

Prohibited Transaction Class Exemption 96-62
OMB Number 1210-0098

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT OF 1995
SUBMISSIONS

The Department of Labor, Employee Benefits Security Administration requests an extension without change for the information collections currently approved under OMB Control Number 1210-0098.

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 establish an exemption procedure in order 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 section 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 establish an exemption procedure and to grant exemptions with respect to such provisions.

Accordingly, on April 28, 1975, the Department Published ERISA Procedure 75-1 in the Federal Register, which provided the public with information regarding the procedure to follow when requesting an exemption. On August 10, 1990, the Department issued a regulation which replaced ERISA Procedure 75-1 for applications for prohibited transaction exemptions filed on or after September 10, 1990 (29 CFR 2570.30 *et seq.*).

On July 31, 1996, the Department published in the Federal Register, Prohibited Transaction Class Exemption 96-62, known as EXPRO¹ that provides for accelerated approval of an exemption permitting a plan to engage in a transaction which might otherwise be prohibited following a demonstration to the Department that the transaction:

¹ EXPRO is the common name for a class exemption that was created by DOL in 1996 (PTE 96-62) “that allows DOL to authorize relief from the prohibited transaction rules on an expedited basis.” EXPRO applications are granted an “authorization” under class exemption rules.

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- (1) is substantially similar in all material respects to at least 2 other transactions for which the Department recently granted administrative relief from the same restriction; and
- (2) presents little, if any, opportunity for abuse or risk of loss to a plan's participants and beneficiaries.

Under the class exemption, a party may proceed with a transaction in as little as 78 days from the acknowledgment of receipt by the Department of a written submission filed in accordance with the terms of the class exemption.

In 2002, the DOL amended the exemption to clarify that it covers "plans" as described in Code Section 4975(e)(1), such as IRAs and Keogh Plans, and that the scope of the exemption is not limited to Title I ERISA covered plans.

Additionally, in 2003 the DOL amended the exemption to permit parties to base their submissions on substantially similar transactions described either in two individual exemptions granted within the past 60 months, or in one individual exemption granted within the last 120 months and one transaction that received final authorization under the exemption within the past 60 months.

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.*

An applicant for an exemption must submit the necessary documentation as described in the class exemption to the Department for the Department to make an informed determination regarding an application for accelerated approval. The applicant must also notify interested parties to ensure that participants and beneficiaries are informed of the application for an exemption and have an opportunity to comment.

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

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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 class exemption was originally issued jointly by the Department of Labor (the Department) and the Internal Revenue Service (IRS). From 1975 to 1979, two copies of the application were required to be filed with both the Department and IRS. However, Reorganization Plan No. 4, published in the Federal Register on October 17, 1978, eliminated duplication in this area. The expedited procedure now requires that two copies of the application are filed only with the Department.

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

No provisions have been included in the class exemption procedure to simplify the application for small businesses. Because the Department must make a specific finding in each individual case, it is not possible to have different information requirements for a small plan. The potential for abuse in any specific transaction is not less in small plans than it is in large plans, and participants and beneficiaries of small plans are entitled to the same rights to protection under the class exemption procedure as participants and beneficiaries in large plans.

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.*

Application for expedited approval is a voluntary undertaking on the part of the applicant and is not required to obtain an exemption. By statute, exemptions may not be granted without certain findings by the Department based on materials submitted by the applicants. The Department has requested this collection to give applicants the option to receive expedited approval of their application by submitting materials in addition to those required in the usual exemption procedure (29 CFR 2570.30 *et seq.*). Each

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information collection relates only to a particular application for exemption; thus, as a practical matter, the collection cannot be conducted “less frequently.”

6. *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.*

There are no special circumstances that require the collection to be conducted in a manner inconsistent with the above.

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

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circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

The Department's notice required by 5 CFR 1320.8(d), soliciting comments on the information collection, was published in the Federal Register on April 29, 2020 (85 FR 23856). 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.*

Because the Secretary must make a determination on the record, no assurance of confidentiality can be provided to applicants for an exemption. The right to review all information supplied by an applicant is an essential part of providing interested parties the opportunity to make informed comments on a proposed class exemption. 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.*

There are no questions of a sensitive nature pertaining to sexual behavior and attitudes, religious beliefs, or other matters that are commonly considered private. Therefore, this is not applicable to the requirements of this class exemption procedure regulation.

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*

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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 burden for this information collection consists of the time required to prepare the documents for an application for expedited approval of an exemption and the time required to prepare and distribute the notice to interested parties. The burden for preparing the basic documents required under the usual exemption procedure has been accounted for in ERISA Procedure 75-1 (OMB Control Number 1210-0060).

While the number of exemption requests received by the Department varies across years, it has averaged seven requests per year for accelerated approval of prohibited transaction exemptions between 2014 and 2017 (the most recent four years data are available). The preparation of an application for expedited approval is generally conducted by or under the direction of attorneys with specialized knowledge of employee benefit plans. We assume that the drafting of the required documentation would be completed by a professional such as a service provider or an attorney rather than by the in-house staff of the plan or plan sponsor. We also assume that the professional will prepare the notice of the application for expedited approval for distribution to interested parties. The estimated annual cost for drafting the required documents and the notice of the application is therefore explained in Question 13.

