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Submitted Electronically – e-ORI@dol.gov and e-OED@dol.gov

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

**Re: Definition of the Term “Fiduciary” (RIN 1210-AB32);
Best Interest Contract Exemption (ZRIN 1210-ZA25)
Amendment of PTE 84-24 (ZRIN 1210-ZA25)**

Ladies and Gentlemen:

Nationwide appreciates the opportunity to comment on the U.S. Department of Labor’s (the “Department”) regulatory package expanding the definition of fiduciary investment advice, and proposing new or amended prohibited transaction class exemptions. We are writing today to address particularly the proposed regulation (the “Proposal”) redefining fiduciary investment advice related to ERISA §3(21)(A)(ii);¹ the new proposed prohibited transaction class exemption “Best Interest Contract Exemption” (“BICE”);² and the proposed amendments to prohibited transaction class exemption 84-24 (“84-24”).³

We agree with the Department that the retirement landscape of today is quite different than it was 40 years ago when the current fiduciary investment advice regulation⁴ was adopted. The shift from defined benefit plans to defined contribution plans like the 401(k) plan has been an important part of the success of our retirement system, but it also has resulted in the need for America’s workers to assume more responsibility for their retirement readiness. For the past 40 years, Nationwide, a Fortune 100 company based in Columbus, Ohio, and one of the largest and strongest diversified insurance and financial services organizations in the United States (rated A+

¹ 80 Fed. Reg. 21928 (Apr. 20, 2015).

² 80 Fed. Reg. 21960 (Apr. 20, 2015).

³ 80 Fed. Reg. 22010 (Apr. 20, 2015).

⁴ 29 CFR §2510.3-21(c).

by both A.M. Best and Standard & Poor's), has been helping millions of America's workers prepare for and live in retirement. We do this by offering innovative and flexible solutions that allow small business employers and their financial professionals to tailor the optimal retirement plan to serve the unique needs of their workers.

As a mutual company we do not have shareholders, which means we put our members and communities first, including the more than 2 million participants that we serve across nearly 40,000 retirement plans with assets in excess of \$100 billion. We are the 10th largest provider of retirement plans to American small businesses, the #1 provider of governmental plans, and the 9th largest life insurer and writer of variable annuities.

Like the Department, Nationwide believes that financial services firms must provide products and services that are in the best interests of America's workers. We support efforts that work to expand access to retirement plans, education and guidance.

However, the Proposal as written could have negative consequences for individuals and families saving for retirement. America's workers, especially low and middle-income retirement savers and small businesses, would have reduced access to financial advice and products they currently rely on to prepare for and live in retirement.

Nationwide has been actively engaged in public policy discussions about how best to provide America's workers and retirees with access to essential planning solutions and tools so that they are adequately prepared to live in and through retirement. These services are needed now more than ever considering an estimated 10,000 workers turn age 65 every day through 2030,⁵ with more than \$2 trillion estimated outflows for U.S. defined contribution accounts through 2018.⁶ Adding to the retirement challenges faced by policymakers is the need to address the "retirement gap," the difference between what retirees will need and what they have saved, which one report stated could be between \$6.8 and \$14.8 trillion depending on the household assets counted.⁷

While well-intentioned, the sweeping changes set forth in the Department's Proposal would effectively eliminate access by plan participants to important and valuable investment education information and tools that are provided as part of their workplace retirement plans. It also would significantly reduce the ability of service providers like Nationwide to continue to make available products and services to small businesses. These products and services are critical to small businesses for the establishment and maintenance of an effective workplace retirement plans designed to meet the unique needs of their workers and retirees.

⁵ See Pew Research Center, *Baby Boomers Retire*, available at <http://www.pewresearch.org/daily-number/baby-boomers-retire>

⁶ See McKinsey & Company, *Winning in the Defined Contribution Market of 2015: New Realities Reshape the Competitive Landscape*, available at <http://www.efinancialnews.com/share/media/downloads/2010/09/4067165967/pdf>.

⁷ See National Institute on Retirement Security, *The Retirement Savings Crisis: Is it Worse Than We Think?* available at http://www.nirsonline.org/research/index.php?option=com_content&task=view&id=768&Itemid=48

Additionally, as Americans are living longer than ever, often times 20 to 30 years after they retire, more and more Americans need the guaranteed income and protection that annuities and insurance products provide. The Department has recognized that since workers have most of their retirement savings in the form of a 401(k) plans, 403(b) plans and IRAs, increasing access and availability to insurance products that offer lifetime income streams that cannot be outlived is critical for Americans' retirement security. Nationwide believes the Proposal will undermine the Administration's goal of providing accessible and affordable lifetime income options and solutions. To avoid these negative outcomes for small businesses and low and middle-income savers, the Proposal must be materially improved in any final rule.

To be very clear, we support the Department's effort to update the current retirement plan regulatory framework to meet the evolving needs of retirement savers. However, we believe core elements of the Proposal must be re-written to provide more workable solutions so that small businesses and their workers continue to have access to valuable and cost-effective investments and services. Only then will the best interests of retirement savers truly be realized.

