Futures Industry Association
2001 Pennsylvania Ave. NW
Suite 600
Washington, DC 20006-1823

202.466.5460
202.296.3184 fax
www.futuresindustry.org

February 3, 2011

The Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Proposed Definition of Fiduciary Regulation
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Proposed Definition of Fiduciary Regulation

Ladies and Gentlemen:

The Futures Industry Association [1] is pleased to provide comments regarding the Department of Labor's ("Department" or "DOL") proposed regulation under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") that will 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"). We appreciate the opportunity to comment and hope that our comments are helpful in understanding the particular concerns of the futures industry.

While the FIA supports regulatory efforts to clarify when a service provider is a fiduciary and when it is not, we are concerned that the proposed rule does not add clarity or certainty to this question. In fact, it takes a relatively clear regulation and makes it substantially murkier. Plans use futures to equitize cash in order to more closely track a benchmark, to increase liquidity, to "stay in the market" during a transition from one asset class to another or one manager 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 defensive positioning. They are a critical component of every manager's strategy and particularly critical to index funds, which are a significant investment of plans and IRAs. Making futures less available or more expensive will actually harm plans, a consequence sought by neither the Department nor the industry.

---

[1] FIA is a principal spokesman for the commodity futures and options industry. FIA's regular membership is comprised of approximately 30 of the largest futures commission merchants ("FCMs") in the United States. Among the FIA's associate members are representatives from virtually all other segments of the futures industry, both national and international. Reflecting the scope and diversity of its membership, FIA estimates that its members effect more than 80% of all futures transactions executed on United States contract markets.

Our members act as agent for plans and plan asset vehicles that utilize futures contracts in their portfolios. We do not provide fiduciary advice[2]; if futures commission merchants ("FCM") were deemed to be fiduciaries, we could not execute transactions, because unlike securities execution, no exemption exists which would permit a fiduciary to earn an additional fee for execution of transactions.[3]

The CFTC regulates commodity trading advisors (CTAs) and FCMs. A CTA is an individual or organization which, for compensation or profit, advises others as to the value of or the advisability of buying or selling futures contracts, options on futures, or retail off-exchange foreign exchange contracts. Under CFTC rules, providing advice includes exercising trading authority over a customer's account as well as giving advice based upon knowledge of or tailored to the customer's particular commodity interest account, particular commodity interest trading activity, or other similar types of information.

The CFTC has enumerated the circumstances in which commodity futures advice will not rise to the quality of advice for which registration is required.[4] Thus, a person is not required to register if he or she is providing advice that is not based upon knowledge of or tailored to customer's particular commodity interest account, particular commodity interest trading activity, or other similar types of information. Examples of such non-tailored advice include:

- advice to buy or sell specific futures contracts should a particular price level be reached, through newsletters, books and periodicals wherein the recipients of publications all receive the same advice; or

- advice (through e-mails, facsimiles, an Internet web site, telephone calls or face-to-face meetings with customers) that consists of instructions to buy or sell a futures contract based on a computerized trading system, which also is available for purchase and use on a personal computer, where the customers all receive the same advice;

- advice delivered at seminars at which attendees are taught how to trade commodity futures contracts aided by a software program that is being sold, along with a question-and-answer session at which commodity trading advice is provided to the entire group without asking or receiving information about the personal characteristics of the attendees;

---

[2] Under the commodity futures regulatory regime, a person who provides advice or has discretionary control with respect to futures strategies and trading is a commodity t trading advisor ("CTA").

[3] PTE 86-128, the successor to PTE 75-1, Part I and PTE 79-1, permits a fiduciary to select itself or an affiliate to execute securities transactions, or transactions ancillary thereto, for an additional fee if its conditions are met. There is no corollary for futures transactions. A similar class exemption was sought by the futures industry in 1981. The Department issued an advisory opinion in response to the request, but declined to provide exemptive relief. A copy of DOL Adv. Opin. 82-49 and the Department's August 16, 1985 response is attached to this submission. We assume that the Department's longstanding positions on futures trading would be unaffected by this change in the regulation.

[4] CTAs are required to register unless they have provided advice to 15 or fewer persons during the preceding 12 months and do not generally hold themselves out to the public as a CTA or they are registered in another capacity (such as an investment adviser) and their advice is solely incidental to that principal business or profession.

- advice through an Internet web site which requires the user to indicate whether he or she has a preference for trading agricultural futures contracts or financial futures contracts. Users who indicate that their preference is agricultural futures contracts receive different advice from those who indicate that financial futures contracts are their preference. The advice is not ``based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients"; rather the clients are merely being allowed to select which advisory services they wish to purchase; or

- advice at seminars at which attendees are taught how to trade commodity futures contracts aided by a software program that is being sold. Before each seminar commences, the attendees are polled to discover their level of ability and knowledge. A more advanced seminar is taught for classes that have a higher degree of experience. Because such advice is not ``based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients, it does not require registration.[5]

We believe that this list is instructive, in that it provides additional certainty which market participants require in order to operate in an orderly and consistent fashion.
In contrast to the role of CTAs, an FCM is the agent of the buyer or seller of a futures contract. It provides market information to its customers, and executes orders at the direction of a plan fiduciary. It provides factual information regarding contract markets and liquidity; its client agreements make clear that it is not agreeing to act as a fiduciary to its clients.

We urge the Department to clarify the proposed rules to make clear that the factual settings described above will not cause an FCM to be deemed a fiduciary, and to permit the agreements and mutual understandings of the parties, as reflected in their written agreements, which are terminable at any time, to govern when and if an FCM is a fiduciary.

For the reasons given by the Securities Industry and Financial Markets Association ("SIFMA") in its comment on the proposal, we believe the proposal needs to be reconsidered. The breadth of the investment adviser test, which does not appear to require an agreement between the plan and adviser, or reliance on tailored advice, would make many of our members and their affiliates fiduciaries to plans, solely on account of research reports that are publicly disseminated. If these entities are fiduciaries, they cannot execute futures trades for the plan. If they cannot be sure whether they are fiduciaries with respect to a particular plan, they will not take the risk that the fees they receive will violate the prohibited transaction provisions of ERISA and the Internal Revenue Code.

