May 20, 2015

Department of Labor
Employee Benefits Security Administration
200 Constitution Ave. NW
Washington, DC 20210

RE: RIN 2010-AB32, Paperwork Reduction Act Comments on "Definition of the Term 'Fiduciary'; Conflict of Interest Rule-Retirement Investment Advice

Thank you for the opportunity to comment on the Employee Benefits Security Administration's (EBSA) proposed "Fiduciary" rule's Paperwork Reduction Act (PRA) analysis. We believe there are several assumptions unsupported in the analysis and instances where the agency rounded down without explaining its justification.

Dubious Assumptions

Throughout the PRA analysis, the agency provides assumptions for the number of affected entities or the time for compliance but omits any relevant explanation for how the agency arrived at those figures.

The largest component of the paperwork hours calculation in the PRA--the number of retirement plans--relies on an estimate that 50 percent of the 85,863 entities will use the seller's carve-out. However, there is no explanation for how EBSA arrived at this figure. The agency should either provide a range or explain in detail how it determined that 50 percent of the universe of possible respondents would participate in the carve-out. If there is no helpful academic literature or any example of similar rules that might be applicable then it should consider some sort of survey to bolster its estimate here. It is crucial to this analysis, after all.

Furthermore, there is also no explanation given for how they arrived at their assumption that legal professionals will spend one hour to produce the required disclosures while clerical staff will need just 30 minutes. The agency should articulate how it arrived at each estimate as well as why they differ by 100 percent.

Finally, EBSA omits any rationale for why the 1,800 service providers in its universe will spend just ten minutes completing the disclosures, as well as why it will take just 20 minutes for the 2,800 financial institutions. Again, the agency should explain how it arrived at each as well as why it assumes there would be a large difference in times. A perfunctory, non-random survey of service providers suggests that these numbers are quite low.

Finally, EBSA uses a figure of 1,800 service providers as an estimate of potential respondents, which comes from 2012 data. We recommend using updated data for the number of service providers, and find it slightly unbelievable that current data would not be available to EBSA.

Alternate Estimates

We believe the agency based much of its PRA analysis upon assumptions unsupported in the paperwork request to the Office of Management and Budget or the text of the proposed rule.

For example, if we assumed that 75 percent, instead of 50 percent, of retirement plans choose to participate in the carve-out then the amount of time required to prepare the legally-required disclosures increases from 43,000 hours to 64,400. This 75 percent adoption rate would also increase the necessary clerical time to 32,200 hours, up from 21,000, for a total paperwork hours burden approaching 100,000.

If we were to assume that legal compliance and clerical compliance will take one hour and that service providers and financial institutions will need 20 minutes to provide the disclosures, for the sake of doing a sensitivity analysis, it would yield a total burden of slightly over 130,000 hours, or almost double the original EBSA estimate ((64,400x2)+600+933=130,333). For costs, this translates to $10.5 million annually, or more than 64 percent higher than EBSA's original estimate.

Conclusion

We appreciate that EBSA has found it necessary to make several assumptions in order to come up with its estimates for the paperwork burden of the rule. We are not sure why a rule that was first proposed in 2010 does not have more relevant data. In five years surely EBSA could have surveyed providers, commissioned studies, or figured out a way to generate more applicable data to ascertain the paperwork costs of completing this rule.

We have pointed out in other venues that agencies have an incentive to downplay the hours necessary to comply with a new regulation as well as the time costs of compliance. We suggest--albeit absent any data of our own--that something of the sort has occurred here as well. Given such incentives we believe it behooves agencies to support their time estimates in some way--if not with data then via some reasoned explanation as to how they arrived at their figures. EBSA has done nothing of the sort in this RIA.

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