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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 and associated Prohibited Transaction Exemption proposals

Ladies and Gentlemen:

The U.S. Chamber of Commerce (the "Chamber") submits these 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).

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 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.

Introduction

These comments address the adequacy of the regulatory economic analysis that is presented by EBSA as the basis for the specific proposed rule and proposed Prohibited Transaction Exemptions (new and amended) presented in EBSA's proposed rulemaking notices. Our examination of the regulatory economic analysis produced by EBSA and reviewed by OMB finds that it is flawed in eight critical aspects:

- Failure to present an adequately detailed baseline description of the need for regulation and of the entities, transactions and outcomes associated with pre-rulemaking baseline market conditions.

- Failure to examine adequately and to compare fully the benefits and costs of multiple alternatives to the proposed regulatory approach;

- Failure to conduct independent research to refine estimates of the expected benefits of the proposed approach and of each alternative;

- Failure to conduct independent research to inform estimates of the labor time, other resources and costs of adapting business operating procedures to comply with the proposed rule and alternatives;

- Failure to consider adequately and to present thoroughly the uncertainties and risks of the costs and benefits of the proposed approach and alternatives;

- Failure to consider adequately the impacts of the proposed rule on small entities under the Regulatory Flexibility Act and to examine the costs and benefits of alternatives to those impacts;

- Failure to include in the analysis identification of ex post measures of effectiveness of the proposed rule and to provide in the proposal provisions for information collection to facilitate retrospective evaluation of the costs, benefits and effectiveness of the rule if adopted; and

- Failure to assess the time needed by the public to assess the potential impacts of the proposed regulation on their needs and interests and to make meaningful comment.

These failures of the regulatory impact analysis each and collectively contribute to the conclusion that EBSA did not have the full and objective information needed to make a reasoned decision to select the regulatory approach proposed in comparison to other alternatives and that is required under E.O. 12866. Furthermore, the public has not been provided sufficient information to replicate the decision, to explore in detail the reasoning process underlying the decision and to respond meaningfully to the proposal.

Section 1 of these comments summarizes the critical importance of a thorough, accurate, objective and quantitatively detailed regulatory impact analysis to inform a reasoned regulatory decision by an agency executive. It explains how a thorough, accurate, objective and quantitatively detailed regulatory impact analysis is a bulwark against arbitrary and capricious rulemaking. Each of the eight types of failure by EBSA to conduct an adequate regulatory economic analysis is detailed in Sections 2 through 9 of this letter.

Comments

Section 1. A thorough, accurate, objective and quantitatively detailed regulatory impact analysis is the foundation for reasoned rulemaking.

Executive Orders 12866 and 13563 require agencies to conduct a thorough analysis of the economic basis of the need for regulatory intervention in markets, to compare the costs and benefits of each alternative regulatory approach, including the approach of no new regulation, and to select among the alternatives a proposed approach that will yield the maximum net benefit, which implies the necessity to calculate or otherwise assess the expected net benefits of each alternative considered:

> "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits…" EO 12866, Section 1(a)

> "Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees, or marketable permits, or providing information upon which choices can be made by the public." EO 12866, Section 1(b)(3)

> "Each agency shall tailor its regulations to impose the least burden on society…" EO 12866, Section 1(b)(11)

The regulatory impact analysis is a decision making aid. It should present to the decision making regulatory executive an array of alternatives. E.O. 12866 specifies that

these should include the alternative of no regulatory action and at least one alternative that provides for public information or education in lieu of direct regulation of behavior. E.O. 12866 specifies that the analysis should present an assessment of both costs and benefits for each available alternative. The presentation of a thorough, accurate, objective and quantitatively detailed analysis ensures that the executive decision maker can chose a proposed regulatory approach that maximizes expected net benefits, as required by E.O. 12866, and that appropriately adjusts the decision to account for considerations of uncertainty and risk.

E. O. 12866, which provides the framework for all executive agency rulemakings, was conceived in the late 1970s and early 1980s in part as a bulwark against the charge of arbitrary and capricious rulemaking.[1] The framework provided by the Executive Order was designed to ensure that rulemaking decisions were made on the basis of demonstrated evidence and that the reasoning underlying a decision was documented and could be replicated. Rather than adding a burden to regulators, the requirements of the Executive Order, including the requirements for thorough, accurate, objective and quantitatively detailed regulatory impact analysis of all available alternatives that flow from the Order, should be seen as a means of protecting the agency from charges of arbitrary and capricious action. If an agency diligently follows the requirements and intent of E.O 12866 by making regulatory decisions based on rigorous regulatory impact analysis, the risk of costly litigation and attendant delay of needed action is reduced.

Inherent in the requirements of the Executive Orders is the expectation that the analysis will be conducted **prior** to the decision of the cognizant executive (in this case the EBSA Administrator) to select and propose a particular approach. Logically, the analysis precedes the decision to select any particular regulatory approach, and the analysis provides a basis of evidence from which the cognizant regulatory executive selects for proposal the best among the alternatives presented. It is the foundation for a reasoned decision by the regulatory executive.

Thoroughness is a critical requirement for an adequate regulatory impact analysis.

- An analysis that fails to include the full range of available alternatives introduces a hidden bias to the eventual decision process.
- A regulatory analysis that presents only the most likely outcomes but omits to show the range of outcomes and assessments of risk among alternatives subtly biases the selection of regulatory approach.
- The regulatory impact analysis should be sufficiently thorough that an independent reviewer can replicate the reasoned decision of the regulatory executive from the information presented. If a piece of information is critical, its omission from the analytical record may render the ultimate decision uncertain, not replicable and capricious.

Accuracy is a critical requirement for an adequate regulatory impact analysis.

[1] See Jim Tozzi, "OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding," Administrative Law Review, vol. 63 (special edition) 37 (2011), pp 37 – 69, for a thorough review of the background.

- Erroneous, incomplete or imprecise information in the regulatory impact analysis can lead to the selection of an ineffective or too costly regulatory approach.
- When tendencies, relationships or effects are uncertain, it is best practice to provide ranges and variances rather than point estimates that imply an unjustified precision.

Objectivity is a critical requirement for an adequate regulatory impact analysis.

