

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT OF 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 is finalizing a regulation under Employee Retirement Income Security Act (ERISA) section 3(21)(A)(ii) and Internal Revenue Code (Code) section 4975(e)(3) (B) (Final Regulation). The Final Regulation will amend a rule dating back to 1975 that defines when a person is a “fiduciary” under ERISA and the Code by reason of providing investment advice for a fee or other compensation regarding assets of a plan or IRA (i.e., an investment advice fiduciary). The Final Regulation will treat investment advisers as fiduciaries in a wider array of advice relationships than the existing regulation.

The Department recognizes that in some instances, plan fiduciaries, participants, beneficiaries, and IRA owners may receive recommendations that should not be treated as fiduciary investment advice. Accordingly, the final regulation describes examples of communications that would not constitute fiduciary advice. These examples focus on communications that the Department believes Congress did not intend to cover as fiduciary “investment advice” and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality. None of the examples apply where the adviser represents or acknowledges its action as fiduciary under ERISA with respect to the advice. Each carve-out is discussed below.

Transactions Involving Independent Fiduciaries with Financial Expertise

Paragraph (c)(1) of the final rule provides that a person shall not be deemed to be an investment advice fiduciary within the meaning of the final rule by reason of advice to certain independent fiduciaries of a plan or IRA in connection with an arm’s length sale, purchase, loan, exchange, or other transaction involving the investment of securities or other property if, before entering into the transaction, the independent fiduciary represents to the person that the fiduciary is exercising independent judgment in evaluating any recommendation, and the person fairly informs the independent plan fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity and fairly informs the independent plan fiduciary of the existence and nature of the person’s financial interests in the transaction.

Transactions involving independent fiduciaries exercising independent judgement are not viewed to be fiduciary advice if certain conditions are met. Among these conditions are

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the following: (A) the person knows or reasonably believes that the independent fiduciary of the plan or IRA is (1) a bank as defined in section 202 of the Investment Advisers Act of 1940 or similar institution that is regulated and supervised and subject to periodic examination by a State or Federal agency; (2) an insurance carrier which is qualified under the laws of more than one State to manage any assets of a plan; (3) an investment adviser registered under the Investment Advisers Act of 1940 or, if not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business; (4) a broker-dealer registered under the Securities Exchange Act of 1934; or (5) any other person acting as an independent fiduciary that holds, or has under management or control, total assets of at least \$50 million; (B) the person must fairly inform the independent plan fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and must fairly inform the independent plan fiduciary of the existence and nature of the person's financial interests in the transaction; and (C) the independent fiduciary must affirmatively indicate to the person that the fiduciary is exercising independent judgment in evaluating the recommendation. This is an information collection request (ICR) subject to the Paperwork Reduction Act (PRA).

Transactions Involving Platform Providers

Paragraph (b)(2)(i) of the final rule provides that a person is not an investment advice fiduciary by reason of certain communications with plan fiduciaries of participant-directed individual account employee benefit plans described in section 3(3) of ERISA regarding platforms of investment vehicles from which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. A condition of paragraph (b)(2)(i) is that the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity. This disclosure is an ICR subject to the PRA.

Investment Education

Paragraph (b)(2)(iv)(C) and (D) of the regulation make clear that furnishing and providing certain specified investment educational information and materials (including certain investment allocation models and interactive plan materials) to a plan, plan fiduciary, participant, beneficiary or IRA owner would not constitute the rendering of investment advice within the meaning of the final rule if certain conditions are met. The investment education provision includes conditions that require asset allocation models or interactive materials to include certain explanations and that they be accompanied by a statement with certain specified information. This is an ICR subject to the PRA.

Swap Transactions

Paragraph (c)(2) of the final rule provides that, in the case of certain swap transactions required to be cleared under provisions of the Dodd-Frank Act, certain counterparties, clearing members and clearing organizations are not deemed to be an investment advice fiduciary within the meaning of the final rule. A condition in the provision is that the plan fiduciary involved in the swap transaction, before entering into the transaction, represents that the fiduciary understands that the counterparty, clearing member or clearing organization are not undertaking to provide impartial investment advice and that the plan fiduciary is exercising independent judgment in evaluating any recommendations. This is an ICR subject to 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.

