

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 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA) gives the Secretary of Labor the authority to "grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a)." In order to grant an exemption under section 408, the Department must determine that the exemption is: (1) administratively feasible; (2) in the interests of the plan and its participants and beneficiaries; and, (3) protective of the rights of the participants and beneficiaries of such plan.

Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978, effective on December 31, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975 of the Code, with certain enumerated exceptions, to the Secretary of Labor. As a result, the Secretary of Labor now possesses authority under section 4975(c)(2) of the Code as well as under 408(a) of ERISA to issue individual and class exemptions from the prohibited transaction rules of ERISA and the Code.

Section 406 of ERISA prohibits certain types of transactions between plans and related parties (called parties in interest), such as plan fiduciaries, sponsoring employers, unions, service providers and affiliates. In particular, under section 406, a fiduciary of a plan may not cause the plan to engage in a transaction involving plan assets (e.g., a sale, lease, loan, transfer, or furnishing of goods or services) with a party in interest or use the plan's assets for the benefit of a party in interest.

In 1981 and 1982, the Department issued two related prohibited transaction class exemptions, PTE 81-6 and PTE 82-63, permitting employee benefit plans to lend securities owned by the plans as investments to banks and broker-dealers and to make compensation arrangements for lending services provided by a plan fiduciary in connection with securities loans. The information collections in those two PTEs were approved by OMB under the control numbers 1210-0065 and 1210-0062, respectively. On October 23, 2003, the Department published a notice in the Federal Register proposing to combine and amend the two PTEs and requesting comments on the proposal and on the resulting combination and revision of the paperwork approvals under the two control numbers. The Department also subsequently submitted an ICR to OMB requesting approval of the paperwork changes. OMB approved the requested revision

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and combination, which resulted in retention of control number 1210-0065 on April 11, 2005, and control number 1210-0062 was allowed to expire. The approval of control number 1210-0065 is currently scheduled to expire on December 31, 2006.

The Department is now promulgating a final class exemption combining and amending the exemptions previously provided under PTE 81-6 and PTE 82-63. The new exemption makes changes to the proposal by expanding the categories of exempted transactions to include securities lending to specified classes of banks and broker-dealers domiciled in specified foreign countries and to allow the use of additional forms of collateral, all subject to specified conditions.

Among other conditions, the class exemption requires that a bank or broker-dealer that borrows securities from a plan provide the plan with its most recent audited financial statement. The borrower must also affirm, when the loan is negotiated, that there has been no material adverse change in its financial condition since the previously audited statement.

The exemption also requires that the agreements regarding the securities loan transaction or transactions and the compensation arrangement for the lending fiduciary be contained in written documents. Individual agreements are not required for each transaction; rather the compensation agreement may be made in the form of a master agreement covering a series of transactions.

This collection of information is necessary, because ERISA section 408(a) provides that the Secretary of Labor may not grant an exemption from ERISA's prohibited transaction rules unless he finds that the exemption is in the interest of the plan and its participants and beneficiaries and protective of the rights of the plan's participants and beneficiaries. The information requirements, which are discussed under item 2 below, are designed to ensure that Secretary meets these statutory requirements.

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.*

A plan fiduciary needs the collected information to meet its fiduciary obligation to participants and beneficiaries under ERISA section 404(a), which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion and to ensure the plan's security lending transactions qualify for exemptive relief. The Department uses the information to (1) ensure that the rights of participants and beneficiaries are protected, (2) effectively enforce the terms of the class exemption and (3) ensure user compliance.

3. *Describe whether, and to what extent, the collection of information involves the use of*

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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.

This information collection is a third-party disclosure; there is no requirement to provide information to the Federal government. The Department has assumed that the entities that rely on this exemption will be large, sophisticated financial institutions involved in securities lending transactions. Such entities generally will communicate by electronic means. The Department has not added any additional burden for documents that are assumed to be distributed by electronic means, because electronic communications will be undertaken through existing electronic systems and databases.

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.*

There is no duplication of information under the exemption. Generally, the annual financial statements of U.S. banks and broker-dealers are required to be audited by a certified public accountant, and annual financial statements of the foreign banks and foreign broker dealers included in the final exemption are required to be audited by a firm that is eligible or authorized to issue audited financial statements in conformity with generally accepted accounting principles in the primary jurisdiction governing the borrowing foreign bank or foreign broker-dealer. Furthermore, the exemption provides that agreements between lenders and borrowers of securities and compensation agreements between plans and lending Fiduciaries may be written in the form of master agreements to avoid repeated and unnecessary duplication.

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.*

The securities lending transactions generally takes place between large employee benefit plans and large, sophisticated financial entities. Accordingly, it is not anticipated that this exemption will have any impact on small businesses.

