

## DOL Finalizes Content Requirements for Cross-Trading Policies and Procedures

On October 7, 2008, the Department of Labor (DOL) released a final rule on the content requirements for cross-trading policies and procedures under an ERISA prohibited transaction exemption (PTE) added by the Pension Protection Act of 2006 (PPA 2006). The DOL's final rule, which is substantially the same as the interim final rule released in February 2007, requires that an investment manager executing a cross-trade (the purchase and sale of a security between an employee benefit plan subject to ERISA and another account with the same 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. If all of the requirements of the PTE are met, an investment manager may cause an ERISA plan to enter into cross-trades that would otherwise be prohibited. (The DOL's final rule does not address all of the requirements of the exemption.)

Under the final rule, the policies and procedures must: be disclosed to an authorizing plan fiduciary other than the investment manager; be clear and concise, and be written in a manner calculated to be understood by that plan fiduciary; and contain sufficient information to allow periodic review of the cross-trades by a compliance officer designated by the investment manager. Furthermore, the policies and procedures must specifically include:

- a description of the criteria applied by the investment manager in determining that the execution of a cross-trade will be beneficial to both parties, and the investment manager's policies and procedures for allocating cross-trades in an objective and equitable manner among participating accounts;
- a description of how the investment manager will determine that cross-trades are effected at the independent "current market price" of the security, including the identity of sources used to establish the price;
- a description of the procedures for ensuring compliance with the PTE requirement that each participating plan have at least \$100 million in assets (which requirement will be satisfied for a transaction if the plan satisfies the requirement upon its initial participation in the cross-trading program and on an annual basis thereafter);
- a statement that any investment manager participating in a cross-trading program will have conflicting loyalties and responsibilities and a description of how the investment manager will mitigate such conflicts;
- a statement that the cross-trading exemption under the PTE requires satisfaction of several objective requirements in addition to those stated in the final rule; and
- the identity of the compliance officer responsible for reviewing the investment manager's compliance with cross-trading policies and procedures, the compliance officer's qualifications for the position, and a description of the scope of the compliance officer's review.

The final rule will take effect on February 4, 2009. An investment manager that has obtained a fiduciary's authorization before February 4, 2009 and in compliance with the interim final rule is not required to obtain re-authorization following disclosures that reflect the final rule.

For additional information about this and other PTEs added by PPA 2006, please see Ropes & Gray's August 2006 alert.

If you have additional questions, please contact [Hardin Matthews](#), [Sabrina Glaser](#) or any member of the ERISA employee benefits group in the Tax & Benefits Department of Ropes & Gray.

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