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May 10, 2024

The Honorable Bernard Sanders
Chairman
The Honorable Bill Cassidy
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable Virginia Foxx
Chairwoman
The Honorable Bobby Scott
Ranking Member
Committee on Education and the Workforce
House of Representatives

Subject: *Department of Labor, Employee Benefits Security Administration: Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor, Employee Benefits Security Administration (EBSA) entitled "Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128" (ZRIN 1210-ZA34). We received the rule on April 25, 2024. It was published in the *Federal Register* on April 25, 2024. 89 Fed. Reg. 32346. The effective date is September 23, 2024.

This final rule amends Prohibited Transaction Exemptions (PTEs) 75-1, 77-4, 80-83, 83-1, and 86-128, which are class exemptions from certain prohibited transactions provisions of the Employee Retirement Income Security Act of 1974, and the Internal Revenue Code of 1986. According to EBSA, after this amendment is effective, investment advice fiduciaries must meet the conditions of PTE 2020-02 or PTE 84-24 for administrative relief when they receive otherwise prohibited compensation as a result of their provision of investment advice within the meaning of the applicable statutes. Other amendments and revisions to PTE 75-1 and PTE 86-128 are also included.

Enclosed is our assessment of EBSA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to

the subject matter of the rule, please contact Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive style with a large initial 'S' and 'J'.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF LABOR,
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
ENTITLED
“AMENDMENT TO PROHIBITED TRANSACTION EXEMPTIONS
75-1, 77-4, 80-83, 83-1, AND 86-128”
(ZRIN 1210-ZA34)

(i) Cost-benefit analysis

The Department of Labor, Employee Benefits Security Administration (EBSA), conducted an economic analysis of this final rule. EBSA stated that it conducted an assessment of the amendment’s costs, benefits, and transfers.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

EBSA prepared a Final Regulatory Flexibility Analysis (FRFA). According to EBSA, the impact of this amendment on small entities is included in the FRFA for the entire project, which can be found in the related notice of rulemaking found elsewhere in the *Federal Register*.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

EBSA determined that this final rule will not have an effect on state, local, or tribal governments, in the aggregate, or on the private sector, of \$100 million or more, adjusted annually for inflation, in any one year.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act’s requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act” in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory

Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

EBSA did not discuss the Act in this final rule. In its submission to us, EBSA stated that the Act does not apply to the rule because it does not increase direct spending.

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On November 3, 2023, EBSA published a proposed rule. 88 Fed. Reg. 76032. EBSA received written comments on the proposed amendments, and on December 12 and 13, 2023, held a public hearing at which witnesses presented testimony. EBSA discussed the comments it received on the amendments in this final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

EBSA determined that this final rule contains information collection requirements (ICRs) under the Act. With respect to amendments to Prohibited Transaction Exemption (PTE) 75-1 (OMB Control Number 1210-0092), EBSA estimated a total annual burden of 15,778 hours and an estimated total annual burden cost of \$0. With respect to PTE 86-128 (OMB Control Number 1210-0059), EBSA estimated a total annual burden of 177 hours and an estimated total annual burden cost of \$3,300.

Statutory authorization for the rule

EBSA stated that it is granting these amendments pursuant to its authority under section 408(a) of the Employee Retirement Income Security Act of 1974 and section 4975(c)(2) of the Internal Revenue Code of 1986. 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2).

Executive Order No. 12866 (Regulatory Planning and Review)

EBSA determined that this final rule is significant under the Order and submitted it to OMB for review.

Executive Order No. 13132 (Federalism)

EBSA determined that this final rule does not have federalism implications and does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.