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.*

This information collection is a third-party disclosure; there is no requirement to provide information to the Federal government. Failure to require the information collection would impair the lending fiduciary's ability to make informed judgments about the appropriateness of

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securities lending arrangements; it would also reduce the Department's ability to oversee and monitor compliance with the conditions of the exemption. The practice of lending securities developed in response to the need of banks and broker-dealers to consummate transactions that require the immediate delivery of securities; the exemption allows plans to participate in this practice and thereby earn additional income from securities held in their investment portfolios. The Department understands that the opportunities for international securities lending activities have increased greatly. Lenders continue to expand their global securities networks by lending securities to new markets and by lending to borrowers located in new jurisdictions.

The information collection requirements of the class exemption are only mandatory if plans wish to rely on the class exemption. Thus, the frequency of disclosure is dependent on the occurrence of such transactions and not on a predetermined time period. Also, as noted in response to item 4, one master agreement may cover a series of transactions.

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*

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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.

The Department published a proposal to amend and combine the two pre-existing PTEs covering securities lending transactions on October 28, 2003, (68 FR 60715). The proposal included a request for public comment on the proposed revisions to the information collections of the two PTEs, and provided a 60-day period within which to submit comments. Although six comments were received in response to the proposal to amend and combine the two pre-existing PTEs, none of those comments discussed or commented upon the information collections or the Department's estimate of the impact of the proposal on the paperwork burden. The Department submitted an ICR to OMB, requesting approval of the proposed revisions, following the close of the 60-day comment period, which was approved by OMB under Control No. 1210-0065. The ICR reference number for the prior submission is 200310-1210-001.

The rulemaking promulgating the final class exemption includes a detailed discussion of the comments received in response to the proposal and describes the changes to the proposal that the Department is making in response to those comments. The rulemaking also describes the Department's estimate of the impact of those changes on the paperwork burden of the new exemption and makes a second request for public comment on the resulting revisions to paperwork burden, providing a second 60-day period for public comment. The Department anticipates that the rulemaking will be published in the Federal Register on or about October 27, 2006. The Department intends to publish a notice in the Federal Register to notify the public of OMB's decision concerning this ICR.

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

No payments or gifts are provided to respondents.

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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.*

In estimating the hour burden for this information collection, the Department consulted with several industry experts and obtained new information on the nature and operation of foreign and domestic securities lending markets.

The Department assumes that the exemption will be relied upon only by the limited group of large, sophisticated domestic broker dealers and banks currently active in the securities lending market, which the Department estimates, based on information from industry experts, at approximately 140 separate entities. In addition, the Department estimates that a total of 60

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foreign broker dealers and banks will begin to rely upon the exemption once it is issued in final form. This produces a total estimate of 200 respondents. Because of the nature of the securities transactions that give rise to the need to borrow securities, the Department assumes that all of the respondents will use their own in-house staff and facilities to comply with the information collection requirements.

Given the nature of securities lending practices, which require expert knowledge, efficient and sophisticated communications systems, and careful monitoring and control of the timing of securities loan transactions, the Department further believes that each of the borrowing entities will establish securities lending relationships with only a limited number of plans. For purposes of this estimate, the Department has assumed that each borrower will sign a contract with no more than 10 employee benefit plans.

The Department has also assumed that the respondents, all of which are large, sophisticated financial entities, will generally communicate by electronic means. Because electronic communications will be undertaken through existing electronic systems and databases, the Department has not added any additional burden for documents that are assumed to be distributed by electronic means.

Financial statements. The Department assumes that each of the 200 respondents will provide each plan with which it has a master lending agreement (10 plans each) with a new financial statement on a quarterly basis, resulting in an estimate of 8,000 financial statements distributed annually (200 respondents x 10 plans x 4 quarterly financial statements). No preparation burden for these statements is assumed, however, since the financial statements will have been prepared for other purposes. The Department has assumed that 10 percent of the respondents will distribute the financial statements in paper by mail, and that the remaining 90 percent of respondents will provide the financial statements electronically. For the 800 financial statements that are distributed annually by mail (10 percent of 8,000 = 800), the Department assumes that preparation of an overnight or priority delivery package will require 5 minutes per statement, resulting in an annual hour burden of 67 hours of clerical time (800 mailings x 5 min./60 min.). For these purposes, each statement is assumed, based on financial statements filed with the Securities and Exchange Commission, to consist of 10 pages.

For the remaining 90 percent of the financial statements distributed annually, or 7,200 statements (8,000 – 800 = 7,200), the Department has assumed electronic distribution and has not estimated any additional distribution burden because it is anticipated that the respondents will use existing electronic databases and e-mail address lists and that the distribution process will entail virtually no additional time.

