February 3, 2011

The Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: 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:

JPMorgan Chase & Co. and its affiliates ("JPMorgan") are pleased to offer comments to the proposal by the Department of Labor (the "Department") to amend the definition of "fiduciary" (the "Proposed Rule") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). These comments relate to the impact of the Proposed Rule on the clients of JPMorgan's investment banking businesses. JPMorgan welcomes the opportunity to comment on this important proposal, as we believe the Proposed Rule will have a direct impact not only on plans and entities subject to the fiduciary responsibility provisions of ERISA and the analogous provisions of the Internal Revenue Code (collectively, "Plans"), but on the capital markets. It is our hope that our comments assist the Department in promoting the interests of Plans in the capital markets, including from a cost, efficiency and product availability perspective.

Service providers spend significant time and resources structuring products and services with the expectation (and mutual understanding with their clients) that the service provider is either acting as an ERISA fiduciary or not acting as an ERISA fiduciary, depending on the product or service and the particular client's needs. In doing so, service providers and clients rely on a well-developed framework of existing law and guidance. The Proposed Rule introduces ambiguity that will create doubt for service providers and clients as to when a service provider is acting as an ERISA fiduciary, in spite of what may have been agreed between the parties. In light of the uncertainty created by the Proposed Rule we believe that service providers, in certain cases, would, in the words of the Department "view the increased costs and liability exposure associated with ERISA fiduciary status as outweighing the benefit of continuing to service the ERISA plan market." Consistent with the expanded range of activities deemed to give rise to fiduciary acts under the Proposed Rule, we believe the impact could affect a very broad array of products and services available to Plans.

We also believe Plans and their fiduciaries would lose the benefit of the investment education, market commentary, investment ideas and generalized investment materials they have come to use in their investment decision-making. The Proposed Rule effectively makes all persons who provide investment information that "may be considered" by a Plan for an investment decision ERISA fiduciaries, as there is no requirement that there be a mutual agreement as to how the information will be used. Higher costs and the contraction of products

and services could affect both Plans and non-Plans alike because it may not always be possible for service providers to know when they are dealing with a Plan. This is because the Proposed Rule requires neither a mutual understanding of a fiduciary relationship nor direct privity between the Plan party and the service provider for the establishment of a fiduciary relationship.

In light of the foregoing, we recommend that the Department do the following:

- Make certain that any changes preserve the integrity of traditional demarcations between those entities deemed to be subject to ERISA (or Section 4975 of the Internal Revenue Code) and those that are not by reason of Section 3(42) of ERISA and 29 CFR 2510.3-101. A person should not be deemed to be a fiduciary when providing services to a vehicle that does not otherwise hold "plan assets," even if providing tailored investment advice, appraisals or other activities. For example, a prime broker should not be a fiduciary when providing a valuation on a security which is used in calculating a hedge fund's net asset value for a Plan that owns an interest in the fund.
- Assure that the provision of valuations, appraisals and similar services do not confer fiduciary status where the services are incidental to otherwise non-fiduciary acts. For example, (i) providing brokerage statements in connection with brokerage activities, (ii) complying with the daily mark and other business conduct requirements established by the Dodd-Frank Wall Street Reform and Consumer Protection Act and regulations thereunder ("Dodd-Frank") relating to swaps, (iii) providing a valuation of non-publicly-traded assets held in an individual retirement account ("IRA") in connection with serving as an IRA custodian and (iv) providing price quotes and other valuations in connection with prime brokerage or calculation agent activities should not be deemed fiduciary acts, unless tailored and performed pursuant to a mutual agreement that such information will be used by the Plan as a primary basis for an investment decision. Similarly, the Department needs to address the issue of valuations and appraisals in a way that ensures Plans' continued access to products and services otherwise available to other market participants. The provision should not be crafted in such a way that would cast doubt on Plans' continued ability to make investments in venture capital, real estate or other alternative investment funds, or that makes the holding of hard to value assets unworkable.
- Clarify that the proposed exception for transactions effected on the basis of the purchase and sale of securities or other property (the "Selling Exception") applies to any bilateral arrangement or the provision of services. The Selling Exception should apply where the service provider is expected to be compensated for its product or service and where the service provider is seeking to be hired as a service provider for a given product, service or transaction. The exception should permit the purchase and sale of securities or other property on both a principal and agency basis, the lending of securities or other property and other extensions of credit, the sale of interests in investment vehicles as well as the sale of investment management services, swaps, options, structured products and futures execution. Given the critical distinction between sales and advice, the Department should make it clear that no investment advice will be deemed to be provided absent the provision of tailored information

