1221 Avenue of the Americas
New York, NY 10020

Morgan Stanley

February 2, 2011

The Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Fiduciary Proposed Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210 (VIA Mail and Electronic Delivery (http://www.regulations.gov))

Re: Proposed Regulation Amending the Definition of Fiduciary

Ladies and Gentlemen:

On behalf of Morgan Stanley, Morgan Stanley & Co. Incorporated[1] and Morgan Stanley Smith Barney LLC[2] (collectively, "Morgan Stanley"), we appreciate the opportunity to comment

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[1] Morgan Stanley: (NYSE: MS). Morgan Stanley (NYSE: MS) is a global financial services firm that, through its subsidiaries and affiliates, provides its products and services to a large and diversified group of clients and customers, including corporations, governments, financial institutions and individuals. Morgan Stanley was originally incorporated under the laws of the State of Delaware in 1981, and its predecessor companies date back to 1924. Morgan Stanley is a financial holding company regulated by the Board of Governors of the Federal Reserve System (the "Fed") under the Bank Holding Company Act of 1956, as amended (the "BHC Act"). Morgan Stanley conducts its business from its headquarters in and around New York City, its regional offices and branches throughout the U.S. and its principal offices in London, Tokyo, Hong Kong and other world financial centers. At December 31, 2009, Morgan Stanley had 61,388 employees worldwide (including employees of Morgan Stanley & Co., Incorporated, and Morgan Stanley Smith Barney LLC, which are described in more detail below).
Morgan Stanley & Co. Incorporated: Morgan Stanley & Co. Incorporated ("MS&Co"), together with its wholly owned subsidiaries, provides a wide variety of products and services to a large and diversified group of clients and customers, including corporations, governments, financial institutions and individuals. Its businesses include securities underwriting and distribution; financial advisory services, including advice on mergers and acquisitions, restructurings, real estate and project finance; sales, trading, financing and market-making activities in equity securities and related products and fixed income securities and related products including foreign exchange and investment activities. MS&Co provides brokerage and investment advisory services covering various investment alternatives; financial and wealth planning services; annuity and insurance products; credit and other lending products; cash management; and retirement plan services. MS&Co and certain of its subsidiaries are registered with the SEC as broker-dealers, and is a member of FINRA and the NYSE. MS&Co is also registered as a futures commission merchant with the CFTC, and as an investment advisor with the SEC. MS&Co is a wholly-owned subsidiary of Morgan Stanley.

[2] Morgan Stanley Smith Barney LLC: Morgan Stanley Smith Barney LLC ("MSSB") is a wholly-owed subsidiary of Morgan Stanley Smith Barney Holdings LLC ("Holdings"), which is 51% owned indirectly by Morgan Stanley and 49% by Citigroup Inc. (NYSE:C). MSSB and its subsidiaries offer a wide variety of financial products and provide financial services to a large and diversified group of clients, financial institutions and individuals. MSSB's businesses include financial advisory services, sales and trading in fixed income securities and related products, including foreign exchange and investment activities and new issue distribution of fixed income, equity and packaged products. MSSB provides clients with a comprehensive array of financial solutions, including MSSB products and services, and products and services from third party providers, such as insurance companies and mutual fund families. MSSB offers brokerage and investment advisory services covering various investment alternatives; financial and wealth planning services; annuity and insurance products; cash management; and retirement plan services. MSSB is a leader in wealth management with over 130 years of experience consisting of over 17,300 financial advisors and 822 brokerage locations around the U.S. MSSB is a broker-dealer and investment advisor registered with the SEC and a member of FINRA and the NYSE. TheMSSB combined businesses operate on a worldwide basis as "Morgan Stanley Smith Barney."

upon the regulation published on October 22, 2010 (the "Proposed Regulation")[3], regarding the "investment advice" prong of the definition of "fiduciary" under section 3(21) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

As described in more detail below, we believe that the Department should, at a minimum, defer the Proposed Regulation for the following reasons:

- Concurrent regulatory efforts addressing market conduct and fiduciary status have been undertaken by other regulatory organizations, and the Proposed Regulation has not been drafted to interact appropriately with such regulatory efforts.

- The Department's efforts, we believe, do not fully consider the impact that this Proposed Regulation would have on market participants (including plans)

- As admitted by the Department, the costs of the Proposed Regulation have not been clearly vetted, and we believe they far exceed any of those identified by the Department.

- The reach of the Proposed Regulation goes far beyond any problems identified by the Department in its justification for this regulatory action.

We have serious concerns regarding the unintended and negative consequences the Proposed Regulation would have on the very plans it is supposed to protect.

In light of these concerns, we believe that the Department should re-evaluate the Proposed Regulation and approach this critically important issue in a more coordinated fashion with other interested regulators and self–regulatory groups (in particular, the U.S. Securities and Exchange Commission (the "SEC") with respect to its fiduciary initiatives, the U.S. Commodities Futures Trading Commission (the "CFTC") with respect to valuation issues for swaps and derivatives under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), and the Financial Industry Regulatory Authority ("FINRA") with respect to suitability and market conduct).

However, in the event the Department determines to go forward with the Proposed Regulation under its current approach, we have also provided certain amendments that we believe should, at a minimum, be made.

[3] Definition of the Term "Fiduciary," 75 Fed. Reg. 65263 (Oct. 22, 2010)(the "Proposed Regulation").

I. The Department Should Postpone and Reevaluate the Proposed Regulation

The Department has promulgated the Proposed Regulation not as a response to any legislative action, but in response to its own circumstances, as described in the preamble to the Proposed Regulation (the "Preamble"). While generally noting that the retirement plan community and the financial marketplace have "changed significantly" since 1975, the Department specifically highlights as a reason for the Proposed Regulation the challenges faced by its enforcement division. To that end, the Department emphasizes the general resource burdens of having to establish that a service provider is a fiduciary under the current definition, though the Preamble actually identifies only two concrete problems: "incorrect valuations of employer securities" for employee stock ownership plans ("ESOPs"), and the receipt of improper, undisclosed compensation by pension consultants and other investment advisers.

For all of the reasons below, we believe that the Department should postpone the issuance of any final regulation, and reevaluate the approach taken in the Proposed Regulation to solving the problems identified in the Preamble.

A. Other Congressionally Mandated Regulatory Projects. Given the uncertain but admittedly "large" impact the Department believes the Proposed regulation would have on the investment market and plan participation in the market, as well as the ongoing massive overhaul of market regulation required by the Dodd-Frank Act, the Department should, prior to the issuance of any revision to the ERISA fiduciary standard, the Department should consult with the SEC, the CFTC and FINRA, as well as other major regulators. The Department should continue and expand its recent efforts to increase information flow among regulators.

