



July 21, 2015

**Via: Electronic Filing**

Office of Regulations and Interpretations  
Office of Exemption Determinations  
Employee Benefits Security Administration  
Attn: Conflict of Interest Rule (RIN 1210-AB32) and Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25)  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: Conflict of Interest Rule and Proposed Best Interest Contract Exemption**

Dear Sir or Madam:

Managed Funds Association (“MFA”)<sup>1</sup> appreciates the opportunity to respond to the regulations proposed by the Department of Labor (“Department”) on the definition of the term “fiduciary,” Conflict of Interest Rule--Retirement Investment Advice (the “Proposed Rule”)<sup>2</sup> and the Proposed Best Interest Contract Exemption (the “BIC Exemption”)<sup>3</sup> (collectively, the “Proposal”). MFA strongly supports the Department’s goal of protecting benefit plans and their participants, and we recognize that imposing fiduciary status on certain service providers to plans can further that goal.

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<sup>1</sup> MFA represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent and fair capital markets. MFA, based in Washington, DC, is an advocacy, education and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and other regions where MFA members are market participants.

<sup>2</sup> 80 Fed. Reg. 21928 (Apr. 20, 2015).

<sup>3</sup> 80 Fed. Reg. 21960 (Apr. 20, 2015).

We are concerned, however, that the Proposal may have unintended and deleterious effects on (1) the sophisticated ERISA plans and IRAs that elect to invest in privately-offered investment funds, and (2) the fund managers and service providers to private investment funds, regardless of whether those funds are deemed to hold plan assets for purposes of ERISA. We appreciate the Department's determination that valuations provided to collective investment vehicles do not create a fiduciary relationship under ERISA. We also are pleased to note that the Department altered the proposal to carve out of the definition of fiduciary "offers or recommendations to plan fiduciaries of ERISA plans to enter into a swap or security-based swap that is regulated under the Securities Exchange Act or the Commodity Exchange Act."<sup>4</sup> For the reasons discussed below, however, we believe that further tailoring and clarification of the Proposal is needed to achieve the stated objectives of the Department's carve-outs for collective investment vehicles. Further, we believe that the Proposal needs to be amended to permit the marketing and sale of private investment funds to sophisticated plan and IRA investors without such marketing and sales activities being deemed fiduciary in nature. Absent additional changes, the broad scope of the Proposal could unintentionally bring the investor reporting and sales activities of private investment funds within the scope of fiduciary advice, even though we believe those activities should not be characterized as providing investment advice or recommendations to plan investors.

Hedge funds and other alternative investment vehicles are and continue to be a valuable component of the investment portfolio for sophisticated investors, including plans. As we have previously noted in the MFA 2011 letter, the properly managed addition of such funds to a plan's or IRA's portfolio may provide diversification, risk management, and returns that are not correlated to traditional equity and fixed income markets. These are critical benefits that help plans generate sufficient returns to meet their obligations and help sophisticated IRA holders to accomplish their financial goals. For the reasons discussed below, we believe that, as drafted, the Proposal could impair the ability of plans and the IRAs of sophisticated investors to invest in hedge funds and other alternative investment vehicles and we ask the Department to reconsider aspects of the Proposal that would result in such a harmful consequence to plans.

## Overview

As noted above, MFA strongly supports the Department's goal of protecting benefit plans and their participants. However, without further clarification, we believe the language in the Proposal could have a number of detrimental, and likely unintended, effects. We also support the Department's decision to exclude valuations provided to collective investment vehicles from the type of services that create a fiduciary relationship. We are concerned, however, that the Proposed Rule nonetheless has the potential to extend fiduciary obligations too far by making persons ERISA fiduciaries because they provide statements of value to investment fund investors that are ERISA plans, plan fiduciaries, plan participants or beneficiaries, IRAs, or IRA owners ("plan investors"). Further, the Proposed Rule threatens to radically alter the sale of investment products to plan investors and sophisticated IRA holders by deeming the sales process itself to be fiduciary in nature.

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<sup>4</sup> 80 FR at 21936. See letter from Richard Baker, President and CEO, MFA, to the Office of Regulations and Interpretations, Employee Benefits Security Administration, U. S. Department of Labor, February 3, 2011 ("MFA 2011 letter") at 13.

