

PTE 86-128 (Securities Broker-Dealers)
OMB Number 1210-0059
OMB Expiration Date: 08/31/2025

**SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT OF 1995:
PTE 86-128 (AGENCY TRANSACTIONS DIRECTED BY FIDUCIARIES)**

This information collection request (ICR) seeks approval for a revision 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) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code) authorizes the Secretary of Labor and the Secretary of the Treasury to grant a conditional or unconditional exemption of any fiduciary, disqualified person or class of fiduciaries, orders of disqualified persons or transactions, from all or part of the restrictions imposed by sections 406 and 407(a) of ERISA and from 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.

Prohibited transaction class exemption (PTE) 86-128, which was granted on November 18, 1986, exempts from the prohibited transaction restrictions a fiduciary's use of its authority to cause a plan (including an individual retirement account) or a pooled investment fund to pay a fee to the fiduciary for effecting or executing of securities transactions as agent for the plan or fund. It also permits a fiduciary to act as an agent in an agency cross transaction for both the plan and one or more other parties to the transaction, and to receive reasonable compensation for effecting or executing the agency cross transaction from one or more of the other parties to the transaction. This class exemption replaced two prior class exemptions, PTE 79-1 and PTE 84-46.

Based on an application submitted by the Securities Industry Association, in 2002, the Department amended PTE 86-128 to make the exemption available to fiduciaries that are discretionary plan trustees¹, subject to certain additional conditions. The conditions include a minimum plan size (at least \$50 million in total net assets), and at least annual reporting to the authorizing fiduciary of both dollar and cents-per-share commissions paid to brokers that are: a) affiliated, and b) non-affiliated with the trustee.

¹Prior to the 2002 amendment, PTE 86-128 was not available to any person (or any affiliate thereof) who was a discretionary trustee, plan administrator, or an employer, any of whose employees were covered by the plan.

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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; or the 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. In addition, unless exempted, section 406(b) of ERISA prohibits a fiduciary's dealing with the assets of a plan in his or her own interest.

Although, section 408(b)(2) of ERISA provides a conditional statutory exemption permitting a plan to make reasonable contractual arrangements with parties in interest for the provision of services necessary for the plan's operations, the statutory exemption does not extend to an act of self-dealing described in section 406(b) of ERISA. A fiduciary performing both investment management and brokerage services for the same plan is in a position where his or her decision, as an exercise of fiduciary discretion, to engage in a portfolio trade on behalf of the plan would result in the plan's paying the fiduciary an additional fee for performance of the brokerage services. In the Department's view, such a decision involves an act of self-dealing prohibited by section 406(b) of ERISA and not exempt by section 408(b)(2) of ERISA. The Department of Labor has authority pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code to grant either individual or class exemptions. In order to grant a class exemption under section 408(a) 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 class 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.

Section III of the class exemption imposes the following information collection requirements on investment advice providers and the independent plan fiduciaries authorizing the IRA to engage in the transactions with the investment advice providers

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(“authorizing fiduciary”) under the conditions contained in the exemption:

- 1) The authorizing fiduciary must provide the investment advice provider with an advance written authorization for the transactions;
- 2) The investment advice provider must provide the authorizing fiduciary with information necessary to determine whether an authorization should be made, including a copy of the exemption, a form for termination, a description of the investment advice provider’s brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests;
- 3) The investment advice provider must provide the authorizing fiduciary with a termination form, at least annually, explaining that the authorization is terminable at will, without penalty to the plan, and that failure to return the form will result in continued authorization for the investment advice provider to engage in securities transactions on behalf of the plan or IRA;
- 4) The investment advice provider must provide the authorizing fiduciary with either (a) a confirmation slip for each individual securities transaction within 10 days of the transaction containing the information described in Rule 10b-10(a)(1-7) under the Securities Exchange Act of 1934, 17 CFR 240.10b-10 or (b) a quarterly report containing certain financial information including the total of all transaction-related charges incurred by the plan or IRA;
- 5) The investment advice provider must provide the authorizing fiduciary with an annual summary of the confirmation slips or quarterly reports, containing all security transaction-related charges, the brokerage placement practices (if changed), and a portfolio turnover ratio;
- 6) An investment advice provider who is a discretionary trustee must provide the authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis.