pursuant to a mutual agreement that such information will be used by the Plan as a primary basis for an investment decision.

- Incorporate standards that assure sophisticated plan representatives, such as qualified professional asset managers ("QPAMs"), in-house asset managers ("INHAMs"), bank or trust company trustees, insurance companies, registered investment advisers, those eligible for relief under Section 408(b)(17) of ERISA or Section 4975(d)(20) of the Internal Revenue Code and other sophisticated investors acting on behalf of Plans as fiduciaries under Section 3(38) of ERISA would not be deemed to be receiving fiduciary advice from a service provider, unless tailored information is provided pursuant to a mutual agreement that such information will be used by the Plan as a primary basis for an investment decision. In this way, arm's-length transactions on behalf of a Plan may continue to be effected by sophisticated and independent parties, a concept that has been the hallmark of the Department's (and Congress') exemptions from ERISA's (and the Internal Revenue Code's) prohibited transaction rules and has served as the basis upon which Plans and service providers interact for most common transactions and services.[1]

- Coordinate with the Securities and Exchange Commission ("SEC"), Commodity Futures Trading Commission ("CFTC"), the Financial Industry Regulatory Authority ("FINRA") and other regulators to assure that any proposed changes are harmonized with all pertinent regulatory schemes. For example, the CFTC recently released proposed rules under Dodd-Frank that could preclude swap transactions under ERISA (and the Internal Revenue Code) because compliance with the CFTC's rules would likely run afoul of the Proposed Rule. The recently proposed CFTC rules under Dodd-Frank require a swaps dealer to (i) verify that a counterparty meets certain eligibility standards, (ii) provide certain disclosures to a counterparty about the material risks and characteristics of the swap, (iii) provide daily marks of the transaction in certain cases, (iv) provide a scenario analysis of the transaction in certain cases and (v) have a sufficient basis to believe that the person representing the Plan counterparty in a swap transaction has sufficient knowledge to evaluate the transaction and the risks, is not subject to statutory disqualification and is independent of the dealer. These duties require several affirmative steps on the part of the swaps dealer. When these proposed duties are read in conjunction with the Proposed Rule, it appears any dealer undertaking to comply with them could be a fiduciary. While the CFTC noted in the preamble to its proposed regulations that it had consulted with members of the Department, confirmation that compliance with the CFTC's business conduct requirements would not cause a dealer to become a fiduciary under ERISA is needed. Otherwise, Plans may be shut out of swaps while other market participants continue to have the benefit of employing them. We believe that this would be a result that is directly contrary to the intent of Congress in the final version of Dodd-Frank.

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[1] See Prohibited Transaction Class Exemption ("PTCE") PTCE 84-14, PTCE 90-1, PTCE 91-38, PTCE 95-60, PTCE 96-23 and Section 408(b)(17) of ERISA and Section 4975(d)(20) of the Internal Revenue Code.

- Assure that any changes to the existing definition provide objective standards of business conduct that are within the control of both the service provider and the Plan. A standard that gives one party the exclusive ability to define the nature of the service relationship will limit the provision of services because of the uncertainties and inherent risks it introduces for the other party. For example, the Proposed Rule allows the Plan party to decide what information "may be considered" and by extension the nature of the relationship. We first recommend that privity between a Plan and a service provider be required to create a fiduciary relationship by reason of the provision of investment advice. We also recommend that a fiduciary relationship be premised both on the provision of investment advice and a mutual understanding between the parties that the advice be individually tailored for the use of the Plan and will be used by the Plan as a primary basis in connection with making investment or management decisions. Neither mere association with a registered investment adviser nor the provision of general investment information, investment ideas or market color, should supersede this core principle.