This is inconsistent with the statute and existing Department guidance and, we believe, beyond the scope of the policy concerns underlying the Proposed Rule. As a result, the Proposed Rule and the BIC Exemption may have the effect of unnecessarily limiting the ability of eligible plan and IRA investors to make prudent investments.

Specifically, MFA is concerned that:

- The Proposed Rule may impose fiduciary status on fund managers and service providers in cases where the Department and Congress have established that no fiduciary status should exist, *i.e.*, in the case of managers and service providers to funds not deemed to hold plan assets under ERISA (“Non-Plan Asset Funds”);
- The Proposed Rule is ambiguous and could result in uncertainty regarding when providing a statement of value to investors in a private investment fund is a fiduciary act;
- The Proposed Rule creates disincentives for fund managers and service providers to provide certain information to plan investors, including reporting of the fund’s net asset value, market commentary, fund commentary, and transparency reporting often provided to all fund investors, to the detriment of those investors;
- The Proposed Rule may make sales communications about an investment fund by that fund’s manager to prospective plan investors—conduct which is already regulated under federal securities laws—fiduciary investment advice;
- The Proposed Rule will make it unreasonably difficult for managers of privately offered investment funds to discuss and sell interests/shares in those funds without providing additional protections for plan investors that are eligible to invest in private funds;
- The Proposed Rule will make it difficult for certain “plan asset” funds, including funds of funds and “funds of one,” to enter into necessary and routine transactions;
- The Proposed Rule imposes new standards that are inconsistent with existing Department rules, including Prohibited Transaction Exemption 84-14; and
- The BIC Exemption unreasonably restricts investment choices by plan investors that are otherwise eligible, under federal securities laws, to invest in privately offered funds and other investments.

### **Statements of Value**

We appreciate and support the Department’s change from the 2010 proposed rule on the Definition of the Term “Fiduciary”<sup>5</sup> (the “2010 Proposal”) that excludes valuations and appraisals provided to collective investment vehicles from the scope of the Proposed Rule. For the reasons discussed below, we believe that the Proposed Rule as drafted nonetheless has the potential to extend fiduciary obligations beyond the Department’s intended scope by making persons who provide statements of value to plan investors ERISA fiduciaries.

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<sup>5</sup> 75 Fed. Reg. 65263 (Oct. 22, 2010).

The Proposed Rule would categorize any entity as a fiduciary if it provides a statement of value to a plan investor if such statement is (1) in connection with a specific transaction; and (2) pursuant to an agreement or understanding that the advice is individualized to, or specifically directed to, the advice recipient for consideration in making investment or management decisions. The Proposed Rule excludes statements of value made to an employee stock ownership plan (the “ESOP carve-out”) or to an investment fund, such as a collective investment fund or pooled separate account, that holds assets of more than one unaffiliated plan (the “pooled fund carve-out”). The Proposed Rule also excludes statements of value made solely for the purposes of complying with state or Federal law, rule or regulation, or the rule or regulation of a self-regulatory organization (the “compliance with law carve-out”).

We appreciate the efforts by the Department to address the issues raised by commenters in connection with the 2010 Proposal through the carve-outs and requirement that the statement of value be in connection with a specific transaction. Nonetheless, we believe that the Department should amend the proposed carve-out to ensure that it has the intended effect. We are concerned that, as currently drafted, many managers and service providers may not be able to rely on the provision because it is not clear from the text of the Proposal that the pooled fund carve-out would extend to statements provided directly to investors in funds, including statements that contain fund or market commentary provided to all investors that go beyond mere reporting of a fund’s net asset value. The pooled fund carve-out also may not cover routine communications with fund investors, to the extent the communication is made to a specific investor rather than all investors concurrently.

We believe it is important for the pooled fund carve-out to cover communications with investors in the fund as we do not believe that managers and service providers will likely be able to conclude that such communications are not statements made “in connection with a specific transaction” and, therefore, outside the scope of the regulation. Broadly construed, a statement made “in connection with a specific transaction” could include: investing in a fund, redeeming interests in a fund, deciding to make, or not to make, additional investments in or redemptions from a fund or even decisions to rebalance other parts of an investing plan’s portfolio based in part on assets held by a fund. Because fund managers and other fund service providers may not know why a plan investor is requesting a statement of value, a broad interpretation of “in connection with a specific transaction” could result in such managers and service providers being considered ERISA fiduciaries without certainty regarding when they are taking on fiduciary responsibility. Similar questions likely would arise to the extent that a plan investor requests such information in a particular format. Routine communications by fund managers and service providers to plan investors about the value of the plan’s account or interests/shares in a fund could therefore be treated as fiduciary investment advice, especially if the communication is not explicitly required by law.<sup>6</sup> We note in this regard that many private investment funds send monthly (or other periodic) statements to investors, which are not required by law, but instead represent a common industry practice.

