

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.*

This information collection arises from two related actions: the Voluntary Fiduciary Correction Program (the VFC Program or the Program) and Prohibited Transaction Class Exemption (PTE) 2002-51 (the VFC Exemption or the Exemption). The Department of Labor (the Department) adopted the Program and the Exemption in order to encourage members of the public to voluntarily correct transactions that violate (or are suspected of violating) the fiduciary or prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA). Both the Program and the Exemption incorporate information collection requirements in order to protect participants and beneficiaries and enable the Department to oversee the appropriate use of the Program and the Exemption. The following describes the Program and the Exemption, and their information collection requirements, in detail.

VFC Program. The Program specifies types of fiduciary breach transactions that can be corrected through the Program and instructs applicants on how to make complete and fully acceptable corrections without prior discussion or negotiation with the Department. This enables applicants to make full correction without entering into settlement negotiations with the Department, which would result in the imposition of a civil monetary penalty under section 502(l) of ERISA, which is required to be paid on amounts recovered by a plan pursuant to a settlement agreement with the Department. An entity or individual that corrects a transaction in compliance with the Program can apply to the Department for a no action letter, which assures the applicant that the transaction has been adequately corrected and that the Department will take no further enforcement action with regard to the corrected transaction.

The information collection in the Program consists of a requirement that an applicant submit an application to a Regional Office of the Employee Benefits Security Administration (EBSA), the agency within the Department charged generally with enforcement of Title I of ERISA and a recordkeeping requirement. The application must include a description of the transaction and its correction, together with other documentation appropriate to the specific transaction (such as bank statements showing deposits, or appraisal reports, etc.). The Program, in section 6(k), also requires an applicant to maintain copies of the application and any subsequent correspondence with EBSA for a period of seven years, which is the record retention requirement generally applicable to plan records under section 107 of ERISA. The application provides sufficient information to enable the Department to fulfill its enforcement responsibilities by examining the correction, ensuring that it is complete and appropriate, and determining whether further action

is necessary to protect the rights of participants and beneficiaries.

The Department adopted the VFC Program on a permanent basis in 2002 and has amended its provisions twice since that time. The first set of changes was effective in April 2005, when the Department published those changes in the Federal Register and simultaneously requested public comment. The first set of changes principally served to simplify the Program's application processes and supporting documentation requirements and to cover additional types of transactions. The Department submitted an ICR to OMB for the April 2005 changes affecting paperwork burden when the Program changes were published in the Register. The ICR requested a revision to the approved information collection under OMB number 1210-0118 and specified: (1) program changes eliminating, under specific circumstances, the requirement for an applicant to provide accounting and payroll records to document the date and amount of each contribution at issue; (2) changes in assumptions regarding number of applicants and wage rates; and (3) the inclusion of a previously unaccounted-for recordkeeping burden for an estimated 700 applicants. These changes in the aggregate increased the information collection burden. OMB approved the revision of 1210-0118 on March 31, 2005. The current approval is scheduled to expire on September 30, 2008.

In response to the public comments received in response to the April 2005 publication, the Department has now made additional changes to the VFC Program that requires further revision of the paperwork burden estimates. This submission requests OMB approval of the revised burden estimate arising from those changes, which specifically are:

- (1) The Program now offers relief from civil penalties imposed on health and welfare plans in addition to similar relief already provided for pension plans.
- (2) The definition of "under investigation" has been both narrowed and clarified, potentially opening the Program to more applications.
- (3) Several additional types of transactions are newly or more clearly eligible for correction under the Program, including additional types of participant loans and violations involving the use of plan assets to pay expenses that should have been paid by the employer.
- (4) Applicants can correct for the purchase of an asset from a party in interest and the sale of an asset to a party in interest by reversing the initial transaction without the involvement and expense of an independent fiduciary. If, however, the applicant believes that it is in the best interest of the plan to have a cash settlement, rather than undoing the initial transaction, an independent fiduciary is required to confirm that such a settlement best serves the plan.
- (5) Applicants may submit reduced documentation for correction of certain transactions. The final Program expands the set of transactions for which reduced document is permitted.

In particular, the documentation required for correction of participant loan transactions has been greatly reduced to require the submission of only proof of payment and a copy of the IRS compliance statement.

