July 20, 2015

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

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

Re: ZRIN: 1210-ZA25; PTE Application D-11850

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is pleased to provide comments regarding the Department of Labor's ("Department") proposal to amend and partially revoke Prohibited Transaction Exemption ("PTE") 84-24[2] under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). We appreciate the opportunity to comment and hope that our comments are helpful to the Department as it assesses whether changing the current exemption and eliminating the ability of individual retirement accounts ("IRAs") to rely on the exemption will serve the interests of retirement investors.

[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

[2] Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transaction Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters, 80 Fed. Reg. 22010 (April 20, 2015).

Attached hereto are SIFMA's submissions for the related rulemakings being undertaken by the Department. These attachments are an integral part of this submission.[3]

Proposed Amendments to and Partial Revocation of PTE 84-24

In its current form,[4] PTE 84-24 provides relief from the prohibitions of ERISA §§ 406(a)(1)(A) through (D) and 406(b) and the parallel provisions of the Internal Revenue Code of 1986, as amended ("Code") for certain transactions relating to purchases by ERISA plans and IRAs of insurance and annuity contracts and for the receipt by an insurance agent, broker or pension consultant of a sales commission in connection with such purchases, provided that the conditions of the exemption are satisfied. PTE 84-24 also provides similar relief for purchases by ERISA plans and IRAs of mutual fund shares and for the related receipt by principal underwriters of a sales commission, if the exemption's conditions are met.

The proposed amendments to PTE 84-24's conditions would require anyone providing fiduciary investment advice to an ERISA plan or an IRA in reliance on the exemption to satisfy Impartial Conduct Standards, which require the adviser to act in the investor's best interest, disclose material conflicts of interest, and not make misleading statements about recommended investments, fees, material conflicts of interest and any other matters relevant to the investor's decision. With respect to IRAs, the Department proposes to revoke PTE 84-24 for IRA purchases of variable annuities and other annuity contracts that "are securities under the federal securities laws", for IRA purchases of mutual fund shares, and for the receipt by insurance agents and brokers, pension consultants and principal underwriters of commissions in connection with such sales. Insurance agents, brokers, pension consultants and insurance companies engaging in

[3] See Appendices numbered 1-8.

[4] *See* 49 Fed. Reg. 13208 (Apr. 3, 1984); 49 Fed. Reg. 24819 (June 15, 1984) (correction): Investment in Load Mutual Funds Where Fund Principal Underwriter, Etc. or Affiliate is Service Provider or Fiduciary, as amended 71 Fed. Reg. 5887 (Feb. 3, 2006).

such transactions would instead rely on the Department's proposed exemption to allow certain investment advice fiduciaries to receive compensation in connection with transactions involving plans and IRAs (including the supplemental exemption for purchases of insurance and annuity contracts) ("BIC Exemption").[5] PTE 84-24 would continue to apply to IRA purchases of insurance and annuity contracts that "are *not* securities" and for the receipt by insurance agents and brokers and pension consultants of a sales commission in connection with such purchases, provided that the conditions of the exemption are satisfied.

In addition, the DOL proposes to add specific definitions for "insurance commissions" and "mutual fund commissions" that would be covered by PTE 84-24. Under these narrowed definitions, insurance agents, brokers, and pension consultants selling insurance contracts to ERISA plans under this exemption would have to limit their compensation to a sales commission as newly defined, and principal underwriters selling mutual fund shares to ERISA plans would have to limit their compensation to a sales load, and would be unable to receive revenue sharing, 12b-1 fees, subtransfer agency fees, or any other compensation related to their sale or holding. Thus, because these fees are currently paid to plan service providers, retirement accounts will likely be changed to wrap fee arrangements to allow for an offset of any third-party payments against the wrap fee.

SIFMA disagrees with the amendments to, and partial revocation of, PTE 84-24 and urges the Department to permit plans covered by ERISA to decide for themselves how their service providers should be compensated, so long as that compensation is fully disclosed.[6] All of these

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[5] Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960 (April 20, 2015).