Accordingly, our comments below reflect our view that the new regulations and exemptions as proposed by the Department need to be modified to retain the beneficial aspects of the current rules even as additional protections and necessary updates are achieved. We look forward to working with the Department to discuss our concerns and recommended changes in detail.

About Us

Nationwide, founded in 1926, is an American company that was formed by farmers who joined together to collectively protect what mattered most to them and rooted in the tradition of neighbors taking care of neighbors. We are a mutual insurance company with the primary goal of serving our members' best interests. Over the past 89 years, Nationwide has grown into one of the strongest and most diversified insurance and financial services companies in the U.S. Nationwide provides a full range of insurance and financial services, including auto, commercial, homeowners and life insurance; public and private sector retirement plans, annuities and mutual funds; banking and mortgages; specialty health; and pet, motorcycle, boat and farm insurance.

As a Fortune 100 company, we have built a diversified business portfolio that provides the financial guarantees to deliver on our promises to our members, our associates and our communities. Nationwide's core values center around our associates who make Nationwide a great place to work by making a difference in the lives of others, including the small business employers and their workers whom we assist in reaching their retirement goals. This culture was recently recognized by Fortune Magazine who named Nationwide as among the 100 Best Companies to Work For.

A leading provider of Retirement Plans

Nationwide is a leader in the small-business retirement plan marketplace, as 90% of our retirement plan clients have less than 100 participants, and our average 401(k) plan size is about \$1 million. Unlike some of our competitors who have high minimum account balances of

\$200,000-\$500,000, we are pleased to serve IRA customers who on average open accounts of less than \$100,000. We provide retirement services and investment products across multiple distribution channels. Nationwide offers a number of investment platforms, and we offer individual and group fixed and variable annuities. Nationwide also includes a wholesale and a retail broker-dealer, a registered investment adviser and a mutual fund complex. Our mission is to provide quality, affordable financial services and investment products to help America prepare for and live in retirement.

Our retirement services platforms are transparently and reasonably priced, and are flexible to best serve the needs of small business employers and their workers. We emphasize and provide participant investment education directly and through our partners. We do not require employers to utilize our own investment products on our platforms—our investments compete with the offerings of other investment providers available on our platform, and we allow employers and their financial professionals to decide which suite of products and services are appropriate for inclusion in their own uniquely designed retirement plans.

We do not view these retirement services in isolation from the other needs of our members. Indeed, our growth has been in part attributable to our ability to assist our members with multiple financial service needs, from succession planning for family farmers to commercial insurance needs of employers to retirement planning for individuals. This commitment to providing “real world” solutions to “real world” problems facing our members is why we are concerned about the potentially harmful effects of the Proposal. Retirement savings should not be isolated into a channel of regulation that prevents coordination of all of the financial needs of employers, plans, participants and IRA owners—this outcome does not serve the best interests of America’s workers or our members.

Overview of our Comments

Our comments below address both broad concerns about the approach taken by the Department and discrete issues related to specific provisions of the Proposal that will negatively impact the ability of small business employers to establish and maintain retirement plans for their workers. The Department can protect retirement savers from the few unscrupulous advisors and bad actors without limiting some of the most effective retirement savings options and tools currently available for workplace retirement plans and IRAs.

We also agree with and add our support to the comments filed by the American Council of Life Insurers (ACLI), Association of Ohio Life Insurance Companies (AOLIC), the Committee of Annuity Insurers (CAI), the Financial Services Roundtable (FSR), the Insured Retirement Institute (IRI), the SPARK Institute (SPARK) and the U.S. Chamber of Commerce (U.S. Chamber). We have highlighted at the end of this letter the specific areas of concern included in the comment letters of ACLI, CAI, FSR, IRI SPARK and the U.S. Chamber that we believe the Department needs to review and consider.

We also are concerned that implementation of the Department’s Proposal may be inconsistent or conflict with regulatory requirements and guidance from other Federal agencies who share

oversight with the Department over certain marketplace activities. For example, while the Proposal does not directly prohibit the payment or receipt of commissions or transaction-based fees, the fee-leveling requirements associated with the new fiduciary status of advisors and insurance agents not previously considered to be fiduciaries will put considerable pressure to transition many workplace retirement plans and IRAs to fee-based account structures. This is a likely outcome due to the administrative complexity of leveling commissions and transaction-based compensation. However, this will clearly increase costs for some workplace plans and IRAs that benefit from transaction-based pricing.

The U.S. Securities and Exchange Commission (“SEC”) has recognized the fee-based model disadvantages some investors, and has a targeted enforcement program directly addressing this so-called “reverse churning” in which fee-based accounts are used to make investors pay more for services than they would have paid in transaction-based accounts. The inappropriate use of fee-based accounts is an SEC examination priority for 2015.⁸ The need to comply with the Proposal (were it adopted as a final rule in current form) would thus conflict with the need to comply with securities regulation, and, perversely, the conflict would result from the shared goal of different Federal agencies to protect retirement plan investors.

The broad scope of the Proposal will significantly impair the ability of Nationwide to serve its members by limiting the ways in which we can interact with them. Judicious and targeted regulation by the Department could effectively address bad actors, and we would strongly support such efforts. However, the fundamental reorganization of retirement services available to workplace plans, participants and IRA owners that the Department has proposed – changing the way services are provided and paid for in connection with nearly \$16 trillion in retirement savings,⁹ and the limited period of only 90 days we were provided to understand, predict the effects of, and comment on the Proposal – will result in unintended consequences undercutting the presumed benefit the Proposal is intended to provide to retirement savers.