Similarly, the Department's revision of the current test leaves FCMs without the necessary certainty which would allow them to execute trades for plans. Current law requires that recommendations be individualized to the plan, be made on a regular basis, pursuant to a mutual understanding, agreement or arrangement that the advice will be a primary basis on which the plan makes its decision. The proposal eliminates regular basis, mutual understanding changes "a primary basis" to "may be considered". Any factual information may be viewed as a

[5] See, CFTC Rule 4.14(a)(9).

recommendation by a listener and a plan may consider a great deal of information without relying on any of it. If the parties do not have a mutual understanding that the recommendation will be relied on to a significant extent, FCMs would likely conclude that they should not execute trades for plans and take the risk that the plan had an understanding that the FCMs did not have.

We will not repeat here all the concerns that this unintentional fiduciary status raises, other than to say that uncertainty with respect to one's role cannot benefit the markets, plans, or the Department's enforcement program. The Department has pointed to no abuse with respect to futures trading, nor has it analyzed the very significant costs that plans would bear if they were unable to employ futures as a trading strategy.

We have studied the selling exception in hopes that it would mitigate some of the concerns described above. We do not think that it does; moreover, we do not believe that it is broad enough to cover FCMs. The selling exception appears to provide relief for dealers and their agents. FCMs are neither dealers nor dealer's agents. FCMs are the plan's agent. The two required warnings for use of the exception – that the party is adverse and is not offering impartial advice – are inapposite for our role. If the Department moves ahead with this regulation, we urge you to include a safe harbor for FCM similar to that provided in 29 CFR 2510.3-21(d) for securities brokers. We suggest the following language to track the current safe harbor for securities dealers.

Execution of futures transactions. (1) A person who is a futures commission merchant registered under the Commodity Exchange Act or similar foreign regulatory regime shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act, with respect to an employee benefit plan or other plan subject to section 4975 of the Internal Revenue Code of 1986, as amended ("plan") solely because such person executes transactions for the purchase or sale of futures contracts, foreign exchange contracts or options on either on behalf of such plan in the ordinary course of its business as a futures commission merchant, pursuant to instructions of a fiduciary with respect to such plan, if:

(i) Neither the fiduciary nor any affiliate of such fiduciary is such futures commission merchant; and

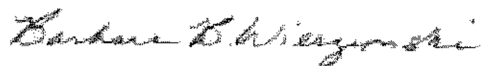
(ii) The instructions specify (A) the futures contract or option to be purchased or sold, (B) a price range within which such futures contract is to be purchased or sold, (C) a time span during which such futures contract may be purchased or sold (not to exceed five business days), and (D) the minimum or maximum quantity of such futures contract which may be purchased or sold within such price range.

We also urge the Department not to permit any regulation to be effective until the Department grants an exemption for futures trading similar to PTE 86-128. The industry has sought such an exemption for more than 20 years. We look forward to working with the Department to answer any questions you may have so that an exemption may be granted.

Finally, we encourage the Department to coordinate with the CFTC any changes in the regulation that could potentially disrupt futures markets and limit plan access to that market. The CFTC has the obligation to ensure that the futures markets function efficiently and fairly; we believe their expertise may be helpful to the Department in understanding the concerns we have raised.

We appreciate the opportunity to comment and look forward to working with the Department to create exceptions that are workable in all the investment markets, to create a safe harbor for futures commission merchants, and to propose and grant a prohibited transaction class exemption for futures commission merchants who may inadvertently become fiduciaries on account of any change in the regulation.[6]

Respectfully submitted,



Barbara Wierzynski
General Counsel
On behalf of the FIA Law and Compliance Executive Committee

[6] See the Department's relief for purchases of insurance contracts and mutual funds for "inadvertent fiduciaries", PTE 84-24.

ERISA Opinion Letter 82-49A , 09/02/1982

References: 401,

References: 401(b),

References: 403,

References: 403(a),

References: 3,

References: 3(21),

References: 3(21)(a),

References: 3(14),

References: 3(14)(b),

References: 3(38)

Howard Pianko, Esq.

Baer Marks & Upham

299 Park Avenue

New York, N.Y. 10171

Dear Mr. Pianko:

This is in reply to your request on behalf of the Futures Industry Association, Inc. (FIA) for a number of advisory opinions and class exemptions under the Employee Retirement Income Security Act of 1974 (the Act) relating to employee benefit plan investments in futures contracts. You filed an initial application with the Department for an advisory opinion on October 17, 1980. By letter dated February 17, 1981, the Department informally notified you of its tentative assessment of the issues raised in your application. At the same time, the Department indicated that it would take no final action with regard to your application until you had submitted certain additional materials. You submitted these materials (which included requests for additional advisory opinions and for class exemptive relief) on May 12, 1981 and June 5, 1981. Further information was provided by you at a meeting with representatives of the Department on October 6, 1981. Pursuant to that meeting, you filed on November 10, 1981, a finalized application for advisory opinions and class exemptive relief.

As discussed at the October 6th meeting, the purpose of this letter is to reply to your advisory opinion requests. Your requests for class exemptive relief will be addressed separately.

A. Background.

You have provided the Department with extensive information regarding trading in futures contracts, which is summarized below.

It appears that a futures contract is basically an executory bilateral agreement pursuant to which a party agrees to buy or sell a specific quantity of a commodity for a stated price at a set time in the future. Pursuant to section 6 of the Commodity Exchange Act (CEA) (7 U.S.C. §6), dealings in futures contracts may lawfully occur only in a "contract market" designated by the Commodity Futures Trading Commission (CFTC) and governed by the CFTC's regulations. You represent that a contract market is the equivalent of a national security exchange. A person buying a commodity futures contract is said to be taking the "long" position and is obligated to take delivery of a specific amount of the underlying commodity at the date indicated in the contract. A person selling a commodity futures contract is said to be taking a "short" position and is obligated to deliver a specific quantity of a given commodity on the date indicated in the contract. Trading in futures contracts does not necessarily involve the purchase or sale of the underlying commodity. Rather, futures contract trading concerns the buying and selling of the rights and obligations attendant upon making or taking delivery of a commodity at some date in the future. Since each futures contract represents such executory agreements to buy and sell, the number of short and long positions is equal at all times.