[6] We believe that the amendments are unnecessary and reflect a lack of consideration of other, more appropriate and cost-effective approaches. For over thirty years, PTE 84-24 has permitted fiduciary advisers to both IRAs and plans to sell insurance or annuities, purchase and sell affiliated mutual fund shares and receive compensation in connection therewith. This is not an exemption from 1975, where the Department did not consider the abilities and sophistication of IRA owners in fashioning relief and now requires a fresh look. It is an exemption that the Department revisited in 2004 without changing a single provision relating to IRAs. The Department has had every

same service providers entirely revised their disclosure under the Department's section 408(b)(2) regulations just three years ago. But these amendments signal that no amount of additional disclosure is enough and that all but certain limited fees are simply prohibited. The Department has not provided a record to support its case that disclosure for fiduciaries is not adequate for ERISA covered plans. Despite its amendment of this exemption four times since it was first granted in 1977, the Department has never suggested that the fully protective disclosure conditions of the exemption, which has always applied to investment advice fiduciaries, do not work. We urge the Department not to finalize the amendments to this exemption.

We are concerned that the Department has significantly underestimated the cost and burden that financial institutions will have to bear to make sure that they have not received any of the now prohibited compensation. The change to the industry – the overwhelming majority of financial professionals who were not subject to fiduciary rules suddenly being subject to them – upends the compensation systems of financial institutions vis a vis mutual funds and insurers. The communications and revision to systems to carve out all ERISA and IRA accounts from these revenue streams will take years and involve reprogramming, testing, verifying and reconciliation with each insurance company and each mutual fund complex. There is no simple switch to turn off, and no simple formula for revising flat dollar payments, such as revenue sharing or training allowances, to meet the Department's ban on this compensation. With an unreasonably short transition period and the massive amount of work necessary to turn off this compensation, we believe the Department has not adequately thought through the work and costs involved for financial institutions.

SIFMA also believes that the impartial conduct standards are unnecessary for ERISA plans and adds costs and burdens that lack any justification under ERISA or in the history of the

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opportunity to modify the exemption conditions in connection with IRAs and has chosen, as recently as 2004, not to do so. The amendments are not supported by any convincing policy reasons.

marketplace since PTE 84-24 was granted. ERISA plans already operate under a fiduciary standard. That standard was, until this exemption, based on disclosure and not on prescriptive fee engineering by the Department. As explained in the preamble to the proposal, the Department's primary goal in amending and partially revoking PTE 84-24 is to "increase the safeguards" relating to covered transactions. SIFMA is concerned that the Department proposes to increase safeguards and, thus, the costs and difficulty of complying with the exemption conditions, without offering any evidence that the existing safeguards, which have been in place for over 30 years, have failed to protect plans or IRAs. SIFMA is concerned that the increased costs and difficulty of moving all advised IRAs out of this exemption and into the BIC exemption will result only in diminished choices for participants.

Section I. Covered Transactions

Who can use the exemption. The Department has significantly restricted the persons who can use the exemption by excluding IRAs from most of the relief provided. It has neglected, however, to mitigate the confusion caused by Footnote 4 of Advisory Opinion 2000-15, which suggests that the exemption cannot be used where fiduciaries are providing investment advice for a fee. Under the text of current PTE 84-24, a principal underwriter, or its affiliate, can receive compensation under the exemption so long as it does not have discretionary authority over the assets of a plan. However, in Advisory Opinion 2000-15, the Department suggested that PTE 84-24 would not cover any fiduciary providing investment advice for a fee. The proposed amendment leaves this language unchanged and does not mention the advisory opinion in the preamble.

Since the net result of the Department's definition of fiduciary proposal will be to make many financial professionals fiduciaries and require them to provide written acknowledgement of their services, if not a written contract, we are concerned that the exemption will not be available to virtually any fiduciary. We urge the Department to make clear that advisory fiduciaries

expressly appointed to provide investment advice for a fee are covered by the relief under the exemption.

The proposed amendment provides as follows:

> (a) The insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter is not (1) a trustee of the plan or IRA (other than a Nondiscretionary Trustee *who does not render investment advice with respect to any assets of the plan*), (2) a plan administrator (within the meaning of ERISA section 3(16)(A) and Code section 414(g)), (3) a fiduciary who is expressly authorized in writing to manage, acquire or dispose of the assets of the plan or IRA on a discretionary basis, or (4) an employer any of whose employees are covered by the plan. Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter that is Affiliated with a trustee or an investment manager (within the meaning of Section VI(e)) with respect to a plan or IRA may engage in a transaction described in Section I(a)(1)-(4) of this exemption (if permitted under Section I(b)) on behalf of the plan or *IRA if the trustee or investment manager has no discretionary authority or control over the assets of the plan or IRA involved in the transaction other than as a Nondiscretionary Trustee.*

