July 20, 2015

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

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712
Suite 400
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: ZRIN: 1210-ZA25; PTE Application D-11687

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is pleased to provide comments regarding the Department of Labor's ("Department") proposed amendment to PTE 75-1, Part V, which extends relief to extensions of credit in connection with securities transactions under section 408 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and section 4975(b) of the Internal Revenue Code of 1986, as amended (the "Code"). We appreciate the opportunity to comment and hope that our comments are helpful to the Department as it assesses the impact of the proposal on plans and their participants as well as IRAs. SIFMA shares the Department's concern that normal securities transactions for plans and IRAs be effected in as efficient and economic a manner as possible and that the exemptions themselves, and how they are to be interpreted, do not result in costly litigation.
Attached hereto are SIFMA's submissions for the related rulemakings being undertaken by the Department. These attachments are an integral part of this submission.[2]

[1] SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

PTE 75-1 was the first class exemption issued by the Department after the enactment of ERISA. As the Department noted at the time of the January 13, 1975 proposal, SIFMA filed the application, along with the National Association of Securities Dealers ("NASD") and certain broker-dealers, to obtain clarity on the nature and extent to which ordinary and customary transactions between broker-dealers and employee benefit plans are subject to the prohibited transaction rules.[3] Among the concerns raised by the applicants were the complexity of the fiduciary provisions, the risks of civil liability, and the potential disruption to the capital markets, with the attendant adverse consequences to plans.[4] In connection with the application, the Department noted that the SEC had expressed "deep concern" about the uncertainty in the securities industry and the potential disruption to the capital markets.[5] The original proposal contained no relief for extensions of credit, and provided only a few weeks of relief, until February 15, 1975, if the broker-dealer was providing investment advice to the plan.

The Department proposed interim relief on February 4, 1975, again citing the SEC's "great concern about the severe disruption and dislocation in the capital markets and the probably concomitant negative impact of employee benefit plans".[6] The Department noted that the record established that the "securities industry is singularly important in facilitating the raising of capital and is singularly important in maintaining market liquidity, particularly for institutional investors. Further, the field of securities trading is unique, complex and closely regulated."[7] On August 8, 1975, the Department proposed a permanent exemption for 5 categories of transactions, including agency transactions, principal transactions in any security, the purchase of securities in an underwriting from a fiduciary and the receipt of compensation by a member of the underwriting syndicate, purchases and sales of securities by market makers in a security, and extensions of credit in connection with the purchase or sale of securities, so long as no

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[2] See Appendices numbered 1-8.
[3] Proposed Exemption, 40 Fed. Reg. 2483 (January 13, 1975).
[4] Id.
[5] Id.
[6] 40 Fed. Reg. 5201 (February 4, 1975).
[7] Id.

compensation was received by a fiduciary in connection with the extension of credit. The exemption was finalized on October 31, 1975.[8]

In recognition of the fact that virtually all broker-dealers may be deemed to be acting as fiduciaries with respect to IRAs and other similar retail accounts if the Department's proposed changes to its regulations under 29 CFR 2510.3-21 are finalized, the Department proposes to amend its exemption for extensions of credit in connection with securities transactions.

The Department properly recognizes that this relief is important to the orderly settlement of transactions. However, we do not understand why the Department has limited the relief to settlement failures when it noted, forty years ago, that this relief is also necessary in connection with short sales, options contracts, and other transactions. These transactions will continue to take place for IRAs and plans and the relief provided under this exemption is critical to a short sale, an options trade or a margin transaction. We assume that the Department is not intending to outlaw these transactions for all plans and IRAs, and assuming we are correct in that assumption, we respectfully request that the Department reinstate the additional relief under current law.

In addition, we believe that the language that the Department has chosen in section (c)(1) of its proposal will generate confusion and litigation and will impede efficient settlement of transactions. That proviso limits relief to situations where the settlement failure is not the result of "action or inaction"[9] on the part of the broker-dealer or its affiliate. In our members' experience, every settlement failure involves different and conflicting interpretations regarding the cause of the settlement failure. Recollections differ, markets change, questions are raised. Most of the time, the parties agree to disagree and no time or money is spent trying to determine with certainty exactly whose fault the failure was. The language in subsection (c)(1) will require that kind of fact intensive inquiry every time, and a clear assumption of blame by the

[8] 40 Fed. Reg. 50845 *October 31, 1975).
[9] It is not clear what the Department has in mind here. Is it that the broker needs to monitor settlement with such assiduity that it can take advantage of the last clear chance to avoid a fail? We do not think this course is rational in the market place.

counterparty, its agent, or the plan's custodian, in order to be certain that the terms of the exemption are met. We can envision the chaotic aftermath of every fail, and we do not see why the Department believes that result is in the interest of IRAs and plans, especially because that kind of factual inquiry will surely increase the cost of the extension of credit only for IRAs and plans, since only these clients will require this kind of certainty. Or no one will use the exemption at all, and instead will increase commissions and markups to accommodate the risk of a fail and an interest free extension of credit while the fail is worked out.

Broker-dealers work out these issues regularly, and do not charge clients when it is their fault. The Federal Reserve Board's Reg T and the SEC's Rule 15c3-3 provide detailed guidance on when a client can be held responsible for a settlement failure. All firms have policies and procedures regarding the allocation of costs of a settlement failure. We do not believe that a condition which uses the vague but potentially over inclusive language used here will ultimately be in the interest of IRAs, plans and plan participants. To the extent that broker-dealers are unable to affirmatively determine that the failure was not due to "action or inaction" on their part, they will simply increase their fees to cover any potential fail issues.

We suggest the following revisions to the language of paragraph (c):

(c) Notwithstanding section (a)(2), a fiduciary within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) may receive reasonable compensation for extending credit to a plan or IRA in connection with a securities transaction if:

(1) To the extent that an extension of credit is in connection with a settlement failure, such failure was not caused by such fiduciary or an affiliate;

(2) The terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties;

(3) Prior to any initial extension of credit after the applicability date, the plan or IRA receives written disclosure of (i) the rate of interest (or other fees) that will apply and (ii) the method of determining the balance upon which interest will be charged, in the event that the fiduciary extends credit to avoid a failed purchase or sale of securities, as well as prior written disclosure of any changes to these terms. This Section (c)(3) will be considered satisfied if the plan or IRA receives the disclosure described in the Securities and Exchange Act Rule 10b-16;

It is appropriate that the Department's disclosure requirement is based on SEC required disclosure and that it has determined that compliance with the SEC standard will constitute compliance with the disclosure requirements of this exemption. As noted in other comments, we think holding financial institutions to the same standard will decrease the costs of compliance, will minimize errors, and will ultimately be in the best interest of IRAs, plans and their participants.

SIFMA and its members appreciate the opportunity to comment and look forward to meeting with the Department to discuss our concerns. For further discussion, please contact the undersigned at 202-962-7329.

Sincerely,

Lisa J. Bleier
Managing Director, Federal Government Relations
and Associate General Counsel