

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 Regulation on Statutory Exemption for Cross-Trading of Securities (29 CFR 2550.408b-19) 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.<sup>1</sup>

The regulation provides 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 the price at which the securities are cross-traded, 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 how the investment manager's policies and procedures will mitigate any potentially conflicting division of loyalties and responsibilities to the parties involved in any cross-trade transaction; (4) a

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<sup>1</sup> 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.

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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; (5) the identity of the compliance officer responsible for reviewing the investment manager's compliance with 408(b)(19) and its written cross-trading policies and procedures and the compliance officer's qualifications for this position; (6) the steps to be performed by the compliance officer during its periodic review of the investment manager's purchases and sales of securities to ensure compliance with the written cross-trading policies and procedures; and (7) a description of the procedures by which the compliance officer will determine whether the requirements of section 408(b)(19) of ERISA are met.

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 regulation 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 regulation, 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 regulation 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 exemption for cross-trading. The exemption does not require any reporting or filing with the Federal

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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 the regulation 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.”<sup>2</sup> 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 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 permits 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 OMB Form 83-I), describe any methods used to minimize burden.*

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<sup>2</sup> 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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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 regulation 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;*
  - *requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;*

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- *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 in the Federal Register, as required by 5 CFR 1320.8 (d), on December 31, 2009 (74 FR 69365), soliciting public comments on the Department's request for an extension of the approval of this information collection and providing the public with 60 days to comment on the submission. No comments were received from the public in response to the notice.

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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.*
- *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 2007 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 \$119, including both wages and benefits, for a legal professional and an hourly wage rate of \$26 for clerical personnel.<sup>3</sup>

The Department estimates that approximately 1,930 investment managers managed the assets of about 2,678 plans eligible to participate in cross-trading programs in 2007.<sup>4</sup> Assuming that the number of investment managers increases each year by 4%, the estimated number of investment managers eligible to engage in cross trading in 2010 equals 2,171.<sup>5</sup> 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 2,171 investment managers have cross-trading operations, 1,954 investment managers would be engaging in cross trading this year. However, unlike in 2007, when this regulation was originally issued, the large majority of plans have already promulgated their initial disclosures. Thus, the only cost the regulation currently imposes is for the investment managers who recently adopted cross trading policies.

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<sup>3</sup> EBSA estimates of labor rates include wages, other benefits, and overhead based on the National Occupational Employment Survey (May 2008, Bureau of Labor Statistics) and the Employment Cost Index June 2009, Bureau of Labor Statistics).

<sup>4</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>5</sup> Based on Form 5500 data, the department assumes that the rate of investment manager growth is approximately 4% per year

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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 regulation. Therefore, the Department assumes that each investment manager will use 10 hours of a legal professional's time to develop written policies and procedures in the first year.

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 equals 14 percent of the managers involved in plans that currently have cross-trading policies and procedures.<sup>6</sup> This amounts to an estimate of 274 managers (1954 managers\*.14). These 274 investment managers would each spend 10 hours of a legal professional's time, at \$119 per hour, to develop new written policies and procedures, for a total of about 2,735 hours. The equivalent costs for that would be about \$325,600.<sup>7</sup>

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 2,462 initial plan disclosures to plan fiduciaries (14 percent of 1,954 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 about 123 hours of clerical time, at \$26 per hour, or about \$3,218

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.

In total, the initial disclosure of cross-trading policies and procedures is estimated to require about 2,859 hours per year, and the equivalent cost of these hours is \$328,818.

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

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<sup>6</sup> The Department estimates that the rate in which investment managers turn over is approximately 5 percent per year. The percent of investment managers changing their cross trading procedures is estimated to be 5%.

<sup>7</sup> Any discrepancies are a byproduct of rounding.



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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 \$5.00 per plan. This includes the actual cost of distribution, plus any overhead costs associated with printing the documentation.

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 274 managers (2,171 estimated eligible managers\*.9\*.14).

The distribution to plan fiduciaries will require material and postage costs of \$5.00 per plan. Assuming that, on average, the assets of about nine plans are managed by each investment manager, this would require 2,462 disclosures annually and about \$12,309 annually in materials and postage costs.

In total, the initial disclosure of policies and procedures is estimated to require \$12,309.

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.*

The Department's estimate is lower than its previous estimate, because in 2007, the regulation investment managers engaged in cross trading to provide written policies and procedures to responsible plan fiduciaries for the first time. The large majority of investment managers already have already prepared written cross-trading policies and procedures; therefore the Department's

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estimates are lower than its prior submission, because the hour and cost burden only is included for investment managers newly adopting written cross-trading policies for responsible plan fiduciaries.

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.