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NEUBERGER | BERMAN

July 20, 2015

Via Electronic Submission
(Docket ID number: EBSA-2014-0016)

Office of Regulations and Interpretations,
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655

Office of Exemption Determinations
Employee Benefit Security Administration
Attn: D-11712, D-11327, and D-11820

U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Re: RIN 1210-AB32 (Proposed Rule—Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice);

ZRIN 1210–ZA25 (Proposed Best Interest Contract Exemption and Proposed Amendments to Existing Prohibited Transaction Exemptions)

Dear 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 its proposed regulation modifying the definition of a "fiduciary" of an employee benefit plan under the Employee Retirement Income Security Act of 1974 ("ERISA") and of a plan, including an Individual Retirement Account ("IRA"), under section 4975 of the Internal Revenue Code (the "Code"), and on the proposed rule's accompanying proposed new and amended prohibited transaction exemptions. 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 employee benefit plans, participants, beneficiaries, and IRA owners, while preserving beneficial business models that promote the delivery of valuable investment advice and education.

We agree with the Department that the challenges facing small retail investors without financial expertise deserve attention. We have acknowledged 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.[1] Therefore, we endorse 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.

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.

We offer our comments because we believe the proposed rule needs certain clarifications and revisions to avoid adversely affecting, or even eliminating, financial services industry practices that benefit retirement investors. We are confident that modifications can be made to the rule without compromising the protections that the Department seeks to put in place, and our suggestions are made with that understanding in mind.

This letter first offers a brief background on Neuberger's services, clients, and experience in markets subject to ERISA and the IRA prohibited transaction rules. It then identifies elements of the proposal that we believe require clarification or modification to satisfy the goal of protecting retail retirement investors while maintaining beneficial business models that promote the delivery of investment advice and education, and suggests appropriate clarifications and modifications. We also discuss how the proposal could adversely affect our clients and significantly disrupt long-standing practices that pose no risk of harm to the retail retirement investors whom the Department seeks to protect.

We appreciate the Department's willingness to consider the comments of all service providers and clients of the financial services industry. 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.

[1] Neuberger Berman 2014 Annual Report 3, http://www.nb.com/documents/public/global/Neuberger_Berman_Annual_Report_2014.pdf.

About Neuberger Berman Group LLC

Neuberger, founded in 1939, manages equities, fixed income, private equity, and hedge fund portfolios for high net worth individuals, institutions, and investment advisers worldwide. We employ more than 2,100 professionals and, as of June 30, 2015, managed $251.4 billion in client assets. Neuberger is tenured, stable and long-term in focus, and fosters an investment culture of fundamental research and independent thinking.

In its role as an asset manager, Neuberger has a long history of serving clients in markets subject to ERISA and the IRA prohibited transaction rules. We have a variety of investment products that are accessed by retail retirement investors, including a family of registered mutual funds that are available through various broker-dealers and other intermediaries, as well as separately managed account strategies available through "wrap-fee" advisory programs of third-party wrap program sponsors.

In addition to managing assets for retail retirement investors through wrap programs and mutual fund offerings, Neuberger manages assets for retirement plans subject to ERISA and high net worth individuals and families who often use IRAs as part of their financial management strategies. These "sophisticated clients" generally invest with us through direct separately managed accounts, registered mutual funds, and private investment funds.

Neuberger, like other leading asset managers, spends considerable resources to make sure that the services and products it provides to ERISA plans and IRAs comply with ERISA and the IRA prohibited transaction rules. In designing its products and services and developing ongoing compliance policies, procedures, and training programs, Neuberger has relied upon the existing definition of "fiduciary" under ERISA and the current constellation of prohibited transaction exemptions. For decades within this framework, Neuberger has successfully served its clients in markets subject to ERISA and the IRA prohibited transaction rules. Accordingly, the proposal has the potential to significantly impact Neuberger and its clients, and we comment to assist the Department in realizing its regulatory goal of protecting retirement investors without compromising the access to products, services, and education that benefits retirement investors.

Comments on the Proposed Rule

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

Neuberger understands and appreciates the Department's concern that the current 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 the proposed rule's scope 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. We therefore request that the Department clarify the proposal to exclude marketing and sales activities from the definition of fiduciary investment advice.

Under the proposal, a "recommendation" to a plan, plan participant, or IRA owner about investment options, distribution or rollover options, the management of an account, or another person who will provide such recommendations for a fee could constitute fiduciary advice unless otherwise carved out of the definition. "Recommendation," in turn, is broadly defined as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." In the most general sense, any marketing of products and services could be viewed as a suggestion for the targeted audience to take a particular course of action, but applying the definition of fiduciary in this manner is contrary to well-established law and guidance distinguishing fiduciary advice from sales pitches. Long-standing law recognizes that, in some circumstances, all investors should be trusted to know the difference between the selling or marketing of a product or service and the offering of fiduciary recommendations.[2] Any new rule should preserve the long-established understanding that a clear sales pitch should not be held to a fiduciary standard.

