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By Email (EBSA.FiduciaryRuleExamination@dol.gov)

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

RE: Comment Letter on Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128. (RIN 1210-AB79)

Ladies and Gentlemen:

Neuberger Berman Group LLC (collectively with its subsidiaries, "Neuberger"), a private, independent, employee-owned investment management firm, thanks the Department of Labor (the "Department") for this opportunity to comment on (1) the questions posed in its Proposed Rule and Extension of Applicability Date, dated February 27, 2017 concerning the Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice (the "2016 Investment Advice Fiduciary Rule") and related exemptions, including the Best Interest Contract Exemption (the "BIC Exemption") to address questions of law and policy, and (2) questions posed by the President's Memorandum to the Secretary of Labor, dated February 3, 2017, directing the Department to examine whether the 2016 Investment Advice Fiduciary Rule may adversely affect the ability of Americans to gain access to retirement information and financial advice, and to prepare an updated economic and legal analysis concerning the likely impact of the 2016 Investment Advice Fiduciary Rule as part of that examination.

We are already fiduciaries under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") when we act as discretionary investment managers or provide investment advice for clients that are employee benefit plans subject to ERISA, individual retirement accounts ("IRAs") and other plans subject to the Internal Revenue Code of 1986, as amended (the "Code"), and their participants and beneficiaries, as well as entities that may be deemed to constitute "plan assets" by reason of 29 CFR 2510.3-101 as amended by Section 3(42) of ERISA or otherwise (all such "employee benefit plans," "plans" and other entities deemed to constitute "plan assets" being

referred to collectively as "Plans"). Our comments, which are drawn from our extensive experience serving clients in markets governed by ERISA and the IRA prohibited transaction rules, are intended to help the Department realize its goal of protecting Plans while preserving beneficial business models that promote the delivery of valuable investment advice and education. Further information about us may be found in our comments to the proposed rule which is incorporated by reference.

Indeed, at Neuberger, we pride ourselves on our services to our clients, as well as on our belief that our interests and our clients' interests are closely aligned. We support the adoption of standards that require all financial professionals advising retirement investors to act in the best interest of their clients, address and mitigate conflicts of interests, and disclose fees and compensation in clear and meaningful ways. We also agree with the Department that efforts to better protect retirement investors should preserve long-standing business models that benefit all parties and that offer investors appropriate choices about the structure of their relationships with financial professionals.

More and more Americans are living longer. The need for investment products and services to keep up with the demands of an aging workforce has never been greater. Neuberger strongly favors a level playing field that ***does not*** promote product favoritism directly or indirectly and that ***does*** promote innovation and creativity. It would be unfortunate if the net effect of the 2016 Investment Advice Fiduciary Rule were to unfairly "tilt" towards lower-cost passive or index investment products in the mistaken belief that the investment management fee cost alone is dispositive of long term outcomes. To be sure, there are instances in which that may be true; but there are plenty of instances where that has not been true. And while we are proud of our record as active investment managers, we recognize that we are not crystal ball gazers; we are not willing to say that past performance is always indicative of future performance. We doubt that the Department wishes to affirmatively place its hands on the scales to tip product selection outcomes demonstrably one way or the other or to stifle the innovation that comes with choice. Outcomes matter, to be sure, but so does process, so does choice, and so does the recognition that no two investor's profiles or preferences are alike.

We agree with the Department that the challenges facing small retail investors without financial expertise deserve attention. We have previously acknowledged to you in our comments to the proposed rule that the retirement savings outlook in the United States is bleak, with more than half of working-age households not saving enough to maintain their standards of living in retirement. We have also recognized that individually directed retirement programs, including IRAs and ERISA plans, require a fair degree of effort, knowledge, and financial understanding to be effective. Therefore, we endorsed at that time the proposed rule's stated goal of protecting retail investors from poor and imprudent advice that compromises the ability of vulnerable retirement investors to save enough for retirement.

However, there are significant aspects of the 2016 Investment Advice Fiduciary Rule that we believe will have deleterious impacts on retirement investors. More specifically, we believe that we and our peers will be less able to provide information and education to Plans than we currently offer, and we and our peers will be more restricted in making available services or products to Plans or market participants for use with their Plan clients that are intended to facilitate wise investing at a reasonable cost and improve retirement investment outcomes.

