J.P.Morgan

February 3, 2011

VIA ELECTRONIC MAIL: E-ORI@DOL.GOV

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

Re: Comments on Proposed Rule Regarding Definition of the Term "Fiduciary" 29 C.F.R. Part 2510, RIN 1210-AB32

Ladies/Gentlemen:

J.P. Morgan Retirement Plan Services LLC and the Worldwide Securities Services line of business of JPMorgan Chase Bank, N.A (collectively, "J.P. Morgan") appreciate this opportunity to comment on recently proposed regulations under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Those regulations (the "Proposed Regulations") define the circumstances under which a person is considered to be a "fiduciary" under Section 3(21)(A)(ii) of ERISA by reason of giving investment advice to an employee benefit plan or a plan's participants. These proposed rules were published by the Department of Labor on October 22, 2010. 75 Federal Register 65,263.

EXECUTIVE SUMMARY

J.P. Morgan believes that the Proposed Regulations should be modified to eliminate unnecessary and subjective standards, particularly those standards on which application of an exception is conditioned. Rather than determining whether a person is "impartial" or has interests that are "adverse" to a plan, the Proposed Regulations will better protect plan sponsors and plan fiduciaries by requiring objective, written disclosures from recordkeepers or other service providers for those instances in which such service providers will not be acting in a fiduciary capacity. For purposes of this letter, we will generally refer to "persons" as "recordkeepers" or "service providers".

In addition, the various limitations described in the Proposed Regulations should be clarified and, in some cases expanded, to enable plan sponsors and plan participants to continue receiving valuable services from service providers. Finally, we believe that existing standards governing education and guidance rendered in the context of permissible plan distributions are sufficient, and need not be modified in the final regulations.

BACKGROUND

J.P. Morgan Retirement Plan Services LLC ("JPMRPS") is one of the nation's largest providers of recordkeeping and related services to plan sponsors of retirement plans and their participants. JPMRPS is one provider in what is commonly referred to as a "bundled" service model, in which other third parties assist plan sponsors and fiduciaries in the creation of investment fund menus to be made available to plan participants, while JPMRPS provides ministerial services such as distribution processing, participant statements, testing, report preparation, and account reconciliation. Within this bundled service environment, plan fiduciaries are able to create investment fund menus that include both J.P. Morgan products (*i.e.*, proprietary funds) and funds that are managed by wholly unrelated entities (*i.e.*, non-proprietary funds). Relying in part on the analysis articulated in Department of Labor Advisory Opinion 97-16A (the "Aetna" Opinion) and Interpretive Bulletin 96-1, JPMRPS provides its recordkeeping services in a non-fiduciary capacity.

J.P. Morgan Chase Bank, N.A. is one of the nation's largest financial institutions and provides non-discretionary trustee, custody, administrative and accounting services to retirement plans and sponsors of retirement plans through its Worldwide Securities Services line of business ("JPMWSS"). JPMWSS' administrative services are ancillary to its trustee and custodian services and are provided as a matter of efficiency and convenience for plan sponsors. Since JPMWSS has plan information and data, it is able to provide non-discretionary administrative, information reporting, and accounting services such as a statement of plan assets, calculation of net asset values, reporting services, and comparative analysis of investment manager performance and reporting of investment manager's compliance with its investment guidelines to plan sponsors.

I. COMMENTS RELATED TO OUR J.P. MORGAN RETIREMENT PLAN SERVICES LLC BUSINESS

A. THE DEPARTMENT SHOULD EXCLUDE ADVICE CONCERNING PLAN DISTRIBUTION OPTIONS FROM THE DEFINITION OF "FIDUCIARY"

The standards articulated by the Department in Advisory Opinion 2005-23A, concerning the limited extent to which providing information about plan distribution options rises to the level of a fiduciary act, are both appropriate and workable, and should not be changed in the final regulations. The analysis in that Advisory Opinion recognized that, in most cases, participants who ask for information about distribution options obtain that information from individuals or entities with whom the participants do not have a fiduciary relationship. Only when the provider is already acting as an ERISA fiduciary with respect to the participant, and thus when such a participant has a well founded expectation that the provider will be disinterested and acting solely in the participant's interests, might guidance concerning plan distribution options rise to the level of "investment advice" and become a fiduciary function.

