July 8, 2015

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

and

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

Re: Conflict of Interest Rule and Related Exemptions, ZRIN: 1210–ZA25 and RIN: 1210-AB32

The Intercontinental Exchange, Inc. ("ICE") appreciates this opportunity to comment on the Department of Labor's ("DOL") proposed rules on fiduciary duties and in particular, the Best Interest Contract ("BIC") exemption.[1] As background, ICE operates markets in North America, Europe and Asia, including derivatives central counterparties ("CCPs"), securities and derivatives exchanges including the NYSE Amex and NYSE Arca options markets. Our exchanges list futures, options on futures and options on securities which would be affected by the BIC exemption.

Executive Summary

- The DOL has expanded the proposed prohibited transaction rules that apply to ERISA plans
- The exemptions from the prohibited transaction rules do not include exchange-traded futures, exchange-traded options on futures, or exchange-traded options on securities, which all form crucial components of a well balanced portfolio.
- Failure to correct this issue will be detrimental to American savers, potentially leaving retirement portfolios subject to greater risk, especially inflation risk.
- The DOL should add exchange-traded futures, exchange-traded options on futures, and exchange-traded options on securities to the definition of "Asset" in the BIC exemption.

[1] 80 Federal Register 21960 (Apr. 20, 2015)

Intercontinental Exchange, Inc.
5660 New Northside Drive
3rd Floor
Atlanta, GA 30328

T +1 770 857 4700
F +1 770 937 0020

Background

Department of Labor proposed regulation expands the definition of the term "fiduciary," for purposes of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the prohibited transaction provisions of the Internal Revenue Code of 1986, as amended (the "Code"). At the same time, the DOL proposed new exemptions to the prohibited transaction rules that apply to ERISA plans, such as 401(k) plans, and individual retirement accounts ("IRAs"). The BIC exempted "Assets" are defined as bank deposits, CDs, shares or interests in registered investment companies (mutual funds), bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities, U.S. Treasury securities, insurance and annuity contracts (both securities and non-securities), guaranteed investment contracts, and exchange-traded equity securities. The enumerated list does not include exchange-traded futures, exchange-traded options on futures, or exchange-traded options on securities; therefore, the new prohibited transaction exemptions would not apply to options and futures transactions entered into by plans or IRAs with entities that are fiduciaries with respect to such plans or IRAs. Thus, if the regulation and exemptions are implemented as proposed, many plan and IRA accounts would no longer be able to engage in security options, futures, or options on futures transactions.

Importance of Futures, Options on Futures, and Options on Securities to Investment Portfolios

Futures and options on futures have been used by investors as an integral component of a well-diversified portfolio for many years. Futures are highly flexible financial instruments with the potential to profit from rising and falling markets and have limited correlation to traditional asset classes, enabling them to provide the opportunity for enhanced returns and lower overall volatility.[2] Diversification into unrelated assets is a tenant of modern portfolio theory and critical to protecting savings.[3] Further, investors also use listed security options in their accounts to manage the risk associated with owning stock. IRA account owners can use conservative strategies such as selling "covered" call options or buying protective put options. Selling covered calls is the most popular options strategy employed in such accounts, and it is widely considered a conservative strategy to generate increased investment income from a stock position. Buying protective puts reduce potential downside risk to investors in exchange for paying a fixed premium. These options on securities serve to help investors diversify and therefore decrease overall risk.

Therefore, exchange-traded futures, exchange-traded options on futures, and exchange-traded options on securities form critical parts of an investor's diversified, hedged portfolio and are valuable tools to reduce overall portfolio risk. These instruments are traded on regulated exchanges and subject to the oversight of applicable regulatory authorities. Eliminating the ability of advisors to use futures, options on

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[2] *See,e.g.* Managed Futures Portfolio Diversification Opportunities *http://www.iasg.com/Articles/Education/Managed-Futures-Portfolio-Diversification-Opportunities* In addition, futures and options on futures can serve as important hedge against inflation. *See, e.g.*, Bodie, Zvi 1983. Commodity Futures as a Hedge Against Inflation, The Journal of Portfolio Management 9(3) (12-17).
[3] *See* Markowitz HM. 1952a. Portfolio Selection. J. Finance 7(1):77–91 (Professor Markowitz won the 1990 Nobel Prize in part based upon his theory of portfolio selection).

futures or security options will be detrimental to retirement savings with little to no benefit to the DOL's goals of protecting retirement savings. ICE believes this cuts against the goals of the proposed rulemakings.

Conclusion

ICE recommends that the DOL amend the definition of "Asset" be revised in the final version of the BIC exemption to include exchange-traded futures, exchange-traded options on futures, and exchange-traded options on securities.

If you have any questions, please contact me at 770.916.7832.

Sincerely,

Trabue Bland

Trabue Bland
Vice President, Regulation
Intercontinental Exchange, Inc.