- Finally, we recommend that the Department conduct a comprehensive study of the relative costs and benefits associated with the proposed changes. The Proposed Rule appears to have been issued without the benefit of the type of comprehensive analyses done for more limited scope projects, such as the Department's recent investment advice regulations and target-date investment option initiatives.[2] By comparison, Section 913 of Dodd-Frank mandates a comprehensive study (released on January 21, 2011) on investment advisers and broker-dealers operating in the retail market.[3] The Dodd-Frank mandated study contemplates a comprehensive examination leveraging a variety of resources, including studies, reports and scholarly works.[4] In addition, FINRA has proposed changes to its "know your customer" rule which are generally viewed as important for customer protection.[5] A Department study should take into account not only the data and research generated from these studies, but should consider the relative benefit to Plans before and after giving effect to the proposal.

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[2] Moreover, it appears that the data used for the Proposed Rule's conclusions of costs and benefits exclude an important constituent of the Plan universe: individual retirement accounts, which account for some $4.2 trillion of assets, and are roughly equal to the assets in employer-sponsored defined contribution plans. See Investment Company Institute Report: The U.S. Retirement Market, Second Quarter 2010 at http://www.ici.org/pressroom/news/10_news_ret_assets_q2.

[3] The study requires an examination of the effectiveness of existing standards of care for providing personalized investment advice and recommendations about securities to retail customers and whether there are any legal or regulatory gaps, shortcomings or overlaps.

[4] See, e.g., RAND Report: http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.

[5] See Regulatory Notice 09-25 (May 2009). See also NYSE Rule 405(1) and NASD Rule 2310.

Highlights of Concerns Over Proposed Rule.

As a global financial services provider, JPMorgan believes that our role in providing products and services must be clearly defined and understood by JPMorgan and our clients. Such a mutual understanding impacts our ability to deliver and perform services in a manner demanded by our clients. Like many service providers, we tailor our products and services to meet the needs of different client relationships. Currently, established guidance lays out the steps service providers should take, or avoid taking, to become or not become a fiduciary. It is this guidance on which our commercial practices are based and upon which our clients depend. The ambiguities inherent in the Proposed Rule will undermine those practices to the detriment of our clients, including Plans. We briefly highlight conceptual and operational challenges inherent in the Proposed Rule which we believe will contribute to this effect.

Mutual Agreement. The existing rule requires that investment advice be provided pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between the person providing the investment advice and the Plan or fiduciary with respect to the Plan. This is a sound requirement, as a commercial relationship must be informed by the expectations and needs of both parties. Like many other service providers, JPMorgan takes great care in defining its role in a given transaction, product or service. Our contractual provisions are crafted to make clear the rights and obligations of each party, and our business lines have been developed, tested and implemented on the basis of certainty as to the legal effect of the arrangement. At the time of entering into an arrangement, both parties are free to negotiate or modify terms as the situation warrants. Variation in the design of our products and services reflects the fact that they are not "one size fits all" and that we are responsive to the needs of our clients. We believe the Proposed Rule would subvert this basic principle and substitute an inflexible standard that will prevent the parties from negotiating a mutually satisfactory arrangement. We submit that this result will not be beneficial to Plans.

The Proposed Rule's deletion of "mutual" in this context is, therefore, particularly troublesome. As we believe the roles of each party to any transaction should be clearly defined and understood by both parties in advance, one party should not be given the ability to recast it after the fact. Such asymmetry will only create uncertainty and limit Plans' access to products and services. Even if not so intended, we are concerned that removal of "mutual", an integral element of a thirty-six year old regulation, may be read as providing a basis for a Plan to second-guess the nature of a given relationship.