Recordkeepers must be able to answer participant questions regarding distribution options and other plan features. In order to answer participant questions, recordkeepers generally maintain call centers where telephone representatives are trained to answer factual questions about the plan and the plan's investment options. These telephone representatives are expressly instructed not to provide investment advice and not to hold themselves out as providing investment advice. In addition, as a general matter, telephone representatives at call centers maintained by recordkeepers do not have the credentials or training needed to provide investment advice in accordance with a "prudent expert" standard. Participants contacting recordkeepers generally do so for purposes of asking questions about distribution options or other plan features to obtain basic information about the plan, the plan's investment options and the plan's distribution options such as rollovers. In those circumstances, the participant will not have established any kind of trusting, fiduciary relationship with the telephone representative who answers the call. Indeed, for large recordkeepers, participants will have no idea which of the hundreds of telephone representatives will be available to assist them. Moreover, each telephone representative might be expected to answer questions about hundreds of plans. Imposing fiduciary standards on those conversations would be unworkable, and could dissuade recordkeepers from providing information about a plan, including permissible plan distributions, at all.

As the Department recognized in Advisory Opinion 2005-23A, in most cases answering questions and providing information about rollovers and other distribution options available under a plan are ministerial functions. Such functions have long been recognized as non-fiduciary in nature. In the Proposed Regulations, the Department recognizes and defines "advice" to include making recommendations as to purchasing, holding or selling securities, or recommendations as to the management of securities. JPMRPS believes this inclusion in the definition to be appropriate. However, recordkeepers must be able to provide information to participants about their rights to receive or defer a plan distribution and related concerns, such as tax consequence and rollover vehicles (such as IRAs), in the same manner as they are able to provide information regarding other plan features such as contribution rights and the availability and related tax consequences of loans or hardships without becoming subject to ERISA's fiduciary requirements. Equating distribution and rollover information to "investment advice" would, at a minimum, require the Department to revise the ministerial function exception set forth at 29 C.F.R. § 2509.75-8, Q&A D-2 (recognizing that "advising participants of their rights and options under the plan" is a non-fiduciary act). Plan sponsors seek out and engage service providers who can effectively provide plan participants with information and guidance to assist participants in maximizing the benefits of the plan with respect to their retirement assets. The inclusion of these services in the definition of "investment advice" may prevent plan sponsors from securing, and plan participants from receiving, such services.

B. THE DEPARTMENT SHOULD CLARIFY THE "SALES" EXCEPTION

While the "sales" exception described in Section 2510.3-21(c)(2)(i) of the Proposed Regulations is helpful to bundled providers like JPMRPS, we believe that it should be clarified in a

number of respects. First, the use of the words "in its capacity as a purchaser or seller of a security or other property" could be construed to limit the application of this exception only to proprietary products of the service provider and its affiliates. Such a restrictive reading does not appear to be consistent with the intent of the exception.

Bundled recordkeepers like JPMRPS and its affiliates frequently make both proprietary *and* non-proprietary investment funds available to plan sponsors and their plan participants, including collective trusts and separate accounts managed by their affiliates or by unrelated banks or investment managers. This occurs both when a plan sponsor first becomes a client of JPMRPS and when an existing plan sponsor modifies its plan's investment lineup. We are concerned that the use of the phrase "in its capacity as a purchaser or seller" in the Proposed Regulations could be construed to make the sales exception unavailable when recordkeepers offer non-proprietary investment funds to their clients. We therefore ask the Department to clarify that the exception will apply in circumstances in which the recordkeeper is making non-proprietary investment funds (including collective trusts and separate accounts) available to their clients. Furthermore, the Department should clarify that the "sales" exception is available for situations in which a service provider is selling a service, as counterparty to the plan sponsor or plan participant. For example, the Department should clarify that the "sales" exception covers "sales" of trustee, custodial, brokerage or other services to the plan sponsor or plan participant by a service provider to the plan. In all these situations, the plan sponsor or plan participant should understand that the service provider is not disinterested or acting solely on the plan sponsor's or plan participant's behalf when presenting such services and related information to the plan sponsor or plan participant.

As currently drafted the sales exception in Section 2510.3-21(c)(2)(i) would apply to service providers whose interests are "adverse" to the interests of the plan or its participants and who are not attempting to provide "impartial" advice. We believe that the "adverse" and "impartial" standards are vague and unworkable. This exception appears to be intended to apply when it is clear that the service provider is engaged in a "sales" process. Such an exception is consistent with prior guidance from the Department confirming that parties may act in both fiduciary and non-fiduciary capacities, and when they act as sales agents they cannot reasonably be construed to be acting as fiduciaries.

