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NEUBERGER | BERMAN

August 7, 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

Re: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

Neuberger Berman Group LLC (collectively with its subsidiaries, "**Neuberger**"), a private, independent, employee-owned investment management firm, thanks the Department of Labor (the "**Department**" or "**DoL**") for the opportunity to respond to its request for information ("**RFI**") related to its examination of its Conflict of Interest Rule (29 C.F.R. 2510.3-21) (the "**Fiduciary Rule**" or "**Rule**"); Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01) (the "**BIC**"); 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, 84-24 and 86-128 (collectively, the "**Exemptions**").

Neuberger, like many product "manufacturers" seeks to address the needs of its many retirement clients and those intermediaries that service them. Product and service innovations designed to meet the challenges of an aging workforce and the realities of greater longevity should not be given a back seat to these fundamental interests nor should the costs associated with repeated changes and disruptions. However, 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,[1] and that, presumably, that encompasses a

[1] 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.

broad review of some of the issues associated with the Rule itself.[2] We understand that the questions posed by the RFI were not intended to be exclusive and sincerely hope that the DoL will find our comments about the Rule, including the exceptions, useful as it conducts this review.

The Department Should Support SEC Adoption of a Uniform Best Interest Standard

We believe it is critical that the DoL, Securities Exchange Commission ("**SEC**") and the financial services industry work together to enhance confidence in markets and investing, advance investor choice, while working to enhance the shared policy goals of increasing levels of individual savings, whether or not through an employer's retirement plan or an individual retirement account ("**IRA**"). We believe that manufacturers and intermediaries need to be empowered to pursue well-designed investment programs and platforms that include the ability for individuals planning to retire and those in retirement. Of course, as we have mentioned in the past, the financial services industry first needs certainty as to the legal requirements, then adequate time to engage in a thoughtful, high-level decision-making process about any required changes, followed by sufficient time to implement and communicate those changes.

Neuberger strongly supports coordination between the DoL and SEC on investment advice regulation that enhances investor confidence, promotes investor choice and facilitates outcome-oriented investing. We support and appreciate Secretary Acosta's and Chairman Clayton's commitment to collaborate on this issue,[3] and we urge those agencies to work together on developing a best interest standard that allows investment professionals to focus precisely that level of service to their clients, which, by corollary, means maintaining, not eliminating choice. We believe that investment professionals can better serve their retail clients' needs with respect to all of their clients' assets, without the burden of complex, conflicting, or overlapping regulatory requirements. SEC Chairman Clayton indicated that it "does not seem right" to have differing rules for the same clients depending whether they are working with their adviser on retirement or other investments.[4] Neuberger agrees. As the

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[2] We note that of the questions posed in the RFI, only one appeared to address the Rule itself. Of course, we read the President's Memorandum as requiring the DoL to publish for notice and comment a proposed rule rescinding or revising the Fiduciary Rule, as appropriate and as consistent with law, independent of any changes to any exemptions, including the BIC Exemption, should the answer to any of the questions posed therein be in the affirmative. As we and others noted in prior comments, there is little doubt that the Rule will increase litigation and hence at least one of the answers to the questions must be "yes".

[3] Statement of SEC Chairman Jay Clayton, Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers, June 1, 2017, available at https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31 ("SEC Request for Comment").

[4] As reported, see: http://www.investmentnews.com/article/20170726/FREE/170729957/jay-clayton-says-sec-dol-can-give-market-clarity-on-fiduciary-rule?NLID=daily&NL_issueDate=20170726&utm_source=Daily-20170726&utm_medium=email&utm_campaign=investmentnews&utm_visit=542711&itx[email]=80900df95a63e8f2539657792d972a2927f3e443acaa7e676a4d65718551112e%40investmentnews.

primary regulator of broker-dealers and investment advisers, the SEC has broad regulatory authority over *all* investment accounts and has a strong history of being focused on determining the appropriate standards of conduct for investment advisers and broker-dealers.[5] The SEC's recent request for comment on a uniform best interest standard does just that.