In particular, before making any decision with regard to the amendment of the definition of fiduciary under ERISA, the Department should consult with these regulators regarding the initiatives required under the Dodd-Frank Act, such as (a) the CFTC's "business conduct" standards and (b) the SEC study on a proposed fiduciary standard for retail brokerage transactions. Coordination of regulatory efforts is vital to prevent either conflicting or unnecessary changes being made.

1. <u>CFTC Business Conduct Standards</u>. First, we note that the CFTC recently issued a proposed rule with respect to the business conduct standards for swap dealers and "major swap participants" (including ERISA-covered pension plans) with counterparties ("CFTC Proposed

Rule")[4], which requires swap dealers to provide a counterparty (or prospective counterparty) with detailed information regarding material risks of the swap, scenario analyses designed in consultation with the counterparty and daily marks/valuations of uncleared swaps. As mandated by the Dodd-Frank Act, the CFTC is seeking to promote greater transparency and responsibility by swap dealers in the markets, and the Department should not inadvertently undermine that goal. Instead, the Department should specifically and publicly confirm, as it has informally confirmed to Congress, that compliance with these market regulations and any other actions that will be required of financial institutions by the Dodd-Frank Act will not result in a swap counterparty to a plan being viewed as a fiduciary under ERISA, either under its current regulations or the Proposed Regulation.

We also note that in the preamble to the CFTC Proposed Rule, the CFTC states that it consulted informally with Department staff regarding the intersection of Department regulatory requirements and those of the Dodd-Frank Act business conduct provisions. The CFTC also specifically notes that the CFTC Proposed Rule was intended to allow existing business relationships to continue, and was not intended to preclude, per se, a swap dealer from both recommending a swap to a plan and entering into the swap with the same plan.[5] Unfortunately, we are not convinced that the Proposed Regulation does anything other than create uncertainty on how to conduct existing business with large institutional plans and plan asset funds managed by sophisticated managers, especially given some confusion regarding comments by Department representatives on the scope of the "safe harbor" carve-out (in paragraph (c)(2)(i) of the Proposed Regulation) in the context of the sale of unaffiliated products and services,[6] and the potential ERISA fiduciary and prohibited transaction liability of parties mandated to provide various "valuations" (e.g., mid-market value of a swap to swap counterparties) under the CFTC Proposed Rule and under the Proposed Regulation. We urge the Department to be extremely careful not to create further confusion through an ill-thought-out expansion of the reach of its fiduciary regulations.

Furthermore, we note that the CTFC Proposed Rule will reinforce the Department's ERISA section 408(b)(2) regulations by requiring swap dealers to provide their counterparties (including plans) with conflicts of interest and compensation information. These proposed rules also require swap dealers to have a reasonable basis to believe that a plan counterparty has a qualified representative making the decision to enter into the swap and requires the swap dealer

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[4] Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 75 Fed. Reg. 80638 (December 22, 2010).

[5] CFTC Proposed Rule at 80650.

[6] In web chat held on January 4, 2011 (http://www.dol.gov/regulations/chat-ebsa-static-201012.htm), the Department orally corrected a prior comment by noting "the seller's exception in the proposed rule on the definition of a fiduciary investment adviser is not limited to agents selling their own products." We believe clarification on this point would be most helpful if incorporated as part of the record.

to disclose the capacity in which it is acting to the plan counterparty. In addition, these proposed rules require swap dealers to disclose pricing and mid-market valuation of the swap. These CFTC provisions directly address concerns raised in the Preamble without the disruption that would be caused by instead subjecting swap dealers to ERISA's fiduciary rules. With respect to pricing/valuation, the CFTC Proposed Rule would require swap dealers to provide certain valuation information to plans (regarding assets for which there is not a generally recognized market) but do not at all suggest that a dealer would become a fiduciary or adviser by providing such valuation information.

It cannot be the case that, in issuing the Proposed Regulation, the Department intended to make the act of providing to plans (or to fiduciary managers of plans/pooled funds in which plans invest) the valuations required by CFTC Proposed Rule to ERISA plans an ERISA fiduciary act, which would render the swap a prohibited transaction under ERISA. We believe that such a result would be inconsistent with Congressional intent.

2. The SEC Study: The Department should also be cognizant of the research on fiduciary status currently being conducted, which could inform its re-evaluation of the Proposed Regulation. As the Department is aware, the SEC issued its "Study on Investment Advisers and Broker-Dealers as Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act" (the "SEC Study") to evaluate "the effectiveness of existing legal or regulatory standards of care (imposed by [the SEC], a national securities association, and other federal or state authorities) for providing personalized investment advice and recommendations about securities to retail customers."[7] In particular, of the 14 items that Congress required the SEC to evaluate, the SEC was directed to analyze: (i) "[t]he potential impact on retail customers if regulatory requirements change, including their access to the range of products and services offered by broker-dealers;" and (ii) "[t]he potential additional costs to retail customers, broker-dealers and investment advisers from potential changes in regulatory requirements."[8] The findings of this study, with respect to which the SEC received more than 3,000 letters, and any resulting action by the SEC, should be considered by the Department prior to making any far-reaching changes being made to the standards of fiduciary conduct under ERISA.

The SEC Study generally concluded that the SEC "should exercise its rulemaking authority to implement the uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers."[9] The standard of conduct it proposes would be "to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice,"

[7] See SEC Study at (i).
[8] See SEC Study at (i)-(ii).
[9] See SEC Study at (vi).

looking to both the regulatory requirements applicable to broker-dealers as well as the fiduciary standards applicable to investment advisers under the Investment Advisers Act of 1940 (the "Advisers Act"). The SEC Study did, however, note that there was some confusion, which needs to be addressed in further rulemaking, about what "personalized investment advice" means in the brokerage context, in much the same way that Justice Cardozo reminded us that "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry."[10]

In recommending that the new fiduciary standard – the "duty of loyalty" -- supplement (rather than supplant) existing regulatory requirements,[11] the SEC was particularly concerned with making sure that this new uniform fiduciary standard did not limit investor choices or require the "absolute elimination of any particular conflicts,"[12] The SEC Study included the following considerations and conclusions:

- The Fiduciary Standard Should Be "Business-Model Neutral." Section 913(b) of the Dodd-Frank Act expressly provides that the receipt of commission-based compensation, or other standard compensation, for the sale of securities does not, in and of itself, violate the uniform fiduciary standard as applied to a broker-dealer. Thus, differential compensation with respect to the purchase and sale of securities was to be construed consistent with, and not in conflict under, such standards.
- Fiduciary Status Must Not Limit Retail Investor Choices As to Products or Services. The SEC was, in particular, concerned about constraining retail investors into a "one size fits all" fiduciary package, constraining the ability of clients to choose the costs, products, and levels of services desired. One of the "[SEC's] goals (and the goals of Section 913) [is] to preserve retail investor choice, as part of the [SEC]'s mandate to protect investors with respect to, among other things, availability of accounts, products, services, and relationships with investment advisers and broker-dealers, **and not inadvertently eliminate or otherwise impede (for example, through higher costs that investors are unwilling to bear) retail investor access to such accounts, products, services and relationships.**"[13]

[10] See, e.g., SEC v. Chenery Corp., 318 U.S. 80, 84-85 (1943), quoted in the SEC Study at 110, n.502.
[11] See, e.g., SEC Study at 109 ("The uniform fiduciary standard would apply to broker-dealers and investment advisers under the new authority in [Securities and Exchange Act of 1934] Sections 15(k) and Advisers Act Section 211(g). Therefore, the recommended uniform fiduciary standard and the related discussion below would not have any direct bearing on other persons who may be characterized as fiduciaries in other areas of the law, including ERISA fiduciaries or financial institutions such as banks and trust companies. The Staff also contemplates that the uniform fiduciary standard would be an overlay on top of the existing investment adviser and broker-dealer regimes and would supplement them, and not supplant them." (citations omitted)).
[12] "[The fiduciary] standard should not prohibit, mandate or promote particular types of products or business models. They also make 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)." See SEC Study at 106.
[13] See SEC Study at 144 (emphasis added).

- Fiduciary Duty Is Not "Continuous." Section 913(g) of the Dodd-Frank Act provides that "the uniform fiduciary standard shall not require broker-dealers to have a continuing duty of care or loyalty to a retail customer after providing personalized investment advice."
- Principal Trading Is Not Banned. Moreover, as discussed below, while the uniform fiduciary standard would affect certain aspects of principal trading, it would not in itself impose the principal trade provisions of Advisers Act Section 206(3) on broker-dealers.
- Access to Proprietary Products Should Be Protected. In addition, Dodd-Frank Act Section 913 provides that offering only proprietary products by a broker-dealer shall not, in and of itself, violate the uniform fiduciary standard, but may be subject to disclosure and consent requirements.

We believe that Congress's unambiguous directive to the SEC to analyze how a "fiduciary" standard in retail brokerage could and would apply, among other areas, to (a) principal trading (especially in fixed income securities, with respect to which the Department has granted various exemptions, thus acknowledging the importance of such principal trading to plans through the grant of various exemptions),[14] (b) syndicate and underwriting activity,[15] and (c) proprietary mutual fund sales in retail accounts offered by mutual fund complexes' affiliated brokers, and the SEC's caution with respect to disrupting any or all of these practices by these rules should be instructive for the Department.

It is clear that the SEC, in particular, is not interested in disrupting the flow of the capital markets through the implementation of this new fiduciary standard[16], and that the guidance to be provided by the SEC would allow brokers to fulfill the uniform fiduciary standard while engaging in principal trades. It is also clear that the SEC wants to preserve the ability for retail investors (including IRA beneficiaries) to choose multiple service models and products, and not

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[14] See, e.g., DOL Prohibited Transaction Exemption 2003-20, 68 Fed. Reg. 40689 (2003).

[15] The Department is aware of Morgan Stanley's longstanding concern with the preservation of the ability for plans to participate in underwritings. As we noted in our joint comment letter in August 1975 on the issues surrounding the issuance of what ultimately became ERISA Prohibited Transaction Class Exemption 75-1 (with The First Boston Corporation, Salomon Brothers and Goldman, Sachs & Co.):

> "Congress intended that [ERISA] do away with abuses that had grown up over the years from transactions between Plans and their managers, and imposed a number of restrictions designed to achieve that result...Congress did not, however, specifically limit Plan participation in securities underwritings, and we believe such participation, far from being an abuse of any kind, is advantageous for Plans, which currently supply an immense amount of new money to United States capital markets....We submit that restrictions on Plans which make it difficult or illegal for them to purchase securities from underwriting syndicates in which these 'fiduciary' securities are found does nothing for Plan beneficiaries, but will (1) adversely affect the terms upon which Plans can acquire publicly-offered securities for their portfolios, (2) limit the access of small companies to capital markets, and (3) by virtue of forcing firms to select either to be underwriters or Plan fiduciaries, dry up the number of firms participating in underwritings.'

[16] See, e.g., SEC Study at x: "The Staff developed its recommendations with a view toward minimizing cost and disruption and assuring that retail investors continue to have access to various investment products and choice among compensation schemes to pay for advice."

be thrown into a "one size fits all" fiduciary model, as one of "the [SEC's] goals (and the goals of Section 913) [is] to preserve retail investor choice, as part of the Commission's mandate to protect investors with respect to, among other things, availability of accounts, products, services, and relationships with investment advisers and broker-dealers, and not inadvertently eliminate or otherwise impede (for example, through higher costs that investors are unwilling to bear) retail investor access to such accounts, products, services and relationships."[17] By contrast, the Department's proposed amendment does not, in fact, attempt to deal with any of the collateral impacts to the markets, nor to participants and beneficiaries of retirement plans and IRAs. Moreover, to the extent current and future relationships with retail retirement investors will be presumed to be subject to the ERISA and Code fiduciary requirements, the Department's proposed amendment does not appropriately provide for the ability for plan investors (especially retail IRA beneficial owners) to choose their own cost structures, service models and product offerings.

As a final point, it may also be instructive for the Department to note that the SEC established a "cross-divisional" working group to implement the study. To help further inform the study the working group met with many interested parties representing a variety of perspectives, and requested assistance from state regulators and FINRA. We would suggest that changes to the definition of fiduciary of the magnitude being proposed in the Proposed Regulation warrant at least a comparable level of study and scrutiny and coordination. We believe that such an analysis will show that the Proposed Regulation will increase costs to plans, decrease services available to plans, drive qualified service providers out of the plan market and lessen the deterrent effect of ERISA fiduciary rules on the fiduciary actually responsible for the plan's investment decisions.