- Error, omission or bias in the presentation of alternatives in the regulatory impact analysis impairs the ability of the regulatory executive to make a reasoned decision. From this perspective, the duty of the regulatory analyst to provide thorough, accurate, objective and detailed information to the executive decision maker is similar to the duty of the financial adviser toward her client.
- It is not the task of the regulatory impact analyst to select or to advocate for any one among the regulatory approach alternatives.
- Ideally, the presentation of each alternative should be parallel and consistent in terms of the detail of analysis of benefits and costs. The decision maker needs to be able to draw from the regulatory impact analysis detail sufficient to distinguish between alternatives in terms of the kinds and quantities of benefits offered, the nature and complexity of costs imposed and the uncertainties and risks associated with each alternative.

Detailed quantification of facts and comparisons is a critical element of regulatory analysis.

- It is important that outcome expectations, risks and uncertainties of each alternative regulatory approach be presented and quantified to the greatest extent possible because comparison between alternatives is seldom a simple matter of finding one approach that yields the greatest excess of benefits over costs, and qualitative comparisons alone are often insufficient to provide a basis for choosing between complex alternatives.
- A quantitatively detailed presentation of the justification and baseline contributes to the ability to distinguish between different regulatory alternatives in terms of benefits and choices. Lack of sufficient detail hampers the ability of the decision maker to identify among alternatives a unique approach that maximizes net benefits while minimizing regulatory risk.
- For each alternative the benefits and costs will typically be uncertain, i.e., expected values based on probabilities associated with each of several outcomes across a range. Even if probabilities of outcomes are subjective, the presentation of a range of likely outcomes and associated probabilities based on explicit reasoning is a more realistic and prudent aid to decision making than the presentation of a single outcome value as if it is certain but that hides from the decision maker and the public the real underlying variability and uncertainty.

- A rational and prudent decision maker may chose a regulatory alternative that yields a slightly lower but less risky outcome in terms of net benefit, just as some investors may choose a security that offers a smaller gain but that exposes them to less risk of loss of principal. The level of detail in the analysis should be sufficient to facilitate such decision making distinctions.
- Reliance on qualitative descriptors can introduce hidden bias into the analysis. Quantitative estimates of proportions should be provided whenever possible rather than descriptions like "many," "most," "usually" or "often."
- An analysis in which qualitative descriptions of conditions, relations, or outcomes predominate may indicate that the problem at hand requires further study and empirical investigation before regulatory decisions can be made with confidence.
- E.O. 12866 directs agencies to quantify estimates to the greatest extent possible, not just to the extent convenient. The government has at its disposal the advantage of resources and time to devote to the process of detailed regulatory research and analysis.

The discussion of the flaws in EBSA's regulatory impact analysis in the eight sections that follow reflects the applications of these principles of thoroughness, accuracy, objectivity and quantitative detail to the assessment of the analysis as presented in the regulatory docket.

Section 2. Failure to present an adequately objective and quantitatively detailed baseline description of the need for regulation.

EBSA's discussion in chapters 3 and 4 conflates assessment of the need for regulation in general and the current market conditions (pre-regulation baseline) with its estimation of benefits expected to be yielded by the specific regulatory approach proposed. The discussion in this section focuses only on the parts of EBSA's RIA chapters 3 and 4 that relate to the justification for regulatory action in general and to description of the baseline, pre-regulation, market conditions that provide the context against which proposed regulatory actions will generate benefits and impose costs. As stated, previously, in Section 1, a quantitatively detailed presentation of the justification and baseline contributes to the ability to distinguish between different regulatory alternatives in terms of benefits and choices.

Lack of sufficient detail hampers the ability of the decision maker to identify among the alternatives a unique approach that maximizes net benefits while minimizing regulatory risk.

The assessment of justification for regulation in chapters 3 and 4, appears on initial reading to be quite extensive and persuasive, but closer inspection raises questions about the objectivity of the analysis and the sufficiency of detail. Confusion between objective assessment of potential market failure justifying some regulatory intervention and advocacy for the specific regulatory approach chosen is evident in the first paragraph of chapter 3:

"Some of this proposal's most important effects will occur in the retail IRA marketplace. The current market for investment advice to IRA investors is replete with conflicts of interest between advisers and investors. Well qualified advisers compete vigorously for investors' business, but investors' high information costs – i.e., the fact that most investors lack the information and expertise necessary to evaluate the quality of advice – prevent this competition from producing efficient results."[2]

The first sentence references the proposed regulatory approach before raising the subject of market failure that may justify regulation. This placement implies that the need for regulation has been pre-determined before the question of market failure is raised in the balance of the paragraph. Then follows the second paragraph, which further touts the proposed solution:

"As noted earlier, the new proposal would broaden the IRC definition of fiduciary investment advice rendered to retail IRAs. This would limit or mitigate conflicts of interest in such advice by subjecting more of it to the IRC PT provisions. Some conflicts would remain permissible, subject to protective conditions, pursuant to certain existing PTEs as well as proposed PTEs that are included with the new proposal."[3]

An objective regulatory impact analysis presents the facts and arguments for and against the existence of a market failure before presenting any specific proposal to remedy the supposed problem. A further problem to note is that the reference above to the "new proposal" totally ignores the possibility that there may be other alternatives worthy of consideration. The mixing of elements of market assessment and "new proposal" advocacy here is redolent of an impermissible ex post regulatory impact analysis. It seems as if there may have been a prior document that was the basis for the regulatory design chosen. If so, the public should be provided with a copy of that original regulatory impact analysis in the docket for fair review and comment. If the current regulatory approach was selected and designed without the benefit of an ex ante regulatory impact analysis as required by E.O. 12866, that fact should be placed in the record.

The RIA quotes extensively from published academic literature, but in some instances the interpretation of the research results lacks objectivity. For example, on page 59 the RIA makes the argument that regulation of advice to retirement savings investors is needed because a preponderant number are older persons. The RIA observes that:

"There is evidence that, as investors age, they become more vulnerable to and targeted for, abuse. By several measures, according to academic research, financial capability begins to decline around age 53 (Agarwal et al. 2009)."

