

**Proposed Amendment to Prohibited Transaction Exemption (PTE) 84-14 for
Plan Asset Transactions Determined by
Independent Qualified Professional Asset Managers (QPAMs)
OMB Number 1210-0128
June 2010**

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT 1995 SUBMISSIONS

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.*

The Department of Labor (the Department) has the authority, pursuant to 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), to grant an exemption from all or part of the restrictions imposed, respectively, by sections 406 of ERISA and from taxes imposed by sections 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (E) of the Code.

Prohibited Transaction Exemption 84-14 (49 FR 9494, March 13, 1984, as corrected at 50 FR 41430, October 10, 1985, and amended at 70 FR 49305 (August 23, 2005)) (PTE 84-14) permits various parties who are related to employee benefit plans to engage in transactions involving plan assets if, among other conditions, the assets are managed by a “qualified professional asset manager” (QPAM). In 2003, the Department published a proposed amendment to the QPAM exemption and from comments received it appeared to the Department that many financial institutions were unaware that the class exemption did not provide relief for transactions by a QPAM in managing its own plans. The Department determined that such relief might be appropriate, and, in finalizing the 2003 proposed amendment, provided retroactive and transitional relief for a QPAM to manage the assets of its own plans.

On August 23, 2005, the Department published a proposed amendment to PTE 84-14 to permit a QPAM to prospectively manage an investment fund that contains the assets of its own plan or the plan of an affiliate of the QPAM. This prospective relief is described in Part V of the proposed amendment, which specifically provides relief for transactions that involve a QPAM-managed fund containing the assets of a plan sponsored by such QPAM.

In order to grant an exemption under section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department must determine that the exemption is administratively feasible, in the interests of the plan and its participants and beneficiaries, and protective of the rights of the participants and beneficiaries of such plan. Since there is no independent person present who would be responsible for monitoring the actions of the QPAM with respect to its own plan, the Department has included specific policy and procedures and audit requirements as conditions of the exemption. These information collections are designed to safeguard plans involved in

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transactions covered by the exemption and the participants and beneficiaries of such plans.

PTE 84-14, as restated in the proposed amendment, contains requirements for written guidelines, when, in certain instances, a property manager acts on behalf of a QPAM, and for a written management agreement acknowledging that an institution is a fiduciary with respect to each plan that has retained the QPAM. Because agreements between an institution and a property manager and between an institution and a plan, when the institution provides services to the plan, are customary and in the usual course of business, no burden has been accounted for arising out of such agreements.

The information collection requirements included in this paperwork burden estimate consist of the requirements that the QPAM develop written policies and procedures designed to assure compliance with the conditions of the exemption and have an independent auditor conduct an annual exemption audit and issue an audit report to the plan.

Written Policies and Procedures

The written policies and procedures are required to describe the following objective requirements of the exemption and the steps adopted by the QPAM to assure compliance with each of the following: (1) the requirement that the entity meets the definition of a QPAM; and (2) the requirements regarding the discretionary authority or control of the QPAM with respect to the plan assets involved in the transaction, in negotiating the terms of the transaction, and with respect to the decision on behalf of the investment fund to enter into the transaction. The policies and procedures also are required to describe additional objective requirements for the transactions afforded relief.

Audit Requirements

An exemption audit is required to be conducted by an independent auditor, who has appropriate technical training or experience and proficiency with ERISA's fiduciary responsibility provisions, and so represents in writing. The exemption audit and report are required to consist of the following:

- A review of the written policies and procedures adopted by the QPAM for consistency with each of the objective requirements of the exemption.
- A test of a representative sample of the plan's transactions in order to make findings regarding whether the QPAM is in compliance with the written policies and procedures adopted by the QPAM and the objective requirements of the exemption.
- A determination as to whether the QPAM has satisfied the definition of a QPAM under

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the exemption.

- Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor's findings.