Futures contracts are bought and sold by open, competitive outcry on the floor of a contract market. A person wishing to trade in futures contracts will place an order with a futures commission merchant (FCM). The FCM will act as an agent for the customer and transmit the customer's order to a broker on the floor. A floor broker with a long order will shout the amount and price of his order, and a floor broker with a short order will do the same. Where the quantities and prices agree, a trade is executed. The respective long and short orders are recorded and transmitted to the clearing organization for the contract market. This clearing process severs the link between the two floor brokers, as long positions are matched with short positions of corresponding amount, price and maturity date without regard to the identities of the original traders. This is made possible because futures contracts in each commodity are in standard form and therefore fungible, varying only in amount, price and maturity date. The clearing firms for the buying and selling floor brokers accept the contracts and assume the responsibility for performance. When the contracts are submitted by the clearing firms to the clearing organization and accepted by the latter, the clearing firms are relieved of liability to one another. As a result of the clearance process, the parties involved in the transaction need only be concerned with the parties with whom they are in direct contractual relation. Thus, the buyer and seller look to their respective FCMs, the FCM looks to his client and to the clearing organization, and the clearing organization looks to both FCMs.

When a customer engages in a futures transaction through an FCM, the customer is required to pay to the FCM an amount equal to a small percentage of the contract amount. This payment is called initial margin, and the minimum amount of such margin is set by rules established by each contract market based on the volatility of the commodity underlying the futures contract. You state that, typically, the minimum margin is 3 to 10 percent of the contract amount. The FCM may require a higher amount of initial margin based on the creditworthiness of each customer, or other relevant characteristics. You represent that the nature of margin in futures transactions is different from that of margin in securities transactions in that futures contract margin does not involve the borrowing of funds by a customer to finance the transaction. Rather, you state that initial margin is in the nature of a performance bond or a good faith deposit on the contract made by the parties. Subsequent payments, called maintenance margin, to or from the FCM may be required as the price of the underlying commodity fluctuates, making the long and short positions in the futures contract more or less valuable. Thus, where a trader has taken a long position (that is, made a contract to buy a specified amount of a certain commodity at a future date for a set price) and the price of the underlying commodity has risen, that position will have

increased in value and the customer will receive from the FCM a maintenance margin payment (or a credit to the customer's account) reflecting that increase in value. Where a trader has taken the corresponding short position (that is, agreed to sell a specific quantity of a certain commodity at a future date for a set price) in the same commodity, his position would be less valuable since he would be obligated to sell his commodity for less than the current market price. As a result, the short trader would be required to make a maintenance margin payment to the FCM.

You note that in a large measure, FCMs are conduits for original and maintenance margin from customers since they in turn must make original and maintenance margin payments either to a clearing organization (if they are a clearing member) or to another FCM which is a clearing member (if they are not). Just as an FCM holds initial margin from customers to insure performance of the customers' obligations, the clearing organization holds original margin from clearing members to insure performance of their obligations.

It appears that there are two ways in which a futures contract position may be terminated. A customer may elect to make or take delivery of the underlying commodity according to the terms of the futures contract. Normally, however, the customer, through an FCM, will take an offsetting futures contract position. In other words, if the customer had previously gone long for a specified quantity of a certain commodity for a future maturity date, he would close out that position by going short for an equal amount of the same commodity on the same future date. Any variation in price between the long and short positions will already have been reflected in the customer's margin account through maintenance margin payments.

You indicate that, since 1979, plans have increasingly engaged in futures contract trading, especially with regard to financial futures (Treasury bonds and notes, GNMA certificates, commercial paper, etc.) Such plans have primarily utilized futures contract trading as a hedging tool in order to minimize risks associated with fluctuating interest rates.

B. Advisory Opinion Requests.

You represent that, as a result of increasing plan investment in this area, a number of questions have arisen with regard to the application of the Act to futures contract trading. You have requested the Department's opinion with regard to eight such issues:

(1) whether initial and maintenance margin are plan assets for the purposes of Part 4 of Subtitle B of Title I of the Act;

(2) whether initial and maintenance margin must be held in trust in accordance with section 403(a) of the Act;

(3) whether regulation 29 CFR §2510.3-21(c)(1) will apply in determining whether an FCM has rendered investment advice to a plan;

(4) whether the holding of margin by itself causes an FCM to be a fiduciary;

(5) whether an FCM executing futures transactions pursuant to instructions from an independent plan fiduciary and under conditions similar to those contained in regulation 29 CFR §2510.3-21(d) will be deemed to be a fiduciary;

(6) whether a clearing organization, or an FCM clearing a transaction for another FCM, will be a party in interest with respect to a plan engaged in a futures transaction;

(7) whether an FCM will be a fiduciary if, pursuant to applicable law and the customer agreement, such FCM liquidates futures contracts in the plan's account and sells government securities or other securities posted as margin to satisfy losses suffered by the account; and

(8) whether an FCM registered both under the Commodity Exchange Act and under the Investment Advisers Act of 1940 will be an investment manager within the meaning of section 3(38) of the Act when such FCM renders advice solely with regard to futures contracts.

Except as necessitated in response to these eight requests, the Department is offering no opinion with regard to the status of specific futures transactions under Part 4, Title I of the Act. Specifically, we note that Section 404(a)(1)(B) of the Act requires that a fiduciary discharge his or her duties with respect to a plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Accordingly, the fiduciaries of a plan must act "prudently" when deciding whether to engage in futures contract trading as part of a plan's overall investment strategy. Similarly, the general standards of fiduciary conduct would apply to futures transactions effected by an FCM who, under the circumstances, is a fiduciary with respect to a plan. Further, nothing in this letter changes the fact that certain futures transactions between a plan and an FCM who is a party in interest (including a fiduciary) will be subject to the prohibitions of section 406 of the Act.

1. Margin and Plan Assets. You have represented that both initial and maintenance margin are in the nature of performance bonds or good faith deposits and indicate a customer's commitment to abide by his agreement with an FCM regarding his futures account. You state that, because of this, margin payments should not be classified as plan assets.

When an authorized FCM effects a futures transaction on behalf of any investor, including an employee benefit plan, the investor's rights and obligations with respect to any property held at any time in a margin account are fixed and determined in accordance with the provisions of the CEA, the rules and regulations of the CFTC and the rules of the applicable contract markets which are generally incorporated in the investor's agreement with its FCM. Both the buyer and seller of a futures contract, their respective FCMs, and those clearing firms and clearing organizations necessary for the proper execution and clearance of a futures transaction assume obligations with respect to the other parties involved in the transaction which are designed to preserve the integrity of the trading process.

