DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210–AB17

Statutory Exemption for Cross-Trading of Securities

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final rule.

SUMMARY: This document contains a final rule that implements the content requirements for the written cross-trading policies and procedures required under section 408(b)(19)(H) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). Section 611(g) of the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, 972, amended section 408(b) of ERISA by adding a new subsection (19) that exempts the purchase and sale of a security between a plan and any other account managed by the same investment manager if certain conditions are satisfied. Among other requirements, section 408(b)(19)(H) stipulates that the investment manager must adopt, and effect cross-trades in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program. This final rule affects employee benefit plans, investment managers, plan fiduciaries and plan participants and beneficiaries.

EFFECTIVE DATE: This final rule is effective (INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER).

FOR FURTHER INFORMATION CONTACT: G. Christopher Cosby or Brian Buyniski, Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, Washington, DC 20210, telephone (202) 693-8540. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

Section 611(g)(1) of the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, 972 (PPA), which was enacted on August 17, 2006, amended ERISA by adding a new section 408(b)(19), which exempts from the prohibitions of sections 406(a)(1)(A) and 406(b)(2) of the Act those transactions involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, provided that certain conditions are satisfied.[1] Among other requirements, an investment manager must adopt, and cross-trades must be effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in

[1] Section 611(g)(2) of the PPA added a parallel provision under the Internal Revenue Code of 1986 (Code), section 4975(d)(22), which provides relief from the prohibitions described in section 4975(c) of the Code in connection with the cross-trading of securities. Under Reorganization Plan No. 4 of 1978, effective December 31, 1978 (5 USC App. 214 (2000)), the authority of the Secretary of the Treasury to issue interpretations regarding section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor, and the Secretary of the Treasury is bound by the interpretations of the Secretary of Labor pursuant to such authority.

the cross-trading program. The policies and procedures must include descriptions of (i) the investment manager's policies and procedures relating to pricing, and (ii) the investment manager's policies and procedures for allocating cross-trades in an objective manner among accounts participating in the cross-trading program.

The investment manager also must designate an individual (a compliance officer) who is responsible for periodically reviewing purchases and sales of securities made pursuant to the exemption to ensure compliance with the foregoing policies and procedures. Following such review, the compliance officer must provide, on an annual basis, a written report describing the steps performed during the course of the review, the level of compliance with the foregoing policies and procedures, and any specific instances of noncompliance. The report must be provided to the plan fiduciary who authorized the cross-trading no later than 90 days following the period to which it relates. Additionally, the written report must notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time and must be signed by the compliance officer under penalty of perjury.

Section 611(g)(3) of the PPA provides that the Secretary of Labor, after consultation with the Securities and Exchange Commission (SEC), shall, no later than 180 days after the date of the enactment of the PPA, issue regulations regarding the content of the written policies and procedures required to be adopted by an investment manager in order for such manager to qualify for relief under section 408(b)(19) of the Act. Section 611(h) of the PPA provides that the amendments made by section 611 of the PPA shall apply to transactions occurring after the date of enactment of the PPA. In accordance with section 611(g)(3) of the PPA, the Department of Labor (the Department) published an interim final rule on Monday, February 12, 2007 (72 FR 6473) in the Federal Register for public comment. The Department received 4 comment letters in response to its request for comments. Submissions are available for review under Public Comments on the Laws & Regulations page of the Department's Employee Benefits Security Administration website at http://www.dol.gov/ebsa.

Set forth below is an overview of the final rule, along with a discussion of the public comments submitted on the interim final rule.

B. Overview of Final Rule and Comments

1. General

Paragraph (a) of the final rule describes the general requirement of section 408(b)(19)(H) of the Act, which requires investment managers to adopt, and effect cross-trades in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program. The policies and procedures must include: (i) a description of the investment manager's pricing policies and procedures, and (ii) the investment manager's policies and procedures for allocating cross-trades in an objective manner among accounts participating in the cross-trading program.

Paragraph (a)(3) of the interim final rule stated that section 408(b)(19)(D) of the Act requires that a plan fiduciary for each plan participating in the cross-trades receive in advance of any cross-trades disclosure regarding the conditions under which the cross-trades may take place in a document that is separate from any other agreement or disclosure involving the asset management relationship. The interim final rule required that the disclosure contain a statement that any investment manager participating in a cross-trading program will have a potentially conflicting division of loyalties and responsibilities to the parties involved in any cross-trade transaction. In the interest of clarity, the Department has determined to delete this statement from the interim final rule and to amend the policies and procedures under paragraph (b)(3)(i)(D) of the final rule to require that the policies and procedures contain a statement regarding a manager's conflicting loyalties and responsibilities to the parties to the cross-trade transaction and a description of how the investment manager will mitigate such conflicts.[2]

Paragraph (a)(4) of the final rule, like paragraph (a)(4) of the interim final rule, states that the standards set forth in the final rule apply solely for purposes of determining whether an investment manager's written policies and procedures satisfy the content requirements of section 408(b)(19)(H) of the Act. Accordingly, such standards shall not apply in determining whether, or to what extent, the investment manager satisfies the other requirements for relief under section 408(b)(19) of the Act.[3]

[2] The policies and procedures containing the disclosure statement must be provided to the plan fiduciary that authorized the plan to participate in the investment manager's cross-trading program in advance of any cross-trade. For a further explanation of this amendment, see the discussion of paragraph (b)(3)(i)(D) under the heading *2. Content of Policies and Procedures -- § 2550.408(b)-19(b)(3)(i)*, below.

[3] In this regard, the Department notes that the investment manager's cross-trading program may also be subject to the requirements of applicable federal securities laws.

2. Content of Policies and Procedures -- § 2550.408(b)-19(b)(3)(i)

Paragraph (b)(3) of the final rule, like the interim final rule, sets forth the content requirements of the written cross-trading policies and procedures that must be adopted by the investment manager, and provided to the plan fiduciary prior to authorizing cross-trading in order for transactions to qualify for relief under section 408(b)(19) of the Act. Paragraph (b)(3)(i) provides that an investment manager's policies and procedures must be fair and equitable to all accounts participating in its cross-trading program and reasonably designed to ensure compliance with the requirements of section 408(b)(19)(H) of the Act.

