1100 15th Street NW, Washington, DC 20005
+1 202 919 4940
info@aima.org

aima.org

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The Honorable Lisa Gomez
Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Submitted via Federal eRulemaking Portal: http://www.regulations.gov

Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210–AC02)

Dear Ms. Gomez:

The Alternative Investment Management Association ("AIMA")[1] appreciates the opportunity to submit this response to the Department of Labor ("DOL") regarding the proposed rule changes to Prohibited Transaction Exemption 2020–02 (Improving Investment Advice for Workers & Retirees) and to several other existing administrative exemptions from the prohibited transaction rules applicable to fiduciaries under Title I and Title II of the Employee Retirement Income Security Act of 1974 ("ERISA") (collectively, the "Proposal"). A number of AIMA's manager members manage entities that include ERISA benefit plan investors ("BPIs"), though, in general, only to a degree that complies with restrictions, exemptions and thresholds that ensure the entity is not converted into an ERISA "plan

[1] AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with around 2,100 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2.5 trillion in hedge fund and private credit assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs, and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 250 members that manage $1 trillion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialized educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org.

assets" vehicle and the manager is not deemed an investment advice fiduciary under DOL regulation. These managers remain within the safe harbor that DOL rules provide and do not otherwise focus on ERISA plan asset management.

As you are aware, the framework for managing entities in a manner that ensures they remain within the DOL's safe harbor from "plan assets" status is complex and unforgiving. Although the 25% equity class test for BPIs seems relatively straightforward, it can be anything but. Because the test is conducted on a class-by-class basis, an entity's structure – such as a multi-feeder master-feeder arrangement – can significantly complicate this math, and the test is recalculated at the time of each new subscription, transfer or redemption into and out of the entity. If the 25% threshold is met or breached, the entity is immediately deemed to be an ERISA "plan assets" vehicle, and the manager must comply with ERISA – unnecessarily impacting other fund investors in the process – unless it can "cure" this threshold issue by forcibly redeeming BPIs to return to a sub-25% level. These are among numerous complicating factors that do not need to be enumerated in this letter but currently dissuade many fund managers from working with BPIs.

In order to remain within the DOL safe harbor, the manager – and to a certain extent, its counterparties – must perform significant additional monitoring and reporting specific to ERISA plan assets while already shouldering the ever-increasing regulatory burden posed by other regulators, who have been unusually active in recent years. The pending rules being promulgated by the U.S. Securities and Exchange Commission are very likely to quell any remaining appetite to take on these ERISA-related requirements.

Although fund managers appreciate the ability to include these BPIs among the investors in the fund entities under their management, the potential forcible conversion of an entity to an ERISA plan assets vehicle is not their only worry. Until the Proposal, fund managers could rely on a fairly straightforward, five-part test to determine their related status as an ERISA fiduciary that is providing investment advice to BPIs and therefore subject to a host of additional strict requirements and restrictions. Several prohibited transaction exemptions ("PTEs") also have been available to provide relief to those otherwise deemed to be providing investment advice as a fiduciary. As you are well aware, ERISA imposes severe consequences for breaches of fiduciary duties, much like the breadth of fiduciary duties and high standards of care other fund manager regulators impose. Fund managers therefore take care to avoid expanding their ample fiduciary duties with additional DOL rules for the sake of a small subset of their funds' investors.

Despite those best efforts, the changes the Proposal offers virtually assure that fund managers who include BPIs in their managed entities will become investment advice fiduciaries. With the Proposal, the DOL replaces the longstanding five-part test with a much broader definition, which undoubtedly will lead to uncertainty regarding the circumstances under which fiduciary status may apply. That uncertainty aside, what is clear is that whether a person has made a recommendation is a threshold element in establishing the existence of fiduciary investment advice, under current rules and the

Proposal. However, the Proposal broadens the scope of what may be construed as a recommendation, and when.

