SIFMA
Securities Industry and
Financial Markets Association

April 12, 2007

Office of Exemption Determinations
Employee Benefit Security Administration
U.S. Department of Labor
Room N5700
200 Constitution Avenue, NW
Washington, DC 20210

Attention: **Cross-Trading Policies and Procedures Interim Final Rule**

Ladies and Gentlemen:

The purpose of this letter is to comment on behalf of the Securities Industry and Financial Markets Association (SIFMA)[1] on the Interim Final Rule on Cross-trading Policies and Procedures, 72 Fed. Reg. 6473, Feb. 12, 2007. We are appreciative of the Department of Labor's ("the Department") effort to provide guidance under the statutory cross trading exemption so promptly. The interim rule provides guidance in a variety of areas and will be helpful to our members in setting up the policies, procedures and written disclosure which will be required by the exemption. Our comments were developed in collaboration with the Investment Advisor Committee at SIFMA as well as SIFMA's Asset Management Group which represents investment managers.

In summary, we request that the final regulation provide additional guidance on certain requirements of the interim rule, including the mitigation of conflicts and the scope of the compliance review. In addition, we request that the Department address certain requirements of the statutory exemption that were not covered by the interim rule, including the definition of a cross trade and the definition of investment manager. In addition, SIFMA urges the Department to reconsider certain conditions in the interim rule, including the requirement to identify the compliance officer by name and the requirement to state the scope of the review. In addition, SIFMA strongly urges the Department to adopt a pooled fund rule to implement the consent requirements of the exemption.

Pooled Fund Rule

SIFMA strongly urges the Department to adopt a pooled fund rule to implement the consent requirements of the exemption. Our members sponsor pooled vehicles which attract both large plans as well as small plans. We recommend that where plans covered by ERISA have more than $100 million in assets hold 50 percent or more of the units of the fund, the ERISA

[1] SIFMA is the product of a recent merger of the Securities Industry Association ("SIA") and the Bond Market Association. SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

regulations should provide that the pooled fund should be eligible to use the statutory exemption. Plans which do not choose to consent need not invest in the pooled fund, or may withdraw if the cross trade program begins after their initial investment. We believe that the Department has sufficient regulatory authority to create a pooled fund rule in the course of its guidance on client consent. Where a pooled fund has sufficient sophisticated investors and any other client with less than $100 million in assets can choose not to invest in a fund that permits cross trading, we believe the Department has adequate authority to deem the requirements of the statute to be met.

Minimum asset test

The interim rule requires that an investment manager insure that the plans involved in a cross-trading program have, at inception of the program, in excess of $100 million, and then quarterly thereafter. The Department has issued many individual and class exemptions with asset based sophisticated investor tests which do not require quarterly reassurance that the test is still met. Requiring the manager to verify the value of the assets of each plan that has initially confirmed its assets are in excess of $100 million is a waste of the manager's resources, burdensome on the plan sponsor, and unlikely to result in plans falling out of the cross-trading program. If plans do not respond, as the Department recognizes is often the case, what is a manager to do? Assume that a plan that had assets of several billion at the end of the preceding quarter still does, or, in the absence of verification, assume that it has fallen below $100 million?

SIFMA would urge the Department to adopt an alternative rule that obligates the plan sponsor to advise the manager that the assets of the plan have fallen below $100 million. In our view, the regulation should provide that the $100 million test will be met if the plan fiduciary represents that it is met at the inception of the program, and if the cross trading consent documents require the plan fiduciary to notify the manager if at any time, they cease to be met. SIFMA would not object if the quarterly report were required to contain a reminder that the plan fiduciary is obligated to notify the manager if the assets test is no longer met. We think this formulation is similar to what the Department has required in exemptions requiring a plan fiduciary to be independent of the manager (see, for example, PTE 2000-25, etc.)

Compliance review

Identification of compliance officer. The interim rule provides that each investment manager must identify the compliance officer who will be responsible for reviewing the cross-trade program, and specify his qualifications. We object to a requirement that the compliance officer's name and individual qualifications be specified. First, identifying any employee by name, rather than by job title, is extremely unusual. Employees change jobs within the company or leave the company altogether. Unlike portfolio managers, they are generally not named in marketing or other materials. Naming an individual is onerous for the employee named. Repeatedly having to notify all ERISA clients when the person with compliance responsibilities changes is burdensome and expensive. In addition, the compliance responsibilities, while they may be carried out by one or more individuals, are a corporate responsibility. We believe this provision should be changed to require only the job title to be specified.