Several commenters requested additional clarification and guidance concerning the policies and procedures to be followed by investment managers in connection with cross-trades under §2550.408b-19(b)(3)(i) of the interim final rule. One commenter recommended that the interim final rule be revised to ensure that investment managers will not be subject to cross-trading disclosure requirements that are more extensive than those currently applicable to registered investment advisers to mutual funds under SEC Rule 17a-7, issued under the Investment Company Act of 1940.[4] The commenter argued that many of the provisions of the PPA regarding cross-trading are substantially similar to the provisions of Rule 17a-7, and that the Department and SEC share the same underlying policy considerations regarding cross-trade transactions. Therefore, the commenter concluded that the final rule should be consistent with, and comparable to, the

[4] 17 CFR 270.17a-7.

Rule 17a-7 cross-trading provisions and any inconsistencies and additional disclosure obligations should be eliminated from the interim final rule to the extent possible. One commenter opined that, to the extent that some investment managers execute cross-trades on behalf of both mutual funds and pension plans, the imposition of this requirement would prove administratively burdensome insofar as it would require managers to adopt different cross-trading policies and procedures for different clients.

Another commenter suggested that the Department establish a "safe harbor" provision in the final rule whereby the adoption of a fair allocation rule for cross-trades that meets the requirements of the Investment Company Act of 1940 would automatically satisfy the requirements of the statutory exemption.

The Department has not adopted the commenters' suggestions in light of the significant differences between Rule 17a-7 and the statutory exemption. The Department recognizes that Congress modeled certain aspects of the cross-trading statutory exemption on Rule 17a-7. For example, both Rule 17a-7 and ERISA section 408(b)(19) limit cross-trades to purchases or sales for cash of securities for which market quotations are readily available. In addition, the transactions must be effected at the independent current market price of the security as described in Rule 17a-7(b) and no brokerage commissions or fees (except for customary transfer fees) may be paid in connection with the transactions.

Rule 17a-7, however, places primary responsibility on the mutual fund's board of directors (a majority of whom must be independent of the mutual fund) to adopt the mutual fund's cross-trading policies and procedures, to make and approve changes as the board deems necessary, and to determine no less frequently than quarterly that all purchases and sales during the preceding quarter were effected in compliance with the policies and procedures. In contrast, ERISA section 408(b)(19) requires the investment manager to adopt the written cross-trading policies and procedures and to effect cross-trades in accordance with such procedures.

In recognition of the differences between mutual funds and ERISA-covered employee benefit plans, the statutory exemption requires the investment manager to appoint a compliance officer to periodically review purchases and sales to ensure compliance with the cross-trading policies and procedures adopted by the manager. The statutory exemption also adds the requirement that the investment manager and compliance officer provide detailed, advance and periodic disclosures to the plan fiduciary responsible for authorizing the investment manager to engage in cross-trading on the plan's behalf. In effect, the expanded role of the compliance officer under ERISA section 408(b)(19), coupled with more detailed disclosures to the independent fiduciary, functions in a manner similar to the mutual fund's board of directors under Rule 17a-7. Accordingly, the Department has not adopted the commenters' suggestions.

Another commenter suggested that the language of subsection (b)(3)(i) be revised to read as follows:

(i) An investment manager's policies and procedures must be reasonably designed (1) to ensure that the transactions entered into pursuant to the policies and procedures are fair and equitable to all accounts participating in its cross-trading program and (2) to ensure compliance with the requirements of section 408(b)(19)(H) of the Act and the requirements of this regulation.

The commenter stated that such a modification would be desirable because the fairness and equity of the policies and procedures would be evaluated, not on the basis of their written terms, but rather on the basis of the results of the cross-trades executed pursuant to such terms. After consideration of the comment, the Department has determined not to adopt the commenter's suggestion. In the Department's view, the suggested modification is inconsistent with section 408(b)(19)(H) of the Act, which requires an investment manager to adopt and effect cross-trades in accordance with written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program.

Paragraph (b)(3)(i)(D) of the interim final rule required an investment manager's cross-trading policies and procedures to contain a description of how the investment manager will mitigate any conflicting loyalties and responsibilities to the parties involved in any cross-trade transaction. Several commenters recommended the deletion of this provision. They suggested that, taken together, the remaining requirements in the interim final rule under § 2550.408b-19(b)(3)(i) - such as the statement of policy describing the criteria that will be applied by the investment manager in determining that the transaction is beneficial to both parties to the cross-trade, the requirement that cross-trades be effected at the independent current market price of the security, and the requirement that cross-trading opportunities be allocated in an objective and equitable manner – are sufficient to mitigate such conflicts, thus obviating the need for this additional procedural requirement.

The Department has not adopted this suggestion. The Department believes that sole reliance upon an independent current market price and an objective allocation method will not reduce the potential for abusive practices such as "cherry picking[5]" or "dumping[6]" of securities among client accounts in a manner designed to favor one account over the other. The content requirements in §2550.408(b)-19(b)(3)(i)(A) and (D) address these potential abusive practices by requiring the investment manager to adopt, and adhere to, policies and criteria that are designed to ensure that conflicts of interest are mitigated. These provisions also reinforce the general proposition that, notwithstanding the relief provided in ERISA section 408(b)(19), the Act's general standards of fiduciary conduct apply to an investment manager's decision to cross-trade securities on behalf of any plan. In this regard, the Department has amended paragraph (b)(3)(i)(D) of the final rule to require that the policies and procedures contain a statement regarding a manager's

[5] "Cherry picking" of securities refers to a practice where an investment manager with discretion on both sides of a transaction utilizes cross-trading to transfer particular securities from less favored accounts to promote the interests of more favored accounts.
[6] "Dumping" of securities refers to a practice where an investment manager with discretion on both sides of a transaction utilizes cross-trading to transfer particular securities to less favored accounts to promote the interests of more favored accounts.

conflicting loyalties and responsibilities[7] to the parties to the cross-trade transaction in addition to a description of how the investment manager will mitigate such conflicts. One commenter suggested that the policies and procedures should do more than simply describe how conflicts will be mitigated. The commenter suggested that the rule be revised to require each proposed transaction to be evaluated by two qualified individuals employed at the investment manager firm, each acting for only one of the plans involved, other than the individuals who made the initial determination to engage in the cross-trade under consideration. According to the commenter, this additional level of review, even though not truly independent because the individuals are employees of the investment manager, would provide additional protection. The Department has not adopted this suggestion because it would add significant costs that could obviate the financial advantages of cross-trading.