Without that clarification, the breadth of the proposed regulation threatens to curtail any sales and marketing effort by responsible investment managers to retirement investors, except for that small class of investors large enough to meet the counterparty's carve-out to the rule. Should the rule as proposed be adopted, it could leave retirement investors—even those investors who are deemed sophisticated investors under other regulatory regimes—less informed about opportunities in the marketplace offered by investment managers that ultimately would adhere to a fiduciary standard in dispensing actual investment advice. Worse yet, a broad definition of fiduciary investment advice that is construed to cover sales pitches may create a sales and marketing vacuum to be filled by less scrupulous institutions or individuals willing to ignore the definition of investment advice or interpret it more aggressively to exclude their activities.

To preserve the ability of financial institutions and professionals to responsibly inform retirement investors about their choices in investment management products and services, we ask the Department to provide that the proposal expressly excludes marketing activities and sales pitches directed to retirement investors, including retail investors, from the definition of fiduciary investment advice. We suggest that the Department provide express standards to delineate marketing and selling activities that would not be perceived by any reasonable investor as fiduciary investment advice.

Specifically, the clarification could provide that sales communications to a retirement investor will not be deemed fiduciary investment advice if, in the course of making communications selling products or services, a financial professional or institution clearly and consistently states that: (i) the person is not a fiduciary with respect to the investor; (ii) the investor should not rely

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[2] *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).

on the person for impartial advice; and (iii) the person has a conflict of interest with respect to the products and services that it offers.

Neuberger believes that such a clarification to the definition of fiduciary investment advice will protect retirement plan investors from being confused about whether a financial professional is a fiduciary offering conflict-free advice, while maintaining important channels through which responsible financial institutions and professionals can make retirement investors aware of products and services that may benefit investors.

Finally, the Department should confirm that responses to requests for proposals (or “RFPs”) from potential plan clients will not constitute the provision of investment advice, because such materials are clearly for marketing purposes, are a direct response to a plan’s inquiry, and are not intended to constitute fiduciary investment advice.

Clarify That the Definition of Investment Advice Excludes the Provision of Model Portfolio Information

The overbroad definition of fiduciary investment advice could be construed to cover the provision of model portfolios in connection with the management of accounts in wrap-fee advisory programs used by ERISA plans and IRAs. Deeming a model provider a fiduciary of an ERISA plan or IRA participating in those types of advisory arrangements would do nothing to promote the Department’s goal of protecting small retail investors, and could threaten the availability of valuable investment advice arrangements to retirement investors.

As referenced above, Neuberger’s strategies are available through “wrap-fee” advisory programs of third-party wrap program sponsors. We and certain other investment advisers regularly provide non-discretionary investment recommendations in the form of model portfolios to other investment advisers and financial institutions that sponsor or offer wrap-fee advisory programs for their respective clients. Generally, under these programs, the program sponsor enters into an investment management agreement with the end client, pursuant to which that client’s assets will be held in a separately managed account to be managed by the program sponsor, its affiliate, an overlay manager or another professional discretionary manager (collectively, the “overlay manager”). Under the program, the client’s assets can be allocated to a number of investment choices, including mutual funds, exchange traded funds (ETFs), active managers, and model-based separately managed accounts. Where a model provider portfolio is used, the overlay manager is generally responsible for contracting with the model provider and managing the client’s account, consistent with the model provider’s model.

What is important to understand here is that the model provider is contracted merely to provide a model portfolio on a non-individualized basis, and that it is generally left to the overlay manager to decide if, when, and how to implement the portfolio and changes thereto in the client’s account. The client’s agreement may permit the client to select among various strategies, but it is the overlay manager, and not the model provider, that has discretion with respect to the implementation of the model. Moreover, the model provider does not have privity with, or generally even know, the actual underlying clients. Notably, under the Investment Advisers Act of 1940 (the “Advisers Act”), the model provider is treated as providing advisory services to the overlay manager, and not to the ultimate client. Also importantly, the implementation of the model is not performed by clients themselves, but rather by another entity, chosen by the client, pursuant to a separate and distinct discretionary investment advisory relationship that is itself subject to fiduciary standards. Therefore, given the manner in which models are provided and implemented, model portfolio providers should not have to worry that the provision of models would be viewed as fiduciary advice to the end ERISA and IRA clients.

