after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 17th day of March, 1997.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

Cross-Trades of Securities by Investment Managers

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice.

SUMMARY: This document announces that the Department has under consideration certain applications for exemptions relating to cross-trades of securities by investment managers with respect to any account, portfolio or fund holding ''plan assets'' [1] subject to the fiduciary responsibility provisions of Part 4 of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The Department requests information to assist it in determining upon what standards and safeguards exemptive relief should be conditioned.

DATES: Responses must be received on or before May 19, 1998.

ADDRESSES: Responses (preferably, at least three copies) should be addressed to: Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N–5649, 200 Constitution Ave., NW., Washington, DC 20210. Attention: ''Cross-Trades of Securities''.

FOR FURTHER INFORMATION CONTACT: Louis J. Campagna or E.F. Williams, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 219–8883 or 219–8194 (not toll-free numbers); or Michael Schloss, Plan Benefits Security Division, Office of the Solicitor, (202) 219–4600 ext. 138 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

A. Background

There are generally two types of securities cross-trading transactions: (i) Direct cross-trades, and (ii) brokered cross-trades.

Direct cross-trades occur whenever an investment manager causes the purchase and sale of a particular security to be made directly between two or more accounts under its management without a broker acting as intermediary. Under this practice, the manager executes a securities transaction between its managed accounts without going into the ''open market''—such as a national securities exchange (*e.g.*, the New York Stock Exchange (''NYSE'') or an automated broker-dealer quotation system (*e.g.*, the National Association of Securities Dealers Automated Quotation National Market System (''NASDAQ'').

Brokered cross-trades occur whenever an investment manager places simultaneous purchase and sale orders for the same security with an independent broker-dealer under an arrangement whereby such broker-dealer's normal commission costs are reduced. In such instances, brokers are often willing to accept a lower commission because the transaction will be easier to execute where there are shares already available to complete the order for both the buyer and the seller.[2]

Cross-trading transactions could result in violations of one or more provisions of Part 4 of Title I of ERISA. Section 406(b)(2) provides that an ERISA fiduciary may not act in any transaction involving a plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. Where an investment manager has investment discretion with respect to both sides of a cross-trade of securities and at least one side is an employee benefit plan account, the Department has previously taken the position that a violation of section 406(b)(2) of ERISA would occur.[3] The Department has also taken the position that by representing the buyer on one side and the seller on the other in a cross-trade, a fiduciary acts on behalf of parties that have adverse interests to each other.[4] Moreover, the prohibitions embodied in section 406(b)(2) of ERISA are per se in nature. Merely representing both sides of a transaction presents an adversity of interests that violates section 406(b)(2) even absent fiduciary misconduct reflecting harm to a plan's beneficiaries.[5]

In addition, violations of section 403 and 404 could also arise where the investment manager represents both sides in a cross-trade. Section 404(a)(1)(A) of ERISA requires, in part, that a plan fiduciary must discharge its duties solely in the interests of the participants and beneficiaries of that plan and ''for the exclusive purpose'' of providing benefits to participants and beneficiaries and defraying reasonable plan expenses. Similarly, section 403(c)(1) of ERISA requires, in part, that the assets of a plan must be ''* * *held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.''

The Department has granted a number of individual exemptions from the prohibitions of section 406(b)(2) of ERISA for cross-trades of securities by investment managers on behalf of employee benefit plan accounts or pooled funds which contain ''plan assets'' subject to ERISA.[6] These individual exemptions generally have focused on direct cross-trading transactions. The individual exemptions granted have not provided relief for any violations of section 406(b)(1) or (b)(3) of the Act [7] which may occur as a result

[1] See 29 CFR 2510.3–101, Definition of ''plan assets''—plan investments.

[2] This notice assumes that cross-trades, including brokered cross-trades, are not performed on the market as ''wash sales'' (in which the same party is the buyer and seller) or as ''matched orders'' (in which confederates simultaneously enter offsetting purchase and sale orders). These and similar types of trades may be used to manipulate stock prices and may raise other issues under ERISA.

[3] *Reich* v. *Strong Capital Management Inc.*, No. 96–C–0669, USDC E.D. Wis. (June 6, 1996).