The same commenter suggested that the rule should be modified to require that the statement about potential conflicts be prominently displayed in a bold font sufficiently large (at least 14 point) to be distinguishable from the rest of the text included in the disclosure to the independent fiduciary. In addition, the commenter suggested that the Department consider requiring the font size for the entire disclosure statement to be no

[7] The Department notes the deletion of the word "potentially" from the operative language of the interim final rule in the phrase "potentially conflicting loyalties and responsibilities". The Department believes that there is an inherent conflict of interests when there is a common investment manager for both sides of a transaction. The Department has taken the position that, where an investment manager has investment discretion with respect to both sides of a cross-trade of securities and at least one side is an employee benefit plan account, a violation of section 406(b)(2) would occur. (See Complaint, Reich v. Strong Capital Management, Inc., No. 96-C-0669, E.D. Wis., June 6, 1996). The Department has also taken the position that by representing the buyer on one side and the seller on the other in a cross-trade, a plan fiduciary acts on behalf of parties that have interests adverse to each other. (See Complaint, Strong Capital Management, Inc., supra).

less than 12 point. The final regulation does not include this suggestion. The Department does not believe that it is necessary to provide a specific format for this statement. Although the Department believes that these statements in the policies and procedures should be prominently displayed in a manner that will bring it to the attention of the independent fiduciary, it does not believe it is necessary to require a specific font size.

3. Role and Responsibility of the Compliance Officer – § 2550.408b-19(b)(3)(i)(F)

Paragraph (b)(3)(i)(F) of the final rule, like the interim final rule, requires an investment manager's cross-trading policies and procedures to identify the compliance officer responsible for periodically reviewing the investment manager's compliance with section 408(b)(19)(H) of the Act and to include a statement of the compliance officer's qualifications for this position.

Several commenters disagreed with the interim final rule's requirement that each investment manager identify, by name, the compliance officer who will review the cross-trading program and specify that individual's qualifications for the position. One commenter stated that notifying all ERISA clients each time the person with compliance responsibilities changes is burdensome and expensive, given that the individuals performing these compliance duties are replaced from time to time. Such compliance responsibilities, the commenter further stated, are typically a matter of corporate, rather that individual, responsibility.

Another commenter agreed with the Department's position that the compliance officer should be identified and recommended that the compensation paid to the compliance officer should not be materially affected by any trading resulting from the transactions that are reviewed to ensure the compliance officer's independence.

The Department has determined not to amend the regulation to adopt these suggestions. In the Department's view, it is important for the plan fiduciary authorizing a plan to engage in cross-trading to know the identity and qualifications of the compliance officer, since this information could impact the fiduciary's decision to participate in an investment manager's cross-trading program. Moreover, it may be useful for the approving plan fiduciary to know the extent of compliance officer turnover in an investment manager's cross-trading program. The Department believes that the benefits of providing these disclosures to the authorizing plan fiduciary outweigh any associated burdens.

The Department has determined not to amend the rule to provide that the compensation paid to the compliance officer should not be materially affected by any trading resulting from the transactions that are reviewed. In the Department's view, limitations on the compliance officer's compensation are beyond the scope of this regulatory proceeding. The Department believes that section 408(b)(19)(I) of the Act, which requires that the compliance officer sign the annual report to the authorizing plan fiduciary under penalty of perjury, provides a sufficient deterrent to ensure that the compliance officer will act independently in periodically reviewing purchases and sales under the investment manager's cross-trading program.

Most of the commenters requested that the Department clarify the role and responsibilities of the compliance officer under the rule. One commenter suggested that the Department modify the interim final rule to stipulate that, in reviewing the cross-trading transactions of an investment manager who is also registered as an investment adviser with the SEC, the compliance officer may perform his or her duties in a manner consistent with the SEC rules regarding the role of a chief compliance officer under the Investment Advisers Act of 1940 and the Investment Company Act of 1940. According to the commenter, these rules permit a chief compliance officer to rely upon others (including independent third parties, such as independent certified public accounting firms) to carry out the review of the adequacy and effectiveness of the policies and procedures, and do not require a review of every cross-trade. The commenter further suggested that the compliance review mandated by ERISA section 408(b)(19)(I) should be subject to the oversight of the designated compliance officer, who, in turn, would be permitted to delegate responsibility for certain aspects of the review.

The Department has not adopted these suggestions in the final rule. The Department believes that the respective roles of the chief compliance officer under Rule 38a-1 of the Investment Company Act of 1940 (17 CFR 270.38a-1) and the compliance officer under the cross-trading statutory exemption differ in a number of respects. Under the Investment Company Act, the chief compliance officer is approved by, and serves at the pleasure of, the mutual fund's board of directors (including a majority of independent directors) and can be removed by the board at any time. The chief compliance officer also must meet with the independent directors at least once each year. On the other hand, the compliance officer under ERISA section 408(b)(19) is designated by the investment manager, and there is no direct parallel under ERISA to the board of directors' oversight. Moreover, the ERISA compliance officer is responsible for the periodic review of the cross-trades and the preparation of the annual report that must be furnished to the independent fiduciary of each plan participating in the cross-trading program. Although nothing in the final rule prohibits a compliance officer from delegating certain aspects of its responsibilities under ERISA section 408(b)(19)(I), the compliance officer is ultimately responsible for the review under penalty of perjury.