VFC Exemption. The Department adopted a class exemption in connection with its 2002 adoption of the VFC Program (67 FR 70623, Nov. 25, 2002) in order to further encourage the voluntary correction of the specific types of transactions involving fiduciary breach and the prohibited transaction provisions of ERISA. A violation of the prohibited transactions provisions of ERISA is generally subject to taxation under section 4975(e)(1) of the Internal Revenue Code (the Code) if the violation involves a plan described in that section. Therefore, for certain types of transactions eligible to be corrected under the VFC Program, a fiduciary would remain liable for excise taxes under section 4975 of Code even though such transactions were fully corrected under the Program. PTE 2002-51 provides relief for certain eligible transactions from the sanctions imposed under section 4975(a) and (b) of the Code provided that the transactions are fully corrected under the Program and the additional conditions prescribed by PTE 2002-51 are met.

As first adopted, the Exemption required, as a condition to the relief, that the party seeking to correct a transaction under the Program notify “interested persons” (usually plan participants and beneficiaries) that an application has been submitted to a Regional Office of EBSA. The notice was required to describe the nature of the prohibited transaction and the resulting correction. A copy of the notice was also required to be sent to the EBSA Regional Office. Finally, the applicant was required to state in the application that he/she intended to rely on the Exemption to include the date on which the notice to interested persons will be distributed.

In April, 2005, the Department proposed amendments to PTE 2002-51 to add an additional transaction involving the purchase and sale of illiquid assets, which was newly included in the VFC Program. No new burden was associated with the proposed amendments, although the Department adjusted the burden analysis to reflect updated information about the number of respondents and wage rates. This adjustment was included in the approval request submitted for the April 2005 revisions to the Program and approved by OMB.

The final amended PTE 2002-51 has been changed in several respects from the proposal. The Exemption now provides excise tax relief for additional transactions involving the improper use of plan assets to pay certain employer expenses. Also, the conditions applicable to the required notice to interested persons have been revised. The Exemption, as amended, provides an option for correction of transactions that involve an excise tax of \$100 or less under which the party seeking relief may choose, rather than providing notice to interested persons, to pay the amount of the otherwise applicable excise tax to the plan and include in his or her application to the Department under the Program certain additional documentation on the calculations of the excise tax due and the payment to the plan. This documentation generally consists of a copy of a

completed IRS Form 5330 or equivalent written evidence containing the information required by IRS Form 5330 and proof of payment to 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 collection provisions of the Program and the Exemption include third-party disclosures, recordkeeping, and disclosures to the Federal government. The information collections enable the Department to fulfill its obligations to protect plan participants and beneficiaries by providing the information needed to determine whether parties that attempt to correct transactions under the Program have done so correctly and under the conditions permitted. The disclosures also serve to inform participants and beneficiaries of important actions taken by plan officials regarding transactions involving their plans. The Department believes that disclosing this information will protect the interests of participants and beneficiaries of employee benefit plans by raising their awareness of issues related to the security of plan assets and the administration of the plan. In addition, the notice provides an opportunity for interested persons to comment to the Department on the relief requested and, in turn, permits the Department to fulfill its obligations under section 408(a) of ERISA.

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.

To the extent that the information collection is a third-party disclosure, respondents may use electronic methods of communications pursuant to the standards established in the Department's regulation at 29 C.F.R. § 2520.104b-1(b) concerning plans' use of electronic communication media to satisfy ERISA disclosure requirements. That regulation provides that plan sponsors and administrators may distribute notices to employees who have access to e-mail at the place of business. In addition, notices may be distributed electronically to employees or their family members who are beneficiaries if they have electronic access at their homes and give prior approval to this type of distribution. The Department generally encourages affected entities to distribute required notices electronically whenever possible, provided that these regulatory standards are met. For the purposes of paperwork burden analysis, EBSA has developed a set of assumptions concerning the use of electronic technology generally for distribution of information to participants and beneficiaries. Based on these assumptions, EBSA has assumed in this analysis that 38 percent of the required disclosures will be made electronically.¹

¹ This assumption is based on EBSA tabulations of the August 2001 Current Population Survey, computer use module.

The Program requires submission of a written application because the Department is requiring the applicant to sign the application “under penalty of perjury.” The application process, however, is designed to take advantage of computerized processes. In particular, the Program has been configured to include an Online Calculator, which is an Internet based compliance assistance tool provided on EBSA’s website that permits applicants to determine the amount of Lost Earnings, any interest on Lost Earnings, and the interest amount for Restoration of Profits, if applicable, necessary under the Program to correct certain transactions. Instead of submitting detailed documentation in support of their own calculations, applicants that make use of the Online Calculator to perform the correction calculations may simply print out and provide to EBSA a copy of the final page(s) that results from using the “Print Viewable Results” feature of the Online Calculator.