[4] See *Strong Capital Management Inc.*, supra.

[5] See, *Cutaiar* v. *Marshall*, 590 F.2d 523 (3d Cir. 1979). In *Cutaiar*, the court held that, ''* * * when identical trustees of two employee benefit plans whose participants and beneficiaries are not identical effect a loan between the plans without a section 408 exemption, a per se violation of ERISA exists.'' *Cutaiar*, 590 F.2d at 529.

[6] In this regard, see the following Prohibited Transaction Exemptions (PTEs): PTE 95–83, Mercury Asset Management (60 FR 47610, September 13, 1995); PTE 95–66, BlackRock Financial Management L.P., (60 FR 39012, July 31, 1995); PTE 95–56, Mellon Bank, N.A. (60 FR 35933, July 12, 1995); PTE 94–61, Batterymarch Financial Management (59 FR 42309, August 17, 1994); PTE 94–47, Bank of America National Trust and Savings Association (59 FR 32021, June 21, 1994); PTE 94–43, Fidelity Management Trust Company (59 FR 30041, June 10, 1994); PTE 94–36, The Northern Trust Company (59 FR 19249, April 22, 1994); PTE 92–11, Wells Fargo Bank, N.A. (57 FR 7801, March 4, 1992)—which replaced PTE 87–51 noted below; PTE 89–116, Capital Guardian Trust Company (54 FR 53397, December 28, 1989); PTE 89–9, State Street Bank and Trust Company (54 FR 8018, February 24, 1989); PTE 87–51, Wells Fargo Bank, N.A. (52 FR 22558, June 12, 1987); and PTE 82–133, Chase Manhattan Bank, N.A. (47 FR 35375, August 13, 1982).

[7] Section 406(b)(1) of ERISA prohibits a plan fiduciary from dealing with the assets of the plan in his own interest or for his own account. Section 406(b)(3) prohibits a plan fiduciary from receiving

of cross-trades where an investment manager has discretion for both sides of the trade. In this regard, the Department notes that the individual exemptions cannot provide exemptive relief for such managers from the provisions contained in sections 403 and 404. Thus, even when proceeding under an individual exemption, an investment manager remains fully liable under sections 403 and 404 of ERISA for the investment decision relating to a cross-trade.

The Department has also granted a class exemption which provides relief for, among other things, certain agency cross-trades of securities where an investment manager has discretion for, and/or provides investment advice to, either the seller or the buyer, but not both, or where the investment manager does not have discretion for, and/or provide investment advice to, any plan involved in the transaction (see PTE 86–128 (51 FR 41686, November 18, 1986)). Such cross-trades do not require individual exemptive relief if the conditions of PTE 86–128 are met.

The Department currently has under consideration a number of individual exemption applications which request relief for cross-trading programs that involve purchases and sales of securities by employee benefit plans.[8]

In the exemption applications, the applicants have represented to the Department that cross-trading provides certain benefits to employee benefit plans. For example, if a plan needs to sell certain securities, the potential negative impact that such transaction may have on the price of the security if the transaction had been executed in the open market may be avoided through the use of a cross-trade. In addition, both the buyer and seller save the transaction costs (e.g., brokerage commissions or the bid-offer spread) that would otherwise have been paid to a broker-dealer for executing the transaction as an agent. Finally, both parties to the cross-trade benefit by avoiding the uncertainty of whether they will be able to find a counter-party for a proposed trade.

Applicants have also represented to the Department that cross-trade opportunities may be triggered by a number of events. For example, the investment guidelines or objectives for one account may dictate that certain securities should be sold, but those same securities may be on the investment manager's ''buy list'' for other accounts. Thus, one account or fund may be selling a particular security at the same time that another account or fund may need to buy that security. For instance, one account may need additional liquidity while another account has excess cash that needs to be invested. Similarly, one account may be too heavily invested in a particular security while another account may have a need for that security.