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<sup>6</sup> Also, we note that the compliance with law exception does not cover non-U.S. laws. Frequently, the funds that ERISA plans and IRAs invest in are organized in non-U.S. jurisdictions, and those jurisdictions, as well as the jurisdictions where a fund is offered, may impose other reporting requirements.

For example, plan investors in funds frequently have side letters or other arrangements requiring that a fund provide the plan with regular statements of value, presumably to assist the plan in determining what action the investor may take in connection with the investor's interests/shares in the fund. These contractually required statements of value likely would not fall within the compliance with law carve-out and thus could be deemed fiduciary investment advice under the Proposal.

Managers and service providers to funds, particularly Non-Plan Asset Funds, are likely to refuse to agree to these arrangements, which have great benefits to plan investors, if fiduciary status is imposed as a result. Periodic performance reporting or any other communication to a plan investor in a fund that contains the fund's net asset value ("NAV") could be a fiduciary act that would raise uncertainty regarding whether the fees charged on the value of assets would violate the prohibited transaction provisions of ERISA.

Uncertainty regarding the scope of this provision is likely to create a disincentive for fund managers and service providers to disclose routine and relevant information to fund investors, a result contrary to the Department's goal of protecting such investors and inconsistent with the pooled fund carve-out. For example, many funds have administrators that calculate the fund's net asset value and periodically provide that information to funds and investors. In addition, many funds have administrators or another service provider (such as a data aggregator) prepare and disseminate transparency reports to investors with information about the fund's investments and providing verification of asset pricing. Such administrators may be unwilling to take on fiduciary risk, ultimately reducing the availability of independent valuations of fund assets. Alternatively, these service providers may be willing to provide valuations and transparency reporting to a fund, but unwilling to allow the fund to provide those valuations to plan investors, disadvantaging the plan investor.<sup>7</sup> If fund managers and other service providers, such as administrators, valuation agents and data aggregators, are deemed to be fiduciaries in connection with providing any statement of value to a plan investor (or a statement from such person that is passed on by the fund to investors), the result of the Proposal as drafted may be to ultimately deprive plan investors in a fund with ready access to basic information about the fund, such as the NAV, that is generally provided to fund investors. Further, faced with potentially prohibitive costs or the inability to find suitable service providers in the first place, funds may be reluctant -- or even unable -- to take investments from plans and sophisticated IRA holders, which would greatly limit these investors' alternative investment options. The cost to plans of these lost opportunities and limited choices could be significant.

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<sup>7</sup> In addition, because the Department's advisory opinions on performance fees essentially require an independent valuation of fund assets in calculating the performance fee, this aspect of the Proposal may make it difficult for funds to be transparent with plan investors about whether a fund manager is entitled to, and the amount of, a performance fee in any particular year. *See* DOL Advisory Opinion 99-16A (Dec. 9, 1999); DOL Advisory Opinion 89-31A (Oct. 11, 1989); DOL Advisory Opinion 86-21A (Aug. 29, 1986); and DOL Advisory Opinion 86-20A (Aug. 29, 1986).

