



May 20, 2015

Office of Information and Regulatory Affairs
Office of Management and Budget
Room 10235
New Executive Office Building
Washington DC 20503

ATTN: Desk Officer for the Employee Benefits Security Administration

Reference: Proposed Information Collection Requests and burden estimates under the Paperwork Reduction Act (PRA) of 1995 associated with the Department of Labor Conflict of Interest Proposed Rule and proposed new/amended Prohibited Transaction Exemption (PTE) notices.

To Whom It May Concern:

The U.S. Chamber of Commerce (the “Chamber”) submits these comments in response to the U.S. Department of Labor’s solicitation of comments to the Office of Management and Budget regarding proposed collections of information subject to the Paperwork Reduction Act of 1995 (PRA) related to the Department’s Employee Benefits Security Administration’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 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 government- mandated information collections under employment benefits regulations protect their employee's retirement savings while avoiding unnecessary costs that could be passed to savers and reduce their investment returns.

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.¹ 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.²

The potential magnitude of these burdens raises serious concern that the costs of the proposed regulation's information collection strategy may outweigh the benefits that the proposed regulation is likely to achieve. Rather than proceeding down a too-costly regulatory path, the government should consider more carefully whether there may exist prudent alternatives to achieve the desired protections and benefits.

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

¹ 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.

² 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, and these findings will be presented in our comments to the full regulatory docket before the comment period closes in July.

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.³ 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 several times the Department’s asserted number.

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 document.

The sections of this letter, below, that review in detail some of our concerns regarding questionable PRA burden estimates for each of the six subject information collection requests show repeated similar examples of assertions of time parameters without supporting evidence. In each case the Department could have presented estimates based on empirical research, surveys or experiments, such as described for the example above. Instead, time parameters are presented as plain assertions without supporting evidence. The result is that the Department’s time and cost estimates for these six information collection burdens seem arbitrary and capricious.

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 underestimate 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.

³ EBSA, Supporting Statement for Paperwork Reduction Submissions: Proposed Exemption for the Receipt of

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:⁴

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.
 - 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.

⁴ The listings below are not exhaustive. Additional errors, inaccuracies, unfounded assertions and omissions may be identified subsequently in comments or testimony.

- 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 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 offers no reason to justify its smaller number assumption. The reference that “internal estimates suggest...” is not illuminating. 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.
 - 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.
- The unit hourly labor cost rates used to convert burden hours for the platform provider carve-out to dollar cost totals are based on a 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.

- 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.
- 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 affect 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 based on 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 based on the expression of a "belief" without benefit of 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 itself magically 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.

The Chamber is committed to the principle that regulatory decisions should be based on sound scientific, statistical and economic evidence. Our preliminary assessments reported here are based on discussions of the relevant facts with experienced and knowledgeable practitioners, but we intend to go further and conduct detailed surveys and field interviews in a structured and systematic sample framework to obtain credible and statistically relevant estimates of key parameters for calculation of information collection costs associated with the proposed EBSA

rulemaking. The Chamber is undertaking research that the Department could have and should have undertaken itself.

The Chamber requests that the Office of Information and Regulatory Affairs extend the stated deadline of 30 days for public comments on the six proposed information collection requests associated with the EBSA Fiduciary rulemaking proposal to 120 days to facilitate collection and analysis of empirical data regarding the key parameters of information collection burdens.

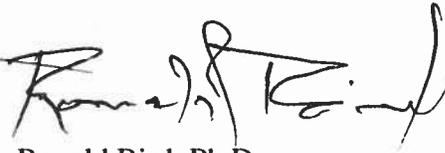
The Chamber also requests that OIRA exercise its authority to direct the Department to reopen its analysis of these compliance burden issues and direct the Department itself to conduct the empirical research that it should have conducted originally, including investigation of the burdens of alternative approaches for the information collection elements of the proposed rule and exemptions.

The Chamber also requests a meeting with the OIRA desk officer for EBSA and other relevant OIRA staff to discuss in more detail our concerns regarding inaccuracies and omissions in the EBSA supporting statements for the six information collection requests associated with the proposed Fiduciary rulemaking.

Sincerely,



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