

**Proposed Amendment to Prohibited Transaction Exemption 96-23
for Plan Asset Transactions Determined by In-House Asset Managers
OMB 1210-NEW
June 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.*

The Department of Labor (the Department) has the authority, pursuant to section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code), to grant an exemption from all or part of the restrictions imposed, respectively, by sections 406 and 407(a) of ERISA and from taxes imposed by sections 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (F) of the Code.

On March 13, 1984, the Department granted PTE 84-14 (49 FR 9494), a class exemption that permits various parties who are related to employee benefit plans to engage in transactions involving plan assets if, among other conditions, the assets are managed by a “qualified professional asset manager” (QPAM). The Department recently amended the QPAM exemption.¹ The QPAM exemption granted in 1984 did not provide relief for transactions involving the assets of plans managed by an in-house asset manager.

The Committee on Investment of Employee Benefit Assets (CIEBA)² subsequently requested such relief. In CIEBA’s original exemption application, CIEBA stated that many large companies manage some or all of their plan assets in-house. These large corporations determined that they could reduce costs and maintain high quality management by developing an in-house asset management capability rather than relying exclusively on outside managers or consultants. CIEBA represented that, unless the Department provided broad exemptive relief for

¹ See Amendment to Prohibited Transaction Exemption (PTE) 84-14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 70 FR 49305 (August 23, 2005). See also Proposed Amendment to Prohibited Transaction Exemption (PTE) 84-14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 70 FR 49312 (August 23, 2005).

² CIEBA is a trade association whose membership includes corporate financial officers who serve as fiduciaries of employee benefit plans subject to ERISA and the Code. CIEBA’s approximately 115 member companies collectively oversee about \$1.4 trillion of defined benefit and defined contribution plan assets for about 16 million plan participants and beneficiaries. For defined benefit plans in 2008, the member companies oversaw more than \$652 billion in plan assets for more than 10.2 million plan participants. CIEBA 2008 Membership Profile Executive Summary. This figure represents approximately 35 percent of the defined benefit plan assets in the United States. This calculation is based on a projection computed by applying percentage changes in pension assets derived from the Federal Reserve Board’s Flow of Funds Accounts to the 2006 Form 5500 filings with the US Department of Labor.

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in-house asset managers, in-house plans would be disadvantaged because of the restrictions on the types of transactions an in-house manager could engage in on behalf of such a plan.

On April 10, 1996, the Department granted PTE 96-23 (61 FR 15975-01), Class Exemption for Plan Asset Transactions Determined by In-House Asset Managers. The class exemption permits various parties in interest to employee benefit plans to engage in transactions involving plan assets if, among other requirements, the assets are managed by an in-house asset manager (INHAM).³ The proposed amendment to PTE 96-23, among other things, broadens the definition of INHAM to permit a greater number of entities to take advantage of the relief provided by the exemption, proposes relief for entities that are parties in interest because they are “co-joint venturers,” clarifies several issues regarding the definition of an INHAM and the scope of the exemption, and clarifies the audit requirements. The proposed amendment expands the definition of INHAM by changing the requirement that an INHAM be a wholly owned subsidiary of an employer or its parent organization, to include a subsidiary that is 80% or more owned by the employer or parent company. Additionally, the plan assets under management requirement would be increased from \$50 million to \$85 million.

In order to grant an exemption under section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department must determine that the exemption is administratively feasible, in the interests of the plan and its participants and beneficiaries, and protective of the rights of the participants and beneficiaries of such plan. In order to protect the participants and beneficiaries of plans managed by INHAMS, the Department has included specific policy and procedures and audit requirements as conditions to the exemption. These information collections are designed to safeguard plans involved in transactions covered by the exemption.

PTE 96-23, as restated in the proposed amendment, contains requirements for written guidelines between an INHAM and a property manager that an INHAM has retained to act on its behalf. Because it is a customary business practice for agreements related to the investment of plan assets or transactions relating to the leasing of space to be described in writing, no burden was estimated for this provision. The information collection requirements included in this paperwork burden estimate consist of the requirements that the INHAM develop written policies and procedures designed to assure compliance with the conditions of the exemption and have an

³ An INHAM is defined in the proposed amendment as an organization which is (1) either (A) a direct or indirect 80 percent or more owned subsidiary of an employer, or a direct or indirect 80 percent or more owned subsidiary of a parent organization of such an employer, or (B) a membership nonprofit corporation a majority of whose members are officers or directors of such an employer or parent organization; and (2) an investment adviser registered under the Investment Advisers Act of 1940 that, as of the last day of its most recent fiscal year, has under its management and control total assets attributable to plans maintained by affiliates of the INHAM in excess of \$85 million; provided that plans maintained by affiliates of the INHAM and/or the INHAM must have, as of the last day of each plan’s most recent reporting year, aggregate assets of at least \$250 million.

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independent auditor conduct an annual INHAM exemption audit and issue an audit report to each plan.

