



September 24, 2015

Delivered electronically by E-mail to: [e-ORI@dol.gov](mailto:e-ORI@dol.gov)

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Conflict of Interest Rule  
Room N5655  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Reference: RIN 1210-AB32 Definition of the term “Fiduciary;” Conflict of Interest proposed rule and associated Prohibited Transaction Exemption proposals

Ladies and Gentlemen:

The U.S. Chamber of Commerce (the “Chamber”) submits these further comments in response to the U.S. Department of Labor’s solicitation of comments regarding the Department’s Employee Benefits Security Administration (EBSA)’s notice of proposed rulemaking regarding “Definition of the Term ‘Fiduciary’; Conflict of Interest Rule—Retirement Investment Advice” (RIN 1210-AB32) and associated notices of proposed Prohibited Transactions Exemptions (PTEs) published at 80 Federal Register 75 (pps.21928, 21960, 21989, 22004, 22010, and 22021). This letter reiterates and expands matters regarding the Department’s regulatory economic impact analysis discussed in our July 20, 2015, comment letter in light of testimony presented during the August 10-13, 2015, administrative hearings.

The Chamber is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region, with substantial membership in all 50 states. More than 96 percent of the Chamber’s members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation’s largest companies are also active members. Therefore, we are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business – manufacturing, retailing, services, construction, wholesaling, and finance – is represented.

These comments and our previous comments have been developed with the input of member companies who are interested that regulations protect their employee’s

retirement savings while avoiding unnecessary costs that could be passed to savers and reduce their investment returns. Our members also are interested to ensure that all Federal rulemaking proposals and final decisions are informed by a thorough, accurate, and objective economic impact analysis as required under Executive Orders 12866 and 13563 and under the Regulatory Flexibility Act. The Chamber and its members are committed to the principle that regulatory decisions should be based on sound scientific, statistical and economic evidence.

In light of testimony presented during the EBSA administrative hearings, three topics are important to reiterate and expand: (1) EBSA's economic impact analysis of the impact on small entities, as required under the Regulatory Flexibility Act, is inadequate and incomplete; (2) EBSA has not adequately considered the risks of unanticipated adverse impacts of its proposal; and (3) EBSA should explicitly and systematically include in its proposal a plan for monitoring and evaluating the impact and effectiveness of any final regulation that it promulgates. Each of these topics is discussed below.

## **Inadequate and Incomplete Regulatory Flexibility Analysis**

EBSA's Initial Regulatory Flexibility Analysis fails to meet the full requirements of the Regulatory Flexibility Act. The statute requires<sup>1</sup>

*(1) a description of the reasons why action by the agency is being considered;*

*(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;*

*(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;*

*(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;*

*(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.*

*(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant*

---

<sup>1</sup> 5 USC 603, accessed at <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-partI-chap6-sec603.htm>

*economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—*

*(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;*

*(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;*

*(3) the use of performance rather than design standards; and*

*(4) an exemption from coverage of the rule, or any part thereof, for such small entities.*

EBSA's initial regulatory flexibility analysis is incomplete and inadequate in terms of identifying the small entities affected and assessing the cost impacts. EBSA's analysis did not include any consideration of feasible regulatory flexibility alternatives to mitigate impacts on small entities. Each of these three elements of inadequacy is discussed in detail below.

**Identification of Affected Small Entities.** EBSA identified affected small entities cursorily and ambiguously as comprising two categories: (1) small retirement savings/pension plan sponsors and individual IRA investors; and (2) small service providers, including small broker/dealers and small Registered Investment Advisor companies.

Small plan sponsors and IRA investors are not identified numerically. EBSA's assertion<sup>2</sup> that affected small plan sponsors and IRA investors only benefit does not obviate the requirement to identify this category of affected small entities in some quantitative detail. It is not clear how EBSA's concept of "small pension plans" relates to categories of small businesses or other entities as defined by the Small Business Administration. Our concern on this point is similar to that expressed by the U.S. Small Business Administration, Office of Advocacy in a letter to EBSA:

"Based on input from small business stakeholders, Advocacy is concerned that the Initial Regulatory Flexibility Analysis (IRFA) contained in the proposed rule lacks essential information required under the Regulatory Flexibility Act (RFA). Specifically, the IRFA does not adequately estimate the costs of the proposal or the number of small entities that would be impacted by it."<sup>3</sup>

---

<sup>2</sup> EBSA Regulatory impact Analysis, p. 181.

