

**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:** Interim final rule with request for comments.

**SUMMARY:** This document contains an interim 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, Public Law 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 interim final rule would affect employee benefit plans, investment managers, plan fiduciaries and plan participants and beneficiaries.

**DATES:** *Effective Date:* This interim final rule is effective April 13, 2007.

*Comment Date:* Written comments on this interim final rule should be received by the Department of Labor on or before April 13, 2007.

**ADDRESSES:** Written comments (preferably, at least three copies) should be addressed to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, Washington, DC 20210, Attention: Cross-Trading Policies and Procedures Interim Final Rule. Commenters are encouraged to submit responses electronically by e-mail to [e-OED@dol.gov](mailto:e-OED@dol.gov), or by using the Federal eRulemaking portal at <http://www.regulations.gov>. Persons submitting responses electronically should not submit paper copies. All responses will be available to the public at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, U.S. Department of

Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and online at <http://www.regulations.gov> and <http://www.dol.gov/ebsa>.

**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, Public Law 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.<sup>1</sup> 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 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.

The rule contained in this document is being issued on an interim final basis to provide immediate guidance regarding the contents of the written cross-trading policies and procedures that must be adopted by investment managers in order to comply with the requirements of the statutory exemption. ERISA section 408(b)(19) is effective for transactions occurring after August 17, 2006, and Congress directed the Secretary of Labor to issue regulations by February 13, 2007. Given the current need for regulations and the short period in which the regulations are to be issued, the Department finds for good cause that notice and public procedure before issuance of this regulation is impracticable. Nevertheless, the Department will carefully review the comments received on this regulation and will thereafter issue a final regulation that takes them into consideration.

**B. Overview of Interim Final Rule**

The interim final rule amends 29 CFR part 2550 by adding a new section, 2550.408b-19. Paragraph (a) of the interim final rule states that the standards set forth in this interim 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

<sup>1</sup> Section 611(g)(92) 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 U.S.C. 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.

for relief under section 408(b)(19) of the Act.

Paragraph (b)(2) requires the content of the written cross-trading policies and procedures to be clear, concise, and written in a manner calculated to be understood by the plan fiduciary authorizing a plan's participation in the manager's cross-trading program. Although no specific format is required for the investment manager's written cross-trading 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.

As discussed below, paragraph (b)(3) of the interim final rule describes 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 the investment manager engaging in any cross-trades under section 408(b)(19) of the Act. The Department of Labor (Department) expects that, following disclosure of the written policies and procedures adopted by the investment manager and any other disclosures required by the exemption,<sup>2</sup> the plan fiduciary will be able to determine whether it is appropriate to authorize the plan's participation in the investment manager's cross-trading program. The definitions of certain terms used in the interim final rule are contained in paragraph (c).

### C. Content of Written Cross-Trading Policies and Procedures

Section 408(b)(19)(H) of the Act requires the 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, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for

allocating cross-trades in an objective manner among accounts participating in the cross-trading program.

Paragraph (b)(3) of the interim final rule sets forth the content requirements for the written cross-trading policies and procedures to be adopted by the investment manager. The Department believes that the policies and procedures must provide sufficient information to enable a plan fiduciary to assess the investment manager's cross-trading program. In this regard, the relief provided by section 408(b)(19) of the Act is subject to satisfaction of a number of conditions by the investment manager, including the designation of a compliance officer to periodically review purchases and sales and prepare an annual report. A number of the content requirements mandated by the interim final rule require the investment manager to describe the method or process that will be employed by the manager to satisfy section 408(b)(19)(H) of the exemption. This information will enable the compliance officer to review securities purchases and sales to ensure compliance with the written policies and procedures. Since the compliance officer's annual report must be issued to plan fiduciaries responsible for authorizing a plan's participation in the investment manager's cross-trading program, it will assist the plan fiduciary in making an informed decision regarding the plan's continued participation in the cross-trading program.

The interim final rule requires the compliance officer to determine whether an investment manager's cross-trading program meets the requirements of section 408(b)(19) (H) of the Act. The Department specifically requests comments from interested persons regarding whether the scope of the compliance officer's responsibilities under the regulation should be expanded to encompass compliance with all of the requirements of the statutory exemption. In this regard, the Department is interested in any information regarding the current practices of compliance officers in determining compliance with applicable statutory or administrative exemptions under ERISA.