Although an issue for all funds in which plans invest, this raises particularly troublesome concerns for managers and service providers to Non-Plan Asset Funds. As drafted, issues with respect to communications with fund investors exists whether or not the fund is considered to hold “plan assets” for ERISA purposes. Thus, a manager or a service provider to a Non-Plan Asset Fund also risks being considered a fiduciary in connection with routine statements of value made to a plan investor in such fund. As we discussed in our comments on the 2010 Proposal, we respectfully submit that imposing fiduciary status on managers and service providers to Non-Plan Asset Funds is inconsistent with ERISA. ERISA Section 3(42) and the Department’s regulations on when the assets of an entity will be deemed to hold plan assets<sup>8</sup> provide that an entity that is not registered as an investment company and whose securities are not publicly offered shall only be considered plan assets if equity participation in the entity is “significant,” meaning if “25 percent or more of the value of any class of equity interests in the entity is held by benefit plan investors.”<sup>10</sup> Accordingly, we respectfully believe that this aspect of the Proposal that could make managers and service providers to such funds fiduciaries are inconsistent with ERISA Section 3(42) and the Department’s regulations.<sup>11</sup> We are deeply concerned about any interpretation of the Proposed Rule that would make managers and service providers to Non-Plan Asset Funds fiduciaries because of routine communications of the fund’s value or other fund specific information to plan investors in a Non-Plan Asset Fund, particularly communications provided to all fund investors.

We note that the pooled fund carve-out does not take into account a “fund of one” structure. Many plans, particularly larger plans that routinely invest in private funds, use wholly owned “funds of one” for various reasons, including, for example, limiting the plan’s liability in connection with investments and to make investments *pari passu* with a fund manager’s existing fund through a plan-controlled entity. The pooled fund carve-out’s non-application to funds of one would result in disparate treatment of any person providing valuation information to a fund of one in connection with the fund’s investments as compared to a pooled fund and could result in less information being available to managers of, and investors in, funds of one, interfering with the structures adopted by plan fiduciaries to prudently make and monitor plan investments.

To address the above issues, we respectfully recommend that the Proposed Rule be revised to allow fund managers, service providers and their agents to be able to communicate directly with plan investors,<sup>12</sup> provide them with factual valuation and valuation-based information, and respond to investor questions, in each case without additional liability. This can be accomplished by

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<sup>8</sup> 29 CFR §2510.3-101.

<sup>9</sup> 29 CFR §2510.3-101(a)(2).

<sup>10</sup> 29 CFR §2510.3-101(f); ERISA § 3(42).

<sup>11</sup> See MFA 2011 letter.

<sup>12</sup> If our recommendations with respect to marketing, discussed further below, are not adopted, then the Department should make clear that basic communications of value, such as performance reporting and NAV, to prospective plan investors are likewise excluded from coverage under the Proposed Rule.

clarifying that such communications are not to be considered “in connection with a specific transaction” regardless of what use the plan investor may make of them. Alternatively, the Department can revise the Proposed Rule to provide an explicit carve-out for such communications to plan investors. Such a carve-out should state that any fund, fund manager, fund service provider, or agent of the foregoing that gives plan investors fund information about NAV (both for the fund as a whole and on a per capital account, share or unit basis), performance, and other information relating to the fund (collectively, “Fund Information”) is not, for that reason alone, providing fiduciary investment advice, regardless of whether the information is provided routinely or on request and regardless of whether the information is provided to all investors or only to specific investors.

It is important to note that, even under this proposed approach, plan investors would still be protected from inaccurate or misleading information under the Investment Advisers Act of 1940 (“Advisers Act”), the Securities Act of 1933, the Securities Exchange Act of 1934, (including Rule 10b-5 thereunder) and, with respect to plan asset funds, ERISA. We also note that fund managers to investment funds that are deemed to hold plan assets under ERISA are ERISA fiduciaries with respect to the investment advice they provide to the investment fund, including “funds of one.”

If the Department declines to clarify that providing Fund Information to plan investors does not constitute providing fiduciary investment advice, at the minimum: (1) the Proposed Rule should be revised to make clear that providing Fund Information to any plan investor or a group of plan investors should be considered the same as providing information to the fund and thus the pooled fund-carve out should apply, and (2) the pooled fund carve-out should be clarified to include “funds of one” as discussed above. Absent these changes, the pooled fund carve-out in the Proposed Rule is unlikely to achieve the intended objective, which would significantly affect a fund’s ability to operate on a day-to-day basis and potentially restrict the flow of information to plan investors in investment funds.

