

**SUPPORTING STATEMENT FOR
FINANCIAL FACTORS IN SELECTING PLAN INVESTMENTS**

OMB CONTROL NUMBER 1210-0162

This ICR seeks for an approval of a new collection of information under OMB Control Number 1210–0162.

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.**

Title I of the Employee Retirement Income Security Act of 1974 (ERISA) establishes minimum standards for the operation of private-sector employee benefit plans and includes fiduciary responsibility rules governing the conduct of plan fiduciaries. In connection with ESG (environmental, social, and governance) investing, the Department of Labor (Department) has a longstanding position that plan fiduciaries' decisions on investments and investment courses of action must be focused solely on pecuniary factors and the interests of plan participants and beneficiaries in financial benefits under the plan. Thus, under ERISA fiduciaries may not accept lower expected returns or take on greater risks in order to pursue non-pecuniary benefits.

The final rule addresses the application of the statutory prudence and loyalty duties under sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA to decisions by plan fiduciaries on plan investments or investment courses of action, including in the case of an ERISA section 404(c) plan or other individual account plan selection of a designated investment alternative under the plan. Under the final rule, plan fiduciaries may select investments using non-pecuniary factors only when they are unable to distinguish alternative investment options based on pecuniary considerations after completing an appropriate evaluation. The final rule also prohibits an investment fund, product, or model portfolio from being added or retained as, or as a component of, a qualified default investment alternative described in 29 CFR 2550.404c-5 if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.

- 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 IC requires plan fiduciaries to meet a documentation requirement when they are unable to distinguish among alternative investments based on pecuniary factors alone and base their investment decision on non-pecuniary factors after completing an appropriate evaluation. In such circumstances, the fiduciary must document (i) why pecuniary factors were not sufficient to select the investment or investment course of action;

Financial Factors in Selecting Plan Investments

OMB Control Number: 1210-0162

OMB Expiration Date:

(ii) how the selected investment compares to the alternative investments with regard to the certain factors listed in the final rule; and (iii) how the chosen non-pecuniary factor or factors are consistent with the interests of participants and beneficiaries in their retirement income or financial benefits under the plan. The documentation requirement is intended to prevent fiduciaries from improperly finding economic equivalence and making decisions based on non-pecuniary benefits without a proper analysis and evaluation.

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.

Use of electronic methods of compliance is neither required nor precluded by the terms of this rule. This IC constitutes recordkeeping. The Department has assumed that the IC under this rule will be performed by plans or sophisticated financial entities that act on behalf of employee benefit plans in connection with the purchase of securities and that generally will establish and maintain recordkeeping systems, and comply with disclosure requests, by electronic means. The Department's estimates therefore take into account the use of electronic recordkeeping in establishing the burden of this IC.

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 IC is not duplicated in any other federal statute or regulation.

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

For purposes of this IC (and more generally for purposes of economic analysis under ERISA), the Department considers "small entities" to be employee benefit plans with fewer than 100 participants (i.e., "small plans"). The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

While the rule is expected to affect small pension plans, it is not likely that there would be a significant economic impact on these plans. The final regulation provides guidance on how fiduciaries can comply with sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA when investing plan assets. The Department believes most plans are already fulfilling the requirements in the course of following the Department's prior guidance.

Financial Factors in Selecting Plan Investments

OMB Control Number: 1210-0162

OMB Expiration Date:

Plans are required to document selections of investments based on non-pecuniary factors where the alternative investment options could not be distinguished on the basis of pecuniary factors alone after an appropriate evaluation. The Department believes that alternative investment options that are unable to be distinguished on the basis of pecuniary factors alone should occur very rarely in practice. The Department estimates a cost of less than \$380 per affected plan needing to document their decisions for plan fiduciaries and clerical professionals to fulfill the documentation requirement.

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 purpose of the regulation is to set forth a regulatory structure to assist ERISA fiduciaries in navigating these ESG investment trends and to separate the legitimate use of risk-return factors from inappropriate investments that sacrifice investment return, increase costs, or assume additional investment risk to promote non-pecuniary benefits or objectives. These requirements help ensure that plan assets are protected, that the interests of participants and beneficiaries in the plan benefits are safeguarded, and that the Department can monitor the named fiduciary's compliance.