In order to assure that plan fiduciaries recognize the scope of compliance reviews conducted under these rules, paragraph (b)(3)(vii) 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 408(b)(19)(H).

Section 408(b)(19)(H) of the Act specifies that the written cross-trading

policies and procedures adopted by the investment manager must include a description of the manager's policies and procedures for determining the price at which securities are cross-traded. The Department expects that the pricing policies and procedures will be described in sufficient detail to enable the compliance officer to independently determine that the cross-trade transaction was effected at the "independent current market price" of the security (within the meaning of § 270.17a-7(b) of Title 17, Code of Federal Regulations) as required by section 408(b)(19)(B) of the Act.<sup>3</sup>

Section 408(b)(19)(H) further specifies that such policies and procedures must include the policies and procedures for allocating cross-trades in an objective manner among accounts participating in the cross-trading program. In this regard, the Department notes that frequently the demand for a particular security among the accounts of an investment manager may exceed the supply available to cross-trade. Section 408(b)(19)(D) of the Act requires that the basis for any objective allocation to be used must be disclosed to each plan fiduciary prior to obtaining the required authorization. It is the Department's understanding that managers have relied on different systems, e.g., a pro rata or queue system, to allocate cross-trade opportunities on an objective basis. The Department recognizes that there may be a number of objective systems that are appropriate for the allocation of securities.

Paragraph (b)(3) of the interim final rule specifies that the investment manager's written cross-trading policies and procedures must include:

- 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;<sup>4</sup>

<sup>3</sup> The Department notes that the SEC has issued several no-action and interpretive letters under 17 CFR 270.17a-7(b). The Department is of the view that investment managers who comply with 17 CFR 270.17a-7(b) and SEC no-action and interpretative letters thereunder will satisfy the requirements of section 408(b)(19)(B) of the Act.

<sup>4</sup> Notwithstanding the relief provided in section 408(b)(19) of the Act, the Department notes that the Act's general standards of fiduciary conduct also would apply to the investment manager's determination to cross-trade securities on behalf of a plan. In this regard, section 404 of the Act requires, among other things, a fiduciary to discharge his duties respecting the plan solely in the interests of the participants and beneficiaries and in a prudent manner. Accordingly, an investment manager must act prudently and solely in the interest of the participants and beneficiaries of the plans on whose behalf they are acting with

<sup>2</sup> Under section 408(b)(19)(D) of the Act, the authorizing plan fiduciary must receive disclosures regarding the conditions under which cross-trades may take place in a document that is separate from any other agreement or disclosure involving the asset management relationship. Such disclosure must 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. The written cross-trading policies and procedures must explain how the investment manager will mitigate such conflicts. Further, section 408(b)(19)(F) of the Act requires the investment manager to provide the plan fiduciary who authorized cross-trading a quarterly report detailing all the cross-trades executed by the investment manager in which the plan participated during such quarter.

- 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;

- A description of the procedures for ensuring compliance with the \$100,000,000 minimum asset size requirement of section 408(b)(19);<sup>5</sup>

- A description of how the investment manager will mitigate any potentially conflicting division of loyalties and responsibilities to the parties involved in any cross-trade transaction;

- A requirement that the investment manager allocate cross-trades among accounts participating in the cross-trading program in an objective and equitable manner and a description of the allocation method(s) that will be available to and used by the investment manager;

- The identity of the compliance officer responsible for reviewing the investment manager's compliance with its written cross-trading policies and procedures, and the compliance officer's qualifications for this position; and

- A statement which describes the scope of the review conducted by the compliance officer, specifically noting whether such review is limited to compliance with the policies and procedures required by 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 ERISA.

#### D. Request for Comments

The Department invites comments from interested persons on all aspects of the interim final rule. Comments should be addressed to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, Washington, DC 20210, Attention: Cross-Trading Policies and Procedures Interim Final Rule. All responses will be available for public inspection at the Public Disclosure Room, Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, Washington,

DC 20210. Electronic responses should contain “Cross-Trading Policies and Procedures Interim Final Rule” in the subject line and be addressed to *e-OED@dol.gov*.

