

Definition of Plan Assets -- Participant Contributions
OMB Number 1210-0100
June 2012

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's (the Department's) regulation at 29 CFR 2510.3-102 states that monies that a participant pays to, or has withheld by, an employer for contribution to an employee benefit plan become "plan assets" for purposes of Title I of ERISA and the related prohibited transaction provisions of the Internal Revenue Code (the Code) as of the earliest date on which such monies can be reasonably segregated from the employer's general assets. With respect to employee pension benefit plans, the regulation further sets a maximum time limit for such contributions: the 15th business day following the end of the month in which the participant contribution amounts are received or withheld by the employer. Under ERISA, "plan assets" cannot be held by the employer as part of its general assets, but must be contributed to the employee benefit plan to which they belong and, with few exceptions, held in trust.

The regulation includes a procedure through which an employer receiving or withholding participant contributions for an employee pension benefit plan may obtain a 10-business-day extension of the 15-day maximum time period if certain requirements, including information collection requirements, are met. The regulation requires, among other things, that the employer provide written notice to plan participants, within 5 business days after the end of the extension period and the employer's transfer of the contributions to the plan, which the employer elected to take the extension for that month. The notice must explain why the employer could not transfer the participant contributions within the maximum time period, state that the participant contributions in question have in fact been transmitted to the plan, and provide the date on which this was done. The employer must also provide a copy of the participant notice to the Secretary, along with a certification that the notice was distributed to participants and that the other requirements under the extension procedure were met, within 5 business days after the end of the extension period.

In the course of investigations of 401(k) and other contributory pension plans, it is commonly represented to the Department that many employers, as well as their advisors, continue to be uncertain as to the time requirements with which they must forward participant contributions to the plan in order to avoid the requirements associated with holding plan assets. Thus, the Department decided it was in the best interest of plan sponsors and plan participants and beneficiaries to amend the participant contribution regulation to establish a safe harbor that would provide a higher degree of compliance certainty with respect to the question of when deposits are deemed timely. On Jan 14, 2010, the Department published a final regulation to amend the participant contribution rules to create a safe harbor period under which participant contributions to a small plan (those with less than 100 participants) will be deemed to comply

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with the law if those amounts are deposited with the plan within seven business days of receipt or withholding.

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 imposed under the regulation include third-party disclosures and disclosures to the government. The information collection is intended to protect participants by ensuring that they and the Department are aware of an employer's failure to meet the regulatory time limits for transferring participant contributions to the employee pension benefit plan they are intended to fund. The Department and the affected participants can then take appropriate action to protect the plan assets. Requiring employers to make the disclosures also ensures that they follow the protective requirements that are part of the extension procedure.

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 the Department's regulation at 29 CFR 2520.104b-1(b), plans and plan sponsors may satisfy disclosure requirements under Title I of ERISA, including the notices to participants and beneficiaries under the extension procedure, through electronic media. The current burden estimate includes assumptions on plan sponsors' anticipated use of electronic media to satisfy this information collection.

The Government Paperwork Elimination Act (GPEA) requires agencies to allow customers the option to submit information or transact with the government electronically, when practicable. Where feasible, and subject to resource availability and resolution of legal issues, EBSA has implemented the electronic acceptance of information submitted by customers to the federal government, including the notice to the Department required by this information collection.

4. *Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.*

This information collection does not duplicate any other information collection requirement, and the information is not available from any other source. Under the extension procedure, the employer must provide written notice to participants and to the Department within 5 business days after the end of the extension period.

Respondents are required to disclose information only if they elect to take an extension of the regulatory time limit. The information collection is therefore voluntary on the part of an employer. The timing of the election, the amount of the contribution, and the notification procedure therefore will vary with the circumstances of each employer.

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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.*

The regulation does provide special treatment for small businesses. The safe harbor is available only to employer remittances of participant contributions to plans with fewer than 100 participants. In attempting to define the appropriate period for a safe harbor, the Department reviewed data collected in the course of its investigations of possible failures to deposit participant contributions in a timely fashion. These data indicate that smaller plans, typically need more time than larger plans to segregate participant contributions from their general assets. On the basis of this data, the Department concluded that adoption of a “7-business day” safe harbor rule would allow most employers with small plans to take advantage of the safe harbor and, thereby, benefit from the certainty of compliance afforded by the regulation.

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 Department has imposed this information collection in order to allow employers a reasonable opportunity to obtain an extension of time for transferring participant contributions to the pension plans for which they are intended, without advance approval, while safeguarding participants’ rights. Each information collection relates only to a plan sponsor’s voluntary reliance on the extension procedure and thus cannot be conducted “less frequently.” Failure to require this information collection would increase the risk that employers would fail to properly transmit participants’ contributions.

