enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), the final rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or impose an annual burden exceeding $100 million on the private sector.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires Federal agencies to adhere to specific criteria in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2509

Employee benefit plans, Pensions.

■ For the reasons set forth in the preamble, the Department amends Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

■ 1. The authority citation for part 2509 is revised to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sections 2509.75–10 and 2509.75–2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75–5 also issued under 29 U.S.C. 1002. Sec. 2509.95–1 also issued under sec. 625, Pub. L. 109–280, 120 Stat. 780.

■ 2. Section 2509.95–1 is amended by revising the section heading and paragraph (a) to read as follows:

§ 2509.95–1 Interpretive bulletin relating to the fiduciary standards under ERISA when selecting an annuity provider for a defined benefit pension plan.

(a) Scope. This Interpretive Bulletin provides guidance concerning certain fiduciary standards under part 4 of title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104–1114, applicable to the selection of an annuity provider for the purpose of benefit distributions from a defined benefit pension plan (hereafter ''pension plan'') when the pension plan intends to transfer liability for benefits to an annuity provider. For guidance applicable to the selection of an annuity provider for benefit distributions from an individual account plan see 29 CFR 2550.404a–4.

* * * * *

Signed at Washington, DC, this 29th day of September, 2008.

Bradford P. Campbell,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. E8–23433 Filed 10–6–08; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210–AB19

Selection of Annuity Providers—Safe Harbor for Individual Account Plans

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains a final regulation that establishes a safe harbor for the selection of annuity providers for the purpose of benefit distributions from individual account plans covered by title I of the Employee Retirement Income Security Act (ERISA). This regulation will affect plan sponsors and fiduciaries of individual account plans and the participants and beneficiaries covered by such plans. Also appearing in today's **Federal Register** is a final rule amending Interpretive Bulletin 95–1 to limit the application of the Bulletin to the selection of annuity providers for defined benefit plans.

DATES: This final rule is effective on December 8, 2008.

FOR FURTHER INFORMATION CONTACT: Janet A. Walters or Allison E. Wielobob, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, Washington, DC 20210, (202) 693–8510. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

On September 12, 2007, the Department published an interim final regulation (72 FR 52004) limiting the scope of Interpretive Bulletin 95–1, relating to the selection of annuity providers, to defined benefit plans, as directed by section 625 of the Pension Protection Act of 2006 (the PPA) (Pub. L. 109–280, 120 Stat. 780). On the same date, the Department published a proposed rule (72 FR 52021) that would establish a safe harbor for the selection of annuity providers for individual account plans. The Department received 10 comment letters in response to its request for comments. Set forth below is an overview of the final rule and the public comments submitted on the proposed rule. A final rule amending Interpretive Bulletin 95–1 also appears in today's **Federal Register**.

B. Overview of Final Rule and Comments

As discussed below, the substance of the final rule is very similar to the Department's proposed rule. The Department, however, has made changes to the proposed rule that clarify and simplify the safe harbor conditions, consistent with the suggestions of the commenters.

Scope of the Final Rule

Although restructured to simplify and clarify the rule, paragraph (a)(1) of § 2550.404a–4 of the final rule, like the proposed rule, describes the scope of the regulation. As described in paragraph (a)(1) of the final rule, the regulation establishes a safe harbor for satisfying the fiduciary duties under section 404(a)(1)(B) of ERISA in selecting an annuity provider and contract for benefit distributions from an individual account plan. Paragraph (a)(1) also includes a reference to § 2509.95–1 for guidance concerning the selection of annuity providers for defined benefit plans.

Several commenters expressed concerns about a safe harbor structure. Some suggested that a safe harbor is inconsistent with the prudent person standard and that the prudent person standard alone would more effectively reduce impediments to annuities as a

distribution option under an individual account plan.

Other commenters asserted that the regulation should explicitly state that the generally applicable fiduciary standards apply outside the safe harbor and that a fiduciary can discharge its fiduciary duties in ways other than those prescribed by the regulation. In this regard, some commenters expressed concerns that fiduciaries may believe that they must meet the safe harbor conditions in order to satisfy their fiduciary duties if the regulation is not clearly identified as a safe harbor. Others argued that the safe harbor has the effect of establishing a heightened standard of review for the selection and monitoring of annuities that is unduly stringent and has limited relevance to many annuity investment and distribution options.