#### E. Good Cause Finding That Proposed Rulemaking Unnecessary

Rulemaking under section 553 of the Administrative Procedure Act (APA) ordinarily involves publication of a notice of proposed rulemaking in the **Federal Register** and the public is given an opportunity to comment on the proposed rule. The APA authorizes agencies to dispense with proposed rulemaking procedures, however, if they find both good cause that such procedures are impracticable, unnecessary, or contrary to the public interest, and incorporate a statement of the finding with the underlying reasons in the interim final rule issued.

In this case, the Department finds that it is impracticable to undertake proposed rulemaking with regard to the content of the cross-trading policies and procedures. The Department believes such rulemaking is impracticable because, prior to the issuance of the Department's regulation, investment managers who engage in cross-trading on behalf of plans do so are at risk that their cross-trading programs will run afoul of the statutory exemption if their policies and procedures do not meet the requirements of the Department's regulation. The Department understands that the lack of guidance has had a “chilling effect” on the willingness of investment managers and plans to take advantage of the statutory exemption. Therefore, the Department made a policy determination to issue the regulation as an interim final regulation to allow plans to take advantage of the cost-savings derived from cross-trades as soon as possible. The Department therefore finds that notice and public procedure is impracticable and is publishing the rule as an interim final rule and is including a request for comment.

The Department has limited the comment period to 60 days in order to enable the Department to adopt changes to the interim final rule at the earliest possible date, taking into account Congress' expectation that regulations would be issued not later than 180 days from enactment of the PPA on August 17, 2006. The Department believes that, in light of the limited number of issues presented for consideration by the interim final rule, the provided 60-day comment period affords interested persons an adequate amount of time to analyze the rule and submit comments.

#### F. 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. Although the Department believes that this regulatory action is not economically significant within the meaning of section 3(f)(1) the Executive Order, the action has been determined to be significant within the meaning of section 3(f)(4) of the Executive Order, and the Department accordingly provides the following assessment of its potential costs and benefits. As elaborated below, the Department believes that the benefits of the interim final rule will be substantial and will justify its costs.

In assessing the costs and benefits of the interim final rule and associated provisions of the Act, the Department endeavored to consider all of the major activities that will be carried out pursuant to them. For example, investment managers will adopt, and effect cross-trades in accordance with, policies and procedures that clearly describe the criteria governing fair and equitable cross-trading, including the pricing of securities when cross-traded and the methods for allocating cross-trades among accounts. Investment managers will also appoint compliance officers responsible for determining and notifying participating plans' fiduciaries whether the applicable policies and procedures have been followed. These activities will help equip plan fiduciaries to evaluate cross-trading programs, and will help ensure that the cross-trades executed under such programs benefit all parties whose

respect to: (1) The decision to enter into a cross-trade; and (2) the terms of such cross-trade.

<sup>5</sup> A plan or master trust will satisfy this 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.

assets are cross-traded, including participating plans.

These activities will entail some cost (a part of which is quantified later in this preamble in connection with the Department's information collection request). The Department believes that many of these activities are already common practice among investment managers that operate high-quality, successful cross-trading programs. As such, much of the cost of these activities is not properly classified as a cost of the interim final rule or associated provisions of the Act.

The Department also believes that all of these activities are a necessary and efficient means of safeguarding plan assets invested in accounts subject to cross-trading programs.

The activities are necessary because plans' investments, and the retirement benefits they will provide for participants and beneficiaries, might otherwise be at avoidable risk. Investment managers operating cross-trading programs owe loyalty to both parties to any cross-trade (as well as to all prospective parties to any cross-trade). Such parties' interests in relation to the cross-trades often conflict. Accordingly, the Department believes that the transparency and protections provided by the interim final rule and associated provisions of the Act are essential to reducing the risks to the security of pension plan investments that are inherent in allowing cross-trading involving plans.