B. The Proposed Regulation is Overinclusive and Disruptive. Instead of targeting the specific problems identified by the Department, the Proposed Regulation changes the entire landscape of the regulation of fiduciaries without adequate consideration of the concomitant costs and consequences to plans.

According to the Department, the Proposed Regulation is designed to make it easier for the Department (as a litigation matter) and others to assert that parties dealing with plans, plan fiduciaries and plan asset vehicles are providing fiduciary "investment advice" in a number of ways, including as follows (discussed more fully below):

- Deeming all individuals and entities registered as "investment advisers" under the Advisers Act also to be ERISA fiduciaries, regardless of whether or not such individuals/entities are serving in an advisory capacity.

[17] SEC Study at 144.

- Classifying individuals and entities as ERISA fiduciaries if they provide an appraisal or fairness opinion, concerning the value of securities or other property (excluding only client statements or reports reflecting the value of plan investments where such reports were provided for purposes of compliance with the reporting and disclosure statements of ERISA, the Code and the regulations, forms and schedules thereunder…" and (b) if the assets have a generally recognized market.

- Rewriting the current five-part ERISA investment advice test to (a) eliminate the reference to a "regular basis" (thus, non-recurring, one-time conversations now can rise to the level of ERISA fiduciary advice); (b) eliminate the requirement that an agreement, arrangement or understanding, written or otherwise between the parties be "mutual" (creating the possibility that if the parties document that there is not a fiduciary relationship, but the plan, plan fiduciary, participant or beneficiary *unilaterally* changes its mind afterward, fiduciary relationship may exist); and (c) eliminate the requirement that the advice constitutes a "primary basis" for a decision, indicating that advice merely "may be considered" for a person providing it to be considered a fiduciary.

By relaxing the standard for being deemed to give fiduciary advice, the Proposed Regulation will clearly increase the number of individuals and entities that could be deemed to be providing "investment advice" at any given time. What the Department may not have considered, however, is that to the extent many "every–day" service providers to plans are now deemed fiduciaries of the plans, such service providers may simply be incapable of dealing, or unwilling to deal, with plans because of the greater legal risks involved.

First, as a policy matter, we do not believe it is either appropriate or prudent for the Department to deem an entity that is an investment adviser (as defined under the Advisers Act) or that has an investment adviser affiliate to be a per se fiduciary. Such an approach (a) abandons the Department's long standing and sensible reliance upon function, not form, in determining fiduciary status, (b) is contrary to other provisions of ERISA (for example, Congress clearly recognized that there is a distinction between a "fiduciary" and an "adviser" by denoting each term separately in its listing of the positions that a person is prohibited from holding under section 411 of ERISA), and (c) fails to recognize, while noting it in the Preamble, that the Advisers Act specifically excludes from the definition of an "investment adviser" any broker or dealer whose performance of advisory services is solely incidental to the conduct of its business as a broker or dealer. We believe that the Department, in deeming all investment advisers to be per se ERISA fiduciaries, is taking an approach fraught with unintended consequences.

For example, Morgan Stanley, like many of its peer firms, is "dually registered" – meaning that it is both registered as an investment adviser under the Advisers Act (where it agrees to act in an advisory capacity for clients) and as a broker-dealer under the Securities Exchange Act of 1934. Section 202(a)(11)(C) of the Advisers Act allows an entity not to be deemed an investment adviser, even if registered as such, if it is a "broker or dealer whose performance of such [advisory] services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor."

Our institutional and retail brokerage arms typically transact and offer services in a wide range of securities, commodities and other investment products as a broker-dealer for institutional and retail clients. For example, from an institutional perspective, Morgan Stanley and its affiliates may offer products and services, as a broker-dealer (not as an investment adviser) in the following areas:

Institutional Equity

- **Sales and Trading** offers cash and electronic trading platforms where Morgan Stanley acts as principal (including as a market maker) and agent in executing transactions globally in fixed income, equity and equity-related products, which include equity swaps, options, warrants and futures overlying individual securities, indices and baskets of securities.

- **Equity Financing Services**, including prime brokerage, offers consolidated clearance and settlement of securities trades, custody, financing and portfolio reporting services. Morgan Stanley also acts as principal and agent in stock borrowing and stock lending transactions in support of its global trading and brokerage, asset management and clearing activities and as an intermediary between broker-dealers.

- **Quantitative Strategies/Research** provides high-quality quantitative investment analysis and service to Morgan Stanley Institutional Equity Division (IED) clients.

Fixed Income

- **Commodities** professionals trade actual physical commodities as well as associated derivatives and futures.

- **Interest Rate and Currency Products**

- Interest Rate Cash/Derivatives provides 24-hour primary and secondary liquidity in government, agency, agency pass-through, interest rate swaps and options markets in all major countries.

- Foreign Exchange is a market-maker in spot and forward currencies, as well as vanilla and exotic options.

- Municipal and Public Finance Securities provide sales, trading, underwriting, derivatives and capital-markets activities in the $2.39 trillion tax-exempt fixed income market.

- Emerging Markets trades external and local debt, foreign exchange of emerging-markets countries, emerging-markets derivatives, and works with clients to develop sophisticated investment and trading strategies for emerging-markets sovereign countries.

- Credit Products Group (CPG) trades all cash and derivative products for securities with embedded credit risk in these areas.

- Corporate Credit Group (CCG) encompasses investment grade and high-yield bond and credit derivatives trading, structured credit trading (including baskets and synthetic CDOs), par and distressed loan trading and convertible bond trading.

- Securitized Products Group (SPG) engages in a wide array of global activities such as structuring, underwriting and trading of collateralized securities. The team makes active markets in the full range of asset-backed, residential mortgage-backed, commercial-backed and collateralized debt-obligation securities in both the cash and synthetic markets.

From a retail perspective, MSSB offers similar sales and trading brokerage options to smaller institutional and retail clients as a broker-dealer, as well as "advisory" programs for which MSSB acts as an investment adviser. On both the institutional and retail platforms, the sales and trading, research and (for large institutional clients) equity financing services are provided to plans directly, or to managers acting on behalf of plans or pooled investment vehicles in which plans invest. We rely on our ability to act as a broker-dealer, not as an investment adviser, in providing these products and services.

To the extent that we are deemed a "per se" ERISA fiduciary merely as a result of our registration as an investment adviser under the Advisers Act, we are extremely concerned about our ability to continue to provide all of the services listed above to our plan clients, and believe the ordinary course brokerage activity may be severely curtailed.