These requirements are designed as appropriate safeguards to ensure the protection of the plan assets involved in the transactions, which, in the absence of the class exemption, would not be permitted. These safeguards rely on the prior authorization and monitoring of the broker-fiduciary’s activities by a second plan fiduciary that is independent of the first. They 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.

2023 Proposed Amendments

The Department is proposing to amend PTE 86-128, which currently provides relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered

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transactions. Investment advice providers would instead have to rely on the amended PTE 2020-02 for exemptive relief covering investment advice transactions.

The Department is proposing certain administrative changes to PTE 86-128, which are not directly related to the provision of fiduciary investment advice. The Department is proposing to delete Section IV(a), which provides an exclusion from the conditions of the exemption for certain plans not covering employees, including IRAs. Therefore, investment advice fiduciaries to IRAs would have to rely on another exemption, such as PTE 2020-02, which significantly increases the safeguards to these retirement investors. Fiduciaries that exercise full discretionary authority or control with respect to IRAs could continue to rely on PTE 86-128, as long as they comply with all of the exemption's conditions.

The Department is also proposing to amend Section VI by requiring financial institutions to maintain or cause to be maintained for six years the records necessary for the Department, IRS, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, participants and beneficiaries and IRA owners to determine whether conditions of this exemption have been met.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration for using information technology to reduce burden.

Under 29 C.F.R. § 2520.104b-1(b) of ERISA, “where certain material, including reports, statements, and documents, is required under Part I of the Act and this part to be furnished either by direct operation of law or an individual request, the plan administrator shall use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries.” Section 2520.104b-1(c) establishes the manner in which disclosures under Title I of ERISA made through electronic media will be deemed to satisfy the requirement of § 2520.104b-1(b). Section 2520-107-1 establishes standards 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.

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 reporting requirements of this class exemption are similar in some respects to the

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information required to be disclosed under Rule 10b-10 of the Securities Exchange Act of 1934. The requirements included in this class exemption have been designed so that compliance with the Securities and Exchange Commission (SEC) requirements could be used where applicable. Therefore, the requirements of this class exemption are not duplicative.

2023 Proposed Amendments

It is likely that duplication of recordkeeping requirements exist with some State and federal banking and securities laws. However, no duplicate recordkeeping is required because entities are able to satisfy the requirements of both the exemption and of the other applicable laws through one recordkeeping arrangement.

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

This exemption is needed primarily for brokers in large institutions, who would be most likely to engage in the covered transactions. Even if the broker works for a small firm, the information collection is the minimal burden necessary to protect the assets of the employee benefit plan.

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 PTE 86-128 are only mandatory if a fiduciary that is an investment advice provider or who has an investment advice provider affiliate wishes to utilize the class exemption. The frequency is dependent on the occurrence of such transactions, not on a predetermined time period. This exemption was requested in part by the Securities Industry Association (SIA) on behalf of its members. Eliminating the information collection would make it difficult to ensure that the rights of participants and beneficiaries are being sufficiently protected, as required by Section 408(a).

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,**

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- **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.

In accordance with 5 CFR 1320.11, the proposed exemption provides the public with 30 days to comment on the information collection and burden estimates.

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

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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.**

No assurance of confidentiality was 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.**

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 difference 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.**
- **Provide estimates of annualized cost to respondents for the hour burdens for collection 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.**

Section III of PTE 1986-128 imposes requirements on investment advice providers and the independent plan fiduciaries authorizing the IRA to engage in the transactions with the investment advice providers (“authorizing fiduciary”) under the conditions contained in the exemption:

- 1) The authorizing fiduciary must provide the investment advice provider with an advance written authorization for the transactions;
- 2) The investment advice provider must provide the authorizing fiduciary with information necessary to determine whether an authorization should be made,

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- including a copy of the exemption, a form for termination, a description of the investment advice provider's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests;
- 3) The investment advice provider must provide the authorizing fiduciary with a termination form, at least annually, explaining that the authorization is terminable at will, without penalty to the plan, and that failure to return the form will result in continued authorization for the investment advice provider to engage in securities transactions on behalf of the plan or IRA;
 - 4) The investment advice provider must provide the authorizing fiduciary with either (a) a confirmation slip for each individual securities transaction within 10 days of the transaction containing the information described in Rule 10b-10(a)(1-7) under the Securities Exchange Act of 1934, 17 CFR 240.10b-10 or (b) a quarterly report containing certain financial information including the total of all transaction-related charges incurred by the plan or IRA;
 - 5) The investment advice provider must provide the authorizing fiduciary with an annual summary of the confirmation slips or quarterly reports, containing all security transaction-related charges, the brokerage placement practices (if changed), and a portfolio turnover ratio;
 - 6) An investment advice provider who is a discretionary trustee must provide the authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis.