The activities are efficient insofar as they exploit investment managers' and compliance officers' comparative advantage at performing certain functions that help fiduciaries protect participants' interests. Investment managers, as the designers and operators of cross-trading programs, are well positioned to evaluate the economic merits of alternative permissible approaches. Compliance officers are well situated to monitor programs' adherence to established policies and procedures. The interim final rule and associated provisions of the Act exploit these efficiencies to protect participants' interests both directly (by creating better conditions for cross-trading) and indirectly (by more efficiently delivering relevant information to participating plans' fiduciaries). By assigning duties of designing, operating, and monitoring cross-trading programs to investment managers and compliance officers, and by ensuring that plan fiduciaries will receive timely and relevant information on adherence to established policies and procedures, the interim final rule will improve the ability of plan fiduciaries to

satisfy their fiduciary duties in determining the appropriateness of a plan's investment in an account subject to cross-trading.

On this basis of this assessment, the Department concludes that the benefits of the interim final rule justify its cost. The Department invites comments on this assessment and conclusion.

The Department is considering whether in the future to pursue additional regulatory action under section 408(b)(19) of the Act. For example, should cross-trading programs' policies and procedures be required to include elements that would ensure the programs' compliance with all of the conditions of the exemption enumerated under section 408(b)(19) of the Act? Should compliance officers be responsible for reviewing and reporting on compliance with all such conditions? Expanding the content requirements might add to the cost of developing, distributing, and adhering to them. Expanding compliance officers' responsibilities might increase their costs to carry out those responsibilities. But, as with the requirements of the interim final rule and associated provisions of the Act, such expanded requirements also might favorably leverage investment managers' and compliance officers' comparative advantage at performing certain functions that help fiduciaries protect participants' interests. The Department invites comment on the desirability of additional regulatory action in this area.

#### *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 is being 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 interim 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*

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, the reporting burden (time and financial resources) is minimized, and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the information collection request (ICR) included in the Interim Final Regulation on Statutory Exemption for Cross-Trading. A copy of the ICR may be obtained by contacting the person listed in the PRA Addressee section below.

The Department has submitted a copy of the interim final regulation to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the

use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., by permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. Although comments may be submitted through April 13, 2007, OMB requests that comments be received within 30 days of publication of the Notice of Interim Final Rulemaking to ensure their consideration.

**PRA Addressee:** Address requests for copies of the ICR to Susan G. Lahne, 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) 219-5333. These are not toll-free numbers.

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 collections also assist 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 interim 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 managed under 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. These information collections, therefore, constitute third-party disclosures between an investment manager and plan fiduciaries.

#### Annual Hour Burden

Based on data derived primarily from the Form 5500 Series filings for the 2001 to 2003 plan years, which is the most recent reliable data available, the Department estimates that approximately 2,100<sup>6</sup> plans would be eligible to, and would likely, participate in cross-trading programs.<sup>7</sup> Further, the Department estimates that approximately 1,600 investment managers would serve as investment managers for the assets of such eligible plans.<sup>8</sup> On average, the Department estimates that each of the 1,600 investment managers will manage assets of nine plans. Assuming that 90 percent of the 1,600 investment managers have cross-trading programs, investment managers would be required to provide about 13,000 initial disclosures of cross-trading policies and procedures to plan fiduciaries (1,600 investment managers  $\times$  9 plans each  $\times$  90 percent = 13,000 initial disclosures). The Department assumes that each investment manager would require 10 hours of a financial analyst's time to develop written policies and procedures in the first year.<sup>9</sup> For the 90 percent of the 1,600 investment managers that develop cross-trading programs, the Department estimates an initial annual hour burden of a little over 14,000 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 13,000 initial plan disclosures to plan fiduciaries (90 percent of 1,600 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, for a total of 650 hours of clerical time.

In years subsequent to the first year of applicability, the Department estimates that new policies and procedures will be written by investment managers whose policies and procedures have changed and by 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 200 managers. These 200 investment managers will each spend 10 hours of a financial analyst's time to develop new written policies and procedures, for a total of about 2,000 hours each year. These investment managers are also estimated to distribute their new written policies and procedures to 1,800 plan fiduciaries. This would require 90 hours of clerical time.

In total, the initial disclosure of cross-trading policies and procedures is estimated to require about 15,000 hours in the first year (14,000 hours of financial analysts' time + 650 hours of clerical time = 14,650 hours total) and about 2,100 hours in each subsequent year (2,000 hours of financial analysts' time + 90 hours of clerical time = 2,090 hours total). The equivalent costs of these hours are \$779,000 and \$109,000, respectively.<sup>10</sup>

<sup>6</sup> 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.

