Testimony of Karen Prange
Executive Director and Assistant General Counsel,
J.P. Morgan Chase and Co.
Before the U.S. Department of Labor
Related to Proposed Rule Regarding Definition of the Term "Fiduciary"
9 C.F.R. Part 2510, RIN 1210-AB32

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ADDENDUM

J.P. Morgan would like to take this opportunity to provide further detail related to certain matters discussed during the hearing.

With respect to recordkeepers providing participants with information about their distribution options, we believe the inclusion of providing such information in the definition of "investment advice" may have unintended consequences to the retirement industry. Specifically, recordkeepers may be forced to eliminate or reduce the scope of the information they are able to provide to participants, thereby inhibiting the ability of participants to obtain this valuable information, if providing such information is considered a fiduciary function or it is uncertain whether the provision of such information would cause the recordkeeper to become a fiduciary. Therefore, J.P. Morgan urges the Department to exclude from the definition of "investment advice" information provided by a recordkeeper regarding a participant's distribution options.

Alternatively, we would urge the Department to issue separate proposed regulations regarding the provision of distribution option information. Given the potential impact on services currently provided to plan sponsors and participants in accordance with Advisory Opinion 2003-23A, interested parties should be provided the opportunity to review the Department's proposal regarding distribution information outside the context of the broader fiduciary definition. However, if the Department is compelled to include distribution information under the Proposed Regulations, we would urge the Department to include the provision of information regarding a participant's distribution options under the sales exception, subject to the recordkeeper disclosing to plan sponsors and participants that the recordkeeper is not acting in a fiduciary capacity when providing distribution information.

Participants generally contact their recordkeeper's call center to obtain basic factual information about the plan, including its distribution and investment options. Recordkeepers generally staff call centers with individuals looking to enter the retirement plan industry. In many firms, the individuals are trained in telephone procedures, retirement plan basics, plan design and investment basics for a period of time before taking calls. These individuals are not trained and do not have the breadth of knowledge and experience to qualify them to provide

investment advice to participants or to meet the high standard of fiduciary conduct. As recognized by the Department in Advisory Opinion 2003-23A, we must preserve the ability of service providers to continue to deliver fundamental plan information, including distribution information, to participants as a ministerial function so participants can make informed decisions about their retirement plan and assets without risking that every conversation may, after the fact, be deemed to have resulted in the delivery of investment advice.

There is a distinction between providing participants with *information* and providing *advice.* Plan sponsors engage recordkeepers to provide information to participants about their rights to receive or defer a plan distribution and related concerns, such as information about tax consequences and rollover vehicles (like IRAs), and expect recordkeepers to provide such information 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 hardship distributions. The plan sponsor's engagement of the recordkeeper to provide such information is expected to be a ministerial function and not subject the recordkeeper to ERISA's fiduciary requirements. Plan sponsors do not expect, and do not want to pay for, call centers to be staffed by representatives who are tax specialists, certified public accountants or certified financial planners and others who have the training and expertise to be held to a fiduciary standard of conduct.

The type of distribution information provided by recordkeepers' call centers generally include a review of the plan distribution options, including deferring the distribution and allowing the assets to remain in the plan, taking a lump sum distribution, and completing a rollover to an IRA or other retirement plan. In addition, the call center representative reviews the tax consequences associated with each distribution option with the participant. If a participant expresses interest in rolling plan assets to an IRA, the call center representative will inquire whether the participant has an existing relationship with an IRA provider, or a preferred provider. To the extent the participant does not have an IRA provider identified, the call center representative may offer the participant access to IRA services within their firm or an affiliate. However, as stated during the hearing, the call center representatives would not make recommendations to participants about how to invest their money, whether assets remain in the plan or are rolled over to an IRA.

If the Department decides to include the provision of distribution option information under the final regulations as "investment advice", J.P. Morgan would urge the Department to include the delivery of such information under the sales exception. Recordkeepers would be required to disclose to plan sponsors and participants that they are not acting in a fiduciary

capacity when providing distribution option information and any affiliation with an IRA provider for the sales exception to apply.

In our experience, plan sponsors and participants value these types of distribution services, in part, as it provides participants with information which results in participants reconsidering cash distributions that may lead to premature depletion of retirement assets. As a result, more participants are considering the benefits of preserving assets for retirement by rolling over distributions to an IRA. The inclusion of distribution services in the definition of "investment advice", without the application of the sales exception, may result in the elimination of such services and reversion of participant behavior to taking cash distributions rather than preserving retirement assets.