Several of the commenters also proposed that, rather than conducting a review of each individual cross-trade, the compliance officer should be permitted to periodically assess the overall effectiveness of the policies and procedures through a representative sampling of cross-trades. Although the Department did not specifically address this issue in the interim final rule, the Department notes that nothing in the final rule would preclude cross-trades from being reviewed using an appropriate sampling methodology based upon the universe of cross-trades effected by the investment manager under the exemption, provided that the sample methodology is disclosed in the investment manager's policies and procedures. The Department expects auditors to ensure that the sample selected is an appropriate representation of the total universe of transactions engaged in over the entire test period.

4. Compliance Officer's Review -- § 2550.408b-19(b)(3)(i)(G)

In order to inform plan fiduciaries regarding the scope of compliance reviews conducted by the compliance officer, paragraph (b)(3)(i)(G) of the final rule, like the interim final rule, requires the policies and procedures to contain a statement describing whether such review is limited to compliance with the policies and procedures required pursuant to ERISA section 408(b)(19)(H), or whether such review extends to any determinations regarding the overall level of compliance with the other requirements of section 408(b)(19) of the Act.

Two commenters expressed concern about this provision. One commenter stated that a compliance officer's performance of any review responsibilities beyond assessing compliance with the requirements of ERISA section 408(b)(19)(H) would be inconsistent with the extent of a compliance officer's duties under the Investment Advisers Act of 1940. Accordingly, the commenter recommended that the interim final rule be revised to limit the scope of the officer's review to the narrower statutory provision. Another commenter noted that the provision permitting the compliance officer to review adherence to the totality of the requirements contained in section 408(b)(19) is unnecessary and should be deleted. According to the commenter, the requirement that the policies and procedures include a statement that the review does not cover more than is required implies that the scope of the review is somehow deficient.

The Department continues to believe that disclosure of the scope of the compliance officer's review is an important consideration that may influence an authorizing fiduciary's determination of whether to participate, or continue participation, in the investment manager's cross-trading program. It also places the approving plan fiduciary on notice of the extent to which it may rely on the compliance officer's review in performing its monitoring duties. Nonetheless, the Department did not intend for such a statement to imply that a review only for compliance with the policies and procedures described in section 408(b)(19)(H), as opposed to all requirements of the statutory exemption, would be deficient. Therefore, the Department has modified the final rule to require that the policies and procedures only provide a statement regarding the scope of the compliance officer's review. In order to ensure that authorizing plan fiduciaries are aware that the other conditions of the statutory exemption also must be satisfied, the final rule has been modified further to require that the policies and procedures include a statement that the ERISA cross-trading statutory exemption requires satisfaction by the investment manager of a number of objective conditions in addition to the requirements that the investment manager adopt and effect cross-trades in accordance with written cross-trading policies and procedures.

5. Definition of Investment Manager – § 2550.408b-19(c)(4)

Like the interim final rule, paragraph (c)(4) of the final rule defines the term "investment manager" by cross-referencing the definition of such term in section 3(38) of the Act. One commenter stated that the final rule would be a suitable regulatory vehicle for the Department to clarify the term "investment manager," noting that the definition in section

3(38) of the Act excludes trustees. This commenter maintained that the Department has taken the view that the exclusion of trustees generally from the section 3(38) definition was not intended to exclude bank trustees, such as collective trust trustees or an institutional bank trustee managing assets on a separate account basis. Accordingly, the commenter requested guidance from the Department that would enable trustees of bank collective trusts to use the cross-trading exemption if the other conditions of the statutory exemption are met.

The Department reiterates that the term "investment manager," as used in Title I of ERISA,[8] is defined in ERISA section 3(38) to mean, in pertinent part, any fiduciary (other than a trustee or named fiduciary, as defined in section 402(a)(2))—

> (A) who has the power to manage, acquire, or dispose of any asset of a plan;
> (B) who (i) is registered as an investment adviser under the Investment Advisers Act of 1940[, 15 U.S.C. 80b-1 et seq.]; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act[, 15 U.S.C. 80b-3a(a)], is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and
> (C) has acknowledged in writing that he is a fiduciary with respect to the plan.

The Department has not adopted this suggestion in the final rule because it is inconsistent with the statutory definition. However, the Department notes that the parenthetical expression "other than a trustee or named fiduciary" in ERISA section 3(38) does not

[8] See ERISA sections 402(c)(3) and 403(a)(2) regarding the appointment of an investment manager.

preclude a trustee from serving as an investment manager, so long as the trustee meets the requirements set forth in subsections (A), (B), and (C) of ERISA section 3(38) and is formally appointed as an investment manager by a named fiduciary. (*See* DOL Advisory Opinion 77-69/70).

6. Additional Comments

Cross-Trades with Investment Manager's Affiliates

Several commenters requested that the Department clarify the rule by expressly permitting cross-trades between the account of an investment manager and the account of an investment manager's affiliate. One commenter noted that many cross-trading programs cover trades between accounts of affiliated managers. For example, a financial institution may have separate investment adviser subsidiaries managing mutual funds and separate account investments, and a trust company subsidiary managing collective investment funds. To facilitate cross-trading with client plans, the commenter urged the Department to clarify that the purchase and sale of a security between accounts managed by the "same investment manager" in ERISA section 408(b)(19) includes both a single investment manager, as well as affiliated investment managers, and that the term "affiliate" encompasses an entity controlling, controlled by, or under common control with, the investment manager. Another commenter stated that, absent such clarification, cross-trades involving plan assets executed between the accounts of an investment manager and its affiliate could be construed to violate ERISA section 406(b)(2).

In the Department's view, securities trades executed between an account managed by an investment manager and an account managed by an affiliate of such manager are beyond the scope of the statutory exemption. The Department believes that the language of ERISA section 408(b)(19), which provides relief for any transaction described in ERISA sections 406(a)(1)(A) and 406(b)(2) "involving the purchase and sale of a security between accounts managed by the same investment manager," only applies to the purchase and sale of a security between accounts managed by the same investment management entity. In this regard, the Department notes that an investment manager's exercise of discretionary authority, on behalf of an account it manages, to effect a purchase or sale of a security with another account over which an affiliate of the manager exercises discretionary authority would not, in itself, constitute a violation of 406(b)(2) of ERISA. However, a violation of ERISA's prohibited transaction provisions could arise in operation if, in fact, there was an agreement or understanding between the affiliated entities to favor one managed account at the expense of the other account in connection with the transaction. Finally, the Department notes that individual portfolio managers employed by the same investment management entity may execute cross-trades in accordance with the relief provided by the statutory exemption.

