

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT 1995 SUBMISSION

**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) gives the Secretary of Labor the authority to "grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a)." In order to grant an exemption under section 408, the Department of Labor (the Department) must determine that the exemption is: (1) administratively feasible; (2) in the interests of the plan and its participants and beneficiaries; and, (3) protective of the rights of the participants and beneficiaries of such plan.

Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978, effective on December 31, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975 of the Internal Revenue Code (the Code), with certain enumerated exceptions, to the Secretary of Labor. As a result, the Secretary of Labor now possesses authority under section 4975(c)(2) of the Code as well as under 408(a) of ERISA to issue individual and class exemptions from the prohibited transaction rules of ERISA and the Code.

Section 406 of ERISA prohibits certain types of transactions between plans and related parties (called parties in interest), such as plan fiduciaries, sponsoring employers, unions, service providers and affiliates. In particular, under section 406, a fiduciary of a plan may not cause the plan to engage in a transaction involving plan assets (e.g., a sale, lease, loan, transfer, or furnishing of goods or services) with a party in interest or use the plan's assets for the benefit of a party in interest.

Prohibited Transaction Class Exemption (PTE) 90-1 provides an exemption from the restrictions of section 406, in part, for certain transactions between insurance company pooled separate accounts and parties in interest to plans that invest assets in the pooled separate accounts. PTE 90-1 provides a general exemption for any transaction between a party in interest with respect to a plan and an insurance company pooled separate account in which the plan has an interest (or any acquisition or holding by the pooled separate account of employer securities or employer real estate), provided that the party in interest

is not the insurance company (or an affiliate of the insurance company) and that the amount of the plan's investment in the separate account does not exceed certain specified percentages (or that the separate account is a specialized account with a policy of investing substantially all of its assets in short-term obligations).

PTE 90-1 also provides specific, additional relief for the following types of transactions with a party in interest: (1) furnishing goods to an insurance company pooled separate account, (2) leasing of real property of the pooled separate account, (3) transactions involving persons who are parties in interest to a plan merely because they are service providers or provide nondiscretionary services to the plan; (4) the insurance company's provision of real property management services in connection with real property investments of the pooled separate account, and (5) furnishing of services, facilities and goods by a place of public accommodations owned by the separate account.

In addition to other specified conditions, the insurance company intending to rely on the general exemption or any of the specific exemptions must maintain records of the transactions to which the exemption applies for a period of six years and make the records available on request to specified interested persons (including plan fiduciaries, the Department, and the Internal Revenue Service). This information collection requirement is considered necessary in order to ensure that the exemption meets the standards of section 408.

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.*

This exemption requires recordkeeping, including disclosure of records on request to the Department and other interested persons. The Department believes that this information collection protects the interests of participants and beneficiaries in plans by enabling interested persons, including the Department, to verify that the conditions of the exemptions have been met.

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 Department has promulgated a regulation, 29 CFR 2520-107-1, that establishes standards permitting plans to use electronic media for the maintenance and retention of

records. Under these rules, entities covered under Title I of ERISA may use electronic media to satisfy disclosure and recordkeeping obligations, subject to specific safeguards. Based on its experience and expert knowledge, the Department believes that the respondents will use electronic systems to create, maintain, and disclose the required records. The Department has taken the expected use of such electronic systems into account in developing the burden estimates described in item 12, below.

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 Department believes that the records required to be maintained under this exemption are also required to be maintained under other state and federal laws and would be maintained by insurance companies as a matter of usual and customary business practice. The Department further believes that one set of records will suffice to fulfill all requirements placed on the entities by regulation or business practice; therefore, there is no duplication of effort.

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

This exemption is primarily intended to enable insurance company pooled separate accounts in which plans invest to enter into transactions that would benefit the accounts and the participating plans. The information collection requirements apply only to the insurance companies operating such pooled separate accounts. These insurance companies are generally large businesses, and the exemption is therefore unlikely to have an impact on small businesses or entities.

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 information collection is required only if parties in interest, or insurance company pooled separate accounts, wish to engage in otherwise prohibited transactions and to rely on the class exemption. The frequency of the event requiring recordkeeping is therefore dependent on the occurrence of the transaction and not on a predetermined time period. Eliminating the information collection requirement would make it difficult to monitor reliance and compliance with the exemption's conditions.

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 4975(c)(2) of the Code, as well as under section 408(a) of ERISA, the exclusion of records from the three-year guideline for record 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 respondents affected by this exemption have generally adopted six-year recordkeeping as standard business practice with regard to employee benefit plans because section 107 of ERISA requires six-year recordkeeping generally with respect to plan records.

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's Federal Register Notice was published in the Federal Register on April 11, 2018 (83 Fed. Reg. 15635), soliciting public comments on the proposed extension of the information collection approval. The notice provided the public with 60 days to comment, as required by 5 CFR 1320(d), and no comments were received.

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 is made in connection with this information collection request.

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.*
- *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.*

Based on data from the 2016 Form 5500 annual reports (the most recent data available), the Department estimates that 102 respondents are likely to rely on this exemption in any given year. Such respondents are large insurance companies that maintain pooled separate accounts. Because respondents are already required under other provisions of ERISA and state insurance law to keep records of transactions covered by this exemption,<sup>1</sup> the additional paperwork burden imposed by the exemption is slight, consisting only of the requirement to maintain records for a six-year period and make them available upon request. Both of these activities will be conducted through the use of electronic databases and communications methods, which are available during the normal course of business to employees who need ongoing access. The Department estimates that the 102 insurance companies that offer pooled separate accounts will each need 10 additional minutes annually (0.167 hours) for an average of 10 transactions per year to satisfy the information collection requirements, resulting in a total annual hour burden of 170 hours (102 companies x 10 transactions/company x 0.167 hours/transaction). The Department believes that the assumption of 10 minutes per transaction is adequate to include, the slight additional recordkeeping burden for establishing and maintaining the records for the required six-year period as well.

The equivalent annual cost to respondents for the annual hour burden for this ICR is \$8,855, which represents 170 hours of a clerk's time at \$52.09 per hour.<sup>2</sup>

---

<sup>1</sup>Under ERISA regulation § 2520.103-9, insurance companies administering pooled separate accounts are required to maintain certain records that are used in the preparation of the company's annual report to the Department. In addition, insurance companies are highly regulated by state law, and their books and records are subject to periodic examination by state agencies.

<sup>2</sup> For more information on how the Department estimates labor costs see:

<https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-july-2017.pdf>

- 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 has assumed that this information collection will be handled in-house by respondents' staff. The recordkeeping itself is presumed to be part of the usual and customary practices of insurance companies, and, because of the prevalence of electronic recordkeeping systems in the banking industry, the Department believes that any additional cost burden arising from the exemption would be, at most, nominal. As a result of these assumptions, there is no apparent additional cost burden accounted for in this ICR.

- 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 requirement for reporting to the federal government and, consequently, no cost to the federal government.

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

There have been no program changes since the last submission. However, the Department has made certain minor adjustments based on new data. First, the number of insurance companies offering pooled separate accounts has increased from 96 companies to 102 companies, based on 2016 Form 5500 data. The result is that the Department's estimate of the annual hour burden for this ICR has increased from 160 hours to 170 hours. Additionally, wage rates have been updated to reflect increased labor costs.

- 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 OMB expiration date will be published in the Federal Register following OMB approval.

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

Not applicable; no exceptions to the certification statement.

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

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