We therefore believe that the questions raised by the President in his February 3 memorandum to the Department are very important, if not essential. Those questions should be viewed in light of the year of experience that the industry has had in trying to prepare for the applicability date. We think the experience of financial institutions in this preparation has caused significant changes to business models and product pricing, which, while pointed out in our original comments as our best prediction, have actually come to pass. We think that the number of financial institutions who have found it very difficult to use the only real exemption proposed for retail accounts demonstrates that the path chosen by the former Administration may have been impractical, unrealistic and unlikely to lead to better financial results for retirement savers. We count ourselves in this number. Our comments follow below.[1]

The President's Questions and Delay Date

Neuberger appreciates the Department's delay in the applicability date of the Rule and its accompanying exemptions. However, we urge the Department to immediately propose an additional delay in the applicability dates so that the 2016 Investment Advice Fiduciary Rule and its accompanying exemptions do not go into effect until the study mandated by the President is completed, and until the President, the Secretary of Labor and his appointed staff have had an opportunity to review the record underlying the report and decide on next steps. As indicated in the memorandum and in the Department's final notice of delay, if the Department answers in the affirmative to any of the questions posed, it is **required** to "publish for notice and comment a proposed rule rescinding or revising the [DOL Fiduciary Rule]" as applicable and consistent with law. The Department is also required to do the same if it concludes "***for any other appropriate reason***" that the DOL Fiduciary Rule fails to "empower Americans to make ***their own financial decisions***, to facilitate their ability to save for retirement and build the individual wealth necessary."

We believe there is no doubt that the answer to at least one (if not more) of the President's questions posed in its memorandum will be answered in the affirmative. For example, we believe that it is without question that the 2016 Investment Advice Fiduciary Rule will cause an increase in litigation, and highly likely that an increase in the prices that investors and retirees must pay to gain access to retirement services will occur. Morningstar has concluded that the ***annual*** class action lawsuit settlement cost will be ***somewhere between $70 Million - $150 Million***.[2] They even went on to say that " . . . we wouldn't be surprised if near-term class-action lawsuit settlements ***exceed this by a multiple***, as firms figure out how to determine, demonstrate, and document best interest."[3] But this should not be a surprise. The Department has given much more than a "nudge" to enforcing the 2016 Investment Advice Fiduciary Rule through private party litigation. Indeed, it

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[1] We have limited our comments on the proposal to those that address issues most pertinent to our clients and our firm, but we also share additional questions and concerns with parties across the financial services industry. Accordingly, we have contributed to the comment letter on the proposal prepared by the Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA") and fully support and endorse the content of that letter. We also fully support letters submitted by the Investment Adviser Association and the Investment Company Institute.

[2]The February 2017 Morningstar Report. This is in addition to the Department's regulatory impact analysis of $1.5 Billion of ongoing costs

[3] Id.

is a central feature of the BIC Exemption, and has been the apparent intent of the rule since its first proposal in 2010. There, the Department indicated that one of the drivers of the rule was based on the difficulties in bringing enforcement actions under the current test and to more "efficiently allocate its enforcement resources." And it was not lost on FINRA's chairman and chief executive officer when he commented that the rule "i[n] one sweeping step, this moves enforcement of these provisions to civil class action lawsuits or arbitrations where the legal focus must be on a contractual interpretation."[4]

We describe further below that one of the reasons that litigation and disruption can be expected is because the 2016 Investment Advice Fiduciary Rule does away with basic concepts such as "mutuality" and because exceptions for selling one's own product are woefully weak. It is hard to imagine that litigation will not ensue, when the arrangement's terms need not be mutually agreed to. The Department's Regulatory Impact Analysis likely needs revisiting to accommodate not only new data, but because the analysis did not take into account the increased cost that will be redistributed back to clients and how financial representatives and firms will become risk averse and thus dramatically reduce choice to minimize and suppress litigation cost.

That, of course, is the analysis with respect to the litigation aspects of the rule. Separately, the Investment Company Institute has pointed out that new economic studies estimate that investors could in fact lose $109 billion over 10 years because of the rule's implementation. [5] Moreover, Neuberger believes revisiting the analysis is not only prudent but necessary in light of the huge changes being contemplated in the market – significant movement to advisory accounts, T shares, clean shares and other reductions in mutual fund fees generally, it will only lead to flawed results. New T shares are a good example of the kind of changes in the market created solely to meet the Department's rules, but not necessarily a product that would otherwise have been promoted. The new T shares are mutual funds with 12b-1 fees and front end loads, but without any rights of exchange or rights of accumulation[6]. Some financial institutions building their business model around the BIC Exemption have indicated that they will limit their mutual fund offerings to T Shares. Most T Shares entail significant front-end loads which may make it more expensive for retirement investors to purchase. It does not appear that the Department factored in these changes in its Regulatory Impact Analysis. Thus, there is much that is new that needs to be considered. Accordingly, we agree with the President's request for an updated review.

