

**PTE 98-54 Relating to Certain Employee Benefit Plan Foreign
Exchange Transactions Executed Pursuant to Standing Instructions**
OMB Number 1210-0111
March 2008

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT 1995 SUBMISSIONS

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.*

The Employee Retirement Income Security Act of 1974 (ERISA), and the Internal Revenue Code (Code), provide that the Secretary of Labor and the Secretary of Treasury, respectively, may grant exemptions from certain prohibited transaction provisions under ERISA and the Code. Section 408(a) of ERISA authorizes the Secretary of Labor to grant administrative exemptions from the restrictions of section 406 of ERISA while section 4975(c)(2) of the Code authorizes the Secretary of Treasury or his delegate to grant exemptions from the prohibitions of section 4975(c)(1).

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.

A foreign exchange transaction between a bank or a broker-dealer and an employee benefit plan could result in a prohibited transaction under one or more of the provisions of section 406(a) or 406(b) of ERISA, depending upon the relationship of the bank or broker-dealer to the plan. For example, where a bank is a party in interest with respect to the plan by reason of being a person described in ERISA section 3(14)(A) (e.g., a fiduciary) or 3(14)(B) (a service provider), the transaction could result in a prohibited sale or exchange of an asset between a plan and a party in interest under ERISA section 406(a)(1)(A) or a transfer of plan assets to, or use of plan assets by or for the benefit of, such party in interest under ERISA section 406(a)(1)(D).

If the bank or the broker-dealer executing a foreign exchange transaction with the plan is a fiduciary (as defined in ERISA section 3(21)(A)) with respect to the plan assets involved in the transaction, the transaction might result in a violation of one or more of the prohibitions of section 406(b) of ERISA. ERISA section 406(b) prohibits a fiduciary from (1) dealing with the assets of the plan in its own interest or for its own account, (2) acting in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to those of the plan or its participants or beneficiaries, and (3) receiving consideration for its own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan.

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Before an exemption may be granted under section 408(a) of ERISA and section 4975(c) (2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of plans and of their participants and beneficiaries, and protective of the rights of those participants and their beneficiaries. In order to ensure that the exemption is not misused, that the rights of participants and beneficiaries are protected, and that there is compliance with the exemption's conditions, the Department often requires disclosures to independent plan fiduciaries and the retention of certain records concerning the transactions.

The class exemption that is the subject of this submission would permit certain foreign exchange transactions between employee benefit plans and certain banks and broker-dealers which are parties in interest with respect to such plans. For purposes of this exemption, a foreign exchange transaction is the exchange of currency of one nation for the currency of another nation. Although the Department previously granted an exemption for certain foreign exchange transactions (PTE 94-20, 59 FR 8022 (OMB# 1210-0085)), that exemption did not include relief for those foreign exchange transactions executed pursuant to the advance written authorization of a plan fiduciary who is independent of the bank or broker-dealer engaging in the transaction (a "standing instruction"). This submission covers the information collection included in the exemption for foreign exchange transactions executed pursuant to standing instructions, which was granted on November 13, 1998.

The transactions covered by the exemption are "income item conversions" and "de minimis purchase or sale transactions." An income item conversion is the conversion of interest, dividends, or other income items into either U.S. dollars or any other currency of an amount which is the equivalent of no more than 300,000 U.S. dollars of interest, dividends, or other distributions with respect to a security or other item denominated in the currency of another nation in connection with the plan's foreign investments. Conversions into other than U.S. currency must be held in an interest bearing account, or reinvested within 24 hours of conversion. A de minimis purchase or sale is the purchase or sale of foreign currency in the equivalent of no more than 300,000 U.S. dollars in connection with the purchase or sale of foreign securities by a plan.

The general purpose of this exemption is to permit employee benefit plans to engage in foreign exchange transactions with banks or broker-dealers which are parties in interest with respect to such plans in ways in which the applicant represents are more cost efficient for the plans. In order that such transactions will be consistent with the requirements of ERISA section 408(a), the exemption imposes the following conditions:¹

¹ The exemption includes both retroactive (i.e., for transactions which occurred between June 18, 1991 and the effective date of this exemption) and prospective conditions. Prospective conditions are shown here.

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a) the terms of the transaction must not be less favorable than those available in comparable arm's-length transactions between unrelated parties or those afforded by the bank or the broker-dealer in comparable arm's-length transactions involving unrelated parties; b) neither the bank nor the broker-dealer has any discretionary authority with respect to the investment of the assets involved in the transaction; c) the bank or broker-dealer maintains written policies and procedures for handling foreign exchange transactions for plans for which it is a party in interest which ensure that the party acting for the bank or the broker-dealer knows it is dealing with a plan; d) the transactions are performed in accordance with a written authorization executed in advance by an independent fiduciary of the plan; e) transactions are executed within one business day of receipt of funds; f) the bank or the broker-dealer at least once a day at a time specified in written procedures establishes a rate or range of rates of exchange to be used for the transactions covered by this exemption, and executes transactions at either the next scheduled time or no later than 24 hours after receipt of notice of receipt of funds; g) prior to execution of a transaction, the bank or the broker-dealer provides the authorizing fiduciary with a copy of its written policies and procedures for foreign exchange transactions involving income item conversions and de minimis purchase and sale transactions; h) the bank or the broker-dealer furnishes the authorizing fiduciary a written confirmation statement with respect to each covered transaction within 5 days of execution; i) the bank or the broker-dealer maintains records necessary for plan fiduciaries, participants, and the Department and Internal Revenue Service to determine whether the conditions of the exemption have been met for a period of six years from the date of execution of a transaction.