Specific Comments Regarding the Proposal and Nationwide’s Services to Small Business Employers and their Workers

These comments are informed by our 40 years of experience working with small business employers and their financial professionals in establishing workplace retirement plans and in the continued operation and enhancement of current workplace retirement plans. Nearly half of the new workplace retirement plans that we service each year are “start-up” plans where a small business employer has decided to make available a new workplace retirement plan to give their workers an opportunity to save for retirement. Decisions by small business employers to take on the responsibility of establishing workplace retirement plans is a critical element of ensuring that

⁸ See “Examination Priorities for 2015--National Exam Program, Office of Compliance Inspections and Examinations,” available at <http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf>

⁹ See “The U.S. Retirement Market, First Quarter 2015,” the Investment Company Institute, June 24, 2015, available at https://www.ici.org/research/stats/retirement/ret_15_q1

America's workers continue to have access to plans that allow them to meet their long-term retirement needs.

For small business employers to continue establishing and successfully maintaining and enhancing such workplace plans, it is critical that the Department's Proposal does not negatively impact the ability of service providers like Nationwide to continue to provide valuable and important non-fiduciary services and information. As a result, we have suggestions for how the Department may reformulate its Proposal to avoid these unintended outcomes.

Platform and Selection and Monitoring Assistance Carve-Outs Must Be Modified to Ensure Providers Can Meet the Basic Expectations of Plan Fiduciaries and IRA Owners

Nationwide offers a robust platform of investment products, investment advisory, and service solutions that provide small business employers and their financial professionals the flexibility and control to tailor a retirement plan to meet the unique needs of the employer and its particular workforce. Considerations around plan design, service features, investment products, advisory services, fiduciary tools and participant education services are all key components of building and maintaining a successful workplace retirement plan.

As the Department has argued in court on several occasions, constructing and offering a platform of investment options available to plans is not a fiduciary act—it is merely constructing a package of services and investment options that are available in the marketplace.¹⁰ Plan fiduciaries, not the platform providers, are responsible for selecting which platform provider to serve the plan, and which of the available investment options, or bundles of options and services, are selected.

While the Proposal includes a Platform Provider Carve-out, we believe the Department needs to provide additional clarification on the following points:

The Platform Provider Carve-out should be expanded to cover IRA platforms as well as plan platforms, including multiple platform options.

We very much support the Proposal's Platform Provider Carve-out as it appropriately recognizes the essential and non-fiduciary services offered by platform providers. However, there is no reason to limit the application of the carve-out to employer-provided plans. The questions and concerns raised by IRA owners are the same as those of plan fiduciaries. Similarly, the Platform Carve-out should apply to multiple platforms offered by the same provider.

In many ways, IRA owners face the same initial challenges as plan fiduciaries when selecting an investment menu—they are trying to sort through the thousands of available investments to find a subset they wish to subject to closer review to determine which to include in their plans. Just

¹⁰ See, e.g., Brief for Secretary of Labor Elaine L. Chao as Amicus Curiae Supporting Plaintiffs-Appellants, Hecker, et. al., April 2, 2008, at 22-23; Brief for Secretary of Labor Hilda Solis as Amicus Curiae in Support of Plaintiff-Appellant, Leimkuehler, June 1, 2012, at 24.

as we help plan fiduciaries narrow the field by responding to questions, setting up investment screens on requested factors, and other non-advice, non-fiduciary services, we should be able to provide those same non-advice, non-fiduciary services to IRA owners who face the same problems. It is not investment advice to answer these questions from plans, and it should not be investment advice to answer them from IRA owners.

The Platform Provider Carve-out should allow platform providers to package investment offerings into products, programs or bundles.

Nationwide, like most product and service providers, offer a variety of solutions for plan fiduciaries to consider and select. These offerings include group variable and fixed annuity contracts, trust platform programs, and bundles of investment options and service features, including investment advisory services. These platforms, packages and bundles of offerings vary based upon market segment, plan design features, pricing, the demographics and number of locations of the workforce covered (including particular service needs of the workforce), the assets of the plan, whether the plan is a “start-up” and other factors.

Making available packages or bundles of investment products and services that appeal to different segments of the marketplace in the form of product construction has never been considered to be fiduciary advice. We do not believe the Department intended to imply otherwise in its Proposal, and urge the Department to state this expressly in the final rule.

The Platform Carve-out should allow platform providers to respond to requests for proposals and information

Providers such as Nationwide are often contacted by plan fiduciaries or their financial professionals asking for investment and service information through a request for proposal (“RFP”) or information. This activity usually is initiated as part of the plan fiduciary’s due diligence process. These requests often seek specific responses based on the plan’s current investment menu or investment policy statement with related services that have been selected by the plan fiduciary.