In its delay release, the Department curiously appeared to signal a reluctance to consider further delays beyond June 9, 2017. The Department noted that it "has concluded that it would be inappropriate to broadly delay application of the fiduciary definition and Impartial Conduct Standards for an extended period in disregard of its previous findings of ongoing injury to retirement investors." Indeed, the Department also noted that it was "concerned that retirement investors will [not] be protected during the period in which the Department conducts its examination of the Fiduciary Rule." While Neuberger lauds the Department's desire to be protective of Plan investors, it does not understand how the Department has concluded that it

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[4] Remarks from the 2015 FINRA Annual Conference of Richard Ketchum, available at https://www.finra.org/newsroom/speeches/052715-remarks-2015-finra-annual-conference

[5] See ICI letter of March 17, 2017 and SIFMA BD Letter.

[6] http://www.barrons.com/articles/morningstar-t-shares-to-kill-off-a-shares-1484029436;

would be "inappropriate" to consider any broader delays. Implicit in the President's memorandum is a direction to consider the "Fiduciary Duty Rule" (viz., the 2016 Investment Advice Fiduciary Rule) ***in its entirety***, which would include the rule itself apart from and in combination with its exemptions. Moreover, the disquieting implication is that without application of the rule and the Impartial Conduct Standards, market participants will somehow work against their clients' own best interests. The urgency, apparently, is to rush to make applicable a rule to protect investors who are not protected.

Were that to be the case, we would agree. But we do not. The Department's imposition of its own view would appear to give short shrift to the strong bevy of regulations that already apply. This includes, of course, the vast enforcement powers of the Department under ERISA. We also commend to the Department the words of FINRA chief Richard G. Ketchum, who indicated:

> The SEC and FINRA, of course, regulate virtually all aspects of a broker-dealer's business. . . . FINRA rules are backed by an active program that examines all broker-dealers, depending on their size and activity, none less than every four years and, for large firms, every year. Through our risk-based programs, this resulted in nearly 6,800 cycle, cause and branch office examinations in 2014 alone. Moreover, our rules are also backed by an active enforcement program. In the last five calendar years, FINRA brought 8,271 disciplinary actions against registered individuals and firms. Over that time, we expelled 107 firms from the securities industry, barred 2,345 individuals, and suspended another 3,417 from associating with FINRA-regulated firms—and ordered over $100 million in restitution to investors. Combine that with strong written supervisory requirements and comprehensive oversight of firms' advertising to ensure both fairness and balance and the result is a very strong and effective regulatory framework.[7]

At the end of the day, we think it is unfortunate that the Department has signaled a presumption that does not appear to accommodate, address or even acknowledge the confusion and chaos that will be caused by the implementation of the 2016 Investment Advice Fiduciary Rule before the Department can complete its Presidentially-mandated study. While we do not pretend to know the Department's motives, such an approach strongly suggests that it has already pre-judged the conclusions to the President's study. We believe there is not only reasonable cause to believe, but a near certain likelihood to conclude, that the answers to one or more of the President's questions will be "yes" and thus worry about the fundamental disruptions and chaos that will ensue with a "shuttlecock" approach to regulation. Preserving access to needed products and services is difficult when trying to adjust to a moving target. And, because many of our intermediary partners face uncertainty regarding this rule occasioned by the President's memorandum, we continue to be handicapped in our best efforts to provide best solutions for our clients. The Department would be

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[7] Remarks from the 2015 FINRA Annual Conference of Richard Ketchum, available at https://www.finra.org/newsroom/speeches/052715-remarks-2015-finra-annual-conference

wise to stop moving the target and call a "cease fire."

Comments on the Rule and Exceptions

Clarify the Definition of Fiduciary Investment Advice to Exclude Clear Sales Pitches

Neuberger understands the Department's concern that the 1975 rule's five-part test for determining fiduciary status under ERISA and the IRA prohibited transaction rules excludes certain investment professionals who play a critical role in guiding employee benefit plan and IRA investments. But we were surprised and disappointed that the 2016 Investment Advice Fiduciary Rule goes far beyond what is necessary to protect retirement investors by potentially covering persons selling products and services or providing education and information in a manner that no reasonable retirement investor — even a small retail investor without financial expertise — would mistake to be fiduciary investment advice. Clearly, there are situations where no reasonable Plan, asset manager or other market participant would expect that the advertiser is acting as a fiduciary, and it is fair to make sure that those are not inadvertently captured by the 2016 Investment Advice Fiduciary Rule.

As a threshold matter, we continue to believe that the absence of mutual assent is contrary to basic principles by which persons become bound by legal obligations. Recent research suggests consumers ***can*** distinguish between a sales call and fiduciary advice. People don't trust sales calls or other unsolicited advice.[8] That finding underscores our view that unsolicited advice – sales conversations – should not be deemed fiduciary advice. Moreover, the failure to include IRAs under the clear ambit of Information Bulletin (I.B.) 96-1 is sure to have a dampening effect on education and information that we and others provide. We cannot understand what empirical evidence the Department has shown to justify the exclusion in I.B. 96-1 that appear specific to IRAs.