Lending and compensation agreements. The Department assumes that each respondent will use master agreements for both the lending agreement and the lending fiduciary compensation

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agreement and will review and distribute them on an annual basis. For purposes of burden analysis, the Department has assumed that each respondent will annually require 30 minutes to review each of these two agreements for compliance (1 hour total per respondent), resulting in an annual hour burden of 200 hours (200 respondents x 1 hour per respondent).

The respondents are further assumed to require 5 minutes to package and mail the agreements to each plan lender. Because of the nature of these agreements, the Department assumes that the respondents will provide each of their plan partners with a single mailing annually containing both the lending agreement and the compensation agreement for that partner and that all agreements will be distributed in paper form by priority or overnight mail. The total time for preparation is 167 hours (200 respondents x 10 lending partners x 5 minutes per agreement)/60).

The total annual hour burden for this information collection, based on these assumptions, is therefore 434 hours (67 hours + 200 hours + 167 hours). The equivalent cost of the annual hour burden is estimated at \$21,514, based on \$16,600 for legal staff review of the agreements (200 hours x \$83 per hour = \$16,600) and \$4,914 for clerical time to prepare and distribute the documents (234 hours x \$21 per hour = \$4,914).

In order to complete the submission of this ICR in the ROCIS ICR Module, the annual hour burden as derived above was recalculated to produce the following data elements: 200 respondents, 10.0 responses annually per respondent, 0.217 hours per response.

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 shown in Items 12 or 14).*

As stated under item 12, above, the Department assumes that the information collections required by the exemption are routinely prepared by the respondent entities in-house. Therefore, the additional cost to respondents resulting from the information collection derives solely from material and postage costs for distribution. These costs were estimated at \$4.00 per priority or overnight domestic mailing of the documents. Discussions with industry experts indicated that nearly all of the foreign-based institutions likely to rely on the exemption have established domestic branches. The Department assumes, therefore, that all mailings will be handled by the domestic-based operations and that there will be few, if any, respondents using foreign mail services.

Financial Statements. For the 800 financial statements delivered via mail, the Department further assumes a total annual cost of \$3,200 (800 mailings x \$4.00 per mailing).

Written Agreements. The cost for mailing 2,000 agreements per year, at \$4.00 for each mailing, is \$8,000.

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The total annual cost burden for this information collection is estimated at \$11,200 (\$8,000 for the agreements + \$3,200 for the financial statements = \$11,200).

In order to complete the submission of this ICR in the ROCIS ICR Module, the annual cost burden as derived above was recalculated to produce the following data elements: 200 respondents, 10.0 responses annually, \$.056 per response.

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 single table.*

The exemption does not require information to be provided to the Federal government. Therefore, there are no ongoing costs to the Federal government.

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

The current submission reports revisions due to program changes and adjustments due to new information. Because the effect of the adjustments is greater than the effect of the program changes, the combined impact of the adjustments and revisions is a reduced aggregate paperwork burden.

The program changes that affect paperwork burden are the expansion of entities eligible to rely on the exemption to include specified banks and broker-dealers domiciled in specified foreign countries and the addition of additional types of collateral that may be used to secure loan transactions.

The adjustments that affect burden analysis derive from new information that the Department has obtained through consultation with industry experts regarding the operation of the foreign and domestic securities lending markets. In its prior paperwork burden analysis, the Department based its estimates conservatively on the assumption that all eligible domestic broker-dealers and banks with trust powers would take advantage of the exemption. This led to an estimate of 13,900 domestic entities that would be respondents to the information collections of the proposed exemption. Based on the advice of industry experts, the Department now believes, given the highly sophisticated nature of the securities lending market in general and the specific limitations of the exemption in particular, that its original burden estimate overstated the likely incidence of reliance. The Department now assumes that the exemption will be relied upon only

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by the limited group of large, sophisticated domestic broker dealers and banks currently active in the securities lending market, which the Department estimates at approximately 140 separate entities. In addition, the Department estimates that in total 60 foreign broker dealers and banks will begin to rely upon the exemption in its final form, including the 13 entities located in the United Kingdom that were previously included in the Department's paperwork burden analysis for the Proposal. This produces a lower estimate of 200 respondents (the prior estimate was 13,913 respondents – all American broker-dealers and banks, plus 13 foreign entities) and correspondingly reduces the overall burden estimates.

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.*

This is not a collection of information for statistical use and there are no plans to publish the results of this collection.

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.*

The collection of information will display a currently valid OMB control number.

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

Not applicable. There are 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.