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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

**Re: Conflicts of Interest Rule
RIN 1210-AB32**

Ladies and Gentlemen:

Introduction

The Department of Labor (the "DOL") has requested comments on the proposed "Conflicts of Interest" Rule which defines the circumstances under which a person is considered to be a "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and Section 4975 of the Internal Revenue Code of 1986, as amended (the "Code"), by reason of providing "investment advice" to an employee benefit plan, plan fiduciary, plan participant or beneficiary, or an IRA owner or fiduciary (the "Proposed Rule"). On behalf of Standard & Poor's Investment Advisory Services LLC ("SPIAS"), we thank you for the opportunity to comment.

Description of SPIAS' Services.

SPIAS is a non-discretionary investment adviser registered with the Securities & Exchange Commission under the Investment Advisers Act of 1940. As discussed in more detail below, SPIAS develops and maintains model portfolios that it provides to its clients pursuant to a license arrangement. As of December 31, 2014, approximately \$31 billion in assets was being invested pursuant to one or more SPIAS model portfolios. SPIAS' clients (each a "Licensee") are primarily financial institutions, such as investment advisers and broker dealers, that use SPIAS' models to assist them in advising their own end clients ("End Clients"), some of whom may be either (i) an employee benefit plan subject to ERISA and/or Section 4975 of the Code (a "Plan") or (ii) an individual retirement account subject to Section 4975 of the Code (an "IRA"). In some cases, the Licensee may sublicense the SPIAS model to another institution (each a "Sublicensee") who will in turn utilize the model to assist it in advising its End Clients. In no case does SPIAS have any contractual arrangement with the End Clients. Indeed, as a general matter, SPIAS does not know the identity of the End Clients of its Licensees and Sublicensees and does not know the extent to which, if at all, the assets being invested pursuant to its models are "plan assets" of Plans or IRAs.

As noted above, SPIAS' core services consist of the provision of model portfolios to investment advisers and other institutional clients. SPIAS utilizes two core groups of model portfolios that are adjusted by SPIAS to fulfill specific investment strategies designed and selected by SPIAS: SPIAS' Model Allocation Portfolios ("MAPS") and SPIAS' Fixed Income and Equity Strategies ("Strategies"). MAPS are maintained based on SPIAS' proprietary algorithms, formulae and calculations that are designed to select unaffiliated mutual funds and exchange traded funds ("ETFs") to fulfill a specific model portfolio's investment strategy¹. SPIAS' Strategies is designed to identify individual equity and fixed income securities based on SPIAS' proprietary stock and bond selection criteria, algorithms, formulae and calculations to be used to fulfill a specific model portfolio's investment strategy.

Each of the models is updated on a regular, periodic basis to reflect changing market and economic conditions. SPIAS performs such updates by feeding updated market and economic data into the computer program that generates the particular model. SPIAS may also revise the applicable computer program for a particular model from time to time to reflect its current thinking and investment perspective. However, the updated models continue to be generic, off-the-shelf model portfolios that are provided to all relevant Licensees (and presumably Sublicensees) as they are updated.

The output from SPIAS' model portfolios is designed such that all Licensees and Sublicensees receive the same model portfolio for any particular investment strategy. SPIAS' model portfolios are not designed to meet any recipient's specific investment objectives or risk tolerance levels. Rather, all of SPIAS' model portfolios are "off-the-shelf" investment tools that can be used "as is," modified or rejected outright by Licensees and Sublicensees or their End Clients, at their discretion. SPIAS permits Licensees to redistribute its model portfolios to Sublicensees with few restrictions, and does not collect any information about how a particular model portfolio is being used or whether the output is being modified by either its Licensees or their Sublicensees.

