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B-328986

April 20, 2017

The Honorable Lamar Alexander
Chairman
The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

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

Subject: *Department of Labor, Employee Benefits Security Administration: Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 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 “Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128” (RIN: 1210-AB79). We received the rule on April 7, 2017. It was published in the *Federal Register* as a “final rule; extension of applicability date” on April 7, 2017. 82 Fed. Reg. 16,902.

The final rule extends for 60 days the applicability date of the final rule (Fiduciary Rule) which was published with RIN 1210-AB32, on April 8, 2016, defining who is a “fiduciary” under the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986. The final rule also extends for 60 days the applicability dates of the Best Interest Contract Exemption and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs. It requires that fiduciaries relying on these exemptions for covered transactions adhere only to the Impartial Conduct Standards (including the “best interest” standard), as conditions of the exemptions during the transition period from June 9, 2017, through January 1, 2018. Thus, the fiduciary definition in the Fiduciary Rule published on April 8, 2016, and Impartial Conduct Standards in these exemptions, are applicable on June 9, 2017, while compliance with the remaining conditions in

these exemptions, such as requirements to make specific written disclosures and representations of fiduciary compliance in communications with investors, is not required until January 1, 2018. According to EBSA, this final rule also delays the applicability of amendments to Prohibited Transaction Exemption 84-24 until January 1, 2018, other than the Impartial Conduct Standards, which will become applicable on June 9, 2017. Finally, the rule extends for 60 days the applicability dates of amendments to other previously granted exemptions. The President, by Memorandum to the Secretary of Labor, directed the Department of Labor to examine whether the Fiduciary Rule may adversely affect the ability of Americans to gain access to retirement information and financial advice, and to prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary Rule as part of that examination. 82 Fed Reg. 9,675 (Feb. 7, 2017). The extensions announced in this document are necessary to enable the Department to perform this examination and to consider possible changes with respect to the Fiduciary Rule and Prohibited Transaction Exemptions (PTEs) based on new evidence or analysis developed pursuant to the examination.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). This final rule was published in the *Federal Register* on April 7, 2017. 82 Fed. Reg. 16,902. It was received on April 7, 2017, and has an effective date of April 10, 2017. The end of the effective period for 29 CR 2510.3-21(j) is extended from April 10, 2017, to June 9, 2017. Therefore, the final rule does not have the required 60-day delay in its effective date. The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and their reasons in the rule issued. 5 U.S.C. § 553(d)(3), 808(2). EBSA found that a delay of the applicability date of the Fiduciary Rule and PTEs relieves a restriction and therefore may appropriately become effective immediately. Additionally, it determined that there is good cause for making the final rule effective immediately.

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. Our review of the procedural steps taken indicates that EBSA complied with the applicable requirements.

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 Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Timothy D. Hauser
Deputy Assistant Secretary for
Program Operations, EBSA
Department of Labor

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
“DEFINITION OF THE TERM “FIDUCIARY”; CONFLICT OF
INTEREST RULE–RETIREMENT INVESTMENT ADVICE; BEST INTEREST
CONTRACT EXEMPTION (PROHIBITED TRANSACTION EXEMPTION 2016-01);
CLASS EXEMPTION FOR PRINCIPAL TRANSACTIONS IN CERTAIN
ASSETS BETWEEN INVESTMENT ADVICE FIDUCIARIES AND EMPLOYEE BENEFIT
PLANS AND IRAS (PROHIBITED TRANSACTION EXEMPTION 2016-02);
PROHIBITED TRANSACTION EXEMPTIONS 75-1, 77-4, 80-83, 83-1, 84-24 AND 86-128”
(RIN: 1210-AB79)