We have several comments on this language. First, we believe the formulation in the last sentence is confusing and would benefit from clarification that the trustee or investment manager may have discretion over certain assets of the plan, so long as such trustee or investment manager does not have discretion over the assets involved in the transaction. In this regard, we suggest the following:

> Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter that is Affiliated with a trustee or an investment manager (within the meaning of Section VI(e)) with respect to a plan or IRA may engage in a transaction described in Section I(a)(1)-(4) of this exemption (if permitted under Section I(b)) on behalf of the plan or *IRA if the trustee or investment manager has no discretionary authority or control over the IRA's or Plan's assets involved in the transaction other than as a Nondiscretionary Trustee.*

We are also concerned that a financial professional will not be able to receive a commission with respect to its own IRA, or the IRA of any family member (including parents, children, brothers,

sisters and spouses of brothers and sisters) when purchasing a fixed annuity. Nor will such a commission be payable for small family owned businesses where the financial professional is related to the owner of the business who would have to approve the transaction. The language provides as follows:

> (2) Following the receipt of the information required to be disclosed in paragraph (b)(1), and prior to the execution of the transaction, the independent fiduciary acknowledges in writing receipt of the information and approves the transaction on behalf of the plan. The fiduciary may be an employer of employees covered by the plan, but may not be an insurance agent or broker, pension consultant or insurance company involved in the transaction. The fiduciary may not receive, directly or indirectly (e.g., through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

We would suggest the following change:

> (2) Following the receipt of the information required to be disclosed in paragraph (b)(1), and prior to the execution of the transaction, the independent fiduciary acknowledges in writing receipt of the information and approves the transaction on behalf of the plan. The independent fiduciary may be an employer of employees covered by the plan, but may not be an insurance agent or broker, pension consultant or insurance company involved in the transaction except with respect to the person's own IRA or the IRA of a family member. The independent fiduciary shall be deemed to be independent of such person even if he or she is a relative of such person. The independent fiduciary may not receive, directly or indirectly (e.g., through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction

Commissions. The proposal covers, among other things, "Insurance Commissions" and "Mutual Fund Commissions." An "Insurance Commission" is defined in Section VI as "a sales commission paid by the insurance company or an Affiliate to the insurance agent or broker or pension consultant for the service of effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailers, but not revenue sharing payments, administrative fees or marketing payments, or payments from parties other than the insurance company or its Affiliates." The term "Mutual Fund Commission" is defined to mean "a commission or sales load paid either by the plan or the investment company for the service of effecting or executing

the purchase or sale of investment company shares, but does not include a 12b-1 fee, revenue sharing payment, administrative fee or marketing fee." SIFMA believes that these definitions should cover all forms of disclosed and agreed upon compensation, regardless of the source of payment. Agents, brokers, consultants and principal underwriters, including both employees and independent contractors and persons overseeing their activities, are compensated in a variety of ways, including commissions, revenue sharing, service fees, salaries and other consideration. There is no valid basis for favoring one form of disclosed and agreed compensation over another. Accordingly, we urge the Department to make clear that all disclosed and agreed compensation be covered and to delete the proposed specific exclusions.[7]

There is no reason why financial professionals should be denied relief for any form of compensation for their services to plans, particularly in light of the enhanced fee disclosure regulations in place. In addition to the substantial increases in disclosures implemented by the Department, the SEC has vastly simplified the disclosure of 12b-1 and other investment company fees through implementation of the widely used summary prospectus disclosure document. We therefore see little advantage in the limitations in these definitions, while we do see disadvantages to them. In the absence of relief for these other expenses under PTE 84-24, financial professionals will charge asset-based fees that are likely to be higher, and simply offset the 12b-1 fees, service fees, sub-transfer agency and other fees dollar for dollar, which may well exceed current fee levels. Further, as discussed in detail earlier in this comment, the amount of work necessary to effect this change will be enormous and, if the Department proceeds with

[7] We are particularly concerned about subtransfer agency fees. As the Department knows, many financial institutions use omnibus accounts at mutual fund companies, allowing the mutual funds to avoid recordkeeping for the hundreds of thousands accounts at the financial institution, and using the financial institution to do that recordkeeping and subaccounting for them. It would be an enormous burden on mutual funds and highly inefficient for the markets in general if mutual funds could not rely on and pay financial institutions for these services. Financial institutions will not perform these functions for free, so clients will be charged additional amounts for subtransfer agency services if the financial institution cannot receive subtransfer agency fees from the mutual fund. We urge the Department to rethink exclusion of subtransfer agency fees.

them, the transition rules should permit any compensation currently received to continue for at least 18 months after the effective date.