We agree with Mr. Clayton in noting that the SEC has its mandate and DoL has its own, but also share his view that there is "common ground" that should be utilized to arrive at greater clarity for the benefit of all retail investors.[6] Implicit within this discussion must be an awareness that the existing structure of the Fiduciary Rule places a disproportionately heavy emphasis on an investment professional's potential conflicts of interest, instead of on whether a product will deliver the client's desired investment outcome. The Fiduciary Rule targets conflicts and presumes that in doing so, there is only marginal disruption on the investment professional's ability to simultaneously act in the client's best interest. Like many product manufacturers, we take our cue in part from intermediaries in terms of product design. Since the applicability date of the Fiduciary Rule on June 9, 2017, we have seen a focus by intermediaries on choosing products for plan and IRA platforms based on whether the product facilitates compensation neutrality within and across fund families and, thus, BIC Exemption (or other exemption) compliance, rather than whether the product is aligned with the client's goals or even outcomes that would otherwise be determined to be objectively in the best interest of the client. Neuberger believes that the overly heavy emphasis on compensation structure, and, even more critically, the emphasis on eradicating the potential for conflicts of interest to the exclusion of other factors, threatens to work *against* the best interests of individual clients. We believe that a universal standard will help advance our shared interests of promoting favorable opportunities for all investors while protecting retirement investors in the process. Once again, let us be clear: Neuberger fully supports a best interest standard. However, it wants to be sure that retail clients obtain outcomes that really are consistent with that standard. The current Fiduciary Rule's undue emphasis on compensation structures within products is a cost that should not have to be borne in investment outcomes. Once a common standard is approved, the DoL should, as part of its review of the Fiduciary Rule and updated regulatory impact analysis, evaluate the impact of applying such a uniform best interest standard to investment advisers and broker-dealers.

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[5] SEC Request for Comment.

[6] As reported, see: http://www.investmentnews.com/article/20170726/FREE/170729957/jay-clayton-says-sec-dol-can-give-market-clarity-on-fiduciary-rule?NLID=daily&NL_issueDate=20170726&utm_source=Daily-20170726&utm_medium=email&utm_campaign=investmentnews&utm_visit=542711&itx[email]=80900df95a63e8f2539657792d972a2927f3e443acaa7e676a4d65718551112e%40investmentnews.

The Department Should Revisit Key Aspects of the Rule Including a Sellers' Exception

Neuberger fully supports the notion that financial professionals should act in their retail clients best interests in a manner that is consistent with a fully developed universal best interest standard. We continue to be disappointed, however, that the Fiduciary Rule goes far beyond what we believe 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 Fiduciary Rule.

While we appreciate the DoL's goals of protecting retail plan and IRA investors, we think that the term "advice" has taken on a meaning beyond all common sense under the Fiduciary Rule. Nobody would believe that a waiter's recitation of the different "soups of the day" at a restaurant amounts to culinary advice. It should therefore not be a surprise that many clients become confused when they are told that merely speaking about an investment strategy is somehow advice that renders one a fiduciary. Let us be clear: we believe that all financial professionals should act in the best interest of their clients. But that does not mean that every utterance by a financial professional or every web search by a retail investor need confer investment advice status. We continue to believe that some mutual understanding be required to import investment advice fiduciary status.

As a threshold matter, as we have noted in the past, Neuberger continues to believe that the absence of mutual assent is contrary to basic principles by which persons become bound by legal obligations. And, as we have mentioned before, research suggests consumers ***can*** distinguish between a sales call and fiduciary advice. People don't trust sales calls or other unsolicited advice.[7] That finding underscores our view that unsolicited advice – sales conversations – should not be deemed fiduciary advice. The Department's general communications exception is appropriate 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 business 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 or other market participants should be so limited in describing the objective features of their products. For poets, beauty may be in the eye of the beholder, but when it comes to

[7] 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.")

retirement products and services, one party should not be the arbiter of whether a sales pitch is a fiduciary act.