Rather than embarking on a subjective inquiry concerning whether a service provider's interests are "adverse" to the plan such that it is not providing "impartial" advice, we suggest that the applicability of the sales exception should turn on whether the service provider and plan sponsor or fiduciary understand that the "advice" is being provided in a sales context. Such an understanding could be imparted through a written disclaimer to the plan sponsor or fiduciary that the service provider is acting in a non-fiduciary capacity in the context of a proposed purchase or sale.

The Department appears to have used a similar disclaimer standard for the "platform" exceptions described in Sections 2510.3-21(c)(2)(ii)(B) and (C) of the Proposed Regulations, under which the exception is available if the provider "discloses in writing to the plan fiduciary that the

person is not undertaking to provide impartial investment advice." If such a disclaimer (perhaps based on model language to be developed by the Department and included in the final regulations) is provided, the advice would be considered non-fiduciary; otherwise, the sales exception would not apply. We believe that this approach would afford a more objective and workable standard, and would provide more certainty to both plan sponsors and service providers.

We also believe that the sales exception should apply in contexts other than the initial "sale" or engagement of the service provider. For instance, when existing service agreements expire or otherwise are renegotiated, and when new products or services become available, service providers should be allowed to avoid fiduciary status under the Proposed Regulations when they describe the new products, services, or agreements. In the context of those discussions, which could be identified by delivery of a disclaimer of the type described above, the plan sponsor or fiduciary should understand that the service provider has a financial interest in the arrangement being described.

Finally, during the sales process recordkeepers are frequently asked by plan sponsors or fiduciaries to develop "proposed" investment fund menus. These proposed menus are sometimes used to create a uniform basis upon which the fees of various recordkeepers may be compared. The Department should clarify in the final regulations that developing such proposed fund menus does not constitute investment advice that gives rise to fiduciary status.

C. THE "PLATFORM" AND "SELECTING OR MONITORING" EXCEPTIONS SHOULD BE EXPANDED IN THE FINAL REGULATIONS

JPMRPS believes that the written disclosure standard for application of the "platform" exception described in Sections 2510.3-21(c)(2)(ii)(B) and (C) of the Proposed Regulations is appropriate, for the most part. We suggest, however, that the Department expand this exception so that it applies to any objective data that a service provider supplies to the plan sponsor or fiduciary for the purpose of monitoring the plan's existing investment funds, as long as the service provider does not make a specific recommendation to the plan sponsor or fiduciary based on that information. Narrowly interpreting this exception could deny plan sponsors and fiduciaries valuable tools for monitoring plan investments.

We suggest that the Department expand this exception by removing, or at least clarifying, one of the conditions for its application. The exception described in Section 2510.3-21(c)(2)(ii)(B) would apply when a service provider makes securities or other property (generally, investment fund options) available "without regard to the individualized needs of the plan." We believe that this phrase requires clarification or elimination, particularly in light of the interim final regulation requirements under Section 408(b)(2) of ERISA regarding JPMRPS's obligation to disclose fees it receives with respect to each of the plan's investment options. As noted above, plan sponsors often ask recordkeepers like JPMRPS to create sub-menus of investment options, or even sample fund lineups, from the platform of investment funds available to the recordkeeper, for the purpose of

evaluating sales or marketing proposals. By its very nature, the information provided to the plan sponsor may be deemed to take into account "the individualized needs of the plan" (in these cases, the plan sponsor's specific request). However, so long as the recordkeeper issues a disclaimer similar to the one described in the last phrase of this exception, the information provided by the recordkeeper should not be considered the provision of "investment advice" that gives rise to fiduciary status.