After careful consideration of these comments, the Department continues to believe that the safe harbor criteria will be useful to many plan fiduciaries when selecting annuity providers and contracts. The Department agrees, however, that a clearer statement concerning the nature of the safe harbor would be beneficial. Accordingly, the Department has modified paragraph (a) of the safe harbor to add new subparagraph (a)(2), clarifying that the regulation does not establish minimum requirements or the exclusive means for satisfying the responsibilities under section 404(a)(1)(B) of ERISA with respect to the selection of an annuity provider or contract for benefit distributions. Further, in an effort to minimize confusion concerning the scope of the safe harbor, as well as to simplify the regulation generally, the Department has eliminated paragraph (b) of the proposal, which discussed the general fiduciary standards of section 404(a)(1).

Safe Harbor

Paragraph (b) of § 2550.404a–4 of the final rule sets forth the conditions of the safe harbor. While the conditions for relief under the final safe harbor regulation are essentially the same as those contained in the proposal, some changes have been made to the ordering and language of the conditions for purposes of clarifying and simplifying the overall regulation.

As with the proposal, the first condition for safe harbor relief is that the plan fiduciary engage in an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. See paragraph (b)(1) of § 2550.404a–4 of the final rule. Consistent with other guidance from the Department, this process must avoid self dealing, conflicts of interest or other improper influence, and should, to the extent feasible, involve consideration of competing annuity providers.

Paragraph (b)(2) of the final rule, consistent with the proposal, requires that the fiduciary appropriately consider information sufficient to assess the ability of the annuity provider to make all future payments under the annuity contract.

Paragraph (b)(3), requires that the fiduciary appropriately consider the cost of the annuity contract, including fees and commissions, in relation to the benefits and administrative services to be provided under the contract. This paragraph is also consistent with the proposal, except that a reference to ''fees and commissions'' has been added to emphasize their importance to the fiduciary's decision making process.

Paragraph (b)(4), also like the proposal, requires that the fiduciary appropriately conclude that, at the time of the selection, the annuity provider is financially able to make all future payments under the annuity contract and the cost of the annuity contract is reasonable in relation to the benefits and services to be provided under the contract.

Paragraph (b)(5) provides that, if necessary, the fiduciary should consult with an appropriate expert or experts for purposes of complying with the requirements of the safe harbor as set forth in paragraph (b). The proposal included as a condition that a fiduciary appropriately determine either that he or she had, at the time of the selection, the appropriate expertise to evaluation the selection of an annuity provider or that the advice of a qualified, independent expert was necessary. A number of commenters expressed concern that this requirement, as framed, would require all employers to engage independent experts to conduct an analysis of the provider and contract, even those that believed they had the requisite knowledge to make a prudent decision. Commenters believed this would be a particularly onerous requirement for small employers. As modified, the regulation makes clear that engaging an independent expert is not required in all cases. Rather, whether and to what extent, if at all, an expert may be needed is a determination to be made by the plan fiduciary taking into account what, if any, assistance the fiduciary needs to satisfy the conditions in paragraphs (b)(1)–(4) of the regulation.

Paragraph (c)(2) of the proposed regulation provided additional guidance concerning what information a fiduciary should consider in meeting the requirements for the safe harbor. A number of commenters argued that the provisions of paragraph (c)(2) were duplicative, confusing and unnecessary. The Department agrees that the paragraph, as part of the safe harbor, is not necessary and, in some instances, may be confusing. Accordingly, the final safe harbor does not include the listing of supplemental considerations set forth in paragraph (c)(2) of the proposal.

The Department believes that the general safe harbor conditions in the final regulation will be more useful for fiduciaries. Further, although an annuity provider's ratings by insurance ratings services are not part of the final safe harbor, in many instances, fiduciaries may want to consider them, particularly if the ratings raise questions regarding the provider's ability to make future payments under the annuity contract. The Department also believes that some information regarding additional protections that might be available through a state guaranty association for an annuity provider also would be useful information to a plan fiduciary, even if limited to that information which is generally available to the public and easily accessible through such associations, state insurance departments, or elsewhere.

