

**Prohibited Transaction Exemption 75-1**  
**(Security Transactions with Broker-Dealers, Reporting Dealers and Banks)**  
**OMB Number 1210-0092**  
March 2015

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 3(14) of the Employee Retirement Income Security Act (ERISA) of 1974, as amended, defines certain relationships to an employee benefit plan as party in interest relationships. Section 406(a) of ERISA prohibits specified transactions between plans and parties in interest, such as the sale or exchange of property or services, loans, leases, or extensions of credit, and section 406(b) further prohibits certain acts by plan fiduciaries that result in benefit to the fiduciary or a party adverse to the plan. Section 408(a) of ERISA gives the Secretary of Labor the right to grant a conditional or unconditional exemption of any class of transactions, from all or part of the restrictions imposed by section 406 and 407(a). In order to grant such exemptions under 408(a), however, the Department must determine that the exemption is administratively feasible, in the interest of the plan and its participants and beneficiaries, and protective of the rights of participants and beneficiaries. This exemption also provides relief from the prohibited transaction provisions of section 4975 of the Internal Revenue Code (the Code). Under section 102 of Reorganization Plan No. 4, the Secretary of Labor was given authority to grant such exemptions.

Prohibited Transaction Exemption (PTE) 75-1 was granted on October 24, 1975. It consists of five parts covering, among other things, securities transactions between plans and broker-dealers, reporting dealers and banks as well as other parties. PTE 75-1 Part I covers the effecting of securities transactions and related services by persons that are not fiduciaries. Part II(1) allows the purchase or sale of a security between plans and IRAs and: (1) a broker-dealer registered under the Securities Exchange Act of 1934; (2) a reporting dealer who makes primary markets in securities of the U.S. Government or of any agency thereof and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon; or (3) a bank supervised by the United States or a State. Part II(2) provides an exemption for certain fiduciaries to act as principals (as opposed to agents for third parties) in selling mutual fund shares to plans and IRAs and to receive commissions for doing so. Part III allows a plan to purchase certain securities from underwriting syndicates of which a plan fiduciary is a member. Part IV allows a plan to purchase from or sell securities to a market maker that is a fiduciary. Part V allows a broker-dealer to extend credit to a plan in connection with the purchase or sale of securities. Each of the five parts of the exemption contains its own conditions and limitations.

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In order to ensure that the exemption is not abused, that the rights of participants and beneficiaries are protected, and that parties comply with the exemption's conditions, the Department requires limited information collection pertaining to the affected transactions. The information collection requirements that are conditions to reliance on the class exemption consist only of a recordkeeping requirement in Parts II, III, IV, and V of the exemption. Specifically, the plan must maintain or cause to be maintained for a period of six years from the date of the transaction records necessary to enable the Department of Labor, the Internal Revenue Service, plan participants and beneficiaries, any employer of plan participants and beneficiaries, and any employee organization any of whose members are covered by plan participating in covered transactions to determine whether the conditions of the exemption have been met and to make such records available unconditionally for examination during normal business hours to their duly authorized employees.

Amendments Related to 2015 Conflict of Interest Rule

The Department is proposing to revoke Part II(2)<sup>1</sup> and to amend Part II(1) of PTE 75-1 in conjunction with its amendments to PTE 86-128, and additionally to amend Part V of PTE 75-1, all in connection with its proposed regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (Proposed Regulation). The Proposed Regulation would amend the definition of fiduciary under ERISA and the Code to specify when a person is a fiduciary by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. If adopted, the proposed regulation would replace an existing regulation that was adopted in 1975 with one that more appropriately distinguishes between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

The proposed amendment to PTE 75-1, Part II(1) made in PTE 86-128 and the proposed amendment to PTE 75-1, Part V would revise the recordkeeping provisions to require the financial institutions engaging in the exempted transactions (rather than the plans) to maintain or cause to be maintained for six years the records necessary for the Department, Internal Revenue Service, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, participants and beneficiaries and IRA owners to determine whether the conditions of the exemption have been met.

The proposed amendment to PTE 75-1, Part V would allow broker-dealers that are investment advice fiduciaries to receive compensation when they extend credit to plans and IRAs to avoid failed securities transactions entered into by the plan or IRA. ERISA and the Code generally prohibit fiduciaries from lending money or otherwise extending credit to plans and IRAs, and from receiving compensation in return. Therefore, in the absence of an exemption, these transactions would be prohibited under ERISA and the Code.

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<sup>1</sup> PTE 75-1 Part II(2) would be added to PTE 86-128 and would contain additional safeguards.

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The proposed amendment to PTE 75-1, Part V requires the plan or IRA to receive written disclosure of certain terms prior to the extension of credit. The disclosure must include the rate of interest or other fees that will be charged on such extension of credit, and the method of determining the balance upon which interest will be charged.<sup>2</sup> The plan or IRA must additionally be provided with prior written disclosure of any changes to these terms.