### **The Ability to Market One’s Own Products and Services**

MFA respectfully urges the Department to alter the Proposal so that it will not interfere inadvertently with legitimate marketing activity for private funds. The Proposed Rule states that any person who makes a recommendation to a plan investor about investing in a fund or retaining a manager and who receives a fee or other compensation, directly or indirectly from any source, would be a fiduciary unless a carve-out applies. Read literally, this could apply to all persons who sell or market interests in funds, both “inside” persons (*i.e.*, the manager of a fund and other persons directly involved in the operation of the fund) and “outside” persons (*i.e.*, unaffiliated persons engaged by the fund or its manager solely for marketing and distribution), and cause all sales activity to be treated as fiduciary activity. Similar to the concerns with respect to investor reporting discussed above, while this is an issue for all funds marketed to plan and sophisticated IRA investors, this raises particularly troublesome concerns for people who are marketing Non-Plan Asset Funds. We are concerned that, absent a revision of the Proposal or the inclusion of an applicable carve-out, the Proposal is likely to have a material adverse impact on private investment funds because it will make it difficult or impossible to market private funds to plan investors.

Private investment fund managers conduct non-public offerings of their funds and services to investors. Marketing of private investment funds is done both by the fund manager and through paid placement agents or other persons who are independent of the manager but who are retained (and compensated by the manager or the fund) to market the fund, the manager and its services. The offer and sale of private investment funds is a lengthy process as a result of the extensive due diligence conducted by sophisticated investors. Marketing often involves a number of meetings with investors and providing investors with significant amounts of information about the fund, including fund commentary, commonly in an investor letter, and investor specific information. Although managers do not compensate themselves for marketing, the manager receives asset management and other fees from investors that ultimately decide to invest in the manager's fund. The Proposed Rule suggests that a manager's receipt of management and/or other fees may be considered to be compensation for purposes of the new definition of investment advice. If so, this would put fund managers in the unique position of acting as fiduciaries merely by trying to market their own products and services. MFA believes that asset managers, like other service providers, should be able to market their goods and services to plan investors without being deemed an ERISA fiduciary with respect to that marketing activity. When a manager, or a placement agent, is marketing a private investment fund, they are not making recommendations to potential investors, nor are they in a position to make a fiduciary determination regarding whether the potential investor should invest in the fund being marketed. As such, imposing fiduciary obligations in connection with "self-marketing" activities by managers or marketing by paid placement agents or others performing similar functions would have a material and adverse impact on MFA members and make it difficult for plan investors to learn about potentially appropriate investments.

The Department has long recognized the distinction between communications that are intended to sell a product or service and communications that constitute investment advice.<sup>13</sup> Notably, in its discussion regarding transactions with fiduciaries in the Department's regulation on the general statutory exemption for services or office space, the Department stated in Example 1 that an investment adviser retained by a plan that proposes to a plan sponsor to perform additional portfolio evaluation services for the plan for additional fees is not engaging in prohibited self-dealing. As the Department recognizes, this is because the adviser is not using any of the authority, control or responsibility that makes the adviser a fiduciary to cause the plan to select and pay for the portfolio evaluation services.<sup>14</sup> In contrast, Example 2 in the same regulation says that a consultant that is already a fiduciary violates Section 406(b)(1)-(3) when, in a fiduciary capacity, it recommends to a trustee that the trustee cause the plan to purchase an insurance policy from a company that will pay the consultant a commission in connection with that purchase. According to the example, the

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<sup>13</sup> In that regard, when discussing third party placement agents or similar third parties, we are not including third party consultants or other persons who are making recommendations to plan investors as to whether the plan should invest in a private investment fund, or recommending which private investment fund(s) the plan should invest in. Our discussion relates only to those persons (managers and third parties) engaged in marketing and selling fund interests, but who are not providing advice to pension plans.

<sup>14</sup> 29 CFR § 2550.408b-2(f), example (1).



consultant is using the authority, control, or responsibility that makes it a fiduciary to cause the plan to enter into a transaction that will result in the consultant receiving additional compensation. The Department also notes in Example 2 that Prohibited Transaction Exemption (“PTE”) 77-9 (now PTE 84-24) will provide relief from this prohibition.<sup>15</sup> Taken together, these examples show that the Department has long been of the view that a fiduciary does not engage in a prohibited transaction when it acts on its own behalf to propose that a plan buy an additional service or product from the fiduciary for additional compensation. Put another way, Example 1 demonstrates that, when a plan elects to purchase additional services or products from a fiduciary in response to a proposal or offer by the fiduciary, any consideration the fiduciary receives from providing the additional service or product is permitted and will not support a claim that the fiduciary has violated Sections 406(b)(1) or 406(b)(3) of ERISA. Furthermore, Example 2 demonstrates the Department’s longstanding willingness to provide exemptive relief for a third party’s receipt of reasonable commissions in connection with the sale of a product to a plan.

