

**Procedure for Application for Prohibited Transaction Exemption Regulation:
Pursuant to 29 CFR § 2570.30, et seq.
OMB Number 1210-0060
August 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 the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code) authorizes the Secretary of Labor and the Secretary of the Treasury to establish an exemption procedure in order to grant a conditional or unconditional exemption of any fiduciary, disqualified person or class of fiduciaries, or orders of disqualified persons or transactions, from all or part of the restrictions imposed by sections 406 and 407(a) of ERISA and from the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code. Under section 102 of Reorganization Plan No. 4 of 1978 (Reorganization Plan No. 4), the Secretary of Labor was given the authority to establish the exemption procedure and to grant such exemptions.

Accordingly, on April 28, 1975, the Department published ERISA Procedure 75-1 in the Federal Register (40 FR 18471). This procedure provided necessary information to the affected public regarding the procedure to follow when requesting an exemption. On August 10, 1990, the Department issued a regulation which replaced ERISA Procedure 75-1 for applications for prohibited transaction exemptions filed on or after September 10, 1990. (29 CFR 2570.30 *et seq.*, 55 FR 32836, Aug. 10, 1990).

Section 406 of ERISA prohibits various transactions between a plan and certain related parties. These related parties, referred to as parties in interest described in section 3(14) of ERISA and as disqualified persons in section 4975(e)(2) of the Code), which include plan fiduciaries, sponsoring employers, unions, service providers and affiliates, may not engage in a transaction described in section 406 of ERISA and section 4975(c) of the Code with a plan, unless a statutory or administrative exemption applies to the transaction. The transactions that are generally prohibited under these statutory provisions include sales, leases, loans, or the provision of services between a party in interest and a plan, as well as a use of plan assets by or for the benefit of, or a transfer of plan assets to, a party in interest or a disqualified person, unless a statutory or administrative exemption applies to the transaction.

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The Department of Labor has authority under Reorganization Plan No. 4, pursuant to section 408 of ERISA and section 4975(c)(2) of the Code to grant either individual or class exemptions. In order to grant an exemption under section 408 and section 4975(c)(2), the Department must determine that the exemption is:

- (1) administratively feasible,
- (2) in the interests of the plan and in its participants and beneficiaries, and
- (3) protective of the rights of participants and beneficiaries of such plan.

In order to make such a determination, the Department requires full information regarding all aspects of the transaction, and the parties and the assets involved. Sections 2570.34 and 2570.35 of the exemption procedure regulation describe the information that must be supplied by the applicant, such as: identifying information (name, type of plan, EIN number, etc.); an estimate of the number of plan participants; a detailed description of the exemption transaction and the parties for which an exemption is requested; a statement regarding which section of ERISA is thought to be violated and whether transaction(s) involved have already been entered into; a statement of whether the transaction is customary in the industry; a statement of the hardship or economic loss, if any, which would result if the exemption were denied; a statement explaining why the proposed exemption would be administratively feasible, in the interests of the plan and protective of the rights of plan participants and beneficiaries; and several other statements. In addition, the applicant must certify that the information supplied is accurate and complete.

The Department is issuing a proposed rule that would, if adopted, supersede the existing rule of procedure governing the filing and processing of applications for administrative exemptions from the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code of 1986 (the Code), and the Federal Employees' Retirement System Act of 1986 (FERSA). The proposed regulation updates the exemption procedure to reflect various changes in the Department's practices that have evolved since the current procedural rule was adopted in 1990. Among other things, key elements of the exemption policies and guidance currently found in ERISA Technical Release 85-1 (pertaining to retroactive exemptions) and the Department's 1995 exemption publication would be consolidated within the text of a unitary, comprehensive final regulation, thus reducing the regulatory burdens on applicants for exemptive relief.

Sections 2570.34 and 2570.35 of the exemption procedure regulation would be expanded

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as follows: all applications would be required to include a chronology of events leading to the exemption transaction; the specialized statements from qualified independent appraisers would be amended to require the appraisal report to be current and not more than one year old as of the date of the transaction and the appraiser's rationale, credentials, and a statement regarding the appraiser's independence from the parties involved in the transaction would need to be included; a new requirement would be added regarding the content requirements for specialized statements submitted by third-party experts other than qualified independent appraisers; a new qualified independent fiduciary statements would be required that discloses the independent fiduciary's qualifications, duties, and current compensation.

A new requirement contained in section 2570.43(d) and (e), if adopted, would permit the Department, in its discretion, to require an applicant to furnish interested persons with a Summary of Proposed Exemption (SPE). The Department expects this requirement to be used in instances where the proposed transaction is relatively complex, and it is likely that the notice of proposed exemption may not be readily understandable by interested persons (i.e., participants and beneficiaries).

The SPE, must be written in a manner calculated to be understood by the average recipient. Among other things, the SPE must objectively describe the exemption transaction and the parties thereto, the reasons why the plan seeks to engage in the transaction, and the conditions and safeguards proposed to protect the plan and its participants from potential abuse or unnecessary risk of loss in the event the Department grants the exemption. Applicants who must provide interested persons with an SPE also would be required to furnish the Department with a copy of the SPE for review and approval before it is distributed to interested persons.

