

July 20, 2015

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11712
U.S. Department of Labor
122 C Street, NW
Suite 400
Washington DC 20001

and

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule and Related Exemptions
Room N-5655

Re: Comments Regarding ZRIN: 1210-ZA25 and RIN: AB32

CBOE Holdings, Inc. welcomes this opportunity to comment on two recent proposals by the Department of Labor (the “Department”): “Definition of Term ‘Fiduciary’; Conflict of Interest Rule -- Retirement Investment Advice [RIN: 1210-AB32]” (the “Fiduciary Proposal”)¹ and “Proposed Best Interest Contract Exemption, Application No. D-11712 [ZRIN: 1210-ZA25]” (the “BIC Exemption Proposal”).²

CBOE Holdings is the holding company for three regulated, derivative exchanges, among other subsidiaries: Chicago Board Options Exchange, Incorporated (“CBOE”), C2 Options Exchange Incorporated (“C2”), and CBOE Futures Exchange, LLC (“CFE”). CBOE and C2 provide markets for exchange-traded options on securities, while CFE provides a market for exchange-traded futures. CBOE is the largest U.S. options exchange and the creator of listed options, and is an industry leader in product innovation, trading technology and investor education.

CBOE is also a member of the U.S. Securities Market Coalition (the “Coalition”) and fully supports the Coalition’s comments on the Fiduciary Proposal and the BIC Exemption Proposal which the Coalition is submitting. We incorporate by reference the Coalition’s comments with respect to both proposals.

BIC Exemption Proposal

¹ 80 Federal Register 21928 (Apr. 20, 2015).

² 80 Federal Register 21960 (Apr. 20, 2015)

BIC Exemption Proposal

We write separately to underscore our concern that the BIC Exemption Proposal, if implemented as proposed, would take away the current ability of investors to use exchange-traded options on securities and exchange-traded futures in Employee Retirement Income Security Act of 1974, as amended (“ERISA”) plans, such as 401(k) plans, and individual retirement accounts (“IRAs”). This result would harm investors by limiting their ability to protect stock positions, manage risks and create income through the use of these products in their retirement accounts, particularly at a time when more and more investors are responsible for their own retirement savings. For instance, selling covered call options is a very popular strategy utilized by these accounts to generate increased investment income from a stock position. CBOE Holdings therefore requests that the Department amend the BIC Exemption Proposal to specifically include exchange-traded options and exchange-traded futures in the definition of “Asset.”

In addition to the Fiduciary Proposal, the Department proposed new exemptions to the prohibited transactions rules that apply to ERISA plans, such as 401(k) plans, and IRAs.³ In the BIC Exemption Proposal, the Department issued a new proposed prohibited transaction class exemption entitled the “Best Interest Contract Exemption” that is intended to permit certain transactions between a fiduciary and an ERISA plan or IRA that would otherwise be prohibited. Specifically, the BIC Exemption Proposal would permit certain “Advisers,” “Financial Institutions,” and their affiliates and related entities to receive compensation for services provided to “Retirement Investors” in connection with a purchase, sale or holding of an “Asset” by a Plan, participant or beneficiary account, or IRA, as a result of the Adviser’s and Financial Institution’s advice. For this purpose, “Asset” is defined as bank deposits, CDs, shares or interests in registered investment companies (mutual funds), bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities, U.S. Treasury securities, insurance and annuity contracts (both securities and non-securities), guaranteed investment contracts, and exchange-traded equity securities.⁴ The definition of “Asset”, however, excludes exchange-traded options on securities (e.g., a put, call, straddle or other option to buy an equity security from or sell an equity security to another without being bound to do so) and exchange-traded futures.

As a result, the new prohibited transaction exemptions would not apply to exchange-traded options on securities and exchange-traded futures transactions entered into by ERISA plans or IRAs with entities that are fiduciaries with respect to such plans or IRAs. Consequently, many ERISA plan and IRA accounts would no longer be able to engage in those types of transactions.

³ The Department also issued another new proposed prohibited transaction class exemption intended to permit principal transactions in certain debt securities, and proposed amendments to and partial revocations of several existing exemptions currently used by ERISA plans and IRAs to engage in common securities trading transactions. These comments do not address such proposals.

⁴ See Section VIII(c) of the Proposed Exemption.

CBOE Holdings recommends that the Department amend the BIC Exemption Proposal to specifically include exchange-traded options and exchange-traded futures in the definition of “Asset,” to preserve the ability of investors to use these types of products in their retirement accounts.

Exchange-traded options and exchange traded-futures are highly regulated products that have been traded on national securities exchanges or futures exchanges for many years. CBOE and C2 (and other members of the Coalition) are national securities exchanges regulated by the Securities and Exchange Commission, while CFE is a designated contract market regulated by the Commodities Futures Exchange Commission. Individual investors are significant participants in the listed options market (accounting for approximately 25% of the volume on U.S. options markets). Individual investors use listed (or exchange-traded) options, such as selling “covered” call options to increase investment income or buying protective puts in their IRAs to manage the risks with owning individual stocks or equity indices, with the goal of increasing their retirement savings. Exchange-traded futures are similarly used by investors as an integral component of a diversified portfolio.

The preamble to the BIC Exemption Proposal states that the exemption is intended to apply to “investments that are commonly purchased by plans, participant and beneficiary accounts, and IRAs.” Exchange-traded options on securities clearly fall within this classification of investments that are commonly purchased by IRAs to manage risks and create income. Exchange-traded futures similarly assist investors in creating a diversified and hedged portfolio. Accordingly, CBOE Holdings requests that the BIC Exemption Proposal be amended to include exchange-traded options on securities and exchange-traded futures in the definition of “Asset.”

Fiduciary Proposal

In the Fiduciary Proposal, the Department issued a new proposed regulation that significantly expands the types of conduct that will cause a person or entity to be considered a “fiduciary” for purposes of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and the prohibited transaction provisions of the Internal Revenue Code of 1986, as amended. As noted in the Coalition’s letter, this expansion goes far beyond the types of conduct that would cause a person to be considered a fiduciary under the Investment Advisers Act of 1940 and the guidance issued thereunder by the primary regulator for investment advisers, the SEC. CBOE requests that the Department clarify in the final version of any new rule that certain actions by brokers would not cause the broker to be considered a fiduciary with respect to such ERISA plan or IRA. Specifically, CBOE recommends that any final regulation make clear that, absent other fiduciary conduct, neither the screening by a broker of the owner of an IRA or plan account nor the determination by a broker that engaging in trading of exchange-traded options and exchange-traded futures is appropriate for such account owner by itself rises to the level of fiduciary conduct. Further, CBOE requests that the Department clarify in any final regulation that the providing of instructional models, videos and interactive education materials regarding exchange-traded options and exchange-traded futures does not constitute investment advice and possibly cause the provider of such information to assume a fiduciary status.



EXECUTE SUCCESSSM

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Thank you for considering our comments. If you have any questions, please contact me.

Sincerely,

Joanne Moffic Silver
Joanne Moffic-Silver