<sup>7</sup> Under the statutory exemption, "each plan participating in a 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."

<sup>8</sup> Because of a plan of this size 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.

<sup>9</sup> The Department assumed that investment managers, which are large, sophisticated financial institutions, will use existing in-house resources to prepare the information and disclosures.

<sup>10</sup> Hourly wage estimates, for purposes of deriving cost equivalents, were based on data from the Bureau of Labor Statistics Occupational Employment Survey (November 30, 2004) and the 2005 Employment Cost Trends. Clerical wage and benefits estimates were based on metropolitan wage rates for Executive Secretaries and Administrative Assistants. Professional wage and benefits estimates were based on metropolitan wage estimates for Financial Analysis. The resulting hourly wage rates were \$53, including both wages and benefits, for professional financial analysts and \$25, similarly

### 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 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 1,600 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 about 13,000 disclosures to plan fiduciaries. The total initial annual cost burden for distributing the required notice amounts to \$52,000.

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 200 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 1,800 disclosures annually and about \$7,300 annually in materials and postage costs.

In total, the initial disclosure of policies and procedures is estimated to require about \$52,000 for materials and postage in the first year and about \$7,300 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-NEW.

including both wages and benefits, for clerical personnel.

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

*Respondents:* 1,440.

*Responses:* 13,000.

*Frequency of Response:* Occasionally.

*Estimated Total Annual Burden*

*Hours:* 15,000 (first year); 2,100 (subsequent years).

*Estimated Total Annual Burden Cost:* \$52,000 (first year); \$7,300 (subsequent years).

### Congressional Review Act

The interim 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 interim 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 interim 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 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 interim 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 interim 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 in 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.

### Cross-Trading Policies and Procedures Regulation

■ For the reasons set forth in the preamble, subchapter F, part 2550 of title 29 of the Code of Federal Regulations is amended as follows:

### SUBCHAPTER F—FIDUCIARY RESPONSIBILITY UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

### 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; sec. 657, Pub. L. 107-16, 115 Stat. 38; sec. 611, Pub. L. 109-280, 120 Stat. 780; 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. 2550.404c-1 also issued under 29 U.S.C. 1104. Sec. 2550.407c-3 also issued under 29 U.S.C. 1107. Sec. 2550.408b-1 also issued under 29 U.S.C. 1108(b)(1) and sec. 102, Reorganization Plan No. 4 of 1978, 3 CFR, 1978 Comp., p. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), and 3 CFR, 1978 Comp., p. 332. 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, 3 CFR, 1978 Comp., p. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1979), and 3 CFR, 1978 Comp., p. 332. Sec. 2550.412-1 also issued under 29 U.S.C. 1112.

■ 2. Add § 2550.408b-19 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. This disclosure must be in a document that is separate from any other agreement or disclosure involving the asset management relationship. The disclosure must 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.

(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.

(b) *Policies and Procedures.*

(1) *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 § 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 a quarterly basis thereafter;

(D) A description of how the investment manager will mitigate any potentially conflicting division of loyalties and responsibilities to the parties involved in any cross-trade transaction;

(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; and

(G) A statement which describes the scope of the review conducted by the compliance officer, specifically noting whether such review is limited to compliance with the policies and procedures required by 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.

(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, DC, this 6th day of February, 2007.

**Bradford P. Campbell,**

*Acting Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

[FR Doc. E7-2290 Filed 2-9-07; 8:45 am]

**BILLING CODE 4510-29-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

#### 43 CFR Part 1820

[WO-850-1820-XZ-24-1A]

RIN 1004-AD34

#### **Application Procedures, Execution and Filing of Forms: Correction of State Office Address for Filings and Recordings, Proper Offices for Recording of Mining Claims**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Final rule; correcting amendment.

**SUMMARY:** This correcting amendment amends the regulations pertaining to execution and filing of forms in order to correct the post office box number in the address of the Nevada State Office of the Bureau of Land Management (BLM) in the list of State Office addresses.

