SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT OF 1995 SUBMISSION: PROHIBITED TRANSACTION CLASS EXEMPTION 88-59, RESIDENTIAL MORTGAGE FINANCING ARRANGEMENTS

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 ERISA authorizes the Secretary of Labor "to grant a conditional or unconditional exemption of any fiduciary or class of fiduciaries or transactions, from all or part of the restrictions imposed by section 406 and 407(a)." In order to grant such exemptions under 408(a), however, the Department must determine that the exemption is administratively feasible, in the interest of the plan and its participants and beneficiaries, and protective of the rights of participants and beneficiaries. To insure the exemption is not violated, that the rights of participants and beneficiaries are protected, and that compliance with exemption's conditions is taking place, the Department often requires information collection pertaining to the exempted transactions.

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 Internal Revenue Code (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 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) 88-59, which amended and replaced PTE 82-87, permits employee benefit plans to invest plan assets in mortgage financing to purchasers of residential dwelling units, including multi-family residential units, by making or participating in loans directly or by purchasing such loans from a third party that is a party in interest to the plan. The exemption also allows the receipt by a plan of a fee in exchange for issuing such loan commitment. These transactions would otherwise be prohibited under ERISA's prohibited transaction provisions. Without the relief provided by the class exemption, employee benefit plans would be barred from investing in residential mortgages involving parties in interest to the plan. Such a result would not be in the best interest of plans, their participants and beneficiaries.

The exemption also requires the agreements regarding the securities loan transaction or transactions and the compensation arrangement for the lending fiduciary to be contained in written documents. Individual agreements are not required for each transaction; rather the compensation agreement may be made in the form of a master agreement covering a series of transactions.

In order to take advantage of the relief provided by a class exemption, the plan seeking relief must maintain, for the duration of a covered loan transaction, records that verify that the conditions of the exemption have been met. Such records could include, for example, showing the identities of the borrower, lender, any developer or builder involved, the qualifications of the lender, the written acknowledgment of the fiduciary obligation of any real estate manager involved in the transaction, evidence of the type of residential dwelling unit involved, and information concerning comparable mortgages and expenses offered at the time of the commitment.

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 exemption allows employee benefit plans to participate in several different types of residential mortgage financing transactions, provided certain conditions are met. Without this exemption, these transactions would be prohibited under section 406(a) of ERISA and under the prohibited transaction provisions of section 4975 of the Internal Revenue Code (the Code). The five categories of transactions permitted under the exemption are: (1) issuance of commitments by a plan for the provision of mortgage financing to purchasers of residential dwelling units; (2) receipt by a plan of a fee for the issuance of the commitments; (3) the actual making or purchase of a mortgage loan or participation interest therein pursuant to the commitment; (4) the direct making or purchase of a mortgage loan or participation interest therein other than where a commitment has been issued; and (5) the sale, exchange, or transfer of a mortgage loan or participation interest therein by a plan prior to the maturity date of the instrument, provided that the interest sold, exchanged, or transferred represents the plan’s entire interest in such investment.

Among other conditions, the exemption requires a plan to maintain for the duration of any loan made pursuant to this exemption all records necessary to determine whether conditions of the exemption have been met and to make such records available for examination on request by any trustee, investment manager, participant or beneficiary of the plan, or duly authorized agents of the Department or the IRS. This recordkeeping requirement enables interested persons, including trustees, investment managers, participants and beneficiaries of the plan, as well as agents of the Department and IRS, to monitor an exempted party's compliance during the entire period for which an action may be brought to seek redress of a breach of fiduciary duty with respect to the transaction. The primary purpose of the exemption's recordkeeping condition is to enable participants and other interested persons to exercise oversight over compliance with the conditions of the exemption.

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 exemption. Inasmuch as plans and financial entities that engage in mortgage financing are generally sophisticated entities, the Department has assumed that this recordkeeping will be undertaken through electronic databases and systems, which reduce the burden of the information collection.

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

It is likely that this recordkeeping requirement overlaps with other federal or state requirements pertaining to mortgage lending, such as those that pertain to lenders participating in the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, or in the mortgage insurance program under the Federal Housing Act. However, duplicate recordkeeping would not typically result because an entity would be able to satisfy any duplicative requirements through a single system of recordkeeping.

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

Although this exemption is more likely to affect large plans with diverse investment programs, small plans may also from time to time make residential mortgage investments. The burden of the exemption is expected to be minimal for all plans because the required records are expected to be kept in the ordinary course of business by most 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.

The recordkeeping requirements are imposed only with respect to transactions voluntarily entered into by the transacting parties; the frequency of response is therefore dependent on the occurrence of a transaction, not a predetermined time-period. In the absence of the recordkeeping requirement, fiduciaries, participants and beneficiaries, and the Department, would not have access to sufficient information to verify compliance with the terms of the exemption.

7. Explain any special circumstances that would cause an information collection to be conducted in a manner:

- **requiring respondents to report information to the agency more often than quarterly;**
- **requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;**
- **requiring respondents to submit more than an original and two copies of any document;**
- **requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;**
- **in connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;**
- **requiring the use of a statistical data classification that has not been reviewed and approved by OMB;**
- **that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or**
- **requiring respondents to submit proprietary trade secret, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.**

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 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 published a notice in the Federal Register, as required by 5 CFR 1320.8 (d), on March 17, 2022 (87 FR 15267), soliciting comments on the request for an extension of approval of this information collection and providing the public with 60 days to submit comments. No comments were received from the public in response to the notice.

