



August 7, 2017

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Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Suite 400
Washington, DC 20210

Re: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (RIN 1210-AB82)

Ladies and Gentlemen:

Nationwide supports the Department of Labor’s (“Department”) effort to conduct a thorough and open review of its rule redefining fiduciary investment advice and providing new or amended prohibited transaction exemptions (collectively, “Fiduciary Rule” or “Rule”).¹ We appreciate the opportunity to respond to the Request for Information (“RFI”) because, at Nationwide, acting in our clients’ best interest has always been, and will continue to be, at the core of our values.

We applaud the Department for issuing the RFI because its comprehensive questions will allow the Department to understand and address three key issues:

- The effect the Rule has already had on retirement savers;
- The effect the Rule is going to have on retirement savers if it is not changed; and
- How the Rule should be modified to better serve the interests of retirement savers.

Nationwide submits this letter for the purpose of providing practical solutions and constructive feedback focused on supporting the Department’s ongoing review and improvement of the Rule. This letter is in addition to our prior letter of July 21, 2017, which responded to Question 1 of the RFI regarding the advisability of extending the January 1, 2018 applicability date of certain provisions in the Best Interest Contract Exemption (the “BIC Exemption”) and the amendments to Prohibited Transaction Class Exemption 84-24 (“84-24”).

About Nationwide

Nationwide, a Fortune 75 company based in Columbus, Ohio, is one of the largest and strongest diversified insurance and financial services organizations in the U.S. and is rated A+ by both A.M.

¹ 81 Fed. Reg. 20,945 – 21,221 (Apr. 8, 2016).

Best and Standard & Poor's. With more than 34,000 associates, Nationwide is one of the nation's largest insurance and financial services employers. We offer annuities, life insurance, retirement plans, mutual funds and corporate-owned life insurance. We strive to offer quality, affordable financial services and investment products that help people across America prepare for and live in retirement.

Overview of our Comments

Nationwide believes that the U.S. retirement plan regulatory framework must keep pace with the dynamic and innovative system of advice and investment products that America's ever-growing pool of retirement savers demand. **However, changes to this regulatory framework should adhere to the principles of increasing transparency and eliminating conflict while concurrently protecting consumers' access to choice, advice, and affordable products.** We believe the Department had these principles in mind when it finalized the Rule; however, since June 9, we have observed what financial institutions have actually done to respond to the Rule, and the unintended consequences that have surfaced. At a high level, we have observed the following:

- ***A reduction in available investment options*** – Many of our distribution partners have reduced the number of investment products and services available to retirement savers, resulting in less choice.
- ***A reduction in access to advice*** – Many of our distribution partners are no longer providing services to retirement savers with low account values.
- ***An increase in cost*** – Many of our distribution partners have experienced increased costs as they seek to levelize compensation, which could lead to higher costs associated with retirement products and services.

The Department has the opportunity to address these concerns by revising the prohibited transaction exemptions and the fiduciary definition. The RFI is an essential step in this process. We urge the Department to consider the detailed empirical data and information gathered through direct and statistically valid examinations of actions taken by specific companies (such as the studies undertaken by the U.S. Chamber of Commerce and the Securities Industry and Financial Markets Association).

To assist with the Department's review, we have structured our responses to the questions in the RFI around the following **key actions** that Nationwide supports and urges the Department to take:

1. **The Transition Period version of PTE 84-24 must be adopted as the final version.**
2. **The "Full" BIC Exemption must be replaced with a streamlined exemption, modeled on the Transition Period version of the BIC Exemption.**
3. **The Department must coordinate with SEC and FINRA on a class exemption.**
4. **The regulatory definitions of Fiduciary Advice need clarification and modification to better protect retirement savers.**
5. **The Department should remove the bias against commission-based products in the Fiduciary Rule.**

We look forward to working with the Department to shape a revised Rule that better achieves our mutual goals. To that end, we offer the following responses to the questions within the RFI.

1. The Transition Period Version of PTE 84-24 Must be Adopted as the Final Version

In Question 17, the RFI asks about potential modifications to PTE 84-24 including whether the scope should be expanded to include all annuities after January 1, 2018. Nationwide recommends that the Department expand the scope of 84-24 to include all annuities in order to avoid several problems associated with the version scheduled to become applicable on January 1, 2018.