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 we have previously pointed out, and as many commentators have noted, the failure to extend the guidance of I.B. 96-1 leads to truly absurd results.[8] Simply put, if the Department is trying to promote financial literacy, the DoL's current guidance is a sure fire way to actually promote the opposite result. Although the Department has excluded "general communications" from the ambit of investment recommendation, the failure to adopt the FINRA standards for triggering suitability in the operative provisions of the Rule has led only to more confusion. We believe, for example, that the "general information" exception may exempt information contained within a prospectus, but we are not even sure whether it would always cover a professional's selection of specific objective materials within a given prospectus. And, of course, we are not sure whether it covers responses to inquiries such as "can you send us basic information on your U.S. equity strategy funds?" other than to simply send the client ***all*** of our entire suite of such prospectuses. Not only is that a costly proposition, it is also guaranteed to make a potential client confused or angry. Many of the prospectuses we deliver may be wholly irrelevant to the customer's needs. Those types of "data dumps" accomplish nothing. And in fact, they may run counter to studies indicating that emphasize that better investment decisions are made when such undifferentiated morasses of material are culled. Making the investment decision-making process easier, not harder, is what the

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[8] 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?
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> This is not much different from a pie chart that provides an asset allocation with broad categories 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.

DoL should be focusing on.[9] It is interesting that the Department continues to maintain that they are not trying to force any particular market participant's actions or business model and that the utility of generalized communications and investment education will permit a wide variety of common sales practices to continue without fear of investment advice fiduciary status when it is not desired.

We submit that the architecture of the rule makes it exceedingly difficult for us and other peers in our situation not to become investment advice fiduciaries when we deal with plans and IRAs outside of the institutional space. If this was the Department's intention, we think it important that it say so directly. If not, we submit that the changes to these exceptions from the Rule need immediate repair to give appropriate practical weight to the opportunities and flexibility that the Department has said it wishes to preserve.

Finally, the preamble to the 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 recommendation 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 those two statements is enormously confusing and leads us only to the conclusion that, again, the DoL's rule is enormously broad and ill-considered. We gather from this that Neuberger representatives can "tout" the quality of the firm, but it doesn't say how. We presume that we are permitted to discuss the fact, for example, that we may have won certain awards for our performance, but the Rule is silent as to whether that is allowed. Are we permitted to "tout" the awards if they are limited to a specific asset class? May we do so if they are limited to a particular active investment strategy? Neuberger believes that no reasonable retail investor would confuse these "touts" as investment advice, and yet, we and many other market participants have concerns. We believe that the DoL would be well

[9] *See* e.g., David Laibson, Lecture at the American Economic Association, "The Psychology and Economics of The Psychology and Economics of Household Investment Decisions Household Investment Decisions" (Jan. 2010), available at http://scholar.harvard.edu/files/laibson/files/thepsychologyandeconomicsofdefaults_laibsonaealecture3.pdf (highlighting the impact of automatic enrollment on making investing easier).

[10] 81 Fed. Reg. No 68 at 20968.

[11] Id.

advised, at a minimum, to provide additional guidance in clarifying that such communications do not and should not be regarded as investment advice, even if they relate to a particular investment strategy (i.e., "Best Equities Manager of the Year Award" etc.). We believe that changes to the Rule itself consistent with this point would be ***both*** material and beneficial for a plan or IRA investor to consider and that no reasonable plan or IRA investor would regard such statements as a "recommendation" about a given strategy. Stated differently, we think that the continued ambiguity on this point only leaves plans and IRAs to suffer needlessly.[12]

We therefore renew our suggestion that the DoL clarify that marketing and sales activities that would not trigger suitability under FINRA will not result in an investment recommendation for purposes of the Fiduciary Rule. 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 that normal, ordinary course discussions about basic information like the contours of the investment strategy, investment philosophy, and performance would turn that sales discussion into a fiduciary one. By its nature, those interactions will wind up involving selections of objective facts; but they are done to meet the inquiries and needs of individual plan and IRA clients.

