Janney
Trusted Advisors for Generations

1801 Market Street
Philadelphia, PA 19103
800.526.6397 • 215.665.6000
www.janney.com

February 3, 2011

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

Janney Montgomery Scott LLC ("Janney" or "we") appreciates the opportunity to provide comments regarding the Department of Labor's ("Department") proposed regulation ("Proposal") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), that will redefine the term "fiduciary" under section 3(21)(A) of ERISA and section 4975(e) of the Internal Revenue Code of 1986, as amended ("the Code").[1] In particular, the Proposal would significantly expand the circumstances in which a firm or individual is considered to offer "investment advice" subject to ERISA's fiduciary responsibilities and the wide range of consequences that would result.

As the largest full-service securities brokerage firm headquartered in Pennsylvania, we provide a broad range of financial advice and services to both retail and institutional investors including financial planning, equity and fixed income investing, portfolio management, wealth management, fixed income sales and trading, equity research and underwriting and retirement planning. We have nearly 1,900 employees in over 100 offices across 17 states primarily in the Eastern United States. We serve more than 350,000 retail-oriented customer accounts and over 400 institutional account relationships. We have over 120,000 retirement and pension plan relationships, a majority of which represent individual retirement accounts ("IRAs"). We have built our business by focusing on our clients' best interest. We are registered with the U.S. Securities and Exchange Commission ("SEC") as a broker-dealer under the Securities Exchange Act of 1934 and as an investment adviser under the Investment Advisers Act of 1940. We are also a member firm of the Financial Industry Regulatory Authority ("FINRA").

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1 *See* Definition of the Term "Fiduciary," 75 Fed. Reg. 65263 (Oct. 22, 2010).

For over 178 years, we have provided clients with a full range of investment products and services used to develop investment portfolios to meet a variety of financial objectives for every stage of a client's personal and professional life, including retirement. With respect to our retirement services, we provide such products and services in our client's best interest consistent with the Department's guidance and industry best practices established over thirty-five (35) years, allowing us to establish a flexible suite of retirement products and services. We are greatly concerned with many aspects of the Proposal and its impact on our clients and our business as described below. In light of these concerns, we support commenters' propositions urging the Department to withdraw the Proposal, conduct a comprehensive review and analysis, including an enhanced cost analysis, and if necessary, re-propose a regulation that is more targeted and not nearly as far reaching as the Proposal.

Our concerns with the Proposal include, but are not limited to, the following broad observations:

Costs. We believe that the significant costs of the Proposal, particularly with respect to small pension and retirement plans and IRAs, likely will far outweigh any intended benefits to clients related to retirement investment advice. Some of these costs include litigation expenses, amending client agreements, modifying model forms, training of personnel, additional legal and compliance resources, and fiduciary insurance. These cost increases will likely be passed on to retirement clients. These significant cost increases may also result in limited or curtailed investment choices for investors in such plans and accounts. As such, we believe the Department should engage in a more comprehensive cost analysis related to the Proposal that should also take into account all relevant costs to plans and IRAs and those costs associated with changes in legal, compliance, operational and business structures for firms.

Fiduciary Standard. The SEC recently released its "Fiduciary Study" as required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). Section 913 required the SEC to conduct a study on the appropriate standard of care for retail accounts and, if necessary, issue regulations implementing a uniform standard of care for investment advisers and broker-dealers when providing personalized investment advice to retail clients. SEC Staff recommended a "uniform fiduciary standard" for investment advisers and broker-dealers in these circumstances, which would subject advisers and brokerage firms to a "fiduciary" standard that is not inconsistent with the current ERISA regulation defining the term "fiduciary." Of significance, the SEC's recommended uniform standard would permit commission-based arrangements, sale of proprietary products and principal trades, and no continuing duty following provision of advice.[2] We note that the "fiduciary" standard as described in the Proposal goes far beyond the uniform standard that the SEC would propose for advisers and broker-dealers and may apply in circumstances where the firm would already be subject to a fiduciary standard under applicable SEC rules and regulations. This likely will result in an unworkable or confusing structure where varying standards of care will apply in different circumstances creating additional pressures on firms potentially causing significant changes in business models that could be adverse to retail clients. We agree with commenters and urge the Department to defer to the conclusions and recommendations of the SEC, particularly with respect to investment advice provided by brokerage firms and advisers and reconsider its proposed standard that well exceeds what the SEC will likely propose with respect to retail accounts.

