

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT 1995 SUBMISSIONS

A. Justification

1. *Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.*

Section 404(c) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that if an individual account pension plan permits a participant or beneficiary to exercise control over the assets in his or her account, and the participant or beneficiary does exercise control over those assets “as determined in regulations of the Secretary [of Labor],” the participant or beneficiary will not be treated as a fiduciary of the plan and no other plan fiduciary will be liable for any loss, or by reason of any breach, which results from the participant’s or beneficiary’s exercise of control. The Pension Protection Act (PPA), Pub. L. No. 109-280, amended section 404(c) to add subparagraph (c)(5)(A), which provides that a participant in an individual account plan who fails to make investment elections regarding his or her account assets will be treated as having exercised control over those assets if the plan provides appropriate notice (as specified) and invests the assets “in accordance with regulations prescribed by the Secretary [of Labor].” Section 404(c)(5)(A), as newly added by the PPA, further requires the Department of Labor (Department) to issue final regulations under section 404(c)(5)(A) within six months after enactment of the PPA. The PPA was signed into law on August 17, 2006.

The Department of Labor (Department) is accordingly proposing a regulation under section 404(c)(5)(A). The proposed regulation provides guidance on the types of investment vehicles that plans may choose as their “qualified default investment alternative” and further implements the statutory requirement that plans provide annual notices to participants and beneficiaries whose account assets may be invested in a qualified default investment alternative. In addition, the proposed regulation requires plans to pass through to any participant and beneficiary who has assets invested in a qualified default investment alternative any pertinent materials they receive from the qualified default investment alternative.

The Department believes that these two information collections are necessary in order to ensure that participants and beneficiaries who do not make investment elections are adequately and timely informed of the consequences of their failure to elect, how their account assets will be invested, and the continued availability of the opportunity to make investment elections, including changing the default investment to another investment choice available under the plan.

2. *Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.*

The information collections under this ICR are not for the use of the Department or any other federal agency, but are rather mandated third-party disclosures. Plans that wish to take advantage of the relief from liability offered by section 404(c)(5)(A) are required to provide participants and beneficiaries in individual account pension plans an annual notice describing the plan's default investment provisions and the participants' and beneficiaries' right to make investment elections, including opting out of the default investment into another investment offered by the plan. Plans must also pass through to participants and beneficiaries whose account assets are invested in a default investment vehicle any material provided by the default investment vehicle to the plan.

The Department believes that both sets of information are necessary to enable the affected individuals to understand the consequences of their failure to make investment choices, the nature of the investment vehicle in which their account balances are invested, and their continued right to make active investment elections.

3. *Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration for using information technology to reduce burden.*

Under 29 C.F.R. § 2520.104b-1(b) of ERISA, "where certain material, including reports, statements, and documents, is required under Part I of the Act and this part to be furnished either by direct operation of law or an individual request, the plan administrator shall use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries." Section 2520.104b-1(c) establishes the manner in which disclosures under Title I of ERISA made through electronic media will be deemed to satisfy the requirement of § 2520.104b-1(b).

The Department understands that a substantial proportion of employee benefit plans, including individual account plans subject to these information collection requirements, have adopted electronic means of communication with participants under the Department's regulation. This burden analysis therefore, as described further below, takes account of the anticipated rate of use by plans of electronic media in communications with participants and beneficiaries of the plan.

4. *Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.*

Neither information collection duplicates information available from any other source. The annual notice uniquely describes the provisions of a particular plan for default investment of account assets when a participant or beneficiary fails to make investment choices. The pass-through requirement merely ensures that important materials relevant to a default investment alternative that are received by the plan are in fact forwarded to the individual account owner, the participant or beneficiary.