However, the “carve-out” for platform providers in section (b) (3) of the Proposal would make platform providers ERISA fiduciaries unless they provide information “...without regard to the individualized needs of the plan, its participants, or beneficiaries...”¹¹ As a definitional matter, responding to an RFP or information is inherently individualizing the response in some manner. Whether informally answering questions or responding to a formal RFP, the platform provider is giving information and explaining product offerings that has some degree of individualization to the plan requesting the information, but is clearly not providing investment advice. This type of individualization in response to questions, or in developing products and options available for market segments of plans to select, should not make these responses or options fiduciary advice under any reasonable interpretation.

¹¹ 80 Fed. Reg. 21,957.

The Platform Provider Carve-out should allow Providers to make available tools and materials to assist in understanding and meeting fiduciary and compliance obligations.

Plan fiduciaries who select the platform provider and the investments and/or bundled services are also responsible for ongoing monitoring to ensure the prudence of those investment options. In doing so, they frequently ask questions of the platform provider about the investment options available, the fees associated with those investments, how those fees can be used to offset other costs of the platform and/or other service providers, and other information they need to carry out their duties.

The “carve-out” for selection and monitoring assistance in section (b) (4) of the Proposal should be clarified to clearly permit responses to those questions, as well as to permit the provision of educational and sample materials for use by plans. While some of these materials may be covered under the general investment education carve-out, the issue should also be addressed more completely in the selection and monitoring assistance provision of the Platform Provider Carve-out. In addition to materials, the carve-out should also expressly cover conversations with plan fiduciaries and their financial professionals in which platform provider personnel explain the fee implications of specific share classes of available funds, or fee differences between fund families. This information is not advice, but is making the plan fiduciaries aware of the fees associated with their investments and investment options on the platform.

For example, Nationwide makes available to plan fiduciaries, with the assistance of their third party administrators (“TPAs”) and financial professionals, a package of materials and interactive web-based tools to assist them in understanding their fiduciary obligations, understanding regulatory compliance, and selecting and monitoring investment menus. These include a sample investment policy statement, a fiduciary handbook, fiduciary checklists and, most importantly, a web-based interactive tool that allows evaluation of investment options based on certain objective measurements that quantify relative operating expenses, total returns, and risk-adjusted performance. These kinds of materials help plan fiduciaries properly administer their plans, but do not provide “investment advice” as contemplated by the regulation.

The Platform Provider Carve-out should allow the inclusion of integrated fiduciary advisory services as part of the platform offerings.

Most small business employers who establish and maintain workplace retirement plans need assistance in the selection and monitoring of plan menus. Nationwide, like many platform providers, makes available to plan fiduciaries for selection third-party investment advisory services. For instance, Nationwide makes an investment advisory service through a non-affiliated registered investment adviser that will provide plan menu selection and monitoring services on behalf of the plan. Additionally, Nationwide makes an investment management service through a different, non-affiliated registered investment adviser who will act as an ERISA 3(38) investment manager for the plan.

Nationwide also makes available investment advice or managed account programs that a plan fiduciary may select for participants to elect should they wish to have an investment adviser manage their accounts rather than managing them themselves. These participant level investment advice or managed account programs include several third-party or non-affiliated registered investment advisers, as well as a Nationwide affiliated investment adviser who utilizes an independent financial expert to provide investment advice that is structured in a manner consistent with the program in Advisory Opinion 2001-09A.¹²

These investment advisory services are important for small business employers to have access to expert advice to ensure that they fulfill their fiduciary obligations and provide their workers with a robust and effective menu of plan investments. Also, for those workers who need or want professional investment advisory assistance in managing their own plan accounts, these participant level investment advisory services are critical to ensuring that they are well-invested and ultimately achieve retirement readiness.

We understand from the Proposal's text that a recommendation to utilize one of these fiduciary services would be a fiduciary act (if the recommendation was for a fee incident to the transaction and the other requirements were met). However, Nationwide and other platform providers must be able to communicate and explain such services and make plan fiduciaries, their financial professionals, plan participants and IRA owners aware of them without engaging in fiduciary advice. There is no inherent difference between providing information about a mutual fund available on the platform or an investment advice service available on the platform. In both cases, Nationwide is merely explaining available options for fiduciaries, participants and IRA owner to then select on behalf of their plans, account or IRAs.

The Platform Provider Carve-out should allow the provider to update and make changes to the investment options and services available without becoming fiduciaries to plans or IRAs.

As the Department recognized in Advisory Opinion 97-16A (the "Aetna Opinion"), platform providers must be able to make modifications to their platforms, services and available investments without becoming fiduciaries to the plans utilizing such services or investments. For example, a mutual fund may no longer be offered on the platform, and a provider for an available advisory service may be replaced with another provider.

The Aetna Opinion describes a process by which adequate notice is provided to the affected plans along with the opportunity to change service providers or otherwise provide alternative instruction. If the plan fiduciaries do not respond within the specified time period, they are deemed to have made the change as fiduciaries to their plans.

¹² We appreciated the Department's clarification that the BIC exemption does not replace, but is available as an alternative to, previous guidance issued by the Department. Specifically, in footnote 30 to the BIC exemption proposal, the Department notes the continued availability of Advisory Opinion 2001-09A and the statutory exemptions in ERISA §408(b)(14) and §408(g). 80 Fed. Reg. 21960 at 21971 (Apr. 20, 2015). We also note that the Department indirectly referenced managed accounts in the platform Carve out, writing in (b)(3) that the platform carve out applied to investments "including qualified default investment alternatives." Id. at 21957.