The proposal's broad definition of fiduciary extends to persons providing recommendations about investments to a plan fiduciary, which could be construed to cover model providers in typical model portfolio arrangements because the overlay manager will be a plan fiduciary under the program to ERISA and IRA clients. Under that construct, the model provider could conceivably be viewed as a fiduciary, even when the model provider has no direct relationship, contractual or otherwise, with the end client, and even when the model provider has limited or no knowledge of the end client's status as an ERISA plan or IRA. Fiduciary status for the model provider is inappropriate in those circumstances because the model provider simply provides a recommendation based on its investment strategy to the overlay manager who is responsible for deciding whether to follow the recommendation.

In the model portfolio context, the appropriate party to be treated as a fiduciary is the overlay manager, because this is the party actually hired by the client that retains fiduciary discretion and the responsibility to weigh the suitability of the model portfolio and to implement the portfolio to the extent appropriate. Even if the overlay manager provides information about the model to an end client, the model is not intended as specific or directed investment advice to the end client, but rather is intended as a tool to aid the overlay manager in making discretionary investment decisions based upon its understanding of the end client's investment objectives, goals, and financial circumstances.

We are concerned that interpreting the proposed rule to view model providers as fiduciaries would disrupt access to these valuable arrangements, which benefit retirement investors by giving discretionary managers access to the expertise of specialized investment firms through their model asset allocations at reduced costs. If model providers are deemed to be fiduciaries, they would be obligated to carry out their own diligence on the end client's status and existing investment arrangements, a role already being performed by the overlay manager. Such an expansive application of the definition would be duplicative, inefficient, and costly, while giving ERISA plans and IRAs only marginal additional protections, or none at all. Neuberger, therefore, requests that the Department clarify the proposal to make clear that the definition of fiduciary is not intended to cover such model providers.

An express modification to the rule can serve to protect access to model portfolio arrangements and other similar beneficial practices, while ensuring that fiduciary standards will apply to protect ERISA plan and IRA end clients. Specifically, we request that the Department modify the rule to carve out from the definition of fiduciary persons providing model portfolios for use by discretionary fiduciaries to ERISA plans and IRAs that are: (1) registered as investment advisers ("RIAs") under the Advisers Act or state law; (2) banks as defined in the Advisers Act; or (3) insurance companies qualified to provide advisory services in more than one state. This carve-out would protect ERISA plans and IRAs by ensuring the implementation of these model portfolios would occur only under the fiduciary oversight and direction of a sophisticated fiduciary investment manager, while not significantly disrupting current model portfolio practices or limiting retirement investors' access to a beneficial business model for delivering efficient and effective retirement asset management.

Modify the Counterparty's Carve-Out to Preserve Established Business Models Serving Sophisticated Investors Without Compromising Protections for Small Retail Investors

<u>Expand the Counterparty's Carve-Out to a Larger Class of Sophisticated Investors</u>

Neuberger appreciates the concept of the proposal's "counterparty's carve-out," and the Department's effort 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 investors, and would merely interfere with the efficient management of retirement assets. We believe that, with certain modifications and clarifications, the carve-out can be further expanded to preserve the benefits of the current marketplace for sophisticated parties without sacrificing the proposal's safeguards for the retail retirement investors whom the proposal seeks to protect. Specifically, the counterparty's carve-out would benefit from further attention to the plan size and asset value eligibility criteria, the language of the fiduciary's required representation, and the products and services that the carve-out would cover.

The preamble to the proposed rule invites comment on the plan size and asset value eligibility criteria of the counterparty's carve-out, and notes that the Department sought thresholds used for similar purposes. We believe that, by applying different criteria used to identify sophisticated investors for similar purposes under other regulatory regimes, the counterparty's carve-out 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.

Neuberger specifically requests that the Department expand the counterparty's carve-out to cover "qualified clients," as defined in Rule 205-3(d)(1) under the Advisers Act, for purposes of an exception from the prohibition on performance fees for advisory agreements entered into with such clients.[3] In proposing this qualified client standard, the Securities and Exchange Commission (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."[4]

[3] Qualified clients for this purpose generally include persons (i) with at least $750,000 under management with an investment manager, (ii) who the investment adviser reasonably believes have a net worth of more than $1,500,000, or are qualified purchasers under section 2(a)(51)(A) of the Investment Company Act of 1940, or (iii) who hold a position such as officer, director, trustee, general partner, or professional employee involved in the investment activities of the investment adviser. 17 C.F.R. § 275.205-3(d).

[4] 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

Likewise, in crafting the scope of the counterparty's carve-out, 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 counterparties in the proposed counterparty's carve-out. 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. 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 counterparty's carve-out 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 ERISA plan and IRA 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, that would not be subject to the proposed 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 counterparty's carve-out as proposed, Neuberger would be required to bifurcate its treatment of these sophisticated, high net worth investors' assets, which will unnecessarily disrupt its services to these clients.

