

**Prohibited Transaction Class Exemption 88-59**  
**Residential Mortgage Financing Arrangements**  
**OMB Number 1210-0095**

April 2010

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 ERISA authorizes the Secretary of Labor “to grant a conditional or unconditional exemption of any fiduciary or class of fiduciaries or transactions, from all or part of the restrictions imposed by section 406 and 407(a).” In order to grant such exemptions under 408(a), however, the Department must determine that the exemption is administratively feasible, in the interest of the plan and its participants and beneficiaries, and protective of the rights of participants and beneficiaries. To insure the exemption is not abused, that the rights of participants and beneficiaries are protected, and that compliance with exemption’s conditions is taking place, the Department often requires minimal information collection pertaining to the exempted transactions.

Prohibited Transaction Class Exemption (PTE) 88-59, which amended and replaced PTE 82-87, allows employee benefit plans to participate in several different types of residential mortgage financing transactions, provided certain conditions are met. Without this exemption, these transactions would be prohibited under section 406 of ERISA and under the prohibited transaction provisions of section 4975 of the Internal Revenue Code (Code). The five categories of transactions permitted under the exemption are: (1) issuance of commitments for the provision of mortgage financing to purchasers of residential dwelling units; (2) receipt by a plan of a fee for the issuance of the commitments; (3) the actual making or purchase of a mortgage loan or participation interest therein pursuant to the commitment; (4) the actual making or purchase of an mortgage loan or participation interest therein without the precondition of a commitment; and (5) the sale, exchange or transfer of a mortgage loan or participation interest therein prior to the maturity date of the instrument, provided that the interest sold, exchanged, or transferred represents the plan’s entire interest in such investment. Among other conditions, the exemption requires a plan to maintain for the duration of any loan made pursuant to this exemption all records necessary to determine whether conditions of this exemption have been met and to make such records available for examination on request by any trustee, investment manager, participant or beneficiary of the plan, or agents of the Department or the IRS. Such records could include, for example, showing the identities of the borrower, lender, any developer or builder involved, the qualifications of the lender, the written acknowledgment of the fiduciary obligation of any real estate manager involved in the transaction, evidence of the type of residential dwelling unit involved, and information concerning comparable mortgages and

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expenses offered at the time of the commitment.

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.*

This exemption permits employee benefit plans to invest plan assets in mortgages financing residential dwelling units, including multi-family residential units, by making or participating in loans directly or by purchasing such loans from a third party that is a party in interest to the plan. The exemption also allows the receipt by a plan of a fee in exchange for issuing such loan commitment. These transactions would otherwise be prohibited under ERISA's prohibited transaction provisions. Without the relief provided by the class exemption, employee benefit plans would be barred from investing in residential mortgages involving parties in interest to the plan. Such a result would not be in the best interest of plans, their participants and beneficiaries.

In order to take advantage of the relief provided by a class exemption, the plan seeking relief must maintain, for the duration of a covered loan transaction, records that verify that the conditions of the exemption have been met. This recordkeeping requirement enables interested persons, including trustees, investment managers, participants and beneficiaries of the plan, as well as agents of the Department and IRS, to monitor an exempted party's compliance during the entire period for which an action may be brought to seek redress of a breach of fiduciary duty with respect to the transaction. The primary purpose of the exemption's recordkeeping condition is to enable participants and other interested persons to exercise oversight over 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.*

Use of electronic methods of compliance is neither required nor precluded by the terms of this exemption. Inasmuch as plans and financial entities that engage in mortgage financing are generally sophisticated entities, the Department has assumed that this recordkeeping will be undertaken through electronic databases and systems, which reduce the burden of the information collection.

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*

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*above.*

It is likely that this recordkeeping requirement overlaps with other federal or state requirements pertaining to mortgage lending, such as those that pertain to lenders participating in the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, or in the mortgage insurance program under the Federal Housing Act. However, duplicate recordkeeping would not typically result because an entity would be able to satisfy any duplicative requirements through a single system of recordkeeping.