During the hearing, J.P. Morgan responded to questions about recordkeepers providing investment information to plan sponsors and when the provision of such information becomes investment advice. We would like to take this opportunity to expand upon our response.

Plan sponsors often rely on their recordkeeper and other non-fiduciary service providers to make investment information available for the plan sponsor's use in determining appropriate investment offerings for their plan. In many cases the plan sponsor is capable of making the fiduciary decision related to the plan's investments, but requires access to information and evaluations of sample fund line ups to make an informed decision. Such information is generally readily available to and often maintained by the service provider. As a result, service providers can efficiently deliver the information to plan sponsors, often, at no additional fee.

Alternatively, a plan sponsor may determine that they are not qualified to make the final decision regarding the plan's investments and engage an investment advisor to make a recommendation or to select the plan's investments on the plan sponsor's behalf. In these circumstances, we believe the investment advisor is performing a fiduciary function and the parties should document, in a written agreement, the fiduciary function to be performed by the investment advisor.

However, we believe the provision of "investment advice" under the final regulations should clearly allow for the application of the sales exception, as well as the platform and selecting or monitoring exceptions to a service provider delivering investment information to plan sponsors when the provision of such information does not include the service provider recommending or selecting investments for the plan.

In addition, we would like to add further clarification to our comments with respect to Section 2510.3-21(c)(2)(iii) of the Proposed Regulations that statements provided by a service provider, including directed trustees and custodians, should not be considered the provision of "investment advice".

Service providers may apply tolerance checks to prices received from pricing vendors, which consist of comparing prices to a percentage threshold, so that significant price movements are confirmed from a second pricing source or the original pricing vendor. Service providers may also confirm back to the pricing vendor in the event that an updated price has not been received within a fixed period of time. These types of activities do not involve discretion or a determination of the appropriate price but merely request confirmation from a third party pricing service and should not be deemed to be the provision of "investment advice".

As stated during the hearing, it would not be J.P. Morgan's intention that a disclaimer of fiduciary responsibility would supersede the actual performance or activities of a service provider. We believe the functional test applicable to fiduciary status is appropriate and should not be eliminated. However, we believe the Department should provide clear and objective guidance so that participants, plan sponsors, service providers and other interested parties can distinguish between the provision of information versus the provision of recommendations or investment advice, and *when* the provision of information rises to a recommendation or investment advice. We are very concerned that recordkeepers and other service providers will intend to provide information that does not constitute a recommendation, while plan sponsor, participants, or their attorneys, will believe (or argue after the fact) that the information was a recommendation or investment advice. J.P. Morgan's desire for a requirement that the "understanding" in the Proposed Regulation be "mutual" is grounded in the belief that a recordkeeper and other service providers should be entitled to provide their services in a manner such that the consequences of their actions are clear under the Department's regulations. We believe that the Department's Proposed Regulations are vague and fail to adequately distinguish between the provision of information and the provision of recommendations or investment advice so that recordkeepers and service providers do not have adequate notice of what communications may cause the recordkeepers and other service providers to become a fiduciary under ERISA. This lack of clarity in the Proposed Regulations also creates ambiguity for plan sponsors and participants who may falsely rely on incorrect assumptions about recordkeepers and other services providers performing fiduciary functions when they are not, defeating one of the Department's stated objectives in issuing the Proposed Regulations. Therefore, we believe the scope of the Proposed Regulations creates so much uncertainty within the industry that if they are adopted without clarification and elimination of certain provisions, the final regulations will result in a significant increase in litigation and significant costs being incurred by the

industry, and, ultimately, the elimination or reduction of services deemed valuable by plan sponsor and participants. Alternatively, service providers may require additional fees for continuing to provide such services to offset the additional compliance structure and risk associated with continuing to provide the services.

J.P. Morgan agrees that with the significant changes in the retirement industry and the increased focus on retirement readiness, a re-examination of the arrangements that give rise to fiduciary status is warranted. In addition, we agree that plan sponsors and participants need to understand whether a service provider is acting in a fiduciary capacity in delivering services. We believe this understanding can be achieved through clear communication and disclosure with respect to the service provider delivering information to *assist* plan sponsors and participants in making decisions and not *making* recommendations or decisions on the behalf of a plan sponsor or participant. We believe this approach is consistent with today's disclosure regime and substantially achieves the objectives of the Department in addressing this issue in the retirement industry.

J.P. Morgan appreciates the opportunity to provide these comments for the Department's consideration in addition to our hearing testimony.