

SUPPORTING STATEMENT
REGULATIONS, 29 C.F.R. PART 547, REQUIREMENTS OF A “BONA FIDE THRIFT
OR SAVINGS PLAN” and
REGULATIONS, 29 C.F.R. PART 549, REQUIREMENTS OF A “BONA FIDE PROFIT-
SHARING PLAN OR TRUST”
OMB CONTROL NUMBER: 1215-0119

1. Bona Fide Thrift or Savings Plan: Regulations 29 C.F.R. Part 547 contain the requirements for a “bona fide thrift or savings plan” under section 7(e)(3)(b) of the Fair Labor Standards Act (FLSA). See 29 U.S.C. § 207(e)(3)(b); 29 C.F.R. §§ 547.0-.2. To compute the amount of overtime due to an individual, it is necessary to first compute the “regular rate” that the individual earned. See 29 U.S.C. § 207 (a); 29 C.F.R. §§ 778.107-.109. When computing the regular rate, it is not necessary to include any sums paid to or on behalf of an employee pursuant to a bona fide thrift or savings plan, as defined in these regulations. See 29 U.S.C. § 207(e)(3)(b); 29 C.F.R. § 547.0. Employers are required to communicate, or make available to the employees, the terms of the bona fide thrift or savings plan. 29 C.F.R. § 547.1(b).

Bona Fide Profit-Sharing Plan or Trust: Regulations 29 C.F.R. Part 549 contain the requirements for a “bona fide profit-sharing plan or trust” under section 7(e)(3)(b) of the FLSA. See 29 U.S.C. § 207(e)(3)(b); 29 C.F.R. §§ 549.0-.3. To compute the amount of overtime due to an individual, it is necessary to first compute the “regular rate” that the individual earned. See 29 U.S.C. § 207 (a); 29 C.F.R. §§ 778.107-.109. When computing the regular rate, it is not necessary to include any sums paid to or on behalf of an employee pursuant to a bona fide profit-sharing plan or trust as defined in these regulations. See 29 U.S.C. § 207(e)(3)(b); 29 C.F.R. § 549.0. Employers are required to communicate, or make available to the employees, the terms of the bona fide profit-sharing plan or trust. 29 C.F.R. § 549.1(b).

FLSA section 11(c) requires all employers covered by the FLSA to make, keep, and preserve records of employees and of wages, hours, and other conditions and practices of employment. See 29 U.S.C. § 211(c). A FLSA-covered employer must maintain such records for a specified period of time and make such reports as prescribed by regulations issued by the Secretary of Labor. *Id.*

2. The third-party disclosure requirements covered by this information collection provide transparency to employees about their remuneration. 29 C.F.R. §§ 547.1(b), 549.1(b). Records detailing the specifics of a thrift or savings plan, as well as a profit-sharing plan or trust, provide evidence of an employer’s compliance or non-compliance with the FLSA. Employer maintenance of those records enables Department of Labor (DOL) investigators to determine, upon inspection, whether such employers are in compliance with section 7(e)(3)(b) of the FLSA. Without these records, a determination could not be made.

3. The Department accepts third-party disclosures in electronic format as complying with the requirements of this information collection. The only information employers are required by these regulations to maintain is that information necessary to support the plan's qualifications as a bona fide thrift or savings plan, profit-sharing plan or trust. Use of improved information technology is at the discretion of the record keeper.
4. The DOL accepts information disclosed and records maintained pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 2021 *et seq.*, (or any other statutory or regulatory requirement) as satisfying the requirements of this information collection, where there is an overlap in the requirements. *See e.g.*, OMB Control Number 1210-0110. The DOL must maintain the separately stated requirements of this information collection in order to meet the FLSA expectation that the agency clarify what constitutes a "bona-fide" plan or trust under either Part 547 or 549.
5. Small businesses choosing to establish a thrift or savings plan, profit-sharing plan or trust are impacted by this information collection. The DOL estimates that 86 percent of employers subject to this information collection are small businesses. (*See Census, Statistics about Business Size-including Small Business, Table-2a, U.S. Department of Commerce, Bureau of the Census, www.census.gov/epcd/www/smallbus.html*). In order to fulfill contractual obligations under a chosen plan or trust, prudent management practice dictates that the disclosures and records maintained by a business pursuant to the regulations be kept even if the requirement to do so did not exist; thus, no alternative means exist to reduce this burden, but for the acceptance of information collected pursuant to identical requirements. Moreover, no particular order or form of record is required by the regulations.
6. There is no regular collection of the information required by the regulations. The regulations require only that the terms of the plan be "in writing" and "communicated or made available" to the employees. *See* 29 C.F.R. §§ 547.1(b); 549.1(b). No further information collection is required. If the information were collected less frequently or not at all, a determination regarding FLSA compliance could not be made.
7. There are no special circumstances required in the conduct of these information collections.
8. The DOL published a Notice in the *Federal Register* inviting public comments about these information collections on July 10, 2008. 73 Fed. Reg. 39725. The agency received no comments in response to the Notice, and regular contacts with respondents during the course of investigation activity and general outreach sessions have not raised any substantive problems or undue burdens.
9. The DOL offers no payments or gifts to respondents in connection with these information collections.