5. *If the collection of information impacts small businesses or other small entities (Item 5 of OMB Form 83-I), describe any methods used to minimize burden.*

Although small individual account plans (defined for this purpose as plans with fewer than 100 participants) are included within the plans entitled to rely on the proposed regulation, the Department has not adopted any particular methods to minimize burden for those small plans. This is because the Department believes that participants and beneficiaries in small plans need the same amount and quality of information regarding default investment programs as do participants and beneficiaries in large plans. Further, reliance on the relief provided under the regulation is voluntary; each plan may decide independently whether to do so is in the interests of the particular participants and beneficiaries of the plan. Finally, the regulation is being proposed in compliance with Congressional mandate under the PPA, and the Department has solicited public comment on whether small plans need or should be provided special treatment with respect to these information collection requirements and will take any comments into account in fashioning relief under a final regulation.

6. *Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.*

Failure to require that plans provide this information to participants and beneficiaries will make it difficult for them to understand how their account balances are being invested, what their choices are under the plan's provisions, or to plan adequately and intelligently for their retirement needs.

The regulation carries out the statutory mandate for annual notices, which therefore cannot be required to be provided less frequently.

7. *Explain any special circumstances that would cause an information collection to be conducted in a manner:*
 - *requiring respondents to report information to the agency more often than quarterly;*
 - *requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;*

- *requiring respondents to submit more than an original and two copies of any document;*
- *requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;*
- *in connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;*
- *requiring the use of a statistical data classification that has not been reviewed and approved by OMB;*
- *that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or*
- *requiring respondents to submit proprietary trade secret, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.*

None.

8. *If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.*

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years -- even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

In addition to requesting public comment on the proposed regulation, the NPRM solicits public comment on the paperwork burden of the proposed regulation. In order to comply with the statutory mandate of the PPA that final regulations on default investment be promulgated within six months after enactment, see PPA, § 624(b), the Department has determined to provide the

public with a period of 45 days for public comment on both the regulatory proposal and its paperwork burden analysis, as permitted by 5 CFR 1320.11. When the NPRM is published in the Federal Register, it will contain a specific request for public comment on the paper burden of the proposed regulation and will provide a period of 45 days within which such comment may be submitted, as required by section 3506(c)(2)(B) of the PRA.

9. *Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.*

None.

10. *Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.*

None.

11. *Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.*

None.

12. *Provide estimates of the hour burden of the collection of information. The statement should:*

- *Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.*
- *If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item 13 of OMB Form 83-I.*
- *Provide estimates of annualized cost to respondents for the hour burdens for*

collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included in Item 13.

The information collection provisions of this regulation consist of two separate requirements: (1) creation and dissemination of an annual notice explaining the automatic enrollment plan; and (2) pass-through to participants and beneficiaries of any material (such as account statements, prospectuses, and proxy voting material) provided to the plan relating to the participant's or beneficiary's investment in a qualified default investment alternative.

The estimates of respondents and responses are derived primarily from the Form 5500 Series filings for the 2003 plan year, which is the most recent reliable data available to the Department. The Department estimates that the number of default enrollment plans in the first few years will not be significantly higher than the number of participant-directed defined contribution plans. The burden for the preparation and distribution of the disclosures is treated solely as an hour burden. For the purpose of this estimate, we have assumed a total annual hour burden of 750,000 hours for the first year and 596,000 hours for the subsequent years, calculated as follows:

Annual Notices

The first information collection is the annual notice explaining the default investment provisions of the plan and providing the opportunity to make investment elections. The proposed regulation requires that a notice be provided to a participant or beneficiary at least 30 days before any portion of the participant's or beneficiary's account balance is initially invested in a qualified default investment alternative, and annually thereafter. The annual notice must describe (1) the circumstances under which assets in a participant's individual account may be invested in a qualified default investment alternative; (2) the qualified default investment alternative, including its investment objectives, risk and return characteristics (if applicable), and fees and expenses; (3) the participants' and beneficiaries' right to direct the investment of the assets to any other investment alternative offered under the plan, without financial penalty; and (4) where participants and beneficiaries can obtain information about the other investment alternatives available under the plan. The proposed regulation states that this annual notice may be included in the plan's summary plan description, the annual investment election notice, or provided as a separate notice.

