

**Interim Final Rule on
Statutory Exemption for Cross-Trading of Securities
OMB Number 1210-NEW
February 2007**

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT 1995 SUBMISSIONS

A. Justification

1. *Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.*

The Interim Final Rule on Statutory Exemption for Cross-Trading of Securities 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 Pension Protection Act of 2006, Pub. L. 109-280 (PPA). 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 those 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. Section 611(g)(3) of the PPA further directed the Secretary of Labor to issue regulations, within 180 days after enactment, regarding the content of the policies and procedures to be adopted by an investment manager to satisfy the conditions of the new statutory exemption.

The interim final rule is being promulgated in order to comply with the statutory directive of section 611(g)(3) of the PPA. It would provide that the policies and procedures for cross-trading under the new statutory exemption must:

- be written in a manner calculated to be understood by the plan fiduciary authorizing cross-trading.
- be sufficiently detailed to facilitate a periodic review of all cross-trades by a compliance officer designated by the investment manager and a determination by the compliance officer that the cross-trades comply with the investment manager's written cross-trading policies and procedures.
- include, at a minimum: (1) a statement of general 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; (2) a description of how the investment manager will determine that cross-trades are effected at the "independent current market price" of the security in a manner that is consistent with 17 C.F.R. 270.17a-7(b) and SEC interpretations thereunder, including the identity of sources used to establish the price; (3) a description of the procedures for ensuring compliance with the \$100,000,000 minimum asset size requirement of section 408(b)(19); (4) a description of how the investment manager will mitigate any potentially conflicting division of loyalties and

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responsibilities to the parties involved in any cross-trade transaction; (5) 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 policies and procedures that will be used; (6) the identity of the compliance officer responsible for reviewing the investment manager's compliance with 408(b)(19)(H) and the compliance officer's qualifications for this position; and (7) 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.

The statutory exemption requires, as a condition to exemptive relief, that an investment manager's policies and procedures regarding cross-trading be provided in advance to the fiduciary of any plan that is considering agreeing to allow its assets to be managed under the investment manager's cross-trading program. The investment manager is also required, under the statutory exemption, to designate a compliance officer responsible for periodically reviewing the investment manager's cross-trading program to ensure compliance with the investment manager's cross-trading written policies and procedures. The statutory exemption requires the compliance officer to issue an annual report to each plan fiduciary describing the steps performed during the course of the review, the level of compliance, and any specific instances of noncompliance.

The information collection provisions of this interim final rule are intended to carry out the Congressional directive to specify the contents of the policies and procedures required under the new statutory exemption. The Department believes the collections are necessary to safeguard plan assets by requiring that investment managers relying on the statutory exemption effect cross-trades in accordance with policies and procedures that are fair and equitable to all accounts participating in the cross-trading program. The information collection provisions of the interim final rule, along with other requirements of the statutory exemption, are also intended to ensure that plan fiduciaries have adequate information to make an informed decision regarding the plan's initial and continued participation in the investment manager's cross-trading program.

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

The information collection requirements of the interim final rule are third-party disclosures to plan fiduciaries involving the development and initial disclosure of written policies and procedures pertaining to an investment manager's cross-trading program under the statutory

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exemption for cross-trading. The exemption does not require any reporting or filing with the Federal government. The information will be used by the plan fiduciary to assess the initial and continued appropriateness of investing plan assets subject to a cross-trading program. The information will enable the plan fiduciary to fulfill its fiduciary duties under the plan and to protect plan assets on behalf of plan participants and beneficiaries.

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

Nothing in this interim final rule requires that disclosures be made through distribution methods that would preclude use of electronic technology. Accordingly, the collection of this information may be satisfied electronically by any investment manager that maintains the documents electronically if the party to which the disclosures must be made is able to receive the documents electronically. Discussions with industry experts indicate that the parties that engage in cross-trading programs are large, financially sophisticated entities. A recent study by the Securities Industry Association indicates that virtually all large, sophisticated financial institutions “have invested in complex information technology (IT) systems.”¹ Consequently, the Department has assumed that more routine interactions between parties will be carried out electronically. For purposes of this burden estimate, however, the Department has assumed that the written policies and procedures initially furnished to plan fiduciaries will be provided in writing to provide desired formality of compliance.

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

The information collection requirements in this interim final rule are required by the Pension Protection Act of 2006. The Department has attempted to avoid duplication of information collection requirements. The required policies and procedures are unique to the circumstances of a particular cross-trading program and do not replicate any other requirements by state or federal regulations. The regulation would permit respondents to satisfy the information collections with documents that are already in existence due to ordinary and customary business practices, provided such documents contain the required disclosures.

5. *If the collection of information impacts small businesses or other small entities (Item 5 of*

¹ Mills, Rob, “Regional firms: Increasingly Retail-Oriented, But Holding Their Own,” SIA Research Reports, Vol. VI, No. 6, (June 29, 2005) at 12.

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OMB Form 83-I), describe any methods used to minimize burden.

This collection of information is unlikely to adversely affect small businesses or small entities. As noted by the SIA study referenced in the answer to Item 3, above, the investment managers affected by this information collection are generally very large, highly sophisticated financial institutions, not small entities. However, even small businesses which engage in investment management have highly automated and sophisticated electronic systems and so the burden is likely to be the same for both small and large businesses. In addition, investment managers that choose to engage in cross-trading under the statutory exemption should uniformly be required to satisfy the regulation and conditions of the statutory exemption regardless of whether the investment manager is considered a large or small entity in order to adequately protect participants and beneficiaries.