Deletion of "A Primary Basis" and Insertion of "May Be Considered." The existing standard requires that advice must form "a" primary basis for any investment decision in order to be considered investment advice for purposes of the regulation. We have always believed that the use of the word "a" and not "the" renders the existing rule very broad. In our experience, service providers are aware of the significant distinction between "a" and "the" for this purpose. This critical word choice has required service providers to invest considerable time, energy, resources and training to comply with this standard. Nevertheless, while far-reaching, it is a firm standard around which service providers can

implement appropriate business and compliance practices. This is in contrast to the standards which we believe the Proposed Rule introduces.

We find it helpful to compare the Department's existing standard with a standard imposed by the SEC in connection with the regulation of advisory activity by brokers. In particular, Section 202(a)(11) of the Investment Advisers Act of 1940 (the "Advisers Act") does not confer the duties of an investment adviser on a broker if the provision of advice by that broker is solely "incidental" to the brokerage services provided to those accounts. This is the case even if the advice serves as a primary basis for an investment decision. We believe that this standard, which the SEC, a primary regulator of the capital markets, deemed appropriate in its regulation of the securities market, is more flexible than the Department's existing "a primary basis" test.

We do not necessarily suggest that the Department adopt this SEC standard, but we do think that the SEC's recently published views on this standard are instructive. In 2007, the SEC published a proposed interpretive rule to clarify when a broker must register as an advisor under the Advisers Act.[6] The SEC noted that the Section 202(a)(11) exception "amounts to a recognition that broker-dealers commonly give a certain amount of advice to their customers in the course of their regular business as broker-dealers and that 'it would be inappropriate to bring them within the scope of the [Advisers Act] merely because of this aspect of their business.'"[7] The SEC noted in that release that "brokerage firms and other interested parties may be unsure about whether we continue to [apply the Section 202(a)(11) standard]" and concluded that it would not change the expectations or obligations of brokers or "take steps or alter their business practices in such a way that would require them to incur new or additional costs as a result of the adoption of the proposed rule." We respectfully submit that the changes offered by the Proposed Rule would result in new or additional costs reflecting the additional risk, which costs would be passed on to Plans.

In lieu of the "a primary basis" standard of the existing rule, the Proposed Rule provides that advice or a recommendation may be considered to give rise to fiduciary status if the advice *may be considered* in connection with making investment or management decisions with respect to the Plan. We believe this subjective standard will be difficult to work with in designing adequate training and compliance. The standard is vague and ambiguous. If service providers are not able to determine what is included by "may be considered", we believe that Plan representatives will not be able to either. It serves nobody's interest to enact rules which introduce uncertainty and are likely to result in litigation.

A plain reading of the standard would include as advice, for example, an interview with one of our officers or strategists providing general market color in the Wall Street Journal, or on Bloomberg or CNBC. Any market idea, color or commentary

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[6] Release No. IA 2652 72 FR 55126 (Sept. 28, 2007).

[7] Opinion of General Counsel Relating to Section 202(a)(11)(C) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 2 (Oct. 28, 1940) 11 FR 10996 (Sept. 27, 1946) .

offered by our personnel "may be considered" by countless Plans, whether or not having any current (or future) nexus to JPMorgan. What's more, JPMorgan would likely never know when any given Plan was using this information. We do not think the Department intended to craft so broad a standard so as to include ordinary course market commentary of this type, yet the Proposed Rule enables a Plan to raise such a claim. Similar concerns arise with respect to research reports, newsletters and our employees' participation at educational conferences. The Proposed Rule seems to suggest that the provision of a general research report to a Plan would convert the authoring institution into a fiduciary, meaning that the Plan could not effectively trade with or purchase products and services from that entity or its affiliates. We doubt the Department believed precluding Plans from utilizing such commonly used information would best serve the interest of Plans.

Dealers will also be hesitant to engage in activities such as giving market color or comparing objective features of one security to another, for the fear that they will face ERISA liability for a prohibited transaction. Wall Street firms routinely provide broadly available and widely distributed research, report on industry trends and make market observations. Both Plan and non-Plan investors recognize the benefits of taking into account such information in their investment-related deliberations. While many investors can continue to freely search for investment related information from generally available sources such as the newspaper or internet, we doubt that chilling these other common types of broadly available and widely disseminated materials would be of benefit to Plans.