The Department assumes that parties interested in an application for accelerated approval of an exemption from a prohibited transaction are participants and beneficiaries of the plans seeking the exemption. Distribution of the notice to interested parties will most likely be handled in house by clerical staff at a rate equivalent to \$55.14 per hour. The Department has determined that a reasonable estimate for the average number of interested parties receiving a notice from a plan applying for an exemption is 700 recipients. With an average of five approved applications, this results in 3,500 notices being distributed.² The average number of exemption requests is seven. Thus, the total number of notices being distributed is 3,507 ($3,500 + 7 = 3,507$).

The total hour burden for distribution of the notice by a clerical person, at 1 1/2 minutes per notice, is approximately 88 hours (5 approved applications x 700 interested parties

² Plan participant average is based on a weighted average of 2017 Form 5500 pension data. The data are split into firms with more than 100 participants and fewer than 100 participants. The Department estimates that half of the applications are from small plans (<100) and half from larger plans (>100). This gives a weighted average of 700 participants per plan. This number multiplied by five approvals yields 3,500 notices.

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times 1 1/2 minutes). The equivalent cost of the hour burden, at \$55.14 per hour, is \$4,825.³

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 application procedure requires documentation explaining how the transaction for which the expedited approval is requested is similar to two other exemptions that have been granted. The Department believes that, because of the technical nature of the information required in an application for expedited approval, a plan will use the services of an attorney to draft the necessary documents. We estimate that the time required to provide the material for expedited approval of an exemption is 11 hours of professional time performed by a legal associate with 2-3 years of experience and 1 hour of clerical time. Once the Department has acknowledged receipt of the application, if the plan does not hear from the Department within 45 days, the plan has tentative authorization to engage in the transaction and must therefore send a notice informing participants of its intent to do so. An average of five plans per year received pending approval by the Department from 2014 to 2017. The Department estimates that one hour of professional time performed by a legal associate with 2-3 years of experience will be required to prepare the notice. The total time required for preparation of the material required for expedited approval and the notice for distribution to interested persons is 12 hours of legal professional time and 1 hour of clerical time per plan. The cost of an attorney with 2-3 years of experience, for five plans, at \$353 per hour,⁴ is approximately \$27,181 (7 plans*11 hours*\$353/hr.). The cost for one hour of clerical time, at \$55.14 per hour is approximately \$386 (7 plans*1 hour*\$55.14/hr.). For those plans receiving approval, the estimated cost per year of preparing the notice is \$1,765 (5 plans*1 hour*\$353/hr.).

The procedures for distributing notices to interested parties provide applicants with some discretion to minimize costs. Large plans may include the notice in an existing newsletter to employees or may post the notice on a company bulletin board. Smaller plans may elect to reproduce the materials and distribute them by hand, regular mail, or electronically. The Department estimates that 56.4 percent of participants will receive notices electronically⁵ and 43.6 percent of participants will receive hard copy notices. At

³ For a description of the Department's methodology for calculating wage rates, see <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

⁴ See USAO Attorney's Fees Matrix 2015-2017 for an attorney with 2-3 years of experience in 2016-2017 at <https://www.justice.gov/usao-dc/file/889176/download>

⁵ According to data from the National Telecommunications and Information Agency (NTIA), 37.7 percent of individuals age 25 and over have access to the Internet at work. According to a Greenwald & Associates survey, 84 percent of plan participants find it acceptable to make electronic delivery the default option, which is used as the proxy for the number of participants who will not opt-out of electronic disclosure that are automatically enrolled (for

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\$.54 per notice (\$.49 for first class paper and \$.05 for the cost of the paper), the cost for distributing the 1,526 hard copy notices to interested persons is approximately \$824. Electronic distribution of the remaining 1,974 notices would result in de minimis cost.

The total cost to applicants for accelerated approval of a prohibited transaction exemption request for document preparation and mailing is approximately \$30,156 (\$27,181+\$386+\$1,765+ \$824).

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.*

Costs to the Federal Government for an average of seven applications per year have generally been accounted for in the costs associated with the regulation that describes the usual procedures for applications filed for an individual prohibited transaction exemption (29 C.F.R. 2570.30 *et seq.*), approved as OMB Control Number 1210-0060. Costs to the Federal government for reviewing two examples of similar previously granted exemptions, the additional documentation required to be submitted under this regulation, for seven applications, is minimal.

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

The increase in hour and cost burden is attributable to an increase in the number of applicants using this PTE. The average annual number of applicants increased from five to seven and the average annual number of exemptions granted remained to be five.

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.

a total of 31.7 percent receiving electronic disclosure at work). Additionally, the NTIA reports that 40.5 percent of individuals age 25 and over have access to the internet outside of work. According to a Pew Research Center survey, 61 percent of internet users use online banking, which is used as the proxy for the number of internet users who will affirmatively consent to receiving electronic disclosures (for a total of 24.7 percent receiving electronic disclosure outside of work). Combining the 31.7 percent who receive electronic disclosure at work with the 24.7 percent who receive electronic disclosure outside of work produces a total of 56.4 percent who will receive electronic disclosure overall.

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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 Item 19, "Certification for Paperwork Reduction Act Submission."*

Not applicable; no exceptions to the certification statement.