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-11327

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 Class Exemption ("PTCE") 86-128[2] and to amend and partially revoke PTCE 75-1 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 the proposal, as written, will continue to permit plans to achieve best execution for securities transactions or whether they will be relegated to a second class citizens in the market.

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[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 (PTCE) 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Proposed Partial Revocation of PTCE 75-1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 80 Fed. Reg. 22021 (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]

SIFMA disagrees with most changes to PTCE 86-128, particularly the exclusion of advised IRAs. We believe that the changes are unnecessary and that they reflect a lack of consideration of other more cost effective approaches. PTCE 86-128 has long permitted discretionary and advisory fiduciaries of both IRAs and plans to use themselves or their affiliates to execute securities transactions. This is not an exemption where the Department, in fashioning relief, did not consider the abilities and sophistication of IRA owners. It is not an exemption that dates from 1975 and thus, in the Department's view, needs a fresh look. This is an exemption that the Department proposed on its own in 1986 to specifically cover plans and IRAs, regardless of size. And it is an exemption that the Department revisited in 2002 without changing a single provision relating to IRAs, including the reporting and disclosure provisions. The Department similarly excluded IRAs from enhanced disclosures under its recent revisions to the regulations under ERISA section 408(b)(2).

Forcing all advised IRAs out of this exemption and into the far more limited and restrictive BIC exemption is not supported by convincing policy reasons. The Department fails to explain why, if there must be a change, a more moderate approach – such as simply applying the reporting and disclosure requirements of this exemption to all plan investors, both plans and IRAs – would not be a more reasonable course.

We believe that the reason the Department will not permit advisory IRAs to use this exemption is because it intends to require financial advisors to have level compensation across all asset

[3] See Appendices numbered 1-8.

classes. This goal contravenes the entire commission-based structure of the agency trading of securities. We think the cost implications of the BIC exemption, compared to the far more reasonable cost increases that financial institutions would incur by extending the reporting and disclosure requirements of this exemption to IRAs, reflect an underlying disregard for the requirements of Executive Orders 12866 and 13563, as well as the Regulatory Flexibility Act.

There is no evidence of abuse of advised IRAs here. Advised IRAs have not been overcharged, and there is no evidence of churning or other unreasonable compensation. Advisers have not caused plans to invest disproportionately in equity securities or engaged in other abusive practices. We respectfully submit that the Department has no reason to amend this exemption to exclude advised IRAs from its coverage.

As explained in the preamble to the proposal, the Department's goal in amending and partially revoking PTCE 86-128 and 75-1 is to "increase the safeguards" relating to the 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 almost 30 years, have failed to protect plans or IRAs. SIFMA is also 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 opportunities for best execution and diminished choices for IRA owners.

Section I. Covered Transactions

Commissions. The proposal limits compensation under the exemption to "Commissions", which are defined as "a brokerage commission or sales load paid for the service of effecting or executing the transaction, but not a 12b-1 fee, revenue sharing payment, marketing fee, administrative fee, sub-TA fee or sub-accounting fee." Further, except with respect to "riskless

principal" mutual fund purchases and agency cross-trades, "Commissions" are limited to payments directly from the plan or IRA. It is unclear why the Department would permit payment of fully disclosed and agreed commissions for agency cross transactions and from mutual funds for "riskless principal" transactions, but not agency transactions in mutual funds or other securities. SIFMA believes that PTCE 86-128 should cover all forms of fully disclosed and agreed upon compensation for effecting or executing a securities transaction, including the performance of clearance, settlement, custodial or other functions ancillary thereto, regardless of the source of payment. Accordingly, we urge the Department to amend the definition of "commission" to include payments of 12b-1 fees, service fees and sub-transfer agency fees paid by a mutual fund. There is no reason why financial professionals should be denied this form of compensation for their services to plans. In the absence of relief under PTCE 86-128, 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.

Related Entities. SIFMA is appreciative of the Department's proposal to expand relief to entities in which the fiduciary has an interest that may affect its best judgment as a fiduciary, but which is not an affiliate of the fiduciary. SIFMA supports this provision.

Proposed Mutual Fund Transactions Exemption. The proposal moves the exemption in PTCE 75-1, Part II for third party mutual fund purchases to PTCE 86-128 and subjects those purchases to the impartial conduct standards and reporting and disclosure requirements of PTCE 86-128. The Department cites no evidence that the exemption in PTCE 75-1, which has existed for almost 40 years, has failed to protect plans or IRAs. The Department has never thought, before now, that it would be appropriate to move the exemption into PTCE 86-128, including when PTCE 86-128 was first promulgated and subsequently amended. Thus, SIFMA believes that the exemption should be left in 75-1 and not subjected to additional requirements that will unnecessarily increase the compliance burdens and costs and, thus, lead advisers to decline to

execute or effect securities transactions or rely on alternatives that are more costly for plans and IRAs, such as wrap fee programs.