Accordingly, we believe that the reinsertion of "a primary basis" is called for and is protective of Plans' interests. Independently, the "may be considered" standard should be deleted in light of the significant uncertainties and asymmetries it introduces. If the Department does not accept the preceding recommendation, we suggest that at a minimum, the Department assure that any information provided to QPAMs, INHAMs bank or trust company trustees, insurance companies, registered investment advisers, those eligible for relief under Section 408(b)(17) of ERISA or Section 4975(d)(20) of the Internal Revenue Code or other sophisticated investors acting on behalf of Plans as fiduciaries under Section 3(38) of ERISA not be deemed to confer fiduciary status, unless the information is provided pursuant to a mutual agreement that such information is tailored for the Plan and will be used by the QPAM, INHAM, or such other sophisticated Plan representative as a primary basis for an investment decision. The exemptions available from ERISA's (and the Internal Revenue Code's) prohibited transaction rules upon which such service providers rely reflect a careful and considered assessment of the safeguards necessary to protect Plans. We doubt that the imposition of a new standard on top of these exemptions will add any significant benefit and believe it will likely reduce access to, and if available, increase the costs of products and services to Plans.

Valuation and Appraisal. The Proposed Rule suggests that any person who provides a valuation report or other valuation information to a Plan becomes a fiduciary. We believe such a suggestion is sufficient to impact the continued ability of Plans to get reasonably priced services, including many ministerial and administrative services, such as brokerage and prime brokerage and engage in certain investments, such as hedge

funds, real estate funds, private equity funds and swaps, all in situations in which the valuations are not generally relied upon for investment decisions. These services and investments are needed in the ordinary course of the operation of many Plans. For example, many Plans hedge interest rate and other risks through the use of swaps. Many others desire to obtain a more diversified return with access to alternative strategies such as hedge funds, real estate funds and private equity funds. In still other cases, Plans are otherwise unable to obtain reasonable valuations for hard to value assets—even where such valuations may be necessary for purposes of complying with Department reporting rules. Whether or not this is a result of current economic circumstances, Plans need this information currently and should be expected to continue to need in the future. If plan sponsors are unwilling to indemnify service providers for the risks associated with becoming fiduciaries, we suspect many service providers, and probably the most competent in disproportionate numbers, will exit the market resulting in a tangible detriment to Plans.

Conferring fiduciary status on service providers who offer a valuation or appraisal on hard-to-value assets, whether they are securities, real estate or other property may have the unintended consequence of preventing the Plan from obtaining necessary valuations. This is particularly troublesome where the valuation agent or appraiser in question is not acting as the Plan's advocate and is otherwise duty bound by other legal or self regulatory provisions to offer information only in an unbiased manner. Without significant clarification, many custodians, brokers and others may not provide valuations to Plans on assets as to which there is no readily available market. Custodians and brokers may simply disclaim any valuation for such assets. This would deprive Plan investors in hedge funds, real estate funds and other similar investment vehicles which hold plan assets and hold hard to value assets of valuations from a source independent of the fund's manager. These valuations are essential for purposes which have nothing to do with the fund's investment decisions, including the unit price at which investors obtain interests and the price at which withdrawing investors are redeemed.

While disclaiming a valuation may be possible for some service providers, custodians of IRAs cannot do so as a legal matter and, therefore, may prohibit the holding of such assets in IRAs. Furthermore all funds must report the year-end share or unit values to Plans under the Department's annual reporting rules. It would be detrimental to Plans to not have those values determined by the most qualified independent valuations firms with no plausible offsetting benefit to Plan investors. As a corollary, if Plans cannot obtain the necessary valuation, a whole suite of investment products, such as private equity, venture capital and real estate related investment funds, could be unavailable to them. We cannot believe that this is what the Department intended. We would hope that, at a minimum, the Department clarify that the mere provision of a valuation or appraisal to QPAMs, INHAMs, bank or trust company trustees, insurance companies, registered investment advisers, those eligible for relief under Section 408(b)(17) of ERISA or Section 4975(d)(20) of the Internal Revenue Code and other sophisticated investors acting on behalf of Plans as fiduciaries under Section 3(38) of ERISA would not cause the service provider to be treated as a fiduciary. We would also hope that the Department clarify that the provision of such services to entities that are not

subject to ERISA (or Section 4975 of the Internal Revenue Code), but in which Plans may invest, would not confer fiduciary status upon the provider of the valuation or appraisal. A similar concern relating to swaps is described directly below. Finally, we would also assume that the Department would not wish to confer fiduciary status where any valuation or appraisal was used by parties to a transaction with differing financial interests.

