



Sunil Cutinho
Senior Managing Director and President
CME Clearing

September 24, 2015

By U.S. Mail and Email: e-ORI@dol.gov; e-OED@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Office of Exemption Determinations
Employee Benefits Security Administration
(Attention: D-11712)
U.S. Department of Labor
200 Constitution Avenue NW.
Suite 400
Washington DC 20210

Re: RIN 1210-AB32: Proposed Definition of the Term "Fiduciary";
ZRIN 1210-ZA25: Proposed Best Interest Contract Exemption

CME Group Inc. ("CME Group") appreciates the opportunity to comment on the Department of Labor's ("Department" or "DOL") proposed regulation (the "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 (the "Code"), as well as the proposed "best interest contract" prohibited transaction class exemption (the "Best Interest Contract Exemption").

CME Group is the parent of Chicago Mercantile Exchange Inc. ("CME"). CME is one of the largest central counterparties ("CCP") in the world and is registered with the Commodity Futures Trading Commission ("CFTC") as a derivatives clearing organization ("DCO") and with the Securities and Exchange Commission ("SEC") as a clearing agency. CME Group, through CME's clearing house division ("CME Clearing"), presently offers clearing and settlement services for exchange-traded futures contracts as well as over-the-counter ("OTC") derivatives transactions, including interest rate swaps ("IRS") and index credit default swaps ("CDS").

CME appreciates the efforts of the Department and its staff through the years to formalize its recognition of the limited application of ERISA in the context of cleared derivatives, in

particular, futures contracts and cleared swaps.¹ CME also appreciates the Department's interest in providing a carve-out from the definition of "investment advice" in the Proposed Regulation² for advice provided by a counterparty in connection with a "swap" or "security-based swap," as defined in the Commodity Exchange Act ("CEA") and Securities and Exchange Act of 1934 ("Exchange Act"), respectively. However, CME is concerned that without certain revisions and clarifications, the Proposed Regulation, if adopted, could create uncertainty with regard to the fiduciary status of various regulated entities involved in cleared transactions. In addition, CME appreciates the Department's interest in providing an exemption from the prohibited transaction rules under ERISA and section 4975 of the Code to permit investment advice fiduciaries and related parties to receive commissions and similar compensation for services provided in connection with certain investment transactions entered into by retail retirement investor clients, but is concerned that the class of investment transactions to which the Best Interest Contract Exemption would apply has been drawn too narrowly and would exclude certain investment transactions beneficial to such investors.

In order to address these concerns, CME respectfully requests that the Department make the following clarifications and revisions in the final rulemaking:

1. Include in the preamble to the final regulation a statement that the Department does not consider a CCP to be acting as a fiduciary in connection with the performance of its customary functions, making reference to the Department's prior guidance regarding futures and cleared swap transactions;
2. Include in the preamble to the final regulation a statement confirming that the "swaps carve-out" applies to investment advice rendered by swap counterparties in connection with both cleared and uncleared swaps and security-based swaps;
3. Preserve certainty with respect to the non-fiduciary status of clearing firms by:
 - (A) expanding the swaps carve-out to apply to the rendering of investment advice by clearing firms in connection with the execution and clearing of swaps and security-based swaps; and
 - (B) expanding the "counterparty carve-out" under paragraph (b)(1)(i) of the Proposed Regulation to apply to investment advice rendered by a clearing firm in connection with the provision of its services and the marketing of its own services;
4. Refrain from including any "valuation prong" in the investment advice definition, thereby ensuring that the provision of valuations, quotes and/or current values with respect to cleared products by CCPs, swap execution facilities (each, a

¹ See DOL Advisory Opinion 82-49A (Sept. 2, 1982) ("AO 92-49A"); DOL Advisory Opinion 2013-01A (Feb. 7, 2013) ("AO 2013-01A").

² Proposed Regulation ¶ (b)(1)(ii), 80 Fed. Reg. 21,957 (Apr. 20, 2015).

“SEF”), designated contract markets (each, a “DCM”) and clearing members is not treated as investment advice; and

5. Expand the relief provided under the Best Interest Contract Exemption to cover receipt of compensation for services rendered in connection with investments by retail retirement investor clients in exchange-traded futures, exchange-traded options on futures, cleared swaps and cleared security-based swaps.