- For example, investment advisers send out generalized research reports about issuers or statements about the economy. These reports should not be viewed as the provision of "investment advice." If they were, a generalized research report on the European markets used in any way by a plan fiduciary to make an investment decision could result in a prohibited transaction if an independent fiduciary of the plan directs it to buy a European security through a broker-dealer affiliate of the investment adviser that issued the report. The Department could not possibly have intended this result.[18]

- Even otherwise generally available market information to plans and other market participants could now be construed as ERISA fiduciary "advice," because of our registration, even if provided on a one-time basis to an individual or entity.

- If we are a per se fiduciary, any principal trading activity as part of our "best execution" obligations (with the potential of substantial excise tax penalties) would be a violation of the ERISA prohibited transaction rules.

- We believe that such restrictions will constrain client service choices (either to engage Morgan Stanley as a broker-dealer or investment adviser), and opportunities to include plan clients as part of any syndicate, underwriting or similar capital markets activities.

Changes to the five-part test, as well as the appraisal/valuation issues described under the CFTC Proposed Rule above, raise comparable concerns.[19] As described in more detail below, we believe that the Department's "counterparty exception" does not, on its face, eliminate the uncertainty raised by the Proposed Regulation in these areas.

Thus, for service providers like Morgan Stanley that have plan clients or that otherwise conduct business with plans or with entities in which plans invest, we are seriously concerned

[18] To this point, we would further note that the CFTC in its proposed business conduct rules specifically excludes the provision of general transaction, financial or market information, as deeming a swap dealer to be an advisor to a Special Entity. See CFTC Proposed Rule at 80650.

[19] For example, if you eliminate the requirement that the advice constitutes a "primary basis" for a retirement plan decision, indicating that advice merely "may be considered" for a person providing it to be considered an ERISA/IRA fiduciary, you have eliminated the nexus between the conversation and the retirement account, To the degree you have a conversation between a broker or investment adviser with a client about a non-retirement account, that conversation becomes subject to the ERISA fiduciary standard conversation if the client "may consider" the advice to make a retirement investment decision, regardless of whether or not that was the intent of the broker or adviser.

that the uncertainty generated by the Proposed Regulation will result in a "Back to the Future" revisit of 1975, when ERISA was adopted. As the Department knows, there existed substantial uncertainty as to what services could be provided to, or transactions engaged in with, plans. At that time, the Department was forced to issue extensive exemptive relief in order to permit plans to continue to participate in the financial markets. The uncertainty that would arise if the Proposed Regulation were adopted would, we believe, have a similar sweeping effect. The Department must remember that it is not merely a matter of whether or not service providers are unwilling to be subjected to an unanticipated higher standard of conduct. The Proposed Regulation (if adopted) could also make impermissible many of their typical business practices and the everyday transactions due to ERISA's fiduciary prohibited transaction provisions, as most of the exemptions they currently rely on would suddenly be rendered unavailable.

C. Increased Costs Need To Be Better Evaluated, as Already Acknowledged by the Department. In instances where service providers continue to provide services to plans, the Proposed Regulation would also, we believe, significantly increase the cost of investment transactions to plans. Two examples are as follows:

- Higher Transaction Costs. Broker-dealers are often engaged by plans to provide brokerage execution services where the plan pays a commission to the broker in the case of a trade executed on an agency basis or a mark up on a trade executed on a principal basis. As the Proposed Regulation appears to cause many typical broker-dealer activities to be deemed fiduciary, the brokers, absent a prohibited transaction exemption, would be unable to execute principal trades and therefore would have to route those trades to unaffiliated brokers for execution (who would charge a mark up), while the routing broker would typically charge an asset based fee to the plan, leading to a substantial dislocation of the principal trading markets (like the fixed income market) to this more expensive "agency" model.

- Valuation Services. In addition, many broker-dealers and other service providers provide various kinds of services to plans relating to valuation of the plan's account. Brokers generally are required to report/disclose the price of securities transactions via trade confirms and clients with accounts custodied at the broker-dealer are typically provided periodic account statements that provide pricing/valuation information. If merely providing price/valuation data to plans is deemed fiduciary, broker-dealers and other service providers may cease to provide such services or may need to significantly increase the costs of providing services to take into account the additional risk associated with this new fiduciary model.

Accordingly, we believe that the Department has not balanced the harms from the Proposed Regulation in terms of more limited or expensive services against the benefits accruing from the broad scope of the proposal. Under its Regulatory Impact Analysis, in a section titled "Uncertainty," the Department states that it is "possible that this rule could have a large market impact" and specifically acknowledges that it is "uncertain" as to:

- "whether, and to what extent, service provider costs would increase...and if so whether the increased cost would be passed on to plans."[20]
- whether service providers "higher costs of doing business due to the increased liability exposure...could result in higher fees for their plan clients,"[21]
- "the number of transactions that would have to be restructured,"[22]
- "whether the service provider market will shrink because some service providers would view the increased costs and liability exposure...as outweighing the benefit of continuing to service the ERISA plan market."[23]

Even given this uncertainty, the Department "tentatively concludes that the proposed regulation's benefits would justify its costs."[24] Tentative conclusions based on speculation are not a substitute for detailed analysis in a proposal so sweeping in its effect on plans and the financial marketplace.

As discussed above, the Department clearly states that it is uncertain as to the costs of the Proposed Regulation to the plans that it seeks to protect. Moreover, in its list of uncertain costs, it fails to recognize other costs to plans that would arise out of the Proposed Regulation, such as lack of access to currently available market products and services. While the Department notes in passing that service providers will need to "identify transactions that would be prohibited because they involve self-dealing, restructure these transactions, and modify their business practices," it fails to recognize that plan fiduciaries will also need to undergo the same costly undertaking in order to satisfy their duty not to cause a plan to engage in prohibited transactions. Furthermore, the Department states that it "is uncertain regarding the number of transactions that would have to be restructured, whether an applicable prohibited transaction exemption would be available for such transactions, and if not, the number of prohibited transactions exemption

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[20] Id.
[21] Id.
[22] Id.
[23] Id.
[24] Id.

applications [it] could expect to receive regarding the transactions."[25] Further, the Department seems to fail to recognize that, in the absence of timely prohibited transaction exemptive relief, a vast number of these transactions may not be able to be restructured but, rather, may need to be unwound, given the requirement to correct non-exempt prohibited transactions along with the threat of considerable excise tax liability, potentially to the significant detriment of the plans involved.

