

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT OF 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.***

Title I of the Employee Retirement Income Security Act of 1974 (ERISA) establishes minimum standards for the operation of private-sector employee benefit plans and includes fiduciary responsibility rules governing the conduct of plan fiduciaries. In connection with Environmental, Social, and Governance (ESG) investing, the Department of Labor's (the Department) longstanding position is that plan fiduciaries when making decisions on investments and investment courses of action must be focused solely on the plan's financial returns and the interests of plan participants and beneficiaries in their plan benefits must be paramount. Thus, under ERISA fiduciaries may not accept lower expected returns or take on greater risks in order to secure non-pecuniary benefits.

The proposed rule addresses the selection of a plan investment or, in the case of an ERISA section 404(c) plan or other individual account plan, a designated investment alternative under the plan. This proposed rule would address the limitations that sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA impose on fiduciaries' consideration of non-pecuniary benefits and goals, including environmental, social, and corporate governance and other similarly situated factors, in making investment decisions. Thus, the rule would eliminate confusion that plan fiduciaries may currently face in the marketplace and reiterate long-established fiduciary standards of prudence and loyalty for selecting and monitoring investments.

The Information Collection (IC) primarily impacts those plans whose fiduciaries consider non-pecuniary factors when selecting investments and the participants in those plans. The IC requires that for investments that are not participant directed, defined benefit (DB) plans and defined contribution (DC) plans maintain records when different investments are economically indistinguishable, documenting specifically why the investments were determined to be indistinguishable and the selected investment was chosen based on the purposes of the plan and the financial interests of plan participants and beneficiaries in receiving benefits from the plan. The IC also requires that individual account plan fiduciaries will need to document their selections of investment alternatives

that include one or more ESG or similarly oriented assessments or judgments in their investment mandates or that include these parameters in the fund name.

- 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 IC requires that if alternative investments appear indistinguishable, and plan fiduciaries use non-pecuniary factors in selecting an investment, then the fiduciaries must document the basis for concluding that a distinguishing factor could not be found and the reasons that the selected investment meets the purposes of the plan and the financial interests of plan participants and beneficiaries. The IC also requires that participant directed individual account plans will need to document their selections of ESG-themed funds as designated investment alternatives.

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

Use of electronic methods of compliance is neither required nor precluded by the terms of this rule. This information collection constitutes recordkeeping. The Department has assumed that the information collection requirements under this rule will be performed by plans or sophisticated financial entities that act on behalf of employee benefit plans in connection with the purchase of securities and that generally will establish and maintain recordkeeping systems, and comply with disclosure requests, by electronic means. The Department's estimates therefore take into account the use of electronic recordkeeping in establishing the burden of this information collection.

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

The information collection requirements are not duplicated in any other federal statute or regulation.

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

For purposes of this information collection (and more generally for purposes of economic analysis under ERISA), the Department considers “small entities” to be employee benefit plans with fewer than 100 participants (i.e., “small plans”). The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

While the rule is expected to affect small pension plans, it is not likely that there would be a significant economic impact on these plans. The proposed regulation provides guidance on how fiduciaries can comply with sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA when investing plan assets. The Department believes most plans are already fulfilling the requirements in the course of following prior guidance. Plans would need to document selections of investments based on non-pecuniary factors where the alternative investment options are economically indistinguishable. The Department believes that truly “economically indistinguishable” alternative investment options should occur very rarely in practice, if at all. The Department estimates a cost of less than \$380 per affected plan needing to document their decisions for plan fiduciaries and clerical professionals to fulfill the documentation requirement.

Participant directed individual account plans will need to document their selections of ESG-themed funds as designated investment alternatives. As described above, fiduciaries in such plans already commonly document and maintain records about their choices of investment funds as designated investment alternatives, since that is the best practice and a potential shield from litigation risk. Therefore, the Department believes that this documentation requirement would impose little, if any, additional cost.

**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.**

These requirements help ensure that plan assets are protected and that the Department can monitor the named fiduciary’s compliance.