Quarterly Report under ERISA section 408(b)(19)(F) and Annual Report under ERISA section 408(b)(19)(I)

One commenter noted that the regulation did not discuss the investment manager's quarterly report required under ERISA section 408(b)(19)(F). The commenter requested that the Department include a provision in the final rule clarifying that the actual names of the counterparties do not have to be provided in the quarterly report, but that such parties could be identified by type, *i.e.*, endowment, insurance company account, mutual fund, or other institutional account. This commenter expressed concern that without this clarification, investment managers may violate confidentiality provisions in client contracts. The Department notes that the interim final rule addressed the content of the written cross-trading policies and procedures that must be adopted by the investment manager in order to comply with the requirements of the statutory exemption. However, the interim final rule did not address any issues related to the quarterly report. In this regard, the Department notes that the quarterly report described in section 408(b)(19)(F) of the Act requires detailed disclosures of all cross-trades executed by the manager during the quarter, including the parties involved in the cross-trade. In light of the language in the statutory exemption, the Department does not concur with the commenter's suggested clarification.

Another commenter stated that the rule should be expanded to address the compliance officer's annual report. The commenter noted that the statutory language requiring the report to provide notification to the plan fiduciary of its right to terminate participation in the cross-trading program at any time is very important. Therefore, the commenter suggested that the opt out language should be prominent and in a bold font sufficiently large (at least 14 point) to be distinguishable from the rest of the text included in the disclosure. Although the Department believes that the language in the annual report regarding a fiduciary's right to terminate its participation in the cross-trading program at any time should be prominently displayed in a manner that will bring it to the attention of the independent fiduciary, it does not believe that it is necessary to require a specific font size.

Consequences of Non-Compliance with Policies and Procedures

One commenter asked the Department to clarify that non-compliance with the policies and procedures mandated by the interim final rule would not, in itself, invalidate the applicability of the statutory exemption to either a specific cross-trade transaction or to any cross-trades undertaken by a particular investment manager. The commenter expressed the view that Congress did not intend that non-compliance with the policies and procedures, in itself, would cause the exemption not to be available for cross-trades by a particular manager, provided that the non-compliance did not result in a failure to conform with the conditions stipulated in ERISA section 408(b)(19)(A) through (G). To support this view, the commenter noted that the annual compliance report mandated in ERISA section 408(b)(19)(I) requires only that instances of non-compliance with the investment manager's policies and procedures be reported to the plan fiduciary authorizing the cross-trades. Following receipt of this report, the authorizing fiduciary would then make a determination as to whether the non-compliance warrants further action (such as termination of the authorization).

In response to the commenter's suggestion, the Department notes that ERISA section 408(b)(19)(H) requires that, in order for the exemption to apply, the investment manager must adopt, and cross-trades must be effected in accordance with, written cross-trading policies and procedures. It is the Department's view that the exemption would be unavailable for any transaction that was not effected in accordance with cross-trading policies and procedures that satisfy the requirements of section 408(b)(19)(H) and the regulations issued thereunder. The Department is of the further view that reporting instances of non-compliance serves as a notice to the plan fiduciary but does not relieve the investment manager from the responsibility to comply with the requirements of the statutory exemption. However, individual instances of non-compliance with the policies and procedures by the investment manager would not, in itself, render the statutory exemption inapplicable to the investment manager's entire cross-trading program, provided that the other cross-trading transactions met all of the requirements of section 408(b)(19) of the Act.

Application of Final Rule to Pooled Investment Vehicles

Several commenters suggested modification of the minimum plan asset size required for participation in the manager's cross-trading program by clarifying that the cross-trading exemption is available to a common or collective trust or other pooled investment vehicle where at least one participating plan has assets of at least $100 million. One commenter stated that this clarification should also extend to master-feeder trust arrangements, where the only investors in the "master" collective trust (i.e., the entity that would engage in cross-trades) are other collective trusts. Under this approach, subject to the requirement that one of the participating "feeder" trusts includes a plan with assets of at least $100 million, the entire master trust would be permitted to cross-trade with the consent of an authorizing fiduciary of the $100 million plan. According to the commenter, absent such clarification, a plan that meets the $100 million minimum asset requirement may not be able to utilize the cross-trading exemption where it participates in such a collective trust or other pooled investment vehicle.

Another commenter suggested that the final regulation should clarify that a pooled fund is eligible to use the statutory exemption if ERISA-covered plans with more than $100 million in assets hold 50 percent or more of the units of such pooled investment fund. Plans would have the option not to invest in pooled investment funds that intend to engage in cross-trading or to withdraw from the fund if the cross-trading program begins after the plan's initial investment. This commenter stated that it believes the Department has sufficient regulatory authority to create a pooled fund rule.

Another commenter suggested that cross-trades should be allowed (i) by plans meeting a $50 million threshold and (ii) between plans maintained by employers in the same controlled group, as long as ERISA plans within the same controlled group meet the minimum threshold requirements in the aggregate.

The Department has not adopted the commenters' suggestions, because it believes that the proposed changes are inconsistent with ERISA section 408(b)(19)(E), which requires "each plan participating in the transaction [to have] assets of at least $100,000,000." The only exception to this requirement is for master trusts containing the assets of plans maintained by employers in the same controlled group, in which case the master trust must have assets of at least $100,000,000. In this regard, the Department notes that pooled investment vehicles comprised solely of plans with assets of at least $100 million may take advantage of the statutory exemption.

Minimum Asset Size Test

Several commenters requested that the Department modify the procedure contained in the interim final rule for verifying that any plan (or master trust containing the assets of plans maintained by employers in the same controlled group) participating in a manager's cross-trading program has assets of at least $100 million. Specifically, the interim final rule at section 2550.408b-19(b)(3)(i)(C) provided that "[a] plan or master trust will satisfy the minimum asset size requirement as to a transaction if it satisfies the requirement upon its initial participation in the cross-trading program and on a quarterly basis thereafter." The commenters expressed the view that annual, rather than quarterly, verification of the minimum asset size requirement would be more practical for investment managers and plan sponsors.