The Department estimates that 418,000¹ participant directed individual account pension plans

¹ All numbers used in this supporting statement have been rounded to the nearest thousand. Actual unrounded numbers have been entered into the ROCIS ICR module for purposes of converting the paperwork burden estimate described here into an equivalent per-respondent, per-response count.

will prepare and distribute annual notices to 61,612,000 eligible workers, and participants and beneficiaries in the first year in which this proposed regulation becomes applicable. The number of recipients is higher than the total of participants and beneficiaries, because it also includes workers that are eligible to join the participant directed individual account pension plan, but have not yet done so. Preparation of the annual notice is estimated to require one-half hour of legal professional time for each plan in the first year, for a total aggregate estimate of 209,000 burden hours (418,000 plans x 0.5 hours). The equivalent cost of these hours, at \$83 per hour for a professional's time, is \$17,353,000.²

The regulation permits plans flexibility in deciding how to make the required disclosures, which may be delivered by mail, by hand, or electronically. For purposes of this burden estimate, the Department has assumed that 38 percent of the disclosures (23,413,000 notices annually) will be provided through electronic means in accordance with the Department's standards for electronic communication of required information under 29 CFR 2520.104b-1(c). The Department has not estimated any additional burden for preparation or distribution of notices via electronic means because the Department assumes that plans will utilize pre-existing electronic communications systems and e-mail lists for these purposes and the process of preparation and distribution involves only a de minimis additional effort, e.g., a few computer key strokes or the equivalent.

For the remaining 62 percent of disclosures (38,200,000 notices annually), the Department has assumed that these annual notices will be sent by mail and has estimated that reproduction and distribution of these annual notices will take ½ minute of clerical time per annual notice. Plans will therefore have an additional annual hour burden of 306,000 hours (28,200,000 x 1/2 minute). The equivalent cost of these hours, at \$17 per hour for a clerical's time, is \$ 5,195,000.

The total annual burden hours estimated for the annual notice in the first year, therefore, are 515,000. The equivalent cost for this burden hour estimate is \$22,548,000.³

In years subsequent to the first year of applicability, the Department estimates that annual notices will be prepared only by newly established participant directed individual account pension plans and plans that change their choice of qualified default investment alternative. For purposes of burden analysis, the Department has assumed that one-third (1/3) of all participant directed individual account plans (139,000 plans) will prepare and distribute new or updated annual notices to all eligible workers, participants and beneficiaries, requiring only 24 minutes of legal professional time per notice. This results in a burden hour estimate of 420,000 professional hours, with an equivalent cost of \$4,628,000 (420,000 hours x \$83). However, the

² Hourly wage estimates are based on data from the Bureau of Labor Statistics 2000 Occupational Employment Survey and data from the 2001 Employment Cost Index, and overhead assumptions by EBSA.

³ For purposes of entering the burden of the annual notice requirement into the ROCIS ICR Module, actual unrounded numbers have been entered to produce the following results: 418,148 respondents, 61,612,347 responses, 147.35 responses per respondent, and 0.008353 burden hours per response.

total number of participants receiving annual notices each year remains static. As in the calculation for the initial year, distribution to the 62 percent of participants and beneficiaries who will receive the annual notice by mail (38,200,000 individuals) will require 306,000 hours, with an equivalent cost, at \$17 per hour of clerical time, of \$5,195,000.

The total annual burden hours estimated for the annual notice in subsequent years, therefore, will fall to 361,000. The equivalent cost for this burden hour estimate is \$9,823,000.

Pass-through Materials

The second information collection created by the proposed regulation results from the plans' duty to pass on information to participants in a default investment. Under the proposed regulation, any material received by a plan (such as account statements, prospectuses, and proxy voting material) that relates to a default investment must be passed through to the participant or beneficiary on whose behalf the default investment was made. The proposed regulation imposes this requirement only with respect to participants and beneficiaries who have an investment in a qualified default investment alternative that was made by default.