1. A CCP does not act as a fiduciary in connection with the performance of its customary functions.

Most market participants assume that a CCP would not be considered a plan fiduciary as a result of accepting a product for clearing on behalf of an employee benefit plan subject to ERISA (an “ERISA Plan”), an individual retirement account (“IRA”), or an entity whose underlying assets are deemed to constitute “plan assets” of one or more ERISA Plans or IRAs pursuant to section 3(42) of ERISA and DOL Regulation §2510.3-101 (a “Plan Asset Entity,” and each such ERISA Plan, IRA or Plan Asset Entity, a “Benefit Plan Investor”). In the Department’s own words, a CCP’s clearing function (in the context of swaps) works as follows: “Upon acceptance of a swap by the CCP for clearing, the original swap is extinguished, and is replaced by an equal and opposite swap between the CCP and each Clearing Member acting as principal for a house trade or acting as agent for a customer trade” and that “the CCP is technically the counterparty to the defaulting customer”³ Likewise, in the context of futures, the Department has long recognized the role of a CCP, noting that “the respective long and short [futures] positions are cleared through a clearing organization” and that the “clearing process severs the relationship between the original traders”⁴

While it is true that a CCP becomes the counterparty to a Benefit Plan Investor once a product is accepted for clearing, this is simply a function of the mechanics of clearing, which is required for most swaps (by notional value) and all futures contracts executed in the U.S.⁵ By accepting a swap or futures contract for clearing, a CCP does not provide any investment advice or negotiate the terms of the trade. In the context of futures and swaps, the majority of CCP communications made in the course of serving the central clearing function and any ancillary roles⁶ are communications with the clearing members of the CCP, as opposed to communications directly with their customers who are the ultimate counterparties to the cleared swaps or futures contracts. In the instances when a CCP might communicate directly with ultimate

³ AO 2013-01A.

⁴ AO 82-49A.

⁵ As a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), certain standardized IRS and CDS are currently required to be cleared by a CCP registered as a DCO with the CFTC. See CEA section 2(h) and Part 50 of the CFTC’s regulations.

⁶ The customary functions of the CCP have expanded over time to include: transaction processing, post-trade management functions, financial management of members’ collateral deposits, final settlement of outstanding obligations through financial payment or physical delivery, overall risk management of market participants, guaranteeing the performance of its contracts, and educating investors on the workings of the clearinghouse.

counterparties, such communications are made in furtherance of operating the clearinghouse or are factual in nature; they have nothing to do with providing investment advice or otherwise acting in a fiduciary capacity. Indeed, the industry does not view a CCP's role in clearing, even where the CCP technically is the counterparty to a Benefit Plan Investor, to involve the exercise of any fiduciary authority, and does not consider a CCP's communications in connection with the performance of its customary functions to constitute the rendering of investment advice.

This view is supported by the Department's recognition that "[i]t does not appear . . . that Congress contemplated that . . . CCPs would act as ERISA fiduciaries with respect to plan customers."⁷ The Department has also taken the view in connection with cleared swaps "that the CCP does not provide services to the plan, and will not be deemed to be a party in interest with respect to the plan solely by reason of providing clearing services for the plan's Clearing Members."⁸ These views echo the Department's earlier conclusion that, in the context of futures transactions, a CCP would not be considered to provide services to a plan investor.⁹

In light of the views reflected in the Department's previous guidance regarding futures and cleared swaps transactions, CME does not believe that any changes are required to the proposed regulations to address CCP functions. However, in the absence of any discussion in the proposed rule of the role CCPs play in swaps or futures clearing, CME requests that in the preamble to the final rule the Department include a reference to the Department's previous guidance, which will serve to confirm that, consistent with such guidance, the Department does not consider a CCP to be acting as a fiduciary in connection with the performance of its customary functions.

2. The "swaps carve-out" applies to investment advice rendered by swap counterparties in connection with cleared swaps and cleared security-based swaps.