One commenter pointed out that many managers obtain updated information about their clients only on an annual basis. Moreover, cross-trading managers who oversee only a portion of a plan's assets may not have continuous access to information on the client plan's overall asset level.

Another commenter suggested that the Department adopt an alternative means for satisfying the minimum asset test. Under such an approach, a plan fiduciary would be required to certify satisfaction of the $100 million threshold at the inception of its participation in the cross-trading program, and to inform the investment manager if the asset level subsequently falls below the minimum asset requirement.

In response to these comments, the Department has modified the rule to provide that a plan's minimum asset size may be verified on an annual basis.

Individual Exemptive Relief for Smaller Plans

One commenter requested that the Department issue an administrative class exemption for plans with assets below $100 million. This commenter stated that plans below the $100 million requirement may have less bargaining power to obtain lower commissions from brokers and potentially could benefit more from cross-trading relative to larger plans.

The Department wishes to take the opportunity to state that enactment of the statutory exemption for cross-trading does not foreclose future consideration of administrative relief if the required findings under section 408(a) of ERISA can be made.

Effective Date

The Department recognizes that implementation issues may arise concerning the effect of the final rule on investment managers that adopted cross-trading policies and procedures and made disclosures to, and obtained authorizations from, independent fiduciaries in reliance on the interim final regulation. After considering this issue, the Department has determined to make the final regulation effective 120 days after publication. Also, it is the view of the Department that an investment manager that obtained a fiduciary's authorization, in accordance with section 408(b)(19)(D) of the Act, prior to the effective date of this final regulation and based on compliance with the interim final regulation, will not be required to obtain a re-authorization following disclosures that reflect this final regulation.

C. Regulatory Impact Analysis

Executive Order 12866 Statement

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, it has been determined that this action is not “significant” within the meaning of section 3(f) of the Executive Order, and, therefore, is not subject to review by OMB.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C 551 et seq.) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a proposed rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rule-making describing the impact of the rule on small entities and seeking public comment on such impact.

Because this rule initially was issued as an interim final rule, the RFA does not apply and the Department is not required to either certify that the rule will not have a significant impact on a substantial number of small businesses or conduct an initial regulatory flexibility analysis. Nevertheless, the Department has considered the likely impact of the rule on small entities in connection with its assessment under Executive Order 12866, described above, and believes this rule will not have a significant impact on a substantial number of small entities. For purposes of this discussion, the Department deemed a small entity to be an employee benefit plan with fewer than 100 participants.

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 which cover fewer than 100 participants.

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), the interim final rule solicited comments on the information collection included in the rule. The Department also submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), contemporaneously with the publication of the interim final rule, for OMB's review. No public comments were received that specifically addressed the paperwork burden analysis of the information collection.

OMB approved the ICR on April 27, 2007 under control number 1210-0130, which expires on April 30, 2010. This final rule does not implement any substantive or material change to the information collection; therefore, no change is made to the ICR, and no further review is requested of OMB at this time. The burden cost and hours were adjusted to reflect updated wage rates and a small increase in the estimated number of investment managers who are expected to engage in cross-trading.

A copy of the ICR may be obtained by contacting the PRA addressee shown below.

PRA ADDRESSEE: Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW, Room N-5718, Washington, DC 20210. Telephone: (202) 693-8410; Fax: (202) 219-4745. These are not toll-free numbers. ICRs submitted to OMB are also available at reginfo.gov (http://www.reginfo.gov/public/do/PRAMain).

This regulation implements the content requirements for the written cross-trading policies and procedures required under section 408(b)(19)(H) of ERISA, as added by section 611(g) of the PPA. As described earlier in this preamble, section 611(g)(1) of the PPA created a new statutory exemption, added to section 408(b) of ERISA as subsection 408(b)(19), that exempts from the prohibitions of sections 406(a)(1)(A) and 406(b)(2) of ERISA cross-trading transactions involving the purchase and sale of a security between an account holding assets of a pension plan and any other account managed by the same investment manager, provided that certain conditions are satisfied.

The information collection provisions of the regulation safeguard plan assets by ensuring that important information about an investment manager's cross-trading program is provided to plan fiduciaries prior to their decision whether to begin or continue participation in the cross-trading program. The information collection also assists in ensuring that investment managers relying on the statutory exemption effect cross-trades in accordance with the criteria described in the policies and procedures.

Under the final regulation, an investment manager would be required to develop written cross-trading policies and procedures that meet the regulation's content requirements and to disclose them to plan fiduciaries prior to their deciding whether to invest plan assets in an account participating in the cross-trading program. The regulation would provide that the policies and procedures for cross-trading under the new statutory exemption must include detailed explanations and descriptions of certain aspects of the investment manager's cross-trading program, as explained earlier in this preamble. This information collection, therefore, constitutes third-party disclosures between an investment manager and plan fiduciaries.

Annual Hour Burden

Based on data derived primarily from the Form 5500 Annual Return/Report of Employee Benefit Plan filings for the 2001 to 2005 plan years, which is the most recent reliable data available, the Department estimates that approximately 2,200[9] plans would be eligible to participate in cross-trading programs. Further, the Department estimates that approximately 1,800[10] investment managers would serve as investment managers for the assets of such eligible plans.[11] On average, the Department estimates that each of the 1,800 investment managers will manage assets of nine plans. Assuming that 90 percent

[9] All numbers in this burden analysis, apart from the hourly wage rates, have been rounded either to the nearest thousand or the nearest hundred, as appropriate.
[10] Under the statutory exemption, ``each plan participating in the cross-trading transaction [must have] assets of at least $100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 407(d)(7)), the master trust has assets of at least $100,000,000." ERISA section 408(b)(19)(E).
[11] Because a plan of this size is likely to use the services of more than one investment manager to invest its assets, the Department has assumed that some of the eligible plans will have assets invested under more than one cross-trading program.

of the 1,800 investment managers have cross-trading programs, investment managers would be required to provide about 15,000 initial disclosures of cross-trading policies and procedures to plan fiduciaries (1,800 investment managers * 9 plans each * 90 percent = 14,580 initial disclosures). The Department assumes that each investment manager would require 10 hours of a legal professional's time to develop written policies and procedures in the first year.[12] For the 90 percent of the 1,800 investment managers that develop cross-trading programs, the Department estimates an initial annual hour burden of a little over 16,000 hours.