The definition of "Insurance Commission" provides for sales commissions to be paid to an insurance agent, broker or pension consultant from either the insurance company *or an Affiliate*, as that term is defined in Section VI(a). Because references to insurance companies and other persons are deemed to include Affiliates under Section 6(e), the Department should delete the words "or an Affiliate" after the words "insurance company" in the definition of "Insurance Commission."

Exclusion of Mutual Fund and Variable Annuity Purchases by IRAs. SIFMA believes that the Department should retain PTE 84-24 for all annuity and mutual fund purchases by IRAs.[8] The Department states that the partial revocation proposed, and the consequential use of the BIC Exemption, "better protect the interests of IRAs with respect to investment advice regarding securities products." The Department presents no evidence that the current exemption fails to protect such interests. While the Department states that IRAs have grown and that financial services generally have become more complex in recent years, the Department provides no explanation as to how this growth and complexity have specifically affected transactions in annuities and mutual funds. Notably, Rule 12b-1 under the Investment Company Act of 1940, adopted in 1980, had been widely used in mutual fund pricing dating well before PTE 84-24 was granted. Regulation of mutual fund sales loads also became more stringent in the decade after PTE 84-24, and the limitations remain in place today.[9]

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[8] In Advisory Opinion 2000-15A, the Department clarified that PTE 84-24 applies to IRA transactions.

[9] In 1992, the Securities and Exchange Commission ("SEC") approved amendments to NASD Conduct Rule 2830, which in effect limited the maximum 12b-1 fees that many funds could deduct from fund assets pursuant to a rule 12b-1 plan, The NASD sales charge rule is administered by FINRA, which derives authority to regulate the level of mutual fund sales charges from section 22(b)(1) of the Investment Company Act of 1940. *See* Order Approving Proposed Rule Change Relating to the Limitation of Asset-Based Sales Charges as Imposed by Investment Companies, 57 Fed. Reg. 30985 (July 13, 1992), NASD Notice to Members 92-41 .

Forcing all mutual fund and variable annuity purchases by IRAs out of this exemption, and into the far more limited and restrictive BIC Exemption, is not supported by any convincing policy reasons, and the Department fails to explain why it is appropriate to do so. We respectfully submit that the Department has no reason to amend this exemption to exclude IRAs from its coverage. IRAs already receive all of the disclosure required with respect to plans under the exemption.

In addition, the Department's proposal fails to appreciate the difference between sophisticated investors and investors with smaller investable assets. It makes little sense to deprive sophisticated investors of the benefits of the exemption or force them into wrap programs with higher fees or the restrictive BIC Exemption, which the Department designed for unsophisticated investors. We believe that these amendments should be abandoned and re-proposed, changing only the disclosure conditions for IRAs.

At the very least, sophisticated IRA owners should be able to use the exemption under the same conditions applicable to plans. The Department has not analyzed the costs and benefits of continuing to permit IRA owners, much less sophisticated IRA owners, to use the exemption. We think it must do so.[10]

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[10] The Department could adopt the framework set forth in the Securities Act of 1933 for accredited investors, which sets forth specific qualifying criteria and verification standards. 17 CFR 230.501(a)(5) and (6). We believe this is a commonly used and commonly understood test and reflects a well-recognized standard of investors who are able to look after their affairs in a financially sophisticated manner. The Jumpstart Our Business Startups (JOBS) Act introduced the current test, and the test is consistently applied based on rule amendments and interpretive guidance , In its current form, the test provides as follows:

> (5) Any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000.
>
> (i) Except as provided in paragraph (a)(5)(ii) of this section, for purposes of calculating net worth under this paragraph (a)(5):
>
> > (A) The person's primary residence shall not be included as an asset;
> >
> > (B) Indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time of the sale of securities, shall not be included as a liability (except that if the amount of such indebtedness outstanding at the time of sale of securities exceeds the amount outstanding 60 days before such time,

The Department's proposed revocation of coverage for IRAs purchasing a variable annuity "or other annuity contract that is a security under federal securities laws" is particularly puzzling. The Department cites as the underpinning for distinguishing between these and other annuities its concern that the BIC Exemption, including some of its disclosure requirements, may not be readily applicable to insurance and annuity contracts that "are not securities", or to distribution channels with characteristics that would not fit within the BIC Exemption. Conversely, the Department indicates in the preamble that it believes that annuities that "are securities" and mutual funds are distributed through the same channels as many other investments covered by the BIC Exemption, thereby leading it to propose to place these transactions into the BIC Exemption framework.