While recognizing the advantages of cross-trading to plans, the Department has particular concerns where managers have investment discretion over both sides of a cross-trade transaction. The conditions contained in the Department's prior individual exemptions were intended to address these concerns and to safeguard plans against the inherent conflict of interest which exists when there is a common investment manager for both sides of a transaction. In this regard, the conditions incorporated into these exemptions were designed to protect plans against the potential that an investment manager may exercise discretion to favor one account over another; e.g., in the pricing of a particular cross-trade, in the decision to either buy and/or sell particular securities for an ERISA account, or to allocate securities among accounts including ERISA accounts.

Specifically, the Department's concerns are illustrated by, among other things, the potential for an investment manager to:

(i) Place relatively illiquid securities into ERISA accounts in order to, among other reasons, shift anticipated losses away from, or provide artificial liquidity and price stability for, favored accounts;

(ii) Use ERISA accounts as buyers or sellers of securities at particular times in order to promote the interests of more favored client accounts;

(iii) Allocate favorable cross-trade opportunities, and the transaction cost savings associated with such trades, to favored client accounts, such as those that have a performance-based fee arrangement with the manager in order to either increase the manager's fees or demonstrate superior investment performance;

(iv) Allow cross-trade opportunities to affect the underlying investment management decision as to which securities to buy or sell for particular ERISA accounts; and

(v) Use cross-trades to avoid the potential market impact of large trades on certain accounts where such trades may not be in the best interests of all accounts involved or may not result in the best execution for the acquisition or sale of such securities.

Types of Individual Exemptions Granted by the Department

The individual exemptions that the Department has granted in the past for cross-trading fall into two categories: (1) Those for Index and Model-Driven Funds; and (2) those for actively-managed or discretionary asset management arrangements.

In the Index Fund programs, trading decisions are ''passive'' or ''process-driven'' because the investment manager has been hired to invest money in a formulaic way that, for example, tracks the rate of return of an independently maintained index by either replicating the entire portfolio of the index or by investing in a representative sample of such portfolio. Model-Driven funds are based upon formulas by which an ''optimal'' portfolio is created to implement some specific investment strategy (e.g., hedge funds). While these ''process-driven'' programs ostensibly may be implemented only by investment in an index replicating portfolio (in the case of index funds) or some set ''optimum'' portfolio (in the case of model-driven funds), as noted below, selection of individual securities for such ''process-driven'' strategies may involve a more subtle exercise of discretion by an investment manager than the Department previously believed.

In actively-managed programs, trading decisions are made by individuals that have been hired to select particular securities as professional investment managers for ''actively-managed'' accounts.

The conditions for both types of exemptions are summarized below.

Index and Model-Driven Funds

1. The index used by the funds or accounts is established and maintained by an independent organization which is in the business of providing financial information to institutional clients.

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any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

The Department notes that some of the individual exemptions have provided, and some of the current exemption applications also request, relief from the prohibitions of section 406(a)(1)(A) of ERISA. Section 406(a)(1)(A) states, in pertinent part, that a fiduciary of a plan shall not cause the plan to engage in a transaction which constitutes a sale, exchange, or leasing of any property between the plan and a party in interest. Relief from this section was provided in certain of the cross-trading exemptions in response to the applicants' representations that some plans may be parties in interest to other plans participating in the cross-trading program.

[8] These exemption requests include the following: D–9584, Wells Fargo Bank, N.A.; D–10107, Bankers Trust Company of New York; D–10210 and D–10211, Rowe Price Fleming International, Inc., and T. Rowe Price Associates, Inc.; D–10290, State Street Bank and Trust Company; D–10322, Brinson Partners; D–10370, Putnam Advisory Company, Inc.; and D–10507, ANB Investment Management and Trust Company.

2. Discretion of the manager is limited because only certain ''triggering events'' effecting the composition or weighting of securities included in the index or model will give rise to a cross-trade opportunity.

3. The triggering events are generally outside the control of the manager and will ''automatically'' cause the buy or sell decision to occur.

4. Specific triggering events in the Index and Model-Driven Fund exemptions include:

(a) Changes in the composition or weighting of the index or model underlying the Fund by the third party who maintains the index;

(b) Changes in the composition or weighting of a portfolio used for a Model-Driven Fund resulting from an independent fiduciary's decision to exclude certain stocks from the Fund;

(c) Changes in the overall investment in a Fund due to investments and withdrawals; and

(d) Accumulations of cash in a Fund.