Time of Selection

Commenters expressed concern that plan fiduciaries would have to comply with the conditions of the proposed safe harbor merely because they offered investment options through an annuity contract, without regard to whether a participant or plan fiduciary actually exercised the annuity feature of the contract. If so, commenters argued, investment products offered by insurers would be subject to what they perceived as a different, if not higher, fiduciary standard than that applied to the selection of other investment products. The Department does not intend, by virtue of the safe harbor, to establish different fiduciary standards for the selection of investment products. Rather, the safe harbor conditions apply solely to a fiduciary's decision to purchase a distribution annuity for an individual account plan. To clarify this point, the final regulation includes a new paragraph (c) that affords plan fiduciaries flexibility concerning when they must meet the safe harbor conditions in order to take advantage of the safe harbor. Paragraph (c)(1) of the final regulation provides that, under the safe harbor, the time of selection may be the time that the fiduciary selects the annuity provider and contract for distribution of benefits to a specific

participant or beneficiary. Paragraph (c)(2) provides, in the alternative, that the fiduciary may meet the safe harbor conditions when the fiduciary selects an annuity provider to provide annuity contracts at future dates to participants or beneficiaries, provided that the selecting fiduciary periodically reviews the continuing appropriateness of the conclusion that the annuity provider is financially able to make all future payments under the annuity contract and the cost of the annuity contract is reasonable in relation to the benefits and services to be provided under the contract, taking into account the factors described in paragraphs (b)(2), (3) and (5) of § 2550.404a–4 of the final rule. For purposes of paragraph (c)(2), a fiduciary is not required to review the appropriateness of this conclusion with respect to any annuity contract purchased for any specific participant or beneficiary.

C. Effective Date

This final regulation will be effective 60 days after the date of its publication in the **Federal Register**.

D. Regulatory Impact Analysis

Executive Order 12866 Statement

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, it has been determined that this action is not ''significant'' within the meaning of section 3(f) of the Executive Order, and, therefore, is not subject to review by OMB.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Section 604 of the RFA requires that the agency present a final regulatory flexibility analysis of the publication of the notice of final rulemaking describing the impact of the rule on small entities. The Department has considered the likely impact of the final rule on small entities in connection with its assessment under Executive Order 12866, described above, and believes this rule will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

This rulemaking is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 301 *et seq.*), because it does not contain ''collection of information'' requirements as defined in 44 U.S.C. 3502(3). Accordingly, the final rule is not being submitted to the OMB for review under the Paperwork Reduction Act.

Congressional Review Act

This notice of final rulemaking is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and therefore has been transmitted to the Congress and the Comptroller General for review.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), the final rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or impose an annual burden exceeding $100 million on the private sector.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires Federal agencies to adhere to specific criteria in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the final rule do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2550

Annuities, Employee benefit plans, Fiduciaries, Pensions.

■ For the reasons set forth in the preamble, the Department amends Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

Title 29—Labor

SUBCHAPTER F—FIDUCIARY RESPONSIBILITY UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

■ 1. The authority citation for Part 2550 is revised to read as follows:

Authority: 29 U.S.C. 1135; and Secretary of Labor's Order No. 1–2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sec. 2550.404a–1 also issued under sec. 657, Pub. L. 107–16, 115 Stat. 38. Sections 2550.404c–1 and 2550.404c–5 also issued under 29 U.S.C. 1104. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1) and sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1. Sec. 2550.408b–19 also issued under sec. 611, Pub. L. 109–280, 120 Stat. 780, 972, and sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1. Sec. 2550.412–1 also issued under 29 U.S.C. 1112.

■ 2. Add § 2550.404a–4 to read as follows:

§ 2550.404a–4 Selection of annuity providers—safe harbor for individual account plans.

(a) *Scope.* (1) This section establishes a safe harbor for satisfying the fiduciary duties under section 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104–1114, in selecting an annuity provider and contract for benefit distributions from an individual account plan. For guidance concerning the selection of an

annuity provider for defined benefit plans see 29 CFR 2509.95–1.

(2) This section sets forth an optional means for satisfying the fiduciary responsibilities under section 404(a)(1)(B) of ERISA with respect to the selection of an annuity provider or contract for benefit distributions. This section does not establish minimum requirements or the exclusive means for satisfying these responsibilities.

