

## SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT SUBMISSIONS

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 section 402(c)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), if an “investment manager” (as defined in section 3(38)) manages plan assets, the plan’s trustee is relieved from certain fiduciary obligations relating to the management of the assets for which the investment manager is responsible. Section 3(38)(B) of ERISA defines “investment manager” as a fiduciary who has the power to manage, acquire, or dispose of any asset of a plan and is, inter alia,<sup>1</sup> either

1. an investment adviser registered with the Securities and Exchange Commission (SEC) under the Investment Advisers Act of 1940 (the IAA), or
2. is not registered with the SEC “by reason of paragraph (1) of section 203A(a)” of the IAA and is instead registered as an investment adviser under the state laws of the state in which it maintains its principal office and place of business, and “at the time the fiduciary last filed the registration form most recently filed” with the state, also files a copy of the state registration form with the Department.

Section 203A(a) of the IAA (and the implementing SEC regulations) provide that investment advisers with less than \$25 million in assets under management must register with the state regulatory authority in the state where the investment adviser maintains its principal office and place of business, rather than with the SEC; advisers with more than \$30 million in assets under management must register with the SEC; those with assets under management between those two dollar values are permitted to choose between state registration and registration with the SEC.

The Department’s regulation at 29 CFR 2510.3-38 provides that investment advisers that register with a state, rather than with the SEC, must satisfy the ERISA section 3(38) requirement to file a copy of the state registration with the Department by instead electronically registering through the Investment Adviser Registration Depository (IARD), which is a centralized electronic filing system operated by the SEC in conjunction with state securities regulation authorities. Because the IARD was established by the SEC and the states and made mandatory for advisers required to file with SEC, and because all states permit filing through IARD even for advisers who do not file with SEC, the Department determined that use of the IARD would eliminate the duplication of filing paper copies of state registration forms with the Department and facilitate creation of a uniform and efficient “one-stop” filing system for state-registered filings by advisers who wished to meet the “investment manager” definition of ERISA section 3(38).

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<sup>1</sup> Section 3(38) also permits banks and insurance companies, subject to specified conditions, to qualify as “investment managers.”

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.*

Although the primary users of the information collected through the Department's regulation are plan fiduciaries, who can review the IARD registration statements for information about investment advisers that are either current or potential service providers to the plan, EBSA also uses the information for enforcement and compliance purposes. EBSA investigators are expected to review IARD data whenever they conduct an investigation that involves investment advisers or investment managers.

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.*

This information collection incorporates electronic filing as a mandatory element, eliminating the previously required duplicative filing of a paper copy of a state registration with the Department. Previously, state-registered advisers that filed with the states in a variety of ways, including paper, electronically through vendor-provided software, and through IARD were required to file an additional paper copy of the filing with the Department in order to meet the requirements of section 3(38).

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.*

This requirement eliminates duplication and streamlines the filing process for state-registered investment advisers who wish to establish their status as "investment managers" under ERISA by eliminating the requirement of filing a paper copy of state registration forms with the Department in favor of electronic filing of standardized information about investment advisers with a nationally centralized electronic database established and maintained by the SEC. It eliminates previously required duplicative paper filings with the Department and increases efficiency for both the private sector and government.

State registration requirements are unchanged by this rule, but a paper copy of such filings is no longer required to be filed with the Department. In addition, the IARD itself incorporates a mechanism for distributing a single filing to the various states in which an adviser may be required to file. All states currently accept IARD filing as their method of state registration, and a majority of states mandate registration through the IARD.

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 affected entities (investment advisers with less than \$25 million in assets under management) are small entities within SEC's definition. However, the regulation's substitution of the IARD, a centralized electronic filing system, in lieu of the duplicative paper filings is expected to increase efficiency and decrease costs for such 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.*

The requirement to file with the Department and the frequency of filing are statutory (established under section 3(38) of ERISA), but apply only if investment advisers elect to meet the terms of the definition of investment manager in 3(38) of ERISA. Advisers are not required to meet the investment manager definition in order to do business with employee benefit plans. The Department's rule ameliorates the burden of filing a duplicate copy of state registration forms by requiring electronic registration with the IARD for entities that wish to fall within the definition of investment manager in 3(38) of ERISA.

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 record keeping, 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 published a notice in the Federal Register in accordance with 5 CFR 1320.8(d) soliciting comments on the extension of the approval of this information collection. See 74 FR 62350 (November 27, 2009). No comments were received.