Review of the article cited reveals this characterization of the research may be somewhat misleading. The interpretation provided by the RIA suggests a longitudinal tracking of the same persons as they individually become older and that their specific individual

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[2] EBSA RIA, p. 51.
[3] Ibid.

financial decision ability peaks around age 53 and declines thereafter. The actual paper by Agarwal, Driscoll, Gabaix and Laibson[4] discusses financial decisions only in the context of cross-sectional data for persons of various ages at fixed points in time. While the authors claim to mimic a longitudinal analysis by controlling for education and other relevant variables in the cross-sectional age cohort comparisons, their findings are in fact not the same as the longitudinal analysis implied. An objective presentation of the referenced research would have acknowledged the complexities and shortcomings of their argument.

Another example of selective characterization of research involves the RIA's application of the RAND study commissioned by EBSA.[5] The RIA quotes extensively from the RAND survey of literature citations of studies highlighting conflicts of interests involving broker dealer advisers, but the RIA fails to quote the findings in the same RAND study that question the fee-based advice model that EBSA uses as a favorable comparator:

> "While many believe commission-based compensation for advisors leads to clear conflicts of interest, others argue that the issues are less clear-cut. Duska (1999) argues that agents and brokers are motivated not only by economic incentives, but also by ethics, and are capable of acting in ways that economic determinists would not predict. Robinson (2007) argues that alternative forms of compensation for financial advisors, such as asset-based fees or flat fees, also have potential conflicts of interest and principal-agent issues – flat fees present the fewest conflicts of interest, but also provide little accountability for future fund performance, compared with recurring asset-based percentage fees in which future compensation is directly tied to fund performance.
>
> "A fees-only model may not benefit all investors: some have argued that moving to a fully fee-based system may price less affluent investors out of the market for advice altogether, as reasonable fees would amount to a large up-front expense when compared to the assets of a small investor (Opiela, 2005). In addition, some firms were found guilty of fraud after moving some clients from commission-based accounts into fee-based accounts when it was clear this action would result in higher costs for the clients with no additional benefits (Pressman and Borrus, 2005)."[6]

Another example of selectivity involves the paper by Christoffersen, Evans and Musto, (CEM) on which the RIA relies extensively to document the relationships among sales load shares with brokers, inflows to funds (i.e., sales to investors), and fund performance. The RIA characterizes the study as finding that "the more the mutual fund pays the broker, the more likely the broker is to recommend the fund to clients." However, later the RIA further characterizes the CEM study as finding "a significant, negative relationship between load shares and mutual fund performance." This

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[4] http://www.brookings.edu/~/media/Projects/BPEA/Fall%202009/2009b_bpea_agarwal.PDF

[5] Burke, Jeremy, Angela Hung, Jack Clift, Steve Garber, and Joanne Yoong. *Impact of Conflicts of Interest in the Financial Services Industry.* RAND Corporation, 2014.

[6] Ibid., p.6.

characterization seems misleading because the finding of the study applies only to one subcategory of brokers' load shares: unaffiliated brokers, not all brokers as implied by the RIA. The CEM study also found that flows (sales to investors) of funds declined as the total load increased, a demand effect that runs counter to the load share effect. The RIA also gives scant mention to the finding in the CEM study regarding the emergence in the market of returns sharing broker compensation arrangements-- a compensation arrangement that may align advisers' incentives with the interests of clients and mitigate conflicts without regulatory intervention.

Insufficient detail is also found in the discussion of potential market failure and baseline market conditions in chapter 4 regarding rollovers from ERISA covered retirement plans. For example, the RIA states that "many plan participants are vulnerable to being harmed by conflicted advice when they receive recommendations regarding whether to take a plan distribution and rollover the assets into an IRA."[7] Later the RIA states that "Performance is especially likely to suffer when rollover choice and asset selection results from conflicted advice."[8] These statements provide insufficient detail to inform a finding of a need to regulate, a selection between alternative regulations or a retrospective evaluation of the ultimate effectiveness of a regulation. There are several unanswered questions: How many plan participants are harmed and what are the quantitative dimensions of harm? What channels of advice and types of conflicts or other relevant factors are associated with the incidence of harm? What is the measure of underperformance? The answers to these questions are needed and could be obtained through appropriate research. The failure to conduct research to provide quantitative detail limits the ability to refine the selection of regulatory design to focus effectively on a core problem in a cost efficient way.

EBSA cites many academic studies that present findings regarding the performance of securities sold via broker-dealer advisory channels. A limitation of these studies is their focus on the security types rather than returns of actual investor portfolios created and managed under various types of advisory services. EBSA has both the authority and the resources to undertake a large scale longitudinal study that tracks the investment decisions, activities portfolio composition and portfolio performance of individuals over time. Such a study would facilitate collection of information regarding both individual investor characteristics (age, income, assets, education, financial knowledge, retirement expectations, and measures of risk aversion) and characteristics of their sources of financial information (including affiliation, compensation, training, experience and other salient characteristics of their financial advisers). A well-designed longitudinal study based on a representative sample of U.S. households would provide definitive answers to some of the questions at the heart of the analysis of the need for regulatory intervention in the retail investment advice market.

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[7] RIA p. 145.
[8] Ibid.

Section 3. Failure to compare thoroughly and objectively the benefits and costs of multiple alternatives to the proposed regulatory approach.

EBSA presents a lengthy and detailed description of its selected regulatory approach, including monetary quantification of benefits and costs. For the other regulatory alternative approaches listed (in chapter 7 of the RIA) the analysis is limited to vague descriptions and purely qualitative assessments. Most are presented as possible amendments to the selected proposed approach rather than as independent alternatives. This treatment of regulatory alternatives analysis is not consistent with the plain instructions of E.O. 12866 to examine and compare fully the benefits and costs each alternative. The regulatory decision making executive cannot make the choice of the regulatory approach that expectedly yields the maximum net benefit unless net benefits are estimated and presented for several distinct and independent alternatives. The EBSA RIA presents a full analysis of only one approach, effectively denying the decision maker the opportunity to choose based on a reasoned consideration of net benefits, relative risks, variability of benefit and cost outcomes and other factors.

