MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

August 10, 2017

**Via Electronic Filing**

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11933 (RIN 1210-AB82)
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

**Re: Managed Funds Association Comments on Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (RIN 1210-AB82)**

Dear Sir or Madam,

Managed Funds Association ("MFA")[1] welcomes the opportunity to provide comments to the Department of Labor (the "Department") with respect to its Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (the "Fiduciary Rule" and the "Exemptions," respectively) under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended. As noted in our comment letters earlier this year regarding the proposed delay of the applicability date of the Fiduciary Rule and review of the Fiduciary Rule,[2] we remain concerned that the Fiduciary Rule is having unintended and adverse effects on many sophisticated ERISA plans and sophisticated individual retirement account ("IRAs") investors that seek to invest in private investment funds and on the fund managers and service providers to those private investment funds, particularly with respect to those funds that are not deemed to hold plan assets for purposes of ERISA.

For the reasons discussed in more detail below, we believe that the Fiduciary Rule has significantly limited the ability of otherwise qualified IRA investors and certain ERISA plan investors to invest in private investment funds. We believe this limitation on investment choice is

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

[2] MFA's March 17, 2017 and April 17, 2017 comment letters, respectively, are available at: https://www.managedfunds.org/wp-content/uploads/2017/03/MFA-letter-on-DOL-proposed-delay-1.pdf and https://www.managedfunds.org/wp-content/uploads/2017/04/MFA-Letter-on-DOL-Review-of-Fiduciary-Rule-1.pdf.

inconsistent with the priorities and considerations set out in President Trump's February 3 Presidential Memorandum on Fiduciary Duty Rule.[3] Accordingly, we encourage the Department to revise the Fiduciary Rule to address these adverse impacts on investors.

Importantly, private investment funds are sold under the federal securities laws to sophisticated investors, as established under the securities laws. MFA strongly supports limiting investments in private funds to sophisticated investors with the financial wherewithal to understand and evaluate such investments. It is important to note that, for many hedge funds, the qualified purchaser standard ($5 million in investments for individuals and $25 million for entities such as pension plans) is the minimum threshold. Further, while other types of private funds may be sold to accredited investors, for the adviser to charge a performance fee, each investor must be a qualified client, defined in rule 205-3 under the Investment Advisers Act of 1940 as a person with a net worth of at least $2 million (or a minimum of $1 million managed by the adviser).

To address the concerns about the Fiduciary Rule's adverse impact on the investment choices available to sophisticated investors, we encourage the Department to consider the policy issues discussed in MFA's prior letters noted above. While the Department conducts its review of the Fiduciary Rule, we continue to encourage it to extend the January 1, 2018 applicability date of the relevant Exemptions and temporary enforcement policy until the Department makes a final determination as to whether and how it intends to revise the Fiduciary Rule and related Exemptions.[4] In this letter, we would like to supplement the policy issues and suggested amendments contained in our prior letters with a discussion of the adverse effects that the Fiduciary Rule has already had, and is likely to continue to have, with respect to the ability of qualified and sophisticated IRA investors to invest in private funds of their choosing.[5]

**The Fiduciary Rule is Limiting Investment Choices for Sophisticated IRA Investors**

Hedge funds and other private investment funds are a valuable component of the investment portfolio for many sophisticated investors, including IRAs and ERISA plans. As we have noted in our prior comment letters on the Fiduciary Rule, the properly managed addition of private investment funds to a sophisticated plan's or IRA's portfolio can provide diversification, risk management, and returns that are not correlated to traditional equity and fixed income markets. These are critical benefits that help plans generate sufficient returns to meet their obligations and help sophisticated IRA holders to accomplish their financial goals.

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[3] Available at: https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

[4] We note that, on August 9, the Department submitted to the Office of Management and Budget for review a proposed rule to extend the transition period and delay the applicability date of the Exemptions to July 19, 2019.

[5] We note that similar issues exist with respect to ERISA plans with less than the $50 million threshold set out in §2510.3-21(c)(1)(E) of the Fiduciary Rule. In discussing the Fiduciary Rule's impact on IRA investors, we encourage the Department to be mindful of the similar effects on other ERISA plans that do not meet the Independent Fiduciary Exception.

As noted in our prior letters, many private investment fund managers organize their funds in reliance on Section 3(42) of ERISA, which provides that "the assets of any entity shall not be treated as plan assets if, immediately after the most recent acquisition of any equity interest in the entity, less than 25 percent of the total value of each class of equity interest in the entity is held by benefit plan investors." Section 3(42) of ERISA and the Department's regulations clearly demonstrate that managers and service providers to such funds ("Non-Plan Asset Funds") are not fiduciaries to benefit plans and, therefore, are not subject to the provisions of section 406 of ERISA.

