

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.*

Under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* (ERISA), the Department of Labor (Department) has responsibility to administer the reporting, disclosure, fiduciary and other standards for pension and welfare benefit plans. In 1976, the Department issued ERISA Procedure 76-1, Procedure for ERISA Advisory Opinions (ERISA Procedure), in order to establish a public process for requesting guidance from the Employee Benefits Security Administration (EBSA) on the application of ERISA to particular circumstances. The ERISA Procedure sets forth specific administrative procedures for requesting either an advisory opinion or an information letter and describes the types of questions that may be submitted. As part of the ERISA Procedure, requesters are instructed to provide information to EBSA concerning the circumstances governing their request. EBSA relies on the information provided by the requester to analyze the issue presented and provide guidance. The ERISA Procedure has been in use since 1976, and the Department has issued hundreds of advisory opinions and information letters under its rules.

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 ERISA Procedure provides a framework for providing useful, pertinent, and specific guidance to the public on issues arising under ERISA, particularly when needed to guide specific transactions involving employee benefit plans and plan assets. By providing clear, efficient rules for the submission of public requests, the ERISA Procedure promotes efficient handling of these requests and facilitates prompt responses. The information required by the ERISA Procedure is used by EBSA to understand and analyze the issues and develop the response, as well as to determine whether EBSA's response should be in the form of an advisory opinion or information letter.

Advisory opinions and information letters issued under this ERISA Procedure help fiduciaries, employers, and other interested parties understand particular provisions of the law and their application to specific facts and circumstances, thereby promoting compliance with ERISA. Advisory opinions also provide the Department with a means of clarifying Departmental policy on certain issues.

Section 6 of the ERISA Procedure lists the information that must be supplied by the party requesting an advisory opinion. This information includes identifying information (name, type of plan, EIN Number, etc.), a detailed description of the act(s) or transaction(s) with respect

to which an advisory opinion is being requested, a discussion of the issues presented by the act(s) or transaction(s), a statement of the party's views concerning the issues to be resolved and the legal basis for such views. The requesting party must also include copies of the relevant documents rather than merely referring to those documents in the request. The requesting party may also request a conference with EBSA in the event that EBSA is considering issuing an adverse opinion.

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 Government Paperwork Elimination Act (GPEA) requires agencies to allow customers the option to submit information or transact with the government electronically, when practicable. Where feasible, and subject to resource availability and resolution of legal issues, EBSA supports and encourages the electronic submission of documents to the federal government, including in connection with the ERISA Procedure. However, for purposes of this burden estimate, the Department has assumed that the information collection provisions of the ERISA Procedure will be satisfied through submission of written documents because the parties requesting guidance are likely to desire the additional formality of written submissions and the necessary documents are likely to already exist in paper form and be bulky and time-consuming to convert to electronic form.

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 information submitted by a party requesting an advisory opinion relates to and describes a specific set of circumstances and is not available from any other source. Each request raises a unique issue requiring an interpretation of a section or sections of ERISA for which the Department has interpretive authority. No similar information is collected or available from any State or Federal agencies or other sources. Therefore, the requirements of this ERISA Procedure are not duplicative.

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 information collection requirements under the ERISA Procedure are the same for large and small plans and businesses. Since the information collection is triggered only by a voluntary request for interpretation from the public, and the Department's need for the information does not differ based upon the size of the requesting plan or business, it is not possible to establish different information collection requirements based on plan or business size. The Department's need for information to answer a request will differ based upon the relative complexity or novelty of the interpretive issue(s) presented by the requester and not upon plan or

business size.

4. *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 of the ERISA Procedure are only mandatory if a requesting party wishes to receive an advisory opinion. The determination whether to seek an advisory opinion is voluntary on the part of the requesting party. Therefore, the frequency of collection is dependent on the initiation of a request, not on a predetermined time period. There is no reporting to the Federal government under this procedure. Failure to impose the information collection requirements contained in the ERISA procedure would mean that EBSA would be unable to respond to advisory opinion requests in many cases because it would not be provided with enough information to allow it to do so.

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.*

There are no special circumstances that would require the collection to be conducted in a manner described above.

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) soliciting comments on the information collection was published on January 28, 2009, 74 FR 4980. No comments were received.