As discussed above, the cost-benefit analysis provided by the Department is full of gaps and uncertainties, including uncertainties even as to the effect on the Department itself. While citing the drain on enforcement resources as a reason for the Proposed Regulation, the Department fails to account for the drain on other Department resources the Proposed Regulation itself will cause. Given the restructuring of market interactions that would occur if the Proposed Regulations were adopted as currently drafted, the Department will have to go through the same costly review of transactions as the service providers and plan fiduciaries. It will also have to review virtually all of its existing trading exemptions, and be prepared to handle the resulting slew of exemption applications.

D. Ancillary Issues Have Already Been Addressed. We believe that many of the problems articulated by the Department as rationales for the Proposed Regulation already have been, or will be, addressed through other actions of the Department, thereby rendering the Proposed Regulation unnecessary.

The Department cites as justification for the Proposed Regulation that it will "redress service provider abuses that currently exist in the market, such as undisclosed fees [and] misrepresentations of compensation arrangements."[26] Section 408(b)(2) is widely relied upon by service providers for exemptive relief from the prohibited transaction provisions of ERISA relating to the provision of services to plans. Under the interim final rule promulgated under section 408(b)(2) by the Department of Labor on July 16, 2010, a "covered service provider" (which is, among other things, a person providing fiduciary services, services as a registered investment adviser, or brokerage services to participant directed individual account plans) will be required to provide to a responsible plan fiduciary in writing both a statement as to whether it is providing its services to the plan as a fiduciary and extensive information regarding its (and its affiliates') direct and indirect compensation for services to the plan. If it fails to do so, in the absence of another exemption, it will be subject to civil penalties under ERISA and excise taxes under the Internal Revenue Code of 1986, as amended (the "Code").

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[25] Id.
[26] Preamble to Proposed Regulation at 65273.

This rule clearly handles the lack of information regarding compensation for services, including advisory, cited as a problem in the Proposed Regulation. It also clearly requires that such service provider address upfront with the responsible plan fiduciary the fiduciary role the service provider is (or is not) playing in the provision of its services.

In addition, the issue of undisclosed fees has also been addressed in the context of (a) participant-directed individual account plans in the Department's recent final rule under 404a-5 (Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans) and (b) the Department's revisions to the Form 5500 process more fully disclosing the "direct" and "indirect" compensation paid to service providers on an annual basis. We believe that the Department should evaluate the impact of these recent regulatory efforts on correcting the issues at hand before promulgating further burdensome, and potentially conflicting, regulations, especially in light of the uncertain costs.

E. IRA Enforcement Authority. As set forth in the Preamble, the impetus for the change to the definition of "fiduciary" was the Department's concern about its enforcement success/resource allocation for plans. The Department does not have enforcement authority over IRAs. Although Reorganization Plan No. 4 gave the Department authority to issue regulations, rulings, opinions, and exemptions under section 4975 of the Code, it carved out certain sections of 4975 "to the extent necessary for the continued enforcement of subsections 4975(a) and (b) by the Secretary of the Treasury."[27] Because only the Department of Treasury can enforce excise taxes for prohibited transactions, the Department should not cite the resource constraints of its enforcement division as a reason to modify the definition of "fiduciary" under section 4975 of the Code, especially as there is no evidence that similar enforcement issues are relevant in the context of plans, individual retirement accounts and other similar accounts that are only subject to section 4975 (and not ERISA). We note that the excise tax provisions of section 4975 are self-executing because any disqualified person participating in the transaction is required to file an excise tax return upon the occurrence of a prohibited transaction.

In other rulemaking (e.g., with respect to investment advice to participants and beneficiaries of individual account plans), the Department has recognized the distinction between IRAs and plans in the application of regulations and in the cost-burden analysis of their effect. We do not believe that the Department has thoroughly undergone such an analysis here. Moreover, as discussed above, the Department should take into account the study and potential rule making by the SEC in the context of retail investors. Applying these regulations to IRAs prior to the completion of the SEC's initiative would be premature.

II. Recommended Changes to the Proposed Regulation

[27] Reorganization Plan No. 4 of 1978, 3 C.F.R. 275 (1978).

To repeat, we believe that the Department should revisit its cost-benefit analysis and carefully re-evaluate the impact of issuing the Proposed Regulation at this time, and coordinate with other regulators in addressing the concerns cited in the Preamble.

If the Department nevertheless determines that a change in the definition of fiduciary is, in fact warranted, we would recommend the following changes to the Proposed Regulation, which we believe will clarify the rules and provide additional protection to plans, while at the same time mitigating at least some of the negative and unintended consequences for plans discussed above.

A. Definition of "Appraisal or Fairness Opinion"

Under paragraph (c)(1)(i)(A) of the Proposed Regulation, the types of advice and recommendations that may result in fiduciary status under ERISA section 3(21)(A)(ii) include advice, appraisals or fairness opinions concerning the value of securities or other property. However, the Proposed Regulation does not define "appraisal" or "fairness opinion" and does not otherwise specify what would be included in "an appraisal or fairness opinion, concerning the value of securities or other property." To that end, the carve-out in paragraph (c)(2)(iii) of the Proposed Regulation for any "general report or statement that merely reflects the value of an investment of a plan or a participant or beneficiary" provided for Department or IRS reporting or disclosure implies that *every* appraisal and fairness opinion that is **not** provided for Department or IRS reporting or disclosure purposes (including, for example, statements provided to clients under other applicable laws or as a client service, such as quarterly brokerage account statements) would constitute fiduciary advice. Furthermore, as the carve-out does not apply if such report involves assets for which there is not a generally recognized market (and such report serves as a basis on which a plan may make distributions to plan participants and beneficiaries, which at least potentially encompasses all reports), this at the very least implies that fiduciary standards would be imposed on *every* valuation, appraisal or fairness opinion – including merely republishing values derived from third-party sources on a client statement -- in cases where there is no generally recognized market for such assets.

