

## 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 404(c) of the Employee Retirement Income Security Act of 1974 (ERISA) states that participants or beneficiaries who can hold individual accounts under their pension plans, and who can exercise control over the assets in their accounts “as determined in regulations of the Secretary [of Labor]” will not be treated as fiduciaries of the plan. Moreover, no other plan fiduciary will be liable for any loss, or by reason of any breach, resulting from the participants’ or beneficiaries’ exercise of control over their individual account assets.

The Pension Protection Act (PPA), Pub. L. No. 109-280, amended ERISA section 404(c) by adding subparagraph (c)(5)(A). The new subparagraph says that a participant in an individual account plan who fails to make investment elections regarding his or her account assets will nevertheless be treated as having exercised control over those assets so long as the plan provides appropriate notice (as specified) and invests the assets “in accordance with regulations prescribed by the Secretary [of Labor].” Section 404(c)(5)(A) further requires the Department of Labor (Department) to issue corresponding final regulations within six months after enactment of the PPA. The PPA was signed into law on August 17, 2006.

The Department of Labor accordingly finalized a regulation under ERISA section 404(c)(5)(A). The regulation offers guidance on the types of investment vehicles that plans may choose as their “qualified default investment alternative” (QDIA). The regulation also outlines two types of information collection. First, it implements the statutory requirement that plans provide annual notices to participants and beneficiaries whose account assets could be invested in a QDIA. Second, the regulation requires plans to pass any pertinent materials they receive from a QDIA to those participants and beneficiaries with assets invested in the QDIA as well to provide certain information on request.

These two information collections are necessary to inform participants and beneficiaries who do not make investment elections of the consequences of their failure to elect investments, of the ways in which their account assets will be invested through the QDIA, and of their continuing opportunity to make other investment elections, including options available under the plan.

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 collections under this ICR are not for the use of the Department or any of other federal agency, but rather are mandated third-party disclosures. A plan that wishes to take advantage of the relief from liability offered by ERISA section 404(c)(5)(A) must provide participants and beneficiaries enrolled in individual account pension plans with an annual notice describing the plan's default investment provisions and the participants' and beneficiaries' right to make investment elections. They must also explain that participants and beneficiaries have the right to opt out of the default investment into another investment offered by the plan. Plans must also pass through to participants and beneficiaries whose account assets are invested in a default investment vehicle any material the plans received from the default investment vehicle and provide certain information on request.

Both sets of information are necessary to enable the affected individuals to understand the consequences of their failure to make investment choices, the nature of the investment vehicle in which their account balances are invested, and their continued right to make active investment elections.

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 how disclosures made through electronic media can satisfy the requirement of § 2520.104b-1(b).

The Department understands that a substantial proportion of employee benefit plans, including individual account plans subject to these information collection requirements, have adopted electronic means of communication with participants under the Department's regulation. This burden analysis, as described further below, takes account of plans' anticipated rate of use of electronic media to communicate with their participants and beneficiaries.

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.*

Neither information collection duplicates information available from any other source. Each annual notice sets out a particular plan's provisions for default investment of participants' and beneficiaries' account assets. The pass-through requirement merely ensures that important materials relevant to a default investment alternative that are received by the plan are in fact forwarded to the individual account owner, the participant or beneficiary.

Under existing regulations, plans claiming 404c status already have to pass through investment material to participants and have to provide information on request. These existent provisions satisfy the information pass-through and information on request requirements of 404(c)(5)(A). Because this information collection is therefore already counted under the paperwork burden for 1210-0090, the paperwork analysis for 404(c)(5)(A) does not count information pass-through and information on request for 404c plans.

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 small individual account plans (defined for this purpose as plans with fewer than 100 participants) are included among the plans entitled to rely on the regulation, the Department has not adopted any particular methods to minimize the burden for those small plans. This is because the Department believes that participants and beneficiaries in small plans need the same amount and quality of information regarding default investment programs as do participants and beneficiaries in large plans. Further, reliance on the relief provided under the regulation is voluntary; each plan may decide adopting the type of default enrollment plan defined in the regulation is in the interests of the particular participants and beneficiaries of the plan and is worth the calculable administrative burden. Finally, the regulation is in compliance with a Congressional mandate under the PPA. The Department, moreover, did not receive any responses to its solicitation of public comment on whether small plans need or should be provided special treatment with respect to these information collection requirements.

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.*

Participants and beneficiaries need this information to understand how plans are investing their account balances and what their choices are under the plans' provisions so that they can intelligently prepare for their retirement needs.

The regulation carries out the statutory mandate for annual notices. The notices therefore cannot be provided less frequently.

7. *Explain any special circumstances that would cause an information collection to be conducted in a manner:*
- *requiring respondents to report information to the agency more often than quarterly;*
  - *requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;*
  - *requiring respondents to submit more than an original and two copies of any document;*
  - *requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;*
  - *in connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;*
  - *requiring the use of a statistical data classification that has not been reviewed and approved by OMB;*
  - *that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or*
  - *requiring respondents to submit proprietary trade secret, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.*

None.