In this regard, it appears that margin fulfills a function central to the futures marketplace. Under section 6d(2) of the CEA, an FCM is required to "treat and deal with all money, securities and property received by such [FCM] to margin ... the trades or contracts of any customer ... as belonging to such customer ... That in accordance with such terms and conditions as the Commission may prescribe by rule, regulation, or order, such money, securities, and property of the customers of such [FCM] may be commingled ... with any other money, securities and property received by such [FCM] and required by the Commission to be separately accounted for and treated and dealt with as belonging to the customers of such [FCM] ..." Thus, you represent that all customers' assets received as margin by the FCM may be held in a single commingled account segregated from the funds of the FCM. It appears that Congress recognized that margin in connection with a futures transaction does not exist solely for the benefit of a customer, but is essential for the protection of all the investors and all the parties (FCMs, clearing firms and clearing organizations) that participate in such regulated transactions.

So long as a plan-investor has not terminated its futures contract position by means of an offsetting transaction or by taking delivery of the underlying commodity, the plan has no right to any assets in the margin account except for those which are available for withdrawal by reason of favorable price fluctuation credits to the plan.

In view of the above, it is the opinion of the Department that the assets held by the FCM to fund a plan's margin account (consisting of initial and maintenance margin in connection with a future transaction) are not plan assets for the purposes of Part 4 of Subtitle B of Title I of the Act. When a plan engages in a futures transaction, its assets are the rights embodied in the futures contract as evidenced by a written confirmation and outlined in its agreement with its FCM, including such rights as the plan may have to make withdrawals from the account. [1]

2. Trust Requirement. Section 403(a) of the Act provides that all plan assets must be held in trust. You have asked the Department's opinion as to the extent to which this trust requirement applies to the holding of margin. As noted above, it is the Department's opinion that the relevant plan asset is the plan's right to payment from the margin account under certain circumstances as embodied in the futures contract and the agreement with the FCM rather than the assets used by the FCM to fund the account. Therefore, the trust requirement in section 403(a) generally would be satisfied, with respect to the holding of margin in connection with a futures transaction involving a plan, if the FCM maintains the account, including any agreements, confirmations, etc., relating to the account, in the name of the plan's trustees, as trustees of the plan. See 29 CFR §2550.403a-1 (47 FR 21241, 21247, May 18, 1982).

3. Investment Advice. Section 3(21)(A)(ii) of the Act states that a person is a fiduciary with respect to a plan to the extent that "he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so." Regulation 29 CFR 172510.3-21(c) states the circumstances under which a person will be deemed to be rendering investment advice for the purposes of section 3(21)(A)(ii) of the Act. You have requested our opinion as to extent to which this regulation applies to an FCM.

Paragraph 2510.3-21(c)(1)(i) of the regulation indicates that the standards contained in the regulation apply to an individual who "renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property." Paragraph 2510.3-21(c)(1)(ii) of the regulation outlines the degree of control, authority or influence such a person must possess to be deemed to be rendering investment advice.

Because futures contracts (as well as the underlying commodities) are "property", and because, according to your representations, part of an FCM's function may be to recommend investment action with regard to such property, a determination of whether an FCM is rendering investment advice within the meaning of section 3(21)(A)(ii) of the Act will be made in accordance with the standards set forth in regulation 29 CFR §2510.3-21(c)(1). Of course, the issue of whether an FCM's activities rise to the level of those outlined in paragraph 2510.3-21(c)(1) of the regulation is a factual determination to be made on the basis of the relevant facts and circumstances of each case.

4. Holding Margin. In addition to questions regarding the status of margin payments as plan assets to be held in trust, you have asked whether an FCM will be deemed to be a fiduciary merely because the FCM holds initial or maintenance margin. Specifically, you note that an FCM holding margin could be considered a custodian, and section 3(14)(A) of the Act includes as a party in interest "any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian) ..."

A person's status as a plan fiduciary is determined pursuant to section 3(21)(A) of the Act. Section 3(21)(A) provides in pertinent part that a person is a fiduciary to the extent he exercises any discretionary control or authority with respect to the management of the plan, or the management or disposition of plan assets. Since the assets held by the FCM to fund the initial and maintenance margin are not plan assets, as noted above, an FCM would not be a plan fiduciary under section 3(21)(A) solely by reason of holding margin.

5. FCM Acting Pursuant to Instructions of an Independent Fiduciary. You have indicated that, in many cases, an FCM will execute transactions in the ordinary course of its business for the purchase or sale of commodity futures contracts on behalf of a plan pursuant to the instructions of a plan fiduciary who is independent of such FCM. You state that the instructions from such independent plan fiduciary to the FCM typically specify: (1) the commodity futures contract to be purchased or sold (including the delivery month stated in such contract); (2) the price range within which such futures contract is to be purchased or sold; (3) a time span during which such contract may be bought or sold (but never exceeding one business day); and (4) the minimum or maximum quantity of such futures contract which may be bought or sold within the indicated price range. You have requested an advisory opinion that, under such circumstances, an FCM would not be a fiduciary with respect to a plan within the meaning of section 3(21)(A) of the Act.

You have further indicated that the conditions applicable to an FCM acting pursuant to the instructions of an independent plan fiduciary are similar, in many ways, to the provisions of regulation 29 CFR §2510.3-21(d). Regulation 29 CFR §2510.3-21(d) outlines the circumstances under which a registered broker or dealer, a reporting dealer, or a bank will not be deemed to be a plan fiduciary when executing a sale or purchase of securities on behalf of a plan pursuant to the instructions of an independent plan fiduciary. This regulation was designed to deal with business practices prevalent in the securities industry, and does not, therefore, apply directly to the execution of a commodity futures transaction. However, you have argued that the futures transaction described above is sufficiently similar to the securities transaction described in 29 CFR §2510.3-21(d) to merit the same treatment.

Section 3(21)(A)ni) of the Act states that a person will be a fiduciary with respect to a plan to the extent such person "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." Under the conditions described in your submission and discussed above, it would appear that the FCM acts as an agent for the independent plan fiduciary. It is the independent plan fiduciary who determines the fundamental constraints, noted above, within which an investment of plan assets is made in a particular commodity futures contract. Under such conditions, therefore, it does not appear that the FCM would possess the authority, control or responsibility which would make him a fiduciary within the meaning of section 3(21)(A)(i) of the Act. [2]

6. Clearing Organizations. As noted earlier, you indicate that once a futures contract is established, the respective long and short positions are cleared through a clearing organization. This clearing process severs the relationship between the original traders and matches buy and sell orders without regard to the identity of the underlying customer. Where an FCM is not a member of a clearing organization, he must engage another FCM who is a clearing member to clear contracts through the clearing organization.

