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Office of Exemption Determinations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice; Proposed Rule – RIN 1210-AB32

Ladies and Gentlemen:

The Futures Industry Association ("FIA")[1] is pleased to provide comments regarding the Department of Labor's ("Department") proposed regulation under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), that will redefine the term "fiduciary" under section 3(21) of ERISA and section 4975(e) of the Internal Revenue Code of 1986, as amended. While the FIA supports regulatory efforts to clarify when a service provider is a fiduciary and when it is not, we are concerned that the proposed rule may be interpreted to sweep in some relationships that are not appropriately regarded as fiduciary in nature and were never intended to be regulated as such. These

[1] FIA is the leading trade organization for the futures, options, and cleared swaps markets. It is the only association representative of all organizations that have an interest in the listed derivatives markets. Its membership includes the world's largest derivatives clearing firms as well as leading derivatives exchanges from more than 20 countries. As the principal members of clearinghouses, our member firms play a critical role in the reduction of systemic risk in the financial markets. They provide the majority of the funds that support these clearinghouses and commit a substantial amount of their own capital to guarantee customer transactions.

FIA's core constituency consists of futures commission merchants, the majority of which are either registered with the Securities and Exchange Commission as broker-dealers or are affiliates of registered broker-dealers. Our larger members are part of integrated financial services companies, with affiliates world-wide. The primary focus of the association is the global use of exchanges, trading systems, and clearinghouses for derivatives transactions. FIA's regular members, which act as the majority clearing members of the U.S. exchanges, handle more than 90 percent of the customer funds held for trading on U.S. futures exchanges.

relationships include services provided by futures commission merchants ("FCMs") that are necessary for ERISA plans' participation in U.S. futures markets. We hope you find our comments helpful in understanding the particular concerns of the futures industry and formulating a rule that guards against such unintended consequences.

I. Role and Regulation of U.S. Futures Markets and FCMs

The U.S. futures markets in which FIA's members operate are highly regulated markets overseen by the Commodity Futures Trading Commission ("CFTC"). Under the Commodity Exchange Act ("CEA") and CFTC rules, futures are traded on registered exchanges and cleared by registered clearinghouses. Plans access the futures markets through registered FCMs. Acting as agents for entities that wish to trade futures, such as plans, FCMs accept, execute, and clear futures orders at the direction of their customers. As members of clearinghouses, FCMs ensure that customer transactions are cleared by guaranteeing their customers' performance to such clearinghouses. To facilitate this clearing process, FCMs collect and post margin – both at the outset of a transaction and on a daily basis thereafter – to ensure positions are at all times appropriately collateralized and can be managed and closed out with minimal market disruption in the event of a customer default. This unique function of FCMs of guaranteeing customers' trades assures the financial integrity of futures markets and protects market participants from potential loss.

Plans use futures for a variety of purposes to manage their investment portfolios. For example, plans use futures to equitize cash to more closely track a benchmark, to increase liquidity, to "stay in the market" during a transition from one asset class to another, to efficiently gain exposure to an asset class without incurring the transaction costs of selling one class of assets and reinvesting in another, and for other administrative and risk-reducing activities. They are a critical component of investment managers' strategies and particularly critical to index funds, which are a significant investment vehicle for plans and individual retirement accounts. Futures are also effective tools for hedging, and for obtaining market exposure while remaining in easily liquidated investments in transitioning from one manager to another. Making futures less available or more expensive risks harming plans, a consequence sought by neither the Department nor the industry.

In their role as FCMs, our members act as agents and guarantors for plans and plan asset vehicles that utilize futures contracts in their portfolios. They do not provide fiduciary advice. Indeed,

under the CFTC's regulatory regime, entities that provide trading advice are defined and regulated differently than FCMs.