(i) Cost-benefit analysis

The Department of Labor, Employee Benefits Security Administration (EBSA) considered the costs and benefits of the final rule. EBSA expects that advisers' compliance with the Impartial Conduct Standards during the period between June 9, 2017, and January 1, 2018, will be substantial resulting in investor gains, even if there is some reduction in compliance relative to the baseline. EBSA is uncertain about the magnitude of this reduction and will consider this question as part of its review of the final rule (Fiduciary Rule) which was published with RIN 1210-AB32, 81 Fed. Reg. 20,946 (April 8, 2016), and Prohibited Transaction Exemptions (PTEs) pursuant to the President's Memorandum to the Secretary of Labor (82 Fed. Reg. 9,675, Feb. 3, 2017). EBSA noted that the Notice of Proposed Rulemaking's (NPRM's) Regulatory Impact Analysis (RIA) for the Fiduciary Rule illustrated a possible effect of a 60-day delay in the commencement of the potential investor gains estimated in the 2016 RIA. The illustration indicated that such a delay could result in a reduction in those estimated gains of \$147 million in the first year and \$890 million over 10 years using a 3 percent discount rate. The illustration used the same methodology that the 2016 RIA used to estimate potential investor gains from the Fiduciary Rule. Both made use of empirical evidence that front-end-load mutual funds that share more of the load with distributing brokers attract more flows but perform worse. EBSA discussed cost savings and stated that in the 2016 RIA, EBSA estimated that financial institutions would incur \$16 billion in compliance costs over the first 10 years, \$5 billion of which are first-year costs. Delaying the applicability date of the Fiduciary Rule and PTEs would result in cost savings due to foregone costs of complying for 60 days with the new PTE conditions. Additionally, after June 9, 2017, until at least January 1, 2018, financial institutions and advisers relying on the Best Interest Contract Exemption (BIC Exemption) and Principal Transactions Exemption to engage in covered transactions would have to satisfy only the Impartial Conduct Standards of those exemptions. They would not be specifically required to meet other transition period requirements of these PTEs, such as to make specific written disclosures and representations of fiduciary status and of compliance with fiduciary standards in investor communications, designate a person or persons responsible for addressing material conflicts of interest and monitoring advisers' adherence to the Impartial Conduct Standards, and comply with new recordkeeping obligations.

EBSA estimated cost savings of \$78 million until January 1, 2018, due to both the 60-day delay of the Fiduciary Rule and PTEs and the reduced transition period requirements. EBSA

estimated that the 10-year cost savings, which also include returns on the cost savings that occur in the April 10, 2017, to January 1, 2018, time period, are \$123 million using a 3 percent discount rate, and \$114 million using a 7 percent discount rate. The equivalent annualized values are \$14.4 million using a 3 percent discount rate and \$16.2 million using a 7 percent discount rate. EBSA included a figure to show the sources of the cost-savings, but stated that there could be additional cost savings not included in the estimates if, for example, firms developed more efficient methods to adhere to the Impartial Conduct Standards. EBSA noted that it does not have sufficient data to estimate these cost savings, therefore, they are not quantified. EBSA also discussed the alternatives it considered and stated that it believes the approach adopted in the final rule likely yields the most desirable outcomes including avoidance of costly market disruptions, more compliance cost savings than other alternatives, and reduced investor losses. In weighing different options, EBSA took numerous factors into account. EBSA's stated objective was to avoid unnecessary confusion and uncertainty in the investment advice market, facilitate continued marketplace innovation, and minimize investor losses while maximizing compliance cost savings.

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

EBSA determined that this final rule will have a significant economic impact on a substantial number of small entities. EBSA estimated the number of firms with a given North American Industry Classification System (NAICS) code that falls below a \$38.5 million threshold to be considered a small entity by the Small Business Administration. According to EBSA, this dataset alone does not provide a sufficient basis to estimate the number of small entities affected by the rule. Not all firms within a given NAICS code would be affected by this rule, because being an Employee Retirement Income Security Act (ERISA) fiduciary relies on a functional test and is not based on industry status as defined by a NAICS code. Further, not all firms within a given NAICS code work with ERISA-covered plans and IRAs. Over 90 percent of broker-dealers (BDs), registered investment advisers, insurance companies, agents, and consultants are small businesses according to the SBA size standards. Applying the ratio of entities that meet the SBA size standards to the number of affected entities, based on the methodology described at greater length in the RIA of the Fiduciary Rule, EBSA estimated that the number of small entities affected by the final rule is 2,438 BDs, 16,521 Registered Investment Advisors, 496 insurers, and 3,358 other ERISA service providers. EBSA continued to consider an employee benefit plan with fewer than 100 participants to be a small entity. The 2013 Form 5500 filings show nearly 595,000 ERISA covered retirement plans with less than 100 participants.