Each investment manager would be required to provide the cross-trading policies and procedures as an initial disclosure to each plan. The Department assumes that the initial disclosure will be provided in writing to provide a desired formality of compliance. Thus, the Department estimates that investment managers will be required to provide about 15,000 initial plan disclosures to plan fiduciaries (90 percent of 1,800 investment managers, times nine plans) in the first year in which the exemption is effective. The Department assumes that 3 (three) minutes of clerical time per plan disclosure will be needed to gather the required information, collate and package the information for distribution, and ensure that the information is distributed in a manner that will create a record of delivery, for a total of about 730 hours of clerical time.

In years subsequent to the first year of applicability, the Department estimates that modified policies and procedures will be written by investment managers whose policies and procedures have changed, and new policies and procedures will be written by

[12] The Department assumed that investment managers, which are large, sophisticated financial institutions, will use existing in-house resources to prepare the information and disclosures.

investment managers that inaugurate new cross-trading programs. For purposes of burden analysis, the Department has assumed that the number of investment managers that either change or newly adopt cross-trading policies and procedures in a subsequent year will equal 14 percent of the investment managers that currently have cross-trading policies and procedures, or about 230 managers. These 230 investment managers will each spend 10 hours of a legal professional's time to develop new written policies and procedures, for a total of about 2,300 hours each year. These investment managers are also estimated to distribute their new written policies and procedures to 2,000 plan fiduciaries. This would require about 100 hours of clerical time.

In total, the initial disclosure of cross-trading policies and procedures is estimated to require about 17,000 hours in the first year (16,200 hours of legal professional's time + 729 hours of clerical time = 16,929 hours total) and about 2,400 hours in each subsequent year (2,268 hours of legal professional's time + 102 hours of clerical time = 2,370 hours total). The equivalent costs of these hours are $1,735,000 and $243,000, respectively.[13]

Annual Cost Burden

The only additional costs arising from this information collection derive from the direct costs of distribution.

The Department believes that initial disclosure of the investment manager's written policies and procedures to plan fiduciaries eligible to participate in the investment

[13] Hourly wage estimates for purposes of deriving cost equivalents were based on data of the Occupational Employment Survey (March 2005, Bureau of Labor Statistics) and the Employment Cost Trends (Sept. 2006, Bureau of Labor Statistics). The resulting hourly wage rates were $106, including both wages and benefits, for legal professionals and $25, similarly including both wages and benefits, for clerical personnel.

manager's cross-trading program will be prepared in paper form and distributed by mail delivery service, courier or some other means of distribution that will create a record of delivery. For the initial disclosures to the plan fiduciaries assumed to receive such disclosure, the Department assumes a distribution cost of $4.00 per plan. This includes the actual cost of distribution, plus any overhead costs associated with printing the documentation. Given that about 90% of the approximately 1,800 investment managers are estimated to engage in cross-trading and that each of them manages on average nine plans, investment managers would have to prepare a little less than 15,000 disclosures to plan fiduciaries. The total initial annual cost burden for distributing the required notice amounts to $58,000.

In years subsequent to the first year of applicability, policies and procedures will only have to be distributed by investment managers that develop new policies and procedures. For purposes of burden analysis, the Department has assumed that the number of investment managers that will do so in a subsequent year will be equal to 14 percent of existing investment managers with cross-trading programs, or about 230 managers.

The distribution of these new written policies and procedures in a subsequent year to plan fiduciaries will require material and postage costs of $4.00 per plan. Assuming that, on average, the assets of about nine plans are managed by each investment manager, this would require a little more than 2,000 disclosures annually and about $8,200 annually in materials and postage costs.

In total, the initial disclosure of policies and procedures is estimated to require about $58,000 for materials and postage in the first year and about $8,200 in each subsequent year.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection

Agency: Employee Benefits Security Administration, Department of Labor

Title: Statutory Exemption for Cross-Trading of Securities

OMB Number: 1210-0130

Affected Public: Business or other for-profit; not-for-profit institutions

Respondents: 1,600 (first year); 230 (subsequent years)

Responses: 15,000 (first year); 2,000 (subsequent years)

Frequency of Response: Occasionally

Estimated Total Annual Burden Hours: 17,000 (first year); 2,400 (subsequent years)

Estimated Total Annual Burden Cost: $58,000 (first year); $8,200 (subsequent years)

Congressional Review Act

The final rule being issued here is subject to the provisions of the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and will be transmitted to Congress and the Comptroller General for review. The final rule is not a "major rule" as that term is defined in 5 U.S.C. 804, because it does not result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), the final rule does not include any federal mandate that may result in expenditures by State, local, or tribal governments, or impose an annual burden exceeding $100 million or more, adjusted for inflation, on the private sector.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires federal agencies to adhere to specific criteria in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the rule do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects 29 CFR Part 2550

Employee benefit plans, Employee Retirement Income Security Act, Employee stock ownership plans, Exemptions, Fiduciaries, Investments, Investments foreign, Party in interest, Pensions, Pension and Welfare Benefit Programs Office, Prohibited transactions, Real estate, Securities, Surety bonds, Trusts and Trustees.

For the reasons set forth above, the Department amends 29 CFR part 2550 as follows:

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

1. The authority citation for part 2550 is revised to read as follows:

Authority: 29 U.S.C. 1135; and Secretary of Labor's Order No. 1-2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2550.401c-1 also issued under 29 U.S.C. 1101. Sec. 2550.404a-1 also issued under sec. 657, Pub. L. 107-16, 115 Stat. 38. Sections 2550.404c-1 and 2550.404c-5 also issued under 29 U.S.C. 1104. Sec. 2550.408b-1 also issued under 29 U.S.C. 1108(b)(1) and sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1. Sec. 2550.408b–19 also issued under sec. 611, Pub. L. 109–280, 120 Stat. 780, 972, and sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1. Sec. 2550.412-1 also issued under 29 U.S.C. 1112.

