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May 8, 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: Retirement Security Rule: Definition of an Investment Advice Fiduciary*

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 “Retirement Security Rule: Definition of an Investment Advice Fiduciary” (RIN: 1210-AC02). We received the rule on April 25, 2024. It was published in the *Federal Register* as a final rule on April 25, 2024. 89 Fed. Reg. 32122. The effective date is September 23, 2024.

According to EBSA, this final rule defines when a person renders “investment advice for a fee or other compensation, direct or indirect” with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a “fiduciary” in the Employee Retirement Income Security Act of 1974 (ERISA). EBSA also stated the rule applies for purposes of title II of ERISA to the definition of a fiduciary of a plan defined in the Internal Revenue Code, including an individual retirement account or other plan identified in the Internal Revenue Code.

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.

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  
“RETIREMENT SECURITY RULE: DEFINITION OF AN INVESTMENT ADVICE FIDUCIARY”  
(RIN: 1210-AC02)

(i) Cost-benefit analysis

The Department of Labor, Employee Benefits Security Administration (EBSA) prepared an accounting statement summarizing its assessment of the benefits, costs, and transfers associated with this final rule. EBSA stated that it is unable to quantify all benefits, costs, and transfers, but has sought, where possible, to describe non-quantified impacts. Among the non-quantified benefits, EBSA stated that the rule will: increase uniformity in the regulation of financial advice for Retirement Investors; protect consumers from losses that can result from advisory conflicts of interest; better align investors’ portfolio with their risk preferences and savings horizons; and facilitate Retirement Investors’ trust in advisors.

(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 discussed: (1) the need for and objectives of this final rule; (2) comments from the Small Business Administration on the RFA; (3) other significant comments on the RFA; (4) a description of affected small entities; (5) the impact of the rule; (6) duplicate, overlapping, or relevant federal rules; and (7) a description of alternatives considered.

(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 contains a federal mandate under the Act that may result in expenditures of \$100 million in 1995 dollars, updated annually for inflation, or more for the private sector in any one year. EBSA stated that it prepared a regulatory impact analysis that shall meet the Act’s obligations.

(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 since 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. 75890. EBSA held public hearings on the proposed rule on December 12 and 13, 2023. According to EBSA, it made certain changes and clarifications in this final rule in response to public comments on the proposed rule and the testimony presented at the public hearings.

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

EBSA determined that this final rule contains no information collection requirements under the Act.

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 stated that this final rule is a significant regulatory action as defined under the Order and submitted it to OMB for review.

Executive Order No. 13132 (Federalism)

EBSA stated that this final rule would affect the insurance industry pertaining to annuities and that these entities are regulated by states. EBSA stated that it carefully considered the regulatory landscape in the states and worked to ensure that its regulations would not impose obligations on advisers or the insurance industry that are inconsistent with their responsibilities under state law. EBSA also stated that it intends to work with state insurance regulators and state securities regulators moving forward.