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.

The VFC Program requires applicants to provide the Department a narrative description of the particular transaction being corrected and the correction method, basic identifying information, a penalty of perjury statement. The Exemption also has a notice requirement. Because each transaction is unique, there is no duplication in this information collection. However, aside from collection provisions that will document the transactions in question for the Department and for the participants and beneficiaries, most of the underlying documentation is already available to the plan.

5. If the collection of information impacts small businesses or other small entities (Item 5 of OMB Form 83-1), describe any methods used to minimize burden.

The VFC Program is a voluntary enforcement program. Only those entities that seek to take advantage of the Program’s methods of correcting breaches (or suspected breaches) of fiduciary responsibility need comply with its information collection requirements. Similarly, reliance on the VFC Exemption is also a voluntary undertaking. Plan officials of small plans will decide on a case by case basis whether it is economically advantageous to use the Program and to take advantage of the Exemption. The Program describes the appropriate corrections for the types of transactions identified and the documentation required for the application. The model application form, reduced supporting documentation, Online Calculator, and checklist (Appendix B) assist applicants with completing an application and reduce their paperwork burden.

For parties that decide to send interested persons notices under the Exemption, no new information need be gathered by a plan; all of the required information will have already been gathered for the purpose of completing the application under the Program. If a plan official of a small plan concludes that it is economically advantageous to rely on the Exemption, they will

experience cost savings based on the tax relief granted. Finally, participants and beneficiaries of small plans are entitled to the same protections as those provided to participants and beneficiaries of large plans. The Department has therefore not adjusted the Program or Exemption requirements specifically for small plans.

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 information collection will be conducted only if applicants choose to participate in Program and/or to take advantage of the relief offered by the Exemption. The Department requires the information to ensure that plan officials comply with the requirements of ERISA. The information collections cannot therefore be conducted 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.*

The Program requires an applicant to maintain copies of the application and any subsequent correspondence with EBSA for a period of six years, which is the period of time required under section 107 of ERISA generally for recordkeeping relevant to the plan's operations. This requirement allows the Department (and other interested persons) to determine whether the conditions of the Program have been met. The six-year recordkeeping requirement is consistent

with the requirements of section 107, as well as general recordkeeping requirements for tax information under the Internal Revenue Code.

- 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.

EBSA's notice providing the public with 60 days to comment on the proposed Extension of the Information Collections in the Voluntary Fiduciary Correction Program and Prohibited Transaction Class Exemption was published in the Federal Register on January 28, 2009 (74 FR 4979). No comments were received.

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

Not applicable.

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

No assurances of confidentiality are offered to respondents under either the VFC Program or the VFC Exemption. Parties who rely on the Exemption must provide notice to interested persons, unless the transaction involves an excise tax of \$100 or less, in which case an alternative correction process is available.

- 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.**

Not applicable.

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.*

VFC Program. The Department estimates that approximately 1,525 plans will take advantage of the VFC Program annually. It is assumed that the information collection requirements will be satisfied through a combination of work performed by staff of the applicant (typically the plan sponsor/employer) and by outside service providers hired by the applicant. The work performed in-house by the applicant is estimated as hour burden and described in this item 12; service provider work is accounted for under item 13, below, as cost burden, as are other costs arising from materials and postage.

The Department estimates that each applicant will require 3.5 hours to gather information required for an application under the VFC Program. This results in an annual hour burden of 5,338 hours (1,525 plans x 3.5 hours = 5,338 hours). The Department estimates that one hour of this time will be spent by human resources staff and the remaining 2.5 hours will be clerical time.

The Department has also accounted for, in this ICR, an additional hour burden for recordkeeping. Although the required records concerning application under the Program generally would be kept in the normal course of business, the Department assumes that one hour annually of clerical time for each of the plans will be spent reviewing and maintaining records as a result of this information collection. This results in an annual hour burden of 1,525 hours (1,525 plans x 1 hour = 1,525 hours).

The total annual hour burden for the final VFC Program is therefore estimated at 6,863 hours (5,338 + 1,525). The cost equivalent of this hour burden is estimated at \$223,496 consisting of \$84,561 for professional time (1,525 plans x 1 hr. x \$55 per hour) plus \$138,935 for clerical time (1,525 plans x 3.5 hr. x \$26 per hour).