The Department Should Simplify the Independent Fiduciary Exception

We agree with the DoL that investment professionals should be able to engage in sales activities and other arms' length transactions with each other without the risk of fiduciary status inadvertently attaching or burdensome paperwork requirements to ensure compliance. We share the DoL's view 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 Exception"[14] that are problematic.

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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 Fiduciary Rule.

While the Independent Fiduciary Exception is helpful, it is subject to a number of conditions, including disclosure requirements. Worse, in the preamble to the Fiduciary Rule, the DoL also made it clear that a person seeking to avoid fiduciary status under this exception has the burden of demonstrating compliance with all of the applicable requirements.[15]

Initial efforts to utilize the exception have proven to be unnecessarily burdensome and complex and have created significant, yet needless confusion. Specifically, the allocation of ownership between independent fiduciaries as to the details of the reasonable belief requirements has created a barrage of back-and-forth representation letters, followed by responses by recipients clarifying one or more aspects of the predicates for which the sending institution has sought comfort, followed by still further retorts and clarifications by the original sending institution, and costly legal work, and in some cases, without the desired comfort that would have been obtained if institutions were just permitted to use common sense. But the Fiduciary Rule does not promote the use of common sense. Instead, it promotes fear given the expansive definition of investment advice fiduciary and the corresponding need for regulated institutions to make sure that they are comfortable enough with every jot and tittle of the exception so that they are not later accused of being an inadvertent fiduciary. Because different firms provide different services, there is no one document that fits all, and there has been no approach we have seen that fits all. We have experienced (and we have been told by intermediaries to whom we have sent such letters that they, too, have experienced) some of the needless aggravation promoted by this approach, despite a bevy of comments warning the Department in advance that these consequences were eminently foreseeable. The time, energy, resources and money spent on evaluating different variations either to ensure accuracy or to address any concerns, often providing letters in response has not been negligible.

We ask the Department to recognize that this effort is essentially to make clear what two sophisticated parties dealing with each other on an arms' length basis know and should be entitled to presume for purposes of the Fiduciary Rule: neither is acting as a fiduciary to the other. We continue to believe that the Independent Fiduciary Exception could be dramatically simplified without causing any undue prejudice on the DoL's goals of protecting the retail retirement markets. The Independent Fiduciary Exception should be changed to simply provide that any communication to a regulated institution or other person identified in the exception as capable of being an independent and sophisticated fiduciary is not and will not be investment advice for purposes of the Fiduciary Rule unless the parties otherwise agree in writing.

We urge the Department to avoid these needless "battle of the forms" that have arisen because of the presumptions it has prescribed as predicates to establishing comfort under the exception. If a party is a sophisticated regulated institution, it simply does not need the "protections" of the Fiduciary Rule even if it is otherwise acting as a fiduciary to its plan and IRA clients. And where any such institution is acting as a fiduciary, they would have a duty

[15] See 81 Fed. Reg. No 68, at 20984.

to act solely in the best interests of its ERISA clients anyway; they need no additional "reminders" from another regulated institution or other sophisticated party trying to engage in ordinary course interactions that such sophisticated person is not acting as their fiduciary, or for that matter, be reminded about the "nature" of that communicating institution's interests. Similarly, a communicating institution need not live in fear that it better obtain sufficient reasonable comfort from a regulated sophisticated institution or other prescribed sophisticated person with whom it wishes to interact to establish reasonable reliance that the receiving institution is capable of evaluating specific transactions, is sophisticated and is independent.