2. Revise § 2550.408b–19 to part 2550 to read as follows:

§2550.408b-19 Statutory exemption for cross-trading of securities.

(a) *In General*. (1) Section 408(b)(19) of the Employee Retirement Income Security Act of 1974 (the Act) exempts from the prohibitions of section 406(a)(1)(A) and 406(b)(2) of the Act any cross-trade of securities if certain conditions are satisfied. Among other conditions, the exemption requires that the investment manager adopt, and effect cross-trades in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include:

(i) A description of the investment manager's pricing policies and procedures; and

(ii) The investment manager's policies and procedures for allocating cross- trades in an objective manner among accounts participating in the cross-trading program.

(2) Section 4975(d)(22) of the Internal Revenue Code of 1986 (the Code) contains parallel provisions to section 408(b)(19) of the Act. Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 214 (2000 ed.), transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. Therefore, all references herein to section 408(b)(19) of the Act should be read to include reference to the parallel provisions of section 4975(d)(22) of the Code.

(3) Section 408(b)(19)(D) of the Act requires that a plan fiduciary for each plan participating in the cross-trades receive in advance of any cross-trades disclosure regarding the conditions under which the cross-trades may take place, including the written policies and procedures described in section 408(b)(19)(H) of the Act. This disclosure must be in a document that is

separate from any other agreement or disclosure involving the asset management relationship. For purposes of section 408(b)(19)(D) of the Act, the policies and procedures furnished to the authorizing fiduciary must conform with the requirements of this regulation.

(4) The standards set forth in this section apply solely for purposes of determining whether an investment manager's written policies and procedures satisfy the content requirements of section 408(b)(19)(H) of the Act. Accordingly, such standards do not determine whether the investment manager satisfies the other requirements for relief under section 408(b)(19) of the Act.

(1) (b) *Policies and Procedures. In General.* This paragraph specifies the content of the written policies and procedures required to be adopted by an investment manager and disclosed to the plan fiduciary prior to authorizing cross-trading in order for transactions to qualify for relief under section 408(b)(19) of the Act.

(2) *Style and Format.* The content of the policies and procedures required by this paragraph must be clear and concise and written in a manner calculated to be understood by the plan fiduciary authorizing cross-trading. Although no specific format is required for the investment manager's written policies and procedures, the information contained

in the policies and procedures must be sufficiently detailed to facilitate a periodic review by the compliance officer of the cross-trades and a determination by such compliance officer that the cross-trades comply with the investment manager's written cross-trading policies and procedures.

(3) *Content* (i). An investment manager's policies and procedures must be fair and equitable to all accounts participating in its cross-trading program and reasonably designed to ensure compliance with the requirements of section 408(b)(19)(H) of the Act. Such policies and procedures must include:

(A) A statement of policy which describes the criteria that will be applied by the investment manager in determining that execution of a securities transaction as a cross-trade will be beneficial to both parties to the transaction;

(B) A description of how the investment manager will determine that cross-trades are effected at the independent "current market price" of the security (within the meaning of section 270.17a-7(b) of Title 17, Code of Federal Regulations and SEC no-action and interpretative letters thereunder) as required by section 408(b)(19)(B) of the Act, including the identity of sources used to establish such price;

(C) A description of the procedures for ensuring compliance with the $100,000,000 minimum asset size requirement of section 408(b)(19). A plan or master trust will satisfy the minimum asset size requirement as to a transaction if it satisfies the requirement upon its initial participation in the cross-trading program and on an annual basis thereafter;

(D) A statement that any investment manager participating in a cross-trading program will have conflicting loyalties and responsibilities to the parties involved in any cross-trade transaction and a description of how the investment manager will mitigate such conflicts;

(E) A requirement that the investment manager allocate cross-trades among accounts in an objective and equitable manner and a description of the allocation method(s) available to and used by the investment manager for assuring an objective allocation among accounts participating in the cross-trading program. If more than one allocation methodology may be used by the investment manager, a description of what circumstances will dictate the use of a particular methodology;

(F) Identification of the compliance officer responsible for periodically reviewing the investment manager's compliance with section

408(b)(19)(H) of the Act and a statement of the compliance officer's qualifications for this position;

(G) A statement that the cross-trading statutory exemption under section 408(b)(19) of the Act requires satisfaction of several objective conditions in addition to the requirements that the investment manager adopt and effect cross-trades in accordance with written cross-trading policies and procedures; and

(H) A statement which specifically describes the scope of the annual review conducted by the compliance officer.

(ii) Nothing herein is intended to preclude an investment manager from including such other policies and procedures not required by this regulation as the investment manager may determine appropriate to comply with the requirements of section 408(b)(19).

(c) *Definitions*. For purposes of this section:

(1) The term “account” includes any single customer or pooled fund or account.

(2) The term “compliance officer” means an individual designated by the investment manager who is responsible for periodically reviewing the cross-trades made for the plan to ensure compliance with the investment manager’s written cross-trading policies and procedures and the requirements of section 408(b)(19)(H) of the Act.

(3) The term “plan fiduciary” means a person described in section 3(21)(A) of the Act with respect to a plan (other than the investment manager engaging in the cross-trades or an affiliate) who has the authority to authorize a plan’s participation in an investment manager’s cross-trading program.

(4) The term “investment manager” means a person described in section 3(38) of the Act.

(5) The term “plan” means any employee benefit plan as described in section 3(3) of the Act to which Title I of the Act applies or any plan defined in section 4975(e)(1) of the Code.

(6) The term "cross-trade" means the purchase and sale of a security between a plan and any other account managed by the same investment manager.

Signed at Washington, D.C., this 29th day of September, 2008.

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Bradford P. Campbell

Assistant Secretary

Employee Benefits Security Administration
Department of Labor
Billing Code 4510-29P

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