You have asked whether, by providing this clearing service, the clearing organization or the third-party clearing FCM will be a party in interest with respect to a plan by reason of section 3(14)(B) of the Act. Section 3(14)(B) states that a party in interest with respect to a plan includes "a person providing services to such plan." It appears that the services provided by the clearing organization or the third party clearing FCM are an integral part of the mechanics of the trading process common to all contract markets. A plan investor would expect its FCM, pursuant to its contractual agreement, to procure all clearance and other services incidental to the

effecting or executing of a futures transaction. Those who provide these clearance services act in a mechanical fashion without regard to the identity of the investors. Accordingly, it is the view of the Department that neither the clearing organization nor the third party clearing FCM provides services to the plan, and neither will be deemed to be a party in interest with respect to the plan solely by reason of providing clearing services for the plan's FCM.

7. Liquidation of Plan Futures Accounts. You have noted that one way to close out a futures account is for a customer to take an offsetting position. Ordinarily, it appears that it is the customer itself who initiates such action. However, you represent that, pursuant to relevant contract market regulations, the FCM may sometimes close out a customer's account without the customer's prior order. You state that the majority of such instances occur when a customer has failed to meet a maintenance margin call. You also state that the FCM's ability to close out an account may also be governed by the terms of the agreement negotiated between the FCM and the customer. You further represent that any outstanding losses suffered on a terminated futures contract will be made up out of the margin posted by the customer. When the margin is in the form of cash, any balance after paying off the losses is returned to the customer. When a customer has posted government securities or other securities as margin, you indicate that the FCM will sell an amount of such securities sufficient to offset losses on the account and return the remainder to the customer.

You have requested an advisory opinion that, when an FCM liquidates the futures contracts in the account of a plan customer and sells securities posted as margin by the plan to meet losses experienced by the plan's account, such FCM is not a fiduciary within the meaning of section 3(21)(A)(i) of the Act as long as the FCM is acting in accordance with applicable law and the agreement negotiated with the plan customer. Section 3(21)(A)(i) of the Act states that a person will be a plan fiduciary to the extent such person exercises discretionary authority or control over the assets of the plan. As noted above, a plan's assets in a futures transaction are those rights embodied in the futures contract and granted pursuant to applicable law and the plan's agreement with the FCM. However, it appears that such laws and agreements place certain obligations on the plan and give the FCM certain rights vis-a-vis the plan customer. Thus, for example, whereas the FCM is obligated to act as the plan's agent pursuant to the customer agreement, the plan customer is required, by the agreement and by applicable contract market rules, to make maintenance margin payments in a timely manner when called upon. Failure to meet a maintenance margin call will result in the FCM's closing out the plan's account and resorting to the initial margin (which is in the nature of a performance bond, as noted above) to make up losses suffered by the plan's account. Any remaining initial margin is then returned to the plan customer. It does not appear that such legally granted or contractual rights necessarily amount to the type of discretionary authority or control over plan assets contemplated in section 3(21)(A)(i) of the Act. As a result, it is the Department's opinion that an FCM acting in accordance with applicable law and pursuant to the agreement negotiated with the plan customer would not be a plan fiduciary within the meaning of section 3(21)(A)(i) solely by reason of liquidating the futures contracts in a plan's account and selling any securities posted as margin in order to pay off losses suffered by such account since the FCM would not be exercising any discretionary authority or control with regard to plan assets.

8. Applicability of Section 3(38) of the Act. Section 3(38) of the Act defines the term "investment manager" to mean any fiduciary of a plan who has the power to manage, acquire or dispose of any plan assets, and who is either a bank, an insurance company, or investment adviser registed under the Investments Adviser Act of 1940. You have requested an opinion that an FCM or other person registered as a commodity trading advisor (CTA) under the CEA who is also a registered investment adviser under the Investment Advisers Act of 1940 may be an investment manager within the meaning of section 3(38) of the Act even when such FCM or other person renders advice solely with respect to futures contract transactions.

The Department has taken the position that, except for banks and insurance companies, only persons registered under the Investment Advisers Act of 1940 may serve as investment managers as defined in section 3(38) of the Act. See ERISA Interpretative Bulletin 75-5 (29 CFR §2509.75-5), questions FR-6 and FR-7. Where an FCM or other person is registered under both the CEA and the Investment Advisers Act of 1940, such FCM or other person may serve as an investment manager under section 3(38) of the Act provided the other conditions of that statutory provision are met.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (41 FR 36281, August 27, 1976). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions. As noted above, having issued this opinion, the Department will continue consideration of your class exemption requests.

Sincerely,

Jeffrey N. Clayton

Administrator

Pension and Welfare Benefits Programs

1

With regard to such withdrawals, you indicate that the FCM and its customer may choose among several different methods of settling the margin account when maintenance margin has accrued to the customer's benefit. In situations where a plan is such a customer, the Department expresses no opinion as to the circumstances, if any, under which the failure by such plan to exercise its rights with regard to the margin account would violate the prudence requirements of section 404(a) or constitute a transaction prohibited under section 406 of the Act.

2

We note that, even when an FCM is not a plan fiduciary within the meaning of section 3(21)(A)(i), such FCM may still be deemed to be a fiduciary pursuant to section 3(21)(A)(ii) of the Act and regulation 29 CFR §2510.3-21(c) by virtue of rendering investment advice to the plan. See Opinion #3, supra. Such FCM may also be a party in interest with respect to a plan as defined in section 3(14)(B) of the Act.
Further, you should be aware that, when an FCM is deemed to be a fiduciary with respect to a plan, such FCM is a fiduciary only regarding those plan assets with respect to which such FCM has the discretionary authority, control or responsibility which cause him to be a fiduciary.

Document Title: ERISA Opinion Letter No. 82-49A
Checkpoint Source: ERISA Opinion Letters

© Copyright 2005 RIA. All rights reserved.

U.S. Department of Labor

Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210

AUG 16 1985

Ms. Mary L. Shapiro
Vice President and Counsel
Futures Industry Association, Inc.
Suite 1040
1825 I Street, N.W.
Washington, D.C. 20006

Re: Futures Industry Association, Inc.
Exemption Application No. D-3006

Dear Ms. Shapiro:

This is in reply to the request of the Futures Industry Association, Inc. (FIA) for consideration under the Employee Retirement Income Security Act of 1974 (the Act) of a number of classes of transactions relating to employee benefit plan investments in futures contracts. On November 10, 1981, the FIA filed with the Department a final application for a number of advisory opinions and class exemptions regarding plan investments in futures contracts. On September 21, 1982, the Department responded to your advisory opinion requests by issuing Advisory Opinion 82-49A. By letter dated December 20, 1982, the FIA renewed its requests for class exemptive relief. Additional information regarding these requests was provided at a meeting with representatives of the Department on August 29, 1984. The FIA made a further submission in support of its application by letter dated October 22, 1984.