Any final rule should (1) clarify that the Aetna Opinion process applies under the new regulation, and (2) affirmatively state that the Aetna Opinion process applies to IRAs as well as to plans.

**Rollovers into Employer Plans Should Not Be Considered Fiduciary Advice;
Alternatively Rollovers into Non-ERISA or Governmental Plans Should Not Be
Considered Fiduciary Advice**

Section (a)(1)(i-ii) of the Proposal reads that fiduciary advice is provided if there is a recommendation to take a distribution or roll over assets “from the plan or IRA.” As a result, moving assets from a workplace or employer plan or an IRA to another employer plan is considered fiduciary advice.

Nationwide is concerned that this definition is too broad and will reduce efforts the Department has long supported to consolidate accounts in plans, an activity that reduces the potential for “lost” accounts by participants or “leakage” through taxable distributions. Specifically, we are concerned that the Department’s Proposal will result in workers who are changing jobs to more likely take a lump sum cash-out from the previous employer’s plan rather than rolling it into their new employer’s plan. This is already a significant problem: a 2011 study by AON Hewitt found that 42% of workers who terminated from employment in 2010 “took a cash distribution...29% left assets in the plan and 29% rolled assets over to a qualified plan. The cash-out behavior of terminated employees was greatly influenced by their plan balance, age, and gender.”¹³ Another study estimated that reducing access to financial service providers upon job termination could “increase annual cash outs of retirement savings by an additional \$20 – 32 billion...these withdrawals could reduce the ultimate retirement savings of affected individuals by 20 to 40 percent.”¹⁴

In addition to the harm of lost savings, we do not believe rollovers to employer plans present the concerns about “conflicts” by advisors that the Department believes it is addressing in the Proposal. Moreover, employer plans provide the benefit of fiduciary oversight, institutional pricing of investments and services and a robust suite of investment education tools and information that will increase the likelihood of retirement readiness.

While it is true that not all plans offer equivalent value to participants (for example, a large plan may be less costly than a small plan due to economies of scale), we believe the Proposal will prevent platform providers, advisors, plan sponsors and others from engaging in consolidation activity with new enrollees and other participants because it will not be feasible in most cases to conduct a thorough review of the prior employer plan or IRA to gather the information necessary to make a fiduciary recommendation. Further, such rollovers may require compliance with the BIC Exemption and its many conditions if the Department concludes that such rollovers present

¹³ “Leakage of Participants’ DC Assets: How Loans, Withdrawals, and Cashouts Are Eroding Retirement Income,” AON Hewitt, 2011 at 10.

¹⁴ “Access to Call Centers and Broker Dealers and Their Effects on Retirement Savings,” Quantria Strategies, April 9, 2014, at 4.

a prohibited transaction by the advisor to the receiving plan.¹⁵ The harm caused by disincanting consolidation activities into current employer plans is likely to be much greater than any potential rollovers into current employer plans that are slightly less cost-efficient than prior employer plans.¹⁶

Alternatively, if the Department will not adopt this position generally, we request that rollover recommendations into governmental or other non-ERISA employer plans be excluded from the definition of advice due to their unique circumstances. Compliance with the Proposal in the non-ERISA marketplace will be unnecessarily confusing and complicated as currently drafted.

As we read the Proposal, it does not apply to rollover recommendations to assets coming from governmental or other non-ERISA plans because such plans are not subject to the regulation. Governmental plans defined under 3(32) of ERISA are exempt from Title I of ERISA under ERISA Sec. 4(b)(1). IRC Sec. 4975(g)(2) excludes governmental plans defined under Sec. 414(d) from the Sec. 4975 prohibited transaction rules as well. The Proposal also does not appear to apply to 403(b) plans that meet the Department's safe harbor at 29 CFR § 2510.3-2(f) as the regulation states that such plans are not "established or maintained" by an employer under section 3(2) of ERISA.

Consequently, rollovers from such plans are not subject to the Proposal, while rollovers to such plans from an IRA or an ERISA plan are subject to the Proposal. Nationwide serves over 7,000 governmental plans, and processes in excess of 15,000 rollovers to such plans each year for government employees who may have IRAs and employer plan accounts outside of their 457 plan, and who decide to consolidate their assets into their employer's 457 plan. It will be very difficult for our associates servicing these governmental plans and their participants to operate under two different sets of rules, two different prohibited transaction scenarios, and two different compliance requirements when the applicability of the rule depends on the source of the rollover, not the ERISA status of the plan receiving the rollover. 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 do not appear to lend themselves to the "conflicts" and abuses the Department believes it is addressing with the Proposal.

¹⁵ This is an example of the ambiguities the Proposal creates regarding whether and under what circumstances a prohibited transaction arises in connection with fiduciary advice regarding a rollover. We urge the Department to provide greater clarity on this and related rollover scenarios. For instance, does the Department believe a rollover from a prior plan creates a prohibited transaction for the current plan advisor if the advisor is compensated on a percentage of assets because the result of the rollover is to ever-so-slightly increase the pool of assets on which the fee is based?