Using data from 2021 Form 5500, the Department estimates that 1,257 unique plans hired service providers denoting on the Schedule C that they were a discretionary trustee. Further, among these plans, 801 also reported that they provided investment management services or received investment management fees paid directly or indirectly by the plan.² Based on these values, the Department estimates on average, 1,000 plans have discretionary fiduciaries with full discretionary control. As small plans do not file the Schedule C, this estimate may be an underestimate.

The Department estimates that of the estimated 1,000 plans discussed above, 7.5 percent are new accounts or new financial advice relationships.³ Based on these assumptions, the Department estimates that 75 plans would be affected by the proposed amendments to PTE 1986-128.⁴

The Department lacks reliable data on the number of managed IRAs that would

² Estimates based on 2021 Form 5500 data.

³ EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

⁴ The number of new plans is estimated as: 1,000 plans x 7.5 percent of plans are new = 75 new plans

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experience such a transaction in a given year. The Department estimates that there are 10,000 managed IRAs. The Department also does not have data on the number of new IRA accounts that are opened each year. However, in 2022, of the 67.8 million IRA owners, 1.4 million, or approximately 2.1 percent, opened an IRA for the first time.⁵ Inferring from this statistic, the Department estimates that 2.1 percent of IRA accounts are new each year. The Department acknowledges that some IRA owners may have multiple IRAs, and as such, this statistic may underestimate the percentage of new IRAs opened.⁶ This results in an estimate of 210 IRAs that are new accounts or new financial advice relationships.⁷

Finally, the Department estimates that 1,894 investment advice providers will use this exemption.⁸ The following wage rates are assumed an in-house rate of \$159.34 for legal professionals and \$63.45 for clerical staff.⁹

- 1) *Written authorization from the authorizing fiduciary to the investment advice provider*

Authorizing fiduciaries of new plans and IRAs entering into a relationship with an investment advice provider are required to provide the investment advice provider with an advance written authorization to perform transactions for the plan or IRA. The Department estimates that there are approximately 285 plans and IRAs that are new or that enter new arrangements each year.¹⁰ Therefore, the Department estimates that approximately 285 authorizing fiduciaries are expected to send an advance written authorization. It is assumed that a legal professional will spend 15 minutes per plan reviewing the disclosures and preparing an authorization form. This results in an hour burden of 71 hours with an equivalent cost of \$11,353.¹¹

5 Cerulli Associates, *U.S. Retirement End-Investor 2023: Fostering Comprehensive Relationships*, The Cerulli Report.

6 The Department lacks data on the number of IRA owners that own multiple IRAs. To provide scope of magnitude, one source reported that in 2019, 19 percent of IRA owners contributed to both a traditional IRA and Roth IRA. (See Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020*, 27(1) *ICI Research Perspective*, (2021).) This statistic does not account for individuals who own multiple of each type of IRA or those who did not contribute in 2019, but it provides a lower bound.

7 $(10,000 \text{ managed IRAs} \times 2.1 \text{ percent of IRAs are new}) = 210 \text{ IRAs}$.

8 Estimates are based on the SEC's FOCUS filings and Form ADV filings.

9 Internal Department calculation based on 2023 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-ehsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

10 $75 \text{ plans} + 210 \text{ IRAs} = 285 \text{ plans and IRAs that are new or that enter new arrangements each year}$.

11 The burden is estimated as follows: $[(285 \text{ plans and IRAs} \times 15 \text{ minutes per plan or IRA}) \div 60 \text{ minutes}] = 71 \text{ hours}$. A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: $[(285 \text{ plans and IRAs} \times 15 \text{ minutes per plan or IRA}) \div 60 \text{ minutes}] \times \$159.34 \text{ per hour} = \$11,353$.