As many commentators have noted, the failure to extend the guidance of I.B. 96-1 leads to truly absurd results.[9] Simply put, if the Department is trying to promote financial literacy,

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[8] See, e.g., "Trust and Financial Advice," J. Burke and A. Hung, RAND Labor and Population Working Paper, WR-1075 (Jan. 2015), at 1. ("...we find that financial trust is correlated with advice usage and likelihood of seeking advisory services. Analysis of the experiment shows that trust is an important predictor of who chooses to receive advice, even after controlling for demographic characteristics and financial literacy. However, providing unsolicited advice has little impact on behavior, even for individuals with high levels of trust.")

[9] SIFMA AMG's Letter to the Department in connection with the 2015 proposed rule highlighted this absurdity:

> Imagine if the Food and Drug Administration were somehow to regulate what pharmacists could say to customers, who, for example, visited their pharmacy asking about which over the counter medicines might address certain symptoms. Assume a customer comes into the pharmacy with a persistent and productive cough, runny nose and some occasional aches and pains. How helpful would it be to the ailing customer if the pharmacist were only able to talk about things such as acetaminophen, bromhexine, acetylcysteine, guaifenesin, ammonium chloride, ammonia, senega, sodium citrate, ipecacuanha, codeine, ibuprofen, dextromethorphan, dihydrocodeine, pholcodine, opentoxyverine? What if the customer asked which products contained which ingredients, but all the pharmacist could tell the customer (who by this time may be exhausted from all of her coughing) is that she should go consult the many bottles which are generously lining the multiple shelves in the pharmacy?
>
> This is not much different from a pie chart that provides an asset allocation with broad categories

this is a sure fire way to inhibit education.

And, of course, although the Department has excluded "general communications" from the ambit of investment recommendation, the failure to formally adopt the FINRA standards that trigger suitability as a bright line has led only to more confusion. And, yes, there has been, in our view, a greater reluctance to share general information as a result, for fear of being called an investment advice fiduciary while just sharing general concepts or objective information.

Actually, in some regards, the narrowness of the exception helps to prove the extraordinary and unforgiving breadth of the rule. The "general information" exception for example, may exempt information contained within a prospectus, but we are not sure whether it would always cover a professional's selection of specific prospectuses for discussion with a Plan client or perhaps, even, whether it would cover all selections of objective materials within a given prospectus. If a Plan customer calls us and asks for "basic information" on, say, our U.S. equity strategy funds, what guiding principle of protection and comfort is there that we can rely upon that would not limit us to simply send ***all*** of our entire suite of equity fund prospectuses? Not only is this costly, it is no doubt a turn off. Many of the prospectuses we deliver may be wholly irrelevant to the customer's needs. These "data dumps" accomplish nothing.

Finally, the preamble to the 2016 Investment Advice Fiduciary Rule indicates that:

> a person or firm can tout the quality of his, her, or its own advisory or investment management services or those of any other person known by the investor to be, or fairly identified by the adviser as, an affiliate, without triggering fiduciary obligations.[10]

And yet, the preamble to the final rule also notes:

> Thus, when a recommendation to ''hire me'' effectively includes recommendations on how to invest or manage plan or IRA assets (*e.g.,* whether to roll assets into an IRA or plan or how to invest assets if rolled over), that recommendation would need to be evaluated separately under the provisions in the final rule.[11]

The combination of these two statements is enormously confusing and leads us only to the conclusion that, again, the Department's rule is enormously broad. We gather from this that Neuberger representatives can "tout" the quality of the firm, but it doesn't say how. Neuberger believes that no reasonable retail investor would confuse "touts" about awards, for example, as investment advice. Moreover, we believe they would be *both* objective and material for a Plan investor to consider. And yet, the Department has given no indication that these communications

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such as "fixed income" or "equities" with no specific references to products. Each of these categories is very broad and can encompass a variety of strategies, sub-strategies and other important differences. Worse than expending the additional costs necessary to do further diligence to fill in the information provided by the asset allocation model, some fiduciaries may be incentivized to "cut corners" or, unfortunately, not do the work at all.

[10] 81 Fed. Reg. 20968
[11] Id.

would in fact not run afoul of the exception. This is not only unwise, it is overly restrictive compared to the types of general information we can and do give to other clients. Why should Plans suffer?[12]

We therefore request that the Department clarify that marketing and sales activities that would not trigger suitability requirements under FINRA will not result in an investment recommendation. We believe that based on the available evidence and common sense, an asset manager willing to serve as a fiduciary ought to be able to sell its products without fear of normal ordinary course discussions about basic information like the contours of the investment strategy, investment philosophy, and performance. By its nature, these interactions will wind up involving selections of objective facts; but they are done to meet the inquiries and needs of individual Plan clients.