6. *Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.*

The information collection requirements in this interim final rule and frequency of the information collection requirements are required by the Pension Protection Act of 2006. The requirements are only mandatory if investment managers voluntarily decide to rely on the statutory exemption and plans voluntarily elect to participate in cross-trading programs. Without the policies and procedures, plans may not be treated fairly and equitably under a cross-trading program and compliance with the statutory exemption may not be monitored to adequately safeguard plan assets. In addition, without the information collection requirements, plan fiduciaries may not receive sufficient information about an investment manager's cross-trading program needed to fulfill their fiduciary responsibilities, and consequently participants' and beneficiaries' investments in a plan may not be adequately protected.

7. *Explain any special circumstances that would cause an information collection to be conducted in a manner:*
- *requiring respondents to report information to the agency more often than quarterly;*
 - *requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;*
 - *requiring respondents to submit more than an original and two copies of any document;*

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

Not applicable.

8. *If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.*

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years -- even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

The Department published a Notice of Interim Final Rulemaking on the statutory exemption for cross-trading of securities regulation in the Federal Register on February 12, 2007 (72 FR 6473),

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soliciting public comment on the information collections contained in the proposal and providing the public 60 days for comment consistent with the requirements of 5 CFR 1320.8. Any comments received in response to this notice will be taken into account and addressed in the final rulemaking.

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

Not applicable.

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

No assurance of confidentiality has been provided.

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

Not applicable.

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

- *Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.*
- *If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item 13 of OMB Form 83-I.*

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- *Provide estimates of annualized cost to respondents for the hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included in Item 13.*

The Department's estimates of respondents and responses are derived primarily from the Form 5500 Series filings for the 2001 to 2003 plan years, which is the most recent reliable data available to the Department. In addition, the Department has made certain specific basic assumptions in order to establish a reasonable estimate of the paperwork burden of this information collection.

First, the Department assumes that investment managers, which are large, sophisticated financial institutions, will use existing in-house resources to prepare the information and disclosures, rather than hire outside service providers to do this work.

Second, given the nature of the information collection requirements, the Department assumes a combination of professional financial or investment personnel and clerical personnel will perform the information collections. Using data from the Bureau of Labor Statistics, the Department assumes an hourly wage rate of \$53, including both wages and benefits, for a professional financial analyst and an hourly wage rate of \$25, similarly including wages and benefits, for clerical personnel.²

The Department estimates that approximately 1,600³ investment managers manage the assets of about 2,100 plans eligible to participate in cross-trading programs.⁴ Because investment managers may manage all or part of a plan's assets, plans may participate in more than one investment manager's cross-trading program. Plan fiduciaries may therefore receive initial disclosure of the policies and procedures of cross-trading programs from more than one investment manager. On average, the Department estimates that each investment manager will manage assets of nine plans. Assuming that 90 percent of the 1,600 investment managers have cross-trading programs, investment managers would provide about 13,000 initial disclosures of

² Hourly wage estimates are based on data from the Bureau of Labor Statistics Occupational Employment Survey (November, 2004) and the 2005 Employment Cost Trends. Clerical wage and benefits estimates are based on metropolitan wage rates for Executive Secretaries and Administrative Assistants. Professional wage and benefits estimates are based on metropolitan wage estimates for Financial Analysts.

³ 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.

⁴ 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."

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cross-trading policies and procedures to plan fiduciaries (1,600 investment managers * 9 plans each * 90 percent=13,000 initial disclosures).

Investment managers are assumed to use existing in-house resources and to modify policies and procedures established for existing cross-trading programs under securities laws in order to develop the written policies and procedures required under the interim final rule. Therefore, the Department assumes that each investment manager will use 10 hours of a financial analyst's time to develop and maintain written policies and procedures in the first year. If 90 percent of the 1,600 investment managers choose to have cross-trading programs, the initial hour burden amounts to a little over 14,000 hours (or equivalent cost, assuming 10 hours of a financial analyst's time, at \$53 per hour, of about \$763,000).

Each investment manager must 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. The Department further assumes that each investment manager will prepare one disclosure package that will be distributed to each plan fiduciary considering investment.

Thus, the Department estimates that investment managers, in total, will be required to provide about 13,000 initial plan disclosures to plan fiduciaries (90 percent of 1,600 investment managers, times nine plans). 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, at \$25 per hour, or \$16,000.

In years subsequent to the first year of applicability, the Department estimates that new policies and procedures will be written only 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 would each spend 10 hours of a financial analyst's time, at \$53 per hour, to develop and maintain new written policies and procedures, for a total of about 2,000 hours. The equivalent costs would be \$107,000.

The 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, and at \$25 per hour, the equivalent costs would be \$2,300.

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In total, the initial disclosure of cross-trading policies and procedures is estimated to require about 15,000 hours in the first year and about 2,100 hours in the subsequent years. The equivalent costs of these hours are \$779,000 and \$109,000, respectively. Because the Department anticipates a significant reduction in burden in the second year of this ICR, the Department intends to file a change request in the second year to adjust the burden estimates to reflect this reduction in burden.

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

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 approximate 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 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 subsequent years.

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14. *Provide estimates of annualized cost to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies also may aggregate cost estimates from Items 12, 13, and 14 in a single table.*

There are no annualized costs to the Federal government for this information collection because it does not require any reporting or filing with the Federal government.

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

Not applicable. This is a new collection of information.

16. *For collections of information whose results will be published, outline plans for tabulation, and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.*

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

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

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

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

There are no exceptions to the certification statement.

B. Collections of Information Employing Statistical Methods

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