The preamble characterizes the transaction contemplated by the proposed mutual fund exemption as "a 'riskless principal' transaction", in which "the fiduciary that is providing investment advice purchases shares on its own account for the purpose of covering a purchase order previously received from a plan or IRA, and then sells the shares to the plan or IRA to satisfy the order." The result of this characterization is that the proposed relief would require a principal transaction confirmation, even though many market participants confirm such sales as agent. In addition, SIFMA believes that reducing the scope of relief to cover only "riskless" purchases is not appropriate. Certain registered investment companies, such as unit investment trusts, are both purchased and sold on a principal basis. Because the BIC exemption does not cover principal transactions, the Department's proposal inexplicably leaves the purchase and sale of such registered investment companies without an exemption. We assume the Department did not intend such a result, which would arbitrarily favor certain forms of open-end registered investment companies over others. For the foregoing reasons, SIFMA respectfully urges the Department to retain the existing language of PTCE 75-1, Part II(2), but with the deletion of the "open-end" qualifier to permit the purchase and sale of unit investment trusts.

Scope of the Exemption. One of the most striking features of the Department's proposal is the revocation of coverage for advised (but not managed) IRAs, thus forcing reliance on the BIC Exemption. The blanket exclusion of advised IRAs from relief under the exemption is unwarranted. Rather than considering whether to simply impose disclosure conditions for advised IRAs similar to those that have always applied to advised plans, the Department radically departs from this exemption to force all commissions into a far more burdensome regime, which will likely increase commission rates, rather than lower them or keep them at current levels. The Department offers no empirical or other evidence indicating that advised

IRAs have been harmed under the existing exemption or that the costs of allowing them to continue to use it outweighs the benefits. SIFMA urges the Department to reconsider the coverage limitations under the BIC exemption and to follow a middle path that permits agency commissions for advised IRAs under PTCE 86-128, conditioned on the same disclosure requirements as advised plans.

The blanket exclusion of advised IRAs also 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 IRAs should be able to use the exemption with the disclosure required for plans.[4]

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[4] The Department could use the test in the Securities Act of 1933 for accredited investors. 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 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.
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> (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, 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:

(Continued …)

Section II. Impartial Conduct Standards.

The proposal amends PTCE 86-128 to require the fiduciary to comply with impartial conduct standards. We object to this requirement.

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

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(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;

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 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 … Related Entity or *any other party*" is unworkable. First, we believe the requirement that advice be "without regard" for the financial interests of the adviser sets up a standard that an adviser will fail any time a plaintiff can prove that the adviser did not recommend the investment that paid him the least. FINRA uses a much more common sense test that does not contain this flaw— i.e., that the adviser provides recommendations that are in the best interest of his client and put his client's interest before his own. We urge the Department to use this formulation, which is found in FINRA Rule 2111.

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 redundant and unnecessary. We request that this language be deleted from the exemption.

Also troubling is the impartial conduct standards' prohibition on unreasonable compensation "in relation to the total services the person and any Related Entity provide to the plan." This Department does not explain this new formulation of reasonable compensation. Nor does the Department attempt to justify the differences between this formulation and Congress's view of reasonable compensation, which does not require all compensation received by a fiduciary to be justified by a particular set of services to a particular account. We urge the Department to use the language it has used since the enactment of ERISA and as recently as 2012, when it entirely revised its regulations under ERISA § 408(b)(2). We urge the Department not to create two entirely different standards for commission compensation. The Department concedes that the

section 406(a) relief for receipt of commissions comes from section 408(b)(2). The relief for section 406(b) should use the same definition of reasonable compensation, and that definition should not require every dollar received to be traceable to the service provided with respect to each individual trade. That is not how the securities commission system works, and the cross-subsidies inherent therein for large and small transactions, domestic and international transactions, and readily-traded and harder-to-trade securities should not cause a fiduciary to lose the benefit of this exemption.

Section III. Conditions Applicable to Transactions Described in Section I(a).

Recapture of Profits Exception. The existing exemption provides relief to employers and plan administrators for transactions executed for their own plans if all profits are recaptured for the benefit of the plans. Under the existing text, however, it was unclear whether discretionary trustees could also use this exception. SIFMA welcomes the Department's clarification (in Section V(b)) that discretionary trustees may utilize the exemption if they comply with the "recapture of profits" exception.

30-Day Reauthorization Period & Alternative Termination Notices. The proposal amends the annual reauthorization process to provide that the "[f]ailure to return the form or some other written notification of the plan's intent to terminate the authorization within thirty (30) days from the date the termination form is sent to the authorizing fiduciary will result in the continued authorization of the authorized person to engage in the covered transactions on behalf of the plan." It is not clear whether the fiduciary is authorized to continue utilizing the exemption in the interim – i.e., while it waits to see whether the form is returned. We suggest a clarification that the authority continues in the interim, which may be accomplished by inserting the following immediately after the phrase "on behalf of the plan": "provided that the prior

authorization shall be deemed to continue until the earlier of the end of such thirty-day period or the date the authorized persons receives written notification of such termination”.

Separately, SIFMA believes that permitting “some other written notification” (i.e., informal notice) to terminate a prior authorization imports uncertainty into the process. While some informal notifications may be clear, others may not be. Requiring plans to return the proper termination form provides clarity as to the authorizing fiduciary’s intent and is no more burdensome than the longstanding practice under ERISA of requiring participants to apply for benefits or designate beneficiaries on proper forms.

