

## SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT OF 1995 SUBMISSIONS

This ICR seeks to revise the ICR to reflect increases in the number of notices sent electronically due to the Department’s finalized new safe harbor for the use of electronic media by administrators of retirement plans covered by ERISA. This amendment enables plan administrators to furnish documents to plan participants and beneficiaries by means of electronic delivery if they have electronic addresses and if they do not opt out of electronic delivery.

### **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 404(c) of the Employee Retirement Income Security Act of 1974 (ERISA) states that participants or beneficiaries who can hold individual accounts under their pension plans, and who can exercise control over the assets in their accounts “as determined in regulations of the Secretary [of Labor]” will not be treated as fiduciaries of the plan. Moreover, no other plan fiduciary will be liable for any loss, or by reason of any breach, resulting from the participants’ or beneficiaries’ exercise of control over their individual account assets.

The Pension Protection Act (PPA), Pub. L. No. 109-280, amended ERISA section 404(c) by adding subparagraph (c)(5)(A). The new subparagraph states that a participant in an individual account plan who fails to make investment elections regarding his or her account assets will nevertheless be treated as having exercised control over those assets so long as the plan provides appropriate notice (as specified below) and invests the assets “in accordance with regulations prescribed by the Secretary [of Labor].” Section 404(c) (5)(A) further requires the Department of Labor (the Department) to issue corresponding final regulations within six months after enactment of the PPA. The PPA was signed into law on August 17, 2006.

The Department of Labor accordingly finalized a regulation under ERISA section 404(c) (5)(A). The regulation offers guidance on the types of investment vehicles that plans may choose as their “qualified default investment alternative” (QDIA). The regulation also outlines two types of information collections. First, it implements the statutory requirement that plans provide annual notices to participants and beneficiaries whose account assets could be invested in a QDIA. Second, the regulation requires plans to pass

any pertinent materials they receive from a QDIA to those participants and beneficiaries with assets invested in the QDIA as well to provide certain information on request.

These two information collections are necessary to inform participants and beneficiaries, who do not make investment elections, of the consequences of their failure to elect investments, the ways in which their account assets will be invested through the QDIA, and of their continuing opportunity to make other investment elections, including options available under the plan.

### 2019 Electronic Disclosure Final Regulation

In response to Executive Order 13847, entitled “Strengthening Retirement Security in America,” which was issued by President Trump on August 31, 2018, the Department is issuing a final rule with a new safe harbor for retirement plan administrators to use electronic media to furnish required pension disclosures to plan participants and beneficiaries. Specifically, the proposal, would allow plan administrators who satisfy specified conditions to provide participants and beneficiaries with a notice that the pension disclosures will be made available on a website. The QDIA disclosures are among the disclosures plan administrations could furnish under the finalized safe harbor. The framework of the proposal is similar to the approach the Securities and Exchange Commission takes for certain investor disclosures and also aligns with Internal Revenue Service rules about delivering retirement plan disclosures electronically.

In order to use the safe harbor, retirement plan administrators must:

Furnish covered individuals with a notice of internet availability delivered to their electronic addresses, for example to the covered individual’s email address. The notice must include, among other things, a brief description of the document being posted online, a website address where the document is posted, and instructions for requesting a free paper copy or electing paper delivery in the future. It must sent each time a retirement plan disclosure is posted to the internet website. To prevent “email overload,” the proposal allows a notice of internet availability to incorporate or combine other notices of internet availability in limited circumstances .

Furnish covered individuals, free of charge, with a paper copy of a covered document, as soon as possible after receiving the covered individual’s request (2520.104b-31(f)(1)).

Provide covered individuals with the ability to opt out of electronic delivery and receive only paper versions of some or all covered documents (2520.104b-31(f)(2)). In the event that a plan administrator becomes aware of an invalid or inoperable electronic address, such as if an email is returned as undeliverable, the administrator must treat the covered individual as if he or she had elected to opt out of electronic delivery if the problem is not

promptly cured (2520.104b-31(f)(4)). This provision is intended to ensure that covered individuals actually receive their pension documents by guarding against invalid or inoperable electronic addresses.

2. *Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.*

The information collections under this ICR are not for the use of the Department or any other federal agency, but rather are mandated third-party disclosures. A plan that wishes to take advantage of the relief from liability offered by ERISA section 404(c)(5)(A) must provide participants and beneficiaries enrolled in individual account pension plans with an annual notice describing the plan's default investment provisions and the participants' and beneficiaries' right to make investment elections. They must also explain that participants and beneficiaries have the right to opt out of the default investment into another investment offered by the plan. Plans must also pass through to participants and beneficiaries whose account assets are invested in a default investment vehicle any material the plans received from the default investment vehicle and provide certain information on request.