<sup>3</sup> See docket for this rulemaking at [www.regulations.gov](http://www.regulations.gov), file:///C:/Users/rbird/Downloads/1210-AB32\_comment\_403\_US\_Small\_Business\_Administration\_Office\_of\_Advocacy\_071715.pdf.

At the very least, EBSA should identify the number of affected small plan sponsors by industry and by gradation of number of plan participants. Within the scope of EBSA's arbitrary definition of a "small pension plan" as one with 100 or fewer members, it may be that the impacts (benefits, costs or both) may vary significantly within that range. For the purposes of regulatory flexibility analysis, it may be meaningful to distinguish the numbers of plans with 10 or fewer participants from those with 50 to 100 participants, for example. It is not sufficient for EBSA to dismiss its obligation with the claim that data is not available. EBSA has the authority, resources, and time available at its disposal to do field research, surveys, records sampling and other data collection activities to determine the numbers and characteristics of affected entities, including those deemed to be small by various definitions.

For the second category of affected small entities, "small service providers rendering investment advice to plan or IRA investors"<sup>4</sup> EBSA first cites the Small Business Administration's standard for small businesses in the "Financial Investments and Related Activities Sector," which is comprised of firms with annual receipts up to \$38.5 million. Paradoxically, EBSA then shifts to an arbitrary and inadequately explained alternative of firms with receipts of \$10 million or less, potentially ignoring many firms that should have been included in the regulatory flexibility analysis based on the SBA standard of \$38.5 million annual revenue. The Chamber agrees with the conclusion of the Small Business Administration Office of Advocacy that "EBSA does not clearly state what constitutes a small business in the analysis for this rulemaking....[and] it is uncertain whether the IRFA contained in the proposed rule accurately takes into account all of the potential small business impacts of the proposal."<sup>5</sup>

In its analysis of small service providers, EBSA again cites the lack of available data. Again, this is not a credible excuse for the lack of an adequate analysis as required by the Regulatory Flexibility Act. EBSA had at its disposal the authority, resources and time to undertake research and data collection to obtain the needed data. This point was made by the SBA Office of Advocacy in its letter to EBSA: "EBSA should consider both obtaining additional information on small entities as well as providing cost estimates in ranges and running multiple sensitivity analyses to see how the costs of the rule might change if some of the factors considered by EBSA are different than its assumptions."<sup>6</sup>

**Economic Impacts on Small Entities.** As noted by the Small Business Administration Office of Advocacy in its letter to EBSA quoted above, the EBSA regulatory flexibility analysis does not adequately estimate the costs of the proposal.<sup>7</sup> Of the two categories of small entities potentially affected by the proposed rule, EBSA effectively ignores cost impacts on one (small plan sponsors and IRA investors) and seriously miscalculates the costs for the other (small service providers).

---

<sup>4</sup> RIA, p. 181.

<sup>5</sup> Claudia Rodgers, Acting Chive Counsel for Advocacy, U.S. Small Business Administration, Letter to The Honorable Phyllis C. Borzi dated July 17, 2015, p. 4. Accessed from the docket for RIN1210-AB32 at [www.regulations.gov](http://www.regulations.gov) as <http://www.regulations.gov/#!documentDetail;D=EBSA-2010-0050-0608>.

<sup>6</sup> Ibid, p. 5.

<sup>7</sup> Ibid, p. 1

For the small plan sponsors/IRA investors category, EBSA summarily dismisses the impact of the proposed rule by the unsupported claim that this group will only benefit: “The proposed rule and the accompanying exemptions will provide benefits to small plan sponsors, and IRA investors...”<sup>8</sup> Apparently EBSA means to suggest that this category of small entities experiences both costs and benefits, but that the net benefits are positive **on average** for affected small plan sponsors or IRA investors.<sup>9</sup> However, EBSA does not present any empirical evidence, calculations or other basis to establishing this conclusion. A credible and useful regulatory flexibility analysis should provide specific estimates of the average costs and average gross benefits from which a claim of positive net benefit average is calculated.

Furthermore, it is not sufficient for the regulatory flexibility analysis only to show that average net benefits are positive. The average is a composite of diverse members, and for some affected small entities there may be a net cost rather than a net benefit. A thorough regulatory flexibility analysis that complies with the intent of the Regulatory Flexibility Act should provide sufficient data detail to reveal whether or not those small entities that will experience costs in excess of benefits are an identifiable subcategory. If any significant subcategory of affected small entities should be found to be exposed to net costs, then EBSA’s duty under the Regulatory Flexibility Act is to identify those costs and to consider how they may be mitigated.

Even if all small entities obtain some net benefit from the proposed rule, it is arguable that the regulatory flexibility analysis should consider how those net benefits could be made larger by reducing the included cost elements.