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To produce and distribute the authorization, the Department assumes that 100 percent of plans and 94.2 percent of IRAs will use traditional electronic methods at no additional burden, and the remaining 5.8 percent of IRAs will be mailed. The Department assumes that clerical staff will spend five minutes preparing and sending the authorization, resulting in an hour burden of approximately 24 hours with an equivalent cost of \$1,507.¹²

In total, the written authorization requirement is expected to result in a total hour burden of 95 hours with an equivalent cost of \$12,860.

| Activity | Burden Hours | Equivalent Burden Cost |
|--------------|--------------|------------------------|
| Legal | 71 | \$11,353 |
| Clerical | 24 | \$1,507 |
| Total | 95 | \$12,860 |

2) *Provision of materials for evaluation of authorization of transaction*

Prior to a written authorization being made, the authorizing fiduciary must be provided by the financial institution with a copy of the exemption, a form for termination of authorization, a description of broker’s placement practices, and any other reasonably available information. This information is assumed to be readily available.

To produce and distribute the materials, the Department assumes that 94.2 percent of financial institutions will use traditional electronic methods at no additional burden, while the remaining 5.8 percent of financial institutions will mail the materials.¹³ The Department estimates that a clerical staff member will spend five minutes to prepare and distribute the required information to the authorizing fiduciary. This information will be sent to the 285 plans and IRAs entering into an agreement with a financial institution, and based on the above, the Department estimates that this requirement results in an hour burden of 24 hours with an equivalent cost of \$1,507.¹⁴

In total, the written authorization requirement is expected to result in a total hour burden

12 The burden is estimated as follows: [(285 plans or IRAs x 5 minutes per plan or IRA) ÷ 60 minutes] = 24 hours; A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(285 plans or IRAs x 5 minutes per IRA) ÷ 60] x \$63.45 = \$1,507.

13 The Department estimates approximately 94.2 percent of retirement investors receive disclosures electronically. This is the sum of the estimated share of retirement investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2 percent) and the estimated share of retirement investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36 percent).

14 The burden is estimated as follows: [(75 plans x 5 minutes per plan) ÷ 60 minutes] + [(210 IRAs x 5 minutes per IRA) ÷ 60 minutes] = 24 hours; A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: {[(75 plans x 5 minutes per plan) ÷ 60 minutes] x \$63.45} + {[(210 IRAs x 5 minutes per IRA) ÷ 60 minutes] x \$63.45} = \$1,507.

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of 24 hours with an equivalent cost of \$1,507.

3) *Provision of an annual termination form*

Each authorizing fiduciary must be supplied annually with a form expressly providing an election to terminate the written authorization. It is assumed that legal professionals with each of the 1,894 investment advice providers will spend on average 15 minutes preparing the termination forms, which results in an hour burden of 474 hours with an equivalent cost of \$75,447.¹⁵

To produce and distribute the termination form to the 10,000 IRAs and 1,000 plans, the Department assumes that 94.2 percent of financial institutions will use traditional electronic methods at no additional burden, while the remaining 5.8 percent of financial institutions will mail the termination forms. The Department estimates that clerical staff will spend five minutes per plan or IRA preparing and distributing the termination forms resulting in an hour burden of 917 hours with an equivalent cost of \$58,163.¹⁶

In total, providing the annual termination form is expected to impose an hour burden of 1,391 hours with an equivalent cost of \$133,610.

| Activity | Burden Hours | Equivalent Burden Cost |
|--------------|--------------|------------------------|
| Legal | 474 | \$75,447 |
| Clerical | 917 | \$58,163 |
| Total | 1,391 | \$133,610 |

4) *Transaction Reporting*

The investment advice provider engaging in a covered transaction must furnish the authorizing fiduciary with either a conformation slip for each securities transaction or a quarterly report containing specified information. As discussed above, the provision of the confirmation already is required under SEC regulations. Therefore, if the transaction reporting requirement is satisfied by sending conformation slips, no additional hour burden will occur.

¹⁵ The burden is estimated as follows: [(1,894 investment advice providers x 15 minutes per financial institution) ÷ 60 minutes] = 474 hours; A labor rate of \$159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,894 investment advice providers x 15 minutes per financial institution) ÷ 60 minutes] x \$159.34 per hour = \$75,447.