In conformity with the assumptions underlying the other economic analyses in this preamble, the Department has assumed that, at any given time, 5.3 percent of participants and beneficiaries in participant directed individual account pension plans (2,351,000 individuals) will not actively direct investments and therefore will be investing in default investments. For purposes of this burden analysis, the Department has also assumed that plans will receive materials that must be passed through the participants and beneficiaries on a quarterly basis. This assumption takes into account that many, although not all, plans will receive quarterly account statements and prospectuses, and that plans will also receive other pass-through materials on occasion. These two factors result in an estimate of 9,405,000 responses (distributions of pass-through materials) per year (4 x 2,351,000). Duplication and packaging of the pass-through material is estimated to require 1.5 minutes of clerical time per distribution, for an annual hour burden estimate of 235,000 hours of clerical time (1.5 minutes x 9,284,000 instances). The equivalent cost of the hour burden is estimated at \$3,997,000 (235,000 hours x \$17), at \$17 per hour for a clerical's time.⁴

The costs for materials and postage of notices and pass-through materials are covered under question 13.

13. *Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information. (Do not include the cost of any hour burden*

⁴ For purposes of entering the burden of the pass-through requirement into the ROCIS ICR Module, actual unrounded numbers have been entered to produce the following results: 418,148 respondents, 9,404,509 responses, 22.49 responses per respondent, and 0.0250 burden hours per response.

shown in Items 12 or 14).

As explained in the answer to Item 12, above, the Department developed estimates for the universe of plans and workers, participants and beneficiaries affected by these information collections. For purposes of this estimate, the Department has assumed that all plans will use their own resources to develop and disseminate the disclosures. Additional costs reported in this answer to question 13 relate solely to the additional costs that arise out of printing and delivery of the individual disclosures. There is no difference in the cost burden for the first and subsequent years. For the purpose of this estimate, we have assumed total annual reproduction and distribution costs of \$28,875,000, calculated as follows:

Annual Notices

As noted in the answer to Item 12, the Department estimates that 61,612,000 eligible workers, participants or beneficiaries will receive notices annually. The Department assumes that 38 percent of these individuals annually will receive notices through electronic means and only 38,200,000 will receive notices by mail. With material costs for a two-page annual notice (\$0.10 per notice) amounting to \$3,820,000 and postage (\$0.39 per mailing) of \$14,898,000, the total annual costs for the annual notice in the first and subsequent years are therefore estimated at \$18,718,000.⁵

Pass-through Materials

The regulation requires that any material received by a plan that relates to a default investment must be passed through to the participant or beneficiary on whose behalf the default investment was made. As noted in the answer to question 12, the Department estimates that information will have to be distributed quarterly to 2,351,000 affected participants and beneficiaries. Assuming that each quarterly information package consists of 10 pages (paper cost 10 x \$0.05 = \$0.50) and requires postage of \$0.58, the material costs for one mailings amount to \$1.08. Total annual material and postage costs in the first and subsequent years are therefore estimated at \$10,157,000 (2,351,000 x 4 x \$1.08).⁶

14. *Provide estimates of annualized cost to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies also may aggregate cost estimates from Items 12, 13, and 14 in a*

⁵ For purposes of entering the burden of the annual notice into the ROCIS ICR Module, actual unrounded numbers have been entered to produce the following results: 418,148 respondents, 61,612,347 responses, 147.35 responses per respondent, and costs of \$0.3038 per response.

⁶ For purposes of entering the burden of the pass-through requirement into the ROCIS ICR Module, actual unrounded numbers have been entered to produce the following results: 418,148 respondents, 9,404,509 responses, 22.49 responses per respondent, and costs of \$1.08 per response.

single table.

None.

15. *Explain the reasons for any program changes or adjustments reporting in Items 13 or 14 of the OMB Form 83-I.*

This is a new collection of information.

16. *For collections of information whose results will be published, outline plans for tabulation, and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.*

Not applicable; results will not be published.

17. *If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.*

A valid OMB control number and current expiration date will be displayed.

18. *Explain each exception to the certification statement identified in Item 19, "Certification for Paperwork Reduction Act Submission," of OMB 83-I.*

Not applicable; no exceptions to the certification statement.

B. Collections of Information Employing Statistical Methods

Not applicable. The use of statistical methods is not relevant to this collection of information.