If the Department allows the scope of PTE 84-24 to be reduced on January 1, 2018, it will no longer be available for the sale of fixed indexed and variable annuities. Variable annuities and fixed indexed annuities will have to either be sold in reliance on the BIC Exemption or in a fee-only compensation model. While these solutions create challenges of their own, those challenges are particularly acute in the context of fixed indexed annuities.

For insurance agents, the BIC Exemption is not a viable solution to continue to recommend fixed indexed annuities. In order to rely on the BIC Exemption, insurance agents would need to have a financial institution that is willing to act as a fiduciary and enter into the BIC Exemption arrangement on their behalf. This has not proven to be a viable option. Entities defined as financial institutions in the exemption have not embraced the idea of stepping into that fiduciary role for independent insurance agents.

Although the Department proposed that insurance carriers may act as financial institutions for insurance agents,² most insurers, including Nationwide, have declined to do so due to the severity of risk associated with such a role and the fact that the insurance carriers do not directly supervise independent insurance agents. It is also true that the Department proposed an insurance intermediary class exemption that would allow a small number of entities to act as financial institutions in a parallel exemption modeled on the BIC Exemption.³ However, this proposed class exemption contained very restrictive conditions, and was quite controversial. While the Department took comments on the proposal, no further action has been taken to address concerns raised in the comments.

The narrowing of PTE 84-24 in January 2018 is set to significantly reduce the number of insurance agents selling fixed indexed annuities. The end result, therefore, is that a large portion of a retirement investor's access to fixed indexed annuities will be effectively terminated. This result is at odds with the principles behind the Rule.

The Department's transitional solution, adding the Impartial Conduct Standards to the existing version of PTE 84-24, achieves the principles of the Rule – a best interest recommendation and reasonable compensation – without being unduly burdensome. Additionally, it does not deny retirement investors access to particular retirement products, and therefore supports the idea of retirement investors taking ownership of their own retirement planning. Therefore, we recommend that the Transition Period version of PTE 84-24 be adopted as the final version of the exemption.

2. The "Full" BIC Exemption Must Be Replaced with a Streamlined Exemption, Modeled on the Transition Period Version of the BIC Exemption

The "full" BIC Exemption scheduled to become applicable on January 1, 2018 will amplify practical problems with the Fiduciary Rule. In Question 4, the RFI asks whether the "incremental" costs

² See, e.g., Conflict of Interest FAQs, (Part I- Exemptions), Q21., October 27, 2016.

³ 82 Fed. Reg. 7,336 (Jan. 19, 2017).

resulting from the application of the deferred elements of the BIC Exemption exceed the additional benefits that may be provided. Without doubt, the answer is yes. As discussed in more detail below, the BIC Exemption must be replaced with a new streamlined exemption, modeled on the Transition Period version of the BIC Exemption, and provide concise and useful information for retirement investors.

- ***The Impartial Conduct Standards Will Benefit Retirement Investors—Not Class Action Litigation and Costly Exemption Conditions***

As the Department noted when it established the Transition Period, the anticipated benefits of the Fiduciary Rule are realized by advisors complying with the Impartial Conduct Standards, not from the deferred conditions in the exemptions.⁴ In Question 5, the Department asks whether these deferred conditions are necessary to incent compliance with the Impartial Conduct Standards. The answer is no. Nationwide is committed to compliance with the Impartial Conduct Standards, and has dedicated its resources to make necessary adjustments to promote and validate ongoing compliance. We have observed the same dedication to compliance at other financial institutions with whom we interact. As further supported below, existing enforcement mechanisms are capable of ensuring industry compliance with the Impartial Conduct Standards and thereby avoid potential abuse of a class action right.

