

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT 1995 SUBMISSIONS

**A. Justification**

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

Section 404(c) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1104(c)) provides that, if an individual account pension plan permits a participant or beneficiary to exercise control over assets in his or her account and the participant or beneficiary in fact exercises such control (as determined under regulations of the Department of Labor), the participant or beneficiary shall not be deemed to be a fiduciary by such exercise of control and no person otherwise a fiduciary to the plan shall be liable for any loss or breach that results solely from this exercise of control.

The Department of Labor's regulation under section 404(c), codified at 29 CFR 2550.404c-1, describes the circumstances in which a participant or beneficiary in an individual account plan is considered to have exercised control over the assets in his or her individual account so as to relieve a fiduciary to the plan of liability relating to the exercise of control. The regulation specifies the manner in which an individual account pension plan must operate in allowing participants or beneficiaries to allocate individual account assets among available investment alternatives, such that section 404(c) will limit the plan fiduciary's liability for the investment decision. The regulation provides, inter alia, that participants and beneficiaries must have adequate information on which to base investment decisions. The regulation specifies the information that a plan must make available before a participant first makes investment decisions; when that information changes, for example when the available investment options under the plan change; and also upon the participant's and beneficiary's request. These information collection provisions are necessary to ensure that participants and beneficiaries are adequately informed about investment alternatives available under the plan, their rights, and the consequences of their investment decisions. Such information is important in assisting participants and beneficiaries in understanding their investment risks and achieving their retirement savings goals.

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.*

There are three information collection requirements incorporated in the regulation under section 404(c). First, plans must disclose specified information regarding the plan, the plan's fiduciaries, and the available investment alternatives to participants and

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beneficiaries before participants and beneficiaries make initial decisions on investment of their account balances. Second, plans must revise their prior disclosures and redistribute them, as appropriate to inform participants and beneficiaries of any changes in the available investment alternatives. Third, plans must provide current relevant information regarding the operating expenses, prospectuses, and assets of each available investment alternative upon the request of participants and beneficiaries.

These information collection requirements are third-party disclosures; information must be disclosed by plan fiduciaries to plan participants and beneficiaries. Plan participants and beneficiaries use the information provided by plan fiduciaries to determine how to invest the plan assets attributed to their individual accounts; the availability of the information governs whether, under the regulation, a participant or beneficiary has “exercised control” over his or her plan assets in such a way as to limit the plan fiduciary’s liability under ERISA for the consequences of the participant’s or beneficiary’s exercise of control. No information is provided to the government.

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.*

The Department’s separate regulation at 29 CFR 2520.104b-1(c) permits plan administrators to use electronic media to make disclosures required under Title I of ERISA, provided certain conditions are met. Plan administrators may rely on that rule to use electronic communications methods for any required disclosures, including the information collection requirements of this ICR. In estimating the burden of this ICR, the Department has assumed, as further described below, that 38 percent of plans will make the required information disclosures through electronic means. This percentage, according to Departmental estimates, has increased since promulgation of the regulation under section 404(c), and the Department has assumed that use of electronic media will continue to increase over time.

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.* In fashioning the regulation, the Department took account of other similar federal and state requirements in order to reduce or eliminate duplication of effort. Much of the information that the regulation requires plans to furnish to participants and beneficiaries will have already been prepared, either by the investment vehicle or by the plan administrator and will be readily available because it is required to meet Securities and Exchange Commission (SEC) requirements. In principal part, this information collection merely insures that existing relevant information is furnished appropriately to

plan participants and beneficiaries.

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 information collections apply only if a plan sponsor decides to modify a plan's operations in order to take advantage of the limitation on fiduciary liability available under section 404(c). Because reliance on 404(c) is voluntary, and because the information collections are designed specifically to protect the rights of participants and beneficiaries with accounts in plans for which such reliance is sought, the regulation does not provide special reduced requirements for small plans or small employers. The Department believes that the information collections are as important to participants and beneficiaries in small plans (or associated with small employers) as they are to participants and beneficiaries in large plans (or associated with large employers).

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 requirements are mandatory only if the sponsor of an individual account pension plan desires to design the plan in a manner that complies with the conditions of the regulation and therefore provides the fiduciary relief available under ERISA section 404(c). There is no reporting to the Federal government under this regulation. Failure to impose the information collection requirements would mean that participants and beneficiaries would have less information on which to base investment decisions with the accompanying increased possibility of loss of retirement savings as the result.