Elimination – or at least clarification – of the "individualized needs" standard is even more warranted in the context of the "selecting or monitoring" exception described in Section 2510.3-21(c)(2)(ii)(C). This exception appears to be tied to the "individualized needs" standard, as well (paragraph (c)(2)(ii)(C) applies "in connection with the activities described in paragraph (c)(2)(ii)(B)"). Information supplied by a service provider for the purpose of assisting plan fiduciaries in monitoring the plan's investment funds – such as Morningstar reports, risk and return characteristics, comparative analysis of investment manager performance, and an evaluation of the investments compared to the standards set forth in the plan's investment policy statement – would be meaningless if that information does not consider the "individualized needs" of the plan at issue. As long as that information does not include a specific recommendation to the plan's fiduciaries, and *does* include a disclaimer similar to the one described in the Proposed Regulations, it should not be considered investment advice that gives rise to fiduciary status. We therefore believe that the "individualized needs" standard confounds the intent of the exceptions, while providing no meaningful benefit to plan sponsors or fiduciaries. JPMRPS suggests that the Department modify these exceptions accordingly in the final regulations. At a minimum, the selection and monitoring exception should be decoupled from this standard in the platform exception.

With regard to the disclaimer described in the Proposed Regulations related to Sections 2510.3-21(c)(2)(ii)(B) and (C), we reiterate our suggestion under the "sales" exception that the Department modify the disclaimer to impart that the service provider is acting in a non-fiduciary capacity.

D. THE "SELECTING OR MONITORING" EXCEPTION SHOULD BE CLARIFIED TO APPLY IN CONTEXTS OTHER THAN THE INITIAL MARKETING OF PLAN SERVICES

Because the "selecting or monitoring" exception in Section 2510.3-21(c)(2)(ii)(C) of the Proposed Regulations is tied to "the activities described" in the "platform" exception set forth in paragraph (c)(2)(ii)(B), it could be construed to apply only when a service provider is engaged in sales or marketing activities. This does not appear to be the intent of the exception, however, as financial information provided for the purpose of "monitoring" investment options is provided on a regular basis, notwithstanding any sales or marketing activities. Therefore, JPMRPS suggests that the Department clarify the "selecting or monitoring" exception accordingly.

II. COMMENTS RELATED TO OUR JPMORGAN CHASE BANK, N.A. WORLDWIDE SECURITIES SERVICES BUSINESS

A. The Final Regulations Should Clarify That All Statements Prepared for Plan Sponsor or Participant Use Do Not Amount to Investment Advice

With respect to Section 2510.3-21(c)(2)(iii) of the Proposed Regulations, JPMWSS suggests that the Department expand this exception so that it applies to any report or statement provided to a plan sponsor, investment manager or plan participant, whether or not required by statutory reporting and disclosure requirements if such report or statement merely reflects the value of an investment. Because the exception contained in this Section of the Proposed Regulations only applies to reports or statements provided for purposes of compliance with reporting and disclosure requirements under the Internal Revenue Code, ERISA and the regulations thereunder, it could be construed to apply only to the year-end certification generally provided by trustees and custodians pursuant to 29 CFR §2520.103-5. However, it is common for service providers, such as trustees and custodians, to use third party pricing vendors for purposes of providing on-line access to account information to plan sponsors and plan participants on a continuous (24/7) basis. Exchange traded securities are priced daily, while others may be priced less frequently. Therefore, expansion of this exception to include such pricing information reporting, consistent with industry practice, is highly desirable. Without this clarification, service providers, including directed trustees and custodians that supply this useful information to plan sponsors, investment managers and plan participants would be reluctant to provide this service for fear of being considered to provide "investment advice". Imposing fiduciary standards on these services could dissuade trustees and custodians from providing such reporting on a more frequent basis than regulations require.

B. The Final Regulations Should Clarify that a Service Provider is Not Providing Investment Advice When It Reports Values of Hard to Value Assets Provided by Third Parties in Statements or Performs Net Asset Value Calculations

JPMWSS believes Section 2510.3-21(c)(2)(iii) of the Proposed Regulations should make clear that service providers that report valuations of plan assets for which there is not a generally recognized market are not providing "investment advice" under ERISA. It is not uncommon for plans to hold hard to value assets, including real estate, hedge funds and other forms of private equity investments, swaps and derivatives. Generally, service providers, such as trustees and custodians, do not independently value such assets nor do they typically review the valuations provided by third parties[1]. The service providers simply supply values provided by third party

[1] In those limited cases where a review is done, the purpose is only to assess the plausibility of the price provided taking into account a limited number of objective factors, such as whether the change in price since the last time the third party priced the instrument appears reasonable under market conditions.

pricing vendors and do not exercise discretion in reporting the values. Rather, they are providing a reporting service for the convenience of the plan sponsor and plan participants and not for purposes of assessing the fair value of the investment or plan assets. Therefore, JPMWSS urges the Department to clarify the Proposed Regulations so that merely including values provided by third parties in reports to plan sponsors, investment managers and plan participants does not cause such provider to be deemed to be providing "investment advice" under ERISA.