- ***The Deferred Conditions Impose Significant New Burdens on Retirement Investors—the Costs Outweigh the Negligible Benefits***

The “full” BIC Exemption imposes significant costs and restrictions on retirement advice. Its class action provisions create significant liability risks and uncertainty. Its specific warranty and representation requirements are subjective, difficult to comply with, and promote a level fee structure that falsely equates the form of compensation with the quality of the advice. The deferred disclosure requirements are difficult to operationalize, and present significant compliance challenges. These significant high costs of compliance will translate to higher prices. We recommend that the disclosures in the final version of the BIC Exemption be replaced in the proposed new streamlined BIC Exemption with clear and concise disclosure of essential information modeled after SEC and FINRA requirements.

- ***The Contract and Class Action Provisions Must Be Removed***

In response to Questions 4 and 5, the contract and class action provisions should be eliminated and not included in a new streamlined BIC Exemption. The costs and confusion resulting from these provisions in the “full” BIC Exemption are likely to be very significant. County judges in different states will be hearing class action lawsuits, requiring them to interpret different state laws governing investment advice contracts while at the same time interpreting new Federal standards defining fiduciary advice. The result will be conflicting and confusing rulings from state to state as judges struggle to create a new body of case law. This is concerning, given that one of the purposes of ERISA is to foster the uniform administration of plans. Furthermore, given the Department’s longstanding efforts to assist Federal courts in interpreting ERISA in a consistent manner, the flood of different interpretations in these cases will create uncertainty for years to come.

Not only is class action litigation costly, inefficient and likely to result in conflicting rulings, it is unnecessary to achieve the goal of ensuring compliance with the fiduciary standard of care. Compliance requirements should be fully addressed by the Impartial Conduct Standards. The

⁴ See, 82 Fed. Reg. 16,907 and 16,909-10 (Apr. 7, 2017).

contract must not be allowed to operate as a vehicle for class action litigation. It is unnecessary as the conditions for a class exemption apply outside of a contract and are fully enforceable by the Internal Revenue Service (“IRS”). In addition, Secretary Acosta and SEC Chair Clayton have expressed a desire to work together to develop regulation—the joint efforts of the two agencies is a more efficient and constructive way to enforce the Impartial Conduct Standards than class action litigation.

- ***Reasonable and Transparent Compensation Best Protects Retirement Savers***

The warranties, policies, procedures and other elements of the contract should be removed in the proposed new streamlined BIC Exemption because they promote arbitrary and unrealistic “level” compensation, and differential compensation based on “neutral” factors, instead of the “reasonable compensation” standard in the Rule. Under this approach, the primary focus as to whether a recommendation is prohibited is the nature of the compensation received; the content of the recommendation itself is not contemplated.

Level compensation, in which there is no variation in compensation across some or all of the different types of investments and features available to retirement investors, can disincentivize advice that is in the best interest of the client—in effect, a “reverse” conflict. If compensation is the same regardless of the investment, there is a disincentive for the advisor to spend extra time (for which they are not compensated) to recommend investments that may be more difficult for retirement investors to understand, but which may in fact be in their best interest. And it may not always be possible to levelize compensation—if, for example, a commission amount is set in a contract approved by the state, it may be impermissible to alter the terms of the compensation. Differential compensation, in which there is some variation among different categories of investments, is permitted but only to the extent it can be shown that the difference is related to a neutral factor—a qualification that is inherently subjective and vague. Given that the availability of the exemption depends on whether these subjective decisions about the validity and magnitude of the neutral factor’s effect on compensation are deemed to be correct, and given that the neutral factor analysis may be the basis for class action litigation under the “full” BIC Exemption, the neutral factor concept presents considerable risks.

Questions 7, 8 and 9 ask whether the Department should consider new, product-specific exemptions based on innovations in the marketplace, such as clean shares, T shares, and fee-based annuities. While Nationwide would support reasonable, product-specific exemptions, it also emphasizes the impracticality of the wide-spread application of level compensation, as well as differential compensation based on neutral factors, to these investment products. The proposed new streamlined BIC Exemption would make a similar accommodation, but would not be product specific. This would provide long-term flexibility for new ideas, rather than fixing in time the innovations currently under consideration.