¹⁶ The burden is estimated as follows: [(1,000 plans x 5 minutes per plan) ÷ 60 minutes] + [(10,000 IRAs x 5 minutes per IRA) ÷ 60 minutes] = 917 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: {[(1,000 plans x 5 minutes per plan) ÷ 60 minutes] x \$63.45} + {[(10,000 IRAs x 5 minutes per IRA) ÷ 60 minutes] x \$63.45} = \$58,163.

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5) *Annual Statement*

In addition to the transaction reporting requirement, investment advice providers are required to send an annual report to each authorizing fiduciary containing the same information as the quarterly report and also containing all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio. Collecting and generating the information required for the annual report is reported as a cost burden. In addition, it is assumed that the information that must be sent annually could be sent together; therefore, the clerical staff hours required to prepare and distribute the report has been included with the provision of annual termination form requirement. Therefore, no additional hour burden has been reported.

6) *Report of Commissions Paid*

A discretionary trustee must provide an authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis. The collecting and generation of the information for the report of commissions paid is reported as a cost burden. The clerical hour burden to prepare and distribute the report is included with the provision of annual termination form requirement, because both items are required to be sent annually.

7) *2023 Proposed Amendments*

The Department is proposing to amend Section VI to require financial institutions to maintain or cause to be maintained for six years the records necessary for the Department, IRS, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, participants and beneficiaries and IRA owners to determine whether conditions of this exemption have been met.

Each of the 1,894 investment advice providers will maintain these records on behalf of their client plans in their normal course of business. Therefore, the Department has estimated that the additional time needed to maintain records consistent with the exemption will only require about one-half hour, on average annually for a financial manager at an hourly rate of \$190.63 to organize and collate the documents. This results in 947 hours of burden at an equivalent cost of \$180,527.¹⁷ The recordkeeping requirement will also require 15 minutes of clerical time at an hourly rate of \$63.45 to prepare and send the documents for inspection, resulting in 474 hours of burden at an equivalent cost of \$30,044.¹⁸

¹⁷ The burden is estimated as follows: [(1,894 investment advice providers x 30 minutes) ÷ 60 minutes] = 947 hours. A labor rate of \$190.63 is used for a financial manager. The labor rate is applied in the following calculation: [(1,894 investment advice providers x 30 minutes) ÷ 60 minutes] x \$190.63 per hour = \$180,527.

¹⁸ The burden is estimated as follows: 1,894 investment advice providers x 15 minutes = 474 hours. A labor rate of \$63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(1,894 investment

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In total, the recordkeeping requirement is expected to impose an hour burden of 1,421 hours with an equivalent cost of \$210,571.

| Activity | Burden Hours | Equivalent Burden Cost |
|-------------------|--------------|------------------------|
| Financial Manager | 947 | \$180,527 |
| Clerical | 474 | \$30,044 |
| Total | 1,421 | \$210,571 |

Summary

In total, the conditions of this exemption will result in the production of 33,570 disclosures.¹⁹ The Department assumes that 100 percent of plans will use electronic methods to distribute the required information, at de minimis burden. The Department also assumes that 94.2 percent of IRAs and financial institutions will use electronic methods to distribute the required information, at de minimis burden, while 1,943²⁰ disclosures will be on paper. Production and distribution of disclosures will result in an overall hour burden of 2,929 hours with an equivalent cost of \$358,548.

| Activity | Burden Hours | Equivalent Burden Cost |
|--|--------------|------------------------|
| 1. Written authorization from the authorizing plan fiduciary to the investment advice provider | 95 | \$12,860 |
| 2. Provision of materials for evaluation of authorization of transaction | 24 | \$1,507 |
| 3. Provision of an annual termination form | 1,391 | \$133,610 |
| 4. Transaction Reporting | 0 | \$0 |
| 5. Annual Statement | 0 | \$0 |
| 6. Report of Commissions Paid | 0 | \$0 |
| 7. Recordkeeping | 1,421 | \$210,571 |
| Total | 2,929 | \$358,548 |

advice providers x 15 minutes) ÷ 60 minutes] x \$63.45 per hour = \$30,044.

¹⁹ The total number of disclosures is calculated in the following manner: 285 (Written authorization disclosures) + 285 (Provision of materials for evaluation of authorization of transaction) + 11,000 (Annual termination form) + 11,000 (Annual Statement) + 11,000 (Report of Commissions Paid) = 33,570 disclosures.