Written Policies and Procedures

The written policies and procedures are required to describe the following objective requirements of the exemption and the procedures adopted by the INHAM to assure compliance with each of the following: (1) the requirement that the entity meets the definition of an INHAM; (2) the requirements regarding the discretionary authority or control of the INHAM with respect to the plan assets involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of the plan to enter into the transaction; and (3) the requirement that any procedure for approval or veto of the transaction meets the conditions of the exemption. The policies and procedures also are required to describe additional objective requirements for the transactions afforded relief, including the steps adopted by the INHAM to assure compliance with each of the requirements.

Audit Requirements

The INHAM exemption audit and report are required to consist of the following:

- A review of the written policies and procedures adopted by the INHAM for consistency with each of the objective requirements of the exemption.
- A test of a sample of the INHAM's transactions during the audit period that is sufficient in size (i.e., number of transactions) and nature (i.e., type of transactions) to afford the auditor a reasonable basis to make its required determinations under the class exemption. The sample should also be sufficient in size and nature for the auditor to render an overall opinion regarding whether the INHAM's program complied with the objective requirements of the exemption, and with the INHAM's own policies and procedures.
- A determination as to whether the INHAM has satisfied the definition of an INHAM under the exemption.
- Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor's findings.

Following completion of the exemption audit, the auditor is required to issue a written report presenting its specific findings regarding the level of compliance with the policies and procedures and with the objective requirements of the exemption. The written report is also required to contain the auditor's overall opinion regarding whether the INHAM's program complied with the policies and procedures and the objective requirements of the exemption. The exemption audit and the written report are required to be completed within six months following the end of the year to which the audit relates.

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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 that are conditions of the proposed amendment include written policies and procedures by an INHAM and audit requirements. The written policies and procedures will be used by an independent auditor to determine the INHAM's compliance with the exemption. An independent auditor will conduct an annual exemption audit and make a determination whether the INHAM is in compliance with the written policies and procedures and the objective requirements of the exemption. These information collections are designed to safeguard participants and beneficiaries in plans managed by INHAMS that are involved in transactions covered by the exemption. The exemption does not require any reporting or filing with the Federal government.

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.*

Nothing in this proposed amendment requires that disclosures be made through distribution methods that would preclude use of electronic technology. INHAMs are part of large, financially sophisticated organizations. A study by the Securities Industry Association indicates that virtually all large, sophisticated financial institutions "have invested in complex information technology (IT) systems."⁴ Consequently, the Department has assumed that more routine interactions between parties will be carried out electronically, such as transmittal of the written policies and procedures to the independent auditor. For purposes of this burden estimate, however, the Department has assumed that the annual audit report will be provided in writing to provide desired formality of compliance, the cost of which is included in the cost of the annual audit.

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.*

⁴ Mills, Rob, "Regional firms: Increasingly Retail-Oriented, But Holding Their Own," SIA Research Reports, Vol. VI, No. 6, (June 29, 2005) at 12.

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The Department has attempted to avoid duplication of information collection requirements. The required policies and procedures and exemption audit are unique to the circumstances of the particular transactions covered by the exemption and do not replicate any other requirements by state or federal regulations. The exemption permits respondents to satisfy the requirements for written guidelines between the INHAM and property manager with documents that are already in existence due to ordinary and customary business practices, provided such documents contain the required disclosures.

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.*

This collection of information is unlikely to adversely affect small businesses or small entities. As noted in the answer to Item 3, above, INHAMs are part of very large, financially sophisticated organizations, not 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 information collection requirements in this exemption are only mandatory if INHAMs voluntarily decide to rely on the statutory exemption. Without the policies and procedures, and audit requirements, compliance with the exemption may not be monitored to adequately safeguard plan assets. The Department has determined that the annual audit is necessary to maintain ongoing monitoring of an INHAMs compliance with the INHAM's policies and procedures and objective requirements 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;*

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- *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.*

Not applicable.

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.

As explained in the response to question 12 below, the Department consulted with some members of CIEBA, a trade organization, in order to obtain information from industry representatives about the number of firms that manage plan assets in-house and other information to estimate the paperwork burden of this information collection.

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The Department published a proposed amendment to PTE 96-23 in the Federal Register on June 14, 2010 (75 FR 33644), soliciting public comment on the information collections contained in the proposed amendment and providing the public 60 days for comment consistent with the requirements of 5 CFR 1320.8. Any comments received in response to this notice will be taken into account and addressed in the final rulemaking.

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.*

No assurance of confidentiality has been provided.

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*

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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 made certain specific basic assumptions in order to establish a reasonable estimate of the paperwork burden of this information collection.

First, the Department assumes that INHAMs, which are large, sophisticated financial institutions, will use existing in-house resources to prepare the policies and procedures, rather than hiring outside service providers to do this work. This assumption does not apply to the audit requirements.

Second, given the nature of the information collection requirements, the Department assumes a combination of personnel will perform the information collection. Using data from the Bureau of Labor Statistics, the Department assumes an hourly wage rate of \$107 for 2010, including both wages and benefits, for a financial manager and an hourly wage rate of \$26, similarly including wages and benefits, for clerical personnel.⁵ Legal professional time is similarly assumed to be \$119 per hour.

