

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.*

The Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code) provide that the Secretary of Labor and the Secretary of Treasury, respectively, may grant exemptions from certain prohibited transaction provisions under ERISA and the Code. Section 408(a) of ERISA authorizes the Secretary of Labor to grant administrative exemptions from the restrictions of section 406 of ERISA, while section 4975(c)(2) of the Code authorizes the Secretary of Treasury or his delegate to grant exemptions from the prohibitions of section 4975(c)(1).

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.

Prohibited Transaction Exemption 2004-07 permits an individual account pension plan sponsored by a real estate investment trust (REIT) that is organized as a business trust under State law (Trust REIT), or by its affiliates, to purchase, hold and sell publicly traded shares of beneficial interest in the Trust REIT. Such purchases, holdings, and sales would otherwise be prohibited under sections 406 of ERISA and 4975 of the Code.

The class exemption requires, among other conditions, that the Trust REIT (or its agent) provide the person who has authority to direct acquisition or sale of REIT shares with the most recent prospectus, quarterly report, and annual report concerning the Trust REIT immediately before an initial investment in the Trust REIT. The person with such authority may be, under the terms of the plan, either an independent fiduciary or a participant exercising investment rights pertaining to his or her individual account under the plan. Updated versions of the reports must be provided to the directing person as subsequently published. The exemption further requires the plan to maintain records concerning investments in a Trust REIT, subject to appropriate confidentiality procedures, for a period of six years and make them available to interested persons including the Department and participants and beneficiaries. The confidentiality procedures must be designed to protect against the possibility that an employer may exert undue influence on participants regarding share-related transactions, and the participants and beneficiaries of the plan must be provided with a statement describing the confidentiality

procedures in place and the fiduciary responsible for monitoring these procedures.

- 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 requirements of the exemption are intended to protect the interests of Plan participants and beneficiaries by ensuring that Plan participants, Plan fiduciaries, and employers and employee organizations with employees and members covered by a Plan of the Trust REIT or one of its employer affiliates are informed about the plan's transactions involving Trust REIT shares and can monitor compliance with the conditions of the exemption. In addition, the disclosure requirements provide fiduciaries with sufficient information on which to decide whether to invest in Trust REIT shares and whether to continue such investments. The Department and the IRS, as well as the other specified interested persons, also can rely on the recordkeeping requirement to oversee compliance with the conditions of the exemption.

- 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.*

Under 29 C.F.R. § 2520.104b-1(c) of ERISA, plan administrators are permitted to use electronic media to satisfy the requirements of § 2520.104b-1(b) concerning disclosure of information to plan participants and beneficiaries; in addition, regulation section 2520.107-1 establishes standards concerning the use of electronic media for maintenance and retention of records. Under these rules, all pension and welfare plans covered under Title I of ERISA may use electronic media to satisfy disclosure and recordkeeping obligations, subject to specific safeguards, including the information collections imposed under this exemption.

As explained further below, the Department does not believe that the Trust REITs and plans affected by this information collection are likely to use electronic means to satisfy the exemption's information collection requirements.

- 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.*

It is likely that some duplication of disclosure and recordkeeping requirements exists between state and federal laws and this exemption. However, little or no actual duplicative effort is expected because the same documents will satisfy both the disclosure and recordkeeping

required by this information collection and other requirements of state and federal law. For example, the requirement to provide prospectuses, quarterly reports, and annual reports under the exemption parallels the disclosure requirements of the Securities and Exchange Commission.

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 sponsored by a Trust REIT or employer affiliate decides to invest in shares of the Trust REIT Shares; no entity is required to invest in these shares. The information collections are expected to affect, at maximum, approximately 14 small plans (with fewer than 100 participants), and 1,120 employees of employers sponsoring small plans. The Department believes therefore that the class exemption does not have a significant impact on small entities.

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.*

Investing in shares of beneficial interest in a Trust REIT is a voluntary undertaking on the part of a plan, and the information collection requirements of the class exemption become mandatory only if a plan wishes to make such an investment, not based on a predetermined time period. The information collections are necessary to ensure that the conditions of the exemption are met; less frequent collection of this information would cause a risk of harm to participants and beneficiaries of the affected plans.

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 exemption requires a plan to maintain for a period of six years the records necessary to enable certain specified persons (e.g., participants, beneficiaries, the Department, and the IRS) to determine whether the conditions of the proposed exemption had been met. The six-year recordkeeping requirement is consistent with the statutory requirements in section 107 of ERISA, as well as general recordkeeping requirements for tax information under the Code. The requirement is also consistent with statutory requirements under ERISA section 413, relating to the statute of limitations for actions for fiduciary breach and for other violations of Part 4 of Title I of ERISA.

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 notice announcing its intention to request extension of OMB's approval of this information collection was published in the Federal Register on April 20, 2009 (74 FR 17987) The notice solicited public comment on the extension and provided 60 days for such purpose, as required by 5 CFR 1320.8(d). No comments were received.

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

None.

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.

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

The Department assumes that the Trust REITs affected by this information collection, which are large, sophisticated financial institutions, will use existing in-house resources to provide the disclosures and maintain the plan recordkeeping systems to satisfy the information collection requirements. Given the nature of the information collection requirements, the Department assumes that the collections will be completed by a combination of professional financial or investment and clerical personnel. Using data from the Bureau of Labor Statistics, the Department assumes an hourly wage rate of \$62, including both wages and benefits, for a

professional financial manager and an hourly wage rate of \$26, similarly including wages and benefits, for clerical personnel.