²⁰ The total number of paper disclosures is calculated in the following manner: (210 Written authorization disclosures for IRAs x 5.8 percent paper) + (285 Provision of materials for evaluation of authorization of transaction x 5.8 percent paper) + (11,000 Annual termination form x 5.8 percent paper) + (11,000 Annual Statement x 5.8 percent paper) + (11,000 Report of Commissions Paid x 5.8 percent paper) = 1,943 disclosures.

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Estimated Annualized Respondent Hour Burden and Equivalent Cost of Hour Burden

| Activity | Number of Respondents* | No. of Responses per Respondent** | Total Responses*** | Average Burden (Hours) | Total Burden (Hours) | Hourly Wage Rate | Equivalent Cost of Hour Burden |
|--|------------------------|-----------------------------------|--------------------|------------------------|----------------------|------------------|--------------------------------|
| Written authorization from the authorizing plan fiduciary to the investment advice provider (Distribution) | 285 | 1 | 285 | 5/60 | 24 | \$63.45 | \$1,507 |
| Written authorization from the authorizing plan fiduciary to the investment advice provider (Legal) | 285 | 1 | 285 | 5/60 | 71 | \$159.34 | \$11,353 |
| Provision of materials for evaluation of authorization of transaction | 285 | 21.02 | 5,992 | 5/60 | 24 | \$63.45 | \$1,507 |
| Provision of an annual termination form (Distribution) | 11,000 | 1 | 11,000 | 5/60 | 917 | \$63.45 | \$58,163 |
| Provision of an annual termination form (Legal) | 1,894 | 1 | 1,894 | 5/60 | 474 | \$159.34 | \$75,447 |
| Financial Managers at Financial Institutions | 1,894 | 1 | 1,894 | 5/60 | 947 | \$190.63 | \$180,527 |

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| | | | | | | | |
|--|-------|-------|--------|------|-------|---------|-----------|
| organize and collate the documents | | | | | | | |
| Clerical workers at Financial Institutions make documents available for inspection | 1,894 | 1 | 1,894 | 5/60 | 474 | \$63.45 | \$30,044 |
| Total | 2,179 | 15.41 | 33,570 | | 2,929 | | \$358,548 |

Note:

*The total number of respondents is calculated in the following manner: 210 IRAs entering into an agreement with a financial institution + 85 plans entering into an agreement with a financial institution + 1,894 financial institutions = 2,179.

**The number of responses per respondent has been rounded to the hundredth digit.

***The total number of responses is calculated in the following manner: 285 (Written authorization disclosures) + 285 (Provision of materials for evaluation of authorization of transaction) + 11,000 (Annual termination form) + 11,000 (Annual Statement) + 11,000 (Report of Commissions Paid) = 33,570 disclosures.

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**

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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.**

As discussed in item 12 above, the exemption imposes six information requests on authorizing fiduciaries and investment advice providers to qualify for the relief provided in the exemption. The cost burden that is associated with complying with these ICRs is discussed below. These estimates are in addition to the hour burden estimates discussed in item 12.

The Department has used the same assumptions as were used in determining the hour burden. In addition, the Department assumes that 100 percent of plans will use electronic to deliver the required information with no associated cost burden. The Department also assumes that 94.2 percent of IRAs and financial institutions will use electronic means to deliver the required information with no associated cost burden.²¹ For the required information not sent electronically, the Department estimates that a cost of 5 cents per page for paper and printing costs will be assessed. Postage of \$0.66 per mailing will also be incurred.²²

The annual cost burden is calculated as follows:

- 1) *Written authorization from the authorizing fiduciary to the investment advice provider*

Authorizing fiduciaries of new plans and IRAs entering into a relationship with an investment advice provider are required to provide the investment advice provider with an advance written authorization to perform transactions for the plan or IRA. The Department estimates that there are approximately 285 plans and IRAs that are new or that enter new arrangements each year.

To produce and distribute the authorization, the Department assumes that 100 percent of plans and 94.2 percent of IRAs will use traditional electronic methods at no additional

21 The Department estimates approximately 94.2 percent of retirement investors receive disclosures electronically. This is the sum of the estimated share of retirement investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2 percent) and the estimated share of retirement investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36 percent).