We understand from conversations with Department staff that the "swaps carve-out" is intended to apply equally to investment advice rendered by swap counterparties in connection with swaps and security-based swaps whether cleared or uncleared.¹⁰

The Department's views regarding cleared swaps, as set forth in AO 2013-01A, are consistent with the purpose of the regulatory framework enacted in Dodd-Frank for both swaps and security-based swaps – to reduce risk, increase transparency, and promote market integrity.¹¹ One of the hallmark requirements of Dodd-Frank is that any swap that the CFTC determines is

⁷ AO 2013-01A.

⁸ *Id.*

⁹ *See* AO 82-49A.

¹⁰ Although the swaps carve-out, as presently worded, would apply only to swap and security-based swap transactions involving ERISA Plans, CME believes that this carve-out should be available for transactions involving any Benefit Plan Investor eligible to enter into a swap or security-based swap.

¹¹ *See* AO-2013-A.

required to be cleared must be submitted to a DCO.¹² CME believes it would be helpful for the Department to include in the preamble to the final regulation a statement or footnote acknowledging that the swaps carve-out applies equally to investment advice rendered by swaps counterparties in connection with cleared swaps and cleared security-based swaps, as well as uncleared swaps and uncleared security-based swaps.

3. Recommendations, valuations and other communications made in connection with the provision of clearing firm services should not be considered investment advice.
 - A. The “swaps carve-out” should be expanded to cover investment advice rendered by a clearing firm in connection with the provision of services related to swap and security-based swap transactions.

The swaps carve-out should be expanded to include investment advice rendered by a clearing firm¹³ in connection with the furnishing of swap and security-based swap services to Benefit Plan Investors. As the Department recognized in AO 2013-01A, “under the Dodd-Frank Act, the Clearing Member has a prescribed role within the swaps clearing framework that requires it to enter into agreements with customers that give it broad discretion to make margin calls, to call defaults and to close out a customer’s position as needed to protect the Clearing Member’s own interests, the interests of the CCP and the interests of its other customers.” In connection with this role, it is common for a clearing firm to provide its customers with information, such as valuations, pricing and liquidity information, that is important to customers in deciding whether to execute, maintain or liquidate swaps positions or, as the security-based swap market develops, security-based swaps positions, or the collateral supporting these positions. If clearing firms are deterred from providing these services due to the risk of being deemed a fiduciary, customers will receive less information, make less-informed decisions, thereby creating greater risks for clearing firms in guaranteeing their customers. As a result, the clearing role considered important to Congress in mandating clearing and execution will be compromised. Accordingly, CME asks the Department to revise the language of the swaps carve-out in a manner substantially similar to the revisions proposed by the Securities Industry and Financial Markets Association (“SIFMA”) and the Futures Industry Association (“FIA”) in their respective comment letters.¹⁴

¹² See CEA Section 2(h)(1). Likewise, any swap required to be cleared also must be executed on a SEF or DCM unless no SEF or DCM makes the swap available to trade. See CEA Section 2(h)(8). Dodd-Frank added substantially similar provisions to the Securities Exchange Act for security-based swaps, although the SEC has not yet implemented a clearing mandate or a trade execution requirement for security-based swaps. See Section 3C of the Exchange Act, 15 U.S.C. 78c-3.

¹³ Clearing firms that clear swaps or security-based swaps for customers generally must be CFTC-registered futures commission merchants or SEC-registered broker-dealers.

¹⁴ See Letter from Lisa J. Bleier, Managing Director, Federal Government Relations, and Associate General Counsel, Securities Industry and Financial Markets Association, to Office of Regulations and Interpretations, Employee Benefits Security Administration, p. 45 (July 20, 2015) (the “SIFMA Comment Letter”); Letter from Allison Lurton, Senior Vice President and General Account, Futures Industry Association, to Office of Exemption Determinations, Employee Benefits Security Administration, pp. 7-8 (July 21, 2015) (the “FIA Comment Letter”).

- B. The “counterparty carve-out” should be expanded to cover investment advice rendered by a clearing firm in connection with the provision of its services and in connection with the marketing of its own services.