As discussed above, the final regulation describes examples of communications that would not constitute fiduciary advice. These examples focus on communications that the Department believes Congress did not intend to cover as fiduciary “investment advice” and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality. However, the communications are subject to conditions that ensure that participants and beneficiaries and plan officials clearly understand that the adviser is not acting in a fiduciary capacity. Service providers will use this information to disclose their status to their clients, and their clients will use the information to inform themselves about the status of their adviser. Without these conditions, participants and beneficiaries, plans and IRA investors may be misled into thinking their advisers are acting in their best interests when they are not.

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 the manner in which disclosures under Title I of ERISA made through electronic media will be deemed to satisfy the requirement of § 2520.104b-1(b). Section 2520-107-1 establishes standards concerning the use of electronic media for maintenance and retention of records. Under these rules, all pension and welfare plans covered under Title I of ERISA may use

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electronic media to satisfy disclosure and recordkeeping obligations, subject to specific safeguards.

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 disclosures required by these communications are unique to this regulation, and therefore, are not duplicative.

5. *If the collection of information impacts small businesses or other small entities describe any methods used to minimize burden.*

These information collections impose a minimal burden on service providers that is necessary to protect the interest of participants and beneficiaries and plan officials.

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.*

If this collection were not conducted, participants and beneficiaries could be misled into believing that their advisers are serving them in a fiduciary capacity.

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.*

Not applicable.

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.

In accordance with 5 CFR 1320.11, the proposed rule provided the public with 60 days to comment on the information collection and burden estimates. The Department received over 3,000 public comments in response to the proposed rule and accompanying proposed PTEs and proposed amendments to PTEs. The public comments were posted on the Department's website at the following two addresses:
<http://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html> and
<http://www.dol.gov/ebsa/regs/cmt-1210-ZA25.html>.

Additionally, the Department held four days of public hearings during August 2015 on the proposed rule and accompanying proposed PTEs and proposed amendments to PTEs. Transcripts, archived video, and other hearing materials were posted on the Department's website here: <http://www.dol.gov/ebsa/regs/1210-AB32-2-Hearing.html>.

In the public comments and the public hearing, the Department received considerable feedback regarding the workability of the proposed rule and accompanying proposed PTEs and proposed amendments to PTEs; however, very little of it was focused on the information collections in the fiduciary exceptions.

The few comments received on the information collections in the fiduciary exceptions centered on how permissive the exceptions should be, and thus, how many respondents would be permitted to use the exceptions and incur the burden associated with the information collections.

Most notably, in response to the commenters, the Department made adjustments to its methodology in calculating burden. These changes are discussed in Questions 12 and 13, where applicable.

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.*

No assurance of confidentiality was provided.

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 the nature described.

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.*
- *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.*

As discussed in Item 1 above, the final rule includes four information collections: transactions involving independent fiduciaries with financial expertise, transactions involving platform providers, investment education, and swap transactions. The hour burden associated with each of these ICRs is discussed below.

In response to a recommendation made during testimony at the Department's August 2015 public hearing on the proposed rule, the Department tasked several attorneys with drafting sample legal documents in an attempt to determine the hour burden associated with complying with the ICRs. Commenters did not provide time or cost estimates needed to draft these disclosures; the legal burden estimates in this analysis, therefore,

use the data generated by the Department to estimate the time required to create sample disclosures.