(b) *Safe harbor.* The selection of an annuity provider for benefit distributions from an individual account plan satisfies the requirements of section 404(a)(1)(B) of ERISA if the fiduciary:

(1) Engages in an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities;

(2) Appropriately considers information sufficient to assess the ability of the annuity provider to make all future payments under the annuity contract;

(3) Appropriately considers the cost (including fees and commissions) of the annuity contract in relation to the benefits and administrative services to be provided under such contract;

(4) Appropriately concludes that, at the time of the selection, the annuity provider is financially able to make all future payments under the annuity contract and the cost of the annuity contract is reasonable in relation to the benefits and services to be provided under the contract; and

(5) If necessary, consults with an appropriate expert or experts for purposes of compliance with the provisions of this paragraph (b).

(c) *Time of selection.* For purposes of paragraph (b) of this section, the ''time of selection'' may be either:

(1) The time that the annuity provider and contract are selected for distribution of benefits to a specific participant or beneficiary; or

(2) The time that the annuity provider is selected to provide annuity contracts at future dates to participants or beneficiaries, provided that the selecting fiduciary periodically reviews the continuing appropriateness of the conclusion described in paragraph (b)(4) of this section, taking into account the factors described in paragraphs (b)(2), (3) and (5) of this section. For purposes of this paragraph (c)(2), a fiduciary is not required to review the appropriateness of this conclusion with respect to any annuity contract purchased for any specific participant or beneficiary.

Signed at Washington, DC, this 29th day of September, 2008.

Bradford P. Campbell,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. E8–23427 Filed 10–6–08; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210–AB17

Statutory Exemption for Cross-Trading of Securities

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final rule.

SUMMARY: This document contains a final rule that implements the content requirements for the written cross-trading policies and procedures required under section 408(b)(19)(H) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). Section 611(g) of the Pension Protection Act of 2006, Public Law No. 109–280, 120 Stat. 780, 972, amended section 408(b) of ERISA by adding a new subsection (19) that exempts the purchase and sale of a security between a plan and any other account managed by the same investment manager if certain conditions are satisfied. Among other requirements, section 408(b)(19)(H) stipulates that the investment manager must 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. This final rule affects employee benefit plans, investment managers, plan fiduciaries and plan participants and beneficiaries.

DATES: *Effective Date:* This final rule is effective February 4, 2009.

FOR FURTHER INFORMATION CONTACT: G. Christopher Cosby or Brian Buyniski, Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5700, U.S. Department of Labor, Washington, DC 20210, telephone (202) 693–8540. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

Section 611(g)(1) of the Pension Protection Act of 2006, Public Law No. 109–280, 120 Stat. 780, 972 (PPA), which was enacted on August 17, 2006, amended ERISA by adding a new section 408(b)(19), which exempts from the prohibitions of sections 406(a)(1)(A) and 406(b)(2) of the Act those transactions involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, provided that certain conditions are satisfied.[1] Among other requirements, an investment manager must adopt, and cross-trades must be effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program. The policies and procedures must include descriptions of (i) the investment manager's policies and procedures relating to pricing, and (ii) the investment manager's policies and procedures for allocating cross-trades in an objective manner among accounts participating in the cross-trading program.

The investment manager also must designate an individual (a compliance officer) who is responsible for periodically reviewing purchases and sales of securities made pursuant to the exemption to ensure compliance with the foregoing policies and procedures. Following such review, the compliance officer must provide, on an annual basis, a written report describing the steps performed during the course of the review, the level of compliance with the foregoing policies and procedures, and any specific instances of noncompliance. The report must be provided to the plan fiduciary who authorized the cross-trading no later than 90 days following the period to which it relates. Additionally, the written report must notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time and must be signed by the compliance officer under penalty of perjury.

Section 611(g)(3) of the PPA provides that the Secretary of Labor, after consultation with the Securities and Exchange Commission (SEC), shall, no later than 180 days after the date of the enactment of the PPA, issue regulations

[1] Section 611(g)(2) of the PPA added a parallel provision under the Internal Revenue Code of 1986 (Code), section 4975(d)(22), which provides relief from the prohibitions described in section 4975(c) of the Code in connection with the cross-trading of securities. Under Reorganization Plan No. 4 of 1978, effective December 31, 1978 (5 U.S.C. App. 214 (2000)), the authority of the Secretary of the Treasury to issue interpretations regarding section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor, and the Secretary of the Treasury is bound by the interpretations of the Secretary of Labor pursuant to such authority.