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Washington, DC 20548

B-322683

November 14, 2011

The Honorable Tom Harkin
Chairman
The Honorable Michael B. Enzi
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable John Kline
Chairman
The Honorable George Miller
Ranking Member
Committee on Education and the Workforce
House of Representatives

Subject: *Department of Labor, Employee Benefits Security Administration:
Investment Advice—Participants and Beneficiaries*

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 (Department), Employee Benefits Security Administration, entitled “Investment Advice—Participants and Beneficiaries” (RIN: 1210-AB35). We received the rule on October 28, 2011. It was published in the *Federal Register* as a final rule on October 25, 2011, with an effective date of December 27, 2011. 76 Fed. Reg. 66,136.

The final rule implements the Employee Retirement Income Security Act (ERISA), and parallel provisions of the Internal Revenue Code of 1986, relating to the provision of investment advice to participants and beneficiaries in individual account plans, such as 401(k) plans, and beneficiaries of individual retirement accounts (and certain similar plans). The final rule affects sponsors, fiduciaries, participants, and beneficiaries of participant-directed individual account plans, as well as providers of investment and investment advice related services to such plans.

Enclosed is our assessment of the Department’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 the Department 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: Phyllis C. Borzi
Assistant 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
"INVESTMENT ADVICE—PARTICIPANTS AND BENEFICIARIES"
(RIN: 1210-AB35)

(i) Cost-benefit analysis

In accordance with OMB Circular A–4, the Department has examined the economic and policy implications of this final rule and has concluded that the action’s benefits justify its costs. The Department estimates that this final rule will yield benefits of between \$7 billion and \$18 billion annually, at a cost of between \$2 billion and \$5 billion, thereby producing a net financial benefit of between \$5 billion and \$13 billion. The estimated costs of the final regulation include costs of approximately \$745 million that are associated with the Paperwork Reduction Act information collection requests contained in the final rule.

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

For purposes of analysis under the RFA, the Department proposes to continue its usual practice of considering a small entity to be an employee benefit plan with fewer than 100 participants. The Department estimates that approximately 100,000 small plans, a significant number, will voluntarily begin offering investment advice to participants as a result of this final regulation. The Department certifies that the impact on small entities will not be significant. Pursuant to this certification, the Department has refrained from preparing an Initial Regulatory Flexibility Analysis of this final regulation. Notwithstanding this certification, the Department did separately consider the impact of this final regulation on participants in small plans.

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

For purposes of the Unfunded Mandates Reform Act of 1995, as well as Executive Order 12,875, the Department states that the final rule does not include any federal mandate that will result in expenditures by state, local, or tribal governments in the aggregate of more than \$100 million, adjusted for inflation, or increase expenditures by the private sector of more than \$100 million, adjusted for inflation.

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

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

On March 2, 2010, the Department published in the *Federal Register* new proposed regulations that, upon adoption, implement the statutory prohibited transaction exemption under ERISA sections 408(b)(14) and 408(g), and the parallel provisions in the Code (75 Fed. Reg. 9360). In response to the proposal, the Department received 74 comment letters.

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

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. § 3506(c)(2)), the notice of proposed rulemaking (NPRM) solicited comments on the information collections included therein. The Department also submitted an information collection request (ICR) to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. § 3507(d), contemporaneously with the publication of the NPRM, for OMB's review.

Statutory authorization for the rule

The Department states that the final rule is authorized by 29 U.S.C. § 1135; and Secretary of Labor's Order No. 6-2009, 74 Fed. Reg. 21,524 (May 7, 2009). Secs. 2550.401b-1, 2550.408b-1, 2550.408b-19, 2550.408g-1, and 2550.408g-2 also issued under sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. § App. Sec. 2550.401c-1 also issued under 29 U.S.C. § 1101. Sections 2550.404c-1 and 2550.404c-5 also issued under 29 U.S.C. § 1104. Sec. 2550.407c-3 also issued under 29 U.S.C. § 1107. Sec. 2550.404a-2 also issued under 26 U.S.C. § 401 note (sec. 657(c)(2), Pub. L. No. 107-16). Sec. 2550.408b-1 also issued under 29 U.S.C. § 1108(b)(1). Sec. 2550.408b-19 also issued under sec. 611(g)(3), Pub. L. No. 109-280).

Executive Order Nos. 12,866 and 13,563 (Regulatory Planning and Review)

The Department states that Executive Orders 12,866 and 13,563 require a comprehensive regulatory impact analysis be performed for any economically significant regulatory action, defined as an action that would result in an annual effect of \$100 million or more on the national economy or which would have other substantial impacts. In accordance with OMB Circular A-4, the Department has examined the economic and policy implications of this final rule.

Executive Order No. 13,132 (Federalism)

This final rule does not have federalism implications because it has no substantial direct effect 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.