JPMWSS also believes the exception should apply to any administrative calculation of the value of any plan investment or plan assets to the extent such calculation is based on information and/or methodologies provided by a third party to the service provider and the calculation requires no exercise of discretion by the service provider. For example, service providers may calculate the values for swaps or derivatives based upon the elements or characteristics of the instrument received from third parties. The service provider inputs such information into a third party calculator model which provides the value for reporting purposes. The creators of these models do not stand behind them and make no representation that the prices they generate represent fair value of the underlying instrument. In addition, the value of certain plan assets may be reported using an industry standard methodology. For example, alternative plan assets such as limited partnership interests (including hedge funds) may be reported based upon an industry standard process known as roll-forward methodology, which uses the last available statement from the limited partnership or investment and adjusts the value solely to reflect subsequent contributions made or distributions received with respect to the investment. In addition, service providers may calculate net asset values ("NAV") for a portion of a plan or an investment option, such as a separately managed account contained in a plan. As with other calculations described above, the calculation of a NAV involves no discretion, just simple mathematical calculations. Service providers calculating such values do so by simply performing mathematical calculation by applying information and/or methodologies of third parties, primarily using industry standard methodologies, and without exercising any discretion.

As with the reporting services, service providers performing administrative calculations are providing a service for the convenience of the plan sponsor and plan participants and not for purposes of assessing the fair value of the investment or plan assets. Therefore, JPMWSS urges the Department to clarify in the final regulations that providing such calculations and reporting values does not constitute "investment advice" that gives rise to fiduciary status.

C. The "Selecting or Monitoring" Exception Should Be Clarified to Apply to Administrative Services Provided to All Employee Benefit Plans, Not Only Participant-Directed Defined Contribution Plans

Section 2510.3-21(c)(1)(i)(A)(3) of the Proposed Regulations includes within the definition of "investment advice" any person who "provides advice or makes recommendations as to the management of securities or other property". The "selecting or monitoring" exception in Section 2510.3-21(c)(2)(ii)(C) of the Proposed Regulations is tied to "the activities described" in the

"platform" exception set forth in paragraph (c)(2)(ii)(B), and therefore appears to apply only to participant-directed defined contribution plans. However, the use of data and analysis is also required by plan sponsors of other employee benefit plans to oversee or analyze investment managers. Therefore, JPMWSS strongly urges the Department to clarify that the "selecting and monitoring" exception applies to similar activities for all employee benefit plans.

Service providers, such as trustees and custodians, can provide analytic and reporting services efficiently based on plan information and data they maintain, without exercising discretion. These services are helpful in assisting plan sponsors and fiduciaries with their fiduciary oversight responsibilities. As noted above, plan sponsors may provide the criteria for the service provider's analysis. Alternatively, the service provider may rely upon industry benchmarks or risk-return data obtained from third parties or proprietary algorithms that are commonly utilized and not customized by plan sponsor. In all cases, the plan sponsor will designate the criteria to be used for comparison purposes. Similarly, a service provider may utilize proprietary algorithms and third party reporting tools to filter for investment managers that satisfy the plan sponsor's criteria for a particular investment mandate. Again, the database of investment managers (including performance data) is provided by a third party; the plan sponsor provides the selection criteria and the reporting tools are not customized by plan sponsor. The service provider exercises no discretion when providing the reporting and makes no recommendations regarding consideration or selection of an investment manager based upon the reporting.

In addition, a service provider may provide reporting of an investment that does not meet an investment manager's guidelines to a plan sponsor on a post-trade basis. Such reporting requires no discretionary act by the service provider. Rather, a simple comparison is made of investments made by an investment manager to the investment guidelines provided by the plan sponsor. The service provider makes no recommendations regarding actions that might be taken by the plan sponsor as a result of such reporting.