The Department Should Rethink Its Definition of Sophisticated Investor to Better Tailor Retail Investor Protections

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 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 and in our subsequent letters, we believe that the Department strikes the wrong dividing line by failing 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 continue to be astonished that the DOL believes 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. Every other federal regulatory agency, including the SEC and the National Futures Association, has noted that financially sophisticated individuals do not require the same degree of protection as those persons who own assets below designated levels. The Departments seems ostrich-like in its continued refusal to recognize that wealthy individuals do not need the same protections as those who have less money.

Neuberger again requests that the Department 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] Neuberger would also support the standard to be that of "qualified purchasers" as defined in Section 2(a)(51)(A)(i) of the Investment Company Act of 1940, as amended.

The Department Should Not Impose Additional BIC Exemption Requirements

As noted in our prior comment letter associated with the delay of the Fiduciary Rule, the Department has indicated that the Fiduciary Rule itself and the application of the Impartial Conduct Standards would be sufficiently protective of investors based on its original regulatory impact analysis during the time in which the President's questions would be addressed.[17] The DoL has not shown that any of the conditions of the BIC that are scheduled to become applicable on January 1, 2018 are necessary to protect investors and before the DoL moves forward with imposing the burdensome additional requirements of the BIC Exemption, it should demonstrate that there are remaining harms that would be addressed by those additional conditions.

And, as we also pointed out in our prior July letter, failure to delay the Applicability Date for those portion of the BIC Exemption scheduled for January 1, 2018 until all potential changes to the Fiduciary Rule are finalized, or any further guidance or coordination is provided by the SEC in concert with the Department, as Secretary Acosta and SEC Chairman Clayton have indicated, will cause confusion to individual investors whose products and services will likely change under the existing Fiduciary Rule, and who then may be subjected to a different regulatory regime, with different products and services made available, upon completion of the Department's examination and coordination with the SEC. As we have previously stated, if different regulators working on similar issues take divergent or inconsistent paths, it will create a complicated and confused regulatory environment that will operate to the detriment of both plan and individual investors. Absent a fully coordinated standard, individual investors with plan and non-plan accounts will simply be flummoxed by different and/or conflicting standards and will then be prone to make investment mistakes.

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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] " . . . the Department concluded that much of this harm could be avoided through the imposition of fiduciary status and adherence to basic fiduciary norms, particularly including the Impartial Conduct Standards." 81 Fed. Reg. No 68 at 16905.

We also remind the Department that the additional requirements of the BIC Exemption coupled with the threat of private litigation, including class action lawsuits,[18] will have a material impact on financial intermediaries' appetite for specific products and services. We continue to believe that in many cases, this will reduce or eliminate products and services available for retirement investors. And given real life interactions between investors and financial professionals, we believe it would be naïve to believe that these impacts will only be confined to retirement accounts. We believe that this is directly contrary to President Trump's stated priority of empowering Americans to make their own decisions as articulated in his February 3 Memorandum. We urge the Department to consider the data it receives since its last regulatory impact analysis. Until the DoL has conducted a revised regulatory impact analysis taking into account the impact of Impartial Conduct Standards on its perceived abuses, the additional conditions of the BIC Exemption should not go into effect.

Moreover, as we have mentioned in the past, we do not think it efficient or productive to re-engineer products or services over and over again and it is not beneficial to our clients to do so. Preserving access to needed products and services is difficult when the goal posts keep moving. Given the continued lack of certainty, we believe that the current Applicability Date imposes unreasonably high costs and operational burdens on the financial services industry and our ability to best develop products and services consistent with our shared goals of facilitating investing and promoting outcome-oriented strategies.