Following completion of the exemption audit, the auditor is required to issue a written report presenting its specific findings regarding the level of compliance with the policies and procedures adopted by the QPAM. The exemption audit and the written report are required to be completed within six months following the end of the year to which the audit relates.

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 collection requirements that are conditions of the proposed amendment include written policies and procedures by a QPAM and audit requirements. The written policies and procedures will be used by an independent auditor to determine the QPAM's compliance with the conditions of the exemption. An independent auditor will conduct an annual exemption audit and make a determination whether the QPAM is in compliance with the written policies and procedures and that the conditions of the exemption have been met. These information collections are designed to safeguard participants and beneficiaries in plans that are involved in transactions covered by the exemption. The exemption does not require any reporting or filing with the Federal government.

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.*

Nothing in this proposed amendment requires that disclosures be made through distribution methods that would preclude use of electronic technology. QPAMs are financially sophisticated organizations. Consequently, the Department has assumed that more routine interactions between parties will be carried out electronically, such as transmittal of the written policies and procedures to the independent auditor. For purposes of this burden estimate, however, the Department has assumed that the annual audit report will be provided in writing to provide desired formality of compliance, the cost of which is included in the cost of the annual audit.

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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 Department has attempted to avoid duplication of information collection requirements. The required policies and procedures and exemption audit are unique to the circumstances of the particular transactions covered by the exemption and do not replicate any other requirements by state or federal regulations. The exemption permits respondents to satisfy the requirements for written guidelines between the QPAM and property manager with documents that are already in existence due to ordinary and customary business practices, provided such documents contain the required disclosures.

5. *If the collection of information impacts small businesses or other small entities (Item 5 of OMB Form 83-I), describe any methods used to minimize burden.*

The proposed amendment will not have an impact on small entities. The types of institutions that will act as a QPAM for their own plans, and therefore be required to develop policies and procedures, are generally large institutions such as banks, savings and loan institutions, and insurance companies. In addition, the Department has provided in the proposed amendment the objective requirements that are to be included in the policies and procedures. Finally, the decision to act as a QPAM for in-house plans is a voluntary one; institutions will not choose to act as a QPAM for their own plans if doing so would be burdensome.

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 proposed amendment's information requirements are only mandated for institutions that are plan sponsors and choose to act as QPAMs for their own plan(s). Without the policies and procedures, and audit requirements, compliance with the exemption may not be monitored to adequately safeguard plan assets. The Department has determined that an exemption audit on a less than an annual basis will weaken an important plan protection. The Department believes that an annual review of, among other things, a QPAM's written policies and procedures and a representative sample of plan transactions by an independent auditor is necessary to address the lack of QPAM independence.

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

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- *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.*

Not applicable.

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,

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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 consulted with some members of the Committee on Investment of Employee Benefit Assets (CIEBA),¹ a trade organization, in order to obtain information from industry representatives about the cost of plan audits for firms that manage plan assets in-house and other information to estimate the paperwork burden of this information collection.

The Department published a notice in the Federal Register on July 14, 2008 (73 FR 40384 corrected at 73 FR 43287 July 24, 2008), soliciting public comment on the information collections contained in the amendment and providing the public 60 days for comment consistent with the requirements of 5 CFR 1320.8.

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

Not applicable.

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 has been 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*

¹ CIEBA is a trade association whose membership includes corporate financial officers who serve as fiduciaries of employee benefit plans subject to ERISA and the Code. CIEBA's approximately 115 member companies collectively oversee about \$1.4 trillion of defined benefit and defined contribution plan assets for about 16 million plan participants and beneficiaries. For defined benefit plans in 2008, the member companies oversaw more than \$652 billion in plan assets for more than 10.2 million plan participants. CIEBA 2008 Membership Profile Executive Summary. This figure represents approximately 35 percent of the defined benefit plan assets in the United States. This calculation is based on a projection computed by applying percentage changes in pension assets derived from the Federal Reserve Board's Flow of Funds Accounts to the 2006 Form 5500 filings with the US Department of Labor.