A "recommendation" is not succinctly defined in the Proposal, instead offering several broad types of communication which may not align with common understanding or intent. Examples abound. Under current rules, the five-part test required communications to be provided on a "regular basis" in order to trigger investment advice fiduciary status. In contrast, under the Proposal, a one-time written or oral "recommendation" – whether in the traditional sense or not – could render the fund manager an investment advice fiduciary. Unlike prior rulemakings, the Proposal offers no safe harbor for "recommendations" from fund managers to sophisticated BPIs. The Proposal indicates that among other things, discussions of investment strategies (with or without specific holdings), investment policies, portfolio composition, and even proxy voting would constitute recommendations. Although the Proposal contains a "hire me" exception to carve out marketing communications from the "recommendation" designation, it is far from clear to what extent it applies to certain discussions between fund managers and prospective BPIs. As a result, even the information provided to a BPI during the pre-investment diligence process could be viewed as "recommendations" under the Proposal, even though it is long and well understood to be provided on an arm's length basis versus in a fiduciary capacity.

To be clear, we do not imply that a fund manager cannot ever be deemed an investment advice fiduciary. There are, of course, circumstances that would rightfully trigger fiduciary designation, such as clear and intentional efforts to provide a BPI with investment advice under a duty of trust and confidence, or where engaging with a less-qualified investor who may not have the sophistication to interpret the relationship appropriately. However, the circumstances that would trigger an investment adviser's fiduciary designation should not include arm's-length communications between sophisticated parties in a due diligence capacity or within the scope of an existing relationship where client communications and other non-soliciting information is provided. These materials generally bear unambiguous disclosure identifying that they are not to be construed as investment advice, in accordance with existing regulatory standards, yet the Proposal would disregard such disclosure, deem the information to be a recommendation and assign fiduciary status accordingly.

The free flow of information between fund managers and their sophisticated investors that is hallmark to private fund investment would be an unwitting casualty of the Proposal. With an exceedingly broad concept of what constitutes a recommendation, and even a one-time "recommendation" capable of triggering fiduciary status, fund managers would rightfully have significant concerns whenever communicating with BPIs. Everything from due diligence discussions to standard client communication to or with BPIs would be fraught with risk. Should the Proposal advance, we urge DOL to provide, at a minimum, a safe harbor for fund manager communications with sophisticated BPIs, which they cannot otherwise service as they would all other investors. Without a safe harbor, it is highly unlikely that fund managers who do not seek to become investment advice fiduciaries would engage with BPIs to any degree going forward.

It also should be noted that, under existing rules, fund managers can derive some comfort from PTEs to remain outside of fiduciary designation. However, the Proposal presents yet-another means by which fund managers would be designated as investment advice fiduciaries: existing PTEs would be modified in such a way to render them unusable. Specifically, PTE 2020-02 would become the default PTE for fiduciary investment advice, as other commonly used PTEs would be subject to very narrow exceptions. However, a condition of PTE 2020-02 is acknowledgment of fiduciary status, which effectively forces the fund manager to be a fiduciary regardless of any other circumstances. This is an unworkable outcome for those who strive to offer BPIs with higher investment returns they may not be able to obtain from ERISA plan assets vehicles, especially where the relevant manager is actively monitoring the levels of BPIs so as to have their managed vehicles stay within the safe harbor.

The requirements for managing ERISA plan assets already dissuade most managers from this area of fund management. For those considering integrating BPIs into a non-plan assets vehicle, the risk of a misstep and the ensuing repercussions often are seen as too much to bear under current rules. The Proposal appears designed to deem fund managers as investment advice fiduciaries, whether intended or not. Fund managers previously could address many concerns by seeking an applicable PTE. However, the Proposal also modifies these curative PTEs in such a way that virtually assures investment advice fiduciary status.

Fund managers engage with BPIs because they value the opportunity to provide them with the investment expertise and higher return profile that their other investors enjoy. BPIs rely on these higher returns to supplement what generally are lower-return investment options available to them. Without significant amendments in a final rule, it is difficult to envision how traditional fund managers that are regulatory risk averse can justify working with BPIs going forward. As the Proposal stands, it is functionally impossible, which translates into fund managers excluding BPIs altogether. We therefore encourage you to withdraw the Proposal, which we believe will prove particularly harmful to the BPIs the Proposal seeks to protect. Absent this, we would highly recommend engaging with the public to understand other, less harmful ways that you may be able to address the perceived risks to BPIs that prompted the Proposal.

For further information or if you have any questions, please contact Suzan Rose at srose@aima.org,

Yours sincerely,

Jiří Król
Deputy CEO, Global Head of Government Affairs
AIMA