8. *If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.*

*Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.*

*Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years -- even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These*

*circumstances should be explained.*

The Department published a notice for the Federal Register, as required by 5 CFR 1320.8(d), on August 23, 2010 (75 FR 51843), providing the public 60 days to comment on the submission. No comments were received.

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

None.

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 information collection provisions of this regulation consist of two separate requirements: (1) the creation and dissemination of an annual notice explaining the default investment; and (2) a pass-through to participants and beneficiaries of certain material (such as account statements and prospectuses) provided to the plan relating to each participant's or beneficiary's investment in a qualified default investment alternative as well as certain information on request.

The estimates of respondents and responses are derived primarily from the Form 5500 Series filings for the 2007 plan year, which are the most recent reliable data available to the Department. The Department estimates that the number of plans with default investments in the first few years will not be significantly higher than the number of participant-directed defined contribution plans.<sup>1</sup> The burden for the preparation and distribution of the disclosures is treated solely as an hour burden. For the purpose of this estimate, we assumed a total annual hour burden of 781,000 hours with an equivalent cost of \$27,886,000 calculated as follows:

#### Annual Notices

The first information collection is the annual notice, which explains the default investment provisions of the plan and the participant's right to make investment elections. The regulation generally requires that plans send a notice to a participant at least 30 days before the participant is eligible to participate in the plan. Where new hires are immediately eligible for participation in a default investment plan and the plan cannot satisfy the 30-day advance notice requirement, these plans must provide the required notice no later than the date of plan eligibility. The plan must continue to provide a similar notice annually thereafter. The annual notice must describe: (1) the circumstances under which the plan may invest assets from a participant's individual account in a qualified default investment alternative and, if relevant, any elective contributions that will be made on the participant's behalf; (2) the right of participants to direct the investment of assets in their accounts; (3) the qualified default investment alternative the plan selected for the participant, including its investment objectives, risk and return characteristics (if applicable), and fees and expenses; (4) the participant's and beneficiary's right to direct the investment of these assets to any other investment alternative offered under the plan, including a description of any fees or restrictions associated with such transfer; and (5) where participants and beneficiaries can obtain information about the other investment alternatives available under the plan.

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<sup>1</sup> The Department does not anticipate an increase in the number of Form 5500 filings merely due to the changes to the Form 5500 for 2007 to 2009.

The Department estimates that about 483,000<sup>2</sup> participant-directed individual account pension plans will prepare and distribute annual notices to approximately 78,000,000 eligible workers. The number of recipients is higher than the total of participants and beneficiaries because it includes workers who are eligible to join the participant-directed individual account pension plan, but have not yet chosen to do so.

The Department estimated that, after the first year of the regulation's applicability, only newly established participant-directed individual account pension plans and plans that change their selection of qualified default investment alternatives would prepare annual notices. For purposes of burden analysis, the Department assumed that 161,000 plans, or one-third (1/3) of all participant directed individual account plans (483,000/3), will prepare and distribute new or updated annual notices to all eligible workers, participants and beneficiaries, requiring only 30 minutes (0.5 x 60 minutes) of legal professional time per notice. This results in a burden hour estimate of about 80,400 legal professional hours (0.5 x 160,847), equivalent to about \$9.6 million (80,424 hrs. x \$119.03).<sup>3</sup> However, the total number of participants receiving annual notices each year remains static.

The regulation permits plans' flexibility in deciding whether to make the required disclosures by mail, by hand, or electronically. For purposes of this burden estimate, the Department assumed that 38 percent of the disclosures (about 29,554,062,000 notices annually) will be provided through electronic means in accordance with the Department's standards for electronic communication of required information under 29 CFR 2520.104b-1(c). The Department did not estimate any additional burden for the preparation or distribution of notices via electronic means because it assumed that plans will use existing electronic communications systems and e-mail lists for these purposes. The preparation and distribution of annual notices would thus involve a de minimis additional effort, e.g., a few computer key strokes. Distribution to the 62 percent of participants and beneficiaries who will receive the annual notice by mail (48,219,785 individuals) will require approximately 402,000 hours, with an equivalent cost, at \$26.14 per hour of clerical time, of approximately \$10,500,000.

The total annual burden hours estimated for the annual notice is approximately 482,000 hours with an equivalent cost of approximately \$20,077,000.

#### Pass-through Materials and Information on Request

The second information collection created by the regulation results from the plans' duty to pass

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<sup>2</sup> All numbers used in this supporting statement have been rounded to the nearest thousand. Less rounded numbers have been entered into the ROCIS ICR module for purposes of converting the paperwork burden estimate described here into an equivalent per-respondent, per-response count.