¹⁶ As a separate point, we believe that if the plan fiduciary of the receiving plan has directed the service provider to ask new enrollees about other accounts and to recommend that they be consolidated into the new employer's plan, then the service provider is following the direction of the plan fiduciary and is not independently providing investment advice or any fiduciary service.

Public Policy Concerns about the Proposal and Associated Exemptions

We wish to continue to partner with the Department in developing public policies affecting retirement plans that improve outcomes and better protect workers. To that end, we briefly address below several broad concerns that are significant, but that the comment letters of ACLI, AOLIC, CAI, FSR, IRI, SPARK and the U.S. Chamber we referenced above address in more detail. We reiterate these core issues here because they are very important to the proper functioning of a retirement system that preserves access and choice for the options needed by plans, participants and IRA owners.

The Proposal's Investment Education Restrictions Will Harm Plan Participants and Increase the Losses Plan Participants Already Incur Due to Investment Errors Stemming from Lack of Investment Advice

For nearly 20 years, the guidance in Interpretive Bulletin 96-1 ("IB 96-1")¹⁷ has helped Nationwide and its partners better serve plan participants. We are pleased that the Proposal would expand IB 96-1 to cover discussions with IRA owners and plan fiduciaries, as well as plan participants, and we think the addition of retirement needs and retirement income issues is very useful and important. However, a key element of the effectiveness of IB 96-1 is the ability to implement change along with imparting the knowledge, and the Proposal significantly curtails this to the detriment of plan participants.

One of the enduring challenges in education and outreach to plan participants has been getting participants to act to implement changes they want to make. In an education meeting or through an online session with interactive tools, the educational materials help a plan participant understand whether the current contribution rate is enough to achieve retirement savings goals. However, unless that understanding is coupled with action, such as filling out the form at the meeting or clicking the button on the website to change the contribution rate, many plan participants won't take action, and the benefit of the education is diminished. Based on the existing guidance, advisors, platform providers and others have been able to help plan participants understand and implement changes to their accounts in a way that would not be possible otherwise.

We therefore strongly disagree with the Proposal's significant restriction on investment education by prohibiting model asset allocation portfolios from referencing specific investments available in the participant's plan. Restricting such models to merely listing percentages and asset classes will be of no use to the vast majority of plan participants, as very few of them likely will go on to determine which asset classes correspond to which plan investments. In order for the educational model portfolio to have any real-world utility, the educator needs to be able to tell plan participants about their plan's investments, and plan participants need to be able to implement the change immediately. For example, upon reviewing a model portfolio allocation developed by the participant's responses to a series of questions, the participant may decide that he wants to implement the allocation. If there is no easy way to do that, and if the participant

¹⁷ 29 CFR §2509.96-1

now has to figure out which investments in the plan belong to which asset classes and then try to individually direct investments to each investment in the appropriate amount, then it likely won't happen at all. This failure to review and rebalance investments is exactly the kind of error that Department included in its 2011 estimate that participants lose roughly \$100 billion per year due to lack of access to advice.¹⁸

Despite no evidence that IB 96-1 has been abused, the Department has expressed a concern that participants might confuse this educational information for fiduciary advice, and thus proposed this limitation. As a platform provider, Nationwide would have to seriously consider whether it could retain its online tools assisting participants, because we also must, of necessity, provide factual information about investment options in the plan or IRA. If providing both types of information constitutes investment advice as the Department suggests, platform providers would face difficult choices in whether and how to offer educational materials, including both online and during in-person meetings.

The Department should retain the expansion to IB 96-1, but eliminate the restriction on referencing specific investments. Failing that, we request the Department consider several alternatives. First, the Department should clarify in the Preamble or regulatory text that education materials can separately address model allocations and available investment options, such as in different places on the same provider's website or in separate written documents. Without such clarification, Nationwide and other providers cannot be certain that they are not providing investment advice if their websites provide online educational tools that help participants make asset allocation decisions in one area and separately provide available investment information in another area of the website.

Second, the Department should eliminate the prohibition on discussing the available plan investments in those situations where the plan only offers one investment choice in each asset class. There seems little reason to prevent an educator from describing the investments related to the model when there is only one investment available for each asset class in the model.

Third, the Department should permit the plan's responsible fiduciary to designate a set of investment options for investment education. In this way, the plan fiduciary would select investments about which asset allocation models and other educational may be provided, addressing the Department's concerns that only a service provider is involved in the educational information.

¹⁸ See Preamble to Pension Protection Act investment advice regulation, 76 FR 66151-66153 (October 25, 2011). (“...Unfortunately, there is evidence that many participants of these retirement accounts often make costly investment errors due to flawed information or reasoning...Financial losses (including foregone earnings) from such mistakes likely amounted to more than \$114 billion in 2010...Such mistakes and consequent losses historically can be attributed at least in part to provisions of the Employee Retirement Income Security Act of 1974 that effectively preclude a variety of arrangements whereby financial professionals might otherwise provide retirement plan participants with expert investment advice...many more participants trade too little, failing even to rebalance. In DC plans, excessive participant trading often worsens performance, and participants in accounts that are automatically rebalanced generally fare best.”).