The streamlined BIC Exemption we propose, much like the Transitional Period version BIC Exemption currently in effect, would apply the Impartial Conduct Standards to the advice: Requiring advice in the best interest in exchange for reasonable compensation. The advantage of the “reasonable compensation” standard to retirement investors is that it is neutral with respect to any particular product or compensation methodology. This provides retirement savers access to a wide array of investments meeting their individual needs, without attempting to force each investment into a compensation structure it may not have been designed for, priced for, or that may be inconsistent with its regulatory requirements.

- ***Disclosures in the BIC Exemption are Unworkable***

The disclosures in the BIC Exemption should be replaced in the proposed streamlined BIC Exemption with clear and concise disclosures of essential information modeled after SEC and FINRA requirements. In a recent comment to the Department, SEC Commissioner Piwowar noted the efficacy of SEC disclosure requirements as an enforcement tool, calling the Department's views on the limited value of disclosure "excessively dour..." and citing scholars criticizing the Department's position as "contrary to standard economic theory."⁵

The current disclosure requirements of the BIC Exemption present significant compliance and information technology challenges. It will be difficult and expensive for many financial institutions to provide timely disclosure in advance of specific transactions, as well as to maintain a website providing access to individual account information. Rather than requiring extensive and confusing disclosure, the streamlined BIC Exemption should focus on leveraging disclosures already developed and extensively researched by the SEC.

- ***Fiduciaries Managing More than \$50 million Should Not Be Excluded from the BIC Exemption***

While the Department allows an independent plan fiduciary managing more than \$50 million to choose to receive non-fiduciary advice from an advisor,⁶ the Department does not allow these plan fiduciaries to receive fiduciary advice under the "full" BIC Exemption.⁷ As a result, the larger ERISA plans these fiduciaries serve will generally have only two choices for advice—they may either receive fiduciary advice from a provider (who does not need to meet the requirements of the BIC Exemption), or they may receive non-fiduciary information. They are not permitted to receive fiduciary advice from a provider that uses the BIC Exemption (such as a broker-dealer, or for an advisor affiliated with an investment product manufacturer offering proprietary products).

This is an odd and likely unintended result. Presumably, such fiduciaries are capable of deciding which service model is best for their plans—after all, they have been deemed sophisticated enough to go without any fiduciary advice at all. Yet, they are not allowed to use an advisor who is subject to the exemption, or a service model deemed safe enough to protect unsophisticated plan fiduciaries. This limits the choices available to the sophisticated fiduciary, disadvantaging their plans, and offers no additional benefit.

In explaining its rationale in the Preamble to the BIC Exemption, the Department states that it believes allowing large plans to receive fiduciary advice through a BIC Exemption arrangement would increase conflicts. Specifically, it wrote that:

"...large ERISA plans have long acknowledged fiduciary status and operated within the constraints of prohibited transaction rules. As a result, extending this Best Interest Contract Exemption to such fiduciaries, and facilitating their receipt of otherwise prohibited

⁵ "Comment Letter in Response to the Department of Labor's 'Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions,'" Securities and Exchange Commissioner Michael S. Piwowar, July 25, 2017.

⁶ See, 29 CFR §2510.3-21(c) defining five types of Independent Fiduciary with Financial Expertise and establishing certain additional requirements.

⁷ See, definition of "Retirement Investor" and "Retail Investor" at BIC Exemption Sec. VII(0)(3) and (N) respectively.

compensation, could result in the promotion, rather than reduction, of conflicted investment advice.”⁸

As this provision first appeared in the final BIC Exemption, the Department did not have the benefit of public comments on these assumptions. The reality is that many large plans, while recognizing their own fiduciary status, received advice from non-fiduciary advisors prior to the Rule, including registered representatives of broker-dealers, and advisors affiliated with insurance carriers or other investment product manufacturers. In this Transition Period, these advisors are now fiduciaries, and the Transition Period version of the BIC Exemption is available to them. However, that won't be the case under the “full” BIC. As a result, the Department likely has not yet heard the concerns of large plan fiduciaries, who will want fiduciary advice, but will find themselves unable to work with their long-time service providers after January 1, 2018 because they are ineligible for the BIC Exemption.