EBSA estimated that small entities would save approximately \$74.1 million in compliance costs due to the delays of the applicability dates described in the final rule. This estimate is a subset of the cost savings discussed in the Regulatory Impact Analysis but is an estimate of cost savings only for small entities. These cost savings are substantially derived from foregone ongoing compliance requirements related to the transition notice requirements for the BIC Exemption and the Principal Transactions Exemption, data collection to demonstrate satisfaction of fiduciary requirements, and retention of data to demonstrate the satisfaction of conditions of the exemption during the Transition Period.

(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 the final rule extending the applicability date does not include any federal mandate that would result in such expenditures by state, local, or tribal governments, or the private sector. EBSA states that it also does not expect that the delay will have any material economic impacts on state, local, or tribal governments, or on health, safety, or the natural environment.

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

Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq.

EBSA published a NPRM seeking comment on a proposed 60-day extension of the applicability dates of the Fiduciary Rule and PTEs until June 9, 2017. 82 Fed. Reg. 12,319 (March 2, 2017). The comment period on the proposed extension ended on March 17, 2017. In the same document, EBSA sought comment regarding the examination described in the Presidential Memorandum and on more general questions concerning the Fiduciary Rule and PTEs. This comment period ends on April 17, 2017. Under APA, an agency may determine that its rulemaking should become effective more quickly than the 30 days after publication that is otherwise required. EBSA found that a delay of the applicability date of the Fiduciary Rule and PTEs relieves a restriction and therefore may appropriately become effective immediately. Additionally, it determined that there is good cause for making the final rule effective immediately. EBSA states that the delay is intended to ensure that affected parties have a reasonable amount of time to adjust their behavior to comply with new regulatory requirements. The final rule, which delays for 60 days regulatory requirements that would otherwise apply as of April 10, 2017, fulfills that purpose. Moreover, if the final rule's 60-day delay were not immediately effective, significant provisions of the Fiduciary Rule and PTEs could become applicable on April 10 before the delay takes effect, resulting in a period in which the Fiduciary Rule, fiduciary obligations, and notice and disclosure requirements would become applicable before becoming inapplicable again. EBSA believed that such a gap period would result in a chaotic transition to fiduciary standards that would create additional confusion, uncertainty, and expense, thereby defeating the purposes of the delay and that the resulting disorder would be contrary to principles of fundamental fairness and could increase costs, not only for firms and advisers, but for the retirement investors that they serve. EBSA also believes that making the rule immediately effective will provide plans, plan fiduciaries, plan participants and beneficiaries, IRAs, IRA owners, financial services providers and other affected service providers the level of certainty that the rule is final and not subject to further modification without additional public notice and comment that will allow them to immediately resume and/or complete preparations for the provisions of the Fiduciary Rule and PTEs that will become applicable on June 9, 2017. Accordingly, EBSA concluded that providing certainty, by making the delay effective immediately, would be a more reasonable and fair path forward. In addition, EBSA states that the Presidential Memorandum ordering it to reconsider its legal and economic analysis was issued only 67 days before the applicability date and generated a high volume of comments. EBSA states it would have been impracticable for it to finish any public rulemaking process quickly enough to provide an effective date 30 days after publication. As of the close of the first comment period on March 17, 2017, EBSA received 193,000 comment and petition letters, approximately 15,000 commenters supported a delay, and 178,000 commenters opposed any delay.

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

EBSA sent a request to the Office of Management and Budget (OMB) to modify the information collections contained in the Fiduciary Rule and PTEs. The information collection contained in the final rule and PTEs are as follows:

- The information collections in the final rule are approved under OMB Control Number 1210-0155.
- PTE 2016-01, the Best Interest Contract Exemption: the information collections in PTE 2016-01, the BIC Exemption, are approved under OMB Control Number 1210-0156.
- PTE 2016-02, the Prohibited Transaction Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption): the information collections in PTE 2016-02, the Principal Transactions Exemption, are approved under OMB Control Number 1210-0157.
- The information collections in Amended PTE 75-1 are approved under OMB Control Number 1210-0092.
- The information collections in Amended PTE 86-128 are approved under OMB Control Number 1210-0059.
- The information collections in Amended PTE 84-24 are approved under OMB Control Number 1210-0158.