22 United States Postal Service, First-Class Mail, United States Postal Service (2023), <https://www.usps.com/ship/first-class-mail.htm>.

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burden, and the remaining 5.8 percent of IRAs will be mailed. It is assumed that the authorization will be two pages and paper authorizations will cost \$0.76 each, which results in a cost burden of \$9.²³

2) *Provision of materials for evaluation of authorization of transaction*

Prior to a written authorization being made, the authorizing fiduciary must be provided by the financial institution with a copy of the exemption, a form for termination of authorization, a description of broker's placement practices, and any other reasonably available information. This information is assumed to be readily available.

To produce and distribute the materials, the Department assumes that 94.2 percent of financial institutions will use traditional electronic methods at no additional burden, while the remaining 5.8 percent of financial institutions will mail the materials. The Department estimates that a clerical staff member will spend five minutes to prepare and distribute the required information to the authorizing fiduciary. It is assumed that this information will be seven pages and paper distribution will cost \$1.01 each, which results in a cost burden of about \$17.²⁴

3) *Provision of an annual termination form*

Each authorizing fiduciary must be supplied annually with a form expressly providing an election to terminate the written authorization.

To produce and distribute the termination form to the 10,000 IRAs and 1,000 plans, the Department assumes that 94.2 percent of financial institutions will use traditional electronic methods at no additional burden, while the remaining 5.8 percent of financial institutions will mail the termination forms. It is assumed that the form will be two pages, so paper copies will cost \$0.76 each, which results in a cost burden of approximately \$485.²⁵

4) *Transaction Reporting*

The investment advice provider engaging in a covered transaction must furnish the authorizing fiduciary with either a conformation slip for each securities transaction or a

23 The burden is estimated as follows: (2 pages x \$0.05 per page) + \$0.66 for postage = \$0.76; The mailing rate is applied in the following calculation: (210 authorizations for IRAs x 5.8 percent paper) x \$0.76 = \$9.

24 The burden is estimated as follows: 7 pages x \$0.05 per page + \$0.66 for postage = \$1.01; The mailing rate is applied in the following calculation: (75 plans x 5.8 percent paper x \$1.01) + (210 materials packages for IRAs x 5.8 percent paper x \$1.01) = \$17.

25 The burden is estimated as follows: 2 pages x \$0.05 per page + \$0.66 for postage = \$0.76. The mailing rate is applied in the following calculation: (1,000 plans x 5.8 percent paper x \$0.76) + (10,000 IRAs x 5.8 percent paper x \$0.76) = \$485.

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quarterly report containing specified information. As discussed above, the provision of the confirmation already is required under SEC regulations. Therefore, if the transaction reporting requirement is satisfied by sending conformation slips, no additional hour and cost burden will occur.

5) Annual Statement

In addition to the transaction reporting requirement, investment advice providers are required to send an annual report to each of the 11,000 authorizing fiduciaries²⁶ containing the same information as the quarterly report and also containing all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio. Collecting and generating the information required for the annual report is reported as a cost burden. Postage cost is not included here as it is assumed that the annual statement will be sent with the annual termination form and postage costs are accounted for there. It is assumed that the annual statement will be five pages, and the paper and print costs are \$0.25 each.²⁷ Therefore, the overall cost burden for the paper and print costs are about \$160.²⁸

In addition, it is assumed that the information that must be sent annually could be sent together; therefore, the clerical staff hours required to prepare and distribute the report has been included with the provision of annual termination form requirement. Therefore, no additional hour burden has been reported.

In total, providing the annual statement is expected to impose a total cost burden of \$160.

6) Report of Commissions Paid

A discretionary trustee must provide an authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis. The collecting and generation of the information for the quarterly report is reported as a cost burden. The clerical hour burden to prepare and distribute the report is included with the provision of annual termination form requirement, because both items are required to be sent annually.

A financial institution who is a discretionary trustee must provide each of the 11,000 authorizing fiduciaries with an annual report showing commissions paid to affiliated and non-affiliated brokers, on both a total dollar and a cents-per-share basis. As the report is sent annually, it is assumed that it could be sent with the transaction report, therefore postage costs are not counted here. The Department estimates that 94.2 percent of

26 1,000 plans + 10,000 IRAs = 11,000 plans and IRAs.