Scope of the compliance review. The interim rule should specify the scope of the compliance review. In clarifying the scope of the review, SIFMA urges the Department to consider the potential burden in performing the review and make clear that sampling cross trades in different accounts and at different times, and in different markets is adequate under the exemption. A trade by trade review would be extremely onerous and the costs of such a requirement would outweigh the benefits of cross-trading. The compliance function at most asset management companies is not charged with supervision of trading on a daily basis, but instead, to keep compliance procedures in place, train trading personnel, test policies and procedures, identify systemic weaknesses and assure that management information systems are properly targeted. The compliance officer should not be in charge of checking every trade.

Statement relating to scope. Section (b)(3)(G) of the interim rule requires that the policies and procedures contain 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. We think this requirement is unnecessary. If the compliance review is only required to cover certain items, we think it is gratuitous to require that the policies include a statement that the review does not cover more than is required and it implies that the scope of review is somehow deficient. We respectfully request that this provision be deleted from the final regulation.

Quarterly Report

The proposed regulation did not cover the quarterly reporting required by the exemption. It would be helpful for the Department to include in the final rule a provision that makes clear that the actual names of other clients do not have to be provided in the quarterly report, but identified by type, i.e., endowment, insurance company account, mutual fund, other institutional account. The identification of the counterparty would be identified on internal systems. Without this clarification, investment managers may violate confidentiality provisions in client contracts.

Definition of cross trade; definition of investment manager

SIFMA also urges the Department to provide additional clarifications regarding the definition of cross trade and the definition of investment manager. First, SIFMA believes it is important to provide relief whenever a trade is arranged between a manager's own accounts, or the accounts of an affiliate of the manager. To the extent that a trade between two accounts managed by affiliates could violate section 406(b)(2), we assume the exemption would cover the cross trade. We would like the relief in the exemption explicitly to encompass this situation. If the Department does not believe that a cross trade occurs when a trade is arranged between the accounts of two affiliated managers, it would be helpful to clarify that view in the final exemption.

The second clarification is the definition of investment manager. The statute refers to a section 3(38) manager. Section 3(38) lists registered investment advisers, banks and insurance companies but excludes trustees. We understand the Department to be of the view that the exclusion for trustees was not intended to exclude bank trustees, such as collective trust trustees or an institutional bank trustee managing assets on a separate account basis. We think this regulation would be an appropriate venue to clarify the Department's position, so that trustees of bank collective trusts may utilize the exemption if the other conditions of the exemption are met.

Mitigation of conflicts

The interim rule requires that the policies and procedures must be fair and equitable and that they must specify the criteria which will be applied in determining that execution will be beneficial to both parties to the transaction. The interim rule also requires the manager to describe how he will mitigate conflicting loyalty. In SIFMA's view, the objective requirements of the exemption – specified pricing mechanisms, established queuing or allocation systems, significant and detailed reporting, compliance officer review of trading practices – are precisely the procedures that will facilitate fair and equitable practices, making the trades beneficial to both parties and mitigate any conflicting loyalty. We do not believe that a rule requiring a manager to recite that these requirements will make the trades beneficial to both parties will mitigate any conflicts. To the contrary, this type of description will only add useless information to plan sponsors and potentially distract them from the factual data that the investment manager is providing such as pricing and trading practices. If the Department has some other explanation to clients that these requirements were intended to address, we respectfully request additional clarification and an opportunity to respond. Instead, we think that the disclosure on conflict in loyalties that is required under the Investment Company Act and PTE 86-128 should be sufficient. In addition, we note that a fair allocation system is required under the Investment Company Act and we urge

the Department to provide a safe harbor that any allocation rule that meets the requirements of the Investment Company Act, the allocation meets the requirements of the exemption.

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Thank you for the opportunity to provide comments on the interim rule for cross-trading. Please do not hesitate to contact the undersigned or Melanie Nussdorf of Steptoe & Johnson at 202-429-3009 to discuss these comments.

Sincerely,

Elizabeth Varley
Vice President and Director, Retirement Policy

cc: The Honorable Bradford Campbell, Acting Assistant Secretary
Employee Benefits Security Administration

Alan D. Lebowitz, Deputy Assistant Secretary for Program Operations
Employee Benefits Security Administration

Robert J. Doyle, Director, Office of Regulations and Interpretations
Employee Benefits Security Administration