There is no reason to believe that it is in the best interest of large plans to be denied the same investment advice options available to small plans. The “all or nothing” approach of the “full” BIC Exemption should be eliminated, as it is not in the best interest of the participants and beneficiaries of these plans. The Department should trust these large plan fiduciaries to select the advisors that best serve the needs of their own plans, rather than arbitrarily eliminating an appropriate option.

3. The Department Must Coordinate with SEC and FINRA on a Class Exemption

In Question 11, the Department asks whether and how a new fiduciary standard in securities regulation could be incorporated into the Fiduciary Rule. Nationwide supports a joint effort by the Department and the SEC to develop a class exemption that coordinates the Department's conditions with a securities law fiduciary standard. SEC Chair Clayton recently issued a similar request for information to examine the fiduciary issues related to broker-dealers and Registered Investment Advisers. An advisor to a plan or individual retirement account (IRA) is likely simultaneously subject to the applicable securities law standard and the Fiduciary Rule. These standards must not conflict with one another, or it will be impossible to comply with both sets of rules.

We believe the Department could adopt an exemption to fit with fiduciary standard updates made by the SEC. For example, the streamlined exemption we propose would be based on the Impartial Conduct Standards. If the Department were to issue guidance or to amend its Fiduciary Rule to provide that compliance with the relevant securities fiduciary standard is also deemed to be compliance with the best interest standard, it would simplify compliance issues for both rules.

Alternatively, the Department and the SEC could draw a distinction between plans and IRAs by creating separate exemptions. The Department could develop an exemption applicable to IRAs that deferred to designated SEC standards, while applying its own rules to ERISA plans. This would be consistent with Congressional intent in establishing ERISA plans and IRAs. The Department would also have to develop an analogous arrangement related to insurance products that are not securities. This could be accomplished either through coordination with the NAIC, or by adopting exemption conditions that take into consideration the agreed-upon national model standards.

⁸ 81 Fed. Reg. at 21,013.

4. The Regulatory Definitions of Fiduciary Advice Need Clarification and Modification to Better Protect Retirement Savers

The Department has set up the RFI as questions regarding exemptions for review by the Office of Exemption Determinations. Nationwide believes a number of changes are also necessary to the fiduciary regulation itself, and accordingly requests that these comments also be made available to the Office of Regulations and Interpretations.

- ***Need to Add a Sales Exclusion***

The definition of fiduciary advice in the Fiduciary Rule should be revised to exclude clearly disclosed sales activity. As Commissioner Piwowar noted in his comment letter, the regulation of financial services has historically recognized the difference between sales and advice. In his letter, Mr. Piwowar wrote that Congress had created the distinction 70 years ago, and urged the Department to remember that “The substantive regulation of broker-dealers and the tailored regulation of ‘selling’ and ‘advice’ activities are core principles of our securities regulatory regime that should not be overlooked.”⁹ We believe the same principle is true for the sale of financial service insurance products.

We note that the Department had previously included some form of a sales exclusion in the Fiduciary Rule since its first proposal in 2010. In the 2010 proposal, the sales exclusion was fairly broad, covering conversations in which the recipient should have known they were receiving sales information and not advice.¹⁰ In the 2015 proposal, the ability to have a sales conversation was limited to the fiduciaries of plans with more than 100 participants. In the 2016 final regulation, this was modified to be limited to fiduciaries managing more than \$50 million in assets. Even in these limited forms, however, the Department has recognized that not all recommendations should be considered fiduciary advice.

Nationwide believes that retirement investors will benefit from choice in the services they receive. A clearly disclosed sales conversation will not confuse retirement investors, but will offer valuable services. A sales exclusion will also eliminate many of the more difficult prohibited transaction problems created by the Rule as currently written, such as recommendations of proprietary products.

- ***Need for Greater Certainty and Clarity Around What Behaviors Give Rise to a Fiduciary Relationship***

The definition of fiduciary advice in the Rule creates a level of ambiguity that is ripe for litigation and will ultimately harm retirement investors. Currently, depending on the content, context, and presentation, any communication that is directed to a retirement investor on a topic covered by the Rule and results in compensation (direct or indirect) to the communicator, gives rise to a fiduciary relationship. This standard is too broad. The result has been that many providers have erred on the side of caution in a way that could be harmful to retirement investors who may not want to, or be able to, pay for professional advice, but need access to thorough education to make informed decisions about their retirement planning needs.