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. The Department has not marshaled, nor do we know of, 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 proposed counterparty's carve-out 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.

Capital Appreciation of a Client's Account, Investment Advisers Act Release No. 1731, 63 Fed. Reg. 39,022 (July 21, 1998).

Modify the Timing and Content of the Required Representation by an Independent Plan Fiduciary of an Employee Benefit Plan with 100 or More Participants Under the Counterparty's Carve-Out

As proposed, the counterparty's carve-out requires an independent fiduciary of a large employee benefit plan to give certain representations prior to a recommendation. Specifically, the independent fiduciary would be required to represent (1) to the number of plan participants, (2) to the fiduciary's authority, and (3) that the fiduciary will not rely on the counterparty. Read literally, for the carve-out to apply to a recommendation, the fiduciary must make the required representation prior to the recommendation—not prior to the transaction motivated by the recommendation. Thus, the proposal could be construed as prohibiting the application of the counterparty's carve-out in the event a recommendation is made without the counterparty first obtaining the representation, even if the representation is obtained prior to the transaction. Further, the timing requirement could be construed to require multiple representations, a new representation before each recommendation, by the fiduciary over the course of a relationship with a counterparty.

We believe that, as proposed, this requirement would require a counterparty to seek independent plan fiduciary representations on an unnecessarily frequent and speculative basis, even before a relationship between the parties is formed, and may cause counterparties and fiduciaries to eschew the carve-out altogether. The timing of the representation requirement as drafted would add to the cost of sales and marketing to larger employee benefit plan clients to which the carve-out would otherwise apply, simply because of the need to see that representations are obtained prior to any recommendation.

The usefulness of the larger plan provision of the counterparty's carve-out would be enhanced if the proposal was modified to permit the fiduciary to execute the representation prior to, or contemporaneously with, the transaction motivated by the recommendation. The usefulness of the carve-out would be even further enhanced if the rule were clarified to expressly permit a large employee benefit plan client to execute a single representation that would apply to subsequent transactions, as long as the fiduciary remained in its role and the representation remained accurate.

The suggested change would not affect the size and disclosure requirements for this component of the proposed carve-out. Even with more flexibility in timing, the independent fiduciary would still be required to execute the representation prior to or contemporaneously with taking any action that could have been influenced by the counterparty's recommendation. Accordingly, we do not believe that the requested change would compromise any of the Department's intended protections.

In addition to the timing issue, Neuberger believes that independent plan fiduciaries may be reluctant to make the representation that they will not rely on the counterparty as it is currently worded, due to fear of litigation. As proposed, to qualify for the large plan counterparty's carve-out, the fiduciary would be required to represent "that the independent fiduciary will not rely on the person to act in the best interest of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity." Neuberger is concerned that this language could be raised by plaintiff's lawyers to argue that a plan fiduciary that favorably considered the incidental advice from the counterparty admitted to relying on advice that was not in the best interest of the plan.

We ask the Department to revise the required representation's language so that it more accurately reflects a plan fiduciary's arm's-length perspective on a transaction, and confirm that the plan fiduciary is exercising its own judgment without exposing the plan fiduciary to litigation risk simply as a matter of making the representation. For example, the proposed language could be revised to require a representation that "the independent plan fiduciary acknowledges that the seller is not providing any investment advice or investment recommendations in a fiduciary capacity, and that the plan fiduciary will exercise its own judgment and evaluation and not those of the seller in making any investment decisions." A modified representation along these lines would provide the Department and participants with an assurance that the independent plan fiduciary is committed to satisfying its fiduciary obligations without suggesting improper activity by the seller.

Modify the Counterparty's Carve-Out to Ease the Identification of Eligible Counterparties

Neuberger also asks that the Department make technical modifications or clarifications to the counterparty's carve-out to bring it into line with existing guidance and to simplify the determination of an eligible counterparty. Neuberger believes that slight modifications and clarifications can make the carve-out far more functional without compromising on the protections offered by the proposed rule.

First, Neuberger asks the Department to expand the counterparty's carve-out to more broadly include any independent fiduciary that satisfies the definition of a "qualified professional asset manager" ("QPAM") set forth in paragraph (a) of Part VI of Prohibited Transaction Class Exemption 84-14 or organization that satisfies the definition of "in-house asset manager" ("INHAM") set forth paragraph (a) of Part IV of Prohibited Transaction Exemption 96-23, without regard to any of the other conditions required for those exemptions to apply in a particular circumstance (including, but not limited to, those under PTE 84-14, Part I(g)).[5] Leveraging the existing QPAM and INHAM definitions would ease the implementation of the proposed rule by more closely aligning the counterparty's carve-out with agreements, policies, and procedures already in place to comply with existing Department guidance.

