

## 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) give the Secretary of Labor the authority to grant an exemption to a class or order of fiduciaries, 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 sections 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code.

This information collection request (ICR) relates to two prohibited transaction class exemptions (PTEs) that the Department of Labor (the Department) has granted, both of which involve settlement agreements. These two exemptions are described below:

**PTE 94-71.** Granted on October 7, 1994, PTE 94-71 exempts from certain restrictions of ERISA and certain taxes imposed by the Code, a transaction or activity that is authorized, prior to the execution of the transaction or activity, by a settlement agreement resulting from an investigation of an employee benefit plan conducted by the Department. The following information collections are among the conditions for the exemption:

- **Written Notice.** A party engaging in a settlement agreement arising out of a Department investigation must provide written notice to the affected participants and beneficiaries of the plan. The notice must contain an objective description of the transaction or activity, the approximate date on which the transaction will occur, the address of the regional or district office of the Department that negotiated the settlement agreement, and a statement informing participants and beneficiaries of their right to forward their comments to such office.
- **Pre-Approval.** A copy of the notice and a description of the method by which it will be distributed must be approved in advance by the regional or district office of the Department which negotiated the settlement.

**PTE 2003-39.** Granted on December 31, 2003, PTE 2003-39 exempts from certain restrictions of ERISA and certain taxes imposed by the Code, transactions arising out of the settlement of litigation that involve the release of claims against parties in interest in exchange for payment by or on behalf of the party in interest, provided that certain conditions are met, including the following information collections:

- Written Agreement. The terms of the settlement must be specifically described in a written agreement or consent decree. Because it is usual and customary business practice to reduce the terms of a settlement agreement to writing, there is no additional burden associated with this requirement.
- Acknowledgement by Fiduciary. The fiduciary acting on behalf of the plan must acknowledge in writing that s/he is a fiduciary with respect to the settlement of the litigation. It is anticipated that this acknowledgement will be included in the written investment management or trustee agreement outlining the terms and conditions of the fiduciary's retention as a plan service provider. Therefore, no measurable burden is attached to this requirement.

Amendment to 2003-39. Granted on June 15, 2010, the amendment expands the categories of assets that may be accepted by plans in the settlement of litigation, subject to certain conditions contained in the exemption. The amendment permits the receipt of non-cash assets in settlement of a claim (including the promise of future employer contributions) but only in instances where the consideration can be objectively valued. Additionally, the amendment permits plans to acquire, hold, or sell employer securities such as warrants and stock rights which are received in settlement of litigation, including bankruptcy proceedings.

In the amendment the Department stated that OMB reviewed the information collection request in the class exemption and determined it was non-material. The written settlement agreement describing the terms of the agreement and the acknowledgment of the fiduciary in writing that s/he is a fiduciary with respect to the litigation is determined to be usual and customary business practice. Therefore, no additional hour burden has been increased for the amendment.

Because both exemptions involve settlement agreements, the Department has combined their information collection provisions into one ICR and has obtained OMB approval for their paperwork burden. The Department believes that the public and the federal government are both best served by allowing the public to review and comment on similar exemption provisions in combination.

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 are intended to protect participants and beneficiaries under the plans that engage in settlement agreements. Without the required disclosures, the Department would be unable to enforce effectively the terms of the exemptions and ensure transactional compliance. The information collections allow the Department to monitor the settlement activities (under PTE 94-71) undertaken in connection with its own investigations and to review

Settlement Agreements Between a Plan and Party in Interest  
OMB Number 1210-0091  
May 2012

other settlement agreements within the scope of its investigations. The information collection under PTE 94-71 also provides participants and beneficiaries with important information about transactions affecting their plan.

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.*

The information collections are third-party disclosures, and respondents may use electronic methods of communication pursuant to the standards established in the Department's regulation at 29 CFR 2520.104b-1 concerning plans' use of electronic communication media to satisfy ERISA disclosure requirements. The regulation provides that plan sponsors may distribute notices to employees who have access to e-mail at the place of business (note that access does not include a kiosk-based system). In addition, notices may be distributed electronically to employees or their family members who are beneficiaries if they have electronic access at their homes and give prior approval for this type of distribution. The Department generally encourages affected entities to distribute required notices electronically whenever possible, provided that these regulatory standards are met. For the purposes of paperwork burden analysis, the Agency has developed a set of assumptions concerning the use of electronic technology generally for distribution of information to participants and beneficiaries. Based on these regulations, the Agency has assumed in this analysis that 38 percent of the required disclosures will be made electronically.<sup>1</sup>

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.*

The information is not available elsewhere. If the required writings (written settlement agreement, consent decree) are created for other purposes, they may be used to satisfy the requirements of these class exemptions.

