

Prohibited Transaction Class Exemption 81-8 for Short-Term Investments
OMB Control Number 1210-0061
OMB Expiration Date: 12/31/2020

SUPPORTING STATEMENT FOR
Prohibited Transaction Class Exemption 81-8 for Short-Term Investments

OMBCONTROL NO. 1210-0061

This ICR seeks to request an extension without change for the information collections currently approved under OMB Control Number 1210-0061.

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 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.

Section 406 of ERISA prohibits various transactions between a plan and certain related parties. Those parties in interest described in section 3(14) of ERISA and disqualified persons described in section 4975(e)(2) of the Code, such as plan fiduciaries, sponsoring employers, unions, service providers and affiliates, may not engage in a transaction described in section 406 of ERISA and section 4975(c) of the Code with a plan without an exemption. Specifically, these sections prohibit sales, leases, loans, or the provision of services between a party in interest and a plan, as well as a use of plan assets by or for the benefit of, or a transfer of plan assets to, a party in interest or a disqualified person, unless a statutory or administrative exemption applies to the transaction.

This class exemption (PTE 81-8), which was granted on January 23, 1981, exempts from the prohibited transaction restrictions the investment of plan assets in certain short-term investments in debt obligations issued by certain persons who provide services to the plan or are affiliated with such service providers. PTE 81-8 covers four types of short-term investments: banker's acceptances, commercial paper, repurchase agreements and certificates of deposit and contains specific conditions for each type of investment. PTE 81-8 was amended on April 9, 1985, to add a new category of permissible investments—securities issued by banks or their affiliates in cases where the bank is a party in interest

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only by reason of the furnishing of a checking account or related services (such as clearing and recordkeeping services) to the list of acceptable short-term investments in the existing class exemption. In addition, PTE 81-8 was amended to expand the category of sellers with whom the plan may enter into repurchase agreements to include dealers in bank acceptances who report their security positions on a daily basis to the Federal Reserve Bank of New York.

The Department of Labor (the Department) has authority under Reorganization Plan No. 4, pursuant to section 408 of ERISA and section 4975(c) (2) of the Code to grant either individual or class exemptions. In order to grant an exemption under section 408 and section 4975(c) (2), 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 participants and beneficiaries of such plan.

In order to ensure that the 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 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 two basic disclosure requirements. Both affect only the portion of the exemption dealing with repurchase agreements.¹ The first requirement calls for the repurchase agreements between the seller and the plan to be in writing. The repurchase agreements have a duration of one year or less and may be in the form of a blanket agreement that covers the transactions for the year. The written agreement is intended to put the plan on notice of possible fees associated with the redemption of open-end mutual fund shares.

The second disclosure requirement obliges the seller of such repurchase agreements to provide the most recent financial statements to the plan at the time of the sale and as the statements are issued. The seller must also represent, either in the repurchase agreement or prior to each repurchase agreement transaction, that as of the time the transaction is negotiated, there has been no material adverse change in the seller's financial condition since the date the most recent financial statement was furnished that has not been disclosed to the plan fiduciary with whom the written agreement is made.

¹ Repurchase agreements are agreements whereby persons owning securities sell them to a third party and agree to repurchase the securities at a later time at an increased price that reflects an interest factor.

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Without the relief provided by this class exemption, plans would be unable to invest plan assets in certain short term investments in debt obligations issued by certain persons who provide services to the plan or who are affiliated with such service providers. In most instances, the service providers engaging in such transactions with the plans are already providing services to the plan. Additionally, the nature of the transactions is short-term, and will be subject to adequate safeguards to protect plan participants and beneficiaries. Without this class exemption, these types of transactions could not continue, causing the disruption of existing business practices for plans and the businesses that service them.

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 of 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 A.2 above.**

The repurchase agreements are individual contracts between the seller and the plan and are not duplicative of any other disclosure requirements.

5. **If the collection of information impacts small businesses or other small entities,**

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describe any methods used to minimize burden.

As noted above, the information collection requirements are limited to that portion of the class exemption pertaining to repurchase agreements. This class exemption is not oriented towards any particular segment of the plan community. However, due to the complexities associated with the types of short-term investments described in the class exemption, and in particular with the repurchase agreement, which require knowledgeable investment advisors and large amounts of plan assets, the Department anticipates that any significant use of the class exemption will be limited to large plans. Therefore, it is not anticipated that small plans will have the expertise or the plan assets necessary to engage in this type of investment program.

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 disclosure requirements of the class exemption are 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.

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 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**

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

The Department's notice for the Federal Register, as 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) providing the public 60 days to comment on the submission. No public comments were received.

- 9. Explain any decision to provide any payments or gifts 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**

There is no promise of confidentiality of the information. The class exemption requires

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information concerning the possible payment of redemption fees to be included in the investment company's prospectus, and, therefore, available to the plan and 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.

- 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. General, 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.**
 - 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 has two basic information collection requirements, both of which affect only that portion of the exemption dealing with repurchase agreements. The first requirement calls for repurchase agreements between the seller and the plan to be in the form of a written agreement and the second requirement obliges the seller to provide his or her most recent financial statement to the plan at the time of a transaction or to agree in the instrument of the transaction that there has been no material adverse change since the

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last financial statement was furnished. A written agreement insures the protection of plans (and their participants and beneficiaries) by defining the rights of the parties to the agreement. The agreement also assists the Department in determining the plan's compliance with the conditions of the exemption.