As mentioned above, broker-dealers routinely provide clients with valuation/pricing information and, in fact, as noted previously, under the Dodd-Frank Act, swap dealers will be required to provide the daily mark to their trading counterparties for uncleared swaps. While it may arguably be appropriate to subject appraisals and fairness opinions to fiduciary standards and liabilities when the parties mutually agree that such appraisals or fairness opinions will form a primary basis for decisions regarding a specific transaction (such as the purchase of real estate or employer securities), it is neither practical nor beneficial for plans to impose fiduciary standards on all valuations prepared for, or otherwise reported to, plans or plan participants in the ordinary course or on advice given in respect of ordinary market transactions. We believe that the Proposed Regulation's definition of "appraisal or fairness opinion concerning the value of securities or other property" should be limited to the situations that the Department cites in the Preamble – valuation of employer securities for ESOP purposes and real estate -- and substantially similar specific situations in which a plan is clearly seeking fiduciary valuation or appraisal expertise on which it can rely. In order to address the specified problem without casting an unnecessarily wide and potentially harmful net, the Proposed Regulation's definition should be limited to appraisals or fairness opinions in respect of which the service provider has provided to the plan in writing a statement that it is providing its valuation services to the plan as a fiduciary (in line with the requirement of the interim final rule under section 408(b)(2)).

B. Investment Adviser Not Per Se Fiduciary

Paragraph (c)(1)(ii)(C) of the Proposed Regulation provides that a person will be considered a fiduciary if that person provides advice or recommendations described in paragraph (c)(1)(i) and that person is an investment adviser within the meaning of section 202(a)(11) of the Advisers Act. We believe that, aside from the situations described in paragraph (c)(1)(ii)(A) (covering persons who acknowledge fiduciary status) of the Proposed Regulation, fiduciary status should be determined by the relationship between the service provider and the plan in the context of the services being provided (established under paragraph (c)(1)(ii)(D) of the Proposed Regulation as we would revise it). As a result, paragraph (c)(1)(ii)(C) of the Proposed Regulation should be eliminated to remove the per se fiduciary treatment of investment advisers within the meaning of section 202(a)(11) of the Investment Advisers Act of 1940.

C. Revision of the Current Five-Part Test

For advice to constitute "investment advice" under the current regulation, an adviser who does not have discretionary authority or control with respect to the purchase or sale of securities or other property for the plan must: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary, that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan.

In contrast, the Proposed Regulation states that a person becomes a fiduciary by providing advice or making recommendations described in paragraph (c)(1)(i) pursuant to an agreement, arrangement or understanding, written or otherwise, between such person and the plan, a plan fiduciary, or a plan participant or beneficiary that such advice *may be considered* in connection with making investment or management decisions with respect to plan assets, and where such advice is individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary (emphasis added).

As written, the new test found in paragraph (c)(1)(ii)(D) of the Proposed Regulation is far too broad and unfocused. In the absence of a "mutual understanding" that the advice will serve as "a primary basis," service providers would effectively have to act as if they could be deemed to be fiduciaries in virtually all interactions with plans, as all advice or recommendations could lead to fiduciary status if merely "considered" by the plan, regardless of the understanding of the service provider of its role or the importance of the advice to the plan decision maker. Such an outcome would not be practical and would make it more difficult and more costly for plans to obtain quality financial and professional services, potentially putting plans at a significant disadvantage as compared to other market participants. As drafted, for example, broker-dealers may well be unable or unwilling to provide otherwise generally available information or recommendations to plans or to sell certain products to plans, given the possibility of fiduciary status and application of the stringent self-dealing and prohibited transaction provisions of ERISA. As a result, plans would not have access to information and products permitting them to make the best-informed investment decisions. The Department certainly did not intend to put plans at such a significant disadvantage vis-à-vis other market participants.

We are surprised the Department would delete the mutual understanding and the primary basis prongs of the test, leaving only a potentially one-sided alleged understanding that advice may be considered. Agreements are always mutual and the removal of the word "mutual" only adds to the ambiguity of the regulation in an area where each party should be certain of the role being played by the other. We note that, in the CFTC Proposed Rules, the CFTC makes clear that a swap dealer may rely on reasonable representations given by a counterparty in order to satisfy its obligations. In a similar vein, the Department should specifically recognize in any final regulation that an agreement between the parties (in this case, that the service provider is not acting as a fiduciary) should similarly be honored.

While we agree that the "regular basis" requirement may arguably be too limiting, we believe it is crucial that the Proposed Regulation also retain "primary basis" as a requirement of "investment advice." The primary basis requirement is entirely consistent with the Department's justification for the Proposed Regulation being to capture as fiduciaries "persons [that] significantly influence the decisions of plan fiduciaries, and have a considerable impact on plan investment."[28] Significant influence, the Department's concept, is akin to a primary basis and very different from "may be considered in connection with." The deletion of the "primary basis" prong would open the floodgates of confusion and concern on the part of all service providers to plans.

[28] Preamble to the Proposed Regulation at 65265.

Accordingly, we would revise paragraph (c)(1)(ii)(D) of the Proposed Regulation as follows (changes in bold):

> (D) Provides advice or makes recommendations described in paragraph (c)(1)(i) of this section pursuant to a **mutual** agreement, arrangement or understanding, written or otherwise, between such person and the plan, a plan fiduciary, or a plan participant or beneficiary that such advice will serve as a **primary basis** for investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary.

D. Expansion of Counterparty Limitation

Under the limitation in paragraph (c)(2)(i) of the Proposed Regulation, a person will not be considered a fiduciary if such person can demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice.

We agree with the Department that its long-held view regarding the exercise of counterparty rights should be captured in any revision to the definition of "investment advice." However, in order to implement the concept fully, we believe that the Department should expand this limitation clearly to encompass clearly principal trades of all types and other transactions with similar economic effects. For example, the limitation should apply equally to any advice provided in the context of a securities loan or a derivative transactions (such as a swap), and not merely a purchase and sale. It should also clarify that any actions taken by a counterparty under the terms of the contract or transaction should not be viewed as "investment advice," for example, actions taken by a note issuer in its role as calculation agent.[29]

In addition, as currently drafted, the limitation is too narrow in respect of numerous routine transactions service providers have with plans in which they may not be technically "adverse" but in which they are clearly not acting as a fiduciary any more than a true counterparty would. For example, the limitation should apply to a service provider acting as an

[29] We note that in Advisory Opinion 82-49A, the Department held that a futures commission merchant (FCM) who liquidates the futures contracts in the account of a plan customer and sells securities posted as margin by the plan to meet losses experienced by the plan's account, would not be a fiduciary within the meaning of ERISA section 3(21)(A)(i) as long as the FCM was acting in accordance with applicable law and the agreement negotiated with the plan customer. Specifically, the Department noted that "[i]t does not appear that such legally granted or contractual rights necessarily amount to the type of discretionary authority or control over plan assets contemplated in section 3(21)(A)(i) of the Act."

agency broker for the plan or as a futures commission merchant for the plan acting as agent (as opposed to a principal trade/counterparty) in connection with a securities or futures trade.