These paperwork burden estimates, which are substantially derived from compliance with conditions that will apply after January 1, 2018, over the 3-year information collection requirements approval period, are summarized as follows:

Titles: (1) Best Interest Contract Exemption and (2) Final Investment Advice Regulation.

- OMB Control Number: 1210-0156.
- Affected Public: Businesses or other for-profits; not for profit institutions.
- Estimated Number of Respondents: 19,890.
- Estimated Number of Annual Responses: 34,095,501 during the first year and 72,282,441 during subsequent years.
- Frequency of Response: When engaging in exempted transaction.
- Estimated Total Annual Burden Hours: 2,701,270 during the first year and 2,832,369 in subsequent years.
- Estimated Total Annual Burden Cost: \$2,436,741,143 during the first year and \$574,302,408 during subsequent years.

Titles: (1) Prohibited Transaction Exemption for Principal Transactions in Certain Assets between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs and (2) Final Investment Advice Regulation.

- OMB Control Number: 1210-0157. Affected Public: Businesses or other for-profits; not for profit institutions.
- Estimated Number of Respondents: 6,075.
- Estimated Number of Annual Responses: 2,463,803 during the first year and 3,018,574 during subsequent years.
- Frequency of Response: annually, when engaging in exempted transaction.
- Estimated Total Annual Burden Hours: 85,457 hours during the first year and 56,197 hours in subsequent years.

- Estimated Total Annual Burden Cost: \$1,953,184,167 during the first year and \$431,468,619 in subsequent years.

EBSA also summarized the paperwork burden eliminations of the PTEs in the final rule and referred to more detailed Paperwork Reduction Act analysis at 81 Fed. Reg. 20,946, 20,994; at 81 Fed. Reg. 21,002, 21,071; at 81 Fed. Reg. 21,089, 21,129; at 81 Fed. Reg. 21,139, 21,145; at 81 Fed. Reg. 21,181, 21,199; and at 81 Fed. Reg. 21,147, 21,171 (April 8, 2016).

Statutory authorization for the rule

EBSA issued the final rule pursuant to the authority of sections 3, 111, and 505 of the Employee Retirement Income Security of 1974 (ERISA), 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order No. 1-2011, 77 Fed. Reg. 1088 (Jan. 9, 2012); Secs. 2510.3-21, 2510.3-101, and 2510.3-102 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 237 (2012), Exec. Ord. No. 12108, 44 Fed. Reg. 1065 (Jan. 3, 1979) and 29 U.S.C. § 1135 note. Sec. 2510.3-38 is also issued under sec. 1, Pub. L. 105-72, 111 Stat. 1457 (1997).

Executive Order No. 12,866 (Regulatory Planning and Review)

According to EBSA, the final rule is an economically significant regulatory action because it would likely have an effect on the economy of \$100 million in at least one year. Accordingly, EBSA has considered the costs and benefits of the final rule, and it has been reviewed by OMB.

Executive Order No. 13,132 (Federalism)

EBSA determined that it does not expect that the delay will have any material economic impacts on state, local, or tribal governments, or on health, safety, or the natural environment. The Order was not discussed in the final rule.

Executive Order No. 13,771 (Reducing Regulation and Controlling Regulatory Costs)

According to EBSA, the impacts of the final rule are categorized consistently with the analysis of the original Fiduciary Rule, and it has also concluded that the impacts identified in the Regulatory Impact Analysis accompanying the 2016 Fiduciary Rule may still be used as a basis for estimating the potential impacts of that final rule, were it not being modified by this final rule. It has been determined that, for purposes of the order, the impacts of the Fiduciary Rule that were identified in the 2016 analysis as costs, and are reduced by this final rule, are presently categorized as cost savings (or negative costs), and impacts of the Fiduciary Rule that were identified in the 2016 analysis as a combination of transfers and positive benefits, and that are reduced by this final rule, are categorized as a combination of (opposite-direction) transfers and negative benefits. Accordingly, OMB determined that this final rule extending the applicability date does not impose costs that would trigger the requirements of the Order.