In particular, the RIA fails to analyze fully the alternative of no regulation, at this time. No regulation does not mean freezing in place current conditions, nor does it mean no regulatory intervention in the future. An analysis of the no regulation, at this time, alternative could have provided EBSA the opportunity to examine trends in the market and to consider whether market failures that may appear to be significant today may become less so over time. The conditions of competition, information and technology in the financial retail market are evolving. The change has been so rapid recently that results of studies of conditions and relative performance ten years ago may already be obsolete. In addition, the financial literacy of the population is not fixed. In the context of a full analysis of the no-regulation-now alternative, EBSA could go beyond the rudimentary qualitative discussion found in the RIA and conduct a full quantitative analysis, including extrapolation of relevant trends and identification of significant non-regulatory drivers of change.

An aspect of EBSA's failure to adequately analyze alternatives is its failure to analyze the separable benefit and cost elements of components of the selected proposed approach. The proposed rule is not a homogeneous construct. It is made up of several parts, each of which could be expanded or reduced. Optimization of regulatory design requires assessment of contributions to the overall regulatory benefits and costs of marginal changes at the component level. It may be possible to identify and eliminate elements that contribute to costs without commensurate contribution to benefit.

The placement of the discussion of alternatives near the end of the RIA and separate from the lengthy and detailed discussion of the selected proposed regulation creates the impression that consideration of alternatives may have been an afterthought rather than an integral part of the analysis and decision making process as required by E.O. 12866. This feature of the organization of the RIA contributes to concern that the RIA presented in the regulatory docket and presented to OMB for review may have been created after the key regulatory decisions were made rather than before as required by

E.O. 12688 to serve as an aid to selection of the optimal regulatory design among all available alternatives.

In addition to the alternatives listed in chapter 7 as having been considered, there may be additional alternatives that could have been recommended by the public. However, the limited period for public comment provided by EBSA does not allow adequate time for the public to suggest additional alternatives.

Section 4. Failure to conduct independent research to refine estimates of the expected benefits of the proposed approach and of each alternative.

EBSA's discussion in chapters 3 and 4 conflates assessment of the need for regulation in general and current market conditions (pre-regulation baseline) with estimation of benefits expected to be yielded by the specific regulatory approach proposed of broadened definition of fiduciary, application of fiduciary duties to IRA advice covered by IRC, and application of fiduciary duties to advice regarding roll-overs of ERISA-covered defined contribution (DC) plan accounts, combined with new or amended prohibited transaction exemptions. The discussion in this section of comments focuses only on the parts of the EBSA's RIA chapters 3 and 4 that relate to the benefits of proposed regulatory approaches.

In chapters 3 and 4 detailed attention is focused only on the benefits expected to be derived from the selected approach and alternative regulatory approaches are not considered with the same level of detail. The appearance of analytical objectivity and thoroughness would be enhanced if the RIA presented equally detailed analyses of the potential benefits of all available alternative regulatory approaches in parallel within a single chapter.

The quantitative analysis of monetary benefits expected from the proposed rule is based on speculative forecasts of future performance of investments under baseline conditions and under hypothetical scenarios of the effectiveness of the proposed rule. The spreadsheet models on which these forecasts are based depend on assumptions drawn primarily form the Christoffersen, Evans and Musto (CEM) research. The extensive dependence on a single published study is problematic. EBSA should have commissioned an independent peer review and replication of the CEM study and, perhaps, of others cited. Such care would have been consistent with the intent of the Federal Information Quality Act.

Many assumptions about key parameter values interact in the models, but only a subset have been subjected to experimental variation by EBSA to detect the sensitivity of benefit forecasts to the uncertainty of assumptions. Every assumption and every combination of assumptions should be subject to sensitivity analysis to test the robustness of the benefit estimates. Rather than rely on the simple spreadsheet models presented in the RIA, EBSA should assign probability distributions to each parametric assumption and apply a Monte Carlo simulation model approach to generate a distribution of benefit outcomes based on thousands of iterations of model runs.[9] This

[9] Available simulation modeling software performs thousands of iterations of stochastic model results in seconds and produces easily interpreted and presented summaries of the results.

more appropriate approach would facilitate better estimation of the expected value of model outcomes, as well as estimates of the variance of the benefit estimates and the kurtosis and skewness of the outcomes distribution. It may be particularly useful as an aid to selection of an appropriate regulatory design to compare the statistical characteristics of the net benefits distributions derived from Monte Carlo simulation modeling of various alternative regulation approaches in a simple graphical outcomes distributions display. For example, the Administrator, presented with such results, could find a reasonable basis to select an alternative regulation approach that has a lower mean expected net benefit in comparison to others because she can see in a simple set of graphs that it offers smaller variance of outcomes (risk), or because the distribution of its outcomes are skewed more toward favorable outcomes than other alternatives.

The Monte Carlo modeling approach suggested here is a readily available technique that can be conducted on a personal computer with free or inexpensive software. There is no practical reason that EBSA could not have conducted this more useful and insightful type of analysis of the key benefit estimation issue.

Section 5. Failure to conduct independent research to inform estimates of the labor time, other resources and costs of adapting business operating procedures to comply with the proposed rule and alternatives.

EBSA's analysis of regulatory costs again focuses exclusively on the selected proposed regulatory approach. No detailed analysis of compliance costs for regulatory alternatives is provided, and it is impossible to know whether or not the proposed regulation is the least cost solution to the problem that the regulation is intended to address. In this regard the RIA completely ignores the President's instruction in E.O. 12866.

The cost analysis is also flawed by omissions of critical cost elements and by un-validated assumptions. Important cost omissions or under-estimation elements include the following:

- The costs of retraining advisers and other employees involved in implementing and maintaining the fiduciary requirements under the proposed rule have not been explicitly recognized and fully estimated.
- The costs of organizational realignment and restructuring as broker-dealers and other affected firms adapt their fundamental business operation methods and procedures to the new requirement have not been adequately addressed.
- The likelihood that different parts of an organization may face significantly different regulatory regimes for ERISA covered accounts and clients versus others is a potential source of costs that needs detailed exploration.
- The initial adjustment to the proposed new regulations and on-going compliance will entail significant costs for adaptation and redesign of information systems,

recordkeeping procedures, and internal regulatory compliance auditing systems that EBSA has not considered.