The required disclosures are intended to be consistent with the requirements of Securities and Exchange Act Rule 10b-16, which governs broker-dealers' disclosure of credit terms in margin transactions. The Department understands that many broker-dealers currently provide such disclosures to all customers, regardless of whether the customer is presently opening a margin account. To the extent such disclosure is provided, the disclosure terms of the proposed exemption would be satisfied.

The disclosure and recordkeeping requirements of the proposed amendment are information collection requests covered under the PRA.

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 recordkeeping would be used by (1) the Department, (2) the Internal Revenue Service, (3) plan participants and beneficiaries and IRA owners, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan to determine whether the conditions of this exemption have been met.

The class exemption allows broker-dealers, reporting dealers and banks and others to engage in securities and other transactions with employee benefit plans. These transactions would otherwise be prohibited under ERISA's prohibited transaction provisions. Thus, without the relief provided by the class exemption, standard financial/business transactions between financial service providers and employee benefit plans, that are generally beneficial to the plans, would be barred. Such a result would not be in the best interest of plans, their participants and beneficiaries, or the financial services industry.

The Department is unable to estimate how frequently records supporting the exempt transactions are examined by either the Department or other parties. The Department has the authority to request such records and does so from time to time in connection with investigations. However, the primary purpose of the recordkeeping condition of the exemption is to ensure

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<sup>2</sup> This disclosure does not need to be made on a transaction by transaction basis, and can be part of an account opening agreement or a master agreement.

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participant access to records enabling them to verify that transactions are being conducted in accordance with the terms of the exemption. Under ERISA section 408(a)(3), protection of participant rights is a required condition of the Department's grant of an exemption from the prohibited transaction provisions of ERISA.

Amendments Related to 2015 Conflict of Interest Rule

The amendment to PTE 75-1, Part V, would require the broker-dealer to disclose the terms of a transaction involving an extension of credit covered by the exemption to the plan or IRA.

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 use of electronic technology to satisfy the information collection provisions of the exemption is neither prescribed nor precluded by the terms of the exemption. Inasmuch as the financial entities that rely on the exemption are generally sophisticated and conduct their business routinely through electronic means of communication, the Department has assumed that the required recordkeeping will be maintained through electronic databases that reduce the burden of the 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.*

It is likely that duplication of recordkeeping requirements exist with some State and federal banking and securities laws. However, no duplicate recordkeeping is required because entities are able to satisfy the requirements of both the exemption and of the other applicable laws through one recordkeeping arrangement.

Amendments Related to 2015 Conflict of Interest Rule

The Department believes that the additional disclosure requirement proposed in PTE 75-1, Part V is consistent with the disclosure requirement mandated by the Securities and Exchange Commission (SEC) in 17 CFR 240.10b-16(1) for margin transactions. Therefore, the same disclosure can be used to fulfilling both requirements.

5. *If the collection of information impacts small businesses or other small entities (Item 5 of*

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*OMB Form 83-I, describe any methods used to minimize burden.*

Large institutional financial service providers are most likely to engage in the covered transactions. However, even if small entities are involved in these transactions, the burden is believed to be minimal because most entities maintain the subject records a part of their ordinary and customary business practices or for other reasons, including other state and Federal securities regulatory requirements.

Amendments Related to 2015 Conflict of Interest Rule

Also, as mentioned in Item 4 above, the Department believes that (i) the recordkeeping requirement is consistent with other applicable laws as well as ordinary and customary business practices, and (ii) the disclosure requirement is consistent with the disclosure requirement mandated by the Securities and Exchange Commission (SEC) in 17 CFR 240.10b-16(1) for margin transactions. Therefore, the same recordkeeping arrangement and disclosure arrangement can be used to fulfill both requirements, and the impact on small entities would be minimal.

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.*

In the absence of the recordkeeping and disclosure requirements, fiduciaries, participants and beneficiaries, the Internal Revenue Service and the Department would not have access to sufficient information to verify compliance with the terms of the exemption or inform investment decisions.

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*

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*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.*

Because this exemption is granted under section 408(a) of ERISA and section 4975(c)(2) of the Code, the exclusion from the three year guideline for record retention set forth in 5 CFR 1320.5 is applicable. Furthermore, as a result of statutory recordkeeping requirements in ERISA, the Code, and other federal laws the respondents affected by this exemption (financial institutions that deal with employee benefit plans), for the most part, have adopted six-year recordkeeping as standard business practice in order to satisfy those separate recordkeeping requirements.

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*

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*circumstances should be explained.*

In accordance with 5 CFR 1320.11, the proposed exemption provides the public with 30 days to comment on the information collection and burden estimates.

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

Not applicable.