Under the CEA and CFTC rules, entities that provide trading advice are classified as "commodity trading advisors" ("CTAs") and must register as such.[2] A CTA is defined as an individual or organization which, for compensation or profit, advises others as to the value of or the advisability of buying or selling futures contracts, options on futures, or retail off-exchange foreign exchange contracts.[3] Under CFTC rules, providing advice includes exercising trading authority over a customer's account as well as giving advice based upon knowledge of or tailored to customer's particular commodity interest account, particular commodity interest trading activity, or other similar types of information.[4]

The CFTC has enumerated circumstances in which commodity futures advice will not rise to the level of the advice for which registration as a CTA is required.[5] A person is not required to register as a CTA if he or she is providing advice that is not based upon knowledge of or tailored to a customer's particular commodity interest account, particular commodity interest trading activity, or other similar types of information.[6] In contrast to the role of CTAs, FCMs act as the agent and guarantor of the buyer or seller of a futures contract. An FCM executes and clears orders for futures contracts at the direction of a plan fiduciary and receives cash and other assets as collateral for the contracts.[7] Its

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[2] 17 C.F.R. § 3.4.
[3] *See* 7 U.S.C. § 1a(12).
[4] *See Exemption From Registration as a Commodity Trading Advisor*, 65 Fed. Reg. 12939, 12939-40 (Mar. 10, 2000).
[5] CTAs are required to register unless they have provided advice to 15 or fewer persons during the preceding 12 months and do not generally hold themselves out to the public as a CTA or they are registered in another capacity (such as an investment adviser) and their advice is solely incidental to that principal business or profession. 17 C.F.R. § 4.14(a)(10).
[6] Examples of such non-tailored advice include:

- advice to buy or sell specific futures contracts should a particular price level be reached, through newsletters, books and periodicals and the recipients of publications all receive the same advice;
- advice (through e-mails, facsimiles, an Internet web site, telephone calls or face-to-face meetings with customers) that consists of instructions to buy or sell a futures contract based on a computerized trading system, which also is available for purchase and use on a personal computer, where the customers all receive the same advice; or
- advice delivered at seminars at which attendees are taught how to trade commodity futures contracts aided by a software program that is being sold, along with a question-and-answer session at which commodity trading advice is provided to the entire group without asking or receiving information about the personal characteristics of the attendees. 65 Fed. Reg. at 12941.

[7] FCMs also clear swaps for market participants.

client agreements make clear that it is not acting as a fiduciary to its clients. Incidental to providing such agency services, it may provide market information to its clients, including pricing and liquidity information that are critical to the client in ensuring efficient order execution.

It is imperative that the Department make clear that incidental advice and recommendations in the course of the above-described services provided by FCMs are not fiduciary advice. If FCMs are deemed to be fiduciaries, they could not execute transactions for plans because, unlike securities execution, no exemption exists which would permit a fiduciary to earn an additional fee for execution of transactions.[8] This would effectively prevent FCMs from providing services to plans, and in turn deny plans access to futures markets. Futures are valuable products in the institutional market, and we urge the Department to clarify its carve-outs so that FCMs are clearly excluded from fiduciary status. To avoid any unintended and harmful outcome, we urge the Department to revise the proposed rule as set forth below.

II. Revisions to Carve-Outs

The Department needs to clarify that the service relationships between a plan fiduciary and an FCM are not fiduciary advice. We believe that this clarification would be best accomplished through revisions to two of the carve-outs currently in the proposal: the Counterparty Carve-Out and the Swap and Security-Based Swap Carve-Out. As presently drafted, the carve-outs do not clearly cover the provision of services in connection with the trading of futures, swaps, and other investment products. We urge the Department to add services to both of these carve-outs so that they will explicitly cover FCMs.

A. The Counterparty Carve-Out

We respectfully request that the Department retitle the Counterparty Carve-Out to include services and to revise it as follows.

> (b) Carve-outs—investment advice. The rendering of advice or other communications in conformance with a carve-out set forth in paragraph (b)(1) through (7) of this section shall not

[8] PTE 86-128, the successor to PTE 75-1, Part I and PTE 79-1, permits a fiduciary to select itself or an affiliate to execute securities transactions, or transactions ancillary thereto, for an additional fee if its conditions are met. There is no corollary for futures transactions. A similar class exemption was sought by the futures industry in 1981. The Department issued an advisory opinion in response to the request, but declined to provide exemptive relief.

cause the person who renders the advice to be treated as a fiduciary under paragraph (a) of this section.