Transactions Involving Independent Fiduciaries with Financial Expertise

The Department estimates that approximately 36,000 independent plan fiduciaries with financial expertise would receive the independent plan fiduciary with financial expertise disclosure.¹

The Department estimates that it will take 25 minutes of legal professional time to produce the required disclosures. Therefore, the disclosures will result in approximately 15,000 hours of legal time.² At an hourly wage rate of \$133.61 for in-house legal staff,³ this results in an equivalent cost of approximately \$2.0 million.⁴

The Department also estimates that it will take 30 minutes of clerical time to produce the required disclosures. Therefore, the disclosures will result in approximately 18,000 hours

1 According to the "2015 Investment Management Compliance Testing Survey," Investment Adviser Association, cited in the regulatory impact analysis for the accompanying rule, 63 percent of Registered Investment Advisers (RIAs) service ERISA-covered plans and IRAs. The Department conservatively interprets this to mean that all of the 113 large RIAs, 63 percent of the 3,021 medium RIAs (1,903), and 63 percent of the 24,475 small RIAs (15,419) work with ERISA-covered plans and IRAs. The Department assumes that all of the 42 large broker-dealers, and similar shares of the 233 medium broker-dealers (147) and the 3,682 small broker-dealers (2,320) work with ERISA-covered plans and IRAs. According to SEC and FINRA data, cited in the regulatory impact analysis, 18 percent of broker-dealers are also registered as RIAs. Removing these firms from the RIA counts produces counts of 105 large RIAs, 1,877 medium RIAs, and 15,001 small RIAs that work with ERISA-covered plans and IRAs and are not also registered as broker-dealers. SNL Financial data show that 398 life insurance companies reported receiving either individual or group annuity considerations in 2014. The Department has used these data as the count of insurance companies working in the ERISA-covered plan and IRA markets. Finally, 2013 Form 5500 data show 3,375 service providers to ERISA-covered plans that are not also broker-dealers, Registered Investment Advisers, or insurance companies. Therefore, the Department estimates that approximately 23,265 broker-dealers, RIAs, insurance companies, and service providers work with ERISA-covered plans and IRAs. Additionally, the Department is using plans with assets of \$50 million or more as a proxy for other persons who managed \$50 million or more in plan assets. According to 2013 Form 5500 filings, 12,446 plans had assets of \$50 million or more. These categories total 35,711. The Department rounded up to 36,000 to account for other entities that might produce the disclosure.

2 36,000 independent fiduciaries with financial expertise x 25 minutes = 15,000 hours.

3 For a description of the Department's methodology for calculating wage rates, see <http://www.dol.gov/ebsa/pdf/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-march-2016.pdf>. The Department's methodology for calculating the overhead cost input of its wage rates was adjusted from the proposed regulation to the final regulation. In the proposed regulation, the Department based its overhead cost estimates on longstanding internal EBSA calculations for the cost of overhead. In response to a public comment stating that the overhead cost estimates were too low and without any supporting evidence, the Department incorporated published US Census Bureau survey data on overhead costs into its wage rate estimates.

4 15,000 hours x \$133.61 per hour = \$2.0 million.

of clerical time.⁵ At an hourly wage rate of \$55.21 for clerical staff, this results in an equivalent cost of approximately \$994,000.⁶

In total, the burden associated with the disclosure required for independent fiduciaries with financial expertise is approximately 33,000 hours at an equivalent cost of \$3.0 million.

Transactions Involving Platform Providers

The Department estimates that 2,000 service providers⁷ will use the platform provider limitation.

The Department estimates that each service provider will require ten minutes of legal professional time to adjust existing service provider contracts to include the required disclosure. Therefore, the disclosure will result in approximately 300 hours of legal time.⁸ At an hourly wage rate of \$133.61 for in-house legal staff, this results in an equivalent cost of \$45,000.⁹

Investment Education

The Department estimates that approximately 23,500 financial institutions and service providers will add the investment education disclosure to their investment education materials.¹⁰ The Department estimates that each financial institution will require one hour

5 36,000 independent fiduciaries with financial expertise x 30 minutes = 18,000 hours.

6 18,000 hours x \$55.21 per hour = \$994,000.

7 According to 2013 Form 5500 Schedule C filings, approximately 2,000 service providers provided recordkeeping services to plans. The Department believes that considerable overlap exists between the recordkeeping market and the platform provider market and between the large plan service provider market and the small plan service provider market. Therefore, the Department has chosen to use recordkeepers reported on the Schedule C as a proxy for platform providers due to data availability constraints.

8 2,000 service providers x 10 minutes = 300 hours.