- Companies or individuals who provide educational information and materials will incur costs to ensure that their activities do not cross the line into coverage by a new fiduciary definition.
- The proposed change in the regulatory regime may impose increased likelihood and expense of litigation, at least initially and perhaps longer term.
- Implementation of the proposed rule will impose initial familiarization and learning costs – time and effort to read about and comprehend the changes – for both affected advisers and for investor clients.
- Others not directly affected by the new rules may incur indirect costs through increases in prices of services and products.
- Others not subject to the new rules may still incur familiarization learning costs to ensure that they are not affected and do not cross the line of coverage.

EBSA's erroneous reliance on the SIFMA survey regarding SEC regulation compliance in its general analysis of the cost of converting to fiduciary status over-simplifies complex cost drivers. The fact that the SIFMA data was compiled in response to a very different regulatory context calls into question the transferability of the results to the EBSA analysis. The fact that the actual complete survey instrument and detailed response records are not available for public inspection and were not available to EBSA adds to the concern about the validity of those results for the current purpose.

EBSA had at its disposal both time and resources to undertake independent research through surveys, case studies, experiments and other research to establish relevant, detailed and credible estimates of cost impacts, but apparently chose not to do so. The notation in the RIA that the SIFMA information was requested by EBSA only as recently as November 2014, less than six months before publication of the proposed rule, suggests that EBSA's cost analysis may have been undertaken without sufficient preparation, planning and time.

The information collection and reporting requirements of the proposed rule that are subject to the Paperwork Reduction Act comprise only a fraction of the total potential compliance costs of the proposed regulation, but the errors, omissions and unfounded assumptions contained in EBSA's analysis of these items is illustrative of the general lack of thoroughness and detail in EBSA's cost analysis.

The information collection burden estimates required under the PRA are intended to provide the regulating agency, the Office of Management and Budget, Congress and the public with awareness of the extent to which these information mandates tax the time and resources that otherwise could be used productively by the private sector to create output, income, innovation and jobs. Accurate and complete estimates of the burdens of alternative collection schemes are essential to ensure that necessary information is collected at least cost and to ensure that the scope of an information collection does not exceed its benefits. While information mandates may

serve to enforce and to make effective measures to protect savers from some sources of diminished returns on investment, information mandates themselves create costs that lead to diminished returns on investment that are ultimately borne by the same retirement savers whose interests regulations seek to protect. Accurate measures of information costs and other regulatory costs are essential to ensure that regulations do not cause more harm than good.

The six Information Collection Requests associated with the Department of Labor's proposed Fiduciary rulemaking will, according to the Department's own estimates, total $792 million over ten years, or $79.2 million per year—amounting to one-third of the total compliance cost of the proposed rule as estimated in the Department's Preliminary Regulatory Impact Analysis.[10] Our review of the detailed calculations underlying the Department's burden estimates reveals, however, that these information collection compliance burdens have been underestimated by the Department. Our preliminary analysis of the information collection cost elements suggests that the real information collection compliance cost may be at five to ten times greater than the $79.2 million per year estimated by the Department.[11]

The potential magnitude of these burdens raises serious concern that the costs of the proposed regulation's information collection strategy alone may outweigh the benefits that the proposed regulation is likely to achieve. When these are added to the other cost elements not covered by the PRA, the likelihood of a benefit deficit becomes a more serious concern. Rather than proceeding down a too-costly regulatory path, the government should consider more carefully whether there are prudent alternatives to achieve the desired protections and benefits. The fact that EBSA did not conduct a full cost analysis for all available alternatives means that compliance with the E.O. 12866 requirement of least cost regulation for a given benefit is undetermined.

The questionable assumptions in the Department's information collection burden estimates primarily flow from a common flaw that pervades the six individual analyses: The Department failed to conduct adequate research, such as experiments, sample surveys and evaluations of comparable information collections to establish credible empirical estimates of the time parameters associated with each of the subject information collection activities. Instead, the Department has asserted, without proof or empirical evidence, too brief individual unit time parameters in its compliance burden calculations. For example, in one calculation the Department assumes that each subject financial institution will require "in-house attorney's to expend 60 hours of time drafting and reviewing the required disclosures and notice" to comply with the "Best Interest Contract" requirement.[12] No data, reasoning, or empirical evidence is cited to support this assertion, and our discussions with experienced practitioners suggests that a realistic time estimate could be more than ten times the Department's asserted number.

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[10] Employee Benefits Security Administration, "Fiduciary Investment Advice: Regulatory Impact Analysis, p. 178. The proportion referenced is in relation to the Scenario B compliance cost estimate that the Department's analysis favors.
[11] We have also found significant errors and omissions in the Department's estimates of the other, non-information, elements of compliance costs for the proposed rule.
[12] EBSA, Supporting Statement for Paperwork Reduction Submissions: Proposed Exemption for the Receipt of

Ideally, the Department could have conducted surveys to ask experienced attorneys how much effort would be required to craft and validate contract language to conform with the specified requirements. The Department could have conducted research to ascertain the actual time involved in crafting contract language for similar previous regulatory requirements in other contexts. At the very least, the Department could have conducted an experiment by which several teams of its own lawyers were tasked to formulate moot contract text while keeping track of their own hours of effort. No such research, evidence or experiments were presented. The Department appears to have pulled the number "60" hours out of nowhere. If there was reasoning behind the assumption, that reasoning should have been presented in the supporting documents.

The flaws in the Department's analysis related to unsupported assertions of time parameters are magnified by other questionable assumptions, unsupported by evidence, that are repeated across the six burden calculations:

- The unit cost parameters used to convert hours of labor effort to dollar costs under-estimate overhead costs. Evidence from our analysis of competitive loaded labor rates in Federal service contracts that the Chamber has submitted to the Department in other regulatory comment contexts suggests that overhead costs for direct labor services are more realistically 200 percent or more of direct hourly wages rather than the 25 percent asserted without evidence by the Department.
- The Department often under-estimates the level of labor skill, training and responsibility required to accomplish information collection responsibilities: less costly clerical labor, for example, is asserted as adequate for tasks where more costly professional or managerial labor would be more reasonably required. Again, no evidence is presented to justify the labor skill level asserted.