Similarly, the CFTC under Dodd-Frank has proposed a rule that would require that a dealer entering into a swap to provide a daily mark to Plans and other "Special Entities." The interplay between this requirement and the Proposed Rule raises two principal concerns. First, as noted above, we believe that the Department needs to make clear that mere compliance with any such rules would not convert a swaps dealer into a fiduciary with respect to a Plan counterparty. Second, the Proposed Rule does not appear to require privity, so that providing a daily mark to a pooled vehicle such as a private investment fund that is not deemed to constitute the assets of investing Plans could render the dealer a fiduciary because the value of the swap is then used by the investment vehicle to calculate a net asset value for purposes of a Plan's investment in the fund. We hope that the Department did not intend this result. Finally, as described above, these proposed CFTC rules place a number of other affirmative obligations upon dealers which we believe could translate into fiduciary status under the Proposed Rule. We urge the Department to unambiguously clarify its position so as to permit Plans' continued access to swaps consistent with Plans' best interests and Congress' intent.

Due to its breadth, the provision extends beyond commonplace financial transactions for Plans to reach a variety of transactions in which the protection of plan assets is not at stake. For example, investment banks provide investment banking advice to corporate clients in connection with proposed mergers and other corporate activities. If under such a mandate, and in the course of its duties, the investment bank provided information relating to the value of the corporate client's pension fund's assets or liabilities, the investment bank could be considered a fiduciary under the Proposed Rule. Similar concerns could arise for other professionals advising a corporate client where the nexus to any given Plan is necessary but ancillary to any corporate work. We assume that the Department did not intend this result.

Accordingly, while we understand the Department's desire to address potential concerns in selected commercial areas, we urge it to more carefully tailor its rule. Otherwise, it risks sweeping in many other practices for Plans which are needed.

Advisers Act Status. The Proposed Rule assumes that merely being associated with a registered investment adviser is sufficient to confer fiduciary status. We note that an individual associated with a registered investment adviser need not even provide information that "may be considered" by a Plan fiduciary for an investment decision. Association is sufficient. While it is possible to glean from the proposal that service providers would be able to avail themselves of the existing exemption under Section 202(a)(11) of the Advisers Act in connection with brokerage activities, it is important to recognize that not all services provided by personnel of a registered investment adviser

relate to brokerage activities contemplated by that exception. Thus, read literally, an employee that is a futures commission merchant of an entity that is registered both as broker-dealer and an investment adviser could be deemed to be a fiduciary by merely providing any recommendation or providing any appraisal regardless of whether such recommendation or appraisal is individually tailored to the circumstances to the Plan.

We urge the Department not to disrupt established principles of securities and commodities law by superimposing an entirely new regulatory regime. While we appreciate that many registered investment advisers often act in a fiduciary capacity, many others do not and many institutions are registered under a variety of different provisions. Many employees of registered investment advisers sell products and services and do not provide tailored investment advice. We submit that facts and circumstances, and not the characterization of the entity involved, should control for purposes of determining fiduciary status. We suggest the Department consider conferring fiduciary status upon an investment adviser or employee of the investment adviser only where the advice is pursuant to a mutual agreement that the Plan will use individually tailored advice for an investment decision.

Dodd-Frank Study. As required by Dodd-Frank, the SEC released a Study on Investment Advisers and Broker-Dealers (the "Section 913 Study"). As the study makes clear, "[b]roker-dealers generally are not considered ERISA fiduciaries, as traditional recommendations by broker-dealers would not usually constitute investment advice for ERISA purposes."