This suggested change would not compromise the proposed rule's protections as it simply aligns the carve-out's coverage with an existing category of regulated banks, savings and loan associations, insurance companies, and registered investment advisors. The proposed counterparty's carve-out applies an assets-under-management threshold of $100 million, which is only marginally higher than the $85 million thresholds for investment advisers qualifying as QPAMs and INHAMs that the Department has set within the past ten years. We believe these standards assure that the counterparty has a high level of sophistication and should be trusted to

[5] If the Department adopts this approach, we would further recommend extending the categories described in PTE 84-14, Part VI(a)(4) and in PTE 96-23, Part IV(a)(2) to registered broker-dealers.

understand that the seller is not acting as an impartial trusted adviser and is capable of independently considering an offer.

Regardless of whether the Department modifies the proposal to conform the counterparty's carve-out to the existing QPAM and INHAM definitions, we ask that the Department clarify that the calculation of assets in determining the asset threshold has been met. The Department should clarify that responsibility for managing the threshold amount in assets includes assets for which the fiduciary has oversight or fiduciary advice responsibility, rather than just assets for which the fiduciary has discretionary management authority. Further, if assets for which the fiduciary has oversight or fiduciary advice responsibility are included in the calculation, the Department should confirm that multiple benefit plans for which the fiduciary has such responsibility are aggregated in calculating whether the threshold level is met.

Moreover, to further simplify the determination of whether a fiduciary meets the threshold, Neuberger recommends that all assets, rather than just employee benefit plan assets, be considered. Consistent with our suggestion regarding the incorporation of the QPAM and INHAM definitions into the carve-out, a $100 million assets-under-management threshold (or even an $85 million threshold if the Department aligns the carve-out with existing guidance) generally assures the fiduciary has the requisite level of investment sophistication to fully consider the seller's potentially conflicted position, regardless of whether the assets under management are retirement assets.

Neuberger believes that these modifications and clarifications would eliminate uncertainty around the application of the counterparty's carve-out, but would not have a material effect on the rule's protections of those investors whom the Department seeks to protect. We therefore strongly encourage the Department to adopt our suggested changes to the proposal.

Clarify the Scope of Transactions to Which the Counterparty's Carve-Out Applies

The scope of the counterparty's carve-out as drafted is not entirely clear in all contexts. The Department should confirm that the counterparty's carve-out extends to the sale of services, including investment advisory services and all sales of investment products (including separately managed accounts and funds sponsored or managed by the seller).

As proposed, the carve-out covers "a sale, purchase, loan, or bilateral contract" between a plan party and a seller or a proposal to enter into such arrangements. The term "bilateral contract," however, raises questions about how sales of services qualify for the carve-out. For example, if the seller sells a service to an independent fiduciary on behalf the plan and the service ultimately will be provided by another party to the plan, it is unclear whether such relationship would qualify as a "bilateral contract." As another example, it is not clear whether a sale of a product on an agency basis, such as the sale of an interest in a commingled vehicle or of a mutual fund share to a plan by an investment adviser or broker, would technically meet the requirements of the counterparty's carve-out because the sale formally is between the commingled fund and the plan, and not directly between the investment adviser/broker and the plan.

The counterparty's carve-out, or accompanying guidance, also should address whether a current fiduciary to the plan with only a specified fiduciary responsibility can use the counterparty's exception to sell an unrelated product or service to the Plan. The proposed rule is unclear as to whether the counterparty's carve-out would cover transactions with a plan for additional products and services offered by a counterparty that is already in a fiduciary relationship with the plan, where the products or services being considered are unrelated to the existing fiduciary obligations and the contractual relationship between the plan and the counterparty. We believe that it should.

Expand the Swaps Carve-Out to Cover Plan Asset Vehicles and Clearing Brokers and to Avoid Inconsistency with the Dodd-Frank Act Business Conduct Rules

Neuberger appreciates the Department's general intention to carve out—provided certain requirements are met—recommendations made by swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants when acting as counterparties to a plan in a swap transaction. To avoid disrupting plan participation in the swap market, however, the carve-out should be broadened to include transactions between dealers or other market participants and ERISA plan assets vehicles like pooled funds, and to specify that, provided the conditions of the carve-out are otherwise met, a clearing broker will not become a fiduciary on account of a recommendation. A parallel carve-out should also be put in place to protect parties participating in the futures markets from becoming plan fiduciaries, provided similar safeguards as are set forth in the swaps carve-out are established.

