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November 24, 2020

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

The Honorable Robert C. "Bobby" Scott
Chairman
The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
House of Representatives

Subject: *Department of Labor, Employee Benefits Security Administration: Financial Factors in Selecting Plan Investments*

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 "Financial Factors in Selecting Plan Investments" (RIN: 1210-AB95). We received the rule on November 13, 2020. It was published in the *Federal Register* as a final rule on November 13, 2020. 85 Fed. Reg. 72846. The final rule has an effective date of January 12, 2021.

By this final rule, EBSA states it is adopting amendments to the "investment duties" regulation under title I of the Employee Retirement Income Security Act of 1974, as amended. 29 U.S.C. ch. 18. According to EBSA, the amendments require plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action.

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 Shari Brewster, Assistant General Counsel, at (202) 512-6398.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Jeanne Klinefelter Wilson
Acting Secretary, Employee Benefits
Security Administration
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
“FINANCIAL FACTORS IN SELECTING PLAN INVESTMENTS”
(RIN: 1210-AB95)

(i) Cost-benefit analysis

According to the Department of Labor, Employee Benefits Security Administration (EBSA), this final rule describes when and how fiduciaries can fulfill their responsibilities by factoring in only pecuniary considerations when selecting and monitoring investments. EBSA expects that some plans and their service providers will incur costs to (1) review the rule and, if necessary, modify their processes for selecting and monitoring investments, (2) make changes to their qualified default investment alternative (QDIA) if it does not align with the final rule’s requirements, and (3) document selections where alternative investment options cannot be distinguished on the basis of pecuniary factors. EBSA does not expect these requirements to impose a significant cost increase. EBSA states that the rule mitigates some costs by allowing plans to make any required changes to QDIAs when necessary to comply with the requirements by April 30, 2022. EBSA also believes cost will be mitigated, because circumstances where alternative investment options that cannot be distinguished based on pecuniary factors should occur very rarely in practice.

According to EBSA, although the final rule will replace its prior sub-regulatory guidance, it believes there is significant overlap in the content of each. EBSA states the final rule will assist fiduciaries in carrying out their responsibilities by avoiding making investment decisions based on nonpecuniary factors, while protecting the financial interests of participants and beneficiaries in their retirement benefits under their plans.

EBSA estimates that the final rule would impose incremental costs of approximately \$44.9 million in the first year and \$122,000 in subsequent years. Over 10 years, EBSA states the associated costs would be approximately \$42.7 million with an annualized cost of \$6.1 million, using a 7 percent discount rate. Using a perpetual time horizon, EBSA states the annualized costs in 2016 dollars are \$2.9 million at a 7 percent discount rate. Applying a 3 percent discount rate, EBSA states the costs would be \$44.5 million over the 10-year period with an annualized cost of \$5.2 million, and the annualized costs in 2016 dollars would be \$1.4 million.

(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. The analysis included (1) a statement of the need for and objectives of the rule; (2) a description of affected small entities; (3) a statement of the impact of the rule; (4) a description of regulatory alternatives; and (5) a statement about duplicate, overlapping, or relevant federal rules.

(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 does not include any federal mandate that would result in expenditures by state, local, or tribal governments of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year.

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

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

On June 30, 2020, EBSA published a proposed rule. 85 Fed. Reg. 39113. EBSA received more than 1,100 written comments during the comment period and more than 7,600 submissions as part of six separate petitions from a variety of parties, including plan sponsors and other plan fiduciaries, individual plan participants and beneficiaries, financial services companies, academics, elected government officials, and trade and industry associations. EBSA responded to comments in this final rule.

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

EBSA determined that this final rule contains information collection requirements under the Act. EBSA has submitted an information collection request to the Office of Management and Budget (OMB). EBSA estimated the new information collection, Financial Factors in Selecting Plan Investments (OMB Control Number 1210-0162), will result in total annual burden of 1,290 hours and total annual burden cost of \$0.

Statutory authorization for the rule

EBSA promulgated this final rule pursuant to section 505 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1135.

Executive Order No. 12866 (Regulatory Planning and Review)

EBSA determined that this final rule is economically significant under the Order and stated that OMB has reviewed the rule.

Executive Order No. 13132 (Federalism)

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