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

Not applicable.

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. Instead, this cost should be included in Item 13.*

The Department has assumed that the only entities affected by this information collection are those state-registered advisers that would have been required, without the existence of the regulation, to file paper copies of their annual state registrations with the Department in order to meet the definition of investment manager under ERISA. Under the Department's regulation, such state-registered advisers must now instead register under the IARD in order to be considered "investment managers" under ERISA. The total number of such filers was about 1,500 prior to implementation of the IARD.

At the time the Department's regulation was promulgated (in 2004), the Department determined that approximately 1,000 of the 1,500 state-registered filers that submitted paper copies of their state registration forms were registered in a state that independently required registration through the IARD in order to complete the state registration process. Thus, the Department previously assumed 500 state-registered investment advisers who would newly be required to register through the IARD in order to claim the status of an "investment manager" under ERISA. At that time, the Department concluded therefore that its regulation did not impose any additional burden on those state-registered filers, inasmuch as they were already subject to a state requirement to register through the IARD. However, since then, of the five states factored into the analysis, all but two (West Virginia and South Carolina) have mandated the IARD for all their investment advisers. One of the states that now mandates the IARD is California, which comprised 87% of the previous cost burden. Therefore, the Department now estimates that approximately ten advisers are affected by this regulation.<sup>2</sup>

The Department's regulatory requirement to register through the IARD imposes a burden only on investment advisers who, in the absence of the regulation, would not choose to do so. All states currently permit investment advisers to complete a state registration by filing through IARD, and the Department is not able to determine how many of the investment advisers who are required under SEC regulations to complete a state registration would not voluntarily do so by filing through the IARD.

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<sup>2</sup> In 2007, West Virginia had two paper filers and South Carolina had six. The Department has rounded this total to ten for the purpose of this analysis.

Because of the continuing spread of electronic means of communication throughout the business community and the increasing prevalence of internet access, the Department further assumes that all of the investment advisers that are respondents have access to the internet and are capable of completing the IARD annual registration without new capital investment. The Department further assumes, conservatively, that in future years two of the respondents will be new filers in any given year. For such new filers, the Department assumes an initial hour burden of two hours, required for learning to navigate the IARD and for collecting and correctly inputting the required information. For filers that are not new filers, the Department assumes one hour of burden to complete the required annual filing. These estimates result in an annual hour burden of 12 hours (4 hours for new filers, plus 8 hours for annual filers).

In order to calculate the equivalent cost for this hour burden, the Department has projected total labor costs for 2010 for financial professionals to be \$107.23 per hour.<sup>3</sup> The equivalent dollar cost of the 12 hour burden is thus estimated to be \$1,287.

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

The only additional costs arising from this information collection consist of filing fees imposed by the IARD. For first year filers and subsequent filings, the IARD generally requires a \$150 filing fee for plans between \$25 and \$30 million and \$40 for plans under \$25 million. The Department estimates that of advisers who manage under \$30 million, 75% of them manage under \$25 million in assets. Therefore, for the estimated 10 respondents subject to this information collection, the annual cost burden for 2010 is estimated at (3 x \$150) for the share between \$25-30 million and (7 x \$40) for those investors managing under \$25 million.<sup>4</sup> Therefore, the total 2010 cost is estimated at \$730.

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 reported in Items 13 or 14 of the OMB Form 83-I.*

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<sup>3</sup> EBSA estimates of labor rates include wages, other benefits, and overhead based on the National Occupational Employment Survey (May 2008, Bureau of Labor Statistics) and the Employment Cost Index June 2009, Bureau of Labor Statistics).

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There have been no program changes to this information collection since the prior ICR. The burden estimates have been adjusted to take into account the fact that most investment advisers that are affected by this information collection have already invested in the systems necessary to make use of electronic methods of communication through the Internet. ). Therefore, capital investments previously assumed to be required have been eliminated, reducing the annual hour and cost burdens of this information collection. Since 2007, most of the states that were listed as not requiring the IARD now do (including California and Florida which comprised 95% of the cost burden in the previous estimates). Only South Carolina and West Virginia do not require the IARD for their investment advisors. Thus, the Department's requirement only imposes a burden upon a small set of investment advisors in two states. The Department has updated the IARD fee numbers, which were calculated previously to be \$150 for all initial registers and \$100 in subsequent years. Wage rates have also been updated.

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.*

Not applicable.

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 collection of information will display a currently valid OMB control number.

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.