The Department's general communications exception is great if one assumes an antiseptic world of automatons. But real life interactions cannot be assumed to be automatic, scripted, or robotic. They involve real people, in real life with real needs. If an individual is able to go to a department store and try on a suit, and the salesperson is able to describe the objective features of the suit (i.e., the size, the material, the weave, the country of origin, etc.) without any hint of being regarded as anything other than a salesperson, we do not understand why asset managers should be so limited in describing the objective features of their products. Once again, the lack of mutuality is a major source of our concern. This landscape results in a presumptive "everything is a recommendation unless both parties agree — reasonably or not — that it is not a recommendation." Beauty may be in the eye of the beholder for poets and lovers, but when it comes to retirement products and services, one party should not be the beholder of all the cards.

Change Important Aspects of the Independent Fiduciary Exception.

We agree with the Department's efforts to differentiate between the retail market and the institutional markets and that "[t]he use of the term 'plan fiduciary' in the proposal was not intended to suggest that ordinary business activities among financial institutions and licensed financial professionals should become fiduciary investment advice relationships merely because the institution or professional was acting on behalf of an ERISA plan or IRA."[13] Unfortunately, there are aspects of the Department's dividing line — the so-called "Independent Fiduciary Exeception"[14] that are problematic.

First, Neuberger believes that where a communication to one of the enumerated financial

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[12] *See Farm King Supply, Inc. v. Edward D. Jones & Co.*, 884 F.2d 288 (7th Cir. 1989); *see also Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 9113-12 (7th Cir. 2013) (confirming that selecting both funds and their share classes for a menu of investment options offered to 401(k) plan customers does not, standing alone, transform a provider of annuities into a functional fiduciary under ERISA); *Hecker v. Deere & Co*., 556 F.3d 575 (7th Cir. 2009) (citing *Farm King* and finding that "merely playing a role or furnishing professional advice" in the selection of funds is not enough to create fiduciary status), *reh'ing denied*, 569 F.3d 708, *cert. denied*, No. 09-447 (Jan. 19, 2010); *Am. Fed' of Unions, Local 102 v. Equitable Life Assurance Soc'y*, 841 F.2d 658 (5th Cir. 1988) (noting that simply urging the purchase of products does not make an insurance company an ERISA fiduciary with respect to those products).

[13] 81 Fed. Reg.20982.

[14] Located at (c)(1) of the 2016 Investment Advice Fiduciary Rule.

institutions in the Independent Fiduciary Exception is not individualized or specifically directed to an identified end-user Plan, a product manufacturer such as Neuberger should not have to reach a litany of "reasonable basis" conclusions about the institution's role, competence, fiduciary status or ERISA compliance. For example, when we wholesale products to these regulated entities, our interactions should not be at risk of being regarded as rising to investment advice if that institution happens to be an investment adviser fiduciary of one or more Plans. These regulated institutions are capable of comporting with their regulatory duties, including, to the extent fiduciaries under ERISA, complying with their fiduciary responsibilities thereunder. To hold otherwise is likely to have a chilling effect on the free flow of information and ideas among financial professionals, which will likely serve to the detriment of Plan end-users.

Neuberger believes that the important thing to understand is that those interactions are the epitome of "ordinary business activities among financial institutions and licensed financial professionals" and do not need a bevy of "reasonable basis" predicates that are overly restrictive and which introduce needless opportunities for confusion and complexity. At its most basic, it seems unreasonable to impose on product manufacturers a responsibility to be the guardians of our intermediaries' compliance with the rule merely to communicate with them. We are two steps removed from any contact with any retail Plan client, and most of the time, there is not even a hint of which types of clients (Plan or not) our activities with a particular regulated intermediary may relate.

As an example of these needless complications, we point to the ill-advised Conflict of Interest FAQ 28 (Set II). We believe that the guidance is unfortunate in that it could be read as implying that a broker-dealer may need to comply with the BIC in order for it to meet the independence test of the Independent Fiduciary Exception. We are doubtful that this was actually intended, as the Department has already acknowledged that intermediaries may have a number of different exemptions available to them apart from the BIC Exemption, or may simply avoid fiduciary status altogether. As to the independence prong, we strongly believe that traditional norms of corporate control are well settled and should be sufficient without the need to further complicated matters with tests upon tests. This is especially the case in the context of an independence test, since if the intermediary is a fiduciary, it would already have a duty to assure independence from us by avoiding situations which may affect its best interest as a fiduciary under 29 CFR 2550.408(b)-2(e). In any event, the important point is that institutions such as Neuberger should not be placed in harm's way by being effectively forced to police their business partners' compliance with the rule in order to feel comfortable that they will not be regarded as some investment advice fiduciary. [15]