Therefore, JPMWSS believes the Department should clarify in the final regulations that administrative services of providing reports (i) analyzing the investment performance or other factors of an investment manager or investment option, such as by calculating investment performance and comparing such performance to a benchmark or other criteria designated by the plan sponsor, (ii) utilizing reporting tools to filter for investment manager's that satisfy the plan sponsor's criteria for a particular mandate , or (iii) reporting on an investment manager's compliance with their investment guidelines does not constitute "investment advice" by the service provider that gives rise to fiduciary status regardless of the type of plan with respect to which such analysis or reports are provided. Lack of such clarity may lead service providers to discontinue services that are non-discretionary and valuable to plan sponsors and fiduciaries.

III. COMMENTS AFFECTING BOTH J.P. MORGAN RETIREMENT PLAN SERVICES LLC AND JPMORGAN CHASE BANK N.A. WORLDWIDE SECURITIES SERVICES BUSINESSES

A. THE FINAL REGULATIONS SHOULD CLARIFY THAT MINISTERIAL DISTRIBUTION OF INVESTMENT FUND PROSPECTUSES AND OTHER INFORMATION REQUIRED FOR COMPLIANCE WITH ERISA DOES NOT AMOUNT TO INVESTMENT ADVICE

J.P. Morgan regularly distributes prospectuses, summary prospectuses, and related information to plan participants on behalf of plan sponsors who are attempting to comply with ERISA Section 404(c), as well as to plan sponsors or investment managers of plans that are not participant-directed. Recordkeepers like JPMRPS also distribute (either in writing or electronically) on behalf of plan sponsors annual enrollment notices, qualified default investment alternative ("QDIA") notices, default investment notices, and investment election forms. Distribution of this information benefits both plan sponsors and participants. These services should not, however, be considered "investment advice," even though some of the forms and information (*e.g.*, prospectuses and investment election forms) contain investment information. J.P. Morgan would like clarification in the final regulations that the ministerial fulfillment service of distributing such information does not create a "fiduciary" relationship or constitute a "fiduciary" act.

B. The Final Regulations Should Provide Objective Standards for Determining What is Investment Advice and Who is a Fiduciary under ERISA

J.P. Morgan urges the Department to revise its Proposed Regulations to ensure that the standards for determining whether a service provider is providing "investment advice" and, therefore, is a "fiduciary" within the meaning of Section 3(21) of ERISA are objective. Service providers expend a great deal of time and expense to ensure that their services comply with the requirements of ERISA, and develop activities, systems, processes, and compliance programs (hereinafter "business model") to delineate their activities so that the service provider is not considered a "fiduciary" under current regulations and interpretations. We are concerned that the breadth and generality of the Proposed Regulations and the lack of clear, objective standards set forth in the Proposed Regulations will make it very difficult for service providers to determine, in advance, whether or not their activities will fall within the definition of a "fiduciary" under the Proposed Regulations. We are also concerned that a service provider may fall within the definition of a "fiduciary" merely because it has an affiliate that is a registered investment adviser or separately provides fiduciary services to the plan. Thus, service providers may be subject to significant risk of litigation over the question of whether the service provider is a "fiduciary" under the Proposed Regulations. Indeed, even if the plan sponsor and service provider do not intend for the service provider to be a "fiduciary" and agree that the activities of the service provider are not "fiduciary" functions, the service provider nevertheless may be determined to be a "fiduciary" under the

Proposed Regulations. The Department should promulgate objective standards for determining whether a service provider is providing "investment advice" and is a "fiduciary" under ERISA to enable service providers to design and implement their business model based upon whether they intend for their activities to be "fiduciary" activities and to avoid potential litigation due to uncertainty under the Proposed Regulations.