Portfolio Turnover Analysis from Investment Advisory Fiduciaries. The proposal seeks to expand the existing requirement to provide an annual portfolio turnover ratio to fiduciaries that merely provide investment advice. *See* Section III(f)(4)(C). Currently, only fiduciaries with discretionary authority need provide the analysis. SIFMA believes that requiring investment advice fiduciaries to provide annual portfolio turnover analyses (whether to ERISA plans or IRAs) is not workable. Such fiduciaries, by definition, do not direct trades themselves and often do not custody the resulting positions. Therefore, in many cases, they will not have sufficient information to provide an annual portfolio turnover analysis and should be excluded from this requirement. In addition, where the client chooses to trade frequently, we see no reason why the analysis, which is meant to evidence whether or not a discretionary fiduciary is churning the account, is appropriate. In such cases, the fiduciary cannot churn the account because every trade must be directed by the independent plan or IRA fiduciary. The portfolio turnover analysis is also expensive, complicated and easily misconstrued. The Department does not provide any justification regarding the expansion of this requirement to advice fiduciaries. It does not analyze the cost of applying this requirement to every single advisory account, nor does it consider more reasonable alternatives, such as a requirement to do such an analysis on request.

It does not even describe this change in the preamble. We strongly urge the Department to continue to limit the portfolio turnover analysis to discretionary fiduciaries.

Section IV. Conditions Applicable to Transactions Described in Section I(b) (Mutual Funds).

As explained in detail above, SIFMA believes that the exemption for registered investment companies in PTCE 75-1, II(2) should be left in place, continue to cover sales and not subjected to additional requirements under PTCE 86-128, and that it should cover all registered investment companies and not just open end investment companies, so that unit investment trusts can be purchased and sold by plans.[5] These requirements will unnecessarily increase compliance burdens and costs and, thus, lead advisers to decline to execute or effect such trades or rely on alternative options.

Section V. Exceptions From Conditions.

Adviser Must Provide All Information Reasonably Necessary to Determine Reauthorization. The proposal changes the standard of information that the adviser must provide to the authorizing fiduciary from information "reasonably available" that the adviser "reasonably believes to be necessary" to all information that "is reasonably necessary." It is unclear why the Department is discarding a standard that has worked well for decades and substituting a new standard that requires advisers to provide information they may not have. The Department acknowledged this concern in originally developing this standard, noting that, without the "reasonably available" qualifier, the "broker could be forced to provide information

[5] We note that such investments cannot be sold under the Department's proposed principal transaction exemption since that exemption only covers debt securities and they cannot be sold under the BIC exemption because that exemption excludes principal transactions.

about its competitors or business practices that it might not possess and could not easily obtain." Preamble to PTCE 79-1, 44 FR 5963, 5965 (Jan. 30, 1979). Further, it is unclear why the Department is requiring the adviser to potentially provide more information that it "reasonably believes" is necessary. Requiring the adviser to prove that it has provided all information that others might find relevant – which could include just about anything, including information regarding competitors and unrelated litigation against the adviser – or face excise taxes will force many advisers to cease relying on the exemption, even at the cost of best execution, and lead other advisers to provide voluminous disclosures in which the most relevant information is lost.

Section VI. 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.

30-Day Rule. Third, SIFMA believes the 30-day period for providing written notice of the adviser's refusal to provide privileged or confidential information is too short, particularly for larger firms with separate legal, compliance and business functions and comprehensive, multi-layered information security protocols. Additional time will be necessary to permit coordination among the responsible legal, compliance and business personnel, the gathering and review of the requested material, correction of misdirected mail and other inadvertent procedural errors and preparation and delivery of the response. SIFMA respectfully requests that the Department change the 30-day deadline to 90 days. While many responses will not require 90 days, a significant buffer of time is appropriate given the draconian ramifications – excise taxes – of failing to meet the requirements of the exemption.

Section VII: Definitions

Many of SIFMA's questions and comments regarding the proposed definitions for PTCE 86-128 are addressed as they arise in the proposed investment advice definition itself. 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.

Independent – As written, the definition of "independent" would disqualify any company that receives compensation from the adviser without qualification. Thus, disqualification would extend to companies that lease office space or provide goods or services to the adviser, including, e.g., accounting, legal, consulting, security, parking and window washing services. To the extent any such company sponsors a plan, the company would not be "independent" under the exemption, regardless of how small the amount of income received from the adviser. Historically, the Department has addressed this issue appropriately in virtually every exemption it has granted, and we assume its failure to do so here was inadvertent. Accordingly, we suggest that subsection (2) of the definition of "independent" in Section VII(f) should be replaced with

the following: “receives less than 5% of its gross annual income from such person”. In addition, subsection (3) should be revised to make clear that an IRA owner will not be deemed to fail the independence requirement simply because he or she is an employee of the adviser.

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 -- As discussed above, the definition does not include any standard of materiality. Without a clear standard, the definition 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?

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

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