5. Cross-trades must take place within three (3) days of a triggering event.

6. Only large plans (i.e., over $50 million in assets) may cross-trade with an Index or Model-Driven Fund in connection with specific portfolio restructuring programs conducted by the manager which have been authorized in advance by an independent plan fiduciary.

7. The price of equity securities involved in a cross-trade must be the closing price of the security on the date of the trade.

Actively-Managed Funds

1. An independent plan fiduciary must specifically authorize in advance a plan's participation in the cross-trade program.

2. Cross-trade opportunities arise at the discretion of the investment manager but must be disclosed to, and authorized in advance by, an independent plan fiduciary prior to the execution of the proposed cross-trade. The authorization is effective for three (3) business days.

3. Written confirmation of the terms and price of the cross-trade must be provided within 10 days of the trade.

4. Equity securities are priced at the closing price as of the date of the cross-trade. As a further limitation, the cross-trade must take place at a price which is within 10 percent of the closing price for the security on the day before the manager receives authorization to engage in a cross-trade.

5. Unless the condition is specifically waived by the independent fiduciary, the cross-trade must involve less than 5 percent of the aggregate average daily trading volume for the security for the week immediately preceding the authorization of the transaction.

Other pertinent conditions applicable to both Index and Model-Driven Funds as well as Actively-Managed Funds.

1. Securities involved in a cross-trade must be securities for which there is a generally recognized market.

2. The investment manager must not charge or receive any commissions or other fees in connection with the cross-trade.

3. The price for any debt security involved in a cross-trade must be determined in accordance with objective and reputable market sources which are independent of the investment manager (e.g., the methodology described under rules promulgated by the Securities and Exchange Commission (SEC) for mutual funds, as discussed further below).

4. A fair system for allocating cross-trade opportunities among managed accounts has been required, with such allocation being made on an objective basis (e.g., pro rata) among buying and selling client accounts.

Issues and Developments

Through the development of cross-trading exemptions and enforcement proceedings the Department has become aware of new issues that have the potential to impact or change exemption policy involving cross-trading transactions. The Department recognizes that it is important to retain the flexibility to review our exemption policy in the context of changed circumstances or new facts that may be brought to our attention. Thus, one of the primary objectives of this notice is to request information from interested persons, e.g., plan fiduciaries, investment management firms, securities industry representatives and securities exchanges that may be affected by the Department's exemption policy for cross-trades of securities by employee benefit plans.

In the ''process-driven'' context, it has been represented to the Department that investment managers who maintain accounts or pooled funds often attempt to track the rate of return of an independently maintained third party index (e.g., the Standard & Poors 500 Composite Stock Price Index a/k/a the S&P 500 Index, the Wilshire 5000 Index, the Russell 2000 Index). These pooled funds are often collective investment funds established and trusteed by large banks that manage money for institutional investors, including employee benefit plans. Under the Department's individual exemptions, such funds usually cross-trade pursuant to certain narrowly-defined ''triggering events'' that were represented to involve little, if any, discretion on the part of the investment manager.

In the past, various applicants represented to the Department that the investment strategy of most Index Funds was to merely replicate the capitalization-weighted composition of a particular index. However, the Department now understands that the process of replication of an index may be more subtle since many, if not most, Index Funds do not totally replicate the exact portfolio of the index that is being tracked. In many instances, the manager maintains some discretion to select particular securities to track the rate of return of the overall index without actually holding all of the securities included in the index. In addition, some Index Funds are designed to exceed the rate of return of the index by altering the composition or weighting of the portfolio designated by the organization that maintains the index. These ''enhanced'' Index Funds often have strategies that resemble actively-managed accounts.

Model-Driven Funds, on the other hand, are portfolios that apply specific investment philosophies and criteria in formulaic fashion to create a specialized portfolio. Model-Driven Funds come in many different forms (e.g., hedge, sector, contra, etc). Some Model-Driven Funds seek to transform the capitalization-weighted or other specified composition of an index in order to accomplish certain goals. Such goals vary from client-initiated instructions to delete certain stocks to mathematical formulae designed to focus on certain investment criteria (e.g., price-earnings ratios) at certain times to achieve a rate of return for the portfolio that exceeds that of the index. Thus, some Model-Driven Funds merely appear to be a more sophisticated type of ''enhanced'' Index Fund.

