

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT 1995 SUBMISSION

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 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA) gives the Secretary of Labor the authority to "grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a)." In order to grant an exemption under section 408, the Department must determine that the exemption is: (1) administratively feasible; (2) in the interests of the plan and its participants and beneficiaries; and, (3) protective of the rights of the participants and beneficiaries of such plan.

Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978, effective on December 31, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975 of the Code, with certain enumerated exceptions, to the Secretary of Labor. As a result, the Secretary of Labor now possesses authority under section 4975(c)(2) of the Code as well as under 408(a) of ERISA to issue individual and class exemptions from the prohibited transaction rules of ERISA and the Code.

Section 406 of ERISA prohibits certain types of transactions between plans and related parties (called parties in interest), such as plan fiduciaries, sponsoring employers, unions, service providers and affiliates. In particular, under section 406, a fiduciary of a plan may not cause the plan to engage in a transaction involving plan assets (e.g., a sale, purchase, lease, loan, transfer, or furnishing of goods or services) with a party in interest or use the plan's assets for the benefit of a party in interest.

In 1994, in response to an application from the American Bankers Association, the Department adopted a prohibited transaction class exemption (PTE 94-20) permitting banks, broker-dealers, and their affiliates (hereinafter, respondent) that are parties in interest to a plan to engage in foreign currency transactions with the plan, provided the transaction is directed by a plan fiduciary independent of the respondent and that certain other conditions are satisfied. To protect the interests of participants and beneficiaries of the employee benefit plan, the exemption requires, among other things, that a respondent wishing to rely on the exemption (1) maintain written policies and procedures applicable to trading in foreign currencies with an employee benefit plan; (2) provide a written confirmation of each foreign currency transaction to the independent plan fiduciary directing the transaction; and (3) maintain records of the transactions for a period of six years and make them available upon request to specified interested persons,

Prohibited Transaction Class Exemption 94-20
Purchases and Sales of Foreign Currencies
OMB Number 1210-0085
June 2009

including plan fiduciaries, participants and beneficiaries, and the Department. This information collection request relates to the foregoing requirements.

2. *Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.*

The exemption imposes recordkeeping requirements, including the requirement to make the records available on request to interested persons, such as the participants and beneficiaries, plan fiduciaries, the Internal Revenue Service, and the Department. These requirements enable the Department and other interested persons to monitor compliance with the conditions of the exemption. These conditions are necessary, as required under section 408(a) of ERISA, to ensure that respondents rely on the exemption only in the circumstances protective of plan participants and beneficiaries.

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.*

ERISA Section 2520-107-1 establishes standards concerning the use of electronic media for maintenance and retention of records. Under these rules, entities covered under Title I of ERISA may use electronic media to satisfy disclosure and recordkeeping obligations, subject to specific safeguards. Based on its experience and expert knowledge, the Department believes that the respondents will use electronic systems to create and maintain the required records. The Department has taken the expected use of such automated systems into account in developing the burden estimates described in item 12, below.

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 written procedures and recordkeeping required by the exemption are specific to each respondent and foreign currency transaction. Therefore, no other existing information already available could be used for the purpose. To the extent that other federal law or state law pertaining to bank regulation might require similar recordkeeping, the records required by this exemption would satisfy those requirements as well; therefore, there is no duplication of effort.

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 collection requirements are imposed only on respondents that engage in foreign currency transactions with a plan. These financial institutions are generally large entities; these requirements therefore are not expected to have an impact on small businesses.

6. *Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.*

The information collections are required only in the event that respondents choose to engage in foreign currency transactions with a plan. Compliance is therefore required only upon the occurrence of a transaction, rather than a pre-determined period of time. If the collection were not conducted, respondents would not have sufficient information to demonstrate compliance with the conditions of the class exemption, and the plan fiduciaries, the Department, and other interested persons would not be able to monitor compliance with those conditions.

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.*

Because this exemption is granted under section 4975(c)(2) of the Code, as well as under section

Prohibited Transaction Class Exemption 94-20
Purchases and Sales of Foreign Currencies
OMB Number 1210-0085
June 2009

408(a) of ERISA, the exclusion of records from the three-year guideline for record retention set forth in 5 CFR 1320.6 is applicable. Furthermore, as a result of statutory recordkeeping requirements in ERISA, the Code and other federal laws, the entities affected by this exemption have generally adopted six-year recordkeeping as standard business practice with regard to employee benefit plans.