The information collection requirements of the exemption are included in the conditions with respect to the written policies and procedures of the bank or broker-dealer, the advance written authorization, transaction confirmation statements, and recordkeeping 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.*

The information collection requirements of the exemption are intended to protect the interests of plan participants and beneficiaries by ensuring that the independent plan fiduciaries have sufficient information to fulfill their fiduciary duties with respect to the plan, and that the federal government agencies responsible for administration and enforcement of ERISA have sufficient information to determine that the conditions of the exemption have been met. As indicated above, before an exemption can be granted under section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department must find, among other things, that the exemption is protective of the rights and interests of

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plan participants and beneficiaries. Consistent with the practice followed in other prohibited transaction class exemptions granted by the Department, the exemption includes a condition requiring a bank or its affiliate using the exemption on a prospective basis to maintain for a period of six years from the date of each covered transaction the records necessary to enable certain persons to determine whether the applicable conditions of the exemption have been met. Such persons include any duly authorized employee or representative of the Department or the IRS, any plan fiduciary who has authority to acquire or dispose of the assets of the plan involved in a foreign exchange transaction, and any contributing employer to the plan.

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). Section 2520-107-1 establishes standards concerning the use of electronic media for maintenance and retention of records. Under these rules, all pension and welfare plans covered under Title I of ERISA may use electronic media to satisfy disclosure and recordkeeping obligations, subject to specific safeguards.

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.*

It is likely that some duplication of record keeping requirements exists between state and federal laws and this exemption. However, no actual duplicative record keeping is expected to be required because transaction records are considered likely to satisfy the requirements of state and federal laws and the exemption in most cases.

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.*

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The disclosure and recordkeeping requirements are imposed on only banks and broker-dealers engaging in foreign exchange transactions. These entities are not typically 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.*

The disclosure and record keeping requirements are mandated only for banks and broker-dealers electing to engage in transactions which are the subject of the class exemption. The frequency is dependent on the occurrence of a transaction rather than a pre-determined period of time. Without the disclosure provisions of the exemption, fiduciaries, participants, and the Department would have no basis to determine whether the other conditions of the exemption have been met, and plans and participants and beneficiaries might not be protected from fiduciary self-dealing.

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*

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- *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.*

The six year record keeping requirement is consistent with requirements in section 107 of ERISA, the general record keeping requirements for tax information under the Internal Revenue Code of 1986, as amended (Code), and the provisions of ERISA section 413 concerning the limitation period on actions for redress of breaches of fiduciary duty (i.e, generally six years after an action which constitutes a breach). Accordingly, the six year recordkeeping requirement has a statutory basis as described in 5 CFR 1320.5(d) (2). Because this exemption is granted under section 4975(c) of the Code (as well as under section 408(a) of ERISA), the exclusion of tax records from the three-year guideline for record retention set forth in 5 CFR 1320.6(e) is applicable.

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.

Attached is a copy of the Department's notice for the Federal Register, as required by 5 CFR 1320.8(d), soliciting comments on the information collection. This notice was published in the Federal Register December 21, 2007 (72 FR 72765), providing the public 60 days to comment on the submission. No comments were received.

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

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No payments or gifts are provided to respondents.

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

There are no issues of confidentiality presented by the disclosure and recordkeeping requirements of the class exemption. The class exemption limits access to trade secrets or privileged or confidential commercial or financial information to government representatives.

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.*

This is not applicable to the requirements of the class exemption.

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.*

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The Department staff estimates the annual hour burden of this information collection to be 4,200. This estimate is based on the assumption that approximately 35 entities will use the exemption. The staff estimates that approximately 30 minutes per day, 240 days per year, the 35 entities will conduct activities relating to the recordkeeping requirements of the exemption. This estimate does not include burden for preparation and distribution of written policies and procedures, advance written authorizations, and confirmation statements because these activities are believed to be usual and customary for banks and broker-dealers engaging in foreign exchange transactions.

The Department staff estimates the cost of the hour burden to be approximately \$218,400. This estimate is based the assumption that professional staff will provide half the services at an hourly rate of \$79 and clerical staff will provide half the services at an hourly rate of \$25 (2100 hours x \$79/hour = \$165,900; 2100 hours x \$25/hour = \$52,500).²

13. *Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information.*

This does not apply because it is not likely that respondents will contract out or pay outside parties for information collection activities relating to this exemption. The cost of material and postage for written policies and procedures, etc. are not counted because these are usual and customary costs for banks broker-dealers engaging in foreign exchange transactions.

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.*

Not applicable.

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

No changes.

² EBSA estimates are based on the National Occupational Employment Survey (May 2006, Bureau of Labor Statistics) and on the Employment Cost Index (March 2007, Bureau of Labor Statistics).

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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.*

There are no plans to publish the results of the collection of information.

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; no exceptions to the certification statement.