(1) Counterparties or service providers to the plan—(i) The person provides advice to a plan fiduciary or its representative, who is independent of such person, in connection with any transaction, or a proposal to enter into any transaction, whether involving a product, service or otherwise, for or with any plan described in section 3(3) of the Act or any entity which is deemed to hold plan assets under section 3(42) of the Act, if such person knows or reasonably believes that the independent plan fiduciary (a) has responsibility for managing at least $50 million in assets or (b) is a bank, savings and loan association, insurance company, broker-dealer registered under the Securities Act of 1933, an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state or foreign securities commission (or any agency or office performing like functions) (for purposes of this paragraph (b)(1)(i) a person may rely on representations from the independent plan fiduciary regarding the value of assets under management or its status as a bank, savings and loan association, insurance company, registered broker-dealer, or registered investment adviser), (ii) prior to or in connection with entering into a transaction, the person discloses to the independent fiduciary that the person is not undertaking to provide impartial financial advice or to give advice in a fiduciary capacity and (iii) such person has not acknowledged in writing that it is acting as a fiduciary (within the meaning of the Act) with respect to the transaction and does not receive a specific separate advisory fee for such advice.[9]

This carve-out must cover services, not just counterparty transactions, and needs to make clear that all services are covered. In the absence of this change, any incidental advice from an FCM could be deemed to be fiduciary advice if it is specifically directed to the plan or is alleged to be individualized. Such incidental advice could even include information provided by an FCM executing a futures trade for the biggest, most sophisticated client. We understand from the Department's public statements that it did not intend to leave services out of the carve-out. We would appreciate reference in the preamble to the fact that clearing services and futures execution are specifically covered for the avoidance of doubt.[10] In addition, we ask the Department to make clear that the carve-out applies to pooled funds.

Revising the carve-out to include services is a critical fix. We hope the Department will find a way to circulate revised language on this point, even if just informally, before the adoption of a final rule so the industry that serves institutional accounts has assurance that the final rule will not upend

[9] While the plan clients of FCMs are generally institutional accounts, the FIA does not object to a "seller's" carve-out that also includes accredited investors.

[10] This clarification will also ensure that the ability of plans to receive the investment services in the manner to which they are accustomed will not be adversely affected, since it has served them well and been provided without any allegation of abuse or confusion for plans and their fiduciaries.

markets and customer business.

The Department should also adopt other important changes related to the carve-out.

First, we request that any asset based "sophistication" test be based on all assets under management, and not on the amount of employee benefit plan assets. Managers generally do not track assets by type, and we see no policy reason to require them to do so. Moreover, using the amount of employee benefit plan assets raises a variety of questions, including whether state and local plan, foreign plan, and nonqualified plan assets can be counted. We know of no other exemptions where the Department has looked at only employee benefit plan assets to qualify a manager.[11] We believe it is more straightforward and administrable to use an asset-based test that the market is familiar with and that needs no further interpretative guidance.

Second, we urge the Department to use commonly understood market definitions rather than creating new standards just for this rule. These market definitions from FINRA and CFTC rules are already captured by our members' current systems, contained in training materials, and imbedded in the compliance culture of our members. New definitions solely for plans create an unnecessary risk of confusion and noncompliance. In our view, the FINRA institutional account definition would be protective of plans and their participants and serve as an appropriate proxy for sophisticated investors. FINRA Rule 4512(c)[12] defines "institutional account" as follows:

> (1) a bank, savings and loan association, insurance company or registered investment company;
> (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or
> (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million.

If the Department chooses instead to use an assets-under-management test, we hope that it will choose the $50 million test in the INHAM Exemption (PTE 96-23) or the $85 million test in QPAM.

[11] *See, e.g.*, PTE 84-14 and numerous individual exemptions. The use of these well-established tests will also allow FCMs to use existing documentation that they have received in the past from QPAMs on which to base their reasonable belief.

[12] FIA would also support the definition of "institutional investor" in FINRA Rule 2210(a)(4).

Third, any representations or disclosures needed for the carve-out should be required only at the outset of the relationship, and not on a trade-by-trade basis. Any other rule would be difficult and costly to operationalize, and in light of the fact that the participants in this market are sophisticated fiduciaries, disclosure at the outset of the relationship does not risk misunderstandings.

Fourth, we believe that the 100 participant test should be abandoned. Assuming it was intended as a proxy for sophisticated fiduciaries, it fails to recognize that very large sophisticated employers may have scores of plans, some of which may be small. Additionally, the test, as written, is burdensome to administer and will cause significant delays while FCMs check the number of participants in a particular plan, or worse, all of the plans in a master trust. The Department should instead use an asset-based test that aggregates the assets of all plans sponsored by the same employer. That formulation would ensure that an FCM is servicing the plans of sophisticated employers without saddling the FCM with unnecessary compliance costs.

