

**SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT OF 1995:
PROHIBITED TRANSACTION CLASS EXEMPTION 91-38**

This ICR seeks approval for an extension of an existing control number.

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) (29 U.S.C. section 1108(a)) 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 an exemption under section 408, the Department must determine that the exemption is: (1) administratively feasible; (2) in the interests of the plan and its participants and beneficiaries; and, (3) protective of the rights of the participants and beneficiaries of such plan.

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

Prohibited Transaction Class Exemption (PTE) 91-38 provides an exemption from the restrictions of sections 406(a), 406(b)(2) and 407(a) of ERISA and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A), (B), (C), or (D) of the Code for certain transactions between a bank collective investment fund in which an employee benefit plan has invested assets and persons who are parties in interest to the employee benefit plan, as long as the plan’s total participation in the collective investment fund does not exceed 10% of the total assets in the collective investment fund. In addition, the bank managing the common investment fund must not itself be a party in interest to the participating plan, the terms of the transaction must be at least as favorable to the collective investment fund as those available in an arm’s length transaction with an unrelated party, and the bank must maintain records of the transactions for six years and make the records available for inspection to specified interested persons (including the Department and the Internal Revenue Service).

- 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 information collections involve recordkeeping and disclosure on request to the Department and other interested persons. The information collection requirements allow the Department, the Internal Revenue Service, and other interested persons to verify that the bank collective investment fund has complied with the conditions of the exemption. These conditions are necessary, as required under section 408(a) of ERISA, to ensure that respondents rely on the exemption only in the circumstances protective of plan participants and beneficiaries.

- 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.**

ERISA Section 2520-107-1 establishes standards concerning the use of electronic media for maintenance and retention of records. Under these rules, entities such as banks and broker/dealers covered under Title I of ERISA may use electronic media to satisfy disclosure and recordkeeping obligations, subject to specific safeguards. Based on its experience and expert knowledge, the Department believes that the respondents will use electronic systems to create, maintain, and disclose the required records. The Department has taken the expected use of such automated systems into account in developing the burden estimates described in item 12, below.

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

Banks already maintain records of these types of transactions as a matter of usual and customary business practices and in order to satisfy other requirements of state and federal law. Such records would satisfy this recordkeeping requirement, and therefore there is no duplication of effort.

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

The recordkeeping requirement is only imposed on those banks maintaining collective investment funds that choose to rely on the exemption in order to conduct business with

an individual or entity that is a party in interest of a plan invested in the fund. These banks are generally large institutions, and the exemption is therefore unlikely to have an impact on small businesses or entities.

6. Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.

The information collection requirements are only required if banks elect to obtain the benefit of relying on the class exemption. The frequency of the information collection is dependent on the occurrence of a transaction for which the exemption is necessary, not on a predetermined time period. Eliminating the information collection would make it difficult to ensure compliance with the conditions 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.**

The six-year recordkeeping requirement is consistent with requirements of section 107 of ERISA as well as general recordkeeping requirements for tax information under the Code. Because this exemption is granted under section 4975(c) of the Code (as well as section 408 of ERISA), the exclusion of tax records from the three-year guideline for

record retention set forth in 5 CFR 1320.6 is applicable. The recordkeeping requirement is also consistent with other statutory provisions of ERISA.

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.

As required by 5 CFR 1320.8 (d), the Department published a Federal Register notice on November 9, 2021 (86 FR 62208) providing the public with 60 days to comment on the proposed extension of the information collection. No comments were received.

9. **Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.**

No payment or gift is provided.

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.**

None.

12. **Provide estimates of the hour burden of the collection of information. The statement should:**
- **Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.**
 - **If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item 13.**
 - **Provide estimates of annualized cost to respondents for the hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here.**

The exemption requires banks and trusts sponsoring collective investment funds that enter into transactions with parties in interest to maintain records pertaining to such transactions for six years and make them available for inspection to specified interested persons (including the Department and the Internal Revenue Service).

The Department has assumed that the recordkeeping required by this class exemption is part of the usual and customary business practices of banks and trusts. The exemption therefore imposes only a small additional burden to review existing records and provide them to interested persons upon request. These records are typically created and maintained in an electronic format and are available during the normal course of business to employees who may generally require ongoing access.

Based on information provided in the 2019 Form 5500 Annual Report, the Department estimates that approximately 9,332 banks and trusts currently offer collective investment funds that may rely on the exemption. Although there is no reliable source for data on the number of transactions subject to the exemption, the Department's experience leads it to believe that requests to review pertinent records are rare. For purposes of this burden analysis, the Department has assumed that each bank or trust will need approximately 10 additional minutes, as a result of the exemption, to review records and produce them for inspection in order to satisfy the additional information collection burden of this exemption, producing an estimated annual hour burden of 1,555 hours (9,332 banks x 0.167 hours/bank).

The equivalent cost of the annual hour burden would be \$85,901 based on a wage rate of \$55.23 per hour for a clerical person's time¹ (9,332 banks x 0.167 hours/bank x \$55.23/hours).

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 staff review records and produce them for inspection	9,332	1	9,332	10/60	1,555	\$55.23	\$85,901
Total	9,332	1	9,332	10/60	1,555	-	\$85,901

13. Provide an estimate of the total annual cost burden to respondents or record keepers resulting from the collection of information. (Do not include the cost of any hour burden shown in Items 12 or 14).

- The cost estimate should be split into 2 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

¹ Internal DOL calculation based on 2020 labor cost data. 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-eb-sa-opr-ria-and-pra-burden-calculations-june-2019.pdf>

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 has assumed that this information collection will be handled in-house by respondents' staff. The recordkeeping itself is presumed to be part of the usual and customary practices of banks and trusts, and, because of the prevalence of electronic recordkeeping systems in the affected industries, the Department believes that the additional burden of the requirement to maintain records for six years is nominal. As a result of these assumptions, there is no apparent additional cost burden for this exemption.

- 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.**

This exemption requires no reporting to the federal government and, as a result, does not impose annual costs on the government.

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

The hour burden for this information collection is being increased from 1,287 hours to 1,555 hours due to the estimated number of respondents increasing, from 7,719 to 9,332. The equivalent costs of the hour burden increased due to updating the labor rate.

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

- 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 identified in the "Certification for Paperwork Reduction Act Submission."**

Not applicable; no exceptions to the certification statement.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

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