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 was published in the Federal Register on April 20, 2009 (74 FR 17990), soliciting comments on the proposed extension of the information collection. The notice provided the public with 60 days to comment, as required by 5 CFR 1320.8(d) and 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.*

The exemption limits access to respondents' trade secrets and privileged or confidential commercial or financial information to government representatives. Otherwise, it provides no assurances of confidentiality.

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. Instead, this cost should be included in Item 14.*

The exemption requires respondents to maintain written policies and procedures governing foreign securities transactions on behalf of employee benefit plans. The exemption also requires respondents to send a written confirmation of each transaction to the independent plan fiduciary that directed the transaction. Finally, the exemption requires that respondents maintain for a period of six years from the date of a transaction the records necessary to enable specified interested persons, including the Department, the Internal Revenue Service, plan fiduciaries, and contributing employers, to determine that the conditions of the exemption have been satisfied and to make the records available upon request to the interested persons. Respondents are expected to satisfy these requirements through use of in-house staff rather than outside service providers. Disclosure requests from interested persons are expected to be rare and to be satisfied

through use of electronic databases and communications systems.

The Department has assumed that respondents have established and rely on written policies and procedures to govern foreign currency transactions with any client as a matter of usual and customary business practices. The Department further assumes that written confirmation of foreign currency transactions is also part of the usual and customary business practices of respondents. Therefore, these requirements do not create any additional paperwork burden for purposes of this analysis.

With respect to the recordkeeping and disclosure requirements, the Department has estimated the paperwork burden as follows. Based on the assumption only large employee benefit plans and large banks and broker/dealers engage in the foreign currency transactions covered by this exemption, the Department has estimated that a total of 279 financial institutions will be subject to this information collection. This total includes 114 large banks that have foreign branches,¹ 25 large foreign subsidiaries of large domestic banks, and 140 large broker/dealers² (e.g., large financial firms with national and international trading capacity).

The Department estimates that these 279 institutions will each engage in foreign currency transactions covered by this exemption five times per year, resulting in an estimate of 1,195 foreign currency transactions annually. These institutions are expected to receive, on average, one request for disclosure per transaction. Because extensive recordkeeping is already required of banks and broker/dealers under other state and federal regulations, the recordkeeping and disclosure required by the class exemption is expected to produce only a small additional recordkeeping burden. Therefore, the Department estimates that each respondent will be required by the exemption to spend ten additional minutes per transaction, for a total annual hour burden of 230 hours (1,195 transactions x 10 minutes per transaction divided by 60 minutes per hour). At \$26 per hour for clerical staff time,³ the equivalent cost of the annual hour burden is \$6,000 (230 x \$26 = \$6,000).

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).*

There is no apparent additional cost resulting from this information collection. As noted, the institutions engaging in these foreign currency transactions are large, sophisticated, and highly

¹ See Federal Deposit Insurance Company, Statistics of Depository Institutes database, on-line, as of March 31, 2009.

² Data obtained from conversations with industry experts, who estimated that 140 banks and broker/dealers are currently active in the international securities market and provide trading services to pension plans.

³ 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)

Prohibited Transaction Class Exemption 94-20
Purchases and Sales of Foreign Currencies
OMB Number 1210-0085
June 2009

automated, and these recordkeeping and data storage practices are a normal and customary business practice.

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.*

There is no reporting to the federal government because of this collection and therefore no direct costs to the federal government.

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

There have been no program changes since the prior submission. However, the Department has made adjustments to the burden analysis that result in an increase in the annual hour burden from 200 hours to 230 hours. The increase is due to the increase in the number of respondents, resulting from more current data from the FDIC regarding the number of banks engaging in currency trading through foreign branches. In addition the increase in the equivalent cost is a result of an increase in the estimated labor rate for clerical staff.

16. *For collections of information whose results will be published, outline plans for tabulation, and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.*

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

17. *If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.*

The 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.