MFA, therefore, respectfully requests that Section (1)(a) of the Proposed Rule be amended to make clear that a fund manager does not make an investment recommendation for a fee or other compensation under Section (a)(1) of the Proposed Rule when it offers to provide or continue to provide asset management services to a retirement plan investor or markets to a retirement plan investor a product such as an equity interest in a fund, trust, or other investment entity to which the manager or an affiliate provides asset management services. This would allow fund managers to market their services and products to retirement plan investors without inadvertently becoming fiduciaries merely by engaging in sales conduct.

### **Suggested Revisions to the Seller’s Carveout**

Alternatively, the Seller’s Carveout, set forth in Section (b)(1) of the Proposed Rule, should be revised to permit fund managers to market investment products to retirement plan investors without acting as fiduciaries in connection with their marketing activities. Although the Seller’s Carveout is obviously intended to be limited to plan investors with a certain level of financial expertise, the carveout is too limited and imposes new standards that are inconsistent with ERISA and other laws, particularly as applied to sales of privately offered investment funds.

Under the federal securities laws, privately offered funds generally may not be sold to the general public or retail investors and are usually offered only to “accredited investors” or “qualified purchasers,” which are investors that are deemed to have sufficient sophistication and ability to absorb the risks associated with making an investment. Although the Seller’s Carveout uses different conditions designed to ensure a sufficient level of sophistication, these conditions are both inadequate and unnecessarily restrictive. Specifically, one condition of the Sellers’ Carveout (that a plan have 100 or more participants) equates plan size in terms of participants with financial sophistication. MFA believes that it is more appropriate to use asset size, as the definitions of accredited investor and qualified purchaser do, as a proxy for sophistication, and respectfully requests that the Sellers’ Carveout be revised to cover, in the case of a purchase or redemption of an

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<sup>15</sup> 29 CFR § 2550.408b-2(f), example (2).

interest in a private fund, employee benefit plans and IRAs that are eligible under federal securities laws (including accredited investors and qualified purchasers) to invest in such funds. MFA also requests that the Sellers' Carveout be revised to clarify that the restriction on receiving a fee in connection with a transaction (see Proposal (b)(1)(3) and (C)(1)(3)), does not apply to the receipt, by a fund manager or its affiliate, of an asset management, incentive or performance fees (or incentive or performance allocations) from a fund.

An alternate condition, that the plan's assets are managed by an independent plan fiduciary that has at least \$100 million in employee benefit plan assets under management, is inconsistent with existing Department exemptions and guidance. For example, PTE 84-14, as amended, permits an investment adviser or other financial institution that is a "qualified professional asset manager" or "QPAM", and therefore a fiduciary of the plan assets under its management, to cause a plan to engage a variety of transactions that would otherwise be prohibited by ERISA. Meeting the standards required to be a QPAM connotes a level of experience and sophistication, which we understand to be very important to the Department regardless of the source of the QPAM's assets under management. Yet the Sellers' Carveout imposes significantly stricter standards on an independent plan fiduciary seeking to rely on Section (b)(1)(C) of the Proposed Rule, notably the requirement that the fiduciary have at least \$100 million in employee benefit plan assets under management (compared with \$85 million in assets under management for a QPAM that is an SEC registered investment adviser and no assets under management requirement for QPAMs that are banks or insurance companies). These conflicting standards will lead to confusion with no additional protection for plans and the Department has provided no explanation as to why the proposed \$100 million threshold would better protect plan investors than the QPAM standard. For example, a fund manager that is a QPAM but that only has \$80 million in assets that are attributable to employee benefit plans, can represent that a purchase of an asset for a plan investor's account is exempt from the prohibited transaction restrictions in Section 406(a) of ERISA and can engage in multiple transactions with "remote" parties in interest. Yet that same QPAM could not, if this provision of the Seller's Carveout remains unchanged, represent that it is the sole fiduciary responsible for the decision to purchase the asset because it does not have sufficient employee benefit assets under management. To avoid this result, Section (b)(1)(C) of the Proposed Rule should be conformed to Part VI(a) of PTE 84-14.