B. The Swaps and Security-Based Swap Carve-Out

We also request that the swap and security-based swap carve-out be clarified. It should cover the services inherent in swap and security-based swap transactions, such as, but not limited to, swap clearing arrangements, as well as pooled funds. These changes are critical to conform this carve-out to the relief the Department recently gave in Advisory Opinion 2013-01A. While the Department has indicated that it did not intend to cut back on that relief, the carve-out is clearly inadequate to cover swap clearing arrangements. Accordingly, we believe the carve-out should read as follows:

> (ii) Swap and security-based swap transactions. The person is (i) a counterparty to an employee benefit plan (as described in section 3(3) of the Act) in connection with a swap or security-based swap, as defined in section 1(a) of the Commodity Exchange Act (7 U.S.C. § 1(a)) and section 3(a) of the Securities Exchange Act (15 U.S.C. § 78c(a)), or (ii) a clearing firm with respect to such a swap or security-based swap if—
>
> (A) The plan is represented by a fiduciary independent of the person;
>
> (B) The person is a swap dealer, security-based swap dealer, major swap participant, or major security-based swap participant or a clearing firm;
>
> (C) The person (if acting as a swap dealer or security-based swap dealer or clearing firm) is not acting as an advisor to the plan (within the meaning of section 4s(h) of the Commodity Exchange Act or section 15F(h) of the Securities Exchange Act of 1934) in connection with the transaction; and

(D) In advance of, or in connection with, entering into the transaction, the person obtains a written representation from the independent plan fiduciary, that the fiduciary will not rely on recommendations provided by the person.

III. Additional Carve-Out for Selling Own Services

In addition to revising the existing carve-outs as discussed above, we respectfully request that the Department add a carve-out for the selling of one's own services (*e.g.*, for recommendations that a client hire the service provider, responses to requests for proposals, and the like). We understand from our members that the Department has clearly stated that it did not intend to make the selling of one's own services a fiduciary act. We are grateful for this clarification and ask that it be formally set forth in a carve-out from the rule.[13]

IV. Acknowledgement of Fiduciary Status

The proposed rule provides that if a person, acting directly or indirectly, or through or together with an affiliate, represents that it is a fiduciary, it may not use any of the carve-outs. Section (a)(2)(i) of the proposal provides:

(2) Such person, either directly or indirectly (*e.g.*, through or together with any affiliate),
(i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to the advice described in paragraph (a)(1) of this section; . . .

We respectfully request that the Department clarify this provision. The language "directly or indirectly (*e.g.*, through or together with an affiliate)" is too broad. A representation that a person is a fiduciary should be made by that person, and that person alone. It is too important a concept, with too much potential liability, to infer such status through loose language used by an affiliate. Many of our members have broker-dealer or investment advisory affiliates who may be fiduciaries under this revised rule. Regardless of that status, FCMs not acting as fiduciaries should not be swept in by this vague concept (directly or indirectly, through or together with an affiliate) or because its asset management affiliate has made a recommendation regarding hedging or transition strategies. We would change this section to provide as follows:

[13] If a carve-out for the selling of one's own services is not provided, we suggest language in the advice definition itself as follows: "Provided, however, that no person shall be deemed to be providing fiduciary advice by recommending, urging, responding to requests for proposals, or otherwise promoting its own hiring."

(2) Such person –

(i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to advice described in paragraph (a)(1) of this section that is or will be provided with respect to a particular account in connection with a particular recommendation of an investment transaction or a series of recommendations regarding such a transaction or series of transactions; . . .

V. Transition Period

We are also concerned about the 8-month transition period. In our experience, any re-documentation required by the regulation will take many months to accomplish, along with any systems build to capture this information and make it readily accessible to be sure that the plan client is covered by the carve-out. If representations are required under any revised formulation, the task of obtaining such representations will likely take at least 18 months. Our members' and their affiliates' experience with obtaining representations from clients in the wake of Dodd-Frank instructs that the process is extremely labor- and time-intensive. We urge the Department to set a compliance schedule that is realistic and that does not impose undue burdens on market participants or interfere with client trading.