Harmonize the Dividing Line Between Retail and Institutional Consistent with Other Regulatory Experts

Neuberger again expresses its agreement with the Department's attempt to exclude from the definition of fiduciary investment advice incidental advice, communicated in arm's-length

[15] Although we appreciate the Department's attempt to clarify its treatment of model portfolios, we would respectfully offer a simpler solution which is consistent with the more basic principles outlined herein: the model provider should not be regarded as a fiduciary where it does not know the identity of the end user, has no privity with the end user and does not knowingly design the model for a specifically identified end-user. Further, contrary to the confusing FAQ 29, disclosure by financial institutions regarding a model provider's fees should be encouraged in the interest of greater transparency rather than penalizing the financial institutions and discouraging such disclosure

transactions between sophisticated parties. We agree that, if this advice were viewed as fiduciary investment advice, the additional regulatory protections would provide no benefit to such investors, and would merely interfere with the efficient management of retirement assets. However, as commented in our letter concerning the proposed rule, we continue to believe that the Department strikes the wrong dividing line by failing entirely to give appropriate attention to Plan size and asset value eligibility criteria.

We continue to believe that, by applying different criteria used to identify sophisticated investors for similar purposes under other regulatory regimes, the Independent Fiduciary Exception can be expanded to include classes of investors whose current investment flexibility would be stymied by additional regulation, without compromising on enhanced protections for the classes of small plan and retail investors whom the Department seeks to protect. Quite frankly, we do not understand why IRAs cannot qualify for the Independent Fiduciary Exception under ***any*** level of financial sophistication or asset size without the IRA being directed by one of the several regulated entities "approved" under the exception. There is simply no good reason to adopt one set of regulatory standards of sophistication for IRAs under one regime, and a totally different one for another.

Neuberger again urges the Department to expand the list of eligible Plan clients to cover "qualified clients," as defined in Rule 205-3(d)(1) under the Advisers Act, where that term is used for purposes of an exception from the prohibition on performance fees for advisory agreements entered into with such clients. Under that standard, the SEC acknowledged that restrictions on performance fees that hindered investment flexibility were unnecessary for "clients who are financially sophisticated or have the resources to obtain sophisticated financial advice to weigh the costs and benefits of entering into such arrangements and to determine for themselves whether to enter into such contracts."[16]

Likewise, in crafting the scope of the Independent Fiduciary Exception, the Department weighed concerns about retail investors and small plan sponsors that "are not financial experts, are unaware of the magnitude and impact of conflicts of interest, and are unable effectively to assess the quality of the advice they receive." The corollary of the Department's analysis and the SEC's qualified client determination is that qualified clients, as defined in Rule 205-3(d)(1), would make appropriate sophisticated investors for purposes of the Independent Fiduciary Exception. In the view of the SEC, this class of persons has the sophistication and resources to make independent investment determinations, so it follows that they should also have the sophistication and resources to be aware of conflicts of interest, to evaluate the quality of investment advice, and to ultimately bear the risk of their own investment decisions.[17]

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[16] SEC, Exemption To Allow Investment Advisers To Charge Fees Based Upon a Share of Capital Gains Upon or Capital Appreciation of a Client's Account, Investment Advisers Act Release No. 1682, 62 Fed. Reg. 61,882, 61,886 (Nov. 19, 1997). "Knowledgeable employees" of the investment adviser were added in the final rule. SEC, Exemption to Allow Investment Advisers to Charge Fees Based Upon a Share of Capital Gains Upon or Capital Appreciation of a Client's Account, Investment Advisers Act Release No. 1731, 63 Fed. Reg. 39,022 (July 21, 1998).

[17] Alternatively, the Department could consider applying other existing regulatory standards of investor sophistication as the basis for an expansion of the counterparty's carve-out, such as the "accredited investor" standard under the Securities Act of 1933 or the "qualified purchaser" standard under the Investment Company Act of 1940.