J.P. Morgan is particularly concerned that the Department did not include a requirement that "advice" be "individualized to the needs" of the plan sponsor, plan or plan participant in the primary definition under Section 2510.3-21(c)(1)(i) of the Proposed Regulations (such requirement is only included in paragraph (c)(1)(ii)(D)). We are also concerned with the Department's proposed deletion of the requirement that there be a "mutual" understanding between a plan fiduciary and the service provider that any "advice" given by the service provider serve as a "primary basis" for investment decisions, and the replacement of those standards by what may be as little as an oral understanding (only expressed after the fact) of a plan sponsor or plan participant that "information" or "statements" given or made by a service provider constitute "advice" or "recommendations" that "may be considered" by the plan fiduciary or plan participant in connection with such fiduciary's, or participant's, investment or management decisions regarding plan assets. The standards set forth in the Proposed Regulation provide the opportunity for any communication, relating to plan assets, between a plan fiduciary or plan participant and a service provider to be considered (by the plan fiduciary or plan participant) to be "investment advice" within the meaning of the Proposed Regulations. We believe this opportunity for "after the fact" claims of an "understanding" that a service provider's statements could be "considered" (even if only as an extremely minor factor) will dramatically increase uncertainty and litigation as a result of the Proposed Regulations. While the courts may take a narrower view of the Proposed Regulations, the breadth of the Proposed Regulations and the opportunity for expensive litigation to determine whether a service provider is providing "investment advice" has the potential to lead to an increase in the amount of litigation, an increase in service providers' costs of doing business with plans (with a corresponding increase in service fees paid by plan sponsors and plan participants), or result in fewer service providers in the industry due to the increase in costs and uncertainty of risks associated with providing services to plan sponsors and plan participants. We strongly urge the Department to reconsider the potential costs of the uncertainty created by the Proposed Regulations and seek a more cost effective means of capturing, as fiduciaries, those service providers the Department appears to want to target (whether they be ESOP appraisers, consultants or "transactional" fiduciaries). We strongly urge the Department to retain, at a minimum, the requirement that there be a "mutual understanding" that advice will serve as a "primary" basis for investment decisions in order for a fiduciary relationship to exist under the Proposed Regulations.

While J.P. Morgan agrees with the Department that a service provider that represents it is acting as a fiduciary with respect to its services should be a "fiduciary" subject to the requirements of ERISA, we urge the Department to provide in the Proposed Regulations that a service provider that enters into an agreement with a plan fiduciary with a representation that the servicer provider is

not acting as a fiduciary will be presumed to not be a "fiduciary" within the meaning of ERISA with respect to the services under the agreement. Such a disclaimer of fiduciary status puts the plan fiduciary on notice that there is no agreement that the service provider's services are intended to be fiduciary in nature and creates a clear delineation between the plan fiduciary and service provider responsibilities.

In addition, J.P. Morgan requests that the Department clarify that the introductory language in Section 2510.3-21(c)(1)(ii), which states that "[s]uch person directly or indirectly (*e.g.*, through or together with any affiliate) - ," requires more than mere affiliation with a registered investment adviser or another party that has discretionary authority or control over the management of plan assets. We request the Department to clarify that the service provider itself be described in Section 2510.3-21(c)(1)(ii)(A)-(D), or be acting in concert with its affiliate that is otherwise described in Section 2510.3-21(c)(1)(ii)(A)-(D) such that it is the affiliate that is effectively providing the "investment advice."

C. The Department Should Re-Propose the Regulations to Allowing Further Opportunity for Interested Parties to Comment

The Proposed Regulations make significant changes to the long-standing rules on what activity gives rise to fiduciary liability by reason of providing advice. While J.P. Morgan agrees with the Department that the current standard may well merit review, we urge the Department to give careful consideration to the issues raised by all interested parties given the potential impact on the retirement industry and those who rely on its services. As has been made clear by the amount of interest the Proposed Regulations have generated, it is important that the final regulations create a clear standard upon which service providers can define and implement their services and plan sponsors and plan participants can base their expectations without causing unintended repercussions in the retirement industry. We would respectfully request that the Department re-propose the regulations once it has the opportunity to consider all comments received and the testimony offered at the hearings in March. Similar to the thorough and thoughtful process the Department engaged in when seeking input on retirement income and lifetime income options (e.g., first input was gathered through a Request For Information, and then augmented through testimony at public hearings), we would maintain that the revision of the definition of "fiduciary" under ERISA deserves an equally thoughtful approach with adequate time for all interested parties to review the Department's proposals and to offer input.

CONCLUSION

J.P. Morgan appreciates the opportunity to comment on the Proposed Regulations and applaud the Department's efforts to clarify the circumstances under which service providers may be considered ERISA fiduciaries. Please do not hesitate to contact either one of us if you have any

questions about the issues raised in this letter or if we may assist in the preparation of final regulations.

Sincerely,

Karen F. Prange
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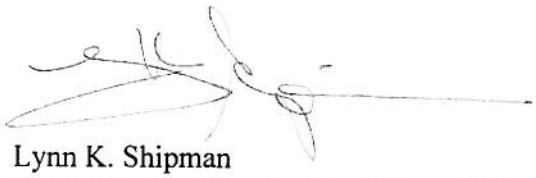

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