VI. Other Revisions to Proposed Regulation

We urge the Department to adopt the rule revisions set forth above. Absent those revisions FCMs will not be able to provide services to plans, and plans will not be able to access futures markets. We believe the revisions are the best and most efficient means of avoiding such harmful and unintended results.

We also note the following concerns with the proposed regulation, which the Department may want to take into consideration.

A. The Valuation Prong of the Advice Definition

We hope the Department will reconsider and reserve, for now, the valuation prong of the advice definition. We agree that valuations should be accurate, professional, and fair, but we do not believe that one should be transformed into a fiduciary merely by quoting prices, marking the value of collateral, and performing other administrative functions in connection with a futures transaction. FCMs routinely provide asset and position values to clients prior to trades and for account statement purposes on a daily, monthly, quarterly, or other periodic basis. We believe the market is better

served by a regulation capturing the person recommending the investment, not the person providing the values from market sources. We agree with the Department that investment advice should hinge on whether a call to action or an explicit endorsement has been made.[14] Valuations, quotes, or current value information, by contrast, are not recommendations and should not fall within this definition.[15] Our members should not be deemed fiduciaries merely by providing these values, and we are concerned that a broad rule and a narrow carve-out will not promote certainty or clarity in a rapidly changing market.

To our knowledge, the Department has not identified evidence that valuations in the futures or swap context have been unfair, abusive, or otherwise unlawful. We see no justification for causing service providers that provide regular reporting of values to plans and other institutional clients as required by the account agreement, as requested by clients, or pursuant to the securities laws or CFTC requirements regarding marking of collateral, etc. to potentially become an ERISA fiduciary without a demonstrated need to remedy or prevent bias or abuse. We urge the Department to address all valuations at the same time after this rule is finalized so it can consider all valuation issues together. Accordingly, we respectfully request that the Department eliminate this troublesome provision from the proposed rule at this time and reserve the section for a future coordinated rulemaking.

B. Mutual Understanding

We believe it is a mistake to eliminate the mutual understanding test from the regulation. The futures markets operate efficiently based on carefully crafted written agreements. Because there is no prohibited transaction exemption for futures trading by a fiduciary, it is critical that there be a mutual understanding when an FCM decides to act as a fiduciary because that decision will eliminate its ability to engage in futures trading for that client. Thus, a plan fiduciary later claiming that he "understood" the FCM or the execution facility to be providing fiduciary advice could invalidate every

[14] *See* Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 80 Fed. Reg. 21938 (Apr. 20, 2015) (referencing this standard).

[15] We suggest that the Department change the definition of "recommendation" as follows:

> Recommendation means a communication that, based on its content, context, and presentation, would reasonably be viewed as a call to action or specific endorsement that the advice recipient engage in or refrain from taking a particular course of action. Recommendation does not include communications that merely suggest actions or course of actions for consideration with no call to action to engage in the action

trade entered into by that client and cause substantial market disruption and confusion. Orderly markets should not be permitted to be hijacked by a fiduciary unhappy with his decisions, or for the sake of "simpler enforcement." Allowing a plan fiduciary or the Department to recast an arrangement and allow a unilateral, after-the-fact "understanding" to replace arms-length agreements is inappropriate and unfair.

C. "Specifically Directed To"

We urge the Department to reconsider its proposal to add "specifically directed to" in section 2(a)(ii) to individualized investment advice. The preamble suggests that the Department may be preserving its argument that every FCM is a fiduciary if it advertises in the financial press, sends out targeted marketing, or provides research on markets or strategy that is not individualized to a particular plan. We are concerned that the rule, as proposed, could be read to transform all advertising by FCMs and all selling of FCM services into actionable fiduciary advice before there is individualized contact, let alone a mutual agreement, based on the Department's "specifically directed to" formulation. This language may be broad enough to make general research provided by an FCM, sent to all or a large group of clients, futures market commentaries or marketing materials, as well as materials which are not geared at all to individualized trading recommendations to be deemed to be fiduciary advice. It is problematic and overbroad, and we respectfully request the Department delete it.

We appreciate the Department's consideration of our comments and would be happy to meet with the Department to discuss our recommendations if that would be helpful.

Sincerely,

Allison Lurton
Senior Vice President and General Counsel

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or course of action. A communication that would not be a recommendation within the meaning of applicable FINRA rules will not be deemed a recommendation under this section.