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By U.S. Mail and Email: e-OED@dol.gov

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712
Suite 400
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Department of Labor Rule Proposals with respect to Fiduciary Duty and the Best Interest Contract Exemption

To Whom It May Concern:

Janney Montgomery Scott LLC (“Janney”) appreciates the opportunity to comment on the Department of Labor’s (the “Department” or “DOL”) proposed regulation under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) that will redefine the term “fiduciary” under Section 3(21) of ERISA and Section 4975(e) of the Internal Revenue Code of 1986, as amended. We are also pleased to provide the Department with our comments to the companion Proposed Best Interest Contract (“BIC”) Exemption under ERISA. The purpose of this letter is not to restate the array of legal issues or grounds for concern created by the redefinition of “fiduciary” or the BIC Exemption (collectively, the “Proposal”), and the corollary proposals related to it.¹ Rather, our intent is to illustrate, from a firm whose primary business model is to provide investment advice, how we believe the Proposal will achieve the opposite results from those intended and negatively impact the clients we serve.

Executive Summary

Janney is in favor of a uniform higher standard of care that will apply to all investment relationships, including individual retirement accounts (“IRAs”), other investment accounts governed by ERISA, and, importantly, those that today are not subject to a fiduciary duty or governed by ERISA. For the reasons set forth herein, however, Janney is opposed to the Proposal. We acknowledge and agree with the DOL’s desire to adopt a fiduciary standard to apply to IRAs by applying “*basic* standards aimed at ensuring that their advice is in the best

¹ We fully support the comments submitted by the Securities Industry and Financial Markets Association (“SIFMA”). We believe the DOL Proposal, if enacted, would ultimately undermine the efforts of American investors who are already struggling to save and invest for their retirement.

interest of customers.” However, the resulting Proposal is, regrettably, anything but basic. To the contrary, the Proposal will be confusing and increase costs to investors, and will be unduly burdensome to comply with. We submit that the Proposal as drafted will have the unintended consequence of cutting off the very advice that retirement investors so desperately need.

At this time, we believe it to be in the best interest of retirement savers for the Department to stand still on its pending fiduciary rulemaking initiatives and allow the securities industry’s primary regulators, namely the Securities and Exchange Commission (“SEC”) and the Financial Industry Regulatory Authority (“FINRA”) to adopt a uniform fiduciary standard of care that will apply to all investors. Both the SEC and FINRA are in favor of this approach.² And as the DOL is aware, SIFMA has proposed a higher best-interest standard of care – one that works within the existing regulatory framework and will be far easier to implement than what is currently proposed.³ In the alternative, if the DOL decides to move forward, significant modifications will be required to make the Proposal workable. As written today, the BIC Exemption will be extremely difficult, if not impossible, to comply with.

Janney Montgomery Scott

Janney Montgomery Scott traces its roots in Philadelphia to 1832. At 183 years strong, it is one of the oldest full service financial services firms in the country, and has capably served its customers for generations. Janney is fortunate to have earned a healthy reputation over the years by consistently acting in the best interests of its clients regardless of the technical legal standards of care that may apply. With approximately 102 offices along the East Coast and as far west as Ohio, Janney provides investment services to retail investors through over 740 financial advisors. Ours is an advice business. We manage over 300,000 client accounts, and our financial advisors provide tailored solutions in a face to face setting helping the roughly 125,000 families we serve achieve their financial goals. Our work with individual clients and families -- what we call our Private Client Group -- is the firm’s primary business representing nearly 80% of firm net revenues. Our clients entrust \$68 billion of their assets with us, a material portion of which (over a third of our clients’ accounts and \$17 billion in assets) are in retirement accounts, primarily IRAs. Notably, and to emphasize the importance that personal advice has on our business model, we do not offer client directed on-line trading nor do we provide a centralized 800 number call-center for processing client transactions. Our service model mandates that our clients and financial advisors communicate regularly so that the investment education and advice we provide takes into consideration all the facts and circumstances necessary to meet the needs of our clients.

² See *Remarks From The 2015 FINRA Annual Conference*, Richard Ketchum, FINRA Chairman and CEO, Washington DC, May 27, 2015 (recommending a “broker-dealer best interest standard under the securities laws, rather than the present Labor proposal...”); See also *Testimony Before the U.S. House of Representatives Committee on Financial Services*, Mary Jo White, SEC Chair, March 24, 2015 (“After significant study and consideration, I believe that broker-dealers and investment advisers should be subject to a uniform fiduciary standard of conduct when providing personalized securities advice to retail investors.”)