VFC Exemption. The Department has estimated 325 of the applicants to the VFC Program will also rely on the notice part of the Exemption. Because of the expertise required, most Program applicants using the Exemption will likely hire a professional service provider to prepare the notice required under the Exemption. The resulting burden is therefore accounted for in item 13, below.

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).

VFC Program. The Department has assumed that each applicant under the Program will hire a service provider to prepare and review the application and the financial documentation required in the application and that the service provider generally will be a financial specialist (accountant, financial manager, etc.). Given the changes to the Program, which generally simplify this process, the Department estimates that the service provider will require an average of 2 hours for each application, resulting in a total of 3,050 hours of service provider time. Using a labor rate of \$62 per hour for an accountant or similar professional,² the annual cost burden for preparation of the applications is estimated at \$188,277 ($\$62 \times 2\text{hrs.} \times 1,525\text{ plans}$).

The Department assumes that the required documentation will be submitted to the Department via certified mail. Mailing and material costs are estimated at \$3.12 per application for 1,525 applicants, or \$5,140. The total annual cost burden for the VFC Program is therefore estimated at \$193,416 ($\$188,277 + \$5,140$).

VFC Exemption. The Department has assumed that approximately 325 of the annual 1,525 applicants to the VFC Program will rely on the exemption by sending notice to affected participants and beneficiaries. For those parties choosing the alternate process of the exemption of paying the excise tax to the plan instead of to the IRS, the Department does not attribute any additional burden. The Department does not know how many plans take advantage of this part of the exemption as they are not required to submit paperwork notifying the Department if they pay excise tax to the plan.

The Department assumes that parties relying on PTE 2002-51 will hire service providers, who will prepare and send out the notices to interested persons and the Department. For those approximately 325 applicants, the Department assumes that the preparation of the information required to be submitted to the Department (and to interested persons when required) will require one hour, resulting in an annual cost burden of \$18,021 ($1\text{ hr.} \times \$55\text{ per hour} \times 325$

² Hourly labor rate estimates are based on EBSA estimates based on the National Occupational Employment Survey (May 2007, Bureau of Labor Statistics) and the Employment Cost Index June 2008, Bureau of Labor Statistics

applicants = \$18,021).

For the estimated 325 applicants that send notices to interested persons, it is assumed that each applicant will send such notices to approximately 230 interested persons (participants and beneficiaries in the affected plan). The Department further assumes, based on its understanding of current employee benefit practices, that 38 percent of these about 74,700 notices will be sent by electronic means;³ the remaining 62 percent of the notices will be sent by first class mail. Therefore, the total number of notices sent by mail will be 46,300 (230 interested persons x 325 applicants x .62). The Department assumes that it will take clerical staff 2 minutes per notice to prepare the notices for mailing at a cost of \$40,200 (46,300 notices x 2/60 x \$26) and the cost of mailing is estimated at \$21,800 (\$0.47⁴ x 46,300). The Department assumes, however, that all applicants who send interested-person notices will send the Department its copy of the notice by mail, using certified or overnight delivery services and that this copy will be included in the application package described above under costs for the VFC Program. The annual costs for preparing and mailing the notices to interested persons and the Department is therefore estimated at \$62,000.

Based on the above assumptions, the total annual cost burden attributable to PTE 2002-51 is estimated at \$80,000 (\$21,800 + \$58,000). The total aggregate annual cost burden for the information collection arising from the VFC Program and the Exemption is estimated at \$273,000 (\$193,000 + \$80,000).

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 cost to the Federal government of the VFC Program and the Exemption is estimated at \$2.3 million annually. This estimate includes \$2.1 million for salary and overhead for 20 dedicated FTEs, and \$200,000 in printing and administrative costs for communication of the Program to the public.

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

³ Because the applicants that send notices electronically are assumed to use existing electronic communications systems and databases, no additional cost burden is assumed relative to those distributions.

⁴ \$0.42 for postage and \$0.05 for printing and material costs.

The Department expects an increase in applications under the Program based on increasing public awareness of the Program and its benefits. Therefore, the number of estimated respondents has been increased from 1,250 to 1,525, and the total annual hours requested have been increased from 5,625 to 6,863. The Department also has revised the wage and postal rates.

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.

The results of the information collections 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 is displayed on the Model VFCP Application. The OMB control number and expiration date will be published in the Federal Register following OMB approval.

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 the collections of information.