**EFFECTIVE DATE:** February 12, 2007.

**FOR FURTHER INFORMATION CONTACT:** Chandra C. Little, Regulatory Affairs Division, (202) 452-5030. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339, 24 hours a day, 7 days a week.

**ADDRESSES:** You may send inquiries or suggestions to U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 401 LS, 1849 C Street, NW., Washington, DC 20240; *Attention:* RIN-1004-AD34.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

This final rule reflects the administrative action of correcting the address of the Nevada State Office of the BLM. The post office box number was incorrectly stated in the final rule published in the **Federal Register** on April 16, 2003 (68 FR 18554). The street address for the personal filing of documents relating to public lands in Nevada remains the same, and this correcting amendment makes no other changes in filing requirements.

#### *Need for Correction*

As published, the final regulations contain an error which may prove to be misleading and needs to be clarified.

#### **List of Subjects in 43 CFR Part 1820**

Administrative practice and procedure; Archives and records; Public lands.

Dated: February 2, 2007.

**Ted R. Hudson,**

*Acting Division Chief, Regulatory Affairs.*

■ For the reasons discussed in the preamble, the Bureau of Land Management amends 43 CFR part 1820 as follows:

#### **PART 1820—APPLICATION PROCEDURES**

■ 1. The authority citation for part 1820 continues to read as follows:

**Authority:** 5 U.S.C. 552, 43 U.S.C. 2, 1201, 1733, and 1740.

#### **Subpart 1821—General Information**

■ 2. Correct § 1821.10 by amending paragraph (a) by revising the address of the Bureau of Land Management, Nevada State Office, in paragraph (a) to read as follows:

##### **§ 1821.10 Where are BLM offices located?**

(a) \* \* \*

State Offices and Areas of Jurisdiction

\* \* \* \* \*

Nevada State Office, 1340 Financial Boulevard, Reno, Nevada 89502-7147, P.O. Box 12000, Reno, Nevada 89520-0006—Nevada.

\* \* \* \* \*

[FR Doc. E7-2108 Filed 2-9-07; 8:45 am]

**BILLING CODE 4310-84-P**

## DEPARTMENT OF DEFENSE

### **Defense Acquisition Regulations System**

#### **48 CFR Parts 211 and 252**

RIN 0750-AF31

#### **Defense Federal Acquisition Regulation Supplement; Radio Frequency Identification (DFARS Case 2006-D002)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD has adopted as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to

include additional commodities and locations that require package marking with passive radio frequency identification (RFID) tags. The rule requires contractors to affix passive RFID tags at the case and palletized unit load levels when shipping packaged petroleum, lubricants, oils, preservatives, chemicals, additives, construction and barrier materials, and medical materials to specified DoD locations.

**EFFECTIVE DATE:** February 12, 2007.

**FOR FURTHER INFORMATION CONTACT:** Ms. Robin Schulze, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; telephone (703) 602-0326; facsimile (703) 602-0350. Please cite DFARS Case 2006-D002.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

DoD published an interim rule at 71 FR 29084 on May 19, 2006, to implement the second year of DoD's three-year roll-out plan for supplier implementation of RFID. The rule added requirements for contractors supplying materiel to DoD to affix passive RFID tags at the case and palletized unit load levels when shipping packaged petroleum, lubricants, oils, preservatives, chemicals, additives, construction and barrier materials, and medical materials to specified locations. Ten respondents submitted comments on the interim rule. A discussion of the comments is provided below.

1. *Comment:* The DoD Suppliers' Passive RFID Information Guide states that the Air Mobility Command Terminals at Charleston, Dover, and Travis Air Force Bases will be added to the locations that require passive RFID tags in 2006. Instead of Dover Air Force Base, the rule adds the Naval Air Station in Norfolk.

*DoD Response:* The locations identified in the DFARS rule are correct. DoD is updating the Suppliers' Passive RFID Information Guide to incorporate these changes.

2. *Comment:* The Air Mobility Commands should be excluded until 2007, when all ship-to locations will require RFID tags. For contracts with transshipment points, such as the Air Mobility Commands, vendors do not know whether or not the ship-to location requires RFID tags when they respond to the solicitation. Vendors are required to contact the Transportation Office for shipping instructions at time of shipment.

*DoD Response:* DoD has amended the rule to require RFID tags for all high-