A final rule that does not include an expanded Independent Fiduciary Exception would result in added cost, inconvenience, and perhaps even more limited access to investment management services for a class of sophisticated investors upon whom the Department's efforts are not primarily intended to focus. Neuberger's Plan clients generally are high net worth investors that meet the qualified client standard. Those individuals generally have assets in ERISA plans and IRAs, in addition to assets outside of those vehicles, which would not be subject to the 2016 Investment Advice Fiduciary Rule. For example, it is possible for us to have as a client an executive of a company that has the firm manage his company's assets and his family's personal assets and retirement accounts. Such an investor understands marketing activities well and needs no added protection to prevent the unscrupulous offering of investment management services to his family's retirement assets. Under the Independent Fiduciary Exception as issued, Neuberger would be required to bi-furcate its treatment of those sophisticated, high net worth investors' assets, which would unnecessarily disrupt its services to those clients. The Department has substituted its judgment for that of retirement investors, which prevents retirement investors from making their own choices with regard to investing their money. Importantly, the Department has also ignored entirely the judgment of other regulators as to the types of individuals who require the full protections of the securities laws.

We are also not aware of any basis, either empirical or philosophical, to extend enhanced protections intended for retail clients to high net worth individuals who are qualified clients. We understand that promulgating rules is an exercise of drawing lines, but we believe that this is not the appropriate place to draw this line especially in the face of other regulatory authority to the contrary. The Department has not marshaled, nor do we know of, provided research suggesting that different sophisticated investor thresholds for enhanced protection should apply to investment advice pertaining to retirement assets regulated by the Department versus investment advice regulated by the SEC. Accordingly, Neuberger believes that an expansion of the Independent Fiduciary Exception to cover persons who meet the well-established qualified client standard (or another, similar established regulatory standard) will not compromise the protections that the Department intends to effect with the rule, but will prevent disruption to a class of high net worth investors that have the sophistication and resources to analyze investment advice.

Comments on the Exemptions

Significant Modification of the Best Interest Contract Exemption Is Necessary to Apply the Exemption in a Manner that Does Not Disrupt Long-Standing Business Practices

We appreciate the Department's stated intention is to use the BIC Exemption as a flexible, "principles-based" exemption that preserves current compensation practices and investor choice while offering clients the protections of the impartial conduct standards. Compliance with the BIC Exemption in its issued form, however, is impracticable and too complex for compliance for many of our financial services partners. We are concerned that the BIC Exemption in practice will preclude the use of long-established compensation models, and ultimately will harm investors by forcing the industry to eliminate choices in compensation structures, except for fee-

leveling or fee-offset models, in an effort to ensure compliance with the BIC Exemption requirements. That, in turn, has a definite impact on client service, and product choice. We believe that the net effect of the BIC Exemption will be to limit choice and that result is fundamentally inconsistent with preparing for the challenges of an aging American population. Indeed, Neuberger believes that increased longevity demands innovation and flexibility: not a straightjacket. And yet the architecture of the BIC Exemption appears designed to favor certain types of products over others. Neuberger continues to strongly believe that national retirement policy should not be guided directly or indirectly by any one regulator's judgment as to which products and services may be in the best interest of any given Plan or Plans. To that point, it appears by design or effect, the Department has limited relief for IRAs to effectively one exemption — the BIC Exemption — which we have seen is helping to lead a full scale change in how financial institutions sell products and services, charge clients, pay financial professionals and distribute mutual funds. When regulators violate this kind of product neutrality, and when they are the ones driving the process of industry change, we believe it goes way too far.

The President asks whether the rule will cause disruption in the industry. The BIC Exemption has already led firms to make very significant changes to their product and service offerings to retirement investors, limiting their choices of services and products. It certainly has affected us. It is a very challenging exemption to deal with, due to hundreds of separate requirements, any one of which, if not complied with, can trigger the loss of the exemption, reversal of the transactions dependent on the exemption, payment of an excise tax and a private lawsuit. There is also a significant amount of subjectivity to those requirements that firms have been concerned about misreading, and that concern has led to many financial institutions deciding that they simply can't comply with BIC Exemptions. As a result, firms have determined that a business model change, in whole or in part, to avoid these dangerous and expensive problems. In some cases, that means abandoning certain products and services. And as product manufacturers, trying to anticipate intermediaries' demands, we have had to endure several ongoing "back to the drawing board" exercises in this past year alone, resulting in significant time, energy, cost, product redesign and other interactions with fearful business partners. We are not certain whether we can offer the full range of products and services to the retirement market that today's evolving demographics demand and we are not confident that we and other peers will be able to fully respond to evolving demands that may be important in the future. It is our belief that fear should not drive these business partners' business decisions, nor should it drive national retirement policy.

At the end of the day, we believe that the Department's substitution of its own judgment of what passes for a given Plan's best interest for that of the Plan's fiduciary is affirmatively harmful. To the extent that the Department really wishes Plans to have access to the best advice around, we submit that the entire architecture and premise of the rule and the BIC Exemption in particular serves the opposite. We think the President's questions demand a "do over" on this entire project. But we do not think that means that the status quo should necessarily follow. The Department has identified real public policy concerns that deserve attention. Nevertheless, the architecture of the 2016 Investment Advice Fiduciary Rule does little to address those concerns in a manner that is

tied to the core objectives it has identified.