Finally, the Department also proposes to amend §2570.43 to permit applicants to utilize electronic means (such as e-mail) to deliver notice to interested persons of a pending exemption, provided that the applicant can demonstrate satisfactory proof of electronic delivery to the entire class of interested persons.

As more fully discussed in items 12 and 13 below, the Department expects that most of the amendments to the procedure would impose a minimal burden on plans and their service providers.

Section 408(a) of ERISA requires that before granting an exemption from sections 406(a) or 407(a) of ERISA, the Secretary "shall require that adequate notice be given to

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interested persons, and shall afford interested persons opportunity to present views.” Thus, section 2570.43 of the exemption procedure regulation requires that the applicant for an exemption provide interested persons with a copy of the Federal Register notice containing the proposed exemption and a statement that informs them of their right to comment on the proposed exemption.

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.*

There are two information disclosure requirements incorporated within the exemption procedure regulation. The first requirement, that an applicant for an exemption disclose information regarding the application and certify to that information, is necessary in order for the Department to make an informed determination regarding the application. The second requirement, notice to interested persons, ensures that participants and beneficiaries are informed of the application for exemption and have an opportunity to respond.

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(b) of ERISA, “where certain material, including reports, statements, and documents, is required under Part I of the Act and this part to be furnished either by direct operation of law or an individual request, the plan administrator shall use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries.” Section 2520.104b-1(c) establishes the manner in which disclosures under Title I of ERISA made through electronic media will be deemed to satisfy the requirement of § 2520.104b-1(b). 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.

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.*

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This procedure was originally issued jointly by the Department of Labor (DOL) and the Internal Revenue Service (IRS). From 1975 to 1979, the exemption procedure was a joint procedure. During this period, two copies of the application had to be filed with both DOL and the IRS. However, Reorganization Plan No. 4 published in the Federal Register on October 17, 1978 eliminated duplication in this area. Currently, applications are filed only with the DOL.

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.

No provisions have been included in this exemption procedure regulation to simplify the application for small businesses. Since the Department is required by the statute to make a finding in every case, it is not possible to required different information to be provided for large and small plans. The potential for abuse in any specific transaction is not less in small plans than in large plans, and participants and beneficiaries in small plans are afforded the same rights to protections under this exemption procedure regulation as those in large 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.*

Each information collection relates only to a particular application for exemption. The frequency of the collection relates only to the applicant's election to enter into a transaction which would otherwise be prohibited by the ERISA and the Code.

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.*

There are no special circumstances that require the collection to be conducted in a manner inconsistent with the above.

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 regulated community will be provided with an opportunity to comment on the revised exemption procedure including changes to the information collection requirements during the 60-day comment period for the proposed rule.

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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.*

Because the Secretary must make a determination on the record, no assurance of confidentiality can be provided to applicants for exemption. The right to review all information supplied by an applicant is an essential part of providing interested parties with the opportunity to make informed comments on a proposed exemption.

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.*

There are no questions of a sensitive nature pertaining to sexual behavior and attitudes, religious beliefs, or other matters that are commonly considered private. Therefore, this is not applicable to the requirements of this exemption procedure regulation.

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.*

Between 2005 and 2008, the Department received an average of 56 requests annually for prohibited transaction exemptions. For purposes of this analysis, the Department assumes that approximately the same number of applications will be received annually over the next three years.¹ The paperwork burden consists of the time required to prepare the information the outside legal will use to prepare and submit an application for exemption and the time required to prepare and distribute the notice of an application to interested parties. Regardless of whether the applicant is a plan or a service provider, however, it is likely that the application will be completed by an outside professional, generally an attorney. Because notices are only distributed once a proposed application for an exemption has been published in the Federal Register, the Department estimates, based on the number of notices published between 2005 and 2008, that 25 applications annually will proceed to the notice stage.

An application for exemption may be made either directly by plans or by parties-interest to plans. The preparation of an application, however, is generally conducted by, or under the direction of, attorneys with specialized knowledge of employee benefit plans. The Department assumes that these same attorneys will also prepare and distribute the notice of the application to interested parties.

The Department estimates that, on average, 10 hours of in-house legal professional and 10 hours of in-house clerical time will be spent preparing the documentation for the application that will be used by the outside counsel. Therefore, the Department estimates that preparing the application will require 560 in-house legal professional hours (56 applications times 10 hours) and 560 clerical hours (56 applications times 10 hours) for a total of 1,120 hours at an equivalent cost of \$79,861.²

¹ This number excludes applications seeking expedited exemption approval under Prohibited Transaction Class Exemption 96-62. The estimated burden hours associated with PTE 96-62 are provided in a separate OMB submission.

² The hourly wage estimates used in this analysis are estimates for 2008 and are based on data from the Bureau of Labor Statistics National Occupational Employment Survey (May 2008) and the Bureau of Labor Statistics. Employment Cost Index (March 2009). Total labor costs (wages plus benefits plus overhead) for clerical staff were estimated to average \$25.67 per hour over the period based on metropolitan wage rates for clerical staff.

