Gregory B. McShea
Senior Vice President
General Counsel

JANNEY MONTGOMERY SCOTT LLC
Office of General Counsel
1717 Arch Street
Philadelphia, PA 19103
215.665.6086
T 800.526.6397
F 215.665.0824
gmcshea@janney.com
www.janney.com

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By Email: EBSA.FiduciaryRuleExamination@dol.gov

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

Re: Reexamination of Conflict of Interest Rule (RIN 1210-AB79)

To Whom It May Concern:

Janney Montgomery Scott LLC ("Janney")[1] appreciates the opportunity to comment on the Department of Labor's (the "Department") reexamination of the final rule entitled: Definition of the Term "Fiduciary;" Conflict of Interest Rule – Retirement Investment Advice, as well as the related prohibited transaction exemptions including the Best Interest Contract Exemption (collectively, the "Fiduciary Duty Rule" or "Rule").

Janney's View

As reflected in its prior comment letters on the Rule, Janney continues to support a uniform higher standard of care that will apply to *all* investment relationships, not just the retirement accounts that are the subject of the Fiduciary Duty Rule. We believe that the Fiduciary Duty Rule, while well intentioned, is overreaching and will cause confusion to investors, limit their access to advice, and reduce freedom of investor choice. We also believe the securities industry's primary regulators, namely the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA"), should lead the effort to adopt such a uniform standard. Janney is an active member of the Securities Industry and Financial Markets

[1] Janney traces its roots in Philadelphia to 1832. At 185 years strong, it is one of the oldest full service financial services firms in the country, and has capably served its customers for generations. With over 100 offices along the East Coast and as far west as Ohio, Janney provides investment services to retail investors through over 750 financial advisors. We manage over 300,000 client accounts, and our financial advisors provide tailored solutions helping the roughly 125,000 families we serve achieve their financial goals.

Association ("SIFMA"), and is generally supportive of the comments regarding the Fiduciary Duty Rule that SIFMA has provided to the Department. The purpose of this letter is to amplify certain concerns raised by SIFMA regarding the Fiduciary Duty Rule, which we believe are also inconsistent with President Trump's stated priorities "to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies."

The President's Memorandum

In President Trump's Memorandum to the Secretary of Labor dated February 3, 2017 (the "President's Memorandum"), the President expressed concern that the Fiduciary Duty Rule "may significantly alter the manner in which Americans can receive financial advice, and may not be consistent with the policies of my Administration." As such, the Department has been directed to examine whether the Rule may adversely affect the ability of Americans to gain access to retirement information and financial advice, and to prepare an updated economic and legal analysis concerning the likely impact of the final Rule as part of that examination.

Specifically, as part of its examination, the Department is obligated to consider, among other things, the following:

(i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;

(ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and

(iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

If the Department makes an affirmative determination as to any of the considerations identified above -- or if it concludes for any other reason after appropriate review that the Fiduciary Duty Rule is inconsistent with the President's stated priorities -- then the Department is required to publish for notice and comment a proposed rule rescinding or revising the Rule, as appropriate and as consistent with law.

Because the Fiduciary Duty Rule is designed to be enforced through private litigation including class actions, the likelihood of that occurring is already causing a diminution in retirement advice and services and will continue to do so. For these reasons alone, the Department is required to take steps to rescind or revise the Rule.

The Rule Will Increase Litigation and Therefore Reduce Investor Access to Services

The Department created the Best Interest Contract Exemption ("BIC") in an attempt to allow investment advice fiduciaries to continue to receive commissions and other common forms of compensation, acknowledging that these forms of compensation could be beneficial to retirement investors under the right circumstances. The BIC places a myriad of new contract and disclosure requirements on fiduciary advisors, and the mechanism created by the Department to ensure compliance with the BIC is private litigation. In doing so, the Department effectively delegated its enforcement duties regarding the BIC to the plaintiffs bar.