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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.

Not applicable.

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 of OMB Form 83-I.*
- *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 13.*

The Department has made certain specific basic assumptions in order to establish a reasonable estimate of the paperwork burden of this information collection.

First, the Department assumes that the majority of institutions that choose prospectively to act as QPAMs for their own plans will prepare policies and procedures in house.

The Department assumes that 75 percent of QPAMs will develop their own policies and procedures. The latest Form 5500 estimates from the year 2007 indicate that there are

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approximately 4,400 QPAMs; therefore, the Department estimates that about 3,300 QPAMs will prepare their policies and procedures in house. ($75\% \times 4,400 = 3,300$)

The Department estimates that 25 percent of QPAMs will use an outside service provider, most likely an attorney because of the expertise required, to develop written policies and procedures. This burden for the information collection is largely a cost burden and is explained in Question 13, below.

Second, given the nature of the information collection requirements, the Department assumes a combination of personnel will perform the information collection. Using data from the Bureau of Labor Statistics, the Department assumes an hourly wage rate of \$107 for 2010, including both wages and benefits, for a financial manager and an hourly wage rate of \$26, similarly including wages and benefits, for clerical personnel.² Legal professional time is similarly assumed to be \$119 per hour.

Third, the Department assumes that maintenance of records of the policies and procedures and the audits is generally a usual and customary business practice that would be undertaken regardless of the exemption. The proposed amendment does not contain any additional recordkeeping requirements; no additional burden has been assumed for recordkeeping costs. Further, given the sophisticated nature of the parties involved, the Department assumes that communications between the parties will occur electronically via means already in existence. Therefore, the costs arising from electronic communications will be negligible.

Written Policies and Procedures

The Department assumes that when a QPAM uses existing in-house resources to prepare the written policies and procedures it will take one hour of a legal professional's time. This leads to an hour burden in the first year of 3,300 hours. ($3,300 \text{ QPAMs} \times 1 \text{ hour} = 3,300 \text{ hours}$) At \$119 per hour, the equivalent cost will be \$392,800 for the first year. ($3,300 \text{ hours} \times \$119 \text{ per hour} = \$392,800$)

As for subsequent years, the Department assumes that 1 percent of the QPAMs will be new every year. This means there will be 33 new QPAMs preparing their policies and procedures in-house each year. ($1\% \times 3,300 = 33$) This leads to an hour burden in each subsequent year of 33

² EBSA estimates of labor rates include wages, other benefits, and overhead based on the National Occupational Employment Survey (May 2008, Bureau of Labor Statistics) and the Employment Cost Index (June 2009, Bureau of Labor Statistics). Figures are projected forward to 2010. Financial manager wage and benefits estimates of \$107.23 are based on metropolitan wage estimates for financial managers. Clerical wage and benefits estimates of \$26.14 are based on metropolitan wage rates for executive secretaries and administrative assistants. Legal professional wage and benefits estimates of \$119.03 are based on metropolitan wage rates for lawyers.

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hours. (33 QPAMs x 1 hour = 33 hours) At \$119 per hour, the equivalent cost will be \$3,900 per year for each subsequent year. ($\$119 \text{ per hour} \times 33 \text{ hours} = \$3,900$)

Audit Requirements

An independent auditor is required to conduct an exemption audit for each QPAM that manages its own plan. The costs of an outside auditing firm to conduct the exemption audits are described below in question 13. For purposes of the hour burden, the Department estimates that each QPAM will use in-house legal professional, financial manager, and clerical time to provide documents and respond to questions from the auditor.

Each exemption audit will require about five hours of a legal professional's time, 13 hours of a financial manager's time, and six hours of clerical time. This leads to an hour burden of 105,600 hours. ($(5 \text{ hours} + 13 \text{ hours} + 6 \text{ hours}) \times 4,400 \text{ QPAMs} = 105,600 \text{ hours}$) The equivalent cost of this hour burden for the exemption audits is approximately \$9,442,000. ($(5 \text{ hours} \times \$119 \text{ per hour} + 13 \text{ hours} \times \$107 \text{ per hour} + 6 \text{ hours} \times \$26 \text{ per hour}) \times 4,400 \text{ QPAMs} = \$9,442,000$) This hour and equivalent cost burden is the same in the first and in subsequent years.

