duty rules absent utilizing the Best Interest Contract Exemption (BICE) in the Department of Labor's new fiduciary regulatory structure, and the Secretary or his designee might have been required to sign a BICE with *each* *my*RA® Roth IRA account holder. The DOL letter does not address this risk.

You, the Treasury Secretary, faced risk, in that the Treasury Secretary risked being a "fiduciary" and/or a "disqualified person" within the meaning of ERISA and/or the Internal Revenue Code with respect to the *my*RA® Roth IRA by reason of Treasury's management of *my*RA® Roth IRA assets on behalf of account holders. The DOL letter does not address this risk.

Innocent American taxpayers faced a risk, in that *my*RA® Roth account holders might have standing, individually or as a class, to bring a lawsuit against the federal government for breach of fiduciary duty. Enrollees in the *my*RA® Roth program are provided with only one investment option—shares in a pooled fund established by Treasury under the program—with a nominal (i.e., not indexed to a measure of inflation) yield tied to the Government Securities Investment Fund (G-Fund) of the Thrift Savings Plan for Federal employees and members of the uniformed services. That single investment option in the *my*RA® Roth scheme provides low nominal and real yields relative to alternative available investments and portfolios.

It is difficult to imagine a private-sector fiduciary who would not face sanctions if they steered a retirement investor into such a scheme as their sole investment.

It is also difficult to establish that the *my*RA® Roth scheme has been successful. Over years of attempts at uptake, my understanding is that Treasury has only around 30,000 *my*RA® Roth account holders. Treasury has spent $70 million on this program so far, and is expected to spend $10 million annually had the program proceeded, on a program which only has $34 million of savings. The *my*RA® Roth scheme clearly fails on a cost-benefit basis, and is a failed program. It is hard to imagine that a private sector IRA service provider charging fees at those levels would meet any fiduciary test.

Aside from the surreptitious manner in which the *my*RA® Roth scheme was established, there are significant risks posed by the scheme to employees, American taxpayers, and the Treasury, that you have inherited. It is unfortunate that the previous administration engaged in Executive overreach in establishing its *my*RA® Roth scheme, subjecting you and others to unacceptable risk. That is especially true given that I had put forward retirement legislation to transparently, through the democratic process in which Congress plays a role, attain goals similar to what the previous administration sought to achieve with its *my*RA® Roth scheme. As was true during your predecessor's term in office, I remain committed to working with the administration to establish expanded opportunities for low- and middle-income Americans who do not have access to employer sponsored retirement plans.[2]

Given the unacceptable risks presented by continuation of the *my*RA® Roth program established in the Treasury Department, with taxpayer resources used to pay a large financial institution to maintain *my*RA® Roth accounts and to market the program, I appreciate that Treasury reexamined continuation of the *my*RA® Roth scheme and Treasury's decision to wind the program down.

Sincerely,

Orrin G. Hatch
Chairman

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[2] For example, the bi-partisan Retirement Enhancement and Savings Act of 2016 (S. 3471, S. Rpt. 114-375, 114th Cong.), which was reported out of the Finance Committee last year on a unanimous vote, contains several such proposals, all supported by at least one Senator from each side of the aisle, that would expand access to workplace retirement savings programs for low- and middle-income Americans. These proposals also would reduce costs and ease administrative burdens on small employers that at present are dissuaded from sponsoring retirement plans because of cost and complexity.