In the process of considering a request for an advisory opinion, the Department often needs to contact or consult with the applicant or a representative of the applicant to request additional information or clarification. Due to its need to communicate individually with requesters under the ERISA Procedure, EBSA is usually aware of requesters' views regarding the information supplied to EBSA. Generally, applicants understand that EBSA will not provide any interpretation without receiving sufficient information to allow it to do so.

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.

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

Section 12 of the ERISA Procedure states that the information provided by the requesting party will be made part of the public record unless any information that is considered proprietary is specified as such in a separate letter at the time of the request. Information considered to be proprietary will be deleted from the public file.

6. *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.

7. *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.*

Based on recent experience concerning numbers of requests submitted under the ERISA Procedure, the Department estimates that 63 applicants will annually submit requests for advisory opinions¹. The respondents will be plans and parties in interest to plans. The burdens associated with this information collection requirement are not normally incurred on an annual basis by any one plan or business because the frequency of collection is dependent on the initiation of a request, not on a predetermined time period. In fact, the experience of the Department indicates that such requests are made very infrequently.

Based on past and current experience, the Department believes that approximately 10 percent of the Advisory opinion requests will be prepared in-house by the respondents. Respondents are expected in 90 percent of the cases to contract with service providers such as attorneys, accountants, and third party administrators, to prepare the request.

In addition to the advisory opinion request itself, the Department requires that certain information be submitted with or shortly after the request. The Department assumes that this information is in the possession of the plan or plan sponsor and as such will be located and collected by in-house staff.

Because contracting for services results in a cost burden and not an hour burden, the costs associated with contracting with a third party to prepare the advisory opinion request are presented in item 13, below. The Department estimates a total aggregate annual hour burden, reflecting in-house hours to prepare 10 percent of the advisory opinion requests and to collect and provide relevant documentation for all advisory opinion requests, of 652 hours. This estimate is based on the following assumptions:

- Applications for advisory opinions are generally from 2 to 20 pages in length and consist of a request for an opinion supported by various documents. The

¹ This estimate is based on the average number of requests for advisory opinions and information letters that the Department received during 2006-2008.

Department estimates that, on average, preparing each advisory opinion request requires a total of 13 hours, including attorney time, human resources or benefit specialist time, and clerical time, divided as follows.

- Attorney time. The Department estimates that each request done in-house will require 3 hours of attorney time for drafting the request. The Department assumes that only the simplest of requests will be done in-house. As noted, the Department expects that 10 percent of advisory opinion requests will be prepared in-house, which results in a hour burden for this analysis of 19 hours (63 requests x 10 percent x 3 hours). The remaining 90 percent of requests are assumed to be prepared by outside professionals and as such are accounted for in item 13, below.
- Human resources/benefit specialist time. The Department estimates that each request will require 8 hours of human resource/benefits specialist time for identifying and collecting the required supporting documentation. Because of the nature of this documentation (plan documents, financial statements, etc.), the Department expects that this activity will be performed entirely in-house by the plan or sponsor for all advisory opinion requests. The resulting hour burden for this analysis is therefore calculated at 507 hours (63 requests x 8 hours per request).
- Clerical time. The Department estimates that each request will require two hours of clerical time for various tasks, such as copying supporting documentation, resulting in an additional annual hour burden of 127 hours.

In total, the Department estimates an aggregate annual hour burden of complying with the information collection requirements of 652 hours (19 hours attorney time + 507 hours professional time + 127 hours clerical time). The equivalent cost of this hour burden, with attorney professional time valued at \$116/hour, human resources/employee benefits specialist time valued at \$55/hour, and clerical time valued at \$26/hour, is estimated at \$33,588.² This total is derived as follows: Legal staff time is valued at \$2,196 (63 requests x 10% handled in-house x 3 hours per request x \$116 per hour). Professional time is calculated at \$28,095 (63 requests x 8 hours per request x \$55 per hour), and clerical costs are calculated at \$3,297 (63 requests x 2 hours x \$26/hour).

8. *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).*

² Hourly wage estimates are based on wage data from the Bureau of Labor Statistics 2004 Occupational Employment Survey (May 2007) and benefits data from the 2005 Employment Cost Index (June 2008) and are reported in 2009 Dollars.

Additional cost burden derives from the direct costs of retaining outside legal counsel for 90 percent of the advisory opinion request and the mailing costs arising from the submission of required documents to the Department. The annual cost burden for this information collection is estimated to be \$1.4 million. This estimate is based on the following assumptions:

The Department estimates that approximately 90 percent of the plans and/or sponsors will hire an outside legal professional to prepare the written request for an advisory opinion. This results in 57 requests (63 requests x 90 percent) being done by outside legal professionals.