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.*

Neither class exemption will have a significant economic impact on a substantial number of small entities; reliance on the PTEs is voluntary and therefore within the control of the parties seeking settlement of a disputed issue involving the plan. There is no requirement that any entity make use of the exemptions. Further, the ICR in both PTEs affects small plans and large plans similarly. Participants and beneficiaries of small plans are entitled to receive information involving transactions based on a settlement agreement with the Department under PTE 94-71;

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<sup>1</sup> This assumption is based on Employee Benefits Security Administration tabulations of the August 2001 Current Population Survey, computer use module.

Settlement Agreements Between a Plan and Party in Interest  
OMB Number 1210-0091  
May 2012

PTE 2003-39 requires written evidence of settlement transactions and fiduciary status. The information to be provided is readily available to a plan in documents provided by the parties during settlement agreement negotiations; therefore, notification will not be unduly burdensome or small 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.*

**PTE 94-71.** The notification requirements of PTE 94-71 are mandatory only for persons who wish to engage in otherwise prohibited transactions that are covered by the class exemption. Thus, the frequency of providing notices to the affected parties is dependent on the occurrence of such transactions, not on a predetermined time period.

**PTE 2003-39.** Notices are not required under PTE 2003-39, and its other information collection provisions simply ensure, for compliance monitoring purposes, that written agreements that describe the transactions are maintained, as would be the case under normal and customary business practices.

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.*

**PTE 94-71.** There are no special circumstances that would require the collection to be conducted in any manner described above.

**PTE 2003-39.** The exemption requires a plan fiduciary to maintain for a period of six years the records necessary to enable certain persons (the Department, participants and beneficiaries) to determine whether the conditions of the exemption had been met. The six-year recordkeeping requirement is consistent with the requirements in section 107 of ERISA, as well as general recordkeeping requirements for tax information under the Code.

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's notice for the Federal Register as required by 5 CFR 1320.8(d) was published on December 7, 2011 (76 Fed. Reg. 76439) and solicited public comments on renewal of the ICR during a 60-day comment period. No comments were received.

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.*

There is no promise of confidentiality of the information. The class exemptions require that the information concerning the transactions be made available to interested parties.

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, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

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 14.*

**PTE 94-71.** A party that seeks to rely on the relief provided in the exemption must provide written notice to the affected participants and beneficiaries prior to entering into a settlement agreement that has been negotiated by the Department and the plan. Additionally, the party must obtain approval of the notice to participants and beneficiaries and the method by which it will be distributed from the regional or district office of the Department that negotiated the settlement. The notice, at a minimum, must include an objective description of the transaction or activity, the approximate date on which the transaction will occur, the address of the regional or district office of the department that negotiated the settlement, and a statement informing participants and beneficiaries of their right to forward comments to such office.

A review of earlier PRA submissions indicated that approximately 4 plans with an average of 270 participants and beneficiaries have made use of the exemption annually.<sup>2</sup> Discussions with the EBSA Office of Enforcement indicate that the number of parties using the exemption is likely to remain steady. Based on this information, we continue to estimate that 4 plans with an average of 270 participants per plan annually will make use of this exemption.

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<sup>2</sup> Based on discussions with the Department's Enforcement Office, this submission total has declined in recent years. Whether this is a permanent decline is not clear; consequently, the Department has retained its prior estimate for the number of responses.