10. The DOL makes no assurances of confidentiality to respondents. As a practical matter, the DOL would only disclose information collected under these requests in accordance with the provisions of the Freedom of Information Act, 5 U.S.C § 552; the Privacy Act, 5 U.S.C. § 552a; and their respective regulations, 29 C.F.R. Parts 70, 71.
11. These information collections ask no sensitive questions.
12. The potential respondent universe includes all employers covered by the FLSA (*i.e.*, employers with workers engaged in interstate commerce, producing goods for interstate commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person), which affects approximately 2.018 million employers. (*See Census, Statistics about Business Size-including Small Business*, Table-3, U.S. Department of Commerce, Bureau of the Census, www.census.gov/epcd/www/smallbus.html). Some 44 percent of establishments offer a defined contribution plan. (*See National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2007*, DOL, Bureau of Labor Statistics (BLS), www.bls.gov/ncs/ebs/sp/ebsm0006.pdf). Of the estimated 2.018 million employers, 44 percent results in a potential universe of 888,108 employers with defined contribution plans, which includes both thrift savings plans and deferred profit-sharing plans. Where thrift plans and deferred profit-sharing plans are available, 65 percent and 30 percent, respectively, of the eligible employees participate. (*See DOL, BLS, National Compensation Survey: Employee Benefits in Private Industry in the United States, 2005*, www.bls.gov/ncs/ebs/sp/ebb10022.pdf). Of the estimated 888,108 firms with defined contribution plans, 95% (the combined number of thrift and deferred profit participants) of the firms produces an estimate of 843,703 (rounded to 844,000) respondents.

The DOL estimates average establishment size to be 5 employees, and the typical worker remains employed for the same employer for seven years (based on an average turnover rate of 15 percent); thus, the average employer makes 0.75 disclosures per year. (844,000 x .75). *See Census, Statistics about Business Size-including Small Business*, Table-3, U.S. Department of Commerce, Bureau of the Census, www.census.gov/epcd/www/smallbus.html. 633,000 Annual Responses.

These regulations would typically not impose any third-party disclosure or recordkeeping burdens on employers beyond what would be common under prudent business practices or required under information collections administered by other agencies. A prudent employer establishing a thrift or savings plan, profit-sharing plan or trust would set forth the plan in writing, describe eligibility requirements, a definite formula for saving, and the amount of the employer's contributions, even if not required to do so by these regulations. The annual burden is estimated to equal two seconds (one second for disclosure and another second for recordkeeping) per new employee, in order to account for situations where the employer would not disclose information subject to this collection as either a routine business practice or in response to an information collection covered under another OMB Control Number. $633,000/60 \text{ seconds}/60 \text{ minutes} \times 2 = 352$ (rounded) Total Annual Recordkeeping and Disclosure Burden Hours.

Employers from a wide variety of businesses, from small firms or retail stores to large manufacturing plants have employee profit-sharing plans or trusts. Absent specific wage data regarding such employers, respondent costs are estimated utilizing \$18.00 per hour, which is the seasonally adjusted average hourly rate of production for non-supervisory workers for June 2008. *Employment Situation, August 2008*, Table B-3, p. 24. DOL, BLS, <http://www.bls.gov/news.release/pdf/empst.pdf>). \$18.00 x 352 hrs = \$6,336.00.

13. The requirements merely direct employers to maintain in their files a copy of the plan, describing its provisions; therefore, there are no annual cost burdens to record keepers.

In the extremely rare situation (*i.e.*, three occurrences since 1970) where an employer must post a notice as required by 29 C.F.R. § 549.1(d)(2), there would be some burden on the employer to meet this requirement (approximately one hour); however, because this occurs so infrequently, this burden figure has not been calculated.

14. There are no costs for the Federal government.
15. The DOL has increased the estimated burden hours by 349 hours due to an adjustment that accounts separately for both the recordkeeping and third-party disclosures that would not be made either as routine business practices or in response to other information collections. The DOL now separately accounts for each transaction, as opposed to an aggregate burden as was done in past paperwork submissions. The number of respondents increased from 818,000 to 844,000, due to an adjustment caused by an increase in the overall number of employers covered by the FLSA. The number of responses, however, decreased from 818,000 to 633,000, due to an adjustment recognizing that these disclosures need only be made one time to each affected employee.
16. The DOL does not publish the results of this information collection.
17. The DOL does not seek an exception to the requirement to display the expiration date on these information collections.
18. The DOL is not requesting an exception to the certification requirements for this information collection.