The Department realizes that the requester who hires outside counsel will not pay direct hourly costs. The Department estimates that pension lawyers on average charge \$25,000³ to prepare a request for an advisory opinion (this charge includes firm profit and other overhead charges). As such, the Department estimates that the total cost burden for the preparation of the 57 advisory opinion request, which will include a determination of the needed accompanying documentation, will amount to \$1.4 million (57 hours x \$25,000 per hour).

As noted, although legal counsel may determine which documents to submit, the actual collection, collation, and submission of such documents will typically be accomplished by the plan's or plan sponsor's internal staff and as such are accounted for above in item 12, above.

In addition to costs associated with outsourcing preparation of the advisory opinion request, the Department estimates additional mailing costs for submission of the request and supporting documentation. Although the Department allows and encourages electronic communication with the public, the probability that advisory opinion requests will require submission of disparate existing documents suggests that requesters will submit the supporting documentation by mail, and thus the Department has not assumed that any percentage of the responses will be submitted electronically. As noted above, it is estimated that anywhere between two and twenty pages of documentation may be required for each response. Assuming an average of 10 pages of documentation sent by registered or return receipt requested mail, the Department estimates that each response will cost \$3.62 (\$3.12 for registered mail + \$0.05 paper and print cost x 10 pages) in mailing costs for a total of \$229 (63 requests x \$3.62 per request).

9. *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 ERISA Procedure imposes certain costs on the Federal government. The costs

3 Departmental Estimates

attributable to the ERISA Procedure's information collection requirements are the costs of filing, handling, and storing the documents. EBSA is designated by the Department to assume these costs. Discussions with the office that handles the collection and storage of the documents indicates that approximately one week of professional time at a GS-15 pay rate and two weeks of clerical time at a GS-6 pay rate are required on an annual basis to collect, collate, and file the required documents within EBSA. Hourly costs for professional time at a GS-15 step 5 in the Washington area are approximately \$84, and hourly costs for clerical time at GS-6 step 5 are approximately \$26 per hour.⁴ Total costs to the Federal government for this information collection are therefore estimated at \$3,360 annually (\$84 x 40 hours) for professional time and at \$2,062 annually (\$26 x 80 hours) for clerical time. This totals an aggregate cost estimate to the Federal government of \$5,422.

In addition, the Department stores archived records pertaining to advisory opinion requests at the National Archives, resulting in a line item budget charge. For the fiscal year beginning October 1, 2008, the EBSA charges for storage of documents related to the ERISA Procedure are estimated at \$900. This estimate is derived as follows:

Discussions with the Department of Labor's administrative officials indicate that for the first six months of fiscal 2009, EBSA was charged \$8,800 for storage of records at the National Archives, or approximately \$1500 monthly. This average monthly cost would result in a year charge of \$17,500. The archived records include documents from all EBSA offices. Discussions with the office tasked with delivery of records to the National Archives indicate that the documents related to the ERISA Procedure constitute no more than 5 percent of the total documents stored at the Archives by EBSA, resulting in the above estimate of \$900 in costs for storage of archived documents related to the ERISA Procedure ($\$900 = ((\$8,800/6) \times 12) \times .05$).

The total annual cost to the Department for the information collections arising out of the ERISA Procedure is therefore estimated at \$6,322 (\$900 for document storage + \$2,062 clerical time + \$3,360 professional time).

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

The methodology used to estimate paperwork burden hours for this submission is essentially the same as for the prior submission in 2006. The Department did however revise its

⁴ Both professional time and clerical include locality pay differentials for the Washington, DC area, as well as the inclusion of 28 percent for benefits costs. Data for wages is from the Office of Personnel Management and for benefits costs is from the EBSA administrative office.

estimate of the cost for outside legal counsel. The Department determined that its previous estimates of outside legal counsel were too low. This resulted in an increase in the cost burden over the previous estimates. In addition the Department updated its estimate of the number of requests it received. Using historical data from the last three years the Department estimates that on average it receives 63 requests per year; this estimate is down from the previous estimate of 83 requests for year. The Department also updated its estimates of labor rates.

Finally, discussions with the EBSA office responsible for collecting and storing documents caused a reduction in the estimate of the cost of storing documents.

11. *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.

12. *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 expiration date will be published in the Federal Register following OMB approval.

13. *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.