

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 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, 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 1981 and 1982, the Department issued two related prohibited transaction class exemptions, PTE 81-6 and PTE 82-63, that permit employee benefit plans to lend securities owned by the plans as investments to banks and broker-dealers and to make compensation arrangements for lending services provided by a plan fiduciary in connection with securities loans. The information collections in those two PTEs were approved by OMB under the control numbers 1210-0065 and 1210-0062, respectively. In 2006, the Department promulgated final class exemption PTE 2006-16, which amends and replaces the exemptions previously provided under PTE 81-6 and PTE 82-63. The final exemption incorporates the exemptions into one renumbered exemption and expands the categories of exempted transactions to include securities

lending to foreign banks and broker-dealers that are domiciled in specified countries and to allow the use of additional forms of collateral, all subject to specified conditions.¹

Among other conditions, the class exemption requires that a bank or broker-dealer that borrows securities from a plan must provide the lending fiduciary with its most recent audited financial statement. The borrower must also affirm, when the loan is negotiated, that there has been no material adverse change in its financial condition since the previously audited statement.

The exemption also requires that the agreements regarding the securities loan transaction or transactions and the compensation arrangement for the lending fiduciary must be contained in written documents. Individual agreements are not required for each transaction; rather the compensation agreement may be made in the form of a master agreement covering a series of transactions.

This collection of information is necessary, because ERISA section 408(a) provides that the Secretary of Labor may not grant an exemption from ERISA's prohibited transaction rules unless he finds that the exemption is in the interest of the plan and its participants and beneficiaries and protective of the rights of the plan's participants and beneficiaries. The information requirements, which are discussed under item 2 below, are designed to ensure that Secretary meets these statutory 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.*

A plan fiduciary needs the collected information to meet its fiduciary obligation to participants and beneficiaries under ERISA section 404(a), which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion and to ensure the plan's security lending transactions qualify for exemptive relief. The Department uses the information to (1) ensure that the rights of participants and beneficiaries are protected, (2) effectively enforce the terms of the class exemption and (3) ensure user compliance.

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*

¹ OMB approved the combination of PTEs 81-6, 86-23, and 2006-16 under OMB Control Number 1210-0065, and control number 1210-0062 was allowed to expire. The approval of control number 1210-0065 is currently scheduled to expire on December 31, 2009.

consideration for using information technology to reduce burden.

This information collection is a third-party disclosure, because there is no requirement to provide the information to the Federal government. The Department has assumed that the entities that rely on this exemption will be large, sophisticated financial institutions involved in securities lending transactions. Such entities generally will communicate by electronic means. The Department has not added any additional burden for documents that are assumed to be distributed by electronic means, because electronic communications will be undertaken through existing electronic systems and databases.

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.*

There is no duplication of information under the exemption. Generally, U.S. banks and broker-dealers are required to have their annual financial statements audited by a certified public accountant, and foreign banks and foreign broker dealers are required to have their statements audited by a firm that is eligible or authorized to issue audited financial statements in conformity with generally accepted accounting principles in the primary jurisdiction governing the borrowing foreign bank or foreign broker-dealer. Furthermore, the exemption provides that agreements between lenders and borrowers of securities and compensation agreements between plans and the lending Fiduciaries may be written in the form of master agreements to avoid repeated and unnecessary duplication.

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 lending of securities generally takes place between large employee benefit plans and large, sophisticated financial entities. Accordingly, it is not anticipated that this exemption will have any 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.*

This information collection is a third-party disclosure, because there is no requirement to provide the information to the Federal government. Failure to require the information collection would impair the lending fiduciary's ability to make informed judgments about the appropriateness of securities lending arrangements; it would also reduce the Department's ability to oversee and monitor compliance with the conditions of the exemption. The practice of lending securities developed in response to the need of banks and broker-dealers to consummate

transactions that require the delivery of securities; the exemption allows plans to participate in this practice and thereby earn additional income from securities held in their investment portfolios. The Department understands that the opportunities for international securities lending activities have increased greatly. Lenders continue to expand their global securities networks by lending securities to new markets and by lending to borrowers located in new jurisdictions.

The information collection requirements of the class exemption are only mandatory if plans wish to rely on the class exemption. Thus, the frequency of disclosure is dependent on the occurrence of such transactions and not on a predetermined time period. Also, as noted in response to item 4, one master agreement may cover a series of transactions.

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 notice of the proposed extension of the information collection was published in the Federal Register on September 25, 2009 (74 FR 49022), pursuant to 5 CFR 1320.8(d), providing the public 60 days to comment on the proposed extension. 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.*

In estimating the hour burden for this information collection, the Department consulted with several industry experts and obtained new information on the nature and operation of foreign and domestic securities lending markets.