³ See *SIFMA Proposed Best Interest of the Customer Standard for Broker Dealers*, June 3, 2015

Janney's Private Client Group offers our clients a choice of fee-based advisory relationships as governed by the Investment Advisers Act of 1940 as well as commission-based brokerage services governed by applicable SEC, FINRA, and state rules and regulations. A small percent of our account relationships also meet the current ERISA fiduciary standards. These legal constructs currently provide different options and advantages to our clients in that we can provide any combination of fee-based or commission-based solutions determined by each client's unique set of investment goals and objectives. It is this aspect of the Proposal that warrants reconsideration. As written, the Proposal jeopardizes our ability to continue providing commission-based IRA accounts to our clients when in many cases that will be the preferred and less expensive option for the customer.

Janney Supports a Higher Standard of Care

Janney is keenly aware of its regulatory obligations and is committed to providing investment solutions to its clients that are both suitable and designed to help them meet their financial goals, particularly when saving for retirement. Janney agrees these goals must be coupled with transparent communications and disclosures that allow our customers to make informed decisions. To this end, Janney supports the DOL's efforts to enhance investor protection and provide plain English disclosures regarding possible conflicts of interest throughout the investment process. Janney believes that a higher standard of care would go a long way to improving the level of trust and confidence individual investors have in the financial system in general and in providers of financial advice specifically. Investors deserve to have their interests placed first. In this regard, the interests of Janney and the Department are aligned.

We have been supportive of a higher standard of care since 2009. At that time, with input from Janney, SIFMA provided the SEC with a road map for a fiduciary standard for broker dealers. Neither Janney nor the securities industry, in general, takes exception to there being a higher standard of care. That said, the approach being taken by the DOL is unnecessarily complicated and, if passed, will have lasting negative unintended impacts as compared to other approaches that can achieve the same or similar result with far less investor confusion, disruption, and expense.

The DOL Should Defer to Securities Industry Regulators

Respectfully, Janney does not believe the approach being taken by Department -- by applying the proposed ERISA fiduciary standard to the IRA and small retirement market place -- is the right approach to achieving the goal of a higher standard of care. We see this Proposal as confusing, increasing costs to retirement savers and investors, and practically eliminating access to investment education, advice and choice those investors enjoy today, particularly for the smallest retirement savers who need advice. At this juncture, with the majority of the securities industry behind a uniform fiduciary standard, including FINRA,⁴ it stands to reason that the

⁴ See *FINRA Comment Letter to the DOL Proposal*, July 17, 2015 ("A best interest standard should apply to both retirement and non-retirement accounts. Most investors consider their investment portfolio to

Department should take the necessary time to substantively collaborate with the SEC and FINRA to create a uniform single standard of care rather than unilaterally move ahead and create its own disparate standard. The DOL Proposal will create unneeded confusion in the minds of investors in that it applies a fiduciary standard *only* to the retirement space. It will create one set of rules and pricing options for clients for their retirement accounts and another different set for their taxable accounts. If the Proposal is passed, there will then be three standards of care applicable to investment accounts – (i) a FINRA suitability standard for commission-based brokerage accounts, (ii) a fiduciary standard for advisory accounts operating under the SEC’s Investment Advisers Act of 1940, and (iii) a DOL promulgated ERISA fiduciary standard of care for IRAs. We question whether that outcome makes sense for retirement investors. In our opinion, any best interest standard going forward should apply to client taxable accounts as well as qualified accounts.

