

## 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 states 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 below) 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 (the 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 collections. 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, 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 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 collections 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 requirements 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 requirements duplicate 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 404(c) 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 404(c) plans.

5. *If the collection of information impacts small businesses or other small entities, 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 May 22, 2013 (78 FR 30335), 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.*
- *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 burden associated with Part (1) is described below. The burden associated with Part (2) has been addressed separately as part of the burden calculations associated with the information collections in the Participant-Level Fee Disclosure Rule (OMB Control Number 1210-0090).

This regulation requires an annual notice be provided to all workers who are eligible to participate in the plan, 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.

The Department estimates that approximately 239,000 participant-directed individual account pension plans with auto-enrollment features will prepare and distribute annual notices to approximately 31.1 million participants.<sup>1</sup>

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<sup>1</sup> Form 5500 data for the 2011 Plan Year show that 505,795 plans with 65.9 million participants are participant-directed individual account plans. Of these plans, 47.2 percent include an auto-enrollment feature according to the PSCA Annual Survey of Profit-Sharing and 401(k) Plans, 2012. Therefore, the Department assumes that approximately 239,000 plans with 31.1 million participants are participant-directed individual account plans with an auto-enrollment feature that are required to send the notice.

The Department assumes that only newly established participant-directed individual account pension plans with auto-enrollment and plans with auto-enrollment that change their selection of qualified default investment alternatives will prepare new notices. For purposes of this analysis, the Department assumes that one-third of all plans with auto-enrollment (80,000 plans) will prepare these new notices, requiring 30 minutes of a legal professional's time at an hourly wage of \$126.07 per hour, for a total of 40,000 hours at an equivalent cost of \$5 million. All other plans will continue to distribute their existing notices, with no additional associated preparation burden.

All participants (31.1 million) are expected to receive the annual notice. The regulation permits flexibility in deciding whether to make the required disclosures by mail, by hand, or electronically. The Department assumes that 38 percent of the disclosures (approximately 11.8 million) will be provided electronically. The Department does 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 (approximately 19.3 million) who will receive the annual notice by mail will require approximately 30 seconds of clerical time per notice at an hourly rate of \$29.14 per hour. This results in a burden of approximately 161,000 hours, with an equivalent cost of approximately \$4.7 million.

The total annual burden hours estimated for the annual notice is approximately 201,000 hours with an equivalent cost of approximately \$9.7 million.

13. *Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information.*

As explained in the answer to Item 12, above, the Department has only developed estimates in this submission for the burden associated with the annual notice information collection. 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 Item 13, represent annual reproduction and distribution costs.

The Department estimates that 31.1 million participants will receive notices annually. The Department assumed that 38 percent of these individuals (approximately 11.8 million) will receive notices through electronic means and 62 percent (31.1 million) will receive notices by mail. Material and printing costs for a two-page annual notice estimated at \$0.10 per notice and postage of \$0.46 per notice lead to an estimated cost of \$0.56 per mailed notice. This results in a total cost of approximately \$10.8 million.

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.*

The burden estimates in this submission have been adjusted to reflect changes in the disclosures required by the Participant-Level Fee Disclosure Rule. The pass-through provisions of the Default Investment Alternatives Rule were previously reflected in this information collection as a second information collection. They are now counted as part of the burden in the Participant-Level Fee Disclosure Rule. In addition, because data are now available that were not available during the previous submissions, this analysis includes only plans that offer auto-enrollment because this paints a more accurate picture of the affected entities. Finally, plan counts, participant counts, wage rates, and postage costs have all been updated to reflect more recent data.

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 "Certification for Paperwork Reduction Act Submission," of OMB 83-I.*

Not applicable; no exceptions to the certification statement.

**B. Statistical Methods**

This information collection does not employ statistical methods.