A. Background.

In Opinion 82-49A, the Department summarized the information and representations submitted in support of the FIA application. That summary dealt with the nature of the futures markets and the roles of the various participants in futures trading. Because the information you have submitted since issuance of Opinion 82-49A is consistent with and supplementary to the summary in Opinion 82-49A, we adopt that summary for the purposes of this letter.

The original FIA application requested five class exemptions. You indicate that, in light of Opinion 82-49A, you are withdrawing the first two class exemption requests. You represent that the remaining three requests all relate to the mechanics of futures trading once the decision has been made to invest plan monies in futures contracts. For purposes of convenience and consistency, we will refer to these requests as Prohibited Transaction Class Exemption (PTCE) Request #3, 4, and 5, following their original enumeration in the FIA application. These requests are treated individually below.

B. PTCE Request #3.

The FIA's PTCE Request #3, as amended in its supplementary submission, requests relief in two areas. First, the application requests general exemptive relief for the provision of a variety of non-fiduciary services by a futures commission merchant (FCM) to a plan in relation to futures transactions. Second, the FIA requests specific relief for the holding by an FCM of so-called "excess margin" in a plan's margin account. These two parts of PTCE Request #3 are discussed separately below.

1. Non-Fiduciary Services. The FIA has requested relief from the prohibitions of section 406(a) of the Act and section 4975(c)(1)(A) through (D) of the Internal Revenue Code of 1954 (the Code) for transactions involved in the effecting and executing of futures contract transactions on behalf of a plan by an FCM who is a party in interest (other than a fiduciary) with respect to a plan. The FIA has requested similar relief for the rendering of any advice to a plan by an FCM who is a party in interest with respect to such plan under circumstances where such advice does not render the FCM a fiduciary with respect to the plan. The FIA notes that, in many instances, a plan fiduciary other than the FCM makes the decision on a transaction by transaction basis to invest plan assets in futures contracts. In such cases, the FCM acts as an agent of the plan fiduciary and performs functions of a ministerial nature. The FIA indicates that such ministerial services include effecting or executing the futures transaction; clearing the trade through the clearing process; receipt, payment and holding of margin; and, if the position is not closed out by an offsetting transaction, making or taking delivery of the underlying commodity. The FIA maintains that these and other transactions incidental to effecting and executing futures transactions involve no discretion on the part of the FCM.

In support of this exemption request, the FIA maintains that the requested relief is similar to that granted to the securities industry in Prohibited Transaction Exemption (PTE) 75-1, Part 1 (40 FR 50845, 50846, October 31, 1975). PTE 75-1, Part 1 provides relief from the prohibitions of section 406 of the Act for the effecting and executing of securities transactions for a plan by a securities broker-dealer who is a party in interest with respect to the plan (other than a fiduciary) and who acts as an agent for the plan with regard to the transaction. The FIA represents that FCMs perform agency functions similar to those performed by securities broker-dealers, and that the requested relief is necessary to allow plans to make full use of all available investment opportunities. The FIA argues that, although relief may be available

for the provision of non-fiduciary services under section 408(b)(2) of the Act, only a class exemption would provide a sufficient amount of certainty to plans seeking to invest in futures.

Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978, the authority of the Secretary of the Treasury to issue exemptions and rulings under section 4975 of the Code, with certain exceptions not here relevant, has been transferred to the Secretary of Labor. Accordingly, all references to specific sections of the Act shall also refer to the corresponding sections of the Code.

In the absence of an exemption, section 406(a) of the Act would prohibit the provision of non-fiduciary services to a plan by an FCM who is a party in interest with respect to that plan. Specifically, such transactions would be viewed as the prohibited furnishing of services between a plan and a party in interest under section 406(a)(1)(C) of the Act. However, section 408(b)(2) of the Act provides a statutory exemption from the prohibitions of section 406(a) of the Act for contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

On June 24, 1977, the Department issued regulation 29 CFR §2550.408b-2 (42 FR 32390) defining the scope of, and certain terms used in, the statutory exemption provided by section 408(b)(2) of the Act. 1/ Specifically, the Department notes that 29 CFR §2550.408b-2(b) defines the term "necessary service" as used in section 408(b)(2) of the Act as any service that is "appropriate and helpful to the plan obtaining the service in carrying out the purposes for which the plan is established or maintained." 2/

Upon review of PTCE Request #3, it is the Department's opinion that the provision of non-fiduciary services described by the FIA are exempt from the prohibitions of section 406(a)

1/ It should be noted that regulation 29 CFR §2550.408b-2 was issued almost two years after publication of PTE 75-1. As such, the guidance provided in the regulation was unavailable to plans and to the securities industry in 1975.

2/ Because your application requests class exemptive relief, you have not presented the Department with a specific factual situation to be addressed. However, the determination of whether a transaction involves a "necessary service" within the meaning of section 408(b)(2) and regulation 29 CFR §2550.408b-2(b) presents inherently factual questions as to which the Department will not ordinarily issue advisory opinions. See ERISA Procedure 76-1, §5.01 (41 FR 36281, 36282, August 27, 1976).

of the Act provided the conditions of section 408(b)(2) and regulation 29 CFR §2550.408b-2 are met. As a result, the Department does not believe that further exemptive relief for these transactions under section 408(a) of the Act is necessary.

2. Excess Margin. As explained in Opinion 82-49A, in order to establish a position in a futures market, a customer is required to pay to an FCM an amount of initial margin specified by the contract market in which the customer is trading. This initial margin payment is equal to a small percentage of the contract amount, and is in the nature of a performance bond or good faith deposit indicating a customer's commitment to abide by his agreement with an FCM regarding his futures account. As a result of the function fulfilled by margin payments in futures markets, adverse market movements will necessitate additional payments by a customer into the margin account. Similarly, favorable market movements will result in payments to a customer's account.

Because of such payments, the amount in a customer's margin account may at various times exceed the amount required to maintain the customer's position in the futures market. Such "excess" margin may also result if the contract market lowers the initial margin requirement for the futures contract in which the customer is trading. An additional cause of "excess" margin occurs when a customer posts government securities as margin and those securities increase in value. Ordinarily, the customer's right to withdraw such excess amounts from the margin account is governed by the futures contract as evidenced by a written confirmation and outlined in the agreement with the customer's FCM.