The following items identify in detail some of the questionable assumptions we have identified in the Department's calculation of PRA burdens associated with the six information collection requests of the proposed Fiduciary rulemaking and related prohibited transaction exemptions:[13]

1. **"Carve-outs" in the definition of fiduciary.** The EBSA proposal includes three "carve-outs" that provide exceptions to the proposed extension of the definition of fiduciary. These "carve-outs" for sellers, for platform providers, and for investment education each involve requirements that information be provided by subject "advisers" to the counter-parties of each transaction or interaction. Questionable assumptions in the Department's ICR burden analysis include:
    - There is no empirical evidence presented to support the Department's assertion that 50 percent of the 85,863 retirement plans with 100 or more participants will use the sellers carve out.

[13] The listings below are not exhaustive. Additional errors, inaccuracies, unfounded assertions and omissions may be identified subsequently in comments or testimony.

- The information requirements are triggered by each interaction between the subject plan and a seller, and the Department's implicit assumption that in any given year there will be only one seller approach to a subject plan is unfounded.
- The assertion that it will require only one hour of legal professional time per seller interaction to produce the required disclosures is not supported by evidence.
- The assertion that it will require 30 minutes of clerical labor time to produce the required disclosures is not supported by evidence.
- There is no provision for management time of the plan fiduciary to coordinate and review the disclosures.
- The assertion of $129.94 per hour as the unit cost factor for legal professional time and of $30.42 for clerical time is based on unfounded assertions of overhead cost factors for the subject labor categories. As discussed above, our previous analyses of competitive loaded labor cost rates for direct labor services in government contracts suggest a much higher overhead rate than the 25 to 35 percent rates assumed by the Department.
- The seller's carve-out calculation reflects only time for the plan sponsor staff to produce subject information, there is no recognition of the corresponding time burden on the outside-the-plan seller representative and her company's staff to carry out their duties under the sellers carve-out, despite the fact that the plain language of the carve-out is that the seller/adviser must affirmatively act to initiate and obtain the required representation from the subject plan fiduciary.
- There is no evidence presented to support the assumption that only 1,800 record keepers or similar service providers will use the platform provider carve-out.
- There is no evidence presented to support the assertion that only ten minutes of legal professional time will be required to adjust existing service provider contracts to add the required disclosure.
- There is no consideration in the platform provider carve-out analysis of time requirements to identify relevant service provider contracts.
- The analysis unrealistically assumes that service provider contracts can be modified unilaterally. No consideration is given to the burden on both contract parties to negotiate and coordinate contract review and revision to satisfy the carve-out disclosure requirement.
- The unit hourly labor cost rates used to convert burden hours for the platform provider carve-out to dollar cost totals are based on an questionable overhead cost assumption, as discussed previously.

- There is no empirical evidence presented to substantiate the assumption that the estimated 2,619 broker dealers who are currently ERISA plan service providers will be the primary (near 100 percent of the 2,800 users estimated) category of broker-dealers who will use the Investment Education carve-out. An alternative calculation based on the full 4,410 number of broker dealers registered with the SEC would nearly double the burden hours and cost for this carve-out element. The Department's justification for the number assumption stems from a reference that "internal estimates suggest…". At the least, the Department should reveal details of this "internal" source.
- The assertion of 20 minutes per institution using the education carve-out to produce the required disclosures is not supported by any evidence. Respondents to our survey of potentially affected members reported that a credible value for this time parameter, based on their experience, would average 19 labor hours per institution.
- No consideration is given to the cost of printing, revising electronic materials (e.g., webpages) and training presenters of educational materials.

2. **The Best Interests Contract (BIC) exemption.** This proposed prohibited transactions exemption will purportedly allow broker-dealers, insurance agents and others to continue current commission and sales revenue sharing compensation arrangements that otherwise would be prohibited provided that they enter into a written contract with each subject retail investor that includes specified conditions of fiduciary conduct and disclosures designed to protect the interests of the retail investor. The information collection burden of the BIC is comprised of several elements, including (1) pre-transaction disclosures, (2) annual statement disclosures, (3) limited investment option disclosures, (4) EBSA notification, (4) record keeping, (5) legal costs to draft and revise conforming contract documents, and (6) Information technology resources to revise software and related computer systems.
   - The Department's calculation of the numbers of affected plan participants and investors under the pre-transaction, annual statement, limited investment option disclosure and EBSA notice headings of the BIC ICR supporting statement is obtuse. There is need for both more complete data and clearer explanation.
   - In particular, the assumption that only about half (2,800) of broker-dealers will use the exemption and trigger disclosure and EBSA notice information requirements is not supported by evidence. If the full (4,410) number of SEC registered broker-dealers were to use the BIC exemption, the Department's estimated information burden of $68.9 million initial annual cost would nearly double.

- The assumptions regarding number of annual transactions covered by the pre-transaction disclosure requirement are not supported by empirical evidence.
- The assumption that 75 per cent of disclosures will be distributed electronically at de minimus cost is unsubstantiated with respect to both the percentage and the assertion that there is no cost to electronic distribution. Similarly, the percentages and unit time parameters asserted for remaining distributions are not supported by empirical evidence.
- The percentage distribution assumptions for annual statements are similarly not supported by empirical evidence.
- The assertions of one minute of clerical time per distribution of pre-transaction disclosures and limited option disclosures and of two minutes of clerical time per annual statement are not supported by evidence. Respondents to our survey of members likely to use the BIC exemption estimated 13 minutes of clerical time per transaction. Respondents added that it would also require supervision or ancillary effort of 19 minutes by the cognizant client adviser, 19 minutes by a financial analyst and 12 minutes by a compliance audit reviewer per transaction. Respondents also estimated that it would take 8 annual full time employees per year to maintain the database of up to 25,000 securities requiring daily updates of pricing and other information required for the subject disclosures. 80 percent of respondents reported that their company did not currently have available the detailed database that would be required for this purpose.
- The unit hourly labor cost rates used to convert burden hours for the platform provider carve-out to dollar cost totals are based on an questionable overhead cost assumption, as discussed previously.
- No consideration is given management time for coordination, supervision, review and verification of the pre-transaction, limited option and annual statement disclosure processes.
- The assumptions that recordkeeping for each financial institution using the BIC exemption would be only 30 minutes per year of manager time and 15 minutes per year of clerical time is not supported by empirical evidence. Similarly, the unit hourly labor costs applied to convert time burden to dollars is based on an unsubstantiated estimate of overhead cost rates.
- The assertion that each financial institution using the BIC exemption will require only 60 total hours of legal professional time for drafting and revising contracts is not supported by any empirical evidence. Respondents to our survey of members who will be affected by the proposed rule and likely to use the BIC exemption unanimously disagreed

with the 60 hour assumption. One third estimated the requirement at 300 hours, 20% estimated the time at 600 hours and 40% estimated the time at 6,000 or more attorney hours. Respondents also pointed out that development of the required template would not be a one-time requirement, but that the document would require frequent review and revision in light of experience and litigation.