There are also indications that, in many cross-trading programs for Index and Model-Driven Funds, the manager may retain a degree of discretion in selecting securities for the Funds' portfolios. Further, it appears that, in weighting a particular tracking factor for an index or model, the manager can produce desired cross-trade opportunities. For example, by factoring in the liquidity or the availability of a security within the control of the manager, the manager can produce more cross-trading opportunities for that particular security by the accounts within the control of the manager. Thus, the process of replicating an independently maintained index or model may not be as automatic as previously described to the Department in the relevant exemption applications. At this point, the Department is uncertain as to the degree of discretion utilized in Index and Model-Driven Funds and believes it would be helpful to obtain further information on this matter.

A number of interested persons have suggested to the Department that, in developing standards and safeguards in individual exemptions involving cross-trade transactions, particularly those involving actively-managed accounts, the Department should adopt the methodology approved by the SEC for cross-trades of equity or debt securities by mutual funds. In this regard, the SEC permits cross-trading of securities if the transactions are accomplished in accordance with SEC Rule 17a–7 (Rule 17a–7 or the Rule).[9]

Rule 17a–7 is an exemption from the prohibited transaction provisions of section 17(a) of the Investment Company Act of 1940, which prohibit, among other things, transactions between an investment company and its investment adviser or affiliates of its investment adviser. Thus, Rule 17a–7 permits transactions between mutual funds and other accounts that use the same or affiliated investment advisers, subject to certain conditions that are designed to assure fair valuation of the assets involved in the transaction and fair treatment of both parties to the transaction.[10] Even so, the requirements of Rule 17a–7 are only applicable to transactions and entities regulated under the Investment Company Act of 1940, and such requirements are not otherwise applicable to other entities—such as employee benefit plans.[11]

An essential requirement of Rule 17a–7 is that the transaction be effected at the independent current market price for the security involved. In this regard, the ''current market price'' for specific types of securities is determined as follows:

(1) If the security is a ''reported security'' as that term is defined in Rule 11Aa3–1 under the Securities Exchange Act of 1934 (17 CFR 240.11Aa3–1), the last sale price with respect to such security reported in the consolidated transaction reporting system (''consolidated system'') or the average of the highest current independent bid and lowest current independent offer for such security (reported pursuant to Rule 11Ac1–1 under the Securities and Exchange Act of 1934 (17 CFR 240.11Ac1–1)) if there are no reported transactions in the consolidated system that day; or

(2) If the security is not a reported security, and the principal market for such security is an exchange, then the last sale on such exchange or the average of the highest current independent bid and lowest current independent offer on such exchange if there are no reported transactions on such exchange that day; or

(3) If the security is not a reported security and is quoted in the NASDAQ system, then the average of the highest current independent bid and lowest current independent offer reported on Level 1 of NASDAQ; or

(4) For all other securities, the average of the highest current independent bid and lowest current independent offer determined on the basis of reasonable inquiry.[12]

It is our understanding that proponents advocating the adoption of a similar exemptive standard for cross-trading by plans argue that, by pricing a cross-trade pursuant to the procedures described in Rule 17a–7, employee benefit plans will be protected from the concerns embodied in ERISA because one plan cannot be favored over another by the common fiduciary determining the appropriate value of the cross-traded security. This argument assumes that if both sides of a cross-trade transaction receive a fair and objectively determined price for a security, there should not be any concern about potential fiduciary abuses under ERISA in connection with the transaction.

The Department believes that this assumption may reflect a misunderstanding of the purposes underlying ERISA. ERISA's fiduciary responsibility and prohibited transaction provisions are designed to help assure that the fiduciary's decisions are made in the best interest of the plan and not colored by self-interest. These provisions require that a plan fiduciary act with an ''eye single'' to the interests of the plan involved in the transaction.[13] Therefore, the Department is not convinced that reliance upon an objective fair price alone will ameliorate the conflicts described above, such as the potential for ''cherry picking'' or ''dumping'' of securities or allocating investment opportunities among client accounts in a manner designed to favor one account over the other.