**Flexibility Alternatives.** EBSA failed to address one necessary element of an adequate regulatory flexibility analysis: identifying and considering alternatives to mitigate impacts on small entities.<sup>10</sup> Nowhere in the IRFA section of EBSA’s RIA document is there any discussion of alternatives that EBSA has considered to mitigate cost impacts of the proposed rule on affected small entities. It may not be necessary that EBSA adopt any mitigating alternative, but it is necessary, to comply with the Regulatory Flexibility Act, that EBSA identify such alternatives, consider them, and if rejecting them, explain why.

In a separate section (Section 8) of the RIA, EBSA does discuss certain general regulatory alternatives, but, as noted in our previous (July 20, 2015) comment letter, EBSA does not examine the listed alternatives in the full benefit/cost analysis context prescribed by OMB guidance and the relevant Executive Orders. The alternatives that EBSA discusses are only tangentially related to mitigation of small entity impacts. EBSA should include in the section of its regulatory analysis specifically addressed to

---

<sup>8</sup> EBSA Regulatory impact Analysis, p. 181.

<sup>9</sup> The alternatives, asserting that there are no costs or that net benefits are positive for every affected entity, are not credible. EBSA estimates that positive costs will be imposed on service providers and EBSA has not presented any evidence to support a claim that all such costs would be absorbed by the service providers. Therefore, it is reasonable to assume that at least some of service providers’ increased costs will be passed to the clients to whom the services are provided, and for at least some of the client plan sponsors or IRA investors the passed on cost may exceed the benefit accrued.

<sup>10</sup> EBSA RIA, p. 185

regulatory flexibility analysis a detailed discussion demonstrating its compliance with the statutory requirement to identify and consider alternatives for mitigating small entity impacts of the proposed rule.

These concerns are mirrored in the Small Business Administration Office of Advocacy letter submitted to the regulatory docket for this rulemaking:<sup>11</sup>

As the proposal contains an IRFA with inadequate cost and small business estimates, the public will not be fully informed as to the possible impact of the proposed rule on small entities. Moreover, because the estimates provided by the IRFA appear to be flawed, it is uncertain how EBSA could accurately evaluate alternatives to the proposed rule which would reduce the burdens on small businesses. As an example, a number of small business owners and representatives have been in contact with Advocacy to express concern that the proposed rule underestimates the burdens it would impose and that the proposal could even limit their ability to offer savings and investment advice to client. Without a more accurate understanding of the regulatory burden on small businesses, EBSA will not be able to understand both the extent of the costs of the rule as well as the efficiency and effectiveness of potential alternatives to help small entities. As described in more detail below, small business stakeholders report to Advocacy that BSA does not fully consider and evaluate certain alternatives in the proposal that could help reduce these costs and burdens on small entities.

The Chamber concurs in the recommendation of the Small Business Administration Office of Advocacy that EBSA should postpone further consideration of the proposed rule until after it has republished a Supplemental IRFA that remedies the errors and omissions identified in the inadequate current version, and receives and considers fully public comments on the republished IRFA. We hope that EBSA will also avail itself of the assistance that the SBA Office of Advocacy has offered toward preparation of a more adequate IRFA.

Advocacy recommends that EBSA republish a Supplemental IRF A for additional public comment before proceeding with this rulemaking. The Supplemental IRFA should provide a more accurate estimate of the small entities impacted by the proposal. Specifically, EBSA should be more transparent about its process for allocating firms into various size categories based on distribution percentages derived from previous reports. EBSA should also better explain, and provide evidence to justify, its approach for dividing ERISA plan service providers into small, medium, and large size categories. Advocacy also suggests that EBSA provide in its Supplemental IRFA a more accurate estimate of the costs of the proposal. Because of the lack of clarity and small

---

<sup>11</sup> Ibid. p. 5.

entity data, Advocacy recommends that EBSA conduct multiple sensitivity analyses on its assumptions and use ranges as opposed to point estimates wherever possible. Advocacy also recommends that the Supplemental IRFA also take into account the suggestions of small business owners and representatives to expand the scope of the best interest contract exemption and the seller's carve-out. Advocacy encourages EBSA to continue to conduct outreach with small business stakeholders to help develop additional alternatives and exemptions in the proposed rule that would make it less burdensome and costly for small businesses. By republishing a Supplemental IRFA and giving full consideration to additional regulatory alternatives, EBSA will gain further valuable insight into the effects of the proposed rule on small business and be more transparent in explaining and justifying the choices that it made in the proposal. ***Advocacy stands ready to assist EBSA in these efforts.***<sup>12</sup> [Emphasis added]

## **Risks of Unanticipated Adverse Consequences**

EBSA has not adequately considered the risks of unanticipated adverse impacts of its proposal. In particular, EBSA should consider the risks that anticipated benefits of the proposed rule will be diminished by the effect of higher costs of obtaining advice, or the scarcity of the supply of advisers able to comply with the proposed rule results in retirement savings investors making decisions without adequate information and advice. This risk is particularly significant in the event of an equities market downturn when, experience shows, investors without the support of experienced advisers are likely to sell in a “panic” and experience loss of unrealized gains and of principal.