- The assertion that each financial institution using the BIC exemption will require only 100 hours of information technology professional or technician labor to create, revise and maintain associated software and websites is not supported by any empirical evidence. Respondents to our survey of companies who would likely use the BIC exemption estimated the IT time for this work at 300 to 10,000 hours. Respondents also added that the work would require periodic review and revision on a regular basis.
- EBSA has presented no analysis of the marginal effects on costs and benefits of alternative compliance dates for meeting the proposed regulatory requirements. The reasoning leading to the compliance date chosen is not transparent.
- The counter-party to each best interest contact is an individual investor whose protection is the object of the BIC exemption. The effectiveness of protection is diminished if the individual investor does not read and comprehend the BIC. The Department neglected to include the time for the investor herself to read and understand the contract in its accounting of information burden.

3. **PTE Regarding Insurance and Annuity Contracts and Mutual Fund Underwriters.** This exemption allows insurance agents, insurance brokers and pension consultants who are fiduciaries with respect to plans or IRAs to effect the purchase of insurance or annuity contracts for the plan or IRAs and to receive a commission on such sales, subject to certain disclosures. The proposed Fiduciary rule will necessitate certain amendments to this existing exemption. The cost elements described below are associated with estimated changes in the information collection burden associated with these amendments.
    - The Department's assumptions of only one hour of legal professional time per year per subject plan and one hour per subject insurance agent or other fiduciary for the written authorization and one hour of in-house attorney time per plan, per IRA and per agent, or underwriter for preparation of disclosures are not supported by evidence.
    - The assumption that every agent or underwriter will have access to an in-house attorney is not supported by empirical evidence.

- The unit hourly labor cost rates used to convert burden hours for the platform provider carve-out to dollar cost totals are based on an questionable overhead cost assumption, as discussed previously.
- The Department's assertion that annual recordkeeping requirements will entail only 30 minutes of manager time and 15 minutes of clerical time is not supported by empirical evidence.

4. **Amendments to PTE 75-1.**
    - The Department's assertion that it will require only 5 minutes per year of management time to create the required records and 5 minutes to make records available for public inspection is not supported by empirical evidence.
    - The labor costs used in the conversion of burden hours to dollar costs are not supported by empirical evidence assumptions regarding overhead cost rates.
    - The Department's estimate that only half of registered broker-dealers will use this exemption is not based on clear evidence.
    - The Department's assumption that companies already maintain records sufficient to comply with the proposed amendment to PTE 75-1, Part V, and that there will be no incremental costs of compliance is not based on any substantiating evidence.
5. **Amendment to PTE 86-128.**
    - The Department's estimate that only 2,800 of 4,410 potential users of the exemption is not clearly based on empirical evidence. There is no explanation to lend credibility to the "internal" information that only 2,619 broker dealers currently service ERISA plans or IRAs.
    - The assumption of one hour of legal professional time to draft the required written authorization is not based on any empirical evidence.
    - There is no evidence to support the assertions that required materials for evaluation of the authorization are "readily available" and can be obtained and distributed at little or no cost in most instances.
    - There is no evidence to support the assertion of only two minutes per instance for clerical time to assemble and dispatch to mail the materials.
    - No cost of postage is considered.
    - There is no evidence presented to substantiate the assumption that each transaction report will require only two minutes of clerical time.
    - The Department denies that the annual statement reporting requirement will impose any additional cost burden, citing the claim that the cost of compiling the constituent information parts has already been accounted. This assertion implicitly assumes that the report self-materializes from the

constituent parts without any coordinating effort. A similar no-cost assumption is applied to the report of commissions paid requirement.

- No management time to coordinate, supervise and verify compliance is considered for any of the categories of disclosures and activities analyzed;
- There is no evidence provided to substantiate the claim that termination forms will require only one hour of legal professional time.
- The labor costs used in the conversion of burden hours to dollar costs are based on unsubstantiated assumptions regarding overhead cost rates.

6. **Proposed Principal Transactions Exemption.** This exemption would allow investment advice fiduciaries to engage in purchases and sales of certain debt securities out of their inventory with plans, participant and beneficiary accounts and IRAs, subject to specified disclosures and reports.
    - There is no empirical basis provided to support the Department's assertion that a financial manager can obtain each of the two required price quotes in five minutes.
    - There is no basis for the assertion that all financial institutions will give the required price quotes orally and that oral price quotes entail no time burden.
    - There is no evidence presented to support the assertion that production and distribution of the required annual statement will require only clerical effort. No evidence is provided to support the assertion of two minutes of clerical effort per report distributed.
    - The labor costs used in the conversion of burden hours to dollar costs are based on unsubstantiated assumptions regarding overhead cost rates.
    - No consideration of management time to supervise and coordinate the production of the annual report and no consideration of professional time to compile, design and draft the information in the report is included in the Department's analysis.
    - No evidence is provided to support the assertion that only 24 hours of attorney labor time will be required per institution to draft and amend contracts.
    - For amendment of contracts no consideration is given to counter-party time to negotiate and review the subject amendments.
    - There is no evidence provided to support the assertion of only eight hours of computer professional labor to revise programming, documents, web pages and other information system components affected by the proposed exemption amendments.

Section 6. Failure to adequately consider and present the uncertainties and risks of the costs and benefits of the proposed approach and alternatives.

A critical omission in the assessment of uncertainties and risks in chapter 8 of the RIA involves non-reversibility risk. Often the unexpected or unlikely adverse outcome of a decision can be mitigated by reversing course and starting over. Taking a wrong turn while driving always has cost depending on how much time and fuel it takes to return to the right course, but some wrong turns take one over a cliff, and the error is catastrophic and irreversible. This is an important concept for risk analysis of major public policies and regulations. Some mistakes cannot be undone.

