

Prohibited Transaction Exemption 75-1
(Security Transactions with Broker-Dealers, Reporting Dealers and Banks)
OMB Number 1210-0092
June 2019

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT OF 1995
SUBMISSIONS

The Department of Labor, Employee Benefits Security Administration requests a revision to the information collections contained in Prohibited Transaction Exemption (PTE) 75-1, which are currently approved under OMB Control Number 1210-0092.¹ The Department is requesting to renew the information collections contained in PTE 75-1 that were in place prior to 2016.

A. Justification

1. *Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.*

Section 3(14) of the Employee Retirement Income Security Act (ERISA) of 1974, as amended, defines certain relationships to an employee benefit plan as party in interest relationships. Section 406(a) of ERISA prohibits specified transactions between plans and parties in interest, such as the sale or exchange of property or services, loans, leases, or extensions of credit, and section 406(b) further prohibits certain acts by plan fiduciaries that result in benefit to the fiduciary or a party adverse to the plan. Section 408(a) of ERISA gives the Secretary of Labor the right “to grant a conditional or unconditional exemption of any fiduciary or class of fiduciaries or transactions, from all or part of the restrictions imposed by section 406 and 407(a).” In order to grant such exemptions under 408(a), however, the Department must determine that the exemption is administratively feasible, in the interest of the plan and its participants and beneficiaries, and protective of the rights of participants and beneficiaries. This exemption also provides relief from the prohibited transaction provisions of section 4975 of the Internal Revenue Code (the Code).

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 brokerage commissions and related services as well as advice by persons that are not fiduciaries. Part II allows broker-dealers to engage in principal purchases or sales of securities with plans and permits reporting dealers and banks to do the same with respect to Government securities. 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

¹ They were amended as part of the Department’s 2016 final rule defining who is a “fiduciary” under ERISA and the Code, which was published in the Federal Register on April 8, 2016. The final rule and PTE amendments were vacated in toto by the Fifth Circuit Court of Appeal’s decision in *Chamber of Commerce v. Department of Labor*, 885 F.3d 360 (5th Cir. 2018).

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purchase from or sell securities to a market maker even if the market maker 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 recordkeeping. Parties relying on the exemption must keep records describing transactions covered by the exemption and make the records available unconditionally during normal business hours to duly authorized employees of 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.

The records must generally be maintained to enable plan fiduciaries and certain other persons specified in the exemption (e.g., Department representatives and employers of participants and beneficiaries) to determine whether the conditions of the exemptions have been met. The records must demonstrate that the transactions are fair to the plan. For certain transactions covered by the exemption, the records must show that qualitative standards (e.g., that the securities involved are of a certain type) and quantitative standards (e.g., that the amount of securities acquired by the plan does not exceed three percent of the total amount of such securities being offered) were met. Consistent with the other prohibited transaction exemptions granted by the Department, the exemptions require that records of transactions entered into in reliance on the exemptions be maintained for a period of 6 years from the date of each transaction.

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

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The Department is unable to estimate how frequently records supporting the exempt transactions are examined by either the Department or other parties. The Department has the authority to request such records and does so from time to time in connection with investigations. However, the primary purpose of the recordkeeping condition of the exemption is to ensure participant access to records enabling participants to verify that transactions are conducted properly. Under ERISA section 408(a)(3), protection of participant rights is a required condition of the Department's grant of an exemption from the prohibited transaction provisions of ERISA.

3. *Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration for using information technology to reduce burden.*

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

4. *Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.*

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

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

This exemption is relied upon primarily by large institutional financial service providers, which are the entities most likely to engage in the covered transactions. However, even if small plans or fiduciaries are involved in these transactions, the burden is expected 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.

6. *Describe the consequence to Federal program or policy activities if the collection is not*

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conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.

The recordkeeping requirements come into effect only with respect to transactions for which the exemptive relief is desired; thus the frequency of collection is dependent upon voluntary transactions, rather than the passage of time. In the absence of the recordkeeping requirement, fiduciaries, participants and beneficiaries, and the Department would not have access to sufficient 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.*

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

8. *If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting*

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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 notice soliciting public comment and providing 60 days for that purpose as required by 5 CFR 1320.8 (d) was published in the Federal Register on April 5, 2019 (84 FR 13719). 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 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 a sensitive nature.

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,*

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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.*

The class exemption requires as a condition to relief that entities 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 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 consistent with the exemption for the plans 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 estimates 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, banks as well as other parties are eligible to take advantage of the provisions of the exemption. However, persons who use the exemption will typically be broker-dealers, reporting dealers, and banks regulated by the Federal Reserve. According to the Security Exchange Commission, approximately 3,791 broker-dealers were registered as of January 31, 2019.² The Financial Industry Regulatory Authority (FINRA) reports approximately 3,726 members as of December 2018.³ Not all broker-dealers perform services for employee benefit plans, and not all broker-dealers that

²<https://www.sec.gov/help/foiadocsbdfoiahtm.html>

³https://www.finra.org/sites/default/files/2018_finra_industry_snapshot.pdf

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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 3,759 respondents⁴

The Federal Deposit Insurance Corporation insured 4,715 commercial banks as of December 31, 2018.⁵ If one-half of these banks (about 2,358) and 3,759 broker-dealers relied on this exemption, there would be approximately 6,116 respondents.⁶ Multiplying this number by ten minutes per year results in a total annual recordkeeping burden of 1,019 hours.

The equivalent cost for this annual hour burden for this collection of information is estimated to be \$160,900, determined as follows: 1,019 hours times \$157.90/hour (estimated per hour cost for financial professionals' time.).⁷

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

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 are no costs to the Federal Government.

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

⁴This estimate is very conservative since there is large overlap between the SEC registered firms and FINRA ones

⁵Federal Insurance Deposit Corporation, Quarterly Banking Profile.

<https://www.fdic.gov/bank/statistical/stats/2018dec/industry.pdf>

⁶Reporting 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)

⁷ 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>

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The Department is renewing the information collections contained in PTE 75-1 that were in place prior to 2016. The burden estimates have been updated to reflect the most current available data. The number of respondents has fallen based on updated information received from the SEC, FINRA, and the FDIC. The burden hour estimate correspondingly decreased. The hourly rate of compensation increased.

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."*

There are no exceptions to the certification statement.