We also appreciate that the Department seeks to ensure that the swaps carve-out is consistent with the Dodd-Frank Act business conduct rule regulatory initiatives of the SEC and the Commodity Futures Trading Commission (the "CFTC"). Swap market participants would be more confident that they would not face conflicting obligations in attempting to satisfy both future Dodd-Frank Act business conduct regulations and the strictures of the swaps carve-out if the carve-out expressly provided that a counterparty would not become a fiduciary where merely complying with new SEC or CFTC Dodd-Frank Act business conduct regulations. Neuberger believes that these express modifications to the proposal will serve to avoid disrupting the participation of plans in the swaps market without compromising the protections that the Department seeks to provide.

Clarify the Financial Reports and Valuations Carve-Out to Provide that Indirect Contributions to a Valuation Do Not Create a Fiduciary Obligation

Neuberger requests that the financial reports and valuations carve-out be expanded to cover persons that provide information that is used to generate a valuation for a plan. In these cases, unless otherwise carved out, the person that generates a valuation on which an ERISA plan or IRA relies may be deemed a fiduciary under the proposal if the valuation is provided in connection with a specific transaction. The underlying suppliers of that information, however, should not be held to a fiduciary standard. For example, a fund manager (or its affiliate) should not become a fiduciary to an ERISA plan or an IRA solely because the manager (or its affiliate) provides information needed to calculate the net asset value of a holding of an ERISA plan or an

IRA; nor should an IRA custodian or service provider become a fiduciary merely for providing valuations in conjunction with "required minimum distribution" calculations or estimates.

The supplier of the information may not know how the data will be used, and generally will not have control over the calculation of the valuation and its presentation. If the sources of information for valuations are not carved out of the fiduciary rule, these parties may seek assurances and indemnification with respect to how the data will be used, driving greater complexity and costs, and slowing the transmission of critical valuations.

Clarify and Modify the Investment Education Carve-Out to Permit Information about Specific Available Investment Alternatives to Be Integrated with General Education Regarding Asset Allocations

We support the Department's efforts to modernize the guidance regarding the fiduciary implications of providing investment education. We are concerned, however, that the education carve-out's prohibition on asset allocation material referencing specific investment alternatives available under an ERISA plan or an IRA will hamper the ability of financial institutions and professionals to provide useful information to retirement investors. We believe this may have been an oversight, and that the Department intended to mirror the permissible inclusion of all options when providing plan information and regarding plan information only intended to prohibit references to the *appropriateness* of any individual option. Otherwise, a participant would be left to cross-reference general asset allocation materials with other specific information about the plan's designated alternatives. This would also create confusion on the ability to simultaneously provide various types of investment education, namely providing both asset allocation models and plan information, including available plan options, at the same time.

Under a literal reading of the proposed rule, a financial institution or professional may provide, without triggering fiduciary status, model asset allocations to ERISA plan participants or IRA owners, but "cannot identify any specific investment product or specific alternative available under the plan or IRA," which would fall within the particular asset classes. Thus, for example, an investor could receive a model asset allocation with sample allocations to large cap, international, and fixed income, but it would appear the investor could not simultaneously receive information about which available investment options fall within the three asset classes. As a result, the investor may not know what available plan options fall within the asset allocation model.

Likewise, while the carve-out covers a financial institution or professional educating ERISA plan participants and IRA owners about general investment concepts, such as diversification and differences in general returns between assets classes, even permitting them to use interactive tools to do so, it prohibits the identification of particular investment options available to those ERISA plan participants and IRA owners. Identifying specific, available investment options as part of these education efforts, however, will help illustrate to participants the application of investing concepts, and empower them to apply their newly developed financial knowledge. With the ability to refer to specific examples, these investors would be more informed consumers that are better equipped to develop a strategy and shop for alternatives. Without particular examples in mind, investors would need to take additional steps to get their arms around the marketplace, and are accordingly more likely to abandon efforts to ensure that their retirement portfolio is appropriate.

We therefore ask that the Department remove the carve-out's prohibitions on referring to specific available investment alternatives to allow investment education materials to refer to specific investment alternatives, in order to elucidate the investment principles explained in the materials, provided that the references to, and information about, the available investment alternatives are made on a nondiscriminatory basis and that no specific option is actually recommended. For example, we suggest that the carve-out permit general financial information discussing various asset classes, asset allocation models, and interactive investment materials to reference, as examples of various types of investments, the actual available alternatives under the plan, provided that the information on the alternatives is offered in a nondiscriminatory manner or that similar allowable plan information prohibits references to the appropriateness of any individual option. Additionally, we ask that the Department clarify that the communication of information about a specific investment option, in direct response to a participant request for the information, will not trigger fiduciary status.