<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).

on information to participants invested in a default investment. Under the regulation, a plan must pass on to a participant or beneficiary certain materials (such as account statements and prospectuses) it receives that relate to a default investment it made on behalf of that person. The regulation imposes this requirement only with respect to participants and beneficiaries who have been invested by default in a QDIA. However, section 404(c) plans are already required to pass on these materials to participants and beneficiaries, regardless of the type of available investment in which these people are invested. Thus, participants and beneficiaries of section 404(c) plans who are invested by default in QDIAs are already covered by the existent section 404(c) pass-through provisions. This paperwork burden has been addressed separately in the renewal to 1210-0090 (see 29 CFR 2550.404c-1) for regulations covering section 404(c) plans. The paperwork burden discussed here is therefore only the pass-through burden engendered by QDIAs in *non*-section 404(c) participant directed individual account pension plans.

The Department assumed that, at any given time, 11.5 percent of the participants and beneficiaries in all participant directed individual account pension plans, or approximately 6,800,000 individuals, will not actively direct investments and therefore will be invested by default. Of this total, approximately 1,300,000 individuals will be invested in QDIAs available under non-section 404(c) types of participant directed individual account pension plans. These are the default investments addressed by the paperwork burden calculations in this Supporting Statement. For the purposes of this burden analysis, the Department assumed that many, although not all, of such plans will receive quarterly account statements and prospectuses, and perhaps also other investment literature, on a quarterly basis. This results in an estimate of about 5,200,000 responses (distributions of pass-through materials) per year. Duplication and packaging of the pass-through material is estimated to require 1.5 minutes of clerical time per distribution, for an annual hour burden estimate of about 130,000 hours of clerical time (1.5 minutes x 5,200,000 instances). The equivalent cost in clerical time of the hour burden is estimated at approximately \$3,400,000 (130,000 hours x \$26.14).

Plans will also need to maintain current information to respond to occasional requests. According to the Department's estimates, keeping such records up-to-date will require one hour of clerical time for each of the 165,000 affected plans, for a total of 165,000 annual burden hours. On average, the Department estimates that plans will respond to about one request for such information every year. Sending out the appropriate materials will take one and one-half minute of clerical time, requiring about 4,000 hours of clerical time ((1.5/60) x 165,000 hrs.). In total, the preparation and sending of information upon request requires about 169,000 burden hours, equivalent in cost to \$4,415,000.

The costs for materials and postage of notices and pass-through materials are covered under Item 13, below.



13. *Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information. (Do not include the cost of any hour burden shown in Items 12 or 14).*

As explained in the answer to Item 12, above, the Department developed estimates for the universe of plans and participants and beneficiaries affected by these information collections. For purposes of this estimate, the Department assumed that all plans will use in-house resources to develop and disseminate the disclosures, which therefore were presented as hour burden. The additional costs reported in this Item 13, represent annual reproduction and distribution costs of about \$32,116,000 as explained below.

#### Annual Notices

As noted in the answer to Item 12, the Department estimated that 77,774,000 eligible workers, participants or beneficiaries will receive notices annually. The Department assumed that 38 percent of these individuals annually (about 29,554,000 workers) will receive notices through electronic means and 62 percent (48,220,000 workers) will receive notices by mail. Material and printing costs for a two-page annual notice estimated at five cent per notice and postage of 44 cents per notice, leads to an estimated cost of 54 cents per mailed notice resulting in a total cost of \$26,039,000 (\$0.54 per mailing x 48,219,784).

#### Pass-through Materials and Information on Request

As mentioned in Item 12, the regulation requires that certain material received by a plan that relates to a default investment must be passed through to the participant or beneficiary on whose behalf the default investment was made. The Department estimated that, under this regulation, information will have to be distributed quarterly to about 1,298,000 affected participants and beneficiaries. Assuming that each quarterly information package consists of 10 pages (10 x \$0.05 paper cost = \$0.50) and requires postage of \$0.61, the material costs for one mailing amounts to \$1.11 (\$0.50 + \$0.61). Total annual material and postage costs in the first and subsequent years are therefore estimated at about \$5,765,000 (4 x 1,298,400 x \$1.11).

Plans will also need to maintain certain information in order to provide it on request. The Department further assumed that, on average, plans will make one disclosure upon request every year. The cost burden for materials is estimated to include paper cost (20 pages of material yearly per information request) and postage (\$0.89 per mailing) for a cost burden of about \$312,000 (164,774 x \$1.89).

Thus, the Department estimates that the costs of providing pass-through material and information on request to participants and beneficiaries amount to about \$6,077,000 (\$5,764,897 + \$311,917).

In total, the costs of providing annual notices, pass-through material, and information on request is estimated to be about \$32,116,000.

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.*

None.

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

The three year average hour burden has decrease relative to the previous estimates. The previous ICR higher hour burden was due to the high hour burden for initial implementation in the first year. However, costs have increased due to a growth in the estimated number of plans and participants. In addition wage rates and postage costs have 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; results 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.*

A valid OMB control number and current expiration date will be displayed.

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. Collections of Information Employing Statistical Methods**

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