Overview of the Proposed Conflict of Interest Rule

Under the Proposed Rule, a person would be deemed to provide "fiduciary investment advice" if he/she: (i) provides investment or investment management recommendations or appraisals to an employee benefit plan, plan fiduciary, plan participant or beneficiary, or an IRA owner or fiduciary; and (ii) either acknowledges fiduciary status or acts pursuant to an agreement, arrangement, or understanding with the advice recipient that the advice is individualized to, or specifically directed to, the recipient for consideration in making investment or management decisions regarding plan assets. If the service is provided for a fee or other compensation (either directly or indirectly), the person providing the information or services would be considered to be a fiduciary.

Conversely, under 29 CFR §2510.3-21(c) of the DOL's existing regulations, an investment adviser like SPIAS that provides output from model portfolios would be considered to be a "fiduciary" to a plan only if its investment recommendations are individualized to the needs of the

¹ Certain ETFs and mutual funds recommended by SPIAS for the MAPS may be benchmarked to an index that is sponsored by S&P Dow Jones Indices ("SPDJI"), an affiliate of SPIAS, and for which SPDJI may receive fees based upon the mutual funds and ETFs assets under management. SPIAS recommends only ETFs that are benchmarked to an unaffiliated index for MAPS to the extent that it knows that the MAPS are utilized by qualified retirement plans.

particular plan. Under the existing definition, SPIAS is clearly not an “advice fiduciary” because its model portfolios are not individualized to the needs of any plan. Indeed, SPIAS does not even know which, if any, plans are utilizing its model portfolios.

The “Specifically Directed To” Language in the Proposed Rule is Overly Broad in Scope

Under the Proposed Rule, the DOL has made it clear that generally any communication that recommends investment in specific securities will be classified as “fiduciary investment advice” if it is individualized to, or specifically directed to, the recipient of such communication, unless it falls within one of the exceptions or carve-outs set forth in the Proposed Rule.

Many entities like SPIAS provide model portfolios to clients and third parties where the output consists of general recommendations of securities or investment products. This output, which is generated by using the entity’s proprietary screening tools, models and databases, is designed to seek certain results based on the entity’s own internal formulae, algorithms and calculations, and is not designed or intended to fulfil any recipient’s specific investment objectives. Many entities like SPIAS permit clients to sublicense the model portfolios, which could result in the output from a specific model portfolio being used by a recipient who is very far removed from the entity that generated the model. Under this type of scenario, the Proposed Rule could be interpreted to impose “fiduciary status” on the creator of the model portfolio even though the ultimate user is not in privity of contract with, or not even known or foreseeable by, the creator of the model portfolio.

Assuming that the creator of a model portfolio, such as SPIAS, does not acknowledge fiduciary status, it can nevertheless be an advice fiduciary if its recommendations are individualized to, or specifically directed to, the recipient. In the context of an entity such as SPIAS, it is quite clear that its model portfolios are not individualized to the particular recipient. Rather, they are generic, off-the-shelf output designed to accomplish certain investment objectives or strategies all of which have been generated by proprietary criteria, algorithms and formulae developed and maintained by the creator of the model. Each model is available to any client who desires to license that model for its own use.

It is the “specifically directed to” aspect of the Proposed Rule that is overbroad and creates an unwarranted ambiguity, at least with respect to the provision of a model portfolio by SPIAS to a Licensee given that SPIAS does have a direct contractual relationship with each Licensee. (Because SPIAS does not have any relationship or contact with the Sublicensees, the provision of the SPIAS model portfolios to Sublicensees should not cause SPIAS to become an advice fiduciary with respect to any of the Sublicensee’s End Clients who happen to be Plans or IRAs.)

SPIAS does not believe that the DOL intended the Proposed Rule to extend so broadly and, in any event, respectfully submits that the concept of investment advice for purposes of ERISA fiduciary status should not be extended so broadly for the following reasons:

1. SPIAS’ models are generic and off-the shelf. They are not designed for any particular recipient. Rather, they are provided to anyone who desires to license them from SPIAS.
2. SPIAS has no contact or relationship with any of the End Clients including any Plans or IRAs that are End Clients. Indeed, it does not even know whether or to what extent any

of the End Clients of a particular Licensee are Plans or IRAs.