7. *Explain any special circumstances that would cause an information collection to be conducted in a manner:*

- *requiring respondents to report information to the agency more often than quarterly;*
- *requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;*
- *requiring respondents to submit more than an original and two copies of any document;*
- *requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;*
- *in connection with a statistical survey, that is not designed to produce valid and reliable*

*results that can be generalized to the universe of study;*

- *requiring the use of a statistical data classification that has not been reviewed and approved by OMB;*
- *that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or*
- *requiring respondents to submit proprietary trade secret, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.*

None.

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

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

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

The Department's Federal Register notice required by 5 CFR 1320.8(d) on the information collection was published on January 28, 2009 (74 Fed. Reg. 4981). This notice provided the public with 60 days to comment. No comments were received.

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.

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.*

The information collection provisions of this regulation consist of three separate requirements: (1) creation and dissemination of an initial notice containing specified information to participants and beneficiaries under an individual account plan before they make a first investment allocation decision; (2) update and revision of certain categories of information in the initial notice and dissemination of revised information to participants and beneficiaries; and (3) provision of updated specific information regarding investment experiences upon request by participants and beneficiaries. The regulation applies only to individual account pension plans that seek to rely upon the limitation on fiduciary liability provided under section 404(c) of ERISA.

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In order to develop estimates of the hour and cost burdens of this regulation, the Department developed, first, an estimate of the number of plans that are likely to rely on the regulation and will therefore comply with the information collection requirements. Based on Form 5500 data for the 2005 and 2006 plan years, which provide the most recent reliable information available, the Department estimates that 296,000<sup>1</sup> plans annually seek to operate in compliance with the 404(c) regulation.

The Department, secondly, developed an estimate of the number of participants and beneficiaries under such plans to whom information must be provided under the regulation. Based on 2006 Form 5500 data, the Department estimates that annually a total of 54,396,000 participants and beneficiaries will receive disclosures.

In estimating paperwork burden for this regulation, the Department assumed that all disclosures will be prepared and distributed in-house by the plans. The Department has considered the experience and expert knowledge of its program analysts and has concluded that, while it is possible that plans may hire service providers to prepare and/or distribute the notices, plans will do so only when outsourcing produces cost savings; experience and outsourcing of such services is most frequently based on a bundling of services, with these disclosures being one of a group of related administrative services provided to a plan for a single bundled price. Under these circumstances, the Department therefore believes that deriving an estimate of the cost in isolation of outsourcing these particular notice requirements would create inaccuracies that would consequently distort the burden estimate.

Because most of the underlying information that must be compiled for the notices will be prepared by the investment managers of the investment alternatives offered under the plan, the plans' professional and clerical staffs will need only to combine the information into a single disclosure document and distribute it appropriately. The burden of preparation and distribution is therefore described solely as an hour burden.

*New Notices: Preparation.*

For plans that newly become compliant with the 404(c) regulation, either because they are newly created or because they are newly amended to comply, new initial disclosure notices must be written. The Department assumes that writing a new disclosure notice will take 30 minutes of professional time and 30 minutes of clerical time. Based on its analysis of Form 5500 data from the 2005 and 2006 years, the Department assumes that approximately 49,000 plans will prepare such new notices annually. The annual hour burden for preparation of new notices is 24,000 hours of professional time and 24,000 hours of clerical time, for a total hour burden of 49,000 hours. The equivalent cost of

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<sup>1</sup> All numbers stated in this document have been rounded to the nearest 1,000. Any apparent discrepancy in the calculations described here is due to this rounding.

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these hours, at \$116 per hour for a professional's time<sup>2</sup> and \$26 per hour for a clerical worker's time, would be \$2,812,000 for professional and \$1,502,000 for clerical work, for a total of \$4,314,000 annually to prepare these new initial notices.

Updated Notices; Preparation. For plans that have previously complied with the 404(c) regulation in prior years, updating the initial disclosure notice to take into account relevant changes, such as new investment alternatives, is estimated to take 15 minutes of professional time and 15 minutes of clerical time per plan. Using information from the Form 5500, the Department estimates that as many as 247,000 plans will be subject annually to this information disclosure requirement. For purposes of this calculation of paperwork burden, we estimate that, on average, all such plans will change investment alternatives once a year and therefore prepare revised, updated notices once annually. The hour burden for preparation of updated notices by these plans is 62,000 hours of professional time and 62,000 hours of clerical time for a total hour burden of 124,000 hours. The equivalent cost of these hours, at \$116 per hour for a professional's time and \$26 per hour for a clerical worker's time, would be \$7,139,000 for professional and \$1,607,000 for clerical work, for a total of \$8,745,000 to prepare these updated notices.