We also seek confirmation that a financial institution or professional does not become a fiduciary to an ERISA plan participant or IRA owner if the financial institution or professional does not have a direct relationship with an ERISA plan or an IRA, and gives product materials or educational materials (regardless of whether it cites specific investment alternatives) to a broker that, in turn, shares it with the ERISA plan participant or IRA owner. In other words, we ask the Department to confirm that, when investment materials prepared by a financial institution or professional are distributed to ERISA plan participants, plan fiduciaries, or IRA owners with whom the financial institution or professional has no privity of contract or direct communication, the financial institution or professional does not become a fiduciary merely because a broker or other third party shares these materials with the ERISA plan participants, plan fiduciaries, or IRA owners.

The modifications to the investment education carve-out sought by Neuberger are intended to make it easier for individuals, who are increasingly responsible for directing the investment of their own retirement assets, to obtain meaningful information and education about asset allocations that they can readily apply to their financial situations.

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

<u>Provide a More Concrete Framework or Safe Harbor for the Contractual Standards of the Impartial Conduct Requirement Under the BIC and the Existing Prohibited Transaction Exemptions</u>

We appreciate the Department's stated intention to use the best interest contract exemption (the "BIC") 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 in its proposed form, however, is impracticable and too complex for compliance. We are concerned that the BIC 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 requirements.

In particular, we are concerned that financial institutions and professionals will not be able to attain the necessary degree of assurance that they have satisfied the BIC's required subjective impartial conduct standard using a commission-based fee arrangement. Given the high costs of even inadvertently engaging in a prohibited transaction, including excise taxes, the forfeiture of compensation, and potential exposure to private litigation, we are uncomfortable with the idea of conditioning compliance with a prohibited transaction exemption on satisfying a subjective standard.

Although the Department has provided examples of compensation structures that would meet the impartial conduct standards, none of the examples offers a workable approximation of the long-standing commission-based fee structure that is well-established in the industry. Neuberger therefore requests that the Department present other methods of satisfying the impartial conduct standards that would permit this type of variable compensation. Ideally, the BIC would include one or more safe-harbor standards of impartial conduct that would apply to variable compensation arrangements. Without a specific framework or safe harbor, determinations of compliance with the impartial conduct standards would turn on the subjective view of an agent of the Department, Internal Revenue Service, arbitrators, or courts after the fact. As such, the same fact pattern could result in completely different outcomes before different decision-makers.

Additionally, Neuberger shares the same concerns about the application of the impartial conduct standards to current class exemptions, including Class Exemptions 75-1, 77-4, and 86-128, as we have about the application of this standard under the BIC.

Alternatively, Neuberger requests that the BIC be modified to take an approach similar to the approach the Department has taken with respect to the required contractual warranties. Specifically, we request that the Department require firms to contractually agree to adhere to the impartial conduct standards, but not to condition exemptive relief under the BIC on actual adherence with these standards. Thus, a failure to adhere to the impartial conduct standards could give investors the right to pursue a breach-of-contract claim, but would not result in loss of the exemption. This would provide the firm greater certainty in addressing its prohibited transaction compliance concerns, while providing the investors contractual rights to enforce a best interest standard of care. Neuberger believes that this approach is more consistent with Congress's structure for protecting investors under ERISA, by separating the prohibited transaction rules from the prudence obligation.

<u>Streamline the BIC's Disclosure Requirements</u>

While Neuberger supports the Department's efforts to promote transparent disclosures regarding fees and compensation, we believe the BIC's current proposed disclosure requirements impose significant and material administrative burdens and raise several unanswered questions, while providing only marginal benefit to investors when compared to the existing disclosure regime. The three disclosures required by the BIC add layers of complexity to compile and disseminate.

The financial institution or professional availing itself of the BIC may not even hold all of the information required to be disclosed under the BIC. The BIC, however, provides no guidance or safe harbor to apply in a situation where required information cannot be obtained from the relevant intermediary, or when inadvertent or immaterial failures occur. Moreover, some of the information that must be disclosed—specifically, information about compensation paid to individual investment professionals—may raise questions about compliance with state privacy laws and employee and affiliate relations.

At the same time, the content of the required disclosures may be of limited value, or even detrimental, to investors. The BIC requires the disclosure of cost estimates over various timelines, based on expenses and "reasonable" assumptions about investment returns. In addition to the difficulty of making reasonable forward-looking assumptions about some investment options, such as managed accounts, we are concerned that investors may develop the impression that their actual rate of return will reflect the estimate presented on the disclosure. Furthermore, the BIC's requirement that a disclosure be provided prior to executing a purchase may slow the implementation of retirement investments, or even cause clients to miss investment opportunities or lose momentum in allocating additional resources to retirement savings, and may result in inconsistencies between the investor's retirement and non-retirement investment accounts. Those near-certain delays are particularly problematic, given that contributions to a tax-favored retirement savings vehicle for a given year generally must be made by a fixed deadline. A delay shortly before a contribution deadline may simply cause an investor to abandon contribution plans for that year.