3. Imposing fiduciary status and, as a result, general fiduciary obligations, on an entity like SPIAS would be inherently inconsistent with the reality of the situation. How can such an entity satisfy such general fiduciary obligations when it does not know anything about, or have any contact or relationship with, the Plans or IRAs that just happen to be End Clients?

To impose fiduciary status on an entity whose relationship to any Plan or IRA is so remote would be entirely inappropriate and was presumably not within the DOL's intent. Accordingly, SPIAS hereby requests that the DOL modify the Proposed Rule to clarify that the provision of generic, off-the-shelf model portfolios such as those provided by SPIAS to an institution that may use the model portfolios in connection with its managing assets for, or advising, clients including Plans and IRAs does not constitute investment advice for purposes of ERISA and Section 4975 of the Code.

Finally, the overbreadth and ambiguity of the Proposed Rule creates an additional problem in a different context. In particular, the language of the Proposed Rule would also seem to characterize as investment advice the provision of information by a financial services firm in response to a "request for a proposal" or "RFP" with respect to investment services. Many financial services firms respond to RFP's and, in doing so, provide responses to common questions relating to the firm's style, experience, investment approach, historical performance, personnel, staffing, compliance and controls and other pertinent information that the requestor considers relevant to its decision-making process. At a minimum, the firm's response will likely include a "recommendation" that the responding firm be retained to perform the investment-related services, which recommendation could constitute investment advice under the Proposed Rule. Moreover, to the extent that the response contains information regarding specific investments, investment strategies or investment products, it could also be classified as investment advice under the Proposed Rule. SPIAS believes that such a broad extension of the fiduciary advice concept to the RFP context could not have been intended by the DOL and respectfully requests that the Proposed Rule be appropriately modified or clarified.

The Investment Education Carve-Out Should be Modified to Allow Investment Advisers to Be Able to Identify Certain Securities and Products

The Proposed Rule would, if finalized in its current form, make changes to the type of information that can be provided to attendees at educational meetings and seminars attended by multiple Licensees (or potential Licensees) and/or multiple End Clients (or potential End Clients) or others. The DOL has created a carve-out for investment education in the Proposed Rule that would supersede an earlier DOL Interpretative Bulletin issued in 1996 known as IB 96-1. Consistent with IB 96-1, the proposed Investment Education carve-out will allow the provision of certain information about general asset classes, but including information about specific investment products or specific securities will turn the communication into "fiduciary investment advice." SPIAS disagrees with the DOL's proposed position that mentioning specific investment products or specific securities during an educational meeting or seminar could steer an investor into a particular investment. Accordingly, we respectfully request that the DOL reconsider its position on the Investment Education carve-out and that it allow financial service providers to mention specific investment products or/or specific securities during educational meetings and seminars without

becoming fiduciary advisers.

Request to DOL

The Proposed Rule, if adopted in its current form, would greatly expand the potential scope of fiduciary status under ERISA. While we acknowledge the DOL's attempt to limit this expansion through the creation of certain "carve-outs" and exemptions, we strongly urge the DOL to consider clarifying and adding limits on the application of the "specifically directed to" language in the Proposed Rule in determining when a provider would be deemed to be fiduciary, as described above. We also urge the DOL to exclude information furnished by a financial services firm in response to RFPs from the concept of "fiduciary investment advice," and also to revisit the Investment Education carve-out so as to permit the mentioning of specific investment products and/or specific securities during education meetings or seminars.

We would be happy to provide any additional information or to discuss these issues further with you. Thank you for the opportunity to comment on the Proposed Rule.

Sincerely,



William C. Bassignani
President, Standard & Poor's Investment Advisory Services LLC

cc: John J. Cleary, Esq.
Goodwin Procter LLP