The proposed regulation presents this non-reversibility risk. 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 retained 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 of adverse consequence 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.

Section 7. Failure to adequately consider the impacts of the proposed rule on small entities under the Regulatory Flexibility Act and to examine the costs and benefits of alternatives to those impacts.

By its own admission in chapter 6 of the RIA, EBSA does not have sufficient information to define and identify small entities that may be adversely affected by the proposed rule. EBSA asserts that “the proposed rule and the accompanying exemptions will provide benefits to small plans and small plan sponsors, and IRA investors, and impose costs on small service providers rendering investment advice to plan and IRA investors.” The analysis reported in the RIA is not sufficiently detailed to reveal whether the benefits to clients of small advisers or service providers may exceed the costs imposed on those affected small entities. EBSA’s failure to analyze small business impacts for other available regulatory approaches besides the selected proposed approach prevents consideration of whether other approaches in general could be preferable from the small business perspective.

EBSA’s estimates of up to 2,440 small BDs, 15,100 small RIAs and 2,300 other small service providers appears to overlook the significant number of advisers who are independent local representatives or agents affiliated with large broker dealers or

insurance companies. These affected advisers are in fact small businesses in their own right, despite the fact that the accounts they manage or advise are subsumed within the affiliated larger company's total assets and revenues. Many of these small business owners will be especially vulnerable to harm if the new regulation causes the large companies with whom they are affiliated to restructure or discontinue lines of business.

The errors and omissions in EBSA's overall cost analysis noted previously, suggest that the cost impacts on small BD advisers ($53,000 to $242,000 in the first year as estimated by EBSA) could become many times greater, and could reach levels that would force small businesses to leave the market. This risk to small businesses should motivate EBSA to fully and diligently comply with its duties under the Regulatory Flexibility Act and undertake more careful research and data compilation to investigate the issue.

EBSA provides no basis in empirical evidence or reasoning for its assertion that "It is unlikely that some small service providers may find that the minimal increased costs associated with ERISA fiduciary status outweigh the benefit of continuing to service the ERISA plan or the IRA market." This is a subject for careful empirical research. The line of belief rather than fact is continued in EBSA's assertion that "It is also possible that the economic impact of the rule on small entities would not be as significant as it would be for large entities…" This seems to be based on anecdote rather than empirical data. EBSA needs to undertake diligent research on these questions.

Despite the mandates of the Regulatory Flexibility Act, the RIA does not document serious consideration by EBSA of regulatory alternatives, flexibility or exemptions designed specifically to mitigate adverse impacts on small businesses. EBSA should revisit its regulatory flexibility analysis and identify some small business flexibility accommodations to consider.

Section 8. Failure to include in the analysis identification of ex post measures of effectiveness of the proposed rule and to provide in the proposal provisions for information collection to facilitate retrospective evaluation of the costs, benefits and effectiveness of the rule, if adopted.

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.

Section 9. Failure to assess the time needed by the public for meaningful comment.

Public comment is an integral part of the rulemaking process. The Administrative Procedure Act requires that agencies solicit and consider public comment before issuing a final rule. Public comment benefits the agency by providing it with data, arguments or perspectives that it may have overlooked in its preliminary regulatory impact analysis or flaws in reasoning underlying the selection of a proposed alternative. In addition, agencies may pose specific questions to the public for comment in response, as is the case with EBSA's proposed rule.

The present proposed regulation will cause profound changes in the fundamental ways of doing business for many affected companies. Our surveys of potentially affected members reveal that many have devoted hundreds of hours of senior management time to assess the potential impact of the proposed rule and to plan how they may adjust to its new requirements. Many report that they still have not answered all of the questions that they need to address to understand the effect on their operations of the proposed changes. This uncertainty about the impact is a significant barrier to the ability of affected parties to comment meaningfully.

Within the present proposal EBSA has also posed a number of questions to the public, seeking data or ideas that the agency acknowledges that it needs. Compiling and analyzing data and generating relevant ideas require time.

In setting the public comment period, the agency should consider the complexity of the proposed regulation as a factor to guide its determination of an appropriate comment period. The appropriate comment period may vary with the complexity and context of the proposed regulation. Too short a comment period may foreclose comment, denying the agency input that could be useful for identifying the most effective, least burdensome and least risky regulatory alternative. Too long a comment period may delay alleviation of harm. Setting the comment period should be a reasoned decision based on balancing explicitly identified competing needs and the reasoning should be explained.

EBSA has not adequately considered the needs of the public for time to assess the impact on themselves of the profound and complex changes that the proposed rule may impose. Nor has the agency considered explicitly the time and resources that may be required for the public to respond to the questions that EBSA has posed. EBSA should reconsider the public comment period allotted for this rulemaking in light of the complexity and extent of the analytical task that it presents to the affected public. EBSA should make a reasoned determination of the time needed by the affected public to assess the potential impacts of the proposed regulation on their needs and interests, to consider and answer questions regarding which the agency has requested public input, and to compile, analyze and present additional data that the public may be able to provide which would be relevant and needed by the agency to ensure that the final executive decision is adequately informed.

Conclusion

It is within the power and capacity of the Department of Labor to produce a regulatory impact analysis that thoroughly, accurately, objectively, and in quantitative detail assesses the need for regulatory action regarding investment advice and that presents to the EBSA administrator assessments of an array of available alternative regulatory approaches (including the null action alternative) as the basis for her reasoned selection of an approach that is expected to yield the greatest net benefit subject to considerations of risk and uncertainty. The regulatory impact analysis presented by EBSA for this proposal does not fulfill that requirement. We urge the Department to withdraw the current flawed analysis and the proposed rule to which it is attached, and to reconsider the regulatory question on the basis of a thorough, accurate, objective and quantitatively detailed regulatory impact analysis. Moreover, given the significant implications that this rulemaking will have, we urge the Department, should it insist on proceeding along this path, to continue on a negotiated rulemaking basis.

Sincerely,

Randel Johnson
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U.S. Chamber of Commerce

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