Thus, as drafted, the Proposed Regulation could inadvertently impose fiduciary standards on broker-dealers with respect to equity transactions (often conducted on an agency basis), while carving out broker-dealers with respect to similar transactions involving fixed-income securities (typically conducted on a principal basis), even where the plan and the broker-dealer have exactly the same agreement and expectations regarding the advice and services to be provided in connection with both transactions. Further, equity transactions may be conducted on both a principal or agency basis (subject to best execution requirements and, in many cases, through automated trading platforms that do not, in fact, require a conscious "choice" by a broker to effect execution in one fashion or another), thus resulting in an anomaly where the broker-dealer may not be a fiduciary for trades it executes on a principal basis but a fiduciary where it executes trades on an agency basis for the same plan client under the same arrangement/agreement. Similarly, in the case of a plan needing to get exposure to Treasury bonds, a broker-dealer that provides advice as a principal in a sale of bonds may not be subject to fiduciary obligations, while a broker-dealer that provides advice about obtaining the same economic exposure in a more efficient manner (such as by using futures) could be subject to fiduciary obligations and liabilities. It is inappropriate to treat economically equivalent transactions under the same arrangement, agreement and/or understanding between the parties in such a disparate manner.

In order to take all of the foregoing into account, we believe that the limitation should be based upon the reasonable expectation of the plan of receiving impartial advice without regard to whether the service provider would necessarily be viewed as adverse to the plan. We would also reiterate that agreements between parties, including written representations, regarding the capacity in which a service provider may be acting should be honored. Accordingly, we would revise the limitation in its entirety as follows:

> For purposes of this paragraph (c), a person shall not be considered to be a person described in paragraph (c)(1) of this section with respect to the provision of advice or recommendations if, with respect to a person other than a person described in paragraph (c)(1)(ii)(A), such person can demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that (i) the person is providing the advice or making the recommendation in its capacity as a purchaser, seller, borrower, lender, swap or other counterparty to the plan or its participants or beneficiaries (or as an agent of, or appraiser for, such a person) or as an agent for the plan or its participants or beneficiaries in respect of a security, financial instrument or other property and (ii) the person is not undertaking to provide impartial investment advice to the plan or its participants or beneficiaries; provided a person will be deemed to have met its

> demonstration obligation by presentation of a written statement provided to the advice recipient that such person is not acting as a fiduciary to the plan in respect of the transaction.

We believe that the proviso is particularly appropriate given all the recent (and recently proposed) regulations of the Department[30] and other regulators that will require a clear, upfront identification by a service provider to a plan and its decision maker as to the capacity in which the service provider is acting. In addition, permitting market participants to rely on written representations of their trading counterparties is consistent with the approach taken by the CFTC in the CFTC Proposed Rules (see for example, CFTC Proposed Rule section 23.440 (c) and 23.450(d)).

E. Limit Effect to Title I Plans

For the reasons stated earlier in this letter, the Proposed Regulation should be limited to Title I plans. We would delete the following provision from the Proposed Regulation:

> All references herein to section 3(21)(A)(ii) of the Act should be read to include reference to the parallel provisions of section 4975(e)(3)(B) of the Code. Furthermore, the provisions of this paragraph (c) shall apply for purposes of the application of Code section 4975 with respect to any plan described in Code section 4975(e)(1).

F. If Not Limited to Title I Plans, Extend Marketing Limitation to IRAs

In its current form, the Proposed Regulation explicitly states that its provisions shall apply for purposes of the application of section 4975 of the Code with respect to any plan described in Code section 4975(e)(1). However, the limitation under paragraph (c)(2)(ii) states that it applies only to "acts in connection with individual account plans, as defined in section 3(34)." This approach is inconsistent as individual account plan holders and IRA owners are similarly situated. The failure to expand the limitation to IRAs would subject them to further challenges in obtaining professional services at reasonable cost. As a result, if the amendment of the definition of fiduciary is extended beyond Title I plans, IRA holders should benefit from the marketing limitation available to individual account plan holders. Specifically, we would revise paragraphs (c)(2)(ii) (A-C) to read as follows:

> (ii) For purposes of this paragraph (c), the following acts in connection with an individual account plan (as defined in section 3(34) of the Act) or a plan described in Code section 4975(e)(1) that permits a participant or beneficiary in such plan to direct the investment

[30] See, e.g., 29 CFR 2550.408b-2(c)(iv)(B).

of plan assets in an individual account shall not, in and of themselves, be treated as the rendering of investment advice for purposes of section 3(21)(A)(ii):

(A) Provision of investment education information and materials within the meaning of 29 CFR 2509.96-1(d);

(B) Marketing or making available (e.g., through a platform or similar mechanism), without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property from which a plan fiduciary may designate investment alternatives into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, if the person making available such investments discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice;

(C) In connection with the activities described in paragraph (c)(2)(ii)(B), the provision of general financial information and data to assist a plan fiduciary's selection or monitoring of such securities or other property as plan investment alternatives, if the person providing such information or data discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice.

G. Comment Request Regarding Plan Distributions.

In response to the Department's request for comment on whether and to what extent any final regulation should define the provision of investment advice to encompass recommendations related to taking a plan distribution, we believe that the guidance under Advisory Opinion 2005-23A is appropriate and should remain in force.

We believe that the decision to take a plan distribution is driven by an individual's specific circumstances and any advice sought regarding the distribution is sought in the context of personal finances outside the plan and, as a result, outside the purview of ERISA's fiduciary rules.

As described above, under Section 913 of the Dodd-Frank Act, the SEC Study addresses the standards that should govern the provision of personalized investment advice about securities to retail clients. The efforts and findings of the SEC and other regulatory bodies should be reviewed before the Department overturns its prior reasoned view.

Morgan Stanley

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We believe the Proposed Regulation substantially underestimates the magnitude of the changes it would cause in the market place as well as the unintended and adverse effects it would have on the plans it seeks to protect. We believe that the reasons behind the Proposed Regulation and its approach should be re-evaluated and that the Department should undertake to more fully understand the benefits, costs and potential determents to plans and the financial markets in addition to addressing each of the significant uncertainties raised by the Department in Section VIII ("Uncertainty") of the Proposed Regulation. Moreover, if any final regulation is adopted, the effective date must be significantly delayed so that plans and service providers can adjust business practices that have developed over the past 36 years.

Finally, we respectfully request the opportunity to address the Department directly regarding these issues at the hearing on the Proposed Regulation.

Respectfully,

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