The counterparty carve-out should be expanded to include investment advice rendered by a clearing firm to a Benefit Plan Investor or its fiduciary in connection with the provision of its services and in connection with the marketing of its own services.¹⁵ Unless such communications are carved out of the “investment advice” definition, there will be a risk that clearing firms will be considered plan fiduciaries by virtue of engaging in routine communications with current or prospective Benefit Plan Investor clients. At the same time, the conditions in the Proposed Rule that are imposed on the use of the counterparty carve-out should be reviewed and pared down. For example, a clearing firm intending to qualify for the carve-out should not be required to obtain new representations from, or refresh its diligence of, a Benefit Plan Investor counterparty on a trade-by-trade basis, which could result in considerably slower execution of transactions, diminishing the ability of Benefit Plan Investors to compete in the derivatives marketplace. Accordingly, CME asks the Department to revise the language of the counterparty carve-out in a manner substantially similar to the revisions proposed by SIFMA and FIA in their respective comment letters.¹⁶

4. The valuation prong of the “investment advice” definition should be excluded from the final regulation.

CME asks the Department to reconsider the valuation prong of the investment advice definition as it relates to the provision of valuations, quotes and current values with respect to futures, swaps and security-based swaps. Such information is routinely provided by CCPs, SEFs,¹⁷ DCMs¹⁸ and clearing firms and no market participant would consider this information to constitute investment advice. Recognizing the many other comments the Department has received, CME requests that the Department refrain from including a valuation prong in the final regulation.

¹⁵ Although the counterparty carve-out, as presently worded, would apply only to transactions involving ERISA Plans that cover 100 or more participants or represented by an independent plan fiduciary that manages at least \$100 million in ERISA Plan assets, CME believes that this carve-out should be available for transactions involving any Benefit Plan Investor represented by a sophisticated independent fiduciary, including Plan Asset Entities managed by a “qualified professional assets manager” (as defined in DOL Prohibited Transaction Class Exemption 84-14) or an “in-house asset manager” (as defined in DOL Prohibited Transaction Class Exemption 96-23) and self-directed IRAs whose beneficial owners are high net worth individuals.

¹⁶ See SIFMA Comment Letter at p. 44; FIA Comment Letter at p. 5.

¹⁷ SEFs are CFTC-registered trading platforms that provide pre-trade information and an execution facility for swaps among the participants of the SEF.

¹⁸ DCMs are the traditional exchanges on which futures must be traded. The Dodd-Frank Act also allows DCMs to make swaps available to trade.

5. The relief provided under the Best Interest Contract Exemption should be expanded to cover receipt of commissions and similar compensation for services provided by investment advice fiduciaries and related parties in connection with investments by retail retirement investor clients in exchange-traded futures, exchange-traded options on futures, cleared swaps and cleared security-based swaps.

The Best Interest Contract Exemption, as proposed, would apply to the receipt of commissions and similar compensation for services provided by an investment advice fiduciary and related parties in connection with the “purchase, sale or holding of an Asset” by a retail retirement investor client.¹⁹ The term “Asset” has been defined for purposes of the Best Interest Contract Exemption to include only specified investment products. CME believes that the range of investment options included within the proposed “Asset” definition is too narrow and would exclude investments that may be beneficial to retail retirement investors. In particular, the process of centrally clearing transactions, such as exchange-traded futures, exchange-traded options on futures, cleared swaps and cleared security-based swaps fosters liquidity and facilitates the ability to mitigate interest-rate risk and various other risks associated with investments commonly held by Benefit Plan Investors. Accordingly, CME requests that the Department revise the definition of “Asset” to include such investments.

CME Group thanks the Department for the opportunity to comment on this matter. Should you have any comments or questions regarding this letter, please contact me by telephone at 312-634-1592, or email at sunil.cutinho@cmegroup.com.



Sincerely,
Sunil Cutinho
Senior Managing Director and President
CME Clearing

¹⁹ For purposes of the Best Interest Contract Exemption, a retail retirement investor is an IRA, a participant or beneficiary of an ERISA Plan that provides for participant-directed investors, and a plan sponsor acting as fiduciary of a non-participant directed ERISA Plan with fewer than 100 participants.