The Department Should Not Adopt Any Streamlined Exemptions

Neuberger does not support the proposal for streamlined exemptions that expressly or implicitly advantage a particular business model, product/asset type, compensation structure or market innovation. We have been consistently opposed to such efforts because we believe they may give rise to commercial incentives that run afoul of what the DoL has set out to accomplish: promote prudence, preserve investor choice and enhance the capability of financial professionals to exercise sound judgment in the prosecution of the best interests of their clients. We question whether the incentives that would be created by a streamlined exemption would be aligned with those of retirement investors or unduly with those of certain providers' business models and structure. And we question whether it is should be the DoL's position to effectively legislate which business and service models or products and services should be implicitly preferred. In the popular book by Cass Sunstein and Richard Thaler, *Nudge*, this approach may not merely be a "nudge" but a shove.[19]

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[18] We acknowledge and appreciate the DoL's recently stated position that it will no longer defend the BIC provision that prohibits limitations on bringing or participating in a class action lawsuit. See Brief for Appellees at p. 59, Chamber of Commerce v. U.S. Dept. of Labor, 5th Cir., No. 17-10238 (Jul. 3, 2017).

[19] Thaler, Richard H.; Sunstein, Cass R. *(2008)*. *Nudge: Improving Decisions about Health, Wealth, and Happiness.* Yale University Press. ISBN 978-0-14-311526-7.

We have already begun to see the impact of such an approach. By providing a streamlined exemption for "level-fee fiduciaries"[20] in the BIC exemption, the DoL encourages and accelerates the continued shift from brokerage to advisory accounts. The Department has indicated that it does not desire to be outcome determinative of any particular business model. Indeed, this model bias is especially curious because in other circumstances, the Department has indicated that it took steps to preserve the availability of other business models, such as robo-advisors.[21] While advisory accounts offer benefits to many investors and limit potential conflicts of interest, they are not right for everyone, as has been made apparent by many commentators throughout the process in developing the Fiduciary Rule. Retail investors who trade infrequently are penalized if only advisory accounts are available as they will be forced to pay an asset based fee that is likely more expensive than the commissions associated with the infrequent trades in a non-advisory account. We know that the Department is aware of this issue,[22] but we think that the use of a streamlined exemption enhances an undue market preference. Rather than focusing on the introduction of new exemptions with streamlined conditions, the DoL should focus on improving the BIC Exemption and the Fiduciary Rule in concert with a universal best interest standard envisioned by SEC Chairman Clayton. In any event, it is important to make the BIC Exemption workable for a much broader set of product types with the goal of promoting investor choice among products, business models, and compensation structures.

Conclusions

Neuberger is supportive of changes to financial regulation that enhance investor confidence, advance investor choice, and facilitate savings and outcome-oriented investing. We strongly support coordination between the DoL and SEC on investment advice regulation that seeks to meet these goals through the development and implementation of a universal best interest standard adopted by the SEC applicable to investment advisers and broker-dealers. We believe that in the retail markets, anything short of such an action will produce confusion, overlapping and contradictory rules and requirements, and sub-optimal market practices. The real world of retail investing involves a recognition that an individual's plan and non-plan assets may not be able to be addressed separately by a given institution, so that the DoL's Fiduciary Rule, without, uniformity with the SEC, risks bleeding into, and causing damage to, investment opportunities and practices outside of the DoL's purview. More importantly, perhaps, is the fact that retail customers do not often distinguish between personal and plan assets when they interact with financial professionals and do not wish to be subject to two wholly inconsistent or contradictory regimes. We therefore believe there has never been a more important time for an SEC spearheaded universal best interest standard designed to protect both sets of accounts for retail investors. To the extent that the DoL identifies remaining gaps that may not be covered under any such universal standard, we

[20] 82 Fed. Reg. No 66 at 16917.

[21] 81 Fed. Reg. at 20158.

[22] 81 Fed. Reg. No 68 at 20958.

have also identified a number of changes to the Fiduciary Rule and its exceptions, as well as some suggestions related to the exemptions that we view as necessary to advance the goals of the DoL and our shared goals of protecting retail investors, while affording investor choice, encouraging saving, and facilitating investing with confidence.

With best regards,

William Braverman

William Braverman
General Counsel – Asset Management