The Proposal Eliminates Investor Choice, Increases Cost, and is Anti-Competitive

Our view, and our business model, is predicated on the notion that our clients value the advice our financial advisors provide. Our clients, at their own discretion, are willing to pay competitive rates for that advice based on the account structure (commission or fee-based) that is best suited for them, no different than any other professional service where the value of the service may vary from one provider to another, be it legal, medical, accounting, or some other professional service. The effect of the Proposal will be to dramatically impact our ability to provide lower-cost commission-based accounts to IRA clients, and thereby result in IRA clients (a) transitioning to higher cost fee-based advisory accounts when that may not be preferable,⁵ (b) “going it alone” through the use of ultra-low cost or “robo” providers where little to no advice is provided, notwithstanding the DOL’s acknowledgment that IRA investors are in dire need of education and advice,⁶ or (c) in the worst case, foregoing investment advice altogether and withdrawing assets, thereby eliminating the benefits of tax deferral and having less in the end for retirement.

include their assets in Individual Retirement Accounts, employer plan accounts, and nonretirement accounts. This perception is rational because an investment decision should reflect the assets in all of those accounts. Imposing disparate standards on different accounts would confuse investors because it would conflict with their own logical assumption that those accounts will be treated seamlessly within their total investment portfolio.”)

⁵ By effectively eliminating the brokerage model (BIC notwithstanding), IRA clients will be served by registered investment advisors (“RIAs”) who arguably receive less regulatory scrutiny than FINRA member broker-dealers.

⁶ The DOL has acknowledged the need for “IRA owners to seek out and rely on sophisticated financial advisors to make critical decisions in an increasingly complex financial marketplace,” and that “retirement investors seldom have the training or specialized expertise necessary to prudently manage retirement assets on their own. As a result, they often depend on investment advice for guidance on how to manage their savings to achieve a secure retirement.”

Janney maintains approximately 130,000 IRA and various types of small retirement accounts for our clients. The vast majority of these -- over 75% -- are currently held in commission-based brokerage accounts. On average, brokerage IRAs cost the account holder approximately .70% annually on the assets held in these accounts. Fee-based advisory accounts on average cost the account holder approximately 1% annually. If the Proposal were to go into effect, our likely path to providing advice to our IRA clients and small retirement plans would be to do so acting as a registered investment advisor and charging an annual fee. As noted above, fee arrangements are generally more costly than brokerage commission arrangements -- on average almost 50% higher. The higher costs are due to the higher attendant legal liability, more active portfolio management, and greater reporting analytics provided to our advisory clients.

Higher cost advisory accounts are especially troubling for our existing brokerage clients who have already determined that they neither want nor need fee-based advisory relationships with us. They prefer brokerage relationships. Further, many of our brokerage IRAs are too small to qualify for our advisory account minimums -- and may leave, in Janney's case, approximately 40,000 accounts stranded and without the financial education, advice, and services they enjoy in a lower-cost account today. Accordingly, the Proposal creates significant unintended client disruption. What happens to these 40,000 clients? Many of these smaller accounts would include savers just starting out and clients of limited means. Where would they go for advice?

Finally, by its structure, the Proposal has the effect of selecting financial advisory business model winners and losers. It is apparent, based on how the Proposal is written, that the DOL's preferred business solution is for IRA investors to invest in no-load mutual funds held in fee-based accounts where cost alone (and not advice) is the dispositive factor when selecting a financial services provider. The pejorative manner in which the DOL describes mutual fund sales loads as "loads taken off the top" makes this point clear. This method of compensating advisors for their advice has been highly regulated and in place for decades, and the fact is that many buy and hold clients prefer paying for their investment advice in this manner (i.e., the purchase of mutual fund A shares in a brokerage account). In many cases this is the most cost-effective and prudent approach for an investor. Selecting fee-based advisors and other low-cost providers as the DOL's business winners (at the expense of brokerage firms) is anti-competitive and should not be permitted.

The DOL Has Not Established that the Benefits of the Proposal Outweigh its Costs

We do not believe that the Department has justified its basis for the Proposal and consider it a solution in search of a problem. The studies relied upon by the DOL in favor of the Proposal are just that -- studies. They are not based on fact, but rather educational and experimental studies heavy on suppositions and conjecture, and with little input from the two regulators who know the industry best.

We challenge the "evidence" relied upon by the DOL. The word "evidence" implies that there is stronger, irrefutable, data in support of the Proposal, when in fact the data being relied upon is murky at best. Even the DOL admits that there are data constraints, and requests commenters to help provide information to support its Proposal. Despite the DOL's awareness of

these limitations, it has extrapolated this “experimental” data into billions of dollars of alleged harm and quantifies the benefits to be gained by the Proposal as if they are without dispute.