Further, the Department notes that, even where cross-trades take place at an appropriate market price or, when no market price is available, at a price set through use of the methodology described in Rule 17a–7, a per se violation of section 406(b)(2) of ERISA may occur even if the result is favorable to the plans involved.[14] Moreover, the mechanism employed under Rule 17a–7 to set the price of a security for a cross-trade may not take into account the transacting plan's specific interest in using its position to affect the transaction price in its favor on the open market. Setting a transaction price pursuant to this rule appears to presume that the trade itself cannot impact the market price and, therefore, that neither party has an interest in performing the trade on (or off) the market. More likely, however, a potential purchaser of securities would find lower prices in the marketplace if there were more sellers than purchasers in the marketplace at the time of the cross-trade. Similarly, a seller would find higher prices in a marketplace populated by more purchasers at the time of the cross-trade. When an investment manager decides to engage in an off-market transaction, particularly with thinly-traded securities, the result is that the effect of the transaction itself on the marketplace may be removed.

The Department notes further that Rule 17a–7 allows certain securities to be priced based on the last sale price for such securities on the exchange.[15] If a manager anticipates a drop in stock prices, such manager could decide to favor a buying client by waiting during the day for the stock price to drop before engaging in a cross-trade where the seller could be an ERISA account. The ability of the Department to address these issues would be lacking under any approach which focuses primarily upon ensuring that there is a fair and objective price for a cross-traded security under the requirements of Rule 17a–7.

Therefore, the Department has thus far been unable to conclude that

[9] 17 CFR 270.17a–7.

[10] Among the conditions of Rule 17a–7 are the following requirements: (a) The transaction must be consistent with the investment objectives and policies of the mutual fund, as described in its registration statement; (b) the security that is the subject of the transaction must be one for which market quotations are readily available; (c) no brokerage commissions or other remuneration (other than customary transfer fees) may be paid in connection with the transaction; and (d) the mutual fund's board of directors (i.e., those directors who are independent of the fund's investment adviser) must adopt procedures to ensure that the requirements of Rule 17a–7 are followed, and determine no less frequently than quarterly that the transactions during the preceding quarter were in compliance with such procedures.

[11] 17 CFR 270.17a–7.

[12] 17 CFR 270.17a–7(b)(1)–(4).

[13] See ''*Donovan* v. *Bierwirth*'', 680 F.2d 263, 271 (2d. Cir.), *cert. denied* 104 S.Ct. 488 (1982).

[14] See, *Cutaiar*, supra.

[15] 17 CFR 270.17a–7(b)(1) and (2).

reliance solely on Rule 17a–7 would adequately protect employee benefit plans in situations where an investment manager exercises discretion for both sides of a cross-trade.[16] However, in recognition of the interest in the approach under Rule 17a–7, the Department specifically invites responses from interested persons on the protections afforded to plans by this Rule.

B. Issues Under Consideration

The Department is issuing this notice to provide interested persons with an opportunity to submit information and responses which will be considered by the Department in developing exemptions for transactions involving cross-trades of securities by investment managers.

In order to assist interested parties in responding, this notice contains a list of specific questions designed to elicit information that the Department believes would be especially helpful in developing additional exemptions. The following questions may not address all issues relevant to the development of standards and safeguards for cross-trades. Therefore, the Department further invites interested persons to submit responses on other issues that they believe are pertinent to the Department's consideration of this matter.

Specific Questions

1. Would the development of a class exemption which covers all types, or any type, of cross-trading programs be in the interests and protective of employee benefit plan investors?

2. Should the Department develop separate class exemptions for cross-trades of securities by (i) actively-managed accounts, and (ii) ''process-driven'' accounts?

3. Should the Department develop consistent conditions in individual exemptions which would then facilitate the use of PTE 96–62?[17]

4. What effect, if any, will each of the following have on cross-trading programs?

a. The move to decimalization of stock quote spreads,

b. The emergence of electronic proprietary trading systems (e.g., Reuters' Instinet, London's Seaq International, Investment Technology Group's Posit, and AZX's Arizona Stock Exchange),

c. The growth of block trading in the so-called ''upstairs market'' on the NYSE or other national securities exchanges, and

d. Other market developments.