We urge the Department to abandon this distinction based on an annuity contract's status as a "security". The federal securities laws expressly cover all investments that are deemed to be securities under the Securities Act of 1933, which in turn subjects securities to the laws regarding registration, trading, sanctions for fraud, and many other substantive requirements. Some

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other than as a result of the acquisition of the primary residence, the amount of such excess shall be included as a liability); and

(C) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence at the time of the sale of securities shall be included as a liability;

(ii) Paragraph (a)(5)(i) of this section will not apply to any calculation of a person's net worth made in connection with a purchase of securities in accordance with a right to purchase such securities, provided that:

(A) Such right was held by the person on July 20, 2010;

(B) The person qualified as an accredited investor on the basis of net worth at the time the person acquired such right; and

(C) The person held securities of the same issuer, other than such right, on July 20, 2010.

(6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

instruments that are deemed to be securities are exempt from registration with the SEC, but are nonetheless subject to other substantive regulations. Other securities are exempt from certain of the offering provisions of the federal laws. To place this distinction at the heart of Department of Labor exemptive relief creates uncertainty for investors in annuities and poses a definitional landscape that will shift over time, prompting changes in firms' abilities to rely either on PTE 84-24 or the BIC Exemption. This is underscored by the fact that we assume the Department meant to permit IRAs to be covered under PTE 84-24 for insurance contracts that are securities, so long as they are exempt securities.[11] Requiring plan and IRA fiduciaries, as well as financial intermediaries, to understand not only these very dense and prescriptive exemptions as well as the status of insurance products under the securities laws is unfair, costly and likely fraught with confusion. We urge the Department to permit all insurance products to continue to be sold under PTE 84-24. For example, many variable annuities have a fixed annuity component. How is that component to be treated under this exemption? In any event, if, however, the Department retains a limitation on IRA purchases of annuities in a final exemption, we recommend that the Department change the criteria in Section I(b) from an annuity that "is a security" to an annuity that is a *registered* security.

Section II. Impartial Conduct Standards

The proposal amends PTE 84-24 to require the fiduciary to comply with impartial conduct standards. We object to this requirement.

[11] See the recent controversy at the SEC regarding indexed annuities. The SEC adopted a new regulation, Rule 151A under the Securities Act of 1933, which would have required SEC registration of equity indexed annuity contracts as securities and the sale of these products by registered broker dealers in accordance with SEC and FINRA sales practice standards. Rule 151A, which had a delayed effective date and never became effective, was challenged in court and vacated on procedural grounds. Today, the SEC does not specify whether or not these contracts are subject to federal securities laws: "Variable annuities are securities regulated by the SEC. An indexed annuity may or may not be a security; however, most indexed annuities are not registered with the SEC. Fixed annuities are not securities and are not regulated by the SEC." U.S. Securities and Exchange Commission website, Investor Information, *Fast Answers, Annuities*. http://www.sec.gov/answers/annuity.htm. Since that time, Congress has periodically considered legislation that would expressly exclude equity indexed annuities from the federal securities laws, and instead would have such annuities overseen by state insurance regulators.

Congress saw no reason to have a prudence standard for IRAs and believed that a violation of the prudence standard for ERISA plans should be remedied through litigation in federal court. Nonetheless, the proposal purports to condition relief under Section 4975 of the Code on the contractual assumption of a prudence standard that would be enforceable by IRA owners in state court. We do not believe that Congress intended a breach of the duty of prudence to violate the prohibited transaction provisions of ERISA and the Code. Our specific comments follow.

SIFMA strongly objects to these standards for plans covered under Title I of ERISA. The Department acknowledges in the preamble that the best interest standard "is based on longstanding concepts derived from ERISA and the law of trusts"; in particular, the duties of prudence and loyalty imposed by ERISA section 404(a). Requiring advisers to ERISA plans or plan participants to agree to, and comply with, a best interest standard separate and apart from their existing ERISA fiduciary duty is redundant and unnecessary to achieve the Department's stated goals. For ERISA plans, requiring advisers and financial institutions to adhere to a best interest standard as a condition for relief under the exemption ramps up the consequences of any fiduciary breach by imposing an excise tax on a prudence violation. We believe that is both inappropriate and contrary to Congress's intent. Title I has its own remedy scheme that Congress carefully crafted to be based on losses, not on foot faults. These plans are already covered by a comprehensive disclosure scheme and a regulation issued just three years ago. We urge the Department to delete this requirement from the exemption, and if the Department declines to do so, to make it applicable only to plans not covered under Title I of ERISA, but as modified below.