One of the central points of the Section 913 Study is that "the standard of conduct should be 'business model-neutral,' i.e., that the standard should not prohibit, mandate or promote particular types of products or business models." The study also makes clear that "the implementation of the uniform fiduciary standard should preserve investor choice among such services and products and how to pay for these services and products (e.g., by preserving commission-based accounts, episodic advice, principal trading and the ability to offer only proprietary products to customers)." If a broker becomes subject to the Advisers Act, it imposes certain duties upon the adviser, including disclosure of certain conflicts, but it does not prohibit a retail customer's access to certain transactions, including principal transactions. By contrast, if a broker were deemed to be an ERISA fiduciary by reason of being subject to the Advisers Act, many transactions, including principal transactions, would be prohibited under Section 406 of ERISA and Section 4975 of the Internal Revenue Code. Accordingly, the recommended uniform fiduciary standard under the Advisers Act appropriately suggests that the presence of such a uniform fiduciary standard "would not have any direct bearing on other persons who may be characterized as fiduciaries in other areas of the law, including ERISA fiduciaries[.]" In an effort to assure certainty to Plans and service providers alike, we urge the Department to clarify the interplay between the Section 913 Study and the Proposed Rule in a manner that clearly retains access by Plans to products and services consistent with the aims of the Section 913 Study and that leaves the facts and circumstances to dictate the nature of the relationship for purposes of ERISA.

As the Section 913 Study was conducted solely with respect to retail customers, we believe that an examination of "personalized advice" should not be relevant with respect to communications with QPAMs, INHAMs, bank or trust company trustees, insurance companies, registered investment advisers, those for which Section 408(b)(17) of ERISA and Section 4975(d)(20) of the Internal Revenue Code applies or other sophisticated investors acting on behalf of Plans. We welcome clarification on this point from the Department for the avoidance of any doubt.

Selling Exception. The Proposed Rule contains an exception for service providers acting in their principal capacity or when acting as an agent for a person with interests adverse to the Plan. While we agree that such a concept is necessary, we believe that this Selling Exception as currently crafted is too narrow. The Selling Exception should make it clear that in addition to "purchases and sales" of securities or other property, any bilateral arrangements, such as swaps, loans and other lending arrangements, options, futures execution and other structured products and solutions are covered. Similarly, to preserve the embedded relief of PTCE 75-1, margin in connection with the settlement of securities should be covered, as should settlements and overdraft protections. The Selling Exception should also be clarified so that it extends beyond any initial sale or purchase of a product or service, to ongoing communications. For example, if a Plan purchases a fund interest, the reporting of the value of the fund interest should be covered by the Selling Exception. The Selling Exception should cover selling at any time, regardless of whether a Plan is a new client or a Plan is already receiving fiduciary or non-fiduciary services. A Plan and a service provider should be able to define the nature of their relationship, not just for purchases and sales of securities or property, but for the provision of any product or service.

In addition, we are concerned with use of the term "adverse" and the apparent requirement that the interests of the Plan and service provider must be "adverse" for this exception to be available. We are also concerned that the exception appears to require that the service provider have the burden of proving that the exception is available. The interests between a service provider and a plan will often not be adverse, including, for example, agency execution. Receiving a fee or spread does not make parties adverse either. We assume that what the Department means is that the Selling Exception would be available where the interests of the Plan and the service provider are *financially* adverse, even though, for example, most service providers do not customarily think of themselves as being adverse to valued clients. We believe any concerns the Department may have in connection with the foregoing could be simply addressed by having a service provider specify that it is not acting as an ERISA fiduciary. In the absence of any other mutual agreement that any individualized investment advice will be used as a primary basis by the Plan party for an investment decision, we believe that this should be protective of Plans' interests. We hope the Department clarifies the Selling Exception accordingly.

JPMorgan appreciates the opportunity to comment on the Proposed Rule and respectfully urges the Department to consider the matters raised herein to accommodate a range of business models, products and services.

Sincerely,

Don Thompson,
Managing Director and Assistant General Counsel
JPMorgan Chase & Co.