Conclusion

In sum, we believe that the 2016 Investment Advice Fiduciary Rule will have the following impacts

- **Harm to Plan Investors and Limitation on Choice**. Has harmed and is likely to continue to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;

- **Dislocations and Disruptions**. Has already resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and

- **Increase in Litigation**. Is unquestionably likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

While the Department points to its Regulatory Impact Analysis, the President's memorandum implicitly calls into question the results of that study by asking for an "updated economic and legal analysis concerning the likely impact of the Fiduciary Duty Rule, which shall consider, among other things, [the three questions specified in the Memorandum]." The Department also makes reference to those commenters on the proposed delay who believe it has "already has studied this topic, as well as the issues presented in the President's Memorandum, at great length as part of an extensive regulatory process, [and argued] its original analysis was not flawed, and [therefore] nothing has changed since then that would warrant a reexamination." We submit that the basis for the Department's cost benefit analysis is already too old to be reliable and it is misapplied by the Department; it was outdated when used, and in light of the huge changes being contemplated in the market – significant movement to advisory accounts, T shares, clean shares and other reductions in mutual fund fees generally, it will only lead to flawed results.

More directly, it is difficult for us to understand how one could at this juncture not reasonably conclude that at least one of the President's questions would be answered in the affirmative. Consider the President's litigation question. Is it not by conscious design that the Department sought to activate the plaintiffs' class action bar as its tool in enforcement of this rule? Cannot that alone be read as *prima facie* evidence of an increase in likely litigation under this rule? Does it not matter that one of the original drivers of the rule — by its own admission — was the Department's belief that it faced difficulties in bringing enforcement actions under the 1975 rule's test and thus sought to make changes to more "efficiently allocate its enforcement resources"? And should the observations of FINRA's chairman and chief executive officer be ignored when he noted that the rule "i[n] one sweeping step, this moves enforcement of these provisions to civil class action lawsuits or arbitrations where the legal focus must be on a contractual

interpretation"[18]? We also note that assuming Alexander Acosta is confirmed as Labor Secretary, he has already indicated to the Senate that "the rule goes far beyond simply addressing the standard of conduct of investment [advisors] . . . ." Moreover, when asked by Senator Warren (D-MA) " . . . [D]o you support this rule?," Mr. Acosta was quite clear in indicating: "There is an executive action that directs how the Department of Labor will approach this rule. If I am confirmed as Secretary of Labor I believe and support my following executive orders of the President who would be my boss."[19]

We believe it essential for the Department to get this right; not be guided by passion or sunk costs. The presumption signaled by the Department does not appear to accommodate, address or even acknowledge the confusion and chaos that will be caused by the implementation of the 2016 Investment Advice Fiduciary Rule before the Department can complete its presidentially-mandated study. While we do not pretend to know the Department's motives, such an approach strongly suggests that it has already pre-judged the conclusions to the President's study.

We look forward to standards that properly divide the universe between institutional and retail accounts based on established principles harmoniously applied, and a presumption in favor of interactions amongst regulated institutions as falling outside of investment advice without mettlesome and confusing "belief" predicates for relief. We also look forward to a standard that demarcates true tailored individualized investment advice on the one hand, with sales calls, and investment education on the other hand. One party should not be left holding all the cards to dictate the results of an opportunistic challenge under an inherently subjective standard. We, as investment managers, often take on fiduciary responsibilities as discretionary managers of Plan assets, and we recognize all too well the limitations on investor education and ordinary market color conversations that will be imported by the 2016 Investment Advice Fiduciary Rule even where we seek to serve as fiduciaries. A "principles based" exemption, like the BIC Exemption should be just that: principles based, and outcome neutral. This means that it should be philosophically agnostic from an investment perspective and allow for the innovation and dynamism needed with an aging workforce facing longer retirement horizons. "One size fits all" has never been our approach to investing, or to our client service. We submit that a rule that has the indirect effect of "nudging" retirement investors to one type of product or service or another betrays a regulator's belief that it can scientifically engineer better results. While we are confident

[18] Remarks from the 2015 FINRA Annual Conference of Richard Ketchum, available at https://www.finra.org/newsroom/speeches/052715-remarks-2015-finra-annual-conference

[19] https://www.c-span.org/video/?425697-1/labor-secretary-nominee-outlines-policy-priorities-confirmation-hearing&start=8972

in our abilities, and proud of our achievements, we would not make such a presumption. We embrace standards that preserve choice and the innovation necessary to meet the new retirement demands of tomorrow.

Sincerely,

William Braverman
General Counsel – Asset Management