The information collection provisions of this regulation consist of two separate requirements: (1) the creation and dissemination of an annual notice explaining the default investment; and (2) a pass-through to participants and beneficiaries of certain material (such as account statements and prospectuses) provided to the plan relating to each participant's or beneficiary's investment in a qualified default investment alternative as well as certain information on request. The burden associated with Part (1) is described in this ICR. The burden associated with Part (2) has been addressed separately as part of the burden calculations associated with the information collections in the Participant-Level Fee Disclosure Rule (OMB Control Number 1210-0090 Exp. Date 2/28/2019).

Both sets of information collections are necessary to enable the affected individuals to understand the consequences of their failure to make investment choices, the nature of the investment vehicle in which their account balances are invested, and their continued right to make active investment elections.

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 how disclosures made through electronic media can satisfy the requirements of § 2520.104b-1(b).

The Department understands that a substantial proportion of employee benefit plans, including individual account plans subject to these information collection requirements, have adopted electronic means of communication with participants under the Department’s regulation. This burden analysis, as described further below, takes account of plans’ anticipated rate of use of electronic media to communicate with their participants and beneficiaries.

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.*

Neither information collection requirements duplicate information available from any other source. Each annual notice sets out a particular plan’s provisions for default investment of participants’ and beneficiaries’ account assets. The pass-through requirement merely ensures that important materials relevant to a default investment alternative that are received by the plan are in fact forwarded to the individual account owner, the participant or beneficiary.

Under existing regulations, plans claiming 404(c) status already have to pass through investment material to participants and have to provide certain information on request. These existent provisions satisfy the information pass-through and information on request requirements of section 404(c)(5)(A) of ERISA. Because this information collection is therefore already counted under the paperwork burden for 1210-0090, the paperwork analysis for 404(c)(5)(A) does not count information pass-through and information on request for 404(c) plans.

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

Although small individual account plans (defined for this purpose as plans with fewer than 100 participants) are included among the plans entitled to rely on the regulation, the Department has not adopted any particular methods to minimize the burden for those small plans. This is because the Department believes that participants and beneficiaries in

small plans need the same amount and quality of information regarding default investment programs as do participants and beneficiaries in large plans. Further, reliance on the relief provided under the regulation is voluntary; each plan may decide adopting the type of default enrollment plan defined in the regulation is in the interests of the particular participants and beneficiaries of the plan and is worth the calculable administrative burden. Finally, the regulation is in compliance with a Congressional mandate under the PPA. The Department, moreover, did not receive any responses to its solicitation of public comment on whether small plans need or should be provided special treatment with respect to these information collection requirements.

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.*

Participants and beneficiaries need this information to understand how plans are investing their account balances and what their choices are under the plans' provisions so that they can intelligently prepare for their retirement needs.

The regulation carries out the statutory mandate for annual notices. The notices therefore cannot be provided less frequently.

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.*

None.

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's Federal Register Notice required by 5 CFR 1320.8(d) soliciting comments on the information collection was published on October 23, 2019, 84 FR 56894. No comments were received by the Department on the ICR. Comments on the broader issue of changes to electronic disclosure requirements are addressed under OMB control number 1210-0121.

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

None.

10. *Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.*

None.

11. *Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency*

*considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.*

None.

12. *Provide estimates of the hour burden of the collection of information. The statement should:*

- *Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.*
- *If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour.*
- *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.*

This regulation requires an annual notice be provided to all workers who are eligible to participate in the plan, which explains the default investment provisions of the plan and the participant's right to make investment elections. The regulation generally requires that plans send a notice to a participant at least 30 days before the participant is eligible to participate in the plan. Where new hires are immediately eligible for participation in a default investment plan and the plan cannot satisfy the 30-day advance notice requirement, these plans must provide the required notice no later than the date of plan eligibility. The plan must continue to provide a similar notice annually thereafter. The annual notice must describe: (1) the circumstances under which the plan may invest assets from a participant's individual account in a qualified default investment alternative and, if relevant, any elective contributions that will be made on the participant's behalf; (2) the right of participants to direct the investment of assets in their accounts; (3) the qualified default investment alternative the plan selected for the participant, including its investment objectives, risk and return characteristics (if applicable), and fees and expenses; (4) the participant's and beneficiary's right to direct the investment of these assets to any other investment alternative offered under the plan, including a description

of any fees or restrictions associated with such transfer; and (5) where participants and beneficiaries can obtain information about the other investment alternatives available under the plan.

The Department estimates that approximately 296,568 participant-directed individual account pension plans with auto-enrollment features will prepare and distribute annual notices to approximately 39,548,900 participants.<sup>1</sup>

The Department assumes that only newly established participant-directed individual account pension plans with auto-enrollment and plans with auto-enrollment that change their selection of qualified default investment alternatives will prepare new notices. For purposes of this analysis, the Department assumes that one-third of all plans with auto-enrollment (98,856 plans) will prepare these new notices, requiring 30 minutes of a legal professional's time at an hourly wage of \$138.41 per hour, for a total of 49,428 hours at an equivalent cost of \$6,841,324.<sup>2</sup> All other plans will continue to distribute their existing notices, with no additional associated preparation burden.