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.

There are no special circumstances that require the collection to be conducted in a manner inconsistent with the guidelines in 5 CFR 1320.5.

- 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 C.F.R. § 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 the required 60-day notice soliciting comments on the IC in the preamble to the Notice of Proposed Rulemaking published in the Federal Register on June 30, 2020 (85 FR 39113). In response, the Department received over 1,100 written comments during the open comment period from a variety of parties, including members of Congress, plan sponsors and fiduciaries, plan service and investment providers. The Department also received over 7,600 submissions as part of six separate petitions (i.e., form letters). Responses to all comments are discussed in the preamble of the final rule. The comments can be found at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95>.

The Department received several comments that specifically addressed the paperwork burden analysis of the IC contained in the proposed rule. The Department took into account such public comments in developing the revised paperwork burden analysis for the final rule discussed below.

Some commenters suggested that the Department underestimated the cost associated with documenting the required information. Specifically, they asserted that the Department

Financial Factors in Selecting Plan Investments

OMB Control Number: 1210-0162

OMB Expiration Date:

underestimated the labor rates for attorneys and the time required to document the required information. The Department disagrees with both of these comments. Instead of using an attorney labor rate, the Department based its estimate on a plan fiduciary's labor rate, because this task could be performed by attorneys or other types of professionals including financial professionals. The labor rate estimates were based on estimates from the Bureau of Labor Statistics (BLS). While the Department understands that hiring outside services can come at a higher cost, the Department believes that using the BLS estimate is appropriate for purposes of this analysis.

Commenters claimed that the two hours estimated to document when alternative investments cannot be distinguished based on pecuniary factors underestimated the burden. The Department continues to believe that a prudent process required by ERISA should already include the burden of research and consideration. The burden associated with this ICR is for plan fiduciaries to meet the final rule's specific documentation requirement. In the final rule, the Department explicitly set forth the three items that must be documented. Stating precisely what is required to be documented should help lower the cost of compliance, because fiduciaries know the specific information that must be documented. In response to the comments, even as the burden of the rule has been reduced, the quantified costs estimate has not.

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.

There is no assurance of confidentiality provided to respondents.

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:

Financial Factors in Selecting Plan Investments

OMB Control Number: 1210-0162

OMB Expiration Date:

- **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.**

According to a 2018 survey by the NEPC, approximately 12 percent of private pension plans have adopted ESG investing.¹ Another survey, conducted by the Callan Institute in 2019, found that about 19 percent of private sector pension plans consider ESG factors in investment decisions.² Both of these estimates are calculated from samples that include both defined benefit (DB) and defined contribution (DC) plans. Some DB plans that consider ESG factors will not be affected by the final rule because they focus only on the financial aspects of ESG factors, rather than on non-pecuniary objectives. In order to generate an upper-bound estimate of the costs; however, the Department assumes that 19 percent of DB plans will be affected by the final rule and 19 percent of DC plans with investments that are not participant directed will be affected.

Furthermore, according to the Plan Sponsor Council of America, about three percent of 401(k) and/or profit sharing plans offered at least one ESG-themed investment option in 2018.³ Vanguard's 2018 administrative data show that approximately nine percent of DC plans offered one or more "socially responsible" domestic equity fund options.⁴ In a comment letter, Fidelity Investments reported that 14.5 percent of corporate DC plans with fewer than 50 participants offered an ESG option, and that the figure is higher for large plans with at least 1,000 participants. Considering these sources together, the Department assumes that nine percent of participant-directed individual account plans

1 Brad Smith & Kelly Regan, *NEPC ESG Survey: A Profile of Corporate & Healthcare Plan Decisionmakers' Perspectives*, NEPC (Jul. 11, 2018), <https://cdn2.hubspot.net/hubfs/2529352/files/2018%2007%20NEPC%20ESG%20Survey%20Results%20.pdf?t=1532123276859>.

2 *2019 ESG Survey*, Callan Institute (2019), www.callan.com/wp-content/uploads/2019/09/2019-ESG-Survey.pdf.

3 *62nd Annual Survey of Profit Sharing and 401(k) Plans*, Plan Sponsor Council of America (2019).