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For applications that reach the stage of publication in the Federal Register as pending approval, a notice must be prepared and distributed to interested parties. The Department estimates that 25 applications will be published annually and that approximately 17,175 notices to interested parties will be distributed.³ The distribution of the notices is estimated to require 5 minutes of clerical time per interested party. Therefore, distribution of notices will require approximately 1,431 hours at an equivalent cost of \$36,740 ((5minutes/60 minutes) times 17,175 times \$25.67 hourly clerical rate).

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 cost burden associated with this ICR is the material costs and distribution costs for the exemption application and notice to interested parties. For purposes of the analysis, the Department assumes that the plan's attorney will send the application to the Department and distribute the notice of the application to interested parties.

An application for exemption may be made either directly by plans or by parties in interest to plans. The preparation of an application, however, is generally conducted by or under the direction of attorneys with specialized knowledge of ERISA. The Department assumes that these same attorneys will also prepare and distribute the notice of the application to interested parties. Because of the large amount of paperwork that is submitted (applications average approximately 60 pages with varying numbers of supporting documents), the Department estimates that legal fees will be \$17,500 on average per case. This estimate includes potential meetings with DOL personnel as well as preparation of supplementary documents that are requested following some of these meetings. For some of the more complex cases, the Department will request a Summary of Proposed Exemption (SPE), which will involve a one page summary of the rationale for the transaction. For the combined services of the qualified independent fiduciary and

Total labor cost for legal staff was estimated to average \$116.93 per hour based on metropolitan wage estimates for attorneys.

Total labor cost for legal staff was estimated to average \$116.93 per hour based on metropolitan wage estimates for attorneys. The 560 clerical hours are estimated to cost \$14,375 and the 560 legal professional hours \$65,486. This totals to \$79,861.

³Based on a weighted average of 2006 Form 5500 Pension data. The data is split into firms with more than 100 participants and fewer than 100 participants. The Department estimates that half of the applications are from small plans (<100) and half from larger plans (>100). This gives a weighted average of 687 participants per plan. This number multiplied by 25 yields 17,175.

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appraiser/expert, the costs are estimated at \$10,000. The new requirements contained in the proposal are incorporated into these cost estimates. Thus, the Department estimates that the cost per transaction of the outside law firm, independent fiduciary, and appraiser/expert are approximately \$27,500, which when multiplied by the estimated 56 cases is expected to result in a cost burden of approximately \$1,540,000.

The Department estimates that 17,175 notices to interested persons will be sent, and that 13,470 of the notices (80 percent) will be distributed via first class mail with a material cost of \$.05 per page and distribution costs of \$.44 per notice. This generates an estimated cost of \$6,733. The Department further estimates that 2,576 (15 percent of the total number of notices) will be distributed electronically and 859 (5 percent) will be distributed by alternative means approved by the Department, for example in highly visible area within a factory, at no cost. The Department notes that it determines whether it is appropriate to distribute notices by means other than mailing on a case-by-case basis and only will allow a method to be used that ensures actual receipt based on the demographics of the class of interested persons.

The Department estimates that SPEs will be requested with respect to 8 submissions (15% of the 56 submissions) per year, and that the SPEs will be sent with the notices. Based on an average plan size of 687 participants per plan, this results in the distribution of 5,496 SPEs, of which 4,397 (80 percent) will be mailed. The material cost associated with mailing the 4,397 SPEs at \$.05 per page is \$220. Therefore, the total cost burden for distribution of the notices and SPEs is estimated to be approximately \$6,953 (\$6,733 for the notices + \$220 for the cost of including the SPEs).

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 ERISA exemption procedure results in certain costs to the government. Section 2570.42 of the procedure requires that before an exemption can be granted the Secretary shall publish a notice of a proposed exemption in the Federal Register. The Department estimates that, on average, these notices will cover two pages in the Federal Register:

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therefore, the cost to publish the notice at \$489 per page for 25 applicants is \$24,450.

Additional costs include the filing, handling, and storing of the applications and supporting documentation. EBSA has assigned approximately 120 staff hours to this function at a cost of roughly \$3,792.⁴ (This includes space, supplies, and other overhead costs in addition to salary and fringe benefits.)

Based on the above, the total annual cost to the Federal government for publishing and processing the paperwork required under the application exemption procedure is estimated at \$28,242.

15. *Explain the reasons for any program changes or adjustments reporting in Items 13 or 14 of the OMB Form 83-I.*

The Department has made adjustments for the estimate in the annual number of applications, the wage rates for professional and clerical help, and the size of the plans filing exemption requests with the Department. The Department has now accounted for the costs of hiring outside services (ERISA oriented law firms, outside appraisers and financial experts). These services are more explicitly laid out than the previous procedure and thus have been factored into the cost estimates. Any paperwork costs of these requirements are built into the estimated fees for outside services. Additionally, mailing costs of the application are now built into the fees of the outside firm. There are new estimates for the Federal staff hours involved. There are also new costs for SPEs and other documentation.

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.*

⁴ This cost also includes the costs of filing and storage of documents processed under PTE 96-62 for the accelerated approval of prohibited transactions exemptions. This is based on the salary of a GS 6 step 5 in the Washington, DC area.

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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. 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.