27 5 pages x \$0.05 per page = \$0.25.

28 (11,000 plans and IRAs x 5.8 percent paper x \$0.25) = \$160.

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financial institutions will use traditional electronic methods at no additional burden, while the remaining 5.8 percent of financial institutions will mail the annual reports. It is assumed that the report will be two pages, and the paper and print costs are \$0.10 each.²⁹ Therefore, the overall cost burden of the paper and print costs is \$64.³⁰

Financial institutions are required to report specific transaction fees and information to the plan fiduciaries. The information must be tracked, assigned to specific plans, and reported. It is assumed that it costs the financial institution \$3.30 per plan or IRA to track this information.³¹ With approximately 11,000 affected plans and IRAs, this results in a cost burden of approximately \$36,300 annually.³²

In total, providing the report is expected to impose a total cost burden of \$36,364.³³

Summary

In total, the conditions of this exemption will result in the production of 33,570 disclosures.³⁴ The Department assumes that 100 percent of plans will use electronic methods to distribute the required information, at de minimis burden. The Department also assumes that 94.2 percent of IRAs and financial institutions will use electronic methods to distribute the required information, at de minimis burden, while 1,943³⁵ disclosures will be on paper. Production and distribution of disclosures will result in an overall cost burden of \$37,034.

| Activity | Cost |
|---|-------|
| 1. Written authorization from the authorizing fiduciary to the investment advice provider | \$9 |
| 2. Provision of materials for evaluation of authorization of transaction | \$17 |
| 3. Provision of an annual termination form | \$485 |
| 4. Transaction Reporting | \$0 |
| 5. Annual Statement | \$160 |

²⁹ 2 pages x \$0.05 per page = \$0.10.

³⁰ (11,000 plans and IRAs x 5.8 percent paper x \$0.10) = \$64.

³¹ This estimate is based on information from a Request for Information and from industry sources.

³² (11,000 plans and IRAs x \$3.30) = \$36,300.

³³ This estimate is calculated as: \$64 + \$36,300 = \$36,364.

³⁴ The total number of disclosures is calculated in the following manner: 285 (Written authorization disclosures) + 285 (Provision of materials for evaluation of authorization of transaction) + 11,000 (Annual termination form) + 11,000 (Annual Statement) + 11,000 (Report of Commissions Paid) = 33,570 disclosures.

³⁵ The total number of paper disclosures is calculated in the following manner: (210 Written authorization disclosures for IRAs x 5.8 percent paper) + (285 Provision of materials for evaluation of authorization of transaction x 5.8 percent paper) + (11,000 Annual termination form x 5.8 percent paper) + (11,000 Annual Statement x 5.8 percent paper) + (11,000 Report of Commissions Paid x 5.8 percent paper) = 1,943 disclosures.

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| | |
|-------------------------------|-----------------|
| 6. Report of Commissions Paid | \$36,364 |
| Total | \$37,034 |

- 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.

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

The number of plans affected has been updated to reflect updated Form 5500 data, and thus, the number of responses has decreased. The estimated number of affected investment advice providers has also been updated to reflect current Securities and Exchange Commission data. In addition, the Department has also revised its estimate of the wage and postage costs due to increased labor costs and inflation.

The Department is proposing to amend PTE 86-128 by adding a recordkeeping requirement for financial institutions. In addition, the amendment would cover IRAs in Section III of the class exemption. Section III imposes information collection requirements on fiduciaries of employee benefit plans and IRAs that effect or execute securities transactions and the independent plan fiduciary authorizing the plan to engage in the transactions with the investment advice provider. Thus, IRAs have been included in this analysis, and thus, the hour burden has increased.

As a result, the number of responses has decreased by 242,175 responses, the hour burden increased by 736 hours, and the cost burden decreased by \$259,074.

Finally, the Department is amending PTE 86-128 by removing fiduciary investment advice from the covered transactions. While the Department is proposing to amend PTE 86-128 by removing fiduciary investment advice from the covered transactions, the Department believes that this would result in a marginal change in burden for the ICR. Thus, this change would not affect the hour and cost burden.

- 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**

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dates, and other actions.

This is not a collection of information for statistical use.

- 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 collection of information will display a currently valid OMB control number.

- 18. Explain each exception to the certification statement.**

There are no exceptions to the certification statement.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

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