

**Prohibited Transaction Class Exemption 85-68
(Permitting Employee Benefit Plans to Invest in Customer Notes of Employers)
OMB Number 1210-0094
January 2017**

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.*

Section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code) authorize the Secretary of Labor and the Secretary of the Treasury to grant a conditional or unconditional exemption of any fiduciary, disqualified person or class of fiduciaries, or orders of disqualified persons or transactions, from all or part of the restrictions imposed by sections 406 and 407(a) of ERISA and from the taxes imposed by sections 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code. Under section 102 of Reorganization Plan No. 4 of 1978 (Reorganization Plan No. 4), the Secretary of Labor was given the authority to grant such exemptions.

This class exemption which was granted on April 3, 1985, and replaced Prohibited Transaction Exemption 79-9, describes the conditions under which a plan is permitted to acquire customer notes accepted by an employer of employees covered by the plan in the ordinary course of the employer's business activity and thus be exempt from the prohibited transaction restrictions, provided that the conditions of the exemption are met. The class exemption covers sales as well as contributions of customer notes by an employer to its plan. The customer notes must have been accepted by the employer in its primary business activity as the seller of tangible personal property that is being financed by the notes, so that the exemption does not apply to notes of an employer's affiliate.

In order to ensure that the class exemption is not abused, that the rights of the participants and beneficiaries are protected, and that the exemption's conditions are being complied with, the Department of Labor (the Department) often requires minimal information collection pertaining to the affected transactions.

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 Department has included in the class exemption a recordkeeping provision, whereby plans are required to maintain for six years from the date of the transaction the records necessary to enable interested parties including the Department to determine whether the

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conditions of the exemption have been met. The class exemption also requires that those records be made available to certain persons on request. Without this recordkeeping requirement, the Department would be unable to effectively enforce the terms of the exemption and ensure user compliance.

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

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.

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 records required to be kept are believed to be records which are already available and which may also be used to satisfy the conditions of the exemption.

Most of the records required to be maintained for the class exemption are normally maintained for purposes of completing the annual report required by ERISA (Form 5500 Series, OMB Control Number 1210-0110). The same records can satisfy both the requirements of the exemption and the requirement to file the annual report. As noted below in question 7, those records not maintained for purposes related to the annual

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report are maintained as a standard business practice or for purposes of complying with the Code.

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

The class exemption does not unusually impact small businesses because records are already maintained for purposes of completing the annual report required by ERISA (Form 5500 Series).

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 recordkeeping requirement of the class exemption is only mandatory if plans wish to utilize this class exemption. The frequency is dependent on the occurrence of such transactions, not on a predetermined time period. In the absence of the recordkeeping requirement, fiduciaries, participants and beneficiaries, and the Department, might not have sufficient access to information to verify compliance with the terms of the exemption.

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.*

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There are no special circumstances that require the collection to be conducted in a manner inconsistent with the above requirements. The six year recordkeeping requirement is consistent with the requirements in section 107 of ERISA as well as general recordkeeping requirements for tax information under the Code. Since this class exemption is granted under section 4975(c)(2) of the Code (as well as under section 408(a) of ERISA), the exclusion of tax records from the three year guideline for tax retention set forth in 5 CFR 1320.6 is applicable. Furthermore, as a result of statutory recordkeeping requirements in ERISA, the Code, and other federal laws, the affected population of the class exemption, for the most part, has adopted six year recordkeeping as standard business practice with regard to employee benefit plans.

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 Federal Register notice on October 28, 2016 (81 FR 75157), as required by 5 CFR 1320.8(d), soliciting comments on the information collection and providing the public 60 days to comment on the submission. No comments were received from the public in response to the notice.

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.*

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There is no promise of confidentiality of the information. The class exemption requires that the information concerning the transactions be made available to interested parties.

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.*

Not applicable.

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.*

The class exemption requires plans to maintain for a period of six years all necessary records pertaining to the affected transactions and to make those records available to certain designated persons upon request. For purposes of this burden analysis, the Department estimates that 69 plans (respondents) will engage in 325 covered transactions (responses). The Department believes that the financial records would normally be maintained for purposes of satisfying the requirements of the Form 5500. To account for the slight, but unlikely, possibility of additional burden beyond the burden associated with the Form 5500, the Department has estimated an annual burden of one hour.

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

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We estimate that the cost to respondents is de minimis. All of the recordkeeping would be done as standard business practice or for purposes of maintaining records related to the Form 5500.

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.*

There is no disclosure to the Federal government and, consequently, no cost to the government as a result of this class exemption.

15. *Explain the reasons for any program changes or adjustments.*

There are no program changes associated with this 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.*

This is not a collection of information for statistical use and there are no plans to publish the results of this 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 expiration date will be published in the Federal Register following OMB approval.

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

Not applicable; no exceptions to the certification statement.

B. Statistical Methods

This information collection does not employ statistical methods.