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

April 17, 2017

Via Electronic Submission

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule Examination (RIN 1210-AB79)
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Sir or Madam,

Re: Fiduciary Rule Examination

Managed Funds Association ("MFA")[1] welcomes the opportunity to provide comments to the Department of Labor (the "Department") with respect to its review of the final rule defining the term "fiduciary" (the "Fiduciary Rule") under the Employee Retirement Income Security Act of 1974 ("ERISA") and the related prohibited transaction exemptions. As noted in our March 17 letter regarding the proposed delay of the applicability date of the Fiduciary Rule, we remain concerned that the Fiduciary Rule may have unintended and adverse effects on the sophisticated ERISA plans and sophisticated individual retirement account ("IRAs") investors that elect 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.

As noted in the Department's proposed and final rule on delaying the applicability date of the Fiduciary Rule, on February 3, President Trump issued a Presidential Memorandum directing the

[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.

Department "to examine the Fiduciary Duty Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of this examination, you shall prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary Duty Rule."[2] The Presidential Memorandum also directs the Department to revise or rescind the Fiduciary Rule if its analysis determines the Fiduciary Rule raises specific concerns identified in the Presidential Memorandum or is inconsistent with the Administration's policy priority stated in the Memorandum.

Hedge funds and other private investment funds are a valuable component of the investment portfolio for sophisticated investors, including IRAs and other ERISA plans. As we have previously noted in our comment letters on the proposed versions of the Fiduciary Rule, the properly managed addition of such funds to a plan's or IRA's portfolio may 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. For the reasons discussed below, we believe that the Fiduciary Rule could impair the ability of plans and the IRAs of sophisticated investors to invest in private investment funds, which is inconsistent with the policy priority set out in the Presidential Memorandum. To the extent the Department determines not to rescind the Fiduciary Rule, as potentially contemplated by the Presidential Memorandum, we ask the Department to reconsider and revise the Fiduciary Rule to avoid this adverse consequence for sophisticated retirement plan investors.

We believe the question of ERISA fiduciary status, with respect to managers of private investment funds, should focus on the discretionary investment management decisions made on behalf of the fund. We believe that activities ancillary to this core investment management activity, such as reporting to investors (or potential investors) information about a fund or marketing a fund to investors (or potential investors), should not by themselves create ERISA fiduciary obligations, particularly for managers that are not ERISA fiduciaries with respect to the investment management decisions made for investment funds that have ERISA plan investors. In that regard, Congress has spoken repeatedly on when a pooled investment fund holds plan assets and, therefore, when the manager of a fund should be deemed a fiduciary to the fund. We believe that these Congressional determinations set the appropriate standards to determine the scope of private investment fund managers that should be subject to fiduciary obligations under ERISA.

Congress most recently spoke to this issue when it enacted the Pension Protection Act of 2006 (the "Pension Protection Act"), which amended section 3 of ERISA by adding new subsection (42). Section 3(42) 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 advisers 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.

[2] *See*, February 3, 2017 Presidential Memorandum, available at: https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

Despite the clear Congressional determination that managers and service providers to Non-Plan Asset Funds should not be deemed fiduciaries under ERISA with respect to Non-Plan Asset Funds, or the investors in those funds, the Fiduciary Rule could nonetheless impose ERISA fiduciary status on managers to Non-Plan Asset Funds as a result of a manager or placement agent marketing those funds to ERISA plans. While the exception under the fiduciary rule for "transactions with independent plan fiduciaries with financial expertise" is helpful with respect to marketing to institutional investors, marketing with respect to Non-Plan Assets Funds should simply be out of scope of the Fiduciary Rule regardless of the type of sophisticated investor.[3] To the extent the Department determines not to rescind the Fiduciary Rule, we strongly encourage the Department to revise the Rule to 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 the clear Congressional intent in the Pension Protection Act.