4 *How America Saves 2019*, Vanguard (June 2019), <https://institutional.vanguard.com/iam/pdf/HAS2019.pdf>.

Financial Factors in Selecting Plan Investments

OMB Control Number: 1210-0162

OMB Expiration Date:

have at least one ESG-themed designated investment alternative and will be affected by the final rule.

Thus, there are 8,905 DB plans and 17,676 DC plans with ESG investments that are not participant directed, and 52,378 participant-directed individual account plans, according to the most recent Form 5500.⁵ These plans and their service providers could be affected by the final rule. The Department does not have data regarding the frequency that documentation would be required because alternative investments cannot be distinguished on the basis of pecuniary factors after completing an appropriate evaluation, and the fiduciary chooses one of the investments on the basis of a non-pecuniary factor. The Department, however, believes such occurrences will be rare and models the burden using one percent of plans with ESG investments as needing to comply with the documentation requirement.

While DB plans may change some investments at least annually, DC plans may do so less frequently. For this analysis, DC plans are assumed to conduct a request for proposal for their service providers and investment alternatives about every three to five years. For this analysis DC plans are estimated to make changes every three years although they could do so more frequently if needed. Therefore, the Department estimates that in a year, 89 DB plans and 59 DC plans with ESG investments that are not participant directed, and 175 participant-directed DC plans with ESG-themed investment options will encounter alternative investment options that cannot be distinguished on the basis of pecuniary factors after an appropriate evaluation.

Documentation Requirements

The final rule provides that if after completing an appropriate evaluation, alternative investments cannot be distinguished on the basis of pecuniary factors and the fiduciary chooses one of the investments on the basis of a non-pecuniary factor, the fiduciary must document why pecuniary factors were not sufficient to select the investment or investment course of action, how the selected investment compares to the alternative investments with regard to certain factors listed in the rule, and how the chosen non-pecuniary factor or factors are consistent with the interests of participants and beneficiaries in their retirement income or financial benefits under the plan. The Department believes that much of the information needed to fulfill this requirement is generated in the normal course of business, but some plans may need additional time to ensure records are properly maintained and meet the standard required by the final rule.

The Department estimates that plan fiduciaries and clerical staff will each spend, on

⁵ DOL calculations based on statistics from U.S. Department of Labor, Employee Benefits Security Administration, "Private Pension Plan Bulletin: Abstract of 2018 Form 5500 Annual Reports," (forthcoming 2020), (46,869 DB plans * 19% = 8,905 DB plans; 93,033 DC Plans * 19% = 17,676 DC plans; 581,974 * 9% = 52,378 individual account plans with participant direction)

Financial Factors in Selecting Plan Investments
OMB Control Number: 1210-0162
OMB Expiration Date:

average, two hours of labor to maintain the needed documentation. This results in an annual burden estimate of 1,290 hours, with an equivalent cost of \$122,115 for DB plans and DC plans with ESG investments. Plans that rely on service providers may incur a lower cost due to economies of scale. The Department does not know exactly how many plans use a service provider; therefore, it estimated such costs on a per plan basis.

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
DB plans- Plan fiduciaries maintain documentation	89	1	89	2	178	\$134.21	\$0
Non participant-directed DC plans- Plan fiduciaries maintain documentation	59	1	59	2	118	\$134.21	\$0
Participant-directed DC plans- Plan fiduciaries maintain documentation	175	1	175	2	349	\$134.21	\$0
DB plans- Clerical staff maintain documentation	89	1	89	2	178	\$55.14	\$0
Non participant-directed DC plans- Clerical staff maintain documentation	59	1	59	2	118	\$55.14	\$0
Participant-directed DC plans- Clerical staff maintain documentation	175	1	175	2	349	\$55.14	\$0
Unduplicated Total	323	1	323	4	1,290	--	\$0

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

- **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, 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.**

There is no cost burden associated with this IC.

- 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 ongoing costs to the federal government associated with this IC.

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

This is a new collection of information.

Financial Factors in Selecting Plan Investments
OMB Control Number: 1210-0162
OMB Expiration Date:

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.

Not applicable.

18. Explain each exception to the certification statement.

There are 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.