The Department addressed the status of such withdrawal rights when a plan is the customer in footnote 1 of Opinion 82-49A:

> With regard to such withdrawals, you indicate that the FCM and its customer may choose among several different methods of settling the margin account when maintenance margin has accrued to the customer's benefit. In situations where a plan is such a customer, the Department expresses no opinion as to the circumstances, if any, under which the failure by such plan to exercise its rights with regard to the margin account would violate the prudence requirements of section 404(a) or constitute a transaction prohibited under section 406 of the Act.

You indicated that this statement has been the source of confusion within the futures industry. You represent that plans are unsure whether the Department will require a specific method and frequency for withdrawals, such as daily wire transfers of excess amounts. In order to avoid such uncertainty, you have requested exemptive relief for the holding of "excess" margin amounts in the margin account.

It was the Department's intention in footnote 1 of Opinion 82-49A to call attention to the fact that plan fiduciaries must act prudently with regard to the plan's rights under a future contract. The information before the Department indicates that there may be circumstances consistent with the requirements of Title I of the Act in which limited amounts of excess margin may be left in the margin account. For example, in a particularly volatile market, such excess margin may provide a cushion for a customer and thereby allow the customer to avoid the necessity of making repeated maintenance margin payments. It was not, therefore, the Department's intention to prescribe a specific withdrawal method applicable to excess margin amounts. It is the fiduciary's responsibility to make reasonable arrangements for such withdrawals in light of all relevant facts and circumstances. However, the failure of a plan fiduciary to make such reasonable arrangements, or to exercise withdrawal rights in a timely manner, or any arrangement, agreement or understanding, whether express or implied, between a fiduciary and an FCM to refrain from exercising such rights may result in prohibited transaction under section 406 of the Act. 3/

C. PTCE Request #4.

You have also requested class exemptive relief from the prohibitions of section 406(b) of the Act for transactions similar to those subject to PTCE Request #3 when the FCM is also a fiduciary with respect to the plan. PTCE Request #4 is patterned after PTE 79-1 (44 FR 5963, January 30, 1979)

3/ We note that in PTE 76-1 (41 FR 12740, 12741-42, March 26, 1976), the Department granted class exemptive relief for situations in which there were extensions of time for employers to make contributions to multiemployers plans. The Department at that time noted that a prohibited transaction would occur if the plan failed to make reasonable efforts to collect the delinquent contributions. The Department nevertheless granted exemptive relief in consideration of the large size of multiemployer plans, the complexity of such collection efforts, and the fact that such extensions of time were often necessitated due to factors beyond the control of the parties involved. These considerations distinguish PTE 76-1 from the present situation since FCMs and plans may negotiate acceptable, and often self-executing withdrawal arrangements.

which provides relief for agency transactions by securities broker-dealers who are fiduciaries with respect to their plan clients. 4/ The FIA application indicates that, in the absence of transaction-by-transaction approval by an independent fiduciary, the performance of these services by a fiduciary FCM for additional consideration would involve transactions prohibited by section 406(b) of the Act which are beyond the scope of the relief provided in section 408(b)(2) of the Act. The application contains a proposed exemption including a variety of authorization and disclosure provisions which, you maintain, provide sufficient safeguards to plan customers.

Section 406(b) of the Act prohibits a plan fiduciary from engaging in acts involving self-dealing or conflicts of interest. Section 406(b)(1) provides that a fiduciary with respect to a plan shall not deal with the assets of the plan in his own interest or for his own account. Section 406(b)(2) prohibits a fiduciary from acting on behalf of a party (or representing a party) whose interests are adverse to those of the plan and its participants and beneficiaries in a transaction involving the plan. Pursuant to section 406(b)(3), a fiduciary may not receive any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan.

With respect to the prohibitions in section 406(b), regulation 29 CFR §2550.408b-2(a) indicates that section 408(b)(2) of ERISA does not contain an exemption for an act described in section 406(b) of ERISA even if such act occurs in connection with a provision of services which is exempt under section 408(b)(2). As explained in regulation 29 CFR §2550.408b-2(e)(1), if a fiduciary uses the authority, control, or responsibility which makes it a fiduciary to cause the plan to enter into a transaction involving the provision of services when such fiduciary has an interest in the transaction which may affect the exercise of its best judgment as a fiduciary, a transaction described in section 406(b) would occur, and that transaction would be deemed to be a separate transaction from the transaction involving the provision of services and would not be exempted by section 408(b)(2). Conversely, the regulation explains that a fiduciary does not engage in an act described in section 406(b) if the fiduciary does not use any of the authority, control or responsibility which makes such person

---

4/ Similar relief is provided for life insurance company pooled separate accounts by PTE 84-46 (49 FR 22157, May 25, 1984). The Department has proposed various amendments to both PTE 79-1 and PTE 84-46. See 50 FR 3427 (January 24, 1985).

a fiduciary to cause a plan to pay additional fees for a service furnished by such fiduciary or to pay a fee for a service furnished by a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary. This may occur, for example, when one fiduciary is retained on behalf of a plan by a second fiduciary to provide a service for an additional fee. However, because the authority, control or responsibility which makes a person a fiduciary may be exercised "in effect" as well as in form, mere approval of the transaction by a second fiduciary does not mean that the first fiduciary has not used any of the authority, control or responsibility which makes such person a fiduciary to cause the plan to pay the first fiduciary an additional fee for a service.

Upon review of your application, the Department believes that the record under consideration contains insufficient information upon which to base a proposed exemption at this time. At our meeting with representatives of the FIA on August 29, 1984, we asked if you could submit any information indicating the degree to which plans are involved in futures transactions. It appeared at that time that there is no industry-wide data of this type, but you agreed to make inquiries of FIA members in order to collect this information. In your letter of October 22, 1984, you indicated that the sample group of FIA members questioned were unable to provide the requested information. In lieu of such information, you supplied the Department with copies of a number of trade publication articles noting plan participation in futures trading. The Department has received no independent submissions of information from individual FCMs to augment this record. Because of this, the record before the Department does not indicate the degree to which plans participate in futures trading. Similarly, the record contains no information on the extent to which FCMs are fiduciaries with respect to plan accounts, or whether such FCMs attain fiduciary status either by virtue of investment management authority over plan assets within the meaning of section 3(21)(A)(i) of the Act or by reason of rendering investment advice to a plan for a fee within the meaning of section 3(21)(A)(ii). Further, although you have provided the Department with detailed information about the general mechanics of futures trading, the Department has no concrete information regarding the way in which discretionary accounts are administered.