Information on Request; Preparation. Plans complying with the 404(c) regulation must be prepared to provide certain information on request and must therefore maintain such information in updated form in order to comply. The Department estimates that plans will need to devote, on average, one hour per year to updating information and maintaining the records necessary to comply with this requirement. For the estimated 296,000 affected plans, this creates an additional hour burden of 296,000 hours of clerical time, which has an equivalent cost of \$7,696,000.

Distribution of Notices. The Department estimates, based on the Form 5500 data, that 54,396,000 participants and beneficiaries will annually receive either an initial or an updated notice. In addition, plans will respond to an estimated 296,000 requests for information annually. The regulation permits plans flexibility in deciding how to make the required disclosures, which may be delivered by mail, by hand, or electronically. For purposes of this burden estimate, the Department has assumed that 38 percent of the disclosures will be provided through electronic means in accordance with the Department's standards for electronic communication of required information under 29 CFR 2520.104b-1(c). The Department has not estimated any additional burden for preparation or distribution of notices via electronic means because the Department assumes that plans will utilize pre-existing electronic communications systems and e-mail lists for these purposes and the process of preparation and distribution involves only

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<sup>2</sup>Hourly wage estimates are based on data from the Bureau of Labor Statistics May 2007 Occupational Employment Survey and data from the June 2008 Employment Cost Index, and overhead assumptions by EBSA, and are reported in 2009 Dollars.

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a de minimis additional effort, e.g., a few computer key strokes or the equivalent.

For the remaining 62 percent of disclosures (33,909,000 notices annually), the Department has assumed that these notices will be sent by mail and has estimated that reproduction and distribution of these notices will take 1.5 minutes of clerical time per notice. Plans will therefore have an additional annual hour burden of 848,000 hours (33,909,000 notices x 0.025 hours). The equivalent cost of these hours is \$22,066,000. The costs for printing and postage of notices are covered under Item 13.

13. *Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information. (Do not include the cost of any hour burden shown in Items 12 or 14)*

As explained in the answer to item 12, above, the Department developed estimates for the universe of plans and participants and beneficiaries affected by these information collections. For purposes of this estimate, the Department has assumed that all plans will use their own resources to develop and disseminate the disclosures. Additional costs reported in this answer to question 13 relate solely to the additional costs that arise out of printing and delivery of the individual disclosures. For the purpose of this estimate, we have assumed total annual reproduction and distribution costs of \$63,070,000, calculated as follows:

Initial and Revised Notices. We have assumed that each plan provides an average of 17 investment alternatives,<sup>3</sup> and that each initial notice will consist of five pages for specific plan information, one cover page, and one page for each investment alternative, for a total of 22 pages per notice. As explained in the answer to question 12, above, we have assumed that only 33,726,000 participants and beneficiaries will receive notices by mail because 38 percent of these disclosures will be made electronically. At reproduction costs of \$0.05 per page and postage costs of \$0.76 per notice, costs to provide these initial and revised notices annually amounts to \$62,729,000.

Information on Request. The regulation requires plans to provide certain information on question. According to the Department's knowledge and experience, such requests are rare. Therefore, for purposes of this estimation, the Department has assumed that each plan will be required to respond to only one request for information per year, and that 38 percent of such requests will be answered electronically. Using the same assumptions described in the preceding paragraph, this information collection results in an estimated additional annual cost burden of \$341,000 (1 x 296,000 plans x 68% x \$1.86 = \$341,000).

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<sup>3</sup>See "Trends and Experiences in 401(k) Plans 2007 Survey," Hewitt Associates (stating that 401(k) plans in 2007 offered an average of 17 investment alternatives).



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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.*

This regulation does not require information to be filed with 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 Department estimates that the number of 404(c) plans has increased from 245,000 to 296,000 and the number of participants in those plans has increased from 30,164,000 million to 54,396,000 million. The increase in the number of plans and participants has led to an increase in the hour burden of the regulation from 1,140,000 to 1,316,000 hours annually.

The increase in plans and participants along with an increase in labor rates and material and mailing costs has led to an increase in the estimated cost burden from \$33,020,000 to \$63,070,000 annually.

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 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 this collection of information.