Neuberger Berman Group LLC
1290 Avenue of the Americas
New York, NY 10104
Tel. 212.476.9000

NEUBERGER | BERMAN

September 13, 2017

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210
Attn: D-11933, RIN 1210-AB82

Submitted via email to: EBSA.FiduciaryRuleExamination@dol.gov; RIN 1210-AB82

Neuberger Berman Group LLC (collectively with its subsidiaries, "**Neuberger**"), a private, independent, employee-owned investment management firm, respectfully responds to the Department of Labor's (the "**Department**" or "**DoL**") proposal on Extension of Transition Period and Delay of Applicability Dates (the "**Extension**").[1]

Delay of January 1, 2018 Applicability Date

Neuberger supports the proposed 18-month delay of the January 1, 2018 applicability date of the provisions in the Best Interest Contract Exemption ("**BIC Exemption**"), the Principal Transaction Class Exemption, and Prohibited Transaction Exemption 84-24 (collectively, the "**Exemptions**") relating to the redefinition of the term "fiduciary" under section 3(21) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and section 4975(e) of the Internal Revenue Code, as amended (the "Code")(the "**Rule**") that are not now in effect, along with the other amended exemptions as part of this rulemaking. We believe that a delay in the applicability date of the BIC Exemption is appropriate in light of the amount of work necessary to finish the review associated with the questions posed by the Presidential Memorandum of February 3, 2017,[2] and the time that it will take for those in our industry to make the changes necessary to comply with any new rules, at such time as they are published.

---

[1] Dept. of Labor Notice of proposed amendments to PTE 2016-01, PTE 2016-02, and PTE 84-24, 82 Fed Reg. 41365 (August 31, 2017).
[2] Presidential Memorandum on Fiduciary Duty Rule (Feb. 3, 2017), available at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

We call upon the Department to extend the delay to a date the later of (x) July 1, 2019 and (y) 24 months after the final rules are published in the Federal Register. We believe it will take the Department some time to propose and receive feedback on changes to the Rule that result from the Presidential Memorandum, and thus advocate a date keyed off the later of the date currently proposed and 24 months after the final publication of the Rule and Exemptions.

The Department Should Address the Questions in the Presidential Memorandum.

The Extension proposal notes that "the Department has not yet completed its reexamination of the [ ] Rule and [Exemptions] as directed by [President Trump] on February 3, 2017," and that "more time is needed to carefully and thoughtfully review the substantial commentary received in response to the March 2, 2017, solicitation for comments," and thus, "to honor [President Trump's] directive to take a hard look at any potential undue burden."

Yet surprisingly, just two lines later, the proposal notes that the "examination will help identify any potential ***alternative exemptions or conditions*** that could reduce costs and increase benefits to all affected parties." [Emphasis supplied]. The Department then suggests that it will have a much clearer image of the range of "such" alternatives once it reviews the responses to the Request for Information [3] and proceeds to indicate that it "anticipates" proposing "a new and more streamlined exemption built in large part on recent innovations in the financial services industry."

We noted in our prior comment letter relating to the Department's Request for Information:

> Neuberger is concerned that the DoL's RFI questions are focused primarily on potential modifications to the exemptions associated with the Rule, rather than on existing challenges with the Rule itself. We understand that the DoL is focused on its examination of the considerations articulated in the Presidential Memorandum of February 3, 2017, and that, presumably, that encompasses a broad review of some of the issues associated with the Rule itself.[4]

We also noted there that "of the questions posed in the RFI, only one appeared to address the Rule itself. [5] And that was the last question. We assume that the Department will engage in a full and complete review of the Rule as is ordered by the President's Memorandum and not solely on the Exemptions, or new exemptions. As we have noted in prior comments to the Department, we believe that a plain reading of the President's Memorandum requires the Department to take a "hard look" not only at "alternative exemptions," or "conditions" (presumably to the Exemptions), **but the Rule itself**. We hope that we are being overly

[3] The Department's request for information ("**RFI**") related to its examination of its Conflict of Interest Rule and Exemptions, July 6, 2017.