In the absence of such information, the Department is unable to determine if the requested relief is needed on a class basis. If relatively few plans place assets in discretionary accounts managed by FCMs, it may be more appropriate to address specific problems through the use of individual exemptions.

Further, in light of the present state of the record, the Department has no basis on which to make the findings required under section 408(a) for the issuance of an exemption.

Specifically, it does not appear that it would be administratively feasible to propose class relief in the absence of information indicating the extent to which any discretionary accounts are managed in a uniform manner and therefore are susceptible to class treatment. Similarly, information regarding the nature and degree of an FCM's fiduciary authority with regard to plan accounts may affect a determination of whether it would be in the interest of plans and plan participants and beneficiaries to exempt transactions accomplished by fiduciary FCMs for such accounts. In addition, the Department is unable to determine whether the conditions suggested in the application would provide adequate protection for plan participants and beneficiaries. For example, condition (e) in the suggested class exemption included in the application would require reporting of certain transactions and costs at three month intervals by the FCM to an independent plan fiduciary. Given the volatile nature of futures markets, the Department cannot at this time ascertain whether the suggested provision would provide the independent fiduciary with any real basis for overseeing and judging the FCM's performance, thereby guarding against abuses by the FCM. Substantial additional information regarding the need for class relief and the nature of the transactions subject to such relief will be necessary before the Department is able to address the substance of your application with regard to FCMs who are also fiduciaries with respect to plans. As a result, the Department has tentatively decided not to propose this portion of your requested exemption at this time. ERISA Procedure 75-1, 40 FR 18471 (April 28, 1975), provides that an applicant is entitled to a conference in Washington, D.C., in the event the Department contemplates not proposing the requested exemption. If you desire a conference, please contact William J. Flanagan, Office of the Solicitor, U.S. Department of Labor, (202)523-9592, or notify the Department in writing at the following address: Office of Regulations and Interpretations, Office of Pension and Welfare Benefit Programs, Room C-4526, 200 Constitution Ave., N.W., Washington, D.C., 20210. A request for a conference should be received within ninety days of the date of this letter.

At the conference, you should be prepared to discuss any matter which you believe will support a decision to publish the requested exempton in the Federal Register for comment. Any additional information or arguments that you want considered with regard to your application should be submitted in writing to the address above no later than five days before the scheduled date and time of the conference.

In the event a request for a conference, or additional information in support of your exemption request is not received within ninety days of the date of this letter, you will be notified that a final decision has been made not to propose the requested exemption and that this portion of your application file has been closed.

D. PTCE Request #5.

The FIA's final exemption request is for relief from the restrictions of section 406 of the Act for all futures contract transactions between a plan and a party in interest, including an FCM, if such transactions result from: (1) trading by open outcry on the floor of a contract market when the floor brokers involved do not know that their respective principals are a plan and a party in interest with respect to such plan; and (2) allocations by a clearing organization of notices of intent to deliver pursuant to a futures contract. As noted in more detail in the application and in Opinion 82-49A, futures contracts are bought and sold by open, competitive outcry on the floor of a contract market. In the ordinary situation, the floor broker in the trading pit knows only to place a particular order; the broker does not know the identity of the customer for whom he is placing the order, nor the identity of the customer on the opposite side of the transaction. This joint lack of knowledge creates the possibility that trades will occur between a plan and a party in interest with respect to the plan, including the plan's FCM. The Commodities Futures Trading Commission and the individual contract markets regulate situations in which the same FCM is on both sides of a transaction. 5/

Once a trade is made, both orders are recorded and transmitted to a clearing organization for the contract market. The clearing process severs the link between the floor traders, and matches long and short orders of corresponding amount, price and maturity date without regard to the identities of the original traders. This is possible because futures contracts in each commodity are in standard form and therefore fungible, varying only in amount, price and maturity date. The clearing firms accept the contracts and assume the responsibility for performance. They in turn submit the contracts to the central clearing organization and, upon acceptance by the latter, the clearing firms are relieved of liability to one another. The clearing organization allocates short contracts (obligating the customer to deliver the commodity) among open long contracts (obligating the customer to accept delivery) at the date of maturity. Because all contracts are in standard form, there appears to be nothing to negotiate at this stage. It is possible that the clearing organization may match a plan with a party in interest at this point even though the plan and the

5/ See, e.g., 17 CFR §1.35 (recordkeeping requirements of all transactions involving the FCM); 17 CFR §1.52(a)(2) (requiring each commodity market to establish a program of surveilance of trading floor practices); 17 CFR §155.3(b)(2) (prohibition against FCM taking the opposite side of a transaction from his customer without the customer's consent and subject to contract market's rules approved by the CFTC).

party in interest have had no prior dealings with regard to the futures contract. This matching would require the delivery and acceptance of the commodity between the plan and the party in interest.

In both the open outcry trading and clearing process instances described above, a plan and a party in interest may be linked in a transaction without their knowledge due to circumstances beyond their control. The legislative history of the Act noted:

> In general, it is expected that a transaction will not be a prohibited transaction (under either the labor or tax provisions) if the transaction is an ordinary 'blind' purchase or sale of securities through an exchange where neither buyer nor seller (nor the agent of either) knows the identity of the other party involved. In this case, there is no reason to impose a sanction on a fiduciary (or party-in-interest) merely because, by chance, the other party turns out to be a party-in-interest (or plan).

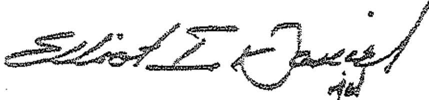
H.R. Report 93-1280, 93d Cong., 2d Sess. p. 307. It is the Department's opinion that the transactions described in the FIA's PTCE Request #5 are "blind" transactions within the meaning of the legislative history of the Act. Therefore, such transactions are not prohibited under section 406 of the Act, and the Department does not believe there is a need for any additional exemptive relief.

E. Conclusion.

In view of this letter, the Department believes that no further action is necessary with regard to PTCE requests #3 and #5. As a result, the Department is closing those portions of your exemption request. With regard to PTCE Request #4, the Department will hold the file open for an additonal ninety days pending receipt of a request for a conference or the submission of additional information, as discussed above.

Should you have any questions concerning this matter, please contact William J. Flanagan, Office of the Solicitor, Plan Benefits Security Division, (202) 523-9592.

Sincerely,



Elliot I. Daniel
Assistant Administrator
for Regulations and Interpretations