Respectfully, the Department does not have the statutory authority to require compliance with a prudence rule as a condition of a prohibited transaction exemption. Congress has issued more than 20 statutory exemptions; not a single one has, as a condition, a subjective and "reasonable person" standard or a subjective "misleading disclosure" standard which is punishable by transaction reversal and an excise tax, regardless of whether there is a loss on the trade and

regardless of whether the disclosure is entirely correct but simply unclear. Nor has any exemption previously issued by the Department contained such a vague and subjective condition. These conditions are not administrable and therefore do not meet the standards for issuance of an exemption under section 408 of ERISA. If the Department insists on retaining compliance with a non-misleading disclosure condition in the exemption, we suggest instead that the Department explicitly adopt FINRA guidance relating to Rule 2210 regarding the term “misleading. Because violation of a prohibited transaction exemption has such dire consequences, we do not believe that an inadvertent, immaterial statement taken in the wrong way by a client should result in a reversal of the transaction, a guarantee of losses and an excise tax on the entire principal amount. We ask that the provision be clarified to require that the financial institution and any adviser acting for that institution reasonably believe that their statements are not misleading.

For the sake of completeness, we discuss below our other concerns with the best interest and other impartial conduct provisions. However, at the heart of the matter, these provisions should be eliminated for far more fundamental legal infirmities.

The language in the best interest standard that purports to require fiduciaries to prove that they acted “without regard to the financial *or other interests of* the … fiduciary, any affiliate or *any other party*” is unworkable. First, we believe the requirement that advice be “without regard” for the financial interests of the fiduciary will fail any time a plaintiff can prove that a covered person under the exemption did not receive the least possible compensation. We urge the Department to use a formulation consistent with that found in FINRA Rule 2111, namely, that the statements made in connection with the covered transactions are in the best interest of the client and put the client’s interest before those of the person making those statements.

In addition, the proposed exemption in the language quoted above refers to “other interests” of “any other party” with no apparent limitation. We do not know what these references to other interests and other parties are intended to address and the preamble does not explain them.

Further, as noted above, to the extent applicable to ERISA plans, the best interest standard is inconsistent with ERISA and the Code. We request that this language be deleted from the exemption.

Section III. Recordkeeping Requirements

As with other exemptions being proposed, relief is conditioned on enhanced recordkeeping requirements. Our comments on those requirements follow immediately below.

Manner of Recordkeeping. First, the proposal specifically requires that the records be maintained "in a manner that is accessible for audit and examination". We believe that the term "reasonably" should be inserted immediately prior to the term "accessible", so that the subjective views of the person wishing to examine or audit the records do not become the basis for the imposition of excise taxes on the adviser.

Scope of Access. Second, the exemption should clarify that fiduciaries, employers, employee organizations, participants and their employees and representatives shall have access only to information concerning their own plans. Similarly, the exemption should clarify that any failure to maintain the required records with respect to a given transaction or set of transactions does not affect exemptive relief for other transactions.

Section IV: Definitions

Many of SIFMA's questions and comments regarding the proposed definitions for PTE 84-24 are raised above, as they arise in the exemption. What follows is a list of additional questions and comments concerning the definitions that are not specific to any particular functional part of the exemption.

Individual Retirement Account -- We believe that health savings accounts (HSAs), educational and other tax-favored savings vehicles not intended for retirement income should not be included

in the definition of IRA. Such other accounts are, by their terms, not intended for retirement income, but, rather, for health care, educational and other expenses.

Material Conflict of Interest -- The exemption does not include any standard of materiality. Without a clear standard, “material” could be interpreted to cover even the most remote financial interest, regardless of whether the *effect* of the financial interest on one’s judgment would be material. Is this definition intended to be consistent with case law addressing the scope of an adviser’s fiduciary duties under the Advisers Act? If not, how is this definition intended to be different?

Relative. In the definition of Affiliate in Section VI(a)(2), which is unchanged from the existing exemption, we note that a "relative" as defined in Section VI(l) includes siblings and spouses of siblings, in contrast to other proposals included in the overall fiduciary advice proposal where the term is limited to those relatives specified in ERISA and the Code. For the sake of consistency, we recommend that the term as used in PTE 84-24 be modified to conform to that used in the BIC Exemption and other relief.

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

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Relations and Associate General Counsel