In summary, the Department estimates that the total hour burden imposed by the exemption in the first year is about 108,900 hours. ($3,300 \text{ hours} + 105,600 \text{ hours} = 108,900 \text{ hours}$) The total equivalent cost of this hour burden in the first year is approximately \$9,834,800. ($\$392,800 + \$9,442,000 = \$9,834,800$) The total annual hour burden in subsequent years is approximately 105,600 hours. ($33 \text{ hours} + 105,600 \text{ hours} = 105,600 \text{ hours}$) The total equivalent annual cost of this hour burden in subsequent years is about \$9,446,000. ($\$3,900 + \$9,442,000 = \$9,446,000$)

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

Written Policies and Procedures

As noted in Item 12, the Department assumes that 25 percent of QPAMs, or approximately 1,100 QPAMs during the first year, will hire an outside service provider to prepare their policies and procedures. ($25\% \times 4,400 \text{ QPAMs} = 1,100 \text{ QPAMs}$) Assuming each QPAM hires an outside service provider for one hour at a legal professional's hourly rate of \$119, then the outside cost is \$130,900 in the first year. ($\$119 \times 1,100 = \$130,900$) In subsequent years, the Department estimates that there will be 11 new QPAMs who have their policies and procedures prepared by outside service providers (1% of 1,100 QPAMs = 11 QPAMs). Therefore, the cost is estimated to be \$1,300 per year. ($11 \text{ QPAMs} \times 1 \text{ hour per QPAM} \times \$119 \text{ per hour} = \$1,300$)

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Audit Requirements

The only additional costs arising from this information collection derive from the costs of an outside auditing firm. QPAMs are assumed to use either a law firm or an accounting firm to conduct the exemption audits. In several of the comments received in response to the proposed amendment, commenters asserted that the exemption audit as proposed would be similar to the exemption audit currently required under PTE 96-23 (relating to the activities of in-house asset managers (INHAMs)). The Department has received information from industry representatives that the cost of the annual audit required by PTE 96-23 may range from approximately \$10,000 to \$25,000, depending on asset size and how many years the INHAM has used the auditing firm. Because the asset size of QPAM-sponsored plans is likely to be smaller than the asset size of plans whose assets are managed by INHAMs, the Department has assumed that the average cost of an exemption audit required under the amendment would be \$10,000. This leads to an annual cost estimate for the exemption audits of \$44,000,000 for both the first year and each subsequent year. (4,400 QPAMs x \$10,000 = \$44,000,000)

In summary, the total cost burden for the first year is estimated to be about \$44,130,900. (\$44,000,000 + \$130,900 = \$44,130,900) The total cost burden for each subsequent year is estimated to be approximately \$44,001,300. (\$44,000,000 + \$1,300 = \$44,001,300)

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 annualized costs to the Federal government for this information collection because it does not require any reporting or filing with the Federal government.

15. *Explain the reasons for any program changes or adjustments reporting in Items 13 or 14 of the OMB Form 83-I.*

Although no program changes have been made that would require revision of the prior paperwork burden estimates, the Department is adjusting its estimates of the cost burden of this amendment in two respects. First, the Department is revising its estimate of the number of respondents, based on more recent Form 5500 data. Second, the Department is revising its estimate of the cost of the exemption audit and report, based on public comments on the

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substance of the proposed amendments.

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.*

There are no plans to publish the results of this collection of information.

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

18. *Explain each exception to the certification statement identified in Item 19, "Certification for Paperwork Reduction Act Submission," of OMB 83-I.*

There are no exceptions to the certification statement.

B. Collections of Information Employing Statistical Methods

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