9 300 hours x \$133.61 per hour = \$45,000

10 One commenter questioned the basis for the Department's assumption regarding the number of financial institutions likely to provide investment education disclosures. According to the "2015 Investment Management Compliance Testing Survey", Investment Adviser Association, cited in the regulatory impact analysis for the accompanying rule, 63 percent of Registered Investment Advisers service ERISA-covered plans and IRAs. The Department conservatively interprets this to mean that all of the 113 large Registered Investment Advisers, 63 percent of the 3,021 medium Registered Investment Advisers (1,903), and 63 percent of the 24,475 small Registered Investment Advisers (RIAs) (15,419) work with ERISA-covered plans and IRAs. The Department assumes that all of the 42 large broker-dealers, and similar shares of the 233 medium broker-dealers (147) and the 3,682 small broker-dealers (2,320) work with ERISA-covered plans and IRAs. According to SEC and FINRA data, cited in the regulatory impact analysis, 18 percent of broker-dealers are also registered as RIAs. Removing these firms from the RIA counts produces counts of 105 large RIAs, 1,877 medium RIAs, and 15,001 small RIAs that work with ERISA-covered plans and IRAs and are not also registered as broker-dealers. SNL Financial data show that 398 life insurance companies reported receiving either individual or group annuity considerations in 2014. The Department

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of legal professional time to adjust existing investment materials to include the required disclosure. Therefore, the disclosure will result in approximately 23,500 hours of legal time.¹¹ At an hourly wage rate of \$133.61 for in-house legal staff, this results in an equivalent cost of \$3.1 million.¹²

Swap Transactions

Plan fiduciaries covered by the swap transactions provision must already make the required representation to the counterparty under the Dodd Frank Act provisions governing cleared swap transactions. This rule adds a requirement that the representation be made to the clearing member and financial institution involved in the transaction. The Department believes that the incremental burden of this additional requirement would be de minimis. Plan fiduciaries would be required to add a few words to the representations required under the Dodd Frank Act provisions reflecting the additional recipients of the representation. Due to the sophisticated nature of the entities engaging in swap transactions, the Department believes that all of these representations are transmitted electronically; therefore, the incremental burden of transmitting this representation to two additional parties is de minimis. Further, keeping records that the representation had been received is a usual and customary business practice. Accordingly, the Department has not associated any burden with this ICR.

Summary

In total, as seen in the table below, the Department estimates that the disclosures required by the four types of communications will require 56,800 hours of burden annually at an equivalent cost of \$6.2 million.

Activity	Total Annual Burden (Hours)	Hourly Rate	Monetized Value of Respondent Time
Transactions Involving Independent Fiduciaries with Financial Expertise Clerical	18,000	\$55.21	\$994,000
Transactions Involving Independent Fiduciaries with Financial Expertise Legal	15,000	\$133.61	\$2.0 million
Platform Provider Legal	300	\$133.61	\$45,000

has used these data as the count of insurance companies working in the ERISA-covered plan and IRA markets. Finally, 2013 Form 5500 data show 3,375 service providers to ERISA-covered plans that are not also broker-dealers, Registered Investment Advisers, or insurance companies. Therefore, the Department estimates that approximately 23,265 broker-dealers, RIAs, insurance companies, and service providers work with ERISA-covered plans and IRAs. The Department has rounded up to 23,500 to account for any other financial institutions that may provide covered investment education.

11 23,500 financial institutions and service providers x 1 hour = 23,500 hours.

12 23,500 hours x \$133.61 per hour = \$3.1 million.

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Investment Education Legal	23,500	\$133.61	\$3.1 million
Swap Transactions	0		\$0
<i>Unduplicated Totals</i>	<i>56,800</i>		<i>\$6.2 million</i>

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 estimates that all disclosures will be transmitted electronically through regular means of communication, or else occupy very small amounts of space on existing paper documents. Therefore, the costs associated with these requirements are de minimis. No other cost burdens are associated with these information collections.

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.*

No cost to the Federal Government.

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

Not applicable.

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 results of this information collection.

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."*

None.

B. Statistical Methods

This information collection does not employ statistical methods.