Finally, the Sellers' Carveout as drafted applies only to plans as defined in Section 3(3) of ERISA. This restriction means, for example, that an investment fund that is deemed to hold plan assets under Section 3(42) of ERISA (whether a pooled fund or a "fund of one" established for a single plan or affiliated group of plans) cannot rely on the Seller's Carveout. Many plan investors invest in private or alternative funds through "funds of funds" and "funds of one" and private funds that seek investment from such funds would not be able to rely on the Sellers' Carveout to market their funds. Given that private funds are not offered to retail or unsophisticated investors, this limitation would appear to frustrate plan diversification with no enhanced protection for plan investors that are eligible to invest in such funds. MFA respectfully requests that the Seller's Carveout be revised to apply to marketing and sales to all retirement plan investors eligible to invest in private investment funds, including accounts or funds deemed to hold plan assets pursuant to Section 3(42) of ERISA (including, but not limited to accounts that are maintained by IRAs that are

accredited investors or qualified purchasers) as well as plans as defined in Section 3(3) of ERISA or to clarify that a fund holding plan assets is deemed to be acting on behalf of the plans, including IRAs, investing in the fund.

### **Suggested Revisions to Best Interest Contract Exemption**

The revisions discussed above would permit a fund manager to continue to sell its own investment products and services consistent with existing Department guidance. They would not, however, permit an adviser to use placement agents or other third-party sales persons that are compensated in connection with a sale of an interest in a private fund. Although the proposed BIC Exemption permits sales persons to receive commissions in connection with sales of certain investment products, the exemption only applies to a limited universe of investment products defined as “Assets.”<sup>16</sup>

MFA believes this is too restrictive and will unnecessarily restrict eligible retirement plan investors from continuing to be able to invest in investment funds that are privately offered. As noted above, federal securities laws permit accredited investors and qualified purchasers to purchase interests in privately offered funds. Because these funds are not sold to the general public or to retail investors, revising the definition of “Asset” in the BIC Exemption to include privately offered funds would not result in any change to the current ability of sophisticated small plans and IRAs to purchase such investments. Rather, it would allow eligible plans and IRAs to continue to meet their financial goals by purchasing interests in such funds and benefit from the conditions of the BIC Exemption.

MFA also notes that plan investors currently invest in non-U.S. funds that are registered in their home jurisdiction or listed on an exchange in their home jurisdiction (or both). Many plan investors invest in these funds to take advantage of investment returns offered by non-US markets. These plan investors should be allowed to continue to do so. MFA respectfully requests that the definition of “Asset” be revised to include non-U.S. investment funds that are registered in their jurisdiction of formation or exchange listed. To provide clarity regarding the scope of investment funds that would be covered by such revisions, the Department could look to existing securities laws definitions, such as (1) an entity that meets the definition of “private fund” in section 202(a)(29) of the Advisers Act, or an entity formed in a jurisdiction outside of the U.S. that would be a private fund if formed in the U.S., or (2) an entity that would be an investment company under section 3(a) of the Investment Company Act of 1940, but for one or more of the exceptions in section 3(c) of that Act, or an entity formed in a jurisdiction outside of the U.S. that would be such an entity if formed in the U.S.

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<sup>16</sup> Specifically, bank deposits, CDs, mutual fund shares, interests in bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, certain corporate bonds, agency debt securities and U.S. treasury securities (each as defined by FINRA rules), insurance and annuity contracts, guaranteed investment contracts, and exchange-traded equity securities.

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MFA strongly supports the Department's goal of protecting benefit plans and their participants, and we recognize that imposing fiduciary status on certain service providers to plans can further that goal. We appreciate the Department's determination that valuations provided to collective investment vehicles do not create a fiduciary relationship under ERISA. For the reasons discussed above, we believe that further tailoring and clarification of the Proposal is needed to achieve the stated objectives of the Department's carve-outs for collective investment vehicles and to permit the marketing and sale of private investment funds to sophisticated retirement plan investors without such marketing and sales activities being deemed fiduciary in nature. If you have any questions regarding any of these comments, or if we can provide further information, please do not hesitate to contact Benjamin Allensworth or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell  
Executive Vice President & Managing  
Director, General Counsel