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.*

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- *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 class exemption requires as a condition to relief that plans entering into the types of transactions covered by the exemption retain or cause to be maintained all records pertaining to such transactions for six years and provide access to the records upon request to the specified parties. The Department has assumed that financial service providers that transact with the employee benefit plans will maintain these records on behalf of their client plans. Because of the sophisticated nature of financial service providers and the strict regulation of the securities industry by State and federal government, and by self-regulatory organizations, the Department has assumed that the records required by this class exemption are the same records kept in the normal course of business. Therefore, the Department has estimated that the additional time needed to maintain records for the plans consistent with the exemption will be very small, requiring only 5 minutes of financial professionals' time per entity annually. The Department has further assumed that making the records available for inspection during normal business hours will require an additional 5 minutes of financial professional time. Thus, the Department estimated that a total of 10 minutes of professional time per entity would be required.

Broker-dealers registered under the Security Exchange Act of 1934 (Act) (15 USC 78a et seq.), reporting dealers, and banks are eligible to take advantage of the provisions of the exemption. According to the Security Exchange Commission, approximately 4,612 broker-dealers were registered as of December 31, 2012.<sup>3</sup> The Financial Industry Regulatory Authority (FINRA) reports approximately 4,275 members as of March, 2013. Not all broker-dealers perform services for employee benefit plans, and not all broker-dealers that perform services for employee benefit plans would need to rely on the exemption in order to conduct their business. The number of broker-dealers that would use the exemption is therefore estimated to be about half of the total number of broker-dealers, or approximately 4,444 respondents.<sup>4</sup>

The Federal Deposit Insurance Corporation insured 6,096 commercial banks as of December 31, 2012.<sup>5</sup> If one-half of these banks (about 3,048) and 4,444 broker-dealers relied on this exemption, there would be approximately 7,492 respondents.<sup>6</sup> Multiplying this number by

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<sup>3</sup>Email contact with the Securities and Exchange Committee Trading and Markets Office on January 10, 2013.

<sup>4</sup>This estimate is very conservative since there is large overlap between the SEC registered firms and FINRA ones.

<sup>5</sup>Federal Insurance Deposit Corporation, Quarterly Banking Profile.

<http://www.fdic.gov/bank/statistical/stats/2012dec/industry.pdf>

<sup>6</sup>Reporting dealers covered by the exemption are not accounted for separately because they are banks and security brokerages that trade in U.S. Government Securities; thus, reporting dealers are already accounted for in the number of broker-dealer firms and banks. The NY Federal Reserve Bank reported 21 primary dealers on March 21, 2013.



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ten minutes per year results in a total annual recordkeeping burden of 1,249 hours.

The equivalent cost for this annual hour burden for this collection of information is estimated to be \$84,632, determined as follows: 1,249 hours times \$67.76/hour (estimated per hour cost for financial professionals' time).<sup>7</sup>

Amendments Related to 2015 Conflict of Interest Rule

In connection with the Proposed Regulation, the Department proposes to amend PTE 75-1, Part II and Part V, to adjust the recordkeeping requirement. Additionally, the Department proposes to amend PTE 75-1, Part V, to include a new disclosure requirement. The Department believes that it is a usual and customary business practice to maintain records required to demonstrate compliance with SEC-mandated disclosure distribution regulations. The Department believes that this new disclosure requirement is consistent with the disclosure requirement mandated by the Securities and Exchange Commission (SEC) in 17 CFR 240.10b-16(1) for margin transactions. Therefore, the Department concludes that these requirements produce no additional burden to the public.

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).*

It is assumed that required records are maintained by the relevant affected parties, the broker-dealers and banks. Thus, there are no additional tasks performed outside of the brokerage firms/banks.

Amendments Related to 2015 Conflict of Interest Rule

In connection with the Proposed Regulation, the Department proposes to amend PTE 75-1, Parts II and V, to require the broker dealer or bank (rather than the plan) to comply with the recordkeeping requirement. Additionally, an amendment is being proposed to PTE 75-1, Part V, to require a new disclosure requirement. The Department believes that it is a usual and customary business practice for broker dealers to maintain the records required by the proposed amendment. The Department believes that this new disclosure requirement is consistent with the disclosure requirement mandated by the Securities and Exchange Commission (SEC) in 17 CFR 240.10b-16(1) for margin transactions; therefore, no additional burden has been added.

[http://www.newyorkfed.org/markets/pridealers\\_current.html](http://www.newyorkfed.org/markets/pridealers_current.html)

<sup>7</sup> The Department estimates 2013 hourly labor rates include wages, other benefits, and overhead based on data from the National Occupational Employment Survey (June 2012, Bureau of Labor Statistics) and the Employment Cost Index (September 2012, Bureau of Labor Statistics); the 2011 estimated labor rates are then inflated to 2013 labor rates.

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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.*

Not applicable.

15. *Explain the reasons for any program changes or adjustments reporting in Items 13 or 14*

There have been no changes to the burden from the prior submission.

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.

18. *Explain each exception to the certification statement identified in Item 19, "Certification for Paperwork Reduction Act Submission."*

Not applicable; no exceptions to the certification statement.

**B. Collection of Information Employing Statistical Methods**

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