Further, when a private investment fund manager to either Non-Plan Asset Funds or funds that are deemed to hold plan assets (because, for example, plan investors exceed the limits in Section 3(42) of ERISA) is marketing its funds, the manager is not intending to make recommendations to potential investors, nor is the manager in a position to make a fiduciary determination regarding whether a potential investor should invest in the funds that the manager is offering. As such, imposing fiduciary obligations in connection with these "self-marketing" activities by managers or marketing by paid placement agents or others performing similar functions creates significant legal and compliance risks for managers and their agents that they generally are unwilling to assume.

Since the June 9 effective date of the Fiduciary Rule, we consistently have heard from our members and from outside law firms representing private investment funds that one of the practical consequences of the Fiduciary Rule is that most private investment funds are no longer accepting new investments from IRA or plan investors that do not meet the exception from fiduciary status in §2510.3–21(c)(1) of the Fiduciary Rule for transactions with independent fiduciaries with financial expertise (the "Independent Fiduciary Exception"). As a practical matter, many IRA investors either cannot meet the Independent Fiduciary Exception or retain fiduciaries that are unwilling to meet the Exception and, as a result, many private investment funds will no longer solicit or accept investments from otherwise qualified IRA investors, including additional investments from IRA investors who are already invested in the fund. Moreover, we also have heard from many members that they are contemplating redeeming existing IRA investors from their private investment funds if the Fiduciary Rule, as currently in effect, remains in place going forward.

Because there is no clear exception or guidance from the Department with respect to a manager marketing its own private investment funds and because transactions with IRA investors generally will not qualify for the Independent Fiduciary Exception, sophisticated IRA investors now face significant limitations on their investment choices. While these sophisticated IRA investors represent a relatively small percentage of assets under management for most private fund managers (generally between one and five percent (or less) of assets), the opportunity to invest in private investment funds is an important investment choice for many qualified IRA investors.

**The Effects of the Fiduciary Rule on Sophisticated IRA Investors is Inconsistent with the Policy Objectives in the Presidential Memorandum**

As noted above, we believe the disruption in IRA investor access to private investment funds that has resulted from the Fiduciary Rule is inconsistent with the policy set out in President Trump's February 3 Presidential Memorandum, which states:

> One of the priorities of my Administration is to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies.

The Presidential Memorandum directs the Department to review whether the Fiduciary Rule conflicts with this stated priority, and to consider:

> (i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
>
> (ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
>
> (iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

Finally, the Presidential Memorandum directs the Department to rescind or revise the Fiduciary Rule if, following its review, it determines that the Fiduciary Rule conflicts with the stated priority or if it makes an affirmative determination with respect to any of the three considerations noted above. We believe that the Fiduciary Rule's impact on sophisticated IRA investors who seek to invest in private investment funds conflicts with the priority stated in the Presidential Memorandum and with considerations (i) and (ii).

**Recommendations**

In light of the disruptive effect the Fiduciary Rule is having on sophisticated IRA investors, we strongly encourage the Department to, at a minimum, revise the Fiduciary Rule to permit fund managers and other service providers to private investment funds to market and sell their funds to sophisticated investors without being deemed ERISA fiduciaries with respect to those activities. We believe the Department could accomplish this in several ways. One possible alternative approach would be to revise the Fiduciary Rule to create a modified exception in the Rule that would permit the marketing and sale of private investment funds to investors who meet the sophisticated investor thresholds in the federal securities laws (*i.e.*, the accredited investor, qualified client, or qualified purchaser standards).[6] Another potential approach would be to amend the Fiduciary Rule to: (1) clearly exclude managers and other service providers to Non-Plan Asset Funds from the scope of the Rule (with respect to their activities in connection with Non-Plan Asset Funds), consistent with

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[6] For a more detailed discussion of the accredited investor, qualified client, and qualified purchaser standards, *see* MFA's September 24, 2015 letter to the Department on the proposed fiduciary rules, available at: https://www.managedfunds.org/wp-content/uploads/2016/04/MFA-Supplemental-Comment-Letter-on-DOL-Fiduciary-Proposal.pdf.

the clear Congressional intent in the Pension Protection Act of 2006; and (2) provide clear guidance that a manager can market the value of its services, regardless of the structure(s) through which it provides those services, including by providing pertinent information on its products, services, and strategies to IRA and plan investors without being a fiduciary with respect to such marketing activities.

MFA would like to reiterate its thanks to the Department for the opportunity to provide comments in response to the Request for Information and we would welcome the opportunity to discuss our views in greater detail. Please do not hesitate to contact Benjamin Allensworth or the undersigned at (202) 730-2600 with any questions that the Department or its staff have regarding this letter.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell

Executive Vice President & Managing
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