Often the unexpected or unlikely adverse outcome of a decision can be mitigated by reversing course and starting over, but some public policy mistakes cannot be easily undone. This non-reversibility risk is an important concern that EBSA should explicitly address. The proposed rule will impose major change on a large and long-established segment of the financial market. Even if the risk is small that the proposed change will have adverse consequences, the change may not be amenable to reversal. The change will fundamentally alter ways of doing business and client relationships. Some institutions will undergo significant restructuring, employees will be laid off or retrained for new duties, and some established companies may find it necessary to merge with others or even to go out of business. Even if the likelihood is small, the magnitude of impact may make the risk unacceptable.

Consideration of irreversibility risk adds a new dimension to the regulatory decision. In particular, it suggests that initial steps and gradual changes that would reveal the likely effects of change, that could be reversed or that would inflict less harm in the worst event may be preferable to a full scale regulatory change. The government has the potential to wield enormous power and influence over markets. Wise

---

<sup>12</sup> Ibid, p. 6.

governance requires wielding that power with discretion and care to avoid unanticipated or unintentional consequences.

## **Need Follow-up Impact Evaluation**

An important strategy that EBSA can adopt to mitigate the risks inherent in the proposed rule would be to include in any final rule explicit provisions for monitoring implementation, data collection, surveys and related research activities to evaluate the effectiveness and impact (costs, benefits and transfers) of the regulation. EBSA should explicitly define metrics and targets by which the effectiveness and impacts of a rule would be judged.

E.O. 13563 instructs agencies to undertake retrospective evaluations of the benefits, costs and effectiveness of regulations. Such ex post regulatory impact analyses are useful for identifying obsolete regulations as candidates for elimination, but such studies are also important for newly implemented rules to gauge whether the forecast benefits and costs are accurate and whether unforeseen effects may require that a regulation be revised or adjusted before irreparable harm occurs.

Retrospective evaluations are often hindered by lack of sufficient data on program outcomes and impacts. The regulatory planning and proposal stage for a new rule is the ideal time to identify the performance measures and other data that will be needed for future retrospective evaluation and to build into the regulatory design information collection requirements and other mechanisms to facilitate future evaluation research. The need for retrospective evaluation is especially great in the case of a regulation like the EBSA proposal, which relies on extensive assumptions and uncertain effects.

For retrospective evaluation of the proposed rule, the primary regulatory performance measure should focus on whether or not the regulation achieves the objective of improving the long-term return on investment enjoyed by retirement savers. Any positive or negative impact on the per capita level of retirement savings contributions should also be assessed. The costs of regulatory compliance, also, should be tracked and compared to the values forecast during the rulemaking decision process.

The Department of Labor is fortunate to have within its Office of the Assistant Secretary for Policy a group of experienced and expert program evaluation research professionals. EBSA should seek their advice and recommendations regarding strategies to incorporate plans for evaluation into any regulation design.

## **Conclusion**

The Regulatory Flexibility Act obligates regulatory agencies to exercise due diligence to enumerate affected small entities and to credibly analyze the impacts of regulations on such small entities. Executive Orders 12866 and 13563 direct agencies to conduct full benefit cost analyses of all available alternatives and to select the most efficient (least cost relative to benefit) regulatory approach. EBSA has not performed its



duty with regard to either the Regulatory Flexibility Act nor the relevant Executive Orders. EBSA should not proceed to a final regulatory action until it has adequately demonstrated full compliance with these requirements by publishing corrected and completed regulatory impact and initial regulatory flexibility analysis, receiving further public comment, and reconsidering any subsequent regulatory proposal in response to an adequate opportunity for the public to submit data and information.

Sincerely,



Randel K. Johnson  
Senior Vice President  
Labor, Immigration & Employee Benefits  
U.S. Chamber of Commerce



Ronald Bird, Ph.D  
Senior Economist, Regulatory Affairs  
Economic Policy Division  
U.S. Chamber of Commerce