[4] See our comment letter of August 7, 2017.

[5] Id.

sensitive in identifying what appears to us to be a disproportionate amount of attention given to the Exemptions in the RFI and the proposed Extension rather than to the Rule itself.

The Temporary Enforcement Policy Should Also be Extended

In footnote 32 of the proposed Extension, the Department asks whether the policy not to pursue claims against investment advice fiduciaries who are "working diligently and in good faith to comply with their fiduciary duties [under the new Rule] and to meet the conditions of the [Exemptions]" should be extended beyond 2017 to comport with the delay in the January 1, 2018 applicability date.

We strongly believe that the Department should have affirmatively extended this non-enforcement policy to line up with the duration of any Extension associated with the January 1, 2018 applicability date. As we have noted previously, the substantial uncertainty associated with the application of key elements of the Rule, and many of the conditions of the Exemptions (i.e., the impartial conduct standards), make enforcement actions in the face of the uncertainty perilous. Where the Department is chiefly concerned about assuring "good faith" compliance with the new Rule[6], the specter of costly investigations and assessment of penalties will almost certainly backfire. In its Temporary Enforcement Policy on Fiduciary Duty Rule, the Department stated that it has "repeatedly said that its general approach to implementation will be marked by an emphasis on assisting (rather than citing violations and imposing penalties on) plans, plan fiduciaries, financial institutions, and others...."

Having been clear in its Temporary Enforcement Policy, and having already made the findings that supported that decision to approve the enforcement hiatus originally, we are perplexed as to why the Department has even asked for comment on extending the policy further, rather than either proposing it affirmatively or simply announcing that it would be extended in line with the time frame contemplated by the extension of the January 1, 2018 applicability date.

We unconditionally support the common sense answer that the Temporary Enforcement Policy be extended to line up with the final applicability dates in respect of those originally scheduled for January 1, 2018. We also strongly request that to further the Department's goal of "assisting" plan fiduciaries and financial institutions during this period, the Department coordinate with the Treasury Department and the Internal Revenue Service to confirm that, for purposes of applying IRA Announcement 2017-4, the extension of the Department's Temporary Enforcement Policy will constitute "other subsequent related enforcement guidance."

[6] https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02

New Exemptions Should Be Broad-Based and They Should Not Deflect Attention from Improvements to Rule

The Department has asked also for comments on the possibility of new exemptions and seems to believe, as stated above, that there are "recent innovations in the financial services industry" that warrant relief. Neuberger is concerned that the Department is continuing to look at creating new exemptions based on those particular recent "innovations" that the Department prefers. And, as mentioned above, we believe that any such new exemptions not displace the "hard look" the Department has been ordered be undertaken by the President with respect to the Rule itself.

While we note our concerns, we believe that any broad-based exemption that the Department considers should be available across business models. One of the challenges of the BIC Exemption and the principal transaction exemption is that it favors certain business models, to the exclusion of others. As we have repeatedly made clear, we do not believe the Department should be in the business of ***un***leveling the playing field so that it can advantage certain business models over others. For example, we have been opposed to a "simplified" or "streamlined" exemption if not capable of being utilized broadly and without favoritism as to product line or business model. While we certainly think the BIC Exemption could be "streamlined," it should not only be streamlined for particular products or business models. Our many comments associated with some of the deleterious impacts of the Rule and of the Exemptions, have been noted in our prior letters.

Ultimately, Neuberger believes it would be more responsible for the Department to propose broad exemptions that are understandable and easily implementable. "Legal lists" of the type that are still prevalent in the principal transaction exemption, and which were done away with in the BIC Exemption, should be strongly discouraged in any exemption the Department considers.

Thank you for the opportunity to provide our responses to your latest proposals.

Sincerely yours,

William Braverman
General Counsel – Asset Management