It is assumed that in-house staff of the entities involved will prepare the notice and that each notice will require one hour of professional staff time at \$66.36 per hour<sup>3</sup> and 30 minutes of clerical time at \$28.21 per hour.<sup>4</sup> The total burden hour attributable to preparation of the required notices is estimated to be 6 hours (4 responses x 1 ½ hours of preparation per response). The equivalent cost of the hour burden is \$321 -- \$265 for professional time (\$66.36 per hour x 4 hours) + \$56 for clerical time (\$28.21/hour x 2 hours).<sup>5</sup>

In addition, the Department estimates that reproduction and distribution of the notice to each participant and beneficiary will require an additional 2 minutes per notice. Because some notices will be distributed electronically with no additional preparation cost, the Department assumes that only a subset of the notices will require this additional preparation time. Based on current practices in the employee benefits field pursuant to regulations published by the Department regarding electronic distribution of notices, the Department has assumed that 38 percent of the notices will be distributed electronically at no additional hour or cost burden. Therefore, for the estimated 670 notices that will be mailed annually (62 percent of 1,080 notices annually), we estimate an additional hour burden for distribution of 22 hours (670 notices x 2 minutes) and the 410 notices sent electronically are expected to create an additional hour burden of approximately 2 hours (410 notices x .25 minutes/notice sent electronically). The equivalent cost of this additional hour burden at \$28.21 per hour is \$678 (24 hours x \$28.21/hour).

Total hour burden for the notice is estimated at 30 hours (4 hours professional time + 2 hours clerical time for preparation + 24 hours clerical time for distribution) and the total equivalent cost is \$1,000 (\$265 + \$56 + \$678).

**PTE 2003-39.** The exemption requires the terms of the settlement to be described in a written document. Because it is usual and customary business practice to express the terms of a settlement in writing, there is no additional hour burden attributed to this provision.

The exemption also requires that a fiduciary representing the plan in settlement negotiations acknowledge in writing his/her fiduciary status with respect to the settlement of the litigation on behalf of the plan. It is anticipated that the acknowledgement will be incorporated into the investment management or trustee agreement outlining the terms and conditions of the fiduciary's retention as a plan service provider, which should already be in existence as part of

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3 The Department estimates 2012 hourly labor rates include wages, other benefits, and overhead based on data from the National Occupational Employment Survey (June 2011, Bureau of Labor Statistics) and the Employment Cost Index (September 2011, Bureau of Labor Statistics); the 2010 estimated labor rates are then inflated to 2012 labor rates.

4 *Id.* It is assumed that each plan will use its existing word processing systems and databases to produce individual notices ready for mailing.

5 Any calculation discrepancies are a byproduct of rounding.

Settlement Agreements Between a Plan and Party in Interest  
OMB Number 1210-0091  
May 2012

usual and customary business practice. The additional hour burden attributable to this acknowledgement is negligible and the Department has not increased the overall hour burden for this provision of the exemption.

*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 question 12, the Department assumes that all work to prepare and distribute the notices will be performed in-house. The paperwork burden for the activities is there accounted for as hour burden. The additional costs that will be paid by respondents to satisfy this information collection, which consist of printing and mailing costs, are described here.

This estimate assumes that 38 percent of the plan administrator's notices will be provided to participants and beneficiaries electronically. Because the respondents will utilize existing electronic communications systems and integrated participant/beneficiary address databases, the Department has assumed that the additional costs of distributing electronic notices will be so small as to be insignificant and no additional cost has been assumed for the electronic distributions.

For the remaining 62 percent of the notices, the Department has assumed a mailing cost of \$0.50 per notice (\$0.45 for postage+\$0.05 per page of paper), for a total annual cost of \$335 to mail an estimated 670 notices (270 participants x 4 plans x 62 percent of notices mailed).

Because the department requires no further notices to be filed, there are no additional costs involved and the total annual cost burden of the information collection is \$335.

*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 there is no requirement to file notices with the Department for either PTE 94-71 or PTE 2003-39, there are no direct costs to the Department for the information collection. PTE 2003-39 does not require any action from the Department or impose any costs. The Department's oversight of the settlement process and its review of the notice for PTE 94-71 may require some small additional time for the regional office of the Department involved in the settlement, but the

Settlement Agreements Between a Plan and Party in Interest  
OMB Number 1210-0091  
May 2012

amount of additional time, over and above time otherwise devoted to the investigation, will be minimal, and the availability of exemptive relief under PTE 94-71 will not alter the basic nature of the Department's course of conduct in its investigative activities. Thus, there should be no addition or reduction to program costs as a result of this exemption.

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

The estimates of the hour burden now assign a small hour burden to electronically delivered notices to participants. The estimates of the equivalent costs of the hour burden and the cost burden have been adjusted to account for increases in the hourly labor rate and mailing costs.

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.*

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.