Information recently received from the National Association of Real Estate Investment Trusts (NAREIT) indicates that, as of December, 2008, there were 136 publicly traded REITS, with 38 organized as Trust REITs, the only entities affected by this information collection. In comments submitted to the Department in connection with the promulgation of this class exemption, NAREIT indicated that all eligible Trust REITs were expected to rely on the exemption. The Department continues to assume the validity of this assumption. The Department therefore estimates that 38 respondents will be affected by this information collection.

NAREIT indicates that each Trust REIT has an average number of 700 employees eligible to participate in its pension plan, for a total of 26,600 eligible employees (38 plans x 700 employees). The Department assumes that all employees eligible to participate in a Trust REIT plan will do so and further that all plans will engage in Trust REIT share transactions and will permit the participants to make investment decisions. The number of responses anticipated annually under this information collection is therefore 79,800 (38 Trust REITs doing 3 quarterly reports for 700 employees).

When a plan fiduciary has the authority to direct investment in the Trust REIT, the Trust REIT (or its agent or affiliate) must furnish the prospectuses and reports to the fiduciary, initially and as they are subsequently published. In any case in which a participant has the authority to direct investment of his or her individual account assets in a Trust REIT, the Trust REIT (or its agent or affiliate) must furnish the prospectuses and reports to the participant. The Department has assumed, for this analysis, that all plans associated with Trust REITs will permit investment direction by the participants. Further, although electronic distribution of such documents is permitted under the Department's regulations, the Department has assumed, for this analysis, that these reports will be distributed by mail to participants, based on its conversation with NAREIT concerning current practices of Trust REITs. Finally, the Department assumes the fourth quarter report will be distributed with or incorporated into the annual report. Therefore, each participant in a plan associated with a Trust REIT will receive by mail three information packages from the plan. Because Trust REITs will make use of modern employee tracking database software to prepare the information for mailing (addressing envelopes via high speed printer, etc.), the Department estimates that 3 minutes of clerical time will be required to prepare and mail each information package. The total annual hour burden for distribution of information packages is 3,990 hours (3 minutes x 26,600 participants x 3 mailing per year / 60 minutes per hour). At \$26 dollars per clerical hour, the equivalent cost of these burden hours is \$103,860.

A plan that invests in Trust REIT shares must provide its participants, in writing, a description of the confidentiality procedures in place to protect information relating to purchase, holding and sale of Trust REIT shares and participants' exercise of voting, tender and other similar rights

with respect to such shares. The description must include the name, address and phone number of fiduciary responsible for monitoring compliance with the procedures. The Department believes that plans will include this information in the initial enrollment packet given to eligible employees upon their entry to the plan. Because this information is unlikely to change substantially from year to year, and because initial enrollment packets must be reviewed and updated regularly as part of the plan's usual and customary practices, the Department believes that this requirement adds no appreciable additional burden to the plan's operations.

The six-year recordkeeping requirement of the exemption is consistent with other ERISA recordkeeping requirements and with requirements pertaining to maintenance of tax records, and so is expected to add only a minimal additional burden to existing practices. For purposes of this analysis, the Department assumes that each Trust REIT (or its employer affiliates) will need an additional ten minutes annually of clerical time to review records and make disclosures as necessary, for an additional hour burden of approximately 6 hours (38 Trust REITs x 10 minutes/60 minutes per hours = 6 hours).

In sum, the Department estimates that the total hour burden for the information collection requirements under this exemption will be 3,996 hours (3,990 hours + 6 hours). The equivalent cost of this hour burden is estimated at \$104,000 (\$103,860 + \$170).

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).

The Department has determined that the only additional annual costs arising from this exemption are the mailing costs of the information package to participants. The Department estimates that approximately 79,800 reports will be mailed annually to participants (26,600 participants times 3 reports per year). The Department calculates that the direct cost for mailing each report is \$2.53 (on average a 35 page report at \$0.05 per page, plus \$0.78 for postage. The total annual cost burden is therefore estimated at \$201,894 (79,800 reports x \$2.53 per report).

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 cost to the Federal government associated with this information collection.

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 in this exemption since the prior submission; however, the Department has updated estimates underlying the analysis. First, based on new information from NAREIT, the number of affected Trusts has declined. Second, labor rates have increased. In addition the Department has revised the material and postage estimates.

The primary reason that the cost estimate is much higher than the previous submission is that the price of mailing the reports has changed. The average length of a quarterly report is about 35 pages, which means that the previous estimation of \$0.42 per mailing was too low. Instead, the Department approximates that printing those 35 pages at \$0.05 per page would cost \$1.75, and that mailing a report would take cost approximately \$0.78. Therefore the total cost of sending each report is estimated to be approximately \$2.53, and, based on this factor, the total cost burden for the information has increased since the last submission from \$158,085 to \$305,894.

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 OMB expiration date will be published in the Federal Register upon OMB approval.

18. Explain each exception to the certification statement identified in Item 19, "Certification for Paperwork Reduction Act Submission," of OMB 83-I.

None.

B. Collections of Information Employing Statistical Methods

Not applicable.