The Proposal Should Permit the Sale of Products to All Plans and IRAs as in the 2010 Proposal Rather than Limit the Exclusion to Large Plans

As the Department recognized in the 2010 version of the Proposal, fiduciary status should not apply when a provider is selling products under circumstances in which there is no reasonable expectation of a fiduciary relationship.¹⁹

Large plans, small plans, individual participants and IRA owners are all capable of understanding when an agent or representative is offering a product for sale rather than providing fiduciary advice. The Department should replace the large plan carve-out with a general sellers' exclusion, subject to the condition that the product seller disclose that he or she is not providing fiduciary advice, is representing only a certain provider or group of providers, and is being paid in connection with the product being sold.

This simple disclosure is all that is necessary to protect participants from misunderstanding the nature of the interaction, and it permits plans, participants, and IRA owners to continue to select the type of provider or advisor that is best suited for their individual situation. Alternatively, if the Department is concerned that a concise disclosure is not enough information to explain the nature of the sales discussion, the Department should consider a 408(b)(2)-based disclosure for IRA owners. The large plan approach is discriminatory, and there is no rational basis for eliminating choice for all participants and IRA owners while retaining it for large plans.

Fiduciary Status Should Be Mutually Understood and Free of Ambiguity— Participants Need Clear Standards to Know When Fiduciary Advice is Being Provided

Participants and IRA owners need to know when fiduciary advice is being provided in order to evaluate the information they receive. Advisors need to know when a fiduciary relationship is established because the applicable compliance requirements are determined by fiduciary status. In fact, the Department began this regulatory initiative in part because of its own dissatisfaction with the clarity of the 1975 regulation.²⁰

We support certain elements of the new definition. For example, we agree that fiduciary advice should not turn on whether it is only provided once, and support the removal of the “regularly provided” requirement. However, we do not believe the Department should have eliminated the word “mutual” from the current rule, or introduced the “specifically directed to” alternative to individualized advice. These changes would result in more confusion, not less.

A mutual intent to enter into an arrangement and a mutual understanding of the arrangement are basic elements of any contract. Mutual understanding is especially important in a fiduciary relationship in which the duties and obligations are so significant. While a mutual understanding that individualized advice is being provided is an objective standard clear to all parties, a mere

¹⁹ See 75 Fed. Reg. 65263 (Oct. 22, 2010)

²⁰ See the Preamble to the 2010 Proposal, 75 Fed. Reg. 65263 at 65272 (Oct. 22, 2010).

understanding that advice is “specifically directed to” someone is not clear to either party, especially when there is no historical context in the law to interpret the new term. The standards for establishing a fiduciary relationship need to be clear enough that an objective third party could reasonably conclude that both parties intended the relationship. “Specifically directed to” does not provide that clear guideline.

The Department should eliminate “specifically directed to” because it appears to describe how information was presented rather than the content of the information. The Department should retain the requirement of a mutual understanding, and should retain the “individualized” standard. The new term “specifically directed to” should be removed from any final regulation in order to prevent confusion by plans, participants and IRA owners.

The Fiduciary Definition Should Apply with Respect to Plans, Participants and IRA Owners, Not to Advisors or Other Third Parties Who Are Also Fiduciaries

A broad reading of the Proposal could construe discussions with investment advisors who are third party fiduciaries to the plans they serve as fiduciary advice. Nationwide, like other financial service providers, provides information about investments and services to many different agents, advisors, registered representatives and other financial professionals. The personnel engaging in these discussions, typically called “wholesalers,” play an essential role in explaining to advisors, TPAs and others how Nationwide’s products and services work, what changes are being anticipated to those products and services, and answering questions about products and services. This function is essential to ensuring information flows between product providers and plan and IRA intermediaries. If talking about these investments and services to third party fiduciary advisors is itself considered fiduciary advice, it would be nearly impossible for Nationwide and others to provide any information about its products and services.

Advisors are sophisticated financial professionals, and need information from product providers to serve their advice clients. While we do not believe that the Department intended to make such discussions fiduciary in nature, we ask the Department to clarify in any final rule that advice to third-party fiduciaries to plans, participants or IRAs is not fiduciary advice.

The BIC Exemption Must Be Substantially Revised—As Proposed, It Simply Does Not Function Due to Fundamental Flaws

The BIC Exemption is fundamentally flawed, and must be substantially revised if the Proposal is to function in the real world. Without a functioning exemption, many rollovers will not be possible and many advisors will not be able to continue to provide services to their plan and IRA clients.

Specifically, the BIC Exemption must be rewritten to address the following issues:

- Open-Ended Legal Liability: The exemption creates open-ended legal liability for advisors and financial institutions because its standards and conditions are subjective. Good faith efforts to comply with the required policies and procedures, disclosures, compensation limitations and warranties will not prevent a class action in state court

because there are no clear objective standards or safe harbors. The principles-based approach creates legal uncertainty. Further, the exemption would attempt to create a state law cause of action for conduct for which Congress has already provided an exclusive Federal remedy (with respect to ERISA participants) or for which Congress declined to create a cause of action in favor of reliance on other laws regulating financial advisors (with respect to IRAs).