5. Will the development of proprietary trading systems impact on the requirements for an exemption permitting cross-trading of securities by plans with the same investment manager?

6. Are there real savings to plans from cross-trading when other market options are available?

7. What are the ''costs'' associated with doing a transaction off-market?

8. Will trading by other investors on securities exchanges be affected by the widespread use of cross-trading programs for securities transactions by employee benefit plans?

9. Are cross-trades beneficial only when the securities involved represent a significant percentage of the average daily trading volume of such securities?

10. How does an investment manager who is a fiduciary of a plan with discretion in a cross-trade, who also has discretion for other accounts in the same cross-trade, act ''solely in the interest of'' the plan account?

11. Does a cross-trade which avoids ''adverse market impact'' for one side of a transaction truly benefit both sides of that transaction?

12. In order to act in an employee benefit plan's best interest, should an investment manager attempt to negotiate a better price for a security before engaging in a cross-trade?

13. Would it ever be in an employee benefit plan's best interest to purchase a security through a cross-trade that the plan would not have otherwise purchased?

14. Where an investment manager has performed an analysis of a range of securities, would it ever be in a plan's best interest to purchase a security through a cross-trade that was not otherwise the superior security as indicated by the investment manager's analytics?

15. If an employee benefit plan purchased a security through a cross-trade that was not the most appropriate security for the plan at the time of the transaction pursuant to an investment manager's model or index, could such a transaction be viewed as being in the plan's best interests if the plan was adequately compensated for providing an accommodation to the selling entity? If so, how could the market value of such an accommodation be determined by the investment manager?

16. Do cross-trade programs tend to benefit larger accounts over smaller ones?

17. What is the best way to establish a price for cross-traded securities? (e.g., the ''current market price'' under SEC Rule 17a–7, the closing price for stocks traded on a nationally recognized securities exchange, the ''volume weighted average price'' for equity securities traded on an exchange,[18] the average between the current ''bid'' and ''ask'' quotations from reputable independent dealers and market-makers—particularly for debt securities where no exchange prices are available, etc.)

18. Given the variety of methods for trading of equity securities and the fact that many trades are conducted after a particular exchange has closed for the day, what is the current understanding of the meaning of the term ''closing price,'' as utilized as a condition in the Department's current individual exemptions?

19. Will volume restrictions on the number of shares of a particular security that can be cross-traded ameliorate the potential for abuse that may occur? If so:

a. What should the volume restrictions be?

b. If particular cross-trades would exceed these limits, should the manager be able to engage in the transaction if certain disclosures are made to an independent plan fiduciary?

20. Are the computer models which ''drive'' portfolio selections made by a manager for an index or model-driven fund capable of being manipulated by such managers in order to produce more cross-trade opportunities for a particular fund?

21. What degree of discretion is provided to investment managers of index or model-driven funds to affect more or less cross-trade opportunities? To the extent that investment managers have such discretion:

a. Could the exercise of such discretion only become apparent upon a detailed examination of the mathematical assumptions used in each computer model and, if not, how else could such actions be discovered?

[16] See also PTE 86–128, 51 FR 41686, 41692 (Nov. 18, 1986).

[17] PTE 96–62 (61 FR 39988, July 31, 1996) is a class exemption granted by the Department which permits certain authorized transactions between plans and parties in interest. The class exemption applies to prospective transactions between employee benefit plans and parties in interest where such transactions are specifically authorized by the Department as having terms, conditions and representations which are substantially similar to two or more individual exemptions previously granted by the Department within the 60-month period prior to the written submission filed in accordance with such class exemption.

[18] The ''volume weighted average price'' calculates the average price, weighted by the volume of each trade during the course of the day and, according to some market analysts, provides a more refined view of the market behavior of a specific security, with time, size and exchange filters.

b. Could the exercise of such discretion create ''false liquidity'' or ''false price stability'' for a particular security and, if so, would that create future problems for the portfolio when large amounts of such security must be sold in the open market?