Applicability to Registered Investment Advisers. The Proposal would subject registered investment advisers to the enhanced fiduciary standard when providing investment advice. For firms like Janney that are registered as both a broker-dealer and investment adviser, this may subject them to the fiduciary standard simply as a result of their status as a registered adviser even though the services are provided through a brokerage relationship or some other non-advisory relationship. This may create an unfair competitive landscape where certain firms are subject to the enhanced standard while others may not for the same services. Moreover, this may lead to further confusion for the investing public as to which standard of care applies to a particular relationship or circumstance. As such, we urge the Department to reconsider its proposal to subject all registered advisers to an enhanced ERISA fiduciary standard and to clarify the impact of the Proposal on dually registered entities that provide retirement services through both brokerage and advisory relationships.

Ability to Effective Provide Retirement Services. We are concerned that our ability to provide critical investment tools, information and services to retirement plan participants and IRA clients may be curtailed or can only be accomplished with significant added costs. Any limitation on providing critical investment products and services or access to markets may decrease competition and likely result in higher costs and spreads, which likely will be passed on to retirement clients. We agree with

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[2] *See* Dodd-Frank Section 913 Study, available on the SEC website at http://www.sec.gov/news/studies/2011/913studyfinal.pdf (the "Fiduciary Study"). In connection with the Fiduciary Study, the staff conducted a detailed cost analysis in determining that these activities should be permitted and, consistent with recommendations from FINRA, determined that the standard should be business-model neutral and flexible to allow different types of compensation arrangements. Both the SEC and FINRA appreciate the potential harm to retail accounts if there are significant changes to existing business models.

commenters that most plan sponsors and IRA owners will see the absence of this information as harmful to their plans and their participants, not protective of them.

Application to IRAs. We believe it is inappropriate to subject IRAs to the fiduciary standard as currently set forth in the Proposal. The application to IRAs would likely discourage firms from providing investment advice to IRA clients due to the risks and costs. Most IRAs are established by individuals as an alternative to retirement or pension plans and are not sponsored by an employer. As such, it is critical for IRA clients to be able to access the services and advice that firms provide, particularly as the importance of IRAs and other participant-directed retirement accounts continues to increase. Implementing any changes that would create impediments to this advice for IRA clients would not be a desirable outcome. We agree with commenters that the Department should consider issuing more comprehensive guidance that addresses key topics in the context of retail IRAs.

Principal Trading. We are also concerned with the impact the Proposal may have on our ability to engage in principal trades for client accounts. In servicing retail customers' needs, Janney relies on fixed income inventory and execution services provided by our fixed income trading desk and to provide for the efficient and cost-effective construction of customer fixed income portfolios using principal trades. Under current broker-dealer and certain advisory rules, Janney is able to provide principal executions efficiently with its retail customers receiving full protection of fair pricing rules. In the absence of any applicable prohibited transaction exemption, we are concerned that we would no longer be able to offer this valuable service to retirement plan clients and IRAs.

Custodial Valuations. As a "non-bank" custodian for IRAs, we may have difficulties in obtaining appropriate pricing or valuation information for alternative investments and other "difficult to value" holdings in IRA accounts. As a result, the Proposal may significantly limit investment choices for IRAs and plans at a time when standard industry model asset allocations include a certain percentage for alternative holdings that may fall within these categories.

Janney respectfully urges the Department to reconsider its proposed changes to the definition of fiduciary regulation, to confer with FINRA and the SEC on the interaction of these changes with the requirements of the Dodd-Frank Act, the new suitability rules and the recommended uniform fiduciary standard for investment advisers and broker-dealers, and to consider modifications to address and clarify the broad concerns referenced herein. We look forward to a further dialogue on these issues at the March 1, 2011 hearing.

We appreciate the opportunity to provide our views. If you have questions, please contact the undersigned at (215) 665-6596.

Sincerely,

Ronald A. Holinsky
Vice President &
Deputy General Counsel