The amorphous nature of the definition of fiduciary advice, coupled with the expense of litigation, has resulted in robust education being less available. Service providers in the retirement plan

⁹ Piwowar comment letter at 4.

¹⁰ 75 Fed. Reg. at 65,276 (October 22, 2010).

and IRA space are forced to choose between providing access to helpful educational tools and materials, and potentially exposing themselves to greater risk of litigation.

Litigation has become too costly in the retirement savings landscape without providing participants and employers with any significant benefits. From the period of 2009 to 2016, attorneys representing plaintiffs in breach of fiduciary duty lawsuits are estimated to have collected roughly \$204,000,000 for themselves, while only securing an average per participant award of \$116.¹¹

This reality will continue to serve to reduce access to retirement planning advice and education, while increasing the cost at which both can be made available. Without greater certainty and clarity around what circumstances will give rise to a fiduciary relationship, retirement investors will inevitably be harmed and potentially priced out by increasing cost (driven by the increased risk of litigation).

- ***Not All Distribution Recommendations Should Be Fiduciary Advice***

The Department has taken an overly broad interpretation of when the Fiduciary Rule applies to recommendations regarding investment of the proceeds of a distribution. Even in the case of a Required Minimum Distribution (“RMD”), where the law compels the distribution itself, the Department has asserted that if a recommendation to invest the proceeds of the RMD is made while the assets are still in the plan or IRA, then the Fiduciary Rule governs the recommendation.¹²

However, based on the Department’s comments in the preamble of the Fiduciary Rule, it seems that what the Department is concerned about are rollovers from employer plans into inappropriate retirement investments. If that’s the case, then the Rule should not be broadly applied to recommendations made regarding amounts that are generally required to be distributed from plans. The current language is so broad that it arguably would result in fiduciary status for individuals who are not involved in the financial services industry (such as art or boat salesmen working on commission and making recommendations to retirees that using the proceeds from their RMD to purchase their product would be a good “investment”). Such broad language could have negative effects on the broader economy.

Rather than applying to all recommendations about the use of distribution proceeds, Nationwide recommends that the Rule be modified to only apply to those distributions related to rollover or transfers between qualified plans and IRAs. This change would draw a clean line around the scope of the Rule, and avoid a variety of likely challenges disputing the application of the Rule to scenarios involving purchases unrelated to retirement.

- ***Exclusion for Governmental Plan Rollovers and Transfers***

We ask the Department to also exclude from the scope of fiduciary advice any recommendations to rollover or transfer between ERISA plans/IRAs and governmental or other non-ERISA employer plans. Given that governmental plans are administered by sovereign entities and participants in these plans are protected by Federal and state laws, rollovers to governmental plans are not likely

¹¹ Tom Kmak, *Fiduciary Benchmarks: Protect yourself at all time*, DC DIMENSIONS (Summer 2016), <https://us.dimensional.com/-/media/Dimensional/Documents/US/Auxiliary/Defined-Contribution/Summer-2016/02-Fiduciary-Benchmarks-Protect-Yourself-at-All-Times.pdf>.

¹² See, Conflict of Interest FAQs (Part II -Rule), Q4., January 2017.

to be misused by advisors or driven by conflicts. They should be excluded from the Rule. We believe this exclusion is necessary to fully align with the principals of sovereign immunity.

- ***Exclusion for Transfers to the Current Employer's Plan***

An exclusion for recommendations to transfer assets from a prior employer's plan to a current employer's plan is needed so that participants' retirement savings will not shrink. We have observed that some advisors are hesitant to continue to offer "plan to plan" rollover advice to participants because of the fiduciary risk exposure that could attach. Advisors particularly do not want to take on the additional liability of being a fiduciary for participants with small account balances.

The unfortunate result of this loss of advice is that too many workers, especially those with small balances who need the most help to prepare for retirement, will take a taxable distribution when they change jobs, thereby harming their retirement readiness. The benefit of getting participants this much-needed guidance is likely to be much greater than the harm related to rollovers into the current employer's plans that may be slightly less cost-efficient than the prior employer's plans. Accordingly, we recommend that the Department exclude recommendations to roll assets into an employer plan from the definition of fiduciary investment advice.