22. Could exemptions for cross-trading programs involving employee benefit plans provide a commercial advantage to investment managers with larger amounts of assets under management and, if so, to what extent?

23. Could an efficient cross-trading program provide an investment manager with commercial advantages over competitors who do not choose to have, or are unable to implement, such programs and, if so, to what extent?

24. Where an investment manager has discretion on both sides of a transaction, can cross-trading of securities be utilized to:

a. ''Dump'' particular securities on less favored accounts to promote the interests of more favored accounts,

b. ''Cherry-pick'' particular securities from less favored accounts to promote the interests of more favored accounts,

c. Promote ''front-running'',

d. Allocate favorable cross-trade opportunities to certain client accounts to benefit the manager's ultimate compensation, and

e. Otherwise provide a benefit to the investment manager, another client of the investment manager or any other person or entity at an employee benefit plan's expense?

25. What new terms or conditions could the Department impose in an exemption to protect any plans involved in cross-trading from potential abuses, such as those listed in question 24?

All submitted responses will be made a part of the record of the proceeding referred to herein and will be available for public disclosure.

Signed at Washington, D.C., this 16th day of March, 1998.

Alan D. Lebowitz,

Deputy Assistant Secretary of Program Operations, Pension and Welfare Benefits Administration, Department of Labor.

[FR Doc. 98–7271 Filed 3–19–98; 8:45 am]

BILLING CODE 7708–01–P

MERIT SYSTEMS PROTECTION BOARD

Agency Information Collection Activities; Proposed Collection

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: The U.S. Merit Systems Protection Board (MSPB) is requesting a second one-year extension of approval of its optional appeal form, Optional Form 283 (Rev. 10/94) from the Office of Management and Budget (OMB) under section 3506 of the Paperwork Reduction Act of 1995. The appeal form is currently displayed in 5 CFR Part 1201, Appendix 1, and on the MSPB Web Site at http://www.mspb.gov/merit009.html. In this regard, we are soliciting comments on the public reporting burden. The reporting burden for the collection of information on this form is estimated to vary from 20 minutes to one hour per response, with an average of 30 minutes, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

ESTIMATED ANNUAL REPORTING BURDEN

5 CFR section	Annual number of respondents	Frequency per response	Total annual responses	Hours per response (average)	Total hours
1201 and 1209	9,000	1	9,000	.5	4,500

In addition, the MSPB invited comments on (1) whether the proposed collection of information is necessary for the proper performance of MSPB's functions, including whether the information will have practical utility; (2) the accuracy of MSPB's estimate of burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate and other forms of information technology.

DATES: Comments must be received on or before May 19, 1998.

ADDRESSES: Copies of the appeal form may be downloaded from the MSPB Web Site at http://www.mspb.gov/merit009.html, or by writing the Office of the Clerk, Merit Systems Protection Board, 1120 Vermont Ave., NW., Washington, DC 20419, or by calling the Clerk's office at (202) 653–7200. Comments concerning the paperwork burden should be addressed to the Office of the Clerk, attention Mr. Arlin Winefordner, at the above address. The fax number is (202) 652–7130, and the E-mail is Winefordner@MSPB.gov.

Dated: March 17, 1998.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 98–7340 Filed 3–19–98; 8:45 am]

BILLING CODE 7406–01–M

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Biological Sciences (BIO); Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Biological Sciences (BIO) (1110).

Date and Time: April 6, 1998; 8:45 a.m.–5:00 p.m., April 7, 1998; 8:45 a.m.–5:00 p.m.

Place: National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230, Room 1235.

Type of Meeting: Open.

Contact Person: Dr. Mary E. Clutter, Assistant Director, Biological Sciences, Room 605, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230, Tel. No.: (703) 306–1400.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: The Advisory Committee for BIO provides advice, recommendations, and oversight concerning major program emphases, directions, and goals for the research-related activities of the divisions that make up BIO.

Agenda: FY 1999 Budget and Science Opportunities Discussion.

Dated: March 16, 1998.

M. Rebecca Winkler,

Committee Management Officer

[FR Doc. 98–7237 Filed 3–19–98; 8:45 am]

BILLING CODE 7555–01–M