Written evidence confirming a transaction can most easily be accomplished by the use of preprinted forms. Preprinted forms can be designed to contain most of the necessary information with blanks provided for the individualized information pertaining to the transactions. The seller will complete these forms in-house. The class exemption allows for a repurchase agreement for each transaction or a blanket agreement to cover all such transactions for up to one year. Based on comments received on the proposed election, we assume that plans utilizing this investment vehicle would enter into a blanket agreement each year. We estimate that it would take no more than 15 minutes or 1/4 of an hour to complete a preprinted blanket repurchase agreement due to the limited amount of individualized information that is requested.

Statistics gathered from the 2017 Form 5500 annual reports indicate that there are 95,170 pension plans that have assets in excess of \$5 million and are not fully insured.² Based on the Department's experience, plans with less than \$5 million in assets would typically not have the assets necessary or the investment expertise to engage in these types of short-term investment transactions. This type of investment is normally centered in or around large metropolitan areas where the large banks and investment institutions are located. However, we recognize that large plans may use more than one bank or investment company to handle its assets. Therefore, for purposes of this estimate, we assume that each large plan enters into an average of five repurchase agreements involving different financial institutions each year.

The written agreement consists of a preprinted form prepared by a service provider with blanks provided for the individualized information pertaining to the transactions. Since the class exemption has been in effect for over 35 years, the Department assumes that every service provider utilizing it has already created such a form; therefore, the Department is not considering such costs in its estimates.

The Department estimates that 10 minutes of financial professional staff time will be required for completion of the individualized information and five minutes of clerical staff time will be required to mail the form to the plan. Thus, each preparation is estimated to require 15 minutes. The Department estimates that the hour burden associated with completing written repurchase agreements will be 118,963 hours a year (95,170 plans x 5 agreements x 1/4 hour). Of that time, 79,308 hours will be spent by financial professionals and 39,654 hours by clerical staff.

² See Private Pension Plan Bulletin Abstract of 2017 Form 5500 Annual Reports, Table B2.

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The estimated equivalent cost of the hour burden is \$15,322,370. This cost breaks down into \$13,135,839 for financial professionals (at \$165.63 per hour)³ and \$2,186,531 for clerical staff (at \$55.14 per hour).⁴

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 Any discrepancies in the calculations are attributable to rounding.

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Estimated Annualized Respondent Cost and Hour Burden

Activity	No. of Respondents	No. of Responses per Respondent	Total Responses	Average Burden (Hours)	Total Burden (Hours)	Hourly Wage Rate	Total Burden Cost
Clerical- Mail the form to the plan	95,170	5	475,850	5/60	39,654	\$55.14	\$114,109
Financial Professional- Completion of individualized information	95,170	5	475,850	10/60	79,308	\$165.63	\$0
Unduplicated Total	95,170	5	475,850	15/60	118,963	--	\$114,109

The Department estimates that the requirement to provide audited and unaudited financial statements as they become available on a normal business basis will add no burden. The class exemption covers only those repurchase agreements for which the seller of the underlying securities is a bank that is supervised by the United States or a State, a broker-dealer registered under the Securities and Exchange Act of 1934, or a dealer who makes primary markets in securities of the United States government and reports its position daily with respect to government securities and borrowing thereon to the Federal Reserve Bank of New York. Dealers of non-governmental securities are required by Securities and Exchange Commission (SEC) rules to provide current financial statements to their shareholders. However, of the three types of security-selling entities which the class exemption covers, all deal in both government and non-government securities and all would be covered by the SEC rule. The requirement to provide a financial statement or a verification of no change since the last financial statement would not create an additional paperwork burden beyond that which is already required by the SEC; therefore, no paperwork burden has been accounted for under this requirement.

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 and 14).

- **The cost estimate should be split into two components: (a) a total capital and start up cost component (annualized over its expected useful life); and (b) a total operation and maintenance and purchase of service component. The estimates should take into account costs associated with generating,**

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maintaining, and disclosing or providing the information. Include descriptions of methods used to estimate major cost factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software; monitoring, sampling, drilling and testing equipment; and record storage facilities.

- If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of purchasing or contracting out information collection services should be a part of this cost burden estimate. In developing cost burden estimates, agencies may consult with a sample of respondents (fewer than 10), utilize the 60-day pre-OMB submission public comment process and use existing economic or regulatory impact analysis associated with the rulemaking containing the information collection, as appropriate.**
- Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government, or (4) as part of customary and usual business or private practices.**

The Department assumes that repurchase agreement forms will be completed by in-house staff. The Department estimates that 56.4 percent of disclosures will be delivered electronically.⁵ Therefore, the cost burden for mailing approximately the remaining 43.6 percent of the 475,850 repurchase agreements, at \$0.55 per agreement, is \$114,109 (475,850 x \$0.55 x 43.6%).

14. Provide estimates of the annualized cost to the Federal Government. Also, provide a description of the method used to estimate cost, which should include

⁵According 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 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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quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), 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 into 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.

According to 2017 Form 5500 data (the most recent data available), more plans exist that are likely to use the exemption compared with the last submission. This increase in the number of plans (respondents) produces an increase in the hour burden. The Department has updated its assumptions regarding the use of electronic disclosure; assuming increased usage relative to the last submission.

16. For collections of information whose results will be published, outline plans for tabulations, 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.

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.