The Department assumes that the exemption will be relied upon only by the limited group of large, sophisticated domestic broker dealers and banks currently active in the securities lending market, which the Department estimates, based on the membership list of the International Securities Lending Association, at approximately 100 separate entities. Because of the nature of the securities transactions that give rise to the need to borrow securities, the Department assumes that all of the respondents will use their own in-house staff and facilities to comply with the information collection requirements.

Given the nature of securities lending practices, which require expert knowledge, efficient and sophisticated communications systems, and careful monitoring and control of the timing of securities loan transactions, the Department further believes that each of the borrowing entities will establish securities lending relationships with only a limited number of plans. For purposes of this estimate, the Department has assumed that each borrower will sign a contract with no more than 10 employee benefit plans.

The Department has also assumed that the respondents, all of which are large, sophisticated financial entities, will generally communicate by electronic means. Because electronic communications will be undertaken through existing electronic systems and databases, the

Department has not added any additional burden for documents that are assumed to be distributed by electronic means.

Financial statements. The Department assumes that each of the 100 respondents will provide each lending fiduciary with which it has a master lending agreement (10 lending fiduciaries each) with a new financial statement on a quarterly basis, resulting in an estimate of 1,000 financial statements distributed annually (100 respondents x 10 plans). No preparation burden for these statements is assumed, however, since the financial statements will have been prepared for other purposes. The Department has assumed that 10 percent of the respondents will distribute the financial statements in paper by mail, and that the remaining 90 percent of respondents will provide the financial statements electronically. For the 100 financial statements that are distributed annually by mail (10 percent of 1,000 = 100), the Department assumes that preparation of an overnight or priority delivery package will require 5 minutes per statement, resulting in an annual hour burden of 8 hours of clerical time (100 mailings x 5 min./60 min.). For these purposes, each statement is assumed, based on financial statements filed with the Securities and Exchange Commission, to consist of 10 pages.

For the remaining 90 percent of the financial statements distributed annually, or 900 statements (1,000 – 100 = 900), the Department has assumed electronic distribution and has not estimated any additional distribution burden because it is anticipated that the respondents will use existing electronic databases and e-mail address lists and that the distribution process will entail virtually no additional time.

Lending and compensation agreements. The Department assumes that each respondent will use master agreements for both the lending agreement and the lending fiduciary compensation agreement and will review and distribute them on an annual basis. For purposes of burden analysis, the Department has assumed that each respondent will annually require 30 minutes to review each of these two agreements for compliance (1 hour total per respondent), resulting in an annual hour burden of 100 hours (100 respondents x 1 hour per respondent).

The respondents are further assumed to require 5 minutes to package and mail the agreements to each plan lender. Because of the nature of these agreements, the Department assumes that the respondents will provide each of their plan partners with a single mailing annually containing both the lending agreement and the compensation agreement for that partner and that all agreements will be distributed in paper form by priority or overnight mail. The total time for preparation is 83 hours (100 respondents x 10 lending partners x 5 minutes per agreement)/60).

The total annual hour burden for this information collection, based on these assumptions, is therefore 191 hours (8 hours + 100 hours + 83 hours). The equivalent cost of the annual hour burden is estimated at \$14,046 based on \$11,693 for legal staff review of the agreements (100

hours x \$116.93 per hour = \$11,693 and \$2,353 for clerical time to prepare and distribute the documents (91 hours x \$25.22 per hour = \$2,353).

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 stated under item 12, above, the Department assumes that the information collections required by the exemption are routinely prepared by the respondent entities in-house. Therefore, the additional cost to respondents resulting from the information collection derives solely from material and postage costs for distribution. These costs were estimated at \$4.95 per priority or overnight domestic mailing of the documents and .10 cents for the paper in the document. Discussions with industry experts indicated that nearly all of the foreign-based institutions likely to rely on the exemption have established domestic branches. The Department assumes, therefore, that all mailings will be handled by the domestic-based operations and that there will be few, if any, respondents using foreign mail services.

Financial Statements. For the 100 financial statements delivered via mail, the Department further assumes a total annual cost of \$550 (100 mailings x \$4.95 per mailing+100*10 pages per statement*.05/page).

Written Agreements. The cost for mailing 1000 agreements per year, at \$5.05 for each mailing, is \$5,050.

The total annual cost burden for this information collection is estimated at \$5,595 (\$5050 for the agreements + \$545 for the financial statements = \$5,595). This number has been rounded up to \$5,600 in ROCIS.

14. *Provide estimates of annualized cost to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies also may aggregate cost estimates from Items 12, 13, and 14 in a single table.*

The exemption 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 adjustments that affect burden analysis arise from new information that the Department has obtained through consultation with industry experts regarding the operation of the foreign and domestic securities lending markets. The Department now assumes that the exemption will be relied upon only by the limited group of large, sophisticated domestic broker dealers and banks currently active in the securities lending market, which the Department estimates at approximately 100 separate entities. The consolidation of the financial services industry and reduction of firms engaging in securities lending led the Department to reduce its estimate of the number of firms engaged in securities lending to 100.

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 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. There are 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.