We question the appropriateness of moving forward with a proposal of this magnitude based on what “could” or “possibly” be the case, and remain unconvinced that clients will be better off as the DOL suggests. For all the many data points that the DOL relies upon in support of the Proposal, there are just as many, if not more, that inform us that the costs of the Proposal far outweigh its perceived benefits.⁷

What we anticipate is that investor education and choices will dissipate, that there will be even more regulatory fragmentation, and that the cost of investment services will increase. The Department should establish a clear and compelling basis for the Proposal, not have others do it for them, nor require opponents of the Proposal to disprove their assumptions. The burden of proof should be on the Department to make their case, and they have not done so.

The BIC Exemption is Unworkable

The Proposal, as we see it, would offer two potential paths for compliance with it. The first, and of course where appropriate for the IRA client, would be to transition our commission-based brokerage IRA accounts to fee-based accounts to avoid having to qualify for a prohibited transaction exemption under ERISA. A second path would be to attempt to utilize the BIC in order to allow our clients to maintain commission-based accounts.

The preamble to the BIC Exemption provides that it “seeks to preserve beneficial business models by taking a standards based approach that will broadly permit firms to continue to rely on common fee practices.” While the Department claims that the Proposal is not intended to disrupt common fee arrangements, it unfortunately will. As the BIC Exemption is currently outlined, regrettably, Janney will be unable to avail itself of its use because the data and reporting requirements are unduly burdensome and not achievable without considerable investment. The obligations to comply with the BIC will substantially increase our legal and regulatory exposure without a commensurate return to offset the risk. Not knowing the magnitude of these liabilities, we would be remiss to undertake such unknown downside risk verses the limited (and shrinking) returns we currently realize serving our IRA clients. So while it may have been the DOL’s intention to create the BIC structure to allow clients to maintain commission-based arrangements with their advisers, it is written in way that impose too many expensive and complicated new reporting requirements (and legal uncertainties) that make its use untenable.

There are numerous other challenges with the BIC. We do not seek to expose each and every one here, but instead offer two practical examples below as to why the BIC does not work.

⁷ See *Deloitte Report on the Anticipated Operational Impacts to Broker Dealers of the Department of Labor’s Proposed Conflict of Interest Rule Package*, July 17, 2015

The BIC imposes additional reporting and disclosure requirements not required by our current regulatory framework including, among others, proposed disclosures requiring 1, 5, and 10 year assumptions about investment returns and the impact of any costs incurred on those returns. This is as good an example as any as to how the DOL could benefit from working collaboratively with the SEC and FINRA on a modified proposal. Regarding these proposed disclosures, how would we predict investment returns or what costs may be in the future, especially for an equity or corporate bond? Ironically, FINRA does not allow us to project returns pursuant to FINRA Rule 2210, which prohibits the type of performance assumptions that the Proposal would require.

Further, the BIC defines those "Assets" that, if purchased in an IRA, will enjoy the protections afforded by the BIC and permit commission-based transactions among those defined Assets. In other words, the Department has determined what it deems to be an appropriate or "legal list" of acceptable securities in an IRA for which commissions may be paid. Permissible "Assets", as proposed, would exclude an assortment of transparent and liquid securities, including municipal bonds, foreign bonds, foreign equities, as well as other common investments including IPOs, options and futures contracts. We see no reason why covered call writing, a tried and true investment strategy, would not be allowed in an account operating under the BIC Exemption. Similarly, the BIC Exemption would render low cost strategies like laddering fixed income securities impossible to execute for clients.

Conclusion

In sum, we believe there are significant flaws with the Proposal that will negatively impact our clients and negatively impact savings for retirement by Americans overall. We believe the Proposal will (i) curtail investment education and advice, (ii) eliminate choices that clients enjoy today in terms how they can pay for advice and what investments they can make, (iii) add unnecessary complexity and confusion into the retirement savings process, and (iv) increase costs for retirement saving and investing. As far as permitting clients to remain in their lower-cost brokerage account IRAs, the BIC is an unworkable solution. Again, Janney favors a single best interest standard for all the types of accounts and clients we serve. SIFMA's proposed best interest standard would be a far more beneficial approach to achieving that end.

We appreciate the opportunity to comment on the Proposal. If you have any questions regarding the foregoing, please feel free to contact me directly.

Very Truly Yours,

A handwritten signature in blue ink, appearing to read "G B McShea", with a long horizontal flourish extending to the right.

Gregory B. McShea