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.*

Although this exemption is more likely to affect large plans with diverse investment programs, small plans may also from time to time make residential mortgage investments. The burden of the exemption is expected to be minimal for all plans because the required records are expected to be kept in the ordinary course of business by most plans.

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 recordkeeping requirements are imposed only with respect to transactions voluntarily entered into by the transacting parties; the frequency of response is therefore dependent on the occurrence of a transaction, not a predetermined time period. In the absence of the recordkeeping requirement, fiduciaries, participants and beneficiaries, and the Department, would not have access to sufficient information to verify compliance with the terms of the exemption.

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*

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- *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*

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*circumstances should be explained.*

The Department published a notice in the Federal Register, as required by 5 CFR 1320.8 (d), on December 31, 2009 (74 FR 69363), soliciting comments on the request for an extension of approval of this information collection and providing the public with 60 days to submit comments. No comments were received from the public in response to the notice.

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*

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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 has estimated that about 2,237 employee benefit plans hold residential mortgage loans. Using 1998 Form 5500 filings, the Department estimates the fraction of non-participant loans that have residential mortgages in them at 30%.<sup>1</sup> This is used as a basis for incorporating recent trends in filings.<sup>2</sup> Although the number of loans held by each plan is not known, we assume that each plan owns an average of five loans. The class exemption's only information collection requirement obliges plans entering into transactions covered by the exemption to retain all records pertaining to such transactions for the duration of the loan. Because of the ERISA annual reporting requirements and the state and federal regulation of

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<sup>1</sup> 1998 is the most recent year that non-participant loans were disaggregated into categories that included residential mortgages and commercial mortgages. Only large plans (>100 participants) that year filed information that was for this estimate. 388 of the large plans held residential mortgages and another 515 held commercial mortgages that year. The Department assumes that 25% of the commercial mortgages (129) were for multi-family residential loans (covered under this exemption). Thus, the estimated total number of plans that had loans subject to this exemption was 517. Overall, there were 1713 plans that held non-participant loans. The conditions provided by this exemption were applicable to approximately 30% of these plans (517/1713).

<sup>2</sup> In 2007 (the most recent Form 5500 bulletin data available), 7,169 pension plans held non-participant loans of which an estimated 2,151 were engaged in residential mortgage loans (30%). Welfare plans also engage in residential mortgage financing transactions. The fraction of loans that are from welfare plans is estimated at 3.85% from the 2007 update. Thus, the total estimated number of plans is estimated at 2,237.

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mortgage lenders, we have further assumed that the records required by this class exemption are the same records kept in the normal course of business by plans. Therefore, the estimated time spent to maintain records consistent with the exemption for each transaction would be minimal. We estimate that plans will spend an additional five minutes of clerical time per year for each loan for this recordkeeping requirement. Five minutes per loan for each of the estimated 11,184 loans plans amounts to a total of 932 hours per year.<sup>3</sup>

The annualized cost to respondents for the hour burdens for collections of information is estimated to be \$24,362, determined as follows: 932 hours times \$26.14/hour.<sup>4</sup>

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).*

We assume that required records are maintained in-house by the plans. As such, the burden is estimated as hours rather than as cost, and there is no other cost attributable to this information collection.

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.*

Because this plan only mandates a recordkeeping burden upon plans, there is no additional cost imposed on 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.*

The number of respondents has been updated to reflect more current Form 5500 data. Wage rates have been updated to reflect the Department's most recent estimates of clerical labor costs. The rate of decline in the number of plans affected by this exemption was slower than previously predicted.<sup>5</sup> Thus, this time, the Department conservatively uses 2007 numbers to make estimates for 2010. This may overstate the impact of this exemption. However, given the

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<sup>3</sup> Any discrepancies may occur from rounding figures in this summary but not in the actual calculations.

<sup>4</sup> The Department 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).

<sup>5</sup> In 2004, the Department cost trends separately for large and small DB and DC plans.

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recent flux of financial markets, there is too much uncertainty in plan composition to attempt to extrapolate any trends at this time.

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.*

The results of the collection of information will not be published.

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.

**B. Collection of Information Employing Statistical Methods**

Not applicable. The use of statistical methods is not relevant to this collection of information.