Third, the Department assumes that maintenance of records of the policies and procedures and the audits is generally a usual and customary business practice that would be undertaken regardless of the exemption. The proposed amendment does not contain any additional recordkeeping requirements; no additional burden has been assumed for recordkeeping costs. Further, given the sophisticated nature of the parties involved, the Department assumes that communications between the parties will occur electronically via means already in existence. Therefore, the costs arising from electronic communications will be negligible.

⁵ 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). Figures are projected forward to 2010. Financial manager wage and benefits estimates of \$107.23 are based on metropolitan wage estimates for financial managers. Clerical wage and benefits estimates of \$26.14 are based on metropolitan wage rates for executive secretaries and administrative assistants. Legal professional wage and benefits estimates of \$119.03 are based on metropolitan wage rates for lawyers.

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The Department estimates that there will be approximately 20 INHAMs that will utilize the amended prohibited transaction exemption. Information provided by CIEBA⁶, an industry trade group, indicates that approximately 24 of CIEBA's members manage plan assets in-house and approximately 14-16 of those currently maintain INHAMs and utilize the exemptive relief provided in the Class Exemption for Plan Asset Transactions Determined by In-House Asset Managers (PTE 96-23). CIEBA's membership is estimated to include about 80 percent of all the large firms that manage plan assets in-house. This leads to an estimate of approximately 18 INHAMs (respondents). In addition, the Department expects approximately two more INHAMs to be established due to proposed changes to the definition of an INHAM. The number of INHAMs is assumed to be constant over time.

Written Policies and Procedures

The Department assumes that INHAMs will use existing in-house resources to prepare the written policies and procedures. The Department estimates that each INHAM will use 15 hours of a legal professional's time to develop policies and procedures. This leads to an hour burden in the first year of 300 hours. (20 INHAMs x 15 hours = 300 hours) At \$119 per hour, the equivalent cost will be \$35,700 for the first year. (300 hours x \$119 per hour = \$35,700)

As for subsequent years, the Department assumes that INHAMs will change their policies and procedures very infrequently. Therefore, the hour burden and associated equivalent cost is estimated to be negligible.

Audit Requirements

An independent auditor is required to conduct an annual audit of the INHAM. The costs of an outside auditing firm to conduct the annual audits are described below in question 13. For purposes of the hour burden, the Department estimates that each INHAM will use in-house legal professional, financial manager, and clerical time to provide documents and respond to questions from the auditor.

⁶ CIEBA is a trade association whose membership includes corporate financial officers who serve as fiduciaries of employee benefit plans subject to ERISA and the Code. CIEBA's approximately 115 member companies collectively oversee about \$1.4 trillion of defined benefit and defined contribution plan assets for about 16 million plan participants and beneficiaries. For defined benefit plans in 2008, the member companies oversaw more than \$652 billion in plan assets for more than 10.2 million plan participants. CIEBA 2008 Membership Profile Executive Summary. This figure represents approximately 35 percent of the defined benefit plan assets in the United States. This calculation is based on a projection computed by applying percentage changes in pension assets derived from the Federal Reserve Board's Flow of Funds Accounts to the 2006 Form 5500 filings with the US Department of Labor.

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Each annual audit will require about ten hours of a legal professional's time, 25 hours of a financial manager's time, and twelve hours of clerical time. This leads to an hour burden of 940 hours. $((10 \text{ hours} + 25 \text{ hours} + 12 \text{ hours}) \times 20 \text{ INHAMs} = 940 \text{ hours})$ The equivalent cost of this hour burden for the annual audits is approximately \$83,700. $((10 \text{ hours} \times \$119 \text{ per hour} + 25 \text{ hours} \times \$107 \text{ per hour} + 12 \text{ hours} \times \$26 \text{ per hour}) \times 20 \text{ INHAMs} = \$83,700)$

In summary, the Department estimates that the total hour burden imposed by the exemption in the first year is about 1,200 hours. $(300 \text{ hours} + 940 \text{ hours} = 1,240 \text{ hours})$ The total equivalent cost of this hour burden in the first year is approximately \$119,400. $(\$35,700 + \$83,700 = \$119,400)$ The total annual hour burden in subsequent years is approximately 940 hours. The total equivalent annual cost of this hour burden in subsequent years is about \$83,700.

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 only additional costs arising from this information collection derive from the costs of an outside auditing firm.

INHAMs are assumed to use either a law firm or an accounting firm to conduct the annual audits. The Department has received information from industry representatives that the cost of the annual audit required by PTE 96-23 may range from approximately \$10,000 to \$25,000, depending on asset size and how many years the INHAM has used the auditing firm. The Department has used a conservative estimate for the cost of the outside auditing firm for each audit of \$20,000. This leads to a cost estimate for the annual audits of \$400,000. $(\$20,000 \times 20 \text{ INHAMs} = \$400,000)$

In summary, the total cost burden for each year is estimated to be about \$400,000.

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.*

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There are no annualized costs to the Federal government for this information collection because it does not require any reporting or filing with 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.*

Not applicable. This is a new collection of information.

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 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.*

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.