

Prohibited Transaction Exemption 75-1
(Security Transactions with Broker-Dealers, Reporting Dealers and Banks)
OMB Control Number 1210-0092
April 2016

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.*

Employee Retirement Income Security Act of 1974 (ERISA) section 406(a) and Internal Revenue Code (Code) section 4975(c)(1)(A)-(D) prohibit specified transactions between plans and “parties in interest,” as defined in ERISA section 3(14) or “disqualified persons” as defined in Code section 4975(e)(2). Fiduciaries and other service providers are parties in interest and disqualified persons under ERISA and the Code. As a result, they are prohibited from engaging in the sale or exchange of property or services, loans, leases, or extensions of credit, with plans and individual retirement accounts (IRAs). ERISA section 406(b) and Code section 4975(c)(1)(E)-(F) further prohibits certain acts by plan fiduciaries that result in benefit to the fiduciary or a party adverse to the plan.

If a broker-dealer advances funds to settle a trade entered into by a plan or IRA, or purchases a security for delivery on behalf of a plan or IRA, the result can potentially be viewed as a loan of money or other extension of credit to the plan or IRA. Further, in the event a broker-dealer steps into a plan’s or IRA’s shoes in any particular transaction, it may charge interest or other fees to the plan or IRA. These transactions potentially violate ERISA section 406(a)(1)(B) and Code section 4975(c)(1)(B) and (D).

The Secretary of Labor may grant and amend administrative exemptions from the prohibited transaction provisions of ERISA and the Code.¹ Before granting an exemption, the Department must find that the exemption is administratively feasible, in the interests of plans, their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of such plans and IRA owners.

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

¹ Regulations at 29 CFR section 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption under ERISA. Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under Code section 4975 to the Secretary of Labor.

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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.

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 2016 Conflict of Interest Rulemaking

The Department is revoking Part I(b) and I(c) of PTE 75-1, and Part II(2) as well as amending Part II(1) of PTE 75-1, in conjunction with its amendments to PTE 86-128, and additionally, is separately amending Part V of PTE 75-1, all in connection with its final regulation defining who is a "fiduciary" of an employee benefit plan under ERISA as a result of giving investment advice to a plan or its participants or beneficiaries (Regulation). The final rule also applies to the definition of a "fiduciary" of a plan (including an IRA under the Code). The Regulation amends a prior regulation specifying when a person is a fiduciary under ERISA and the Code by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. The Regulation replaces an existing regulation dating to 1975. The Regulation takes into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other

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developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Regulation updates existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

The amendment to PTE 75-1, Part II(1) and the amendment to PTE 75-1, Part V will 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. As amended, parties relying on the exemptions do not have to disclose trade secrets or other confidential information to members of the public (*i.e.*, plan fiduciaries, contributing employers or employee organizations whose members are covered by the plan, participants and beneficiaries and IRA owners), but that in the event a party refuses to disclose information on this basis, it must provide a written notice to the requester advising of the reasons for the refusal and advising that the Department may request such information.

The amendment to PTE 75-1, Part V will 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.

The 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. 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 exemption would be satisfied.

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The disclosure and recordkeeping requirements of the 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. The recordkeeping requirement is intended to be protective of rights of plan participants and beneficiaries and IRA owners by ensuring they and the Department can confirm that the conditions of the exemption has been satisfied.

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.

Amendments to PTE 75-1, Part V Related to 2016 Conflict of Interest Rulemaking

The 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. The plan or IRA must additionally be provided with prior written disclosure of any changes to these terms.

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.*

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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.

As further discussed in items 12 and 13 below, the Department has taken into account that some of the disclosures and written authorizations will be delivered electronically.

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 2016 Conflict of Interest Rulemaking

The Department believes that the additional disclosure requirement 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 fulfill both requirements.

5. *If the collection of information impacts small businesses or other small entities, 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 2016 Conflict of Interest Rulemaking

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

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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.*

The requirements of this PTE are only mandatory if entities wish to utilize the class exemption. The frequency is dependent upon the occurrence of such transactions, not on a predetermined time period.

If the disclosure and recordkeeping requirements were not included in PTE 75-1, the Department could not ensure that the exemption is protective of the rights of participants and beneficiaries as required under ERISA section 408(a) and Code section 4975(c)(2).

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.*

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

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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.

Under the recordkeeping provisions of the amended exemption, fiduciaries are not required to disclose records that are privileged trade secrets or privileged commercial or financial information to plan fiduciaries, participants or beneficiaries, IRA owners, or their representatives. However, if the fiduciary refuses to disclose information on the basis that the information is exempt from disclosure, the fiduciary must, by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

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 exemption 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.

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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. With respect to the amendments to PTE 75-1, the Department received multiple comments from one commenter regarding the existing, unchanged information collections in PTE 75-1. In the comment solicitation contained in the proposed amendment to PTE 75-1, the Department limited the scope of the comments to those focused on the proposed amendments to the ICR. Therefore, the Department did not make any changes to ICR, because these comments are outside the scope of the comment solicitation.

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.*

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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 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, 2012.² 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.³

²Email contact with the Securities and Exchange Committee Trading and Markets Office on January 10, 2013.

³This estimate is very conservative since there is large overlap between the SEC registered firms and FINRA ones.

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The Federal Deposit Insurance Corporation insured 6,096 commercial banks as of December 31, 2012.⁴ 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.⁵ Multiplying this number by 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).⁶

Amendments Related to 2016 Conflict of Interest Rule

In connection with the Final Regulation, the Department is amending PTE 75-1, Part II and Part V, to adjust the recordkeeping requirement. Additionally, the Department is amending 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 2016 Conflict of Interest Rule

⁴Federal Insurance Deposit Corporation, Quarterly Banking Profile.
<http://www.fdic.gov/bank/statistical/stats/2012dec/industry.pdf>

⁵Reporting 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. (http://www.newyorkfed.org/markets/pridealers_current.html)

⁶The 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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In connection with the Final Regulation, the Department is amending 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, the Department is amending 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.

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.

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B. Collection of Information Employing Statistical Methods

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