As such, the BIC remains a problem – but not because financial services firms don't want to comply with its requirements. Rather, the BIC is not viable because financial services firms, even with the best of intentions and best compliance programs, are choosing not to avail themselves of it. The reason for doing so is clear. Firms are afraid of the unknown, and are loathe to undertake the complexity of attempting to comply with the BIC for fear that the slightest mishap will be subject to armchair quarterbacking and second-guessing, not by the Department mind you, but by a plaintiffs bar that is motivated by profit. To this end, SEC Commissioner Piwowar recently agreed, "For me, the rule was never about investor protection, it was about enabling trail lawyers to increase profits."

Accordingly, Firms are mitigating or eliminating this unchartered downside risk of failing to comply with the BIC by avoiding it altogether. The Department has repeatedly referred to the contractual obligation of the BIC as a "powerful incentive" to ensure advice is provided conflict free. The fact of the matter is that the BIC merely serves as a *powerful disincentive* to provide advice to retirement investors in a commission-based account.

Predictably, retirement investors are already seeing a reduction in access to retirement savings advice and retirement product structures. Many of America's largest financial services firms have already publicly announced their plans to limit advice and/or services to scores of retirement investors. For example,

- In August 2016, Edward Jones announced it would halt mutual fund sales in commission based IRAs;
- In October 2016, Merrill Lynch announced that it would no longer offer commission-based IRAs to its clients, thereby forcing those investors into fee-based options only or without advice altogether;
- In October 2016, Commonwealth Financial announced it will cease commission based-products in IRAs;
- In November 2016, Merrill Lynch instructed its advisors to stop selling mutual funds in brokerage IRAs; and
- In November 2016, J.P. Morgan stopped offering commission based retirement accounts for certain of its wealth management clients.

Though not publicly announced, we understand that numerous other financial services firms, including Janney, are in the process of curtailing products and services to retirement investors to comply with the Rule. Many are avoiding the BIC altogether, limiting its use to accounts of a given size, and/or cutting back the products or services available within a BIC-governed account.

The Rule Should Be Further Delayed

On April 5, 2017, the Department published the 60-day delay of the Fiduciary Rule. We appreciate the Department for having done so, as well as having eliminated the requirement to provide a transition notice and other disclosures to retirement clients during the Rule's transition period. The latter are helpful reprieves from an administrative point of view, but firms will nevertheless have to substantively comply with the Rule by adhering to the Impartial Conduct Standards come June 9th, with all the attendant systems and controls to comply with the Rule at that time.

In granting the 60-day delay, the Department agreed that it was important to protect against investor confusion and uncertainty, and further acknowledged that "rigid adherence to the April 10 applicability date could result in investor confusion, excessive costs, and needlessly restricted or reduced advisory services". The Department also recognized the logic that "the extensions … are necessary to enable the Department to perform the examination and to consider possible changes with respect to the Fiduciary Rule". The same issues that led the Department to the 60-day delay exist today and will continue to exist on June 9th.

In sum, under the Rule as we know it today, access to investment advice and services to retail investors will be curtailed, and litigation will increase, which will increase the cost of investment advices and services to retail investors. Therefore, the Department must take steps to revise or rescind the Rule. That being the case, then it makes no sense to put firms, and retail investors, through the changes required to comply with the Rule by effective date of June 9th when it is evident that the Rule must be revised or rescinded based on the President's directive. The better outcome would be to further delay the Rule so that the DOL can comprehensively complete its analysis as required by the President.

We trust the Department will go about its business and conduct its reexamination process pursuant to the President's Memorandum thoughtfully and carefully. We believe in a higher standard. Let's get it right rather than cause even more disruption and confusion for our shared constituents and clients.

We appreciate the opportunity to comment on the reexamination of the Fiduciary Duty Rule. If you have any questions regarding the foregoing, please feel free to contact me directly.

Very Truly Yours,

Gregory B. McShea