- ***The Independent Fiduciaries with Financial Expertise Exclusion Should be Expanded***

The Independent Fiduciary with Financial Expertise exclusion was created to facilitate wholesaling activity between financial service intermediaries. The purpose of this exclusion was to ensure that when investment product manufacturers explain their products to retirement service professionals, the sales pitch does not itself become fiduciary advice. This exclusion is not crafted broadly enough to accomplish this goal.

This exclusion was necessary because the breadth of the definition of fiduciary advice could have caused interactions between financial professionals to trigger fiduciary liability. The Rule was not created, or necessary, to provide protections for interactions between sophisticated financial service intermediaries. The Department agreed with the industry on this point prior to finalizing this Rule and endeavored to create an appropriate exclusion that would allow financial service intermediaries to interact freely without worrying about fiduciary status attaching. While we appreciate the Department's efforts in this regard, the exclusion was crafted too narrowly. In §2510.3-21(c)(1)(i), the text of the regulation defines four types of financial institutions whose investment professionals will not be deemed to have received fiduciary advice. However, this approach is too narrowly prescriptive. Instead this exclusion needs to be revised to include all intermediaries that may be hired to provide services to retirement plans and participants or IRA owners or their respective beneficiaries. All interactions between these types of intermediaries should be considered non-fiduciary.

In addition to advisors, the financial services industry is filled with sophisticated service providers that offer helpful services to plans. This is also a constantly evolving space. Given the breadth of the definition of fiduciary advice, discussions that are only peripherally investment-related could trigger fiduciary status for these service providers. That potential has resulted in many changes to how intermediaries interact with one another and increased legal risk exposure associated with their interactions. This will ultimately impede retirement savers' ability to access lower cost retirement planning support.

Therefore, Nationwide recommends that the Independent Fiduciary with Financial Expertise exclusion be expanded to allow any professional, sophisticated enough to be hired to provide

services to a retirement plan or IRA, to be qualified as an Independent Fiduciary with Financial Expertise. This enhancement is very important to ensure that industry intermediaries can freely converse with one another about products in the marketplace.

- ***The Platform Provider Exclusion Should Apply to IRA Platforms as Well as to Plans***

The Fiduciary Rule helpfully clarifies that providing a platform of investments for plans to choose from is not a fiduciary act. However, the Department did not extend this same exclusion to IRA platforms, noting that there was no fiduciary making the decision on behalf of the IRA owner.¹³ We ask that the Department reconsider this issue and provide an exclusion for IRA platforms as well.

While one could imagine a circumstance in which a platform offering was tantamount to a recommendation (an IRA platform of only three investments, for example), the reality is that most IRA providers, including Nationwide, offer hundreds or thousands of investments on our IRA platforms. There is no fundamental difference between plan fiduciaries and IRA owners when it comes to selecting a platform. Accordingly, we propose that the Department provide an exclusion for an IRA platform consisting of more than 500 investment options. This is a sufficiently great number that by its size alone, does not implicitly steer or influence the IRA owner into specific investment choices. The exclusion should allow the IRA provider to offer multiple platform choices as well (*i.e.*, segmented platforms).

- ***Clarify that Recommending a Platform or Platform Provider is Not Fiduciary Advice***

The Fiduciary Rule should clarify that neither recommending a specific platform, nor recommending a platform provider, is fiduciary advice. In the first scenario, a platform provider offers a prospective client a segmented platform. While the Department has said merely offering such segmented platforms is not advice, the Preamble goes on to read,

“Of course, a provider could find itself providing investment advice depending on the particular marketing technique used to promote a segmented platform. For example, if a provider were to communicate to the plan fiduciary of a small plan that a particular platform has been designed for small plans in general, and is appropriate for this plan in particular, the communication would likely constitute advice based on the individual needs of the plan and, therefore, very likely would be considered a recommendation.”¹⁴

We do not believe this should be fiduciary advice and urge the Department to strike the “individualized needs of the plan” language from the regulation. Recommending a platform should not be recommending a fiduciary service, or viewed as making specific investment recommendations for a plan. It should not be the case that a sales representative for a non-fiduciary service (*e.g.*, a record-keeper) can become a fiduciary simply for stating that the platform designed for small plans is the proper product platform for the small plan the customer is considering.