- Disclosure Requirements Unworkable: The prospective, retroactive and web-based disclosure requirements simply cannot be met given the many different ways arrangements are structured, and the immense cost of attempting to do so will be borne by the participants and IRA owners who would benefit instead from simplified disclosures.
- Time Period for Implementation Too Short: Eight months is not enough time to reconfigure systems, amend contracts and compensation systems, identify and mitigate potential conflicts or otherwise take the steps necessary to use the exemption. We believe a minimum of two years would be required, given our experience implementing the 408(b) (2) disclosure requirements.
- Grandfather Provision Inequitable: The exemption permits existing arrangements to continue only to the extent they don't provide new advice, at which time they must be reformed. This denies IRA owners the benefit of the bargain they made, such as where a front-end load pays for subsequent services, and incents advisers to provide no additional advice.
- Limited Applicability to Rollovers: Not all rollovers would be eligible for the exemption. For example, a rollover to a discretionary managed account would not be eligible, or where the assets involve investments excluded from the exemption.
- Excludes Participant Directed Plans: The exemption would not cover advisors to small participant directed plans—it is not clear from the proposed text whether this omission also excludes advice to the individuals owning IRAs in SEP and SIMPLE plans. As noted above, Nationwide is a leader in the small business retirement plan marketplace servicing 21,000 private sector 401(k) plans. Of these 21,000 plans, over 20,000 are participant directed plans. As proposed, there is very little prohibited transaction relief for advice to small businesses. As a result, small businesses will be cut-off from individualized advice in setting up and maintaining a retirement plan. One recent study found that small businesses that work with an advisor are 50% more likely to set up a retirement plan and micro-businesses with 1-9 employees are almost twice as likely.²¹
- Disparate Treatment of Annuity Contracts Unwarranted: Variable annuity contracts should be included under amended PTE 84-24 as other insurance contracts and not separately under this exemption. There is no basis for the Department's conclusion that additional investor protections are necessary.

²¹ "The role of financial advisors in the US retirement market", Oliver Wyman (July 10, 2015).

The amendments to PTCE 84-24 are unwarranted and will confuse plan fiduciaries and IRA owners seeking guaranteed income products.

As discussed in our comments above on the BIC Exemption, we do not believe the proposal should remove purchase of IRAs or variable annuities within IRAs from PTE 84-24 to be exclusively covered under BICE. All annuities have been covered under PTE 84-24 (and its predecessor) since 1977. The changes brought about by the proposed amendment will create a significant amount of confusion and uncertainty in the annuity sales marketplace for plan fiduciaries, IRA holders as well as salespeople, brokers and consultants who have always relied on one exemption to cover all annuity product sales.

A plan participant or IRA owner asking questions about available guaranteed income products will not understand that the information provided is subject to different standards depending on the products. How will the plan participant or IRA owner know that he or she is not getting “apples to apples” information, and even if he or she does know that, how will he or she evaluate the differences to make an informed decision?

We see no basis for the Department to require that annuity products use two separate and distinct exemptions. There is no justification or rationale for treating annuity products differently, whether or not the annuity is deemed a security. The Department is well aware of the importance of annuity products for the attainment of retirement security by plan participants and IRA holders, and the importance of annuity products offering a lifetime income option.

We ask that any final exemption put all such insurance products under PTE 84-24 as has been that case for nearly 40 years.

The Department should remove ambiguities created by new definitions in PTE 84-24

The new terms in the proposed amendment raise questions about how the exemption would apply in practice. For example, the proposal would replace the term “sales commission” with “Insurance Commission,” which is the sales commission paid by the insurer or an affiliate to the agent, broker or consultant for effecting the sale of an annuity contract, including renewal fees and trailers, but not revenue sharing payments, administrative fees or marketing payments, or payments from parties other than the insurer and affiliates. The current PTE 84-24 “sales commission” disclosure definition has been in effect since 1977, and was drafted to take into account common commission and compensation payment practices.

We need additional guidance and clarification on the meaning of the new term “Insurance Commission.” For example, some commissions are paid as overrides or gross dealer concessions to someone that oversees the agent working directly with the customer. These are often not referred to as “commissions” and are management payments for overseeing the purchase or sale of the annuity. Are they included in the new definition?

Another ambiguity needing clarification is the scope of the relief for proprietary products. PTE 84-24 permits the purchase with plan assets of an annuity contract from the insurer, even if the insurer is a party in interest to the plan. We ask that any final amendment to PTE 84-24 confirm that it continues to cover the sale of the insurer's proprietary products.

Conclusion

We want to work with the Department to better serve America's workers and retirees and revise the Proposal and its associated exemptions to function as the Department intended. The Proposal needs to be modified to retain the beneficial aspects of the current rules and to avoid unintended consequences or execution errors that we believe will harm American retirement savers and small business employers.

We look forward to discussing these issues with the Department, and we hope the Department will accept that these comments are informed by our real-world experience in helping plans, participants and IRA owners prepare for and live in retirement. Our commitment to our customers has been the bedrock of our company since the beginning, and we appreciate the chance to offer our views on this important regulatory proposal.

Please contact Naveen Parmar in our Government Relations Department at 202-347-5913 or via email at parman1@nationwide.com for any follow up questions you may have.

Sincerely,



Kirt A. Walker
President and Chief Operating Officer
Nationwide Financial