The additional burdens imposed and questions raised by the BIC's required disclosures must be weighed against the volume and quality of information about fees that retirement investors can currently access. For example, summary prospectuses provide this information for mutual funds, and fund fact sheets give this background for bank collective funds. For ERISA plan participants and fiduciaries, information about fees and expenses is also available in the participant fee disclosures required under the 404a-5 regulation, the service provider fee disclosures required under ERISA section 408(b)(2), and through the Form 5500 annual report.

Given this background, we strongly encourage the Department to adopt the "cigarette warning" disclosure it proposed as an alternative to the pre-transaction point of sale disclosure. We also recommend that the Department consider other means to leverage current disclosures to investors and retirement plan participants to lessen the burden of the annual and website disclosures required under the BIC.

We further request the Department to adopt principle-based penalties for infractions that reasonably weigh the penalty and correction against the severity of the infraction. Respecting the Department's approach of applying a principles-based methodology to these issues, we continue to believe that it only works where applicable penalties and corrections correspond to the magnitude of the violation of the exemption's conditions. We believe that this is an important issue that must be addressed in any final rule.

Streamline the BIC's Three-Party Agreement Requirements

Neuberger objects to the BIC's requirement that both the individual financial professional acting as the adviser and the financial institution must enter into a contract meeting the BIC's terms with the retirement investor. We believe that this three-party agreement will cause unnecessary complications, while providing participants with little or no additional protection. Where our financial professionals provide services to our clients, they act as our agent and in the name of Neuberger. We believe that it is inappropriate to require them to enter into a separate contractual arrangement with the client. Their obligations to service the client stem from their employment with us, and we have the ultimate responsibility to supervise their activities; the client will look to Neuberger, and not the employee, in the event of liability. We believe that, so long as we are contractually liable for our employee's acts and omissions, requiring the individual to also be a party to the contract is unnecessary.

Clarify the Scope of the BIC's Coverage

Putting aside questions about the practicality of complying with the BIC, the BIC as proposed also raises questions about the scope of its coverage, both with respect to assets and services. The BIC limits the definition of "asset" to only some types of investments, and even expressly excludes certain types of equity derivatives. Neuberger objects to limiting covered categories of assets, as these limitations effectively deny advice about a full range of retirement assets under the primary exemption intended to preserve long-standing business models. As the criteria to meet the counterparty's carve-out for recommendations to sophisticated investors is so high, limiting available assets under the BIC may prevent high net worth investors, for whom more sophisticated assets are appropriate retirement investments, from obtaining advice about such options under the investor's long-standing advice arrangement. Moreover, current federal and state laws, as well as firms' policies and procedures, limit availability and impose additional disclosure and other investor protections on the sale of such assets.

With respect to coverage, Neuberger also is particularly interested in whether the BIC would cover the receipt of compensation in connection with the recommendation of investment advisory services to retirement investors. Even assuming such compensation is covered, it is again unclear how the impartial conduct standards would apply in the context of referral fees.

With regard to the BIC generally, we have serious concerns about the implementation of the exemption, and respectfully ask that the Department revisit the BIC entirely and solicit further comment on a revised proposal before finalizing it with the other elements of the proposed rule.

Conclusion

Neuberger again thanks the Department for the opportunity to comment on its proposal that will have a significant impact on its clients and its own business practices. Our comments are focused on those issues most pertinent to our clients and our firm, but more generally, we participated in drafting and fully endorse the comments submitted by SIFMA's Asset Management Group on the proposal, and we also support the letters submitted by the Investment Adviser Association and the Investment Company Institute. We would further urge the

Department to consider requests for additional cost analysis and extended time well beyond eight months to implement the rule once it is finalized. We encourage the Department to consider all comments received on this proposal, to conduct focus groups with stakeholders, and to repropose the rule an additional time before promulgating a final rule. Neuberger welcomes discussion with the Department on the issues raised in this letter or in SIFMA's Asset Management Group letter, and invites the Department to contact William Braverman at 212-476-9035 or William.Braverman@nb.com for further discussion.

Despite the concerns set forth in this letter, Neuberger supports the Department's efforts, and believes that, with enough time and input from stakeholders, the Department can realize its goal of better protecting retail retirement investors without disrupting existing beneficial business models.

Sincerely,

William Braverman
General Counsel – Asset Management