Similarly, the Department should clarify that a third party recommending a record-keeper and/or a platform is not giving fiduciary advice.

¹³ 81 Fed. Reg. at 20,974.

¹⁴ 81 Fed. Reg. at 20,973.

- ***Clarify that a Platform Provider is Not Giving Fiduciary Advice by Making Available a Third Party Fiduciary Advisor as an Option on the Platform***

The Department should clarify that a platform service provider is not giving fiduciary advice when offering the services of a third party fiduciary. Even if the platform offers only one option, the Rule should clarify that there has been no recommendation by that service provider.

- ***Include Exclusion to Address Abandoned Plan Sponsors and IRA Account Holders***

Because of the Fiduciary Rule, a number of broker-dealer firms no longer provide services to the plans or IRA owners that represent the small account segment of the market. These plans often contact Nationwide for information regarding who they might be able to work with for obtaining fiduciary assistance or with questions about how to best manage their existing accounts.

Presently under the definition of investment advice, as a non-fiduciary service provider, Nationwide is prohibited from providing these plans with a list of advisors that they may consider. This is an unnecessarily harsh outcome for plan sponsors and participants who wish to benefit from the assistance of a professional fiduciary.

Therefore, we are requesting that the Department include an exclusion from the definition of fiduciary advice that would allow Nationwide and other non-fiduciary service providers to provide a list of potential fiduciary advisors to both plan sponsors and IRA owners when their advisor has terminated their relationship with them.

5. The Department Should Remove the Bias Against Commission-Based Products in the Fiduciary Rule

The Rule should be revised to remove the bias against commission-based products. Specifically, the Rule should be modified to level the playing field between fee-based and commission-based models by removing the disproportionately burdensome requirements of operating in a commission-based compensation model. Adopting the Transition Period version of PTE 84-24 as the final version and replacing the “full” BIC Exemption with a streamlined exemption that would enable retirement investors and advisors to consider the entire universe of retirement products equally, and determine the best solution for the investor.

Nationwide develops and distributes a variety of retirement products – both fee-based and commission-based – and we do not propose that one compensation structure is better or more generally appropriate than another. Rather, Nationwide understands and supports the idea that each retirement investor has situation-specific needs and no one product (or compensation structure) is always appropriate. There is no room for generalizations in the retirement saver space. Each investor and each advisor must determine together, based on that investor’s specific circumstances, the best product(s) for that retirement investor’s needs.

It is this idea that drives Nationwide’s request that the DOL level the playing field between fee-based and commission-based models. Regardless of the compensation model, the obligations of the advisor to the retirement investor should be the same: best interest advice and reasonable compensation.

Conclusion

As a mutual company, our commitment to acting in the best interest of our clients has always been, and will continue to be, at the core of our values. Therefore, Nationwide supports the principle of the Fiduciary Rule and urges the Department to take the key actions detailed above. Nationwide believes that executing on these actions will help to curb the Rule's unintended consequences, and facilitate a long-term regulatory solution that promotes the best interest of America's retirement savers.

In addition to our comments here, we lend our support to the comments filed by the American Council of Life Insurers (ACLI), Committee of Annuity Insurers (CAI), the Financial Services Roundtable (FSR), the Insurers Retirement Institute (IRI), the National Association for Fixed Annuities (NAFA), the SPARK Institute (SPARK), and the U.S. Chamber of Commerce (U.S. Chamber). These comment letters highlight many of the key actions described above and further elaborate on the harm that ignoring them will have on America's retirement savers.

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If you have questions about anything in this letter, or if we can be of any further assistance as the Department considers amending the Fiduciary Rule, please feel free to contact Ben Brewster in our Government Relations Department at 202-347-5914 or via email at brewstb1@nationwide.com.

Sincerely,



Kirt A. Walker
President and Chief Operating Officer
Nationwide Financial