



December 22, 2023

Submitted electronically to <https://www.regulations.gov>
Office of Regulations and Interpretations
Employee Benefits Security Administration
US Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary and Related Exemptions
(RIN 1210-AC02)

To Whom it Concerns:

The Futures Industry Association (“FIA”)¹ is pleased to provide comments regarding the Department of Labor’s (“Department”) proposed regulation under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) that would redefine the term “fiduciary” under section 3(21) of ERISA and section 4975(e) of the Internal Revenue Code of 1986, as amended (the “Code”). While we appreciate the opportunity to provide these comments to the Department as it assesses the impact of the proposal on retirement investors, we have concerns that this proposal far expands the definition of “fiduciary” in unworkable ways and, in so doing, goes well beyond any stated goal of the Department. We urge the Department to withdraw its proposal.

As you know, the U.S. futures markets in which FIA’s members operate are highly regulated markets overseen by the Commodity Futures Trading Commission (“CFTC”). Under the Commodity Exchange Act (“CEA”) and CFTC rules, futures are traded on registered exchanges and cleared by registered clearinghouses. Plans access the futures markets through registered futures commission merchants (“FCMs”). Acting as agents for entities that wish to trade futures, such as plans, FCMs accept, execute, and clear futures orders at the direction of their customers. As members of clearinghouses, FCMs ensure that customer transactions are cleared by guaranteeing their customers’ performance to such clearinghouses. To facilitate this clearing process, FCMs collect and post margin – both at the outset of a transaction and on a daily basis thereafter – to ensure positions are at all times appropriately collateralized and can be managed and closed out with minimal market disruption in the event of a customer default. This unique function of FCMs of guaranteeing customers’ trades assures the financial integrity of futures markets and protects market participants from potential loss.

¹ FIA is the leading trade organization for the futures, options, and cleared swaps markets, with offices in Washington, DC, London, Brussels and Singapore. FIA is the only association that represents all organizations that have an interest in the listed derivatives markets. Its membership includes the world’s largest derivatives clearing firms as well as leading derivatives exchanges from more than 20 countries. FIA’s core constituency consists of futures commission merchants registered with the Commodity Futures Trading Commission, the majority of which are also either registered with the Securities and Exchange Commission as broker-dealers or are affiliates of registered broker-dealers.

In their role as FCMs, our members act as agents and guarantors for plans and plan asset vehicles that utilize futures contracts in their portfolios. They do not provide fiduciary advice. Indeed, under the CFTC's regulatory regime, entities that provide trading advice are defined and regulated differently than FCMs.²

We are concerned that the proposed overly broad definition of fiduciary could make it more difficult for FCMs to provide the critical service of futures market access to ERISA plans.³ Plans use futures for a variety of purposes to manage their investment portfolios. For example, plans use futures to equitize cash to more closely track a benchmark, to increase liquidity, to "stay in the market" during a transition from one asset class to another, to efficiently gain exposure to an asset class without incurring the transaction costs of selling one class of assets and reinvesting in another, and for other administrative and risk-reducing activities. Futures are a critical component of investment managers' strategies and particularly critical to index funds subject to ERISA fiduciary rules, which are a significant investment vehicle for plans and individual retirement accounts. Futures are also effective tools for hedging, and for obtaining market exposure while remaining in easily liquidated investments in transitioning from one manager to another. Making futures less available or more expensive risks harming plans, a consequence sought by neither the Department nor the Industry.

Should the Department proceed with this proposal, it is imperative that the Department make clear in the rule that incidental advice and recommendations in the course of the above-described services provided by FCMs are not fiduciary advice. If the Department proceeds with the proposal as drafted the implementation time is not enough time for firms to comply with the significant changes. Firms may need to change policies and procedures, conduct training, create or update customer communications and disclosures, and amend customer relationship documentation. We urge the Department to consider a more reasonable time for compliance of at least one year.

Finally, we have worked with the Securities Industry and Financial Markets Association ("SIFMA") on the proposed regulation and share the concerns relevant for FIA members' jointly registered broker-dealers detailed in the comprehensive comment letter SIFMA is preparing to file.

We urge you to consider revisions to the rule that protect the well-regulated role that FCMs play for their customers. Should you have any questions, please contact me at alurton@fia.org or 202-772-3057.

Sincerely,



Allison Lurton
General Counsel and Chief Legal Officer

² See Part 4 of the CFTC's regulations governing commodity trading advisors and commodity pool operators. 17 C.F.R. Sec. 4.1 et seq.

³ We raised similar concerns in our response to the Department's 2015 proposal to amend the definition of "fiduciary". See Letter from Allison Lurton, Senior Vice President and General Counsel, FIA, to Office of Exemption Determinations, ERISA, U.S. Dep't. of Labor (July 21, 2015), available at: <https://www.fia.org/sites/default/files/2020-03/DOL%20Definition%20of%20Fiduciary%20Comment%20Letter%20%28July%202015%29.pdf>