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

- **requiring respondents to report information to the agency more often than quarterly;**
- **requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;**
- **requiring respondents to submit more than an original and two copies of any document;**

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

There are no special circumstances that require the collection to be conducted in a manner inconsistent with the guidelines in 5 CFR 1320.5.

- 8. *If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 C.F.R. § 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 addition to requesting public comment on the proposed regulation, the NPRM solicits public comment on the paperwork burden of the proposed regulation. The Office of Management and Budget has 60 days to review the information collection request, but must allow at least 30 days for public comment. Therefore, the PRA section of the proposed rule requests the public to send comments within 30 days to ensure their consideration. (5 CFR 1320.11(c); 5 CFR 1320.11(e))

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

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.**

There is no assurance of confidentiality provided to respondents.

**11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.**

There are no questions of a sensitive nature.

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

- **Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.**
- **If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item 13.**
- **Provide estimates of annualized cost to respondents for the hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included in Item 14.**

According to the most recent Form 5500 data there are 8,870 DB plans and 18,400 DC plans with ESG investments that are not participant directed that could be affected by the

proposed rule.<sup>1</sup> While the Department does not have data regarding the frequency of the rare event of alternatives being indistinguishable and requiring documentation, the Department models the burden using one percent of plans with ESG investments as needing to provide the documentation.

While DB plans may change investments at least annually, DC plans may do so less frequently. For this analysis, DC plans are assumed to review their service providers and investments about every three years. Therefore, the Department estimates that 89 DB plans and 61 DC plans with ESG investments that are not participant directed will encounter economically indistinguishable alternatives in a year.<sup>2</sup>

#### Maintain Documentation

The proposed rule requires ESG plan fiduciaries to maintain documentation if alternative investments appear to be economically indistinguishable. While much of the documentation needed to fulfill this requirement is generated in the normal course of business, plans may need additional time to ensure records are properly maintained and are up to the standard required by the Department. The Department estimates that plan fiduciaries and clerical staff will each expend, on average, 2 hours of labor to maintain the needed documentation. This results in an annual burden estimate of 600 hours, with an equivalent cost of \$56,818 for DB plans and DC plans with ESG investments that are not participant directed.<sup>3</sup>

The proposal also would require individual account plan fiduciaries to document their selections of ESG-themed funds as designated investment alternatives for their participant-directed investment platforms. As explained above, fiduciaries selecting investment options for DC plans already commonly document and maintain records about their investment choices, since that is a best practice and a potential shield from litigation risk. Therefore, the Department assumes this documentation requirement will impose little, if any, additional cost. The requirement is included to confirm the need to document actions taken and to provide a safeguard against the risk that fiduciaries will select investment options based on non-pecuniary factors without a proper analysis and evaluation.

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1 DOL calculations based on statistics from U.S. Department of Labor, Employee Benefits Security Administration, "Private Pension Plan Bulletin: Abstract of 2017 Form 5500 Annual Reports," (Sep. 2019), (46,698 DB plans x 19% = 8,870 DB plans; 96,860 DC Plans x 19% = 18,400 DC plans).

2 8,870 DB plans \* 0.01 = 89 DB plans; 18,400 DC plans \* 0.01 \* 0.33 = 61 DC plans.

3 The burden is estimated as follows: (8,870 DB plans \* 0.01 \* 2 hours) + (18,400 DC plans \* 0.01 \* 2 hours \* 0.33) = 300 hours for both a plan fiduciary and clerical staff. A labor rate of \$134.21 is used for a plan fiduciary and a labor rate of \$55.14 for clerical staff ((8,870 DB plans \* 0.01 \* 2 \* \$134.21) + (18,400 DC plans \* 0.01 \* 2 hours \* 0.33 \* \$134.21) + (8,870 DB plans \* 0.01 \* 2 \* \$55.14) + (18,400 DC plans \* 0.01 \* 2 hours \* 0.33 \* \$55.14) = \$56,818.)

- 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)**

There is no cost burden in this information collection requirement.

- 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 reporting in Items 13 or 14.**

This is a new collection of information.

- 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.**

This is not a collection of information for statistical use and there are no plans to publish the results of this collection.

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

Not applicable.

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

There are no exceptions to the certification statement.