All participants (39,548,900) are expected to receive the annual notice. The regulation permits flexibility in deciding whether to make the required disclosures by mail, by hand, or electronically. The Department assumes that 56.4 percent of the disclosures (22,305,580) will be provided electronically.<sup>3</sup> The Department does not estimate any additional burden for the preparation or distribution of notices via electronic means because it assumed that plans will use existing electronic communications systems and e-mail lists for these purposes. The preparation and distribution of annual notices would thus involve a de minimis additional effort, e.g., a few computer key strokes.

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1 Form 5500 data for the 2017 Plan Year show that 565,969 plans with 75,475,000 participants are participant-directed individual account plans. Of these plans, 52.4 percent include an auto-enrollment feature according to the PSCA Annual Survey of Profit-Sharing and 401(k) Plans, 2014. Therefore, the Department assumes that approximately 296,568 plans with 39,548,900 participants are participant-directed individual account plans with an auto-enrollment feature that are required to send the notice.

2 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-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>

3 According to data from the National Telecommunications and Information Agency (NTIA), 37.7 percent of individuals age 25 and over have access to the internet at work. According to a Greenwald & Associates survey, 84 percent of plan participants find it acceptable to make electronic delivery the default option, which is used as the proxy for the number of participants who will not opt out that are automatically enrolled (for a total of 31.7 percent receiving electronic disclosure at work). Additionally, the NTIA reports that 40.5 percent of individuals age 25 and over have access to the internet outside of work. According to a Pew Research Center survey, 61 percent of internet users use online banking, which is used as the proxy for the number of internet users who will opt in for electronic disclosure (for a total of 24.7 percent receiving electronic disclosure outside of work). Combining the 31.7 percent who receive electronic disclosure at work with the 24.7 percent who receive electronic disclosure outside of work produces a total of 56.4 percent who will receive electronic disclosure overall.

Distribution to the 43.6 percent of participants (17,243,320) who will receive the annual notice by mail will require approximately 30 seconds of clerical time per notice at an hourly rate of \$64.11 per hour. This results in a burden of 143,694 hours, with an equivalent cost of \$9,212,466.

The total annual burden hours estimated for the annual notice is 193,122 hours with an equivalent cost of \$16,053,790.

### **2019 Electronic Disclosure Final Regulation**

The finalized changes would provide plan administrators with more flexibility to deliver pension plan disclosures electronically. Expanded electronic disclosure would lower the burden associated with delivering the Annual QDIA Notice by mail, including burden to prepare the mailings.

The Department estimates that in the first year, 81.5 percent of participants and beneficiaries currently receiving the Annual QDIA Notice by mail in the base year would begin receiving the Annual QDIA Notice electronically. The expanded electronic disclosure is estimated to lower the Annual QDIA Notice average hour burden by 117,111 hours, resulting in a new three-year average hour burden of 76,011 hours.

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

As explained in the answer to Item 12, above, the Department has only developed estimates in this submission for the burden associated with the annual notice information collection. The Department assumed that all plans will use in-house resources to develop and disseminate the disclosures, which therefore were presented as hour burden. The additional costs reported in Item 13, represent annual reproduction and distribution costs.

The Department estimates that 39,548,900 participants will receive notices annually. The Department assumed that 56.4 percent of these individuals (22,305,580) will receive notices through electronic means and 43.6 percent (17,243,320) will receive notices by mail. Material and printing costs for a two-page annual notice estimated at \$0.10 per notice and postage of \$0.55 per notice lead to an estimated cost of \$0.65 per mailed notice. This results in a total cost prior to the finalized regulation of \$11,208,158.

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cost associated with delivering the Annual QDIA Notice by mail.

The Department estimates that in the first year, 81.5 percent of participants and beneficiaries currently receiving the Annual QDIA Notice by mail in the base year would begin receiving the Annual QDIA Notice electronically. The expanded electronic disclosure is estimated to lower the Annual QDIA Notice average cost burden by \$9.13 million, resulting in a new three-year average cost of \$2.07 million.

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.*

None.

15. *Explain the reasons for any program changes or adjustments.*

In accordance with Executive Order 13847, the Department finalized a new safe harbor for the use of electronic media by administrators of retirement plans covered by ERISA. This amendment enables plan administrators to furnish documents to plan participants and beneficiaries by means of electronic delivery if they have electronic addresses and if they do not opt out of electronic delivery. This rule creates cost savings by increasing the number of electronically delivered documents, thereby reducing printing and mailing costs. This cost savings is reflected in the lower estimated costs for materials and postage reflected in Item 13 above. Estimates were also updated with new data and statistics.

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.*

Not applicable; results 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.*

A valid OMB control number and current expiration date will be displayed.

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

Not applicable; no exceptions to the certification statement.

**B. Statistical Methods**

This information collection does not employ statistical methods.