We also encourage the Department to revise the Fiduciary Rule with respect to managers of private investment funds that are deemed to hold plan assets because the fund exceeds the 25 percent threshold in Section 3(42) of ERISA ("Plan Asset Funds"). Managers to Plan Asset Funds are ERISA fiduciaries with respect to the investment management services provided to those Funds; however, those managers should not be subject to separate ERISA fiduciary obligations with respect to marketing their investment management services to plan investors (and potential investors) in Plan Asset Funds. [4]

With respect to marketing activities, while the Fiduciary Rule appropriately recognizes that an investment manager marketing itself and the value of its services to clients and potential clients is not providing investment advice and, as such, is not acting as an ERISA fiduciary with respect to those activities. We encourage the Department to provide clear guidance with respect to this "hire me" exception to ensure that it is meaningful in practice.

Further, in discussing the scope of this exception, the Fiduciary Rule distinguishes between a manager marketing itself and the value of its services and a manager recommending its proprietary products or strategies, creating the potential for a manager to be deemed an ERISA fiduciary with respect to marketing its services because it provides those services via a pooled investment vehicle structure. The Department should modify the Fiduciary Rule to make clear that a manager can market the value of its services, regardless of the structure(s) through which it provides those

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[3] By sophisticated investor, we mean those investors eligible to invest in private investment funds under the federal securities laws. *See,* MFA's September 24, 2015 letter to the Department, which explains the relevant investor thresholds under the federal securities laws, available at: https://www.managedfunds.org/wp-content/uploads/2016/04/MFA-Supplemental-Comment-Letter-on-DOL-Fiduciary-Proposal.pdf.

[4] We also note that, in the Fiduciary Rule, the Department reserved for future consideration its final decision on the circumstances when providing statements of value to a plan could give rise to ERISA fiduciary status. Because we remain concerned with respect to the negative consequences that would result if providing information relevant to an investment in a pooled fund, such as valuation, pricing, or liquidity information to investors (or potential investors) in the pooled investment fund were deemed to constitute fiduciary investment advice, we request that the Department make clear in any revised Rule that providing such information to fund investors (or potential investors) will not be deemed to create ERISA fiduciary status.

services, including by providing pertinent information on its products, services, and strategies to plan investors without being a fiduciary with respect to such marketing activities.

Private investment fund managers conduct non-public offerings of their funds and services to investors (or potential investors). Marketing of private investment funds may be done both by the fund manager or through paid placement agents or other persons who are independent of the manager but who are retained (and compensated by the manager or the fund) to market the fund, the manager and its services. The offer and sale of private investment funds is a lengthy process as a result of the extensive due diligence conducted by sophisticated investors. Marketing often involves a number of meetings with investors and providing investors with significant amounts of information about the fund, including fund commentary, commonly in an investor letter, and investor specific information. Although managers do not compensate themselves for marketing, the manager receives asset management and other fees from investors that ultimately decide to invest in the manager's fund. MFA believes that investment managers, like other service providers, should be able to market their goods and services to plan investors without being deemed an ERISA fiduciary with respect to that marketing activity. When a manager, or a placement agent, is marketing a private investment fund, they are not making recommendations to potential investors, nor are they in a position to make a fiduciary determination regarding whether the potential investor should invest in the fund being marketed. As such, imposing fiduciary obligations in connection with "self-marketing" activities by managers or marketing by paid placement agents or others performing similar functions would have a material and adverse impact on MFA members and make it difficult for plan investors to learn about potentially appropriate investments.

We believe that there is not a sound policy basis for potentially subjecting an investment manager or its agents to ERISA fiduciary obligations with respect to marketing the manager's services simply because the manager provides its services via a pooled investment vehicle. Accordingly, we urge the Department to revise the Fiduciary Rule so that it will not adversely affect legitimate marketing activity for private funds. We are concerned that, absent a revision of the Fiduciary Rule that includes a clear exclusion for such marketing activities, the Fiduciary Rule is likely to have a material adverse impact on plans seeking to invest in private investment funds, particularly sophisticated IRA investors, because it will make it difficult or impossible to market private funds to plan investors.

Finally, while we appreciate the Department's decision to delay the applicability date of the Fiduciary Rule for 60 days, we continue to encourage the Department to consider a further extension of the applicability date while the Department conducts the review mandated by the Presidential Memorandum and considers the legal and policy implications of the comments it receives in connection with the request for public comment on the Fiduciary Rule.

MFA would like to reiterate its thanks to the Department for the opportunity to engage constructively in these issues. 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 Director, General Counsel