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

There are no payments or gifts 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:

- **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.**

The Department has estimated that about 2,289 employee benefit plans hold residential mortgage loans. Using 1998 Form 5500 filings, the Department estimates the fraction of non-participant loans that have residential mortgages in them at 30%.[1] Using 2007 Form 5500 filings, the Department estimates that the fraction of pension plans that have non-participant loans is approximately 1% and the ratio of non-participant loans in pension plans vs. welfare plans is 1.04.[2] This is used as a basis for incorporating recent trends in filings.[3] Although the number of loans held by each plan is not known, we assume that

1 1998 is the most recent year that non-participant loans were disaggregated into categories that included residential mortgages and commercial mortgages. Only large plans (>100 participants) that year filed information that was for this estimate. 388 of the large plans held residential mortgages and another 515 held commercial mortgages that year. The Department assumes that 25% of the commercial mortgages (129) were for multi-family residential loans (covered under this exemption). Thus, the estimated total number of plans that had loans subject to this exemption was 517. Overall, there were 1713 plans that held non-participant loans. The conditions provided by this exemption were applicable to approximately 30% of these plans (517/1713).

2 Beginning with the 2009 Form 5500, small plans had the option of filing the Form 5500-SF, which does not include information on non-participant loans. Therefore, the Department is no longer able to count the total number of plans with non-participant loans. Data from prior Form 5500 submission years indicate that approximately 1 percent of pension plans have non-participant loans. Welfare plans also offer non-participant loans, and the ratio of pension plans to welfare plans offering non-participant loans is approximately 1.04.

3 In 2019 (the most recent Form 5500 bulletin data available), there were 733,678 pension plans. 733,678 x 30% x

each plan owns an average of five loans. The class exemption's only information collection requirement obliges plans entering into transactions covered by the exemption to retain all records pertaining to such transactions for the duration of the loan. Because of the ERISA annual reporting requirements and the state and federal regulation of mortgage lenders, we have further assumed that the records required by this class exemption are the same records kept in the normal course of business by plans. Therefore, the estimated time spent to maintain records consistent with the exemption for each transaction would be minimal. We estimate that plans will spend an additional five minutes of clerical time per year for each loan for this recordkeeping requirement. Five minutes per loan for each of the estimated 11,445 loans plans[4] amounts to a total of 954 hours per year.[5]

The Department assumes that it will that take a lawyer 30 minutes per loan plan to prepare and review the agreements. The total hour burden for legal staff, at an hourly rate of $147.32,[6] to prepare and review the agreements will be 5,723 hours (11,445 plans x 30 minutes) at an equivalent cost of $843,039 (11,445 plans x 30 minutes x $147.32).

The Department also assumes that it will take 5 minutes per loan plan for a clerical worker to package and mail the agreements. The total hour burden for clerical staff, at an hourly rate of $58.66, to package and mail the agreements will be 954 hours (11,445 plans x 5 minutes) at equivalent cost of $55,947 (11,445 plans x 5 minutes x $58.66).

Finally, the Department assumes that it will take 5 minutes per loan plan for a clerical worker to prepare recordkeeping. The total hour burden for clerical staff, at an hourly rate of $58.66, be 954 hours (11,445 plans x 5 minutes) at an equivalent cost of $55,947 (11,445 plans x 5 minutes x $58.66).

Therefore, the total annual hour burden for the collection of information will be 7,630 hours with an equivalent cost of $954,964.

Estimated Annualized Respondent Cost and Hour Burden

1% x 1.04 = 2,289. Thus, the total estimated number of plans is 2,289.

4 2,289 plans x 5 loans per plan = 11,445 loans.

5 Any discrepancies may occur from rounding figures in this summary but not in the actual calculations.

6 Internal DOL calculation based on 2021 labor cost data. For a description of DOL'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

Activity	No. of Respondents	No. of Responses per Respondent	Total Responses	Average Burden (Hours)	Total Burden (Hours)	Hourly Wage Rate	Total Burden Cost
Record keeping by clerical staff	2,289	5	11,445	5/60	954	$58.66	$55,947
Prepare and review agreement by lawyer	2,289	5	11,445	30/60	5,723	$147.32	$843,039
Package and mail by clerical staff	2,289	5	11,445	5/60	954	$58.66	$55,947
Total	2,289	-	11,445		7,630 (Rounded in ROCIS)	-	$954,933

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**

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 cost burden resulting from the information collection derives solely from the material and postage costs for the distribution of loan plans. These costs were estimated at $8.95 per priority or overnight domestic mailing of the documents and $0.05 cost of printing per page that results $0.50 for the 10 pages of the document. For the 11,445 loan plans, about 10 percent or 1,145 loan plans are assumed to be sent via mail. The cost for mailing is estimated as $10,816.[7]

14. Provide estimates of annualized cost to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies also may aggregate cost estimates from Items 12, 13, and 14 in a single table.

There are no costs to the Federal government associated with this information collection.

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

This ICR contains no program changes. In 2019, there were 733,678 pension plans, which is an increase from the previous information collection, which was 702,540 pension plans. Based on the number of pension plans, the estimated number of loan plans or responses increased in this information collection.

The Department has also included the hour and cost burden associated with preparing and mailing the loan plans. As a result, the hour burden and cost burden has increased in this information collection. Finally, the Department has updated the wage rates of the clerical staff and legal professionals.

7 Mailing cost is calculated as: 10% of 11,445 x ($8.95 postage charge for priority mail + $0.05 per page x 10 pages) = $10,816.

16. For collections of information whose results will be published, outline plans for tabulation, and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.

The results of the collection of information will not be published.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.

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

18. Explain each exception to the certification statement identified in Item 19.

There are 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.