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*

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- 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.*

The extension procedure for this regulation accommodates employers that, on occasion, need more time than the regulatory maximum period to transmit amounts that a participant or beneficiary pays to an employer, or that an employer withholds from a participant's wages, to employee pension benefit plans. In order to comply with the extension procedure, an employer or plan sponsor must provide notice to participants and beneficiaries, within 5 business days of the expiration of the extension, that the deadline for the deposit of contributions has been extended; and; within 5 business days of the expiration of the extension, a copy of the notice to the Secretary.

Delays in the transmittal of funds to a pension trust can result in lost earnings to participants. Because the use of the extension period to delay the deposit of contributions to the plan will not be subject to prior approval of the Department and because participant contributions that have not yet been deposited to a trust are at risk, the Department has provided for a 5-day time period for providing notice to both the participants and the Department -- a shorter time period than the 30 days provided for under 5 CFR 1320.5. The Department believes that the shorter notice/certification time period is necessary so that both participants and the Department will be able to adequately monitor employers' contribution patterns and to ensure that there is no loss to the participants and beneficiaries.

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 of the proposed extension of the information collection was published in the Federal Register on April 5, 2012 (77 FR 20650) and allowed the required 60-day public 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.

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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 is made in connection with this information collection request.

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 14.

The Department has reviewed its records for the past three years and has determined that it has not received any employer notices under the extension procedure during that time period. However, the Department continues to estimate, based on its long-term experience of employer practices, that one respondent will seek to take advantage of this extension procedure in any given year. For purposes of this estimate, the Department has assumed that the respondent will sponsor a medium-sized pension plan with 250 participants.

The Department has assumed that a respondent relying on the extension procedure will not prepare extension notices in-house, but will contract with a service provider, such as an attorney, accountant, or third-party administrator, to prepare the notice. The burden of preparation of the notice, therefore, is estimated as a cost burden under item 13, below.

The Department further assumes that the distribution of the notice will be completed by the employer using its own resources, rather than by a third-party preparer. Although the

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Department believes that a substantial percentage of employee benefit plans and employers communicate with their participants and beneficiaries through electronic media, because the Department is estimating that only one employer per year will take an extension under the extension procedure, the Department has not undertaken to reduce its burden estimates to account for electronic distribution. It is possible, however, that an employer who takes an extension will use electronic media to provide the participant notice; in that case, the distribution burden, in both hours and costs, will be negligible. For purposes of this burden estimate, the Department has assumed that the time needed to prepare individual notices for the Department and for the 250 participants and beneficiaries is two minutes of clerical time per notice. $250 \text{ responses} \times 2 \text{ minutes}/60 \text{ minutes per hour} = 8 \text{ hours}$. The annualized hour burden to respondents for this information collection is therefore estimated at eight hours of clerical time at a labor rate of \$28.21 per hour. These estimates result in an equivalent cost of $8 \text{ hours} \times \$28.21 = \225.68 .

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 Department has assumed that a respondent will pay an attorney, accountant, or third party administrator to prepare the notices required by the regulation to be furnished to the participants and to the Department. Notification to the Secretary includes the provision of a copy of the notice to the participants along with a certification that the notice was actually distributed and that a performance bond or irrevocable letter of credit was obtained. The Department estimates that preparing the notice to participants and the certification for the Secretary will take four hours of an attorney's time at \$240 per hour for an annual cost burden to respondents of \$960. ($4 \text{ hours} \times \$240 = \960 .) In addition, the distribution costs, in material and postage, for the 251 notices is estimated at \$128, which includes \$0.50 per notice for materials and postage for the 250 participant notices and \$3.00 for the notice to the Secretary, which is likely to be sent by certified mail. ($250 \text{ mailings} \times \$0.50 + \$3.00 = \128.00). The total annual cost burden for this information collection is therefore estimated at \$1,088.

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 annualized cost to the Federal government for this ICR, which consists primarily of receiving, reviewing, and storing any extension notice received in a year, is anticipated to be nominal.

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

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The estimate has been revised to reflect increases in professional and clerical wage rates and postage costs, since the last submission, with a resulting \$63 increase in the cost burden of the information collection. In addition, the DOL notes that the last submission included a slight inadvertent error in the data entry for burden hours. This correction results in a 7 hour burden increase.

